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THE REPRESSED ISSUES OF SENTENCING: ACCOUNTABILITY, PREDICTABILITY, AND EQUALITY IN THE ERA OF THE SENTENCING COMMISSION

JOHN C. COFFEE, JR.*

The existence of disparities in the sentences imposed on equally culpable offenders has long been a subject of jurisprudential concern. The author provides a critique of recent efforts to objectify the sentencing process that rely on a matrix table prescribing guideline sentence lengths on the basis of offense severity and predictions of recidivism. With particular emphasis on the Sentencing Commission authorized by pending federal legislation, he urges the need for political accountability in the body that inevitably makes value judgments in the preparation and administration of such a guideline system. Finally, the author discusses the normative issues that surround the development of any sentencing system, critiques various normative models, and advances a model that recognizes the paramount importance of equality in sentencing while preserving the efficiency of a carefully administered system of categoric prediction.

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The author currently is serving as the Reporter for Sentencing Alternatives and Procedures in connection with the American Bar Association's Project to Update the Minimum Standards for Criminal Justice. The author wishes to emphasize that this article was completed prior to the acceptance of that role and in no respect represents the position of the American Bar Association or that of any of its constituent groups.

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I. INTRODUCTION

In the tide of social reforms a moment sometimes occurs when a cause long ignored suddenly achieves recognition and respectability. Once perceived as an idea whose time has come, the *au courant* cause may become a “motherhood” issue that all espouse in principle and defend vociferously against already vanquished opponents. Such moments are dangerous, however, because the rapidity with which the
flood stage crests can tempt the legislature to accept incomplete remedies in order to pronounce the problem "solved." In this rush to reform, however, deeper and more perplexing issues are sometimes ignored or even unconsciously repressed.

So it may be today with the cause of sentencing reform. Sentencing has long been the backwater of the criminal justice system—an ugly little secret veiled from public scrutiny by the myth of rehabilitation and avoided by overworked appellate courts with the same distasteful aversion the Victorians gave public discussion of sex. A decade of serious criticism has now changed much of that: First came critiques,¹ then models for reform,² and now federal legislation, S. 1437.³ Popularly known as "son of S. 1,"⁴ S. 1437 represents the most serious attempt yet made by the legislature to achieve procedural regularity in the sentencing and parole process without discarding the idea of individualization. In overview, it contains what a consensus of

1. The seminal works in the recent consensus that the rehabilitative model of sentencing has failed include F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE (1964); R. DAWSON, SENTENCING (1969); and Cohen, Sentencing, Probation and the Rehabilitative Ideal: The View From Mempa v. Rhay, 47 Texas L. Rev. 1 (1968). These early probing works of the 1960's were followed by the bombshells of the 1970's. See AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); and J. MITFORD, KIND AND USUAL PUNISHMENT (1973). Although the tone and style of these later works range from the careful, lucid discussion of Judge Frankel to the outrage of Caleb Foote and his fellow members of the American Friends Service Committee, to finally the elegant irony of Jessica Mitford, the works have demolished, for the current generation, the idea that an individualized approach to sentencing that emphasizes treatment and rehabilitation is either feasible or safe. In turn, they set the stage for the new models next cited.


3. S. 1437, 95th Cong. 2d Sess. (1978); see S. Rep. No. 605, 95th Cong., 1st Sess., Part I (1977) [legislative history to date] [hereinafter cited as COMM. REP.]. The bill passed the Senate on January 30, 1978 and is currently before the House Justice Subcommittee. For a summary of the political cross-currents affecting the bill, see Clymer, New Criminal Code Is Due for Still More Decoding, N.Y. Times, Feb. 5, 1978, at E4, col. 3. All references to statutory sections are to the Senate's version of the bill unless otherwise indicated.

recent critics would probably recognize as the holy trinity of sentencing reform:

- It introduces a modest degree of appellate review into an area where substantive review has been virtually nonexistent;
- It establishes at last a procedural requirement that the sentencing court explain its decision, an element of due process long ago imposed on virtually every other governmental official involved in adjudicative decisionmaking;
- Finally, in its most important and potentially controversial reform, it creates a Sentencing Commission as a quasi-administrative agency to promulgate sentencing ranges within the statutory minima and maxima set by the legislature.

5. See P. O'DONNELL, M. CHURGIN & D. CURTIS, supra note 2, at 58-67 (summarizing consensus). In suggesting that these three reforms, which represent the lowest common denominator on which all recent critics can agree, are by themselves not fully sufficient, this article does not mean to disparage them or imply that they are not essential. Cf. CONR REP., supra note 3, at 855-93, 1055-61, 1159-72 (Senate Judiciary Committee's justification of their use).

6. S. 1437, 95th Cong., 2d Sess., sec.101, § 3725 (1978). This section establishes a limited right of appellate review when the sentence imposed is outside the guidelines issued by the Sentencing Commission. The standard for review, however, is forbiddingly high: The appellate court must determine that the sentence is unreasonable before it may remand and must then "state specific reasons for its conclusions." Id. § 3725(e). Sentences within the guideline ranges will be subject to discretionary review by appellate courts on the filing of a petition for leave to appeal under proposed subsection (b)(2) to Rule 35 of the Federal Rules of Criminal Procedure. Id. § 3725(b).

7. If the sentence is outside the guideline range, the court must state "in open court" the "specific reason for the imposition of a sentence outside such range." Id. Nevertheless, the bill does not specifically require that the reasons be in writing. In contrast, prison authorities are required to supply the inmate with a written statement of reasons before taking disciplinary action that could result in the forfeiture of statutory good time credits, Wolff v. McDonnell, 418 U.S. 539, 564-65 (1974), and the Parole Commission is effectively required by statute to retain a complete record of every proceeding and make such available, upon request, to any prisoner eligible for parole. 18 U.S.C. § 4208(t) (1970), as amended by Parole Commission and Reorganization Act, Pub. L. No. 94-233 (1976). See also Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (requiring written statement by factfinders as to evidence relied on and reasons for revoking parole).


A potential inconsistency exists in S. 1437 as to the presumptive force of the guidelines issued by its Commission. Section 3725(e)(1) authorizes an appellate court to reverse a decision outside the guidelines only when it finds such a decision "unreasonable," thus placing the
Given the much-documented existence of serious disparities in sentences assigned to similarly situated offenders, these relatively dilute reforms seem essential, and probably each element in this trinity of appellate review, mandatory explanation, and administrative guidelines requires the others if the total improvement package is to work. In view of the vacuum these reforms replace, a major transition seems close at hand. At such times, a wise French proverb cautions us not to reject the good—S. 1437—in hopes of the best. If so, what basis then exists for this article's skeptical suggestion that the current flood tide of reform can sweep in incomplete and ill-considered remedies?

Two reasons compel further examination of these reforms. First, because it is always easier to beat dead horses than to tame living ones, many commentators still direct their criticisms at the unfettered discretion of the sentencing judge. In continuing to whip this crippled horse, critics themselves may have donned a set of intellectual blinders that causes them to miss other, less visible variables, such as the role of the prosecutor or the probation officer, which social burden of proof on the party appealing the sentencing judge's decision. Id. § 3725(e)(1). But section 2003(a)(2), which was added late in the drafting process, mandates that the "court shall impose a sentence within the range described . . . unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a different sentence." Id. § 2003(a)(2). This section seems to mandate that the sentencing judge show special findings of relatively unusual characteristics when imposing sentences outside the guidelines.


11. Appellate review would not be effective without an obligation on the part of the sentencing judge to explain his decision. Otherwise the appellate court would be forced to speculate as to the balancing process that occurred below. Why guidelines are also essential is a more controversial issue, although in a multicircuit federal system intercircuit disparity could persist even with close appellate review. Nevertheless, even beyond the problems of intercircuit disparity and the glacial pace at which appellate courts work to achieve consistency, several commentators have argued, based largely on the research of Zeisel and Diamond, that effective appellate review demands a common sentencing scale, which in turn seems to require a guideline-drafting agency. See note 36 infra; text accompanying notes 240-43.

scientists quietly have been telling us also cause disparities. To the extent these hidden variables are at the heart of the problem, reforms such as substantive appellate review or a required statement of reasons by the sentencing judge may have less effect than is now confidently expected.

Second and even more important, the remedy of a Sentencing Commission can be more dangerous than the disease it is meant to cure. Hippocrates told his student physicians that the first rule was to do no harm. Because the idea of guidelines as embodied in S. 1437 involves dealing with offenders in terms of their membership in categories rather than as individuals, the Sentencing Commission prescription represents strong medicine that may be accompanied by disturbing side effects we have not adequately considered. Briefly, our criminal justice system has always concentrated on achieving fairness in making "micro" decisions involving individual cases, but with the advent of such a Commission a new level of "macro" decisionmaking about classes of persons is superimposed over that micro-level. At this level of generic decisionmaking, the concept of fairness remains undefined and very much at issue.

13. Section 994 of S. 1437 requires the Sentencing Commission to establish "categories of defendants for use in the guidelines" and to consider certain enumerated socioeconomic characteristics, such as education level, employment record, and community ties, in formulating such categories. S. 1437, 95th Cong., 2d Sess., sec. 124, §994 (b), (d) (1978). In essence, this section directs the Commission to frame guidelines similar to those of the United States Parole Commission that view the offender as a categoric risk. See Coffee, The Future of Sentencing Reform, 73 Mich. L. Rev. 1361, 1405-15 (1975); notes 45-53 infra and accompanying text.

14. In short, dispositional decisions always have been made—whether at the plea bargaining, sentencing, parole, parole revocation, or good time revocation stages—in an ad hoc fashion based on the unique facts of a specific case presented to a decisionmaker. In contrast to such "micro" decisions, guideline drafting is a "macro" decision in which an abstract choice is made between competing policies without reference to the facts of any individual case. For example, when framing its guidelines, the Sentencing Commission must decide at least implicitly the relative weight to be given to such disembodied concepts as deterrence, incapacitation, retribution, and rehabilitation. See S. 1437, 95th Cong., 2d Sess., sec. 124, §2003 (1978) (requiring that these four enumerated purposes of sentencing be taken into consideration by the Sentencing Commission when framing guidelines).

15. Sentencing guideline-drafting is not the only level of macro-decisionmaking. Several junctures exist in our criminal justice system at which such "macro" decisions seem necessary if the system is to produce fair results, or, at a minimum, results in which like cases are treated alike. First, the system needs guidelines and standards to control prosecutorial discretion and plea bargaining practices. One commentator has suggested that the Sentencing Commission might even seek to assume such a role, since sentencing disparities may be caused as much by prosecutorial behavior as by any other variable. See Zalman, A Commission Model of Sentencing, 53 Notre Dame Law. 266, 275-76 (1977). Beyond this prosecutorial stage, it is possible to divide the basic dispositional decision into two components: (1) the "in-out" decision of whether to incarcerate or to grant probation; and (2) if incarceration is thought necessary, the term-fixing decision for the length of confinement. Several commentators have proposed dividing these decisions between the sentencing judge and the parole board, the former deciding only whether
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For example, is it fair to extend the confinement of some offenders beyond that of similarly situated offenders based on their marginally greater likelihood of recidivism?\(^{16}\) In so doing, are the values of equality and fairness among offenders unreasonably sacrificed? For those to whom a simple yes or no answer to these questions seems satisfactory, the remainder of this article will likely prove anticlimactic. But to those for whom these questions are troubling, it is time to change our focus, to stop beating the dead horse of judicial discretion and begin the vastly more difficult task of taming the wild horse of categoric prediction. This process of domestication has two major components: first, identifying and reaching agreement on the methodological issues associated with the mass implementation of any system of categoric prediction; and second, developing a normative critique of prediction systems that, if possible, expresses our ethical reservations about categoric prediction without at the same time effectively nullifying the predictive efficiency of such systems.

This task in turn supplies the roadmap for this article. To aid our initial inquiry into the methodological issues of categoric prediction, it is useful to stalk our horse more gradually and by a route that explains more fully the significance of these issues in the forthcoming era of the Sentencing Commission.

II. AN OVERVIEW OF THE ISSUES IN THE STRUCTURING OF JUDICIAL DISCRETION: HOW DO WE TREAT LIKE CASES ALIKE?

The efficacy of two of S. 1437's trinity of reforms—the requirements of appellate review and a statement of reasons—depends on to incarcerate and the latter deciding how long. Thus, the function of a Sentencing Commission would be limited to guideline drafting as to the "in-out" decision, and the United States Parole Commission's guidelines would govern the term-fixing decision. See A. VON HIRSCH & K. HANRAHAN, ABDISH PAROLE? 39-43 (NILECJ Grant No. 76-NI-99-0038) (1977) (to be published in book form in 1978). Finally, guidelines could be used to structure discretion at such postincarceration stages as the decisions whether to grant a pardon, whether to revoke probation or parole (and, if so, for how long), or whether to forfeit good time credits. Although some guidelines exist at these stages, little attempt has been made in most jurisdictions to structure discretion at these levels with anything approaching the formality and rigor employed by the Parole Commission.

16. The ethics of prediction in this context have been only occasionally addressed by the legal literature. A key issue, of course, is whether it is fair to increase a sentence based on the offender's predicted dangerousness. For excellent treatments of this question, see N. MORRIS, supra note 2, at 62-72; Dershowitz, Indeterminate Confinement: Letting the Therapy Fit the Harm, 123 U. PA. L. REV. 297 (1974); Dershowitz, The Law of Dangerousness: Some Fictions About Predictions, 23 J. LEGAL EDUC. 24 (1970); von Hirsch, Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons, 21 BUFFALO L. REV. 717 (1972). This article submits, however, that the recent practice of the United States Parole Commission presents the issue of prediction in a form different from that which these commentators have analyzed.
the validity of some basic and seldom-questioned assumptions about the nature of the sentencing process:
- that the sentencing judge is the key decisionmaker who in fact decides the sentence to be served; and
- that sentencing disparities are therefore caused by the inevitable variety of differing temperaments and philosophies among sentencing judges.¹⁷

From these orthodox premises flow prescriptions, such as sentencing councils, fuller sentencing hearings, and appellate review mechanisms of various sorts, largely aimed at standardizing the behavior of sentencing judges.¹⁸ Although these premises are far from demonstrably false, alternative explanations of the causes of sentencing disparities exist today that seem at least as consistent with the available data and that place the locus of the problem elsewhere than with the sentencing judge. Several of these rival explanations also have particular relevance because they show the comparative virtues of a guideline-drafting agency capable of making macro-level decisions about the allocation of punishment.

A. SENTENCING DISPARITIES: ALTERNATIVE HYPOTHESES

THE BUREAUCRATIZATION OF SENTENCING

Recent decades have seen a quiet and not adequately recognized transformation in the sentencing process. The key event in this process has been the professionalization of the probation staff. In a phrase, the simple turnkey of an earlier era has given way to the modern, highly trained probation officer, equipped with a master's degree in criminology, a manual of standard operating procedures, and a highly developed sense of the importance of his role in the sentencing drama.¹⁹ A by-product has emerged, however, from this

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¹⁷. The Senate Judiciary Committee Report attributes the existence of disparities to the fact that "[e]ach judge is left to formulate his own ideas as to the factors to be considered in imposing sentence. . . . The not surprising result is unwarranted disparities among sentences imposed by different judges." Comm. Rep., supra note 3, at 890. This is a seriously incomplete causal explanation of the problem of disparities. See notes 19-25 infra and accompanying text.

¹⁸. See P. O'Donnell, M. Churkin & D. Curtis, supra note 2, at 16-20 (good capsule summary of recent efforts at reform characterized by the authors as "fingers in the dike").

¹⁹. It is of course a commonplace that probation officers are today better trained and prepared than in the past. See generally ABA Project on Standards for Criminal Justice, Standards Relating to Probation (Approved Draft 1970); D. Dressler, Practice and Theory of Probation and Parole (2d ed. 1969); P. Keve, The Probation Officer Investigates (1960); Task Force on Corrections, The President's Comm. on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 93-102 (1967).
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process of professionalization: a developing bureaucracy that defends its institutional turf zealously. Indeed, some evidence exists that probation officers throughout the country tend to define their success in terms of their ability to obtain acceptance of their sentencing recommendations from judges; the higher the percentage of concurrence between the judicial decision and their recommendation, the greater the evidence, in their view, of their recognition as true “professionals.” On the whole, probation officers have been extraordinarily successful in winning acceptance of their recommendations. In part, this success is unrelated to the quality of their work, but instead is due to the judge’s need to be perceived as fair and to his desire to diffuse responsibility for a decision provoking anxiety and even guilt.

Of what relevance is this phenomenon? Some social scientists, after studying the sentencing process, have concluded that the truly

More importantly, the desire on the part of the probation officer to be recognized as a true professional leads him to seek to expand the definition of his role from that of a simple data collector to that of a clinician preparing a full scale study of the offender. See Coffee, supra note 13, at 1399-1404, 1400 n.168 (description of this process and the dangers it carries). In short, practices within the criminal justice system are often explained as much by the aspirations and needs of the bureaucrats who man the system as by the interests of society or the accused.

Probation offices often tabulate the rate of concurrence between their staff recommendations and judicial dispositions. I have collected several such studies and one conducted by the Federal Probation Office in Phoenix tallied this concurrence rate from April to July 1975 (covering some 123 dispositions) and found that the concurrence rate for federal judges in that district court ranged between 92% and 97%. Relevant here is the interpretation the Phoenix office placed on this report: “[t]he probability that this review is evidence of the Court’s confidence in the report and recommendation made by the individual probation officer—or more simply stated, confidence in professionals doing a professional job.” See S. Thomas, Memorandum, Recommendations and Court Dispositions (July 31, 1975) (copy on file at the Georgetown Law Journal) (emphasis added).


22. See Coffee, supra note 13, at 1456 n. 361 (discussing attribution theory of Thibaut, Walker, and Lind that suggests the decisionmaker is more likely to balance his judgment because of strong “role pressure” to avoid any manifestation of bias).

23. Social psychologists Janis and Mann have developed a widely respected theory that under conditions of uncertainty decisionmakers engage in decision-avoidance and seek consensus from their staff in order to escape responsibility for decisions about which they feel anxiety. I. JANIS & L. MANN, DECISION-MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT (1977). The psychiatrist Thomas Szasz has similarly observed that judges may use clinical data to help them rationalize sentences about which they would otherwise feel guilty. Szasz, Some Observations on the Relationship Between Psychiatry and the Law, 75 AMA ARCHIVES, NEUROLOGY & PSYCHIATRY 297 (1956). See also A. BLUMBERG, CRIMINAL JUSTICE 124-25, 137 (1967); J. HOGARTH, SENTENCING AS A HUMAN PROCESS 390-91 (1971); note 31 infra.
operative decisionmaker often is the probation officer. Although the judge holds the legal power, he tends to ratify decisions made earlier in the process by these new sentencing bureaucrats. Tension always exists between sovereigns and bureaucracies. The modern day sentencing judge is like the 17th-century monarch, who possessed absolute power in theory but in practice was frequently manipulated by the ministers who stood quietly behind the throne and controlled the flow of information to him. Today, the judge must operate in a system that processes a high volume of criminal cases, and therefore he must rely heavily on his own ministers, the probation staff. Not unexpectedly, some social scientists have pointed to the probation staff—and to the differences in techniques and attitudes among individual probation officers—as a likely major cause of disparities.

Why have recent proposals not sought to deal with this problem? To suggest a theme that will reappear throughout this article, lawyers as a class tend to share an unconsciously egotistical vision of the legal process that makes it difficult for them to recognize that nonlawyer participants could have a greater effect on the outcome of a judicial proceeding than the lawyers themselves. In any event, a kind of false consciousness has persisted: Both legislative and judicial efforts to reform have continued to focus on the interchange among the court, the defense counsel, and the prosecutor on the day of sentencing. By this time, however, the outcome frequently has become a \textit{fait accompli}.

SENTENCING AS A DECISIONMAKING PROCESS: THE PROBLEMS OF INFORMATION INTERCHANGE AND USAGE

If one views sentencing as a decisionmaking process it becomes obvious that recent developments in the social sciences focusing on decisionmaking have relevance to any serious attempt to upgrade the quality and evenness of the decisions reached at sentencing. A host of social scientists have studied the problem of selective reception of information, noting the unconscious tendency of decisionmakers to filter out some items of information while enlarging the significance of

\footnote{24. R. Hood & R. Sparks, Key Issues in Criminology 164-67 (1970); Wilkins, A Typology of Decision-makers in Parole: Legal Issues/Decision-Making Research 169, 168 (W. Amos & L. Newman eds. 1975) [hereinafter cited as Amos & Newman].} \footnote{25. Carter & Wilkins, supra note 21, at 503-11. Hood and Sparks, supra note 24, at 169, conclude that it is "primarily differences in the way in which information is categorized and perceived [by judges] . . . which explain disparity in sentencing."}
That this research has considerable relevance to the problem of sentencing already has been demonstrated by Professor Hogarth. His elaborate empirical studies of the sentencing process led him to conclude that the contemporary presentence report is a highly unsatisfactory medium of communication because it frequently produces an impression in the judge's mind contrary to that intended by the probation officer. Overloaded with irrelevant information from unstandardized presentence reports, the sentencing judge inevitably tends to reach inconsistent decisions. Equally germane is the research of Thibaut, Walker, and Lind on the relative effect of inquisitorial versus adversarial styles of legal decisionmaking; their work suggests that inquisitorial techniques, of which the sentencing process is a virtual paradigm, tend to be more vulnerable to the problem of hasty stereotyping. Finally, social psychologists—notably Janis and Mann—have examined decisionmaking within institutions and have identified a recurring pattern of decision avoidance when uncertainty exists. They report strong social and role pressures within the institutional context to seek consensus and to delegate anxiety-producing decisions to subordinates, a phenomenon that may help explain the extent of the sentencing judge's deference to the probation staff.

26. See L. JANIS & L. MANN, supra note 23, at 82-83; H. SCHRODER, M. DRIVER & S. STREUFFERT, HUMAN INFORMATION PROCESSING (1967). The problem of cognitive dissonance has been recognized in at least one circuit court decision dealing with sentencing appeals. Citing Professor Festinger, a leading theorist in this area, a Ninth Circuit panel acknowledged that the "natural human tendency to reduce the dissonance created in choosing one of several alternatives by thereafter persuading oneself that the chosen alternative is the correct one has been recognized and measured by psychologists." United States v. Farrow, No. 74-2429, slip op. at 9 (9th Cir. Sept. 1976), withdrawn and submitted en banc (Apr. 14, 1977). Thus, it concluded that resentencings should be held before a different judge from the original.

27. J. HOGARTH, supra note 23, at 261. Professor Hogarth later adds bluntly: "The notion that magistrates can sentence better if they know 'all about' offenders has been shown to be a myth." Id. at 389.

28. Because the human mind generally can effectively absorb only five or six items of information in reaching a decision, voluminous presentence reports result in information overload, Hogarth argues; in turn, this produces impairment of the efficiency with which the sentencing judge reaches his decisions. Id. at 302-03. The problem is greatest, he adds, when the available range of sentencing options is broad.


30. L. JANIS & L. MANN, supra note 23, passim.

31. Id.; see notes 21-25 & 27 supra.

One recent case may exemplify this tendency for a conscientious judge to seek advice and support from others before imposing a sentence about which he evidently feels some anxiety. In United States v. Alton Box Board Co., Judge Parsons was faced with a request by the Antitrust Division of the Justice Department that he sentence middle class defendants convicted of antitrust violations to prison terms. United States v. Alton Box Board Co., 1977-1 TRADE CASES
The cited evidence suggests a more general observation. If sentencing is a form of decisionmaking and if our ultimate goal is a process that produces relatively consistent results based on relatively accurate perceptions of reality, what is needed most may not be checks and balances on the unfettered discretion of any decisionmaker, important as that goal is, but rather a reliable methodology. Unless social scientists such as Hogarth, Wilkins, and Carter are seriously wrong in their diagnosis, disparities may be at least as much the product of an inadequate methodology—one that will almost predictably yield erratic, random results—as of arbitrary decisions by strong-willed judges. Once again, however, the lawyer’s bias is to avoid questions of methodology and to focus instead on those questions that can be framed in terms of the traditional issues of due process.

THE INFORMATIONAL INPUTS: PROBLEMS OF QUALITY AND QUANTITY

Sentencing is an example of a decisionmaking process in which decisions are made not directly about people, but about information.
about people. Such a process cannot outperform its informational inputs: garbage in, garbage out. Uniformly, social scientists studying dispositional decisionmaking have commented on the nearly hopeless unreliability of the data used in the process. Even more important than the level of inaccuracies identified, however, is the level of inconsistency found. Often, factors deemed significant in one presentence report may be omitted and ignored in another, although present in both cases. Compounding the problematic character of the actual data is an approach to data presentation that stresses not a standardized comparative assessment, but an individualized understanding of each offender on his own terms. Here, then, is an impressionistic methodology uniquely ill-suited to the elimination of disparities, because it focuses on the uniqueness of each case and not on the similarities among cases. Put simply, if we wish the sentencing judge to treat “like cases alike,” a more inappropriate technique for the presentation of information could hardly be found than one that stresses a novelistic portrayal of each offender and thereby overloads the decisionmaker in a welter of detail.

B. A SENTENCING COMMISSION: OPPORTUNITIES AND DANGERS

These problems—the central role of a low-visibility decisionmaker in the form of the probation officer, the methodological problem of ensuring uniformity in decisionmaking, and the level of inaccuracy and unevenness in the data employed—are stressed to indicate the

33. Wilkins, Information Overload: Peace or War with the Computer, in AMOS & NEWMAN, supra note 24, at 394, 500, reprinted in UNITED STATES PAROLE COMMISSION RESEARCH UNIT, SELECTED REPRINTS RELATING TO FEDERAL PAROLE DECISIONMAKING (1977) [hereinafter cited as SELECTED REPRINTS].

34. Wilkins, The Problem of Overlap in Experience Table Construction, in PROBATION, PAROLE AND COMMUNITY CORRECTIONS 826, 832 (R. Carter & L. Wilkins eds. 1976), reprinted in SELECTED REPRINTS, supra note 33. For a study finding a low level of reliability of information in parole case files by measuring the agreement between different people coding the same information, see J. BECK, S. SINGER, W. BROWN & G. PASELA, supra note 32.

35. An early study found such inconsistency to be common. See Cohn, Criteria for the Probation Officer’s Recommendations to the Juvenile Court Judge, 9 CRIME & DELINQUENCY 262 (1963). A more systematic study has been conducted recently by the Sentencing Guideline Project. Out of some 205 items of information relevant to sentencing studied, some 48 were found to be missing in over 25% of the cases studied in a Denver pilot study sample; an additional 21 items were missing in 11% to 24% of the cases studied. In total, then, over a quarter of the relevant items of information studied were omitted more than 10% of the time. Another pilot study conducted in Vermont and reported in the same project found roughly this same percentage to have been omitted. L. WILKINS, J. KRESS, D. GOTTFREDSON, J. GALPIN & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION 133-43 app. (1976) [hereinafter cited as SENTENCING GUIDELINES].
limitations of appellate review and similar procedural reforms. These limitations have been noted here as a prelude to the major focus of this article: the issues raised by the advent of a Sentencing Commission. For, of the trinity of reforms presented in S. 1437, only such a quasi-administrative agency seems capable of responding effectively to the foregoing problems.

The arguments for such an agency are clear. The guideline ranges to be drafted by the agency can reduce the effect of uncontrolled discretion within the sentencing bureaucracy and can minimize the distortions arising from a methodology premised on ad hoc individualization. By selecting in advance a limited number of relevant factors and assigning each a formal numerical weight, it is possible, as the United States Parole Commission has already proven, to balance the goal of consistency in decisionmaking with the objective of individualization. In short, discretion can be systematized, rather than simply abandoned as in the recent trend toward flat time sentences. Finally, the Sentencing Commission promises to be a body with a systemwide perspective and at least the potential to upgrade the quality and evenness of the information used at sentencing.

Although some arguments for a Sentencing Commission seem conclusive, the Sentencing Commission proposed by S. 1437 raises new, troubling issues. For the most part these issues relate less to what might be termed the minimal concept of a guideline-drafting agency, one that simply promulgates benchmark sentences based on the offense and the offender's prior record, and more to the particular type of agency and guidelines proposed by that bill. New ideas rarely appear in elementary form; more typically, they emerge as part of an interwoven complex. So it is with the Sentencing Commission concept set forth in S. 1437, which comes fast on the heels of the new interest in the incapacitation of offenders according to their statistical likelihood of recidivism. Several distinct transitions have accompanied the emergence of this new incapacitation model. Increasingly, new social theorists, most notably Rutgers' von Hirsch, Harvard's Wilson, and N.Y.U.'s van den Haag, have emphasized society's right

37. Prior to the Parole Commission and Reorganization Act's passage in 1975, the Parole Commission was known as the Board of Parole. Throughout this article the body will be designated as the Parole Commission without differentiation unless the reference is made expressly to actions of the former Board of Parole.
to punish the offender.\textsuperscript{39} Tactically, Wilson and van den Haag argue that the only effective strategy for dealing with crime is one that gives priority to the "tough" goals of incapacitation and deterrence over the "soft" goals of rehabilitation and social reform.\textsuperscript{40} On the empirical level criminologists have gathered evidence indicating that while "hard core" offenders represent a low percentage of the total offender population, they nonetheless account for a high percentage of total serious crime.\textsuperscript{41}

The policy implications of such research are enticing. If one can differentiate between "high-risk" and "low-risk" offenders and then restrain the former group for marginally longer periods of time, the result may be substantial reductions in the crime rate without significant increases in the time of confinement served by the average prisoner. Add to this picture the new interest of economists in the theory of general deterrence, evidenced by a controversial series of monographs concluding that increasing the severity of the penalty might discourage crime almost as effectively as raising the risk of

\textsuperscript{39} Symptomatic of this trend has been the recent revival of interest in retribution as a justification for punishment. See generally A. VON HIRSCH, supra note 2; Gardner, The Renaissance of Retribution—An Examination of Doing Justice, 1976 Wisc. L. Rev. 781. A revived interest among philosophers presaged this new interest among lawyers. See generally PUNISHMENT: SELECTED READINGS (J. Feinberg & H. Gross eds. 1975) (in particular, H. Morris, Persons and Punishment, at 74). Newspaper editorials also have applauded the new emphasis on "just deserts." See Editorial, New Look at Crime, Wall St. J., Sept. 23, 1977, at 20, col. 1.

\textsuperscript{40} See E. VAN DEN HAAG, supra note 2, at 51-52, 241-251; J. WILSON, supra note 2, at 162-182, 200-08.

\textsuperscript{41} Wilson relies heavily on the statistical work of Shlomo and Shinnar, who have estimated that use of an incapacitation strategy could have reduced the rate of serious crime in New York City by at least two-thirds if every person convicted of a serious crime received a mandatory three-year sentence. J. WILSON, supra note 2, at 200-01. In another study, the Shinnars estimated that recidivists constitute only 18% of the criminal population, but commit 90% of the crimes surveyed. See Van Dine, Dinitz & Conrad, The Incarceration of the Dangerous Offender: A Statistical Experiment, 14 J. OF RESEARCH IN CRIME AND DELINQUENCY 22, 23-24 (1977). Both Wilson and van den Haag place heavy emphasis on the birth cohort data developed by Marvin Wolfgang in his study of 10,000 Philadelphia boys born in 1945. J. WILSON, supra at 200-01; E. VAN DEN HAAG, supra note 2, at 247-50. Wolfgang found that while over a third of his youths acquired a police record, only 6% committed five or more offenses before they were eighteen. Yet this tiny minority accounted for over one-half of the recorded delinquencies and about two-thirds of all violent crimes committed by the entire birth cohort. Of particular importance, Wolfgang found that once a youth had been arrested, a second recorded offense became probable: if the youth committed a second recorded offense, the probability of a third offense rose to 65%. Beyond the third offense, probabilities of further offenses ranged between 70-80%—in short, the youth became a highly predictable recidivist. Wolfgang, Crime in a Birth Cohort, 17 PROCEEDINGS OF AM. PHILOSOPHICAL SOCY 404 (1973). A very recent Rand Institute study that focused on habitual criminals also has advocated an incapacitory strategy on the grounds that recidivism is highly predictable for a small class of offenders. See J. PETERSILA, P. GREENWOOD & M. LAVIN, CRIMINAL CAREERS OF HABITUAL FELONS 118-21 (1977) (LEAA Grant No. R-2144-DOJ)
apprehension, and it becomes clear that a golden promise has been held out to the public and the legislature: a strategy yielding quick and cheap reduction of the crime rate. Although other researchers have disputed the validity of such a conclusion, a costless cure for crime is understandably the opium of politicians. Thus, it is not surprising that S. 1437 contains relatively clear authority for its Sentencing Commission to adopt such an incapacitation strategy.

Finally, independent of this debate over the purpose of punishment, the former Parole Commission began to develop in the early 1970s exactly the methodology that such a strategy of incremental incapacitation required for use on a mass scale. The Parole Commission’s aim was to develop not a new rationale for punishment, but only a systematic response to the problem of sentencing disparities. With remarkable candor for a bureaucratic agency, it had conceded that recognizing the “magic moment” when offenders became rehabilitated was beyond its capability. To point out that the Emperor has no clothes, however, raises a ticklish dilemma when the party making the announcement is itself the Emperor. For the Parole Commission, this acknowledgment that it could not measure progress toward rehabilitation, or even be sure that such an end state existed, forced on it the awkward necessity of developing some de facto system of appellate review. Confronted with hopeless disparities in the sentences assigned similarly situated offenders, and having abandoned the traditional defense mechanism of parole boards—claiming that they only determined if the offender had been rehabilitated—the Parole Commission effectively had two choices. First, it could adopt some mechanical benchmark standard for parole,


43. Van Dine, Dinitz & Conrad, supra note 41, at 22.

44. S. 1437, 95th Cong., 2d Sess., sec. 101, § 2003 (a)(2)(B) (1978) (instructing court imposing sentence to consider “the need for the sentence imposed . . . to protect the public from further crimes of the defendant”); see Comm. Rep., supra note 3, at 891.

such as forty percent of the original sentence. This choice, however, would perpetuate the disparities created by judges at sentencing and by prosecutors at plea bargaining. Alternatively, it chose to develop formalized guidelines that geared parole release to some normative standard, such as the severity of the offender's crime or his prior culpability. This decision marked a rare and insufficiently celebrated triumph of bureaucratic rationality.

In seeking to rationalize parole release, however, the Commission made a second decision, one that was as sensitive as it was invisible. In devising its guidelines, it chose—first as an experimental project and then as a formal policy that was later ratified by the Parole Commission and Re-Organization Act of 1976—to rank offenders not simply in terms of the severity of their crimes but also in terms of their potential for recidivism. The result was a guideline system consisting of a two-dimensional table: On the vertical axis was an offense severity rating composed of six categories; on the horizontal axis was a four-category offender prognosis rating, known as the Salient Factor Score, reflecting the offender's statistical likelihood of recidivism. As shown by the abbreviated diagram below, at each intersection of the two axes on this matrix, a cell would contain the guideline range within which the offender normally could expect to be released.

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47. 42 Fed.Reg. 31,786-87 (1977) (amending 28 C.F.R. § 2.20). A prior version of the guidelines is set forth in P. O'DONNELL, M. CHURGIN & D. CURTIS, supra note 2, at 24. Although the guideline ranges promulgated by the Parole Commission are not strictly binding on the Commission's hearing examiners, decisions below the guideline ranges are comparatively rare. From October 1973 to March 1974, some 88.4% of all parole release decisions were made within the guideline ranges; only 5.3% were made below the guideline range, and only 6.3% were made above the suggested ranges. See Kortness v. United States, 514 F.2d 167, 169 n.3 (8th Cir. 1975).
Table I

Adult Guidelines, Customary Total Time to be Served Before Release (Including Jail Time)

Offense Characteristics:
Severity of Offense Behavior

<table>
<thead>
<tr>
<th>Severity of Offense Behavior</th>
<th>Greatest</th>
<th>Very High</th>
<th>High</th>
<th>Moderate</th>
<th>Low Moderate</th>
<th>Low</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Greater than below—specific ranges not given</td>
<td>26-36 mos.</td>
<td>16-20 mos.</td>
<td>12-16 mos.</td>
<td>8-12 mos.</td>
<td>6-10 mos.</td>
</tr>
<tr>
<td></td>
<td>36-48 mos.</td>
<td>20-26 mos.</td>
<td>16-20 mos.</td>
<td>12-16 mos.</td>
<td>8-12 mos.</td>
<td>10-14 mos.</td>
</tr>
<tr>
<td></td>
<td>48-60 mos.</td>
<td>26-34 mos.</td>
<td>20-24 mos.</td>
<td>16-20 mos.</td>
<td>10-14 mos.</td>
<td>12-18 mos.</td>
</tr>
<tr>
<td></td>
<td>60-72 mos.</td>
<td>34-44 mos.</td>
<td>24-32 mos.</td>
<td>20-28 mos.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Offender Characteristics:
Parole Prognosis (Salient Factor Score)

Thus, an offender convicted of a “high” severity offense normally would be released in the interval between 16 to 20 months if he had a “very good” parole prognosis, but not for 34-44 months if that prognosis were “poor.” In short, this scheme amounts to adoption of an incapacitation strategy, but it is only a qualified adoption because limits are present here that are not present for the more extreme forms of indeterminate sentencing. The Parole Commission placed outer boundaries on the scope of permissible preventive confinement based on the severity of the crime; within those limits, however, the offender’s relative status as a risk is decisive.

To many, the price of achieving consistency in this fashion is some loss in the moral coherence of the system of punishment thus formalized. On the simplest level, this problem is illustrated by comparing the offender who has committed a “low moderate” severity offense but has a “poor” prognosis, with one convicted of a “high” severity offense but who has a “very good” prognosis. Although the actions of the former were presumably less blameworthy, he could

48. See Table I in text supra.
serve a 20 to 28 month sentence while the latter, more culpable offender would be released after 16 to 20 months of incarceration. In such an example it becomes clear that because the guideline ranges overlap between severity levels, the offender's status as a risk may be more determinative of his sentence than his actual triggering conduct.

Overshadowing this issue of the desirable balance between the offender and the offense in the allocation of punishment are the even more serious issues connected with the determination of the offender's risk level. The designers of the Salient Factor Score felt constrained to rely on those variables having the highest observed correlation with subsequent recidivism. After extensive validation studies with control groups, they found that a number of those variables having a positive correlation with parole failure were of a "neutral" socioeconomic nature; that is, they did not in themselves carry any stigma or express any higher degree of culpability on the part of the offender. For example, a low level of education, a defined period of unemployment, and a single marital status are characteristics shared by a large segment of the general population and yet were variables selected for the Salient Factor Score as a basis upon which to enhance punishment. In fact, attempts to find narrower predictive variables were recurrently frustrated by the problem of "shrinkage"; that is, although narrower variables might be identified for a given control group, they seldom held up in subsequent validation studies on similar groups.

In overview, such categoric risk prediction techniques tend toward substantial reliance on broad generic variables; inherently, they find it easier to use predictors that relate broadly to social status rather than narrowly to individual conduct.

**PROCEDURAL ISSUES OF RISK-LEVEL DETERMINATION**

The issues thus raised subdivide into procedural and substantive dimensions. On the procedural level, there are first the methodological...
cal issues: The predictive efficiency of such techniques is not high in an absolute sense.\textsuperscript{54} Evidence also exists that base expectancy rate tables may be culturally bound, that their predictive power erodes over time, and that the problem of self-fulfilling prophecies can sometimes creep into the validation process.\textsuperscript{55} These problems in turn raise the inevitable question of who will guard the guardians. Clearly, our existing procedural remedies, even those intimated by the most generous readings of dicta in case law,\textsuperscript{56} were formulated to protect against arbitrary action or negligent error in what I have termed the “micro” context of individualized hearings. Disclosure of the presentence report, substantive appellate review, and requirements of a statement of reasons are all remedies designed for an individual hearing procedure. They may protect against misinformation in the presentence report, but they are virtually irrelevant when seeking to prevent the dangers that a given prediction system may overpredict recidivism or may be culturally biased or stale. Indeed, even at the micro-level such remedies, focused as they are on sentencing, appear increasingly remote to a system such as the Parole Commission’s in which the truly operative decision determining the length of confinement is made not by a sentencing judge, but by a Parole Commission hearing examiner in a proceeding that denies counsel the opportunity to participate effectively.\textsuperscript{57}

\textsuperscript{54} F. Simon, Prediction Methods in Criminology (1971). In this study, the British Home Office surveyed some 40 prediction devices earlier placed in use (but not the Salient Factor Score) and concluded that “for practical purposes their real predictive power is usually rather low.” Id. at 14.

\textsuperscript{55} See Gottfredson, supra note 32, at 181-82; Laulicht, Problems of Statistical Research: Recidivism and Its Correlates, 54 J. Crim. L.C. & P.S. 163 (1963). For example, some shrinkage was experienced in the construction of the Salient Factor Score. Wilkins reports that the California youth prediction tables did not work for the younger federal offenders when extended beyond California, where they had been validated. Wilkins, Inefficient Statistics, in Amos & Newman, supra note 24, at 217, reprinted in Selected Reprints, supra note 33; see notes 174 & 179 infra and accompanying text.

\textsuperscript{56} Although lists of the most progressive sentencing decisions in recent years are inherently subjective, many lists would include the following three cases: United States v. Stein, 544 F.2d 96, 103-04 (2d Cir. 1976) (defendant must be given opportunity to rebut assumption relied on by sentencing judge); United States v. Pinkney, 561 F.2d 1241, 1249-51 (D.C. Cir. 1977) (effective assistance of counsel may be denied if defense counsel fails to familiarize himself with all reports relevant to sentencing decision and to verify and rebut essential facts); and United States v. Weston, 448 F.2d 626, 684 (9th Cir. 1971) (trial court may rely on information in presentence report only if it is adequately supported). Examined closely, these decisions, which I applaud, focus only on individual facts in the presentence report and the respective obligations of the probation officer, judge and defense counsel to verify them. To go beyond this level and focus instead on the methodology of offender assessment would require a quantum jump that I doubt the case law on sentencing can make in the near future.

\textsuperscript{57} Under the Parole Commission’s regulations, an attorney may appear at the hearing in which a Commission hearing examiner decides upon the applicable guideline. At that hearing the examiner will determine both the Salient Factor Score and the “real offense” underlying the
This new methodology for the comparative assessment of offenders poses a crisis in accountability. In overview, this problem of accountability comes into better focus when we examine the uniquely value-laden issues that arise in the construction of any categoric risk-prediction system. To give two examples, it is necessary under such systems to agree on an outcome criterion and a measure for determining the predictive efficiency of any given variable.\(^5^8\) Typically, base expectancy rate tables such as the Salient Factor Score use parole failure within a defined period as the outcome criterion, but this may be a dubious measure of the relative risks that different groups of offenders pose. Given the variety of causes, trivial and serious, that can result in parole failure, the brief two-year period used to observe subsequent behavior, and the absence of any weighting system to distinguish the severity of a subsequent criminal violation (i.e., a bad check is a more common but less dangerous event than a series of armed robberies), the question that arises is whether the "high-risk" group defined by such an outcome criterion represents the most dangerous group of offenders or only the least competent. Furthermore, in determining the predictive value of any proposed variable two basic approaches to scoring are possible. We can simply assign equal weight to all factors that correlate positively with subsequent recidivism, however that term is defined, or we can look more narrowly at the incremental predictive value of a variable when added to those already in use. Arguments exist for both crime for which the defendant was convicted. The hearing examiner also may upgrade the offense to a severity level above that of the crime for which the offender was convicted. Generally, this is the truly operational sentencing decision, yet the attorney's role at that hearing is strictly limited by the Parole Commission's regulations See 28 C.F.R. § 2.13(b) (1977). This regulation limits the attorney to making a "statement at the conclusion of the interview" and to providing "such additional information as the hearing panel shall request." \(\text{Id.}\) Ironically, this regulation does not give the attorney the right to rebut or challenge questionable information in the case file, a "right" that has been made a mandatory duty by some recent sentencing decisions. See United States v. Pinkney, 551 F.2d 1241, 1249-51 (D.C. Cir. 1976) (citing the ABA Standards on Sentencing Alternatives and Procedures; counsel at a minimum must be familiar with all reports used at sentencing, must supplement them if incomplete, challenge them if inaccurate, and consult with client on dispositional alternatives, and failure to do so may be a denial of effective assistance of counsel). Compounding this irony, the basis for upholding such discretion in the hearing examiner is the argument that he is performing essentially the same discretionary function as the sentencing judge. See United States v. Billiteri, 541 F.2d 938 (2d Cir. 1976). Yet under recent sentencing decisions, the exercise of discretion appears procedurally more limited for the judge than it does for the Parole Commission's hearing examiner. See cases cited at note 56 supra. On occasion, hearing examiners appear to have informed counsel that they may not act in a "legal capacity." See Williams v. United States Bd. of Parole, 383 F. Supp. 402 (D. Conn. 1974).\(^5^8\) See text accompanying notes 107-15 & 163-70 infra.
techniques, but the latter stepwise regression approach may lead to a considerably different perspective on the utility of "neutral" socioeconomic criteria. Such criteria, when examined in terms of their marginal contribution, will appear to make a smaller contribution to the system's predictive efficiency than when measured in terms of their overall positive correlation with the outcome criterion.

The issue here is not whether the Salient Factor Score or any other base expectancy table is methodologically deficient. In fact, among the designers of the Parole Commission's guideline system were some of the most distinguished empirical criminologists of our era. Even so, the design and implementation of such a new system of dispositional decisionmaking involves unique and sensitive choices among competing values. Critical moments can be identified when considerations of fairness have been balanced against those of predictive efficiency. Such trade-offs may be inevitable, but the process should be a political one in which the decisions reached are visible and the considerations balanced are subject to public scrutiny, prospective comment, and the political pressure that interested groups in a pluralistic society are entitled to exert. Ultimately, the decisionmakers must be accountable.

As others have argued at greater length, a nation's system of criminal justice reflects its social ideology. In this light, there may be a fundamental inconsistency in according the accused the balance of advantage at the trial stage, thus underscoring our ideological commitment to the dignity of the individual, but then measuring the punishment assigned based on status variables associated with the socially disfavored. To be sure, one can debate this question, but the key point is that society at large has a right to think there is a moral contradiction here. In short, the criminal justice process is not a hermetically closed system, and when the offender's status is made relevant, social values are implicated that transcend even the context

59. As the footnotes to this article will attest, Leslie Wilkins has been one of the most prolific writers in this area, and his book Evaluation of Penal Measures is a classic work on the problems of predicting and assessing both offenders and legal decisionmakers. Although it may be premature to suggest nominations for the Sentencing Commission, the need for an empirical criminologist such as Wilkins seems clear, as does the need for a counterbalancing presence of those inclined to view the same issues from a more moralistic perspective. Other designers of the Parole Commission's guideline system, notably Gottfredson and Hoffman, also have been highly visible figures in recent criminology literature.

of the criminal law. These values are of legitimate concern to groups within society normally not preoccupied with criminal justice. At such times, to paraphrase Clemenceau, criminal justice is too important to be left to the criminologists.

In fairness to the architects of the Parole Commission's guideline system, they consciously sought to avoid making discretionary decisions that were beyond their special competence as technicians. Thus, they designed the offense severity axis largely to formalize the historical practices of the Commission's predecessor, the Board of Parole. Whether such a historical orientation is wise is open to question, but at least the result has provided an alternative to experts arrogating value decisions to themselves. Self-imposed limitations, however, are rarely a satisfactory substitute for a functioning system of oversight. What is needed is some mechanism of checks and balances by which to hold accountable the low-visibility decision-makers at this new macro-level of our criminal justice system.

The dilemma of how to structure a system of accountability at this new level is compounded by the fact that S.1437 places the Sentencing Commission in the judicial branch, unlike the Parole Commission, which is part of the executive branch. Three basic consequences flow from this change. First, the guideline-drafting agency faces a blank slate because it no longer can see itself simply as an agency seeking to even out disparities that other institutions have thrust upon it. Not only is it less confined by prior practices than were the Parole Commission's guideline draftsmen, but it has been delegated a broad grant of authority with only vague legislative directions on how to use it. Second, decisions made within the

61. For example, the NAACP normally might not have a policy on crime control, but presumably it would be concerned about any approach to dispositional decisionmaking that resulted in longer sentences for minority group offenders than for equally guilty white offenders.

62. See Gottfredson, Hoffman, Sigler & Wilkins, supra note 45, at 39. The Project staff computed the median time served historically for each offense coded by the Project, and offenses having similar median times were determined to be of the same severity level for purposes of the guideline system. See notes 186-88 infra and accompanying text (critical discussion of this procedure). This practice seems to have been motivated in part by the discovery that parole boards would place little weight on base expectancy rate data standing alone, but instead preferred to focus on the offense severity. Id. at 37. See notes 48-49 supra and accompanying text. This practice suggests that the criminologists have in fact induced the legal decisionmakers to move in a direction in which initially they were reluctant to go. That is, the guidelines reflect a move toward greater emphasis on risk and less on severity or, in this article's terminology, more dependence on status and less on conduct. In this light, the criminologists may have succeeded in doing more than structuring discretion; to a degree, they may have changed it.

63. Under S. 1437, sec. 124, § 991(b), the Sentencing Commission is directed to establish sentencing policies that meet the purposes of sentencing set forth in § 101(b) of that bill. That section of the bill directs decisionmakers to impose punishment for illegal conduct so as to:
judicial branch tend to receive a far greater degree of deference and
immunity from public criticism than those made elsewhere within our
system of government. But this myth of the robe seems a dangerously
misleading cloak to throw around a Sentencing Commission that will
necessarily be making political choices involving conflicting social
values. Finally, when confronted with factually complex problems that
require a sophisticated but flexible remedy, the modern response of
the law has been to rely on the administrative agency model. Yet the
traditional safeguards on that model have been largely abandoned by
S. 1437. One of the bill's less noted features is that it substitutes an
agency that is largely immune from the reach of the Administrative
Procedures Act (APA) for one that has been largely subject to that

(1) deter such conduct;
(2) protect the public from persons who engage in such conduct;
(3) assure just punishment for such conduct;
(4) promote the correction and rehabilitation of persons who engage in such
conduct.

Id., sec. 101, § 101(b). In short, deterrence, incapacitation, retribution, and rehabilitation all are
recognized in a general explication that ignores the tension among these goals. Thus, the
Commission's compass points in all four directions at once. In addition, the Commission is
instructed further by proposed section 991(b)(1)(B) to "provide certainty and fairness" and
minimize "unwarranted sentence disparities" while also giving effect "when warranted" to
"mitigating or aggravating factors." Although the Committee Report indicates that these
provisions are to balance each other, COMM REP., supra note 3, at 1160-61, others might feel that
they simply contradict one another. At best, S. 1437 provides only a vague degree of legislative
guidance and merely restates the criteria for imprisonment found in section 7.01 of the ALI
Model Penal Code (Proposed Official Draft). Several states, including New York, have passed
revised criminal codes based largely on the Model Penal Code, and no one yet has suggested
that the problem of sentencing disparities has been solved for those jurisdictions. COMM REP.,
supra note 3, at 11-12.

As Judge Frankel has noted, the most common criticism of S. 1437 is that it amounts to an
abdication by Congress. Frankel, Jail Sentence Reform, N.Y. Times, Jan. 15, 1978, § E, at 21,
ccol. 1-2. Judge Frankel answers this criticism with the argument that "complex subjects
requiring continuous adaptation of the law" such as sentencing "are beyond the capacities of
legislative bodies," and in similar situations . . . Congress has found it necessary to create
specialized agencies." Id. I agree, but given the extent of the legislative delegation here it
also seems necessary that the safeguards usually attached to the administrative agency model be
adopted. These safeguards have not been adopted. See note 65 infra.

64. See Frankel, supra note 63.
65. The only provision of the Administrative Procedure Act (APA) made applicable to the
Sentencing Commission is the rulemaking notice and comment requirements of 5 U.S.C. § 553
(1976). See COMM REP., supra note 3, at 1170 (explaining S. 1437 § 994(g)). The draftsmen
appear to have read broadly the provision and intent of 5 U.S.C. § 551, which exempts the
courts of the United States from the application of the APA. Id. at 1170 n.17; see Cook v.
Willingham, 400 F.2d 885 (10th Cir. 1968) (Freedom of Information Act does not reach judicial
bodies such as probation offices). Quite apart from the policy arguments about whether the
Sentencing Commission should be subject to the APA, it seems questionable simply as a matter
of statutory construction whether an exemption for courts should be read broadly to mean
agencies of courts doing functionally the same tasks as other agencies subject to the APA. See
It appears that the consequences of such a change have not been adequately considered. The kind of decisionmaking that occurs in the categoric risk approach to criminal corrections is of an inherently low order of visibility and a high order of abstruseness. If one accepts the premise that greater visibility is needed given the significance of the value choices being made, an exemption from the APA becomes a matter of serious concern when it is realized that with it comes an automatic exemption from the APA’s constituent statute, the Freedom of Information Act (FOIA). The FOIA is the most obvious means of enhancing the agency’s visibility, and hence its accountability.

In reply to these warnings of an accountability crisis in our criminal justice system, two rebuttals are likely. First, it can be asserted that nothing really is new here: Low visibility discretionary decisions by lower echelon personnel long have been a part of our criminal justice system. More likely than not, sentencing judges in the past have regularly considered the relative likelihood of recidivism when imposing sentence. In part this observation is valid, but distinctions here are striking. The effects of these new macro-decisions are felt not by isolated individuals, but on a vastly larger scale by entire classes of offenders. Even if it were true that guidelines only make explicit what was hitherto intuitive, there still may be a significant difference—in terms of the erosion of these social values—between random instances of bias and the institutionalization of a formal policy that

Note 66 infra. Professor Lesnick has questioned whether the Judicial Conference, the existing body most closely resembling the Sentencing Commission, is properly exempt from the APA. See Lesnick, The Federal Rule-Making Process: A Time for Reexamination, 61 A.B.A.J. 579 (1975). It is clearly the intent of the draftsmen, however, that the Sentencing Commission should be exempt.


67. The Freedom of Information Act (FOIA) is contained within the APA as section 552. For purposes of the FOIA, the term “agency,” critical to the APA’s application, is given the definition set forth in section 551(1) of the APA, but section 552(c) expands the definition to include, inter alia, “any independent regulatory agency.” See 5 U.S.C. § 552(c) (1976). If not for the clear intent of the draftsmen, it could be argued that the Sentencing Commission was such an “independent regulatory agency.” See note 66 supra.
explicitly offends our proclaimed concept of the irrelevance of racial, social, and economic status. In addition, the newest feature of this macro-level of decisionmaking is the unprecedented opportunity it provides. Paradoxically, it at last makes the goal of accountability realizable within this area of the criminal justice system. By formalizing the criteria that are to affect the allocation of punishment, it creates a nerve center through which important decisions must pass. Where before there had been only the decentralized anarchy of individual decisionmakers, there will exist a centralized body that can be influenced, lobbied, sued, and reviewed. The irony then is that accountability is both most lacking and most possible at this new level.

A second potential reply to the assertion that the level of political visibility provided for in the brave new world envisioned by S. 1437 is insufficient, is the claim that the decisions to be made are largely of an actuarial nature and hence too abstruse or ministerial to be either comprehensible or of interest to many. Further, given the scientific objectivity of the professionals involved in constructing base expectancy rate tables, it can also be asserted that these experts are not engaged in any exercise of discretion as lawyers traditionally understand that term. Thus, they require less supervision. This argument surfaced in the legislative history of S. 1, the predecessor of S. 1437. It is, however, a myth. One of the principal objectives of part III of this article is to identify those sensitive junctures in the implementation of any categoric prediction system where value choices must be made. To point out these choices is to suggest also that other options might have been selected if the significance of these choices had been highlighted. Put simply, we will seek to determine what public participation in the rulemaking process of guideline drafting might achieve if that process were made more politically accessible.

SUBSTANTIVE ISSUES OF RISK-LEVEL DETERMINATION:
LIBERTY VERSUS EQUALITY

To this point we have focused only on the alleged existence of subterranean value choices buried in the process of guideline drafting.

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68. See S. REP. NO. 9000, 94th Cong., 1st Sess. (1975). Here it was argued that because "the issues and considerations underlying [parole determinations] differ sufficiently from the usual nature of administrative determinations" as to make "application of the Administrative Procedure Act... unnecessary and unwarranted," the APA should be inapplicable to the Parole Commission. Id. at 1082. Differ they do, but the real issue to be addressed is whether these differences heighten or lessen the need for oversight and political accountability.
The argument has been made that if conscious trade-offs between concepts of fairness and those of efficiency are inevitable, it is important to structure the process so that such choices are adequately explored, explained, and subjected to the crossfire that occurs in a pluralistic society when significant values and interests are implicated. Eventually, however, the question of substantive fairness must be reached: Is it just to enhance the punishment given one offender over that given another equally culpable offender because of the presence in one case of socioeconomic variables, unrelated to blameworthiness but showing a positive correlation with predicted recidivism?

This is the most controversial question involved in the use of a prediction table, and to ask it is to invite a flurry of intuitive and emotional responses. Some will argue, with scattered dicta to support the proposition, that the law may not punish status in such a manner. 69

69. The argument can be made that the Constitution requires that punishment be proportioned to the offender’s culpability and not his status. In Skinner v. Oklahoma, 316 U.S. 535 (1942), the Supreme Court held that a statute providing for sterilization of certain habitual criminals but not reaching embezzlers violated the fourteenth amendment’s equal protection clause. In so doing, Justice Douglas noted that “when the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.” Id. at 541. In Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969), there is also language suggesting that status should be irrelevant. In requiring a finding of the defendant’s dangerousness for commitment under the Sexual Psychopath Act, Judge Bazelon noted, in dicta, that “[i]ncarceration for a mere propensity is punishment nor for acts, but for status, and punishment for status is hardly favored in our society.” Id. at 1101-02. See also Robinson v. California, 370 U.S. 660 (1962). The theory suggested by Cross and Robinson, however, probably contains a fatal flaw when applied to the context of sentencing. Proponents of preventive confinement can argue that we are not imprisoning the offender because he is a risk or because of his status, but because he has committed a crime. Accordingly, so long as the prisoner is not confined for a period in excess of the “retributive limit” justified by the severity of his crime, he has no further entitlements. Indeed, such an attitude seems implicit in the Supreme Court’s decision in McGinnis v. Royster, 410 U.S. 263, 270 (1973), which held that only a weak “rational relationship” test would be used in subjecting issues of confinement length to equal protection scrutiny. Under such a test, attacks on the use of status-sensitive criteria at sentencing seem foredoomed. See note 75 infra.

But Skinner is less easily distinguished because it seems to hold that punishment must be proportioned to culpability. Of course it is questionable whether the Court was seriously advancing a constitutional theory of punishment in that case or seeking only an expedient means of outlawing compulsory sterilization as a criminal sanction. Still, more recently in Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975), the Court emphasized that “the criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability.” At issue in that case was whether the state bore the burden of proving beyond a reasonable doubt not only the defendant’s guilt, but his level of culpability; specifically, whether he had acted with premeditation or out of passion. The Court held that the Constitution required the state to bear this burden. Id. at 704. Subsequently, the Court retreated from the position expressed in Mullaney on the allocation of procedural burdens, see Patterson v. New York, 97 S.Ct. 2319 (1977), but in its death penalty decisions it has continued to emphasize the importance of the offender’s actual culpability, in particular the presence or absence of
Clearly, such a practice coexists uneasily with the concept of equal protection of the law. Anatole France wrote that the law in its majestic impartiality forbids the rich as well as the poor to sleep under bridges or to steal bread. But even this spurious claim of neutrality becomes untenable when the poor, high-risk offender receives a longer sentence for such a crime than the rich, low-risk offender. Adding to the intensity of the debate is the tendency for socioeconomic variables such as employment and education to be racially sensitive. With the rate of black unemployment currently more than double the overall jobless rate, it seems likely that in the high-risk category defined by such criteria blacks will be disproportionately represented. In fairness, it must be acknowledged that the racial impact of the Salient Factor Score at the parole release stage is subject to interpretation; mitigating or aggravating factors. See Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976).

Indeed, in an extension of this argument the Third Circuit has recently held that the use of "fixed and mechanical" guidelines would violate statutory and constitutional prohibitions. See Geraghty v. United States Parole Commission, No. 77-1679 (3d Cir. March 9, 1978). The court did not hold that the Parole Commission's guideline matrix was in fact so rigid as to offend due process, but only that the plaintiffs were entitled to relief if they could prove the facts alleged. See also Woolsey v. United States, 478 F.2d 139 (8th Cir. 1973).

Thus, scattered seeds appear in the case law, particularly in Skinner, Mullaney, Woodson, and Geraghty, which someday could sprout into a unified constitutional theory of punishment, one that would require a closer relationship between punishment and culpability than simply that punishment be within the outer limits imposed by the eighth amendment. No prophecy is made here, however, that these seeds will soon prove fertile.

Recent unemployment statistics show the rate of black unemployment to be 14.5%, or double the overall unemployment rate of 7.1%. Mossberg, Seeking a Solution: Black Jobless Problem Still Haunts President Despite New Programs, Wall St. J., Nov. 28, 1977, at 1, col. 1. Because crime is age specific and principally a vocation of the young, it is even more important to note that the unemployment rate among black teenagers is an extraordinary 40%. See id. 70. Current data is not available on the overall impact of the Salient Factor Score on minority group offenders. A study conducted several years ago did suggest, however, that on the whole minorities were not more adversely affected by the Salient Factor Score than white offenders because both the highest and lowest risk categories were disproportionately white, with blacks falling disproportionately into the intermediate categories. See Project, supra note 45, at 877 n.329. It can, of course, still be argued that the disproportionate white presence in the most favorable category is alone sufficient to demonstrate a discriminatory impact. But to examine only the aggregate impact of the Salient Factor Score may be short-sighted. There are special reasons why a focus on the individual variables employed by the Salient Factor Score makes more sense and provides more meaningful data. Apparently, one reason for the disproportionate white presence in the highest and lowest risk levels was that the most risky and least risky types of offenders by crime category are auto thieves and embezzlers respectively; both crimes have been disproportionately committed in the past by white offenders. Interview with Dr. Peter Hoffman, Director of Research, U.S. Parole Commission (Mar. 22, 1978). As a result, however, this presence of a sizable number of white car thieves among federal offenders makes it impossible to compare the racial effect of the Salient Factor Score upon otherwise similarly situated offenders. To make this comparison it would be necessary to isolate all offenders convicted of the same offense and having other similar characteristics, except for race.

Accordingly, it may be wiser to look at the individual variables used by the Salient Factor Score. Three variables are of particular interest because they involve socioeconomic factors unrelated to the offender's level of blameworthiness: (1) employment history (basically, six
yet, the fact that little data has been gathered or released may itself be a symptom of the lack of visibility surrounding the present system. 72

months of verified employment over two years); (2) education level (twelfth grade or an equivalency diploma earned before entry into prison); and (3) satisfactory living arrangements (either a legal or common law spouse). A table provided by Dr. Hoffman shows the impact of these three variables on black versus nonblack offenders (a comparison that, of course, may underestimate any discriminatory impact because it treats Hispanics as whites). I have simplified Dr. Hoffman's table, which was expressed in terms of subgroups of offenders having specified numbers of prior convictions and incarcerations, by aggregating his data to show only the total number of blacks and nonblacks who did or did not receive favorable points on the basis of the three socioeconomic variables. The total sample consisted of 1188 blacks and 3455 nonblacks. The results may be expressed as follows:

<table>
<thead>
<tr>
<th>Number and Percentage Receiving Favorable Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Employment History Variable</td>
</tr>
<tr>
<td>Black</td>
</tr>
<tr>
<td>Number:</td>
</tr>
<tr>
<td>521</td>
</tr>
<tr>
<td>Percent:</td>
</tr>
<tr>
<td>43.8%</td>
</tr>
<tr>
<td>NonBlack</td>
</tr>
<tr>
<td>1777</td>
</tr>
<tr>
<td>51.4%</td>
</tr>
<tr>
<td>B. Education Variable</td>
</tr>
<tr>
<td>Black</td>
</tr>
<tr>
<td>Number:</td>
</tr>
<tr>
<td>266</td>
</tr>
<tr>
<td>Percent:</td>
</tr>
<tr>
<td>22.4%</td>
</tr>
<tr>
<td>NonBlack</td>
</tr>
<tr>
<td>1171</td>
</tr>
<tr>
<td>33.9%</td>
</tr>
<tr>
<td>C. Planned Living Arrangements Variable</td>
</tr>
<tr>
<td>Black</td>
</tr>
<tr>
<td>Number:</td>
</tr>
<tr>
<td>219</td>
</tr>
<tr>
<td>Percent:</td>
</tr>
<tr>
<td>18.4%</td>
</tr>
<tr>
<td>NonBlack</td>
</tr>
<tr>
<td>745</td>
</tr>
<tr>
<td>21.5%</td>
</tr>
</tbody>
</table>

Each variable seems to favor the nonblack offender, although Dr. Hoffman has informed me that he does not believe the results are statistically significant for the planned living arrangements variable. The disparity is greatest in the case of education (11.5%), but still significant in the case of prior employment (7.6%). Consideration of all three factors is mandated by S. 1437. See note 78 infra (chart and worksheet supporting these computations on file at the Georgetown Law Journal).

Nonetheless, whatever the evidence at the parole stage, the racial impact of socioeconomic variables seems likely to be more pronounced with the advent of a Sentencing Commission, because the relevant population is far different at sentencing than at parole. At the sentencing stage a far less winnowed and screened population is present. Of the relevant population at sentencing, roughly fifty percent receive probation\textsuperscript{73} and thus never appear at the parole stage; this group is likely to be disproportionately white.\textsuperscript{74}

Rejoiners to this argument about the de facto discriminatory effect of neutral socioeconomic variables are inevitable. The hardnosed realist can argue that, on the basis of recent decisions, the offender is not constitutionally entitled to anything more than protection from intentional, de jure discrimination.\textsuperscript{75} Even the civil libertarian may support the use of validated factors that have a proven positive correlation with recidivism, because their use may result in the imposition of less aggregate punishment if we can distinguish high-risk from low-risk offenders.\textsuperscript{76} The utilitarian, as a believer in cost-benefit analysis, would argue also that the system is best that punishes least in achieving its intended goals. If our goal is to interdict the criminal careers of true recidivists, segregating offenders into high-risk and low-risk categories, then confining the high-risk group

\textsuperscript{73.} In 1972, for example, 45.8\% of all federal offenders sentenced received probation; of these, 6.5\% received short split sentences under which they were released before ever becoming eligible for parole. P. O’DONNELL, M. CHURIN & D. CURTIS, supra note 2, at 25, 29 n.12. Therefore, nearly one-half of federal offenders never appear before the Parole Commission and thus the relevant populations at sentencing and parole are very different.

\textsuperscript{74.} There have been numerous studies of racial prejudice in sentencing. See Wolfgang & Riedel, \textit{Race, Judicial Discretion and the Death Penalty}, in \textit{THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE} (May 1973) (showing that blacks disproportionately subject to death penalty in rape cases because of racial discrimination); Comment, \textit{Discretion in Felony Sentencing – A Study of Influencing Factors}, 48 \textit{WASH. L. REV.} 887 (1973) (concluding that race is one influencing factor). Even when no conscious prejudice is involved, it seems likely that judges tend to grant probation disproportionately to middle class and white collar offenders, who are usually white.

\textsuperscript{75.} In \textit{McGinnis v. Royster}, 410 U.S. 263 (1973), the Court held constitutional a New York statute denying good time credits to prisoners for time spent in pretrial incarceration. Plaintiffs argued that this denial of “jail time” discriminated against poorer defendants who were unable to obtain bail. The Court reviewed the statute and found that prisons have more “rehabilitative” facilities than jails and that, therefore, there was a rational basis for the state’s desire to grant good time credits for prison time only. \textit{Id.} at 270-73. The strained character of this rationalization suggests that equal protection attacks on sentencing practices have for the present little chance of success. \textit{See} note 205 \textit{infra}.

\textsuperscript{76.} \textit{See} text accompanying notes 278-80, 308-09, 331-35 \textit{infra}.
for a longer period represents a "principle of parsimony." Under such an approach it can be demonstrated that the total cost in terms of aggregate liberty deprived is lower for any given level of incapacitation desired than if we assigned equal sentences to equally culpable offenders.77 Morally, this argument would conclude, it is unnecessarily cruel to impose more punishment than is minimally necessary to realize our incapacitory purpose. Arguably, a failure to so differentiate thus becomes unconscionable.

Seldom can such stark trade-offs between the values of liberty and equality be posed. Nor is this dilemma a fabricated one, because S. 1437 clearly contemplates the use of several socioeconomic factors that are likely to have a racially sensitive impact.78 Other jurisdictions have also adopted, or are in the process of implementing, guideline systems modeled after that of the Parole Commission.79 Therefore, we legitimately face a rare issue of applied jurisprudence: What role does equality merit in our scale of values when its recognition may increase the aggregate liberty deprived? Although others have debated issues concerning the ethics of preventive confinement, generally they have framed the issue differently, focusing instead on the high proportion

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77. See text accompanying notes 391-95 infra.

78. See S. 1437, 95th Cong. 2d Sess., sec. 124, § 994 (d) (1978). This section of the bill directs the Sentencing Commission to consider the following variables in establishing categories of defendants for use in the guidelines:

1. age;
2. education;
3. vocational skills;
4. mental and emotional condition to the extent that condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
5. physical condition, including drug dependence;
6. previous employment record;
7. family ties and responsibilities;
8. community ties;
9. role in the offense;
10. criminal history; and
11. degree of dependence upon criminal activity for a livelihood.

Id. When compared with the nine-factor Salient Factor Score, a high degree of overlap is evident. See notes 123-26 infra and accompanying text.

79. Judicially prescribed sentencing guidelines developed by designers of the Parole Commission's system are now in operation in Denver and are being introduced in Newark, Philadelphia, and Chicago. Kress, Wilkins & Gottfredson, Is the End of Judicial Sentencing in Sight? 60 JUDICATURE 216 (1976). Guideline-drafting bodies have recently been created in Oregon and Minnesota which appear patterned after U.S. Parole Commission's model. Interview with Dr. Peter Hoffman, Director of Research, U.S. Parole Commission (Mar. 22, 1978). The trend appears to be accelerating.
of false positives that most systems of actuarial prediction yield. But the issue of whether it is just to confine someone under an indeterminate sentence for as long as that person poses a substantial risk of dangerousness is not truly the question presented by the modern prediction table as it has been developed by the Parole Commission. Under the Parole Commission's approach, the additional confinement is only marginal, not indefinite, and is probably well within the outside limit justified by the triggering offense. The critical issue thus posed is different from that raised by civil commitment or sexual psychopath statutes, where the potential confinement based on predicted dangerousness is far greater. Here, the issue for those interested in the ethics of prediction is the unique conflict that arises between the values of liberty and equality.

Not only has this question been little discussed in the context of the ethics of prediction, but surprisingly those modern jurisprudential theorists who have recognized in related contexts the potential conflict between the values of liberty and equality in the allocation of punishment generally have opted to give priority to liberty. As a result, they have assigned equality only a second echelon status, which, when it conflicts with the goal of prevention, must be subordinated.

Plainly, one can give common sense reasons why punishment should not be based on status to any material degree. Among the cogent arguments that have been made are: (1) that any status-sensitive system flouts common morality, thereby bringing the law into disrespect and ultimately interfering with the aim of prevention; (2) that such a system severs the already tenuous connection between the alienated offender and society; and (3) that it enables the offender to blame society for misfortunes that are of the offender's own

80. *See, e.g.*, N. Morris, supra note 2, at 34-35, 69-73; A. von Hirschi, supra note 2, at 35-44. These critiques, however, rely chiefly on studies finding a high level of overprediction in clinical diagnoses of dangerousness. Less evidence exists concerning categoric systems of prediction, but they tend to be more accurate than clinical techniques. *See P. Meehl, Clinical Versus Statistical Prediction* (1954). Even more important, the offender's deprivation under a categoric risk approach is generally only a marginal increase in his sentence, well within the range of sentences sometimes imposed by judges and well short of any outer limit required by the eighth amendment. Thus, the deprivation is far less than under some clinical systems, in which a positive prediction of dangerousness may lead to life-time confinement. *See Burt, Of Mad Dogs and Scientists: The Perils of the "Criminal-Insane,"* 123 U. Pa. L. Rev. 258 (1974). This is not to assert by any means that von Hirschi, Dershowitz, Morris, or others are thereby wrong in their criticism, but only that their target has moved.

making. Others say that it is simply self-evident that we cannot punish offenders for "being a risk." Nevertheless, all these arguments are based on intuitive or empirical premises that some will share and others will reject. The challenge then is to determine whether we can give a more rigorous account of the offender's right to equality and show why it should outweigh whatever social interest is involved in incapacitating for a marginally longer period the offender who is believed, on the best evidence available, to be the more likely recidivist.

Of course, models for punishment exist that can supply such an explanation. In particular the recently revived interest in retribution as a justification for punishment seems in part owing to the ease with which it can give the desired answer. But there is a difference between saying simply that all offenders should be treated alike in terms of their relative culpability and explaining the origin of this moral imperative to critics. It is this gap between assertion and justification that recently popular supporters of a retributively oriented system of sentencing, notably Professor von Hirsch in Doing Justice, seem not quite able to bridge. Even more unfortunately, the new retributive model brings with it undesirable byproducts. These include the dangers of a harsher, more vengeful system of punishment and the risk that a "just-deserts" principle will increase rather than

82. The need for the criminal law to be reinforced by the common morality if it is to achieve its preventive end is stressed by both Hart and Parker. See text accompanying notes 288-89, 299-300 infra. The danger of further alienating the offender so that he sees himself permanently in the role of a social outcast has been stressed wisely by Judge Motley. Motley, "Law and Order" and the Criminal Justice System, 64 J. OF CRIM LAW AND CRIMINOLOGY 259, 269 (1973).

83. A. VON HIRSCH, supra note 2, at 125. Although this analysis tends to ignore the role of the triggering offense as justification for the punishment, I share a sense of intuitive unfairness with these writers. Consider for example two hypothetical defendants, the accountant and the prostitute, each convicted of tax fraud for failing to report large sums of cash they have acquired. The lower class defendant seems to have lost at both ends. Society has denied her the opportunities available to the middle class defendant, and thus, the inducements for her to turn to crime are greater. In turn, the penalties upon conviction are also greater. Not having prior verified employment, a high school diploma, or satisfactorily planned living arrangements, the prostitute's Salient Factor Score will be materially lower than that of the accountant; yet, it is difficult to say that she is more dangerous to society. In any event, this result is inconsistent with a sense shared by many that along with higher rank should come higher responsibilities. If so, then the middle class defendant is more culpable. See United States v. Bergman, 416 F. Supp. 496, 501 n.14 (S.D.N.Y. 1976) (sentencing memorandum stating that despite Biblical teachings to the contrary, defendant not held to different standard of responsibility because of his social position).

This argument about the unfairness of such punishment disparities does not convince the utilitarian, who reasons that greater penalties naturally are needed when there are relatively greater inducements for committing the offense. The second part of this article will set forth a different argument directed at those who take this position.

84. In addition to sources cited at note 39 supra, the recent literature on retribution is set forth in A. VON HIRSCH, supra note 2, at 160-61.
reduce disparities, given its inherent subjectivity. Thus, this article presents in its concluding section an alternative model for the allocation of punishment; one, it is hoped, that has fewer undesirable corollaries and that gives a fuller justification of why reasonable individuals should recognize the primacy of equality in any satisfactory model of punishment. Finally, although the model rests largely on a method of analysis borrowed from the philosopher John Rawls, the article argues that at least in the limited context of the ethics of punishment the model is relatively immune from the philosophical rebuttals that have been directed at Rawls.

From the foregoing roadmap, it becomes clear that our focus has broadened ambitiously beyond a critique of S. 1437. In order, we will turn from the procedural to the substantive issues of prediction, from an examination of the new macro-level of decisionmaking that a categoric risk approach to prediction entails, to the jurisprudential issues that will remain even if the methodology employed is as precise and narrow as possible. Despite the organizational schizophrenia that such a transition may seem to involve, important linkages exist between these two sets of issues. Both are implicated by S. 1437 and yet largely ignored by it. More importantly, given the limited likelihood that we will soon achieve a jurisprudential consensus on the ethics of punishment, there may be a second best answer: Raising the visibility of the process, which can sometimes render moot the deeper problems of substantive theory. Once made politically visible, the trade-offs between the goal of predictive efficiency and the value of equality may be quite different from those reached in a political vacuum by even the wisest of criminologists.

III. THE PROBLEM OF ACCOUNTABILITY

The proposed Sentencing Commission is a rare animal, in effect a judicial administrative agency without precedent. Not only is it
virtually immune from the controls normally placed on administrative agencies by the APA, but it also is exempt from the special means of legislative oversight and control that Congress has attached to the previous grants of judicial rulemaking power.\textsuperscript{88} To appraise the significance of the autonomy given to the Sentencing Commission,\textsuperscript{89} we begin by considering the kinds of decisions it will likely have to face in developing a guideline system. The initial purpose of this survey is to identify the junctures where value-laden decisions exist and where increased public visibility might affect the outcome. Of course, one always can oppose any form of categoric prediction on a variety of broad ethical or political grounds, but that is not the purpose of this survey. Although the survey may seem hypersensitive about the methodological issues of prediction, its aim is the political domestication of categoric prediction, not its elimination. In particular, this article explores the possibilities for developing some role for public interest groups in order to tame this most elusive of the wild horses earlier referred to. If one generalization seems justified about recent analyses of the behavior of administrative agencies, it is

\textit{194-97 infra} and accompanying text. Yet, at least the Judicial Conference consults extensively with outside experts and concerned groups, such as the relevant ABA Committees. Although some consultation is mandated by S. 1437 and encouraged in general by its legislative history, no analogous “sentencing bar” of experienced practitioners exists. \textit{See S. 1437, 95th Cong., 2d Sess., sec. 124, § 994(m) (1978); Comm. Rep., supra note 3, at 1169-70.}

\textit{88. See Weinstein, Reform of Federal Court Rulemaking Procedures, 76 Colum. L. Rev. 905} (1976) (in depth discussion of these oversight techniques). Judge Weinstein advocates that Congress should in the future “retain the power to reject any proposed rule or amendment by joint resolution within a limited period.” \textit{Id. See also Lesnick, supra note 65, at 583-84} (concluding that a workable model of genuine congressional review, although not yet devised, is necessary).

In the original May 2, 1977 version of S. 1437, section 994(g) provided that guidelines promulgated by the Commission would take effect within 180 days “unless within that time one House of Congress vote[d] to disapprove them.” This provision was subsequently deleted. \textit{See S. 1437, 95th Cong., 1st Sess. § 994(g) (1977).}

\textit{89. A spurious issue arises whenever it is suggested that the autonomy of any agency within the judicial branch be restricted. Inevitably, some claim such restrictions violate the separation of powers doctrine by rendering the judicial branch less than co-equal. On the state level a few decisions have found judicial rulemaking to be beyond the legislature’s power. See Winbery v. Salisbury, 5 N.J. 240, 245-46, 74 A.2d 406, 409 (under state constitution, rulemaking power of state supreme court not subject to overriding legislation because this would foster continuous conflict between two departments; court rule requiring appeal within 45 days held to prevail over state statute setting one year time limit), cert. denied, 340 U.S. 877 (1950).}

On the federal level, this argument has long been authoritatively rejected. \textit{See Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 9 (1940) (Congress has power to regulate practice and procedure of federal courts); Weinstein, supra note 88, at 927-31 (federal courts recognize that rulemaking is a legislative power although in large measure delegated to courts). Moreover, sentencing seems a unique context in which the conscience of the community, rather than that of the court, should control. The decision as to the amount of punishment normally to be prescribed, as such, is more substantive than procedural.}
that agencies perform differently, and probably more satisfactorily, when their performance is monitored by such outside observers. Although it is far from clear that the success in influencing marginal change within federal administrative agencies by activists such as Ralph Nader can be duplicated at the macro-decisionmaking stages of our criminal justice system, this article will map the intersections where such influence might be exerted. Indeed, if greater accountability cannot be structured into the system, there are already signs of a reaction against categoric prediction as a mode of decisionmaking. At least one subcommittee of the American Bar Association has taken a stand against the Sentencing Commission, partially on such grounds, and other committees currently appear divided on the issue.\footnote{Opposition to the Sentencing Commission concept has been formally expressed by ABA's Standing Committee on Legal Aid and Indigent Defendants. To date both the ABA's Criminal Justice Section and its Commission on Correctional Facilities and Services have declined to endorse the Sentencing Commission proposal in S. 1437, but have taken no formal stand in opposition. The ABA itself has not taken a position on the Sentencing Commission. Interview with Ms. Laurie Robinson, American Bar Association's Section on Criminal Justice (Apr. 1978).} Even if based on misperceptions of how categoric prediction works, this opposition remains symptomatic, suggesting the need for greater sensitivity to the concerns of those troubled by prediction based on status.

A distorted picture results, however, from an approach that simply attacks the lack of visibility surrounding the decisions made at this new macro-level. Such criticism ignores the even greater problems involved in structuring discretion and assuring accountability at the micro-level. Nowhere is accountability more lacking than in a decentralized system of individualized sentencing hearings before a cross-section of strong-willed judges. Rather than merely criticize a proposed solution to a perplexing problem, this section examines the problems of these two levels and suggests forms of oversight that both levels need.

A. THE MACRO-LEVEL: BUT WHO WILL GUARD THE GUARDIANS?

Although a variety of guideline systems are possible, it is a useful organizational device to follow the structure already developed by the Parole Commission and subdivide the process of guideline drafting into two components: first, guidelines dealing with the offender, and second, guidelines dealing with the offense. Under this latter heading, we will also consider the question of how to balance these two components.
Ranking Offenders: Issues in the Use of Base Expectancy Rate Data

Base expectancy rate tables are not new. Criminologists generally recognize the table developed by E.W. Burgess for the Illinois parole board in 1928 as the first table placed in operation. Although the Burgess table appears to have been fairly accurate, evidence exists that its adoption coincided with a gradual increase in the time actually served by the average Illinois prisoner, an observation that has also been made with respect to the Parole Commission's system. Other attempts to develop prediction instruments during this early era, however, have been characterized by Leslie Wilkins as a tragedy for criminology. Naive in design and seldom validated on groups other than the original control group, they were methodological nightmares that frequently employed highly subjective criteria that different raters would score differently. At that time, little was understood about the phenomenon of prediction shrinkage or the tendency for positively correlated factors to overlap.

To judge the potential of categoric prediction systems based on these early blundering efforts is roughly comparable to criticizing airline safety by pointing to the errors of "Wrong Way" Corrigan. Still, more recent efforts also involve what seem to be highly dubious judgments. Since 1970 the United States District Court for the District of Columbia has used a statistical prediction scale to evaluate probationers that is largely borrowed from the state of California. That scale, known as the BE61/A table, classifies offenders into high-

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92. Id. at 65-66. There were precursors, but Wilkins describes this as the "first prediction table in the form in which it is now recognized." Id.
94. One study by the Parole Commission's researchers showed, based on early experience with the base expectancy rate table, that its use increased the average time of incarceration. In short, "focusing the parole board members' attention upon the issue of 'risk' " through the use of a prediction table or similar means made them more risk averse. See Hoffman, Gottfredson, Wilkins & Pasela, The Operational Use Of An Experience Table, CRIMINOLOGY 214, 224, 227 (Aug. 1974). Structuring discretion in this way, then, may have some predictable results.
95. L. Wilkins, supra note 91, at 62.
96. Id. at 62-73. In particular, Wilkins criticizes these studies for their use of "soft" data such as personality ratings and other forms of subjective judgments. Id. at 73. Some of the variables used until recently in the Salient Factor Score seem equally subject to this criticism. See notes 158-60 infra and accompanying text.
medium-, and low-risk categories based in substantial part on socioeconomic data. It had been recommended for use in all federal probation offices by the Administrative Office of the United States Courts, a decision that, symptomatically, seems as questionable as it was invisible. Not surprisingly, a 1972 validation study in the District of Columbia found that the scale had malfunctioned: Regardless of their ranking on the scale, probationers who had a history of opiate use were failing on probation at an alarmingly high 74% rate.\footnote{Id. at 34-35.} Apparently conditions in the District of Columbia were sufficiently different from those in California that what worked out West did not appear to do so back East.\footnote{This is but one manifestation of the problem of prediction shrinkage. See note 53 supra. One wonders whether other federal probation offices also following the recommendation of the Administrative Office to use the BE61/A table ever paused to conduct similar local validation studies. If not, the undetected distortions in other districts may be equally as great as those found by the District of Columbia researchers. Today, the BE61/A table remains in use in a few federal probation offices, but for the most part it has been superseded by the Salient Factor Score.} The contemporary significance of this finding is important because many federal probation offices now use the Salient Factor Score as a means of evaluating offenders awaiting sentence even though that table was validated on a different population—parolees and released prisoners.\footnote{I have been informed by several probation officers and by the authors of a forthcoming Federal Judicial Center study that the use of the Salient Factor Score at the sentencing stage is now fairly standard. See also Project, supra note 45, at 878 n.334 (noting that the Salient Factor Score is now in use in the Southern District of New York in presentence reports).}

The aftermath of this discovery of the limited geographic validity of the BE61/A table is even more intriguing. In seeking to discover what local factors correlated with recidivism, District of Columbia probation officials developed a hypothesis based more on theory than empiricism. Drawing on the well-known opportunity theory of Cloward and Ohlin,\footnote{R. CLOWARD & L. OHLIN, DELINQUENCY AND OPPORTUNITY (1960). The authors argue that youths in particular turn to crime not because they are maladjusted or sick, but because legitimate opportunities have been denied them.} they hypothesized that persons enjoying either legitimate or illegitimate economic opportunities would be good probation risks.\footnote{Hemple & Webb, supra note 97, at 35.} On investigation they did indeed find that offenders who had completed high school and offenders who were professional gamblers appeared to succeed on parole at virtually a 100% rate, a fact that tentatively corroborated their thesis. Although such a limited investigation of possibly causative variables seems almost a textbook example of methodological imprecision, the District of Columbia probation officials actually modified the BE61/A table to give a more favorable score to those who were gamblers.\footnote{Id.}
Such a result borders on self-parody. Even more noteworthy for our purpose than the methodological imprecision here is the tunnel vision focused exclusively on the goal of enhanced prediction. Something morally absurd occurs when we recommend more favorable treatment for offenders such as gamblers who have engaged in more, not less, illegal activities than the average. Pursued further, such illogic might justify a special dispensation for members of organized crime, who have, after all, the most illegitimate opportunities available to them and as superior criminals should fail on probation less frequently than others.

Two points of general significance emerge. First, those who have technical expertise may lose sight of the need for a moral coherence within the criminal law. Followed blindly, the goal of efficiency seems likely to conflict eventually with the moral underpinnings of our criminal justice system. Second, the process by which such a comic result transpired is equally important: The Administrative Office of the United States Courts disseminates a virtually invisible policy among a highly decentralized, basically autonomous structure of district court probation offices. Next, without any requirement of prior local validation, officials throughout the country put into use a prediction table, honestly believing it to be the scientific approach. Predictably, one local office and perhaps others decides to freelance and, for the right reason, adopts the wrong modification. Unfortunately, throughout this process it seems doubtful that either defense counsel or the sentencing judge will ever understand the real basis for parole failure regardless of the subsequent disposition accorded the arrest. Seemingly, this practice conflicts with the presumption of innocence our criminal justice system prides itself on.

For example, some prediction tables use arrest records as a variable showing propensity for parole failure regardless of the subsequent disposition accorded the arrest. At least one table considers whether anyone in the offender's family has a prior criminal record, thus offending our intuitive sense that guilt through association is wrong. For examples of such tables, see McGee, *Objectivity in Predicting Criminal Behavior*, 42 F.R.D. 193, 195 (1968); Stern, *Courts and Computers: Conflicts in Approaches and Goals*, 58 JUDICATURE 222, 226-27 (1974); *Institute on Sentencing for United States District Judges*, 35 F.R.D. 381, 403-04 (1964).

At present, there are 92 federal chief probation officers. COMM. REP., supra note 3, at 14. Few mechanisms exist by which uniformity or consistency of approach can be achieved among them. The Judicial Conference has a Committee on the Administration of the Probation System, chaired by United States Senior District Judge Wollenberg, and the Administrative Office of the United States Courts has a Division of Probation. In conjunction, these two bodies have approved the standard guidebooks for federal probation officers. See *The Presentence Investigation Report* (Publication 105) (1977) and *The Selective Presentence Investigation Report* (Publication 104) (1974) [hereinafter cited as *Publication 105* and *Publication 104*, respectively]. Guidebooks fall short of being operating manuals, however, and local practices appear to differ. More importantly, neither a manual nor a judicial committee can perform the monitoring function that seems essential and that is within the capacity of an administrative agency such as a Sentencing Commission. See notes 213-22 infra and accompanying text.
upon which probation recommendations are determined, despite the fact that judicial reliance on such recommendations is generally heavy. In short, existing procedural remedies, such as disclosure of the presentence report, have been shortcircuited. Although defense counsel may strive to rebut or clarify the statement made in the presentence report, the attorney never learns the basis, extrinsic to that report, upon which the critical probation recommendation has been made. If the concept of accountability is sometimes hazy at its margins, it may be easier to start with the idea of unaccountable discretion; here, we have a paradigm.

Yet, the implications that such a case study generates cut both ways. On the one hand, it is obvious that technicians sometimes can reach strange value judgments. On the other hand, such an example implies that categoric risk prediction systems come into use even in the absence of a formalized macro-level body. Thus, centralizing these decisions within an entity such as the Sentencing Commission, which can at least potentially be supervised, may be more a part of the answer than part of the problem. The dangers we perceive in such a commission may in effect be outweighed by the unseen dangers that already exist.

Once such a centralized agency is created, as S. 1437 proposes, and amateur night in the design of prediction tables thereby draws to a close, what dangers remain? Concededly, little in the construction of the Parole Commission's Salient Factor Score could be cited as evidence of methodological laxness, but once again there are instances in which a methodological decision intersects with questions of value. Three such points of intersection deserve special attention because they will be encountered in the design of any base expectancy rate table: first, the selection of relevant outcome criteria; second, the decision of which criteria, among those having a validated correlation with that outcome criterion, should be employed; and finally, the choice of weighting system to be used. In addition, another close encounter between values and methodology has yet to be faced even by the Parole Commission: How does one revalidate a prediction table on releasees who have been held for different periods by the operation of the table?

**Defining the Outcome Criterion.** In any statistical prediction system, independent variables are selected for observation in order to measure their correlation with the dependent variable. Thus, the first

106. See note 21 *supra* and accompanying text.
step must be to define the dependent variable used to measure recidivism: What will serve as our proxy for recidivism?\textsuperscript{107} If the answer is parole failure within a designated period, as empirical criminologists appear to agree, the next question is whether all parole failures should be treated alike for the purposes of determining the correlation between the independent and dependent variables,\textsuperscript{108} or whether some forms of parole failure should be weighted to give them a special emphasis. For example, both the parolee who has passed a bad check and the parolee who commits an armed robbery have failed. Should we distinguish these two types of parole failures, however, because one poses a greater danger to society than the other? As a rule the empirical criminologist does not seek to measure the severity or even the frequency of the offense behavior leading to parole failure. Yet, an informed public might ask whether the criminologist is measuring the most important relationships or only the most easily observed ones.

How much time should pass before we deem an offender a parole success? The technician’s bias probably is to use a relatively short period because it simplifies data handling and enables him to draw conclusions sooner. The public interest may be different. The shorter the period used, the greater the likelihood that we are singling out only the incompetent criminal, who is probably the least dangerous criminal given his inability to escape detection.\textsuperscript{109} To validate the Salient Factor Score, a two-year period was used.\textsuperscript{110} As a control, it would be interesting to know if the lines between risk categories would have been blurred had a five-year period been used.

How broadly should we define parole failure? Advocates of a stricter approach include in their definition not only reconviction but


\textsuperscript{108} Criminologists seem to have reached a consensus that base expectancy rate tables do not have much utility in identifying the violence-prone or dangerous offender. See N. Morris, supra note 2, at 66-73; McGee, supra note 104, at 196.

\textsuperscript{109} Some criminologists have warned that a possible fallacy lies in the “implicit assumption... of homogeneity of the offender population.” Avi-Itzhak & Shinnar, Quantitative Models in Crime Control, 1 J. CRIM. JUST. 183, 212 (1973). By this, they mean that conceivably “...offenders divide into two classes — those who are always caught and those very clever ones who are never caught.” Id. at 212. They add: “Since more than 80% of crimes remain unsolved, the assumption of two classes is not impossible.” Id. More likely, they think, is a broad continuum of different classes, but even if this is the case they acknowledge that some “slight bias” remains in any prediction system that treats offenders as homogeneous and therefore measures relative risk based on recorded reconvictions. Id.

also parole revocation. Because parole revocation can occur for a variety of technical, noncriminal reasons—such as failure to report to one's probation officer—the revocation may possibly be the product of a biased discretion. The inclusion of such technical revocations therefore brings into question the objectivity of the data utilized because discretion may be exercised more harshly when the parolee is perceived to be a higher risk.  

In the District of Columbia validation study noted earlier, not only did the researchers classify technical revocations as failures, but they also classified any person against whom a warrant for violation of probation had been issued as a failure—even if the court had refused to revoke probation at the requisite hearing brought on by the warrant. The researchers justified this extraordinary step, which is tantamount to treating arrest records as convictions, by saying that the District of Columbia courts were too lenient and frequently only warned the probationer. 

Of course, what they perceived as unwarranted judicial leniency might also be viewed as judicial skepticism about such technical revocations; these courts may have perceived a problem of biased, or at least erratic, exercise of discretion by the parole officer.

A more sophisticated problem is discernible in the validation of the Salient Factor Score, which also counted technical revocations as failures. The control and validation samples used by the Parole Commission were composed of both parolees and prisoners released at the expiration of their terms. Because only the parolee can have his parole revoked, and thus only he can be deemed a failure even without being accused of some criminal act, the population samples lacked uniformity. The result is to tilt the scoring of failures against the parolee group, which was not only subject to revocation but was under greater supervision than the releasee group and thus probably more vulnerable to detection for truly illegal activities. Yet,

111. Gottfredson points out that the behavior of the "parole agent or the paroling authority" is involved in the parole revocation decision as much as the behavior of the parolee, and sometimes even the behavior of the victim is a critical variable. Gottfredson, supra note 32, at 173.
112. Hemple & Webb, supra note 97, at 35.
113. Id.
115. The Parole Commission's researchers were fully aware of this disparity in the degree of surveillance between parolees and releasees, but justified counting technical parole revocations as failures because the only alternative would result in unevenness of an opposite sort: "parolees would be subject to less risk of being classified as having unfavorable outcome than unsupervised releasees." Hoffman & Beck, supra note 110, at 206 n.6. Granting that objective truth is unknowable, or at least indeterminate in this situation, the question becomes on which side we choose to err. Do we choose to risk overestimating the predictive power of
paradoxically, those released only at the end of their terms were necessarily those originally perceived as more dangerous, and thus were never granted parole. Why is this distinction between these two classes relevant? If, as seems likely, the releasee group never received parole because of evidence of prior culpability, their lesser exposure to failing the outcome criterion of “parole success” because parole revocation was inapplicable to them could result in understating the predictive value of their prior culpable acts, which led the parole authorities originally to deny them parole. In turn, any such understatement of the predictive power otherwise obtainable from culpability-oriented criteria results in increasing the base expectancy rate table’s reliance on criteria that are unrelated to culpability, such as the socioeconomic variables. It would probably be an overstatement to say that the Parole Commission by not excluding technical parole revocations was thereby comparing apples and oranges, but a public concerned about a status-sensitive prediction system could at least ask if the Commission was not perhaps mixing Northern Spys and Golden Deliciouses.

Selecting the Salient Factors. This step might seem to be the easiest: simply utilize all factors that show a positive correlation above some conventional statistical cutoff. At first glance the only issue seems to be whether the researchers have investigated every possible independent variable that might have a causal relationship with parole failure, the dependent variable used to measure recidivism. In fact, however, researchers have never followed such a pure, rigorous approach, and understandably so.

The District of Columbia researchers hypothesized that only a limited number of factors might account for the local shrinkage of the BE61/A table, and they investigated only these. In contrast, the Parole Commission researchers cross-tabulated a wide variety of factors with parole failure. These were quickly winnowed down to a relatively small number that showed a statistically significant positive correlation with parole failure. But the Parole Commission

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116. See generally Gottfredson, supra note 32 (fuller discussion of the problems at this stage).
117. Hemple & Webb, supra note 97, at 34-35.
118. The Parole Decisionmaking Project studied some 66 variables, eventually isolating nine predictive variables. See Hoffman & Beck, supra note 110, at 197. In a subsequent Sentencing Guidelines Project, the researchers studied 205 variables. See SENTENCING GUIDELINES, supra note 35, at 120-32 (list of items of information collected).
researchers did not stop here; they further eliminated other variables, found to have a positive correlation with the outcome criterion, because they were "judged to pose ethical problems for use in individual parole selection decisions."\(^{120}\) Examples of variables excluded are an arrest record not leading to a conviction\(^{121}\) and apparently race.\(^{122}\) Of course anyone who believes that moral considerations must be balanced against the goal of predictive efficiency will understand immediately the justification for such decisions. But, at this point, the designers of the Salient Factor Score are no longer performing a limited actuarial function. Fairness, like beauty, is in the eye of the beholder. If we say race may not be considered, can we meaningfully distinguish other factors, such as education level or employment record, which tend to overlap with race? Trade-offs between fairness and efficiency are probably inevitable, but the real question here is who should make such decisions, because once the question of fairness is broached we are outside the special expertise of the statistician. The legitimacy of such a predictive system should depend at a minimum on reaching these trade-offs in a politically accountable way.

The complexity of this trade-off process comes into clearer focus when we examine the salient factors in more detail. Of an original 66 factors studied, the designers of the Salient Factor Score chose nine variables for use.\(^{123}\) These can be grouped into three categories: (1) those that distinguish offenders in terms of their reported prior criminality, such as prior convictions, prior incarcerations, and prior parole revocations;\(^{124}\) (2) those that distinguish offenders in terms of socioeconomic characteristics, such as education, employment

\(^{120}\) Id.

\(^{121}\) Id.

\(^{122}\) Project, supra note 45, at 877 n.329. This Project notes that race was excluded both on ethical and mathematical grounds because it proved redundant given its high degree of overlap with other variables. Id. Some may question whether the ethical issue has been resolved or only defined by this statement.

\(^{123}\) Hoffman & Beck, supra note 110, at 197. See generally UNITED STATES PAROLE COMMISSION RESEARCH UNIT, SALIENT FACTOR SCORING MANUAL (1975), reprinted in RESEARCH REPORTS, supra note 72, at 1, 1-4 (detailed discussion of the nine variables used in the Salient Factor Score—how they were interpreted, defined, and scored).

\(^{124}\) See RESEARCH REPORTS, supra note 72, at I, 1-4 (items A, B, and E on the Salient Factor Score respectively; the "prior incarcerations" variable does not generally include pretrial confinement). While few issues surround the use of this data, it may surprise some to learn that even expunged juvenile adjudications are considered in determining the defendant's parole prognosis. See id. at I, 2-3. In contrast, Publication 105, supra note 105, at 32, advises probation officers not to refer to expunged juvenile court dispositions in the presentence report.

In the Sentencing Guideline Project, prior convictions, prior incarcerations, and information relating to offense severity outperformed all variables relating to social stability. SENTENCING GUIDELINES, supra note 35, at 143.
record, and marital status; and (3) those that distinguish offenders in terms of types of culpability, but not degree of culpability, such as age at first commitment and history of "drug involvement." This last category of variables, although touching on culpability, does not add information relating to the offender's overall level of blameworthiness, but only adds a special weight to certain crimes that were already counted under the first category above.

Issues of fairness proliferate around all three categories, but chiefly the latter two. Even in the case of the first category, counting prior incarcerations and parole revocations may prejudice lower income or minority group members who may be distinguished from other offenders of equal prior culpability because an earlier biased decisionmaker denied them probation or revoked parole on technical grounds.

Similarly, use of age at first commitment as a variable may work against those non-middle class youths who are less likely to benefit from police or prosecutorial discretion. In addition, some crimes, such as drug offenses, may be race sensitive. Finally, the heavier

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125. See Research Reports, supra note 72, at I, 5-7 (items G, H, and I respectively). If the offender had completed the 12th grade or received an equivalency diploma, he received one positive point. See id. at I, 5. In keeping with the static character of categoric risk prediction, educational achievement after commitment to prison did not count. Id. The Parole Commission's Research Director has informed me that postincarceration educational achievement did not correlate significantly with parole success. Apparently, it is not the diploma but the behavioral pattern associated with remaining in high school until graduation that evidences social stability. Interview with Dr. Peter Hoffman (Mar. 22, 1978).

Verified employment or full-time school attendance for six months during the two-year period prior to commitment also improved the offender's score by one point. Research Reports, supra note 72, at I, 6. However, when the subject claimed employment that was not verified, the Scoring Manual advised the hearing examiner to "normally score 0," subject to reopening on appeal if the caseworker forwards verification. Id. An offender who planned to live with his spouse or children when released also received one point. Id. However, a common law wife was treated as a spouse "only if a stable past relationship is evident," an inherently subjective concept. Id.; see note 127 infra.

126. See Research Reports, supra note 72, at I, 3-5 (items C, D, and F respectively). The variable relating to a "history of heroin or opiate dependence" is, I suggest, the most subjective of these factors. "Dependence" was defined as "any physical or psychological dependence, or regular or habitual usage." Id. at I, 5.

127. Two reliability studies conducted during the Parole Decision-Making Project found that "unreliable" items of information in both samples included those relating to living arrangements, drug use, and employment history over the prior two years. See J. Beck, S. Singer, W. Brown & G. Pasea, The Reliability of Information in the Parole Decision-Making Study, 9-11 (1973) (NCCD Research Center Supplemental Report Twelve). In short, this sort of data seems the most questionable from both a moral and methodological standpoint. Difficulties encountered with these variables included: "seldom sufficient information" (employment history); "lack of information" (drug use); and information "subjective . . . and difficult to code" (living arrangements). Id. at 9-10.

128. Different crimes have different racial breakdowns in terms of the offender who commits them. For example, from a study of 17 selected cities in 1967, the racial breakdown of offenders convicted of armed robbery was 85.1% "Negro" and 14.9% "White"; in the case of forcible rape,
weighting given certain crimes by the Salient Factor Score, such as auto theft and drug possession, seems inconsistent with the low ranking these offenses will generally receive on the offensive severity axis of the Parole Commission's guideline table. The net result of treating the same factor harshly on one axis and leniently on the other may be statistically sound, but it is morally incoherent.

All these issues pale in comparison with the use of socioeconomic variables that tend to distinguish between the socially stable and the socially disfavored—the loners and the nomads. Of course, some argue that evidence of social instability, even when it does not amount to blameworthy conduct, should be—and perhaps always has been—considered by the sentencing judge in order to incapacitate the more dangerous. The dilemma thus posed troubled the framers of the guideline matrix. They have written:

[We] decided that in investigating this new area, it was preferable to err on the side of statistical over-inclusiveness; but this decision was not lightly made for we initially saw the potential for sharp conflict between our moral and pragmatic values. Pragmatically, we wished to consider any and all factors which would enhance the predictive utility of any guideline model. Morally, we looked towards an operational guideline system which would be based only upon statistically valid factors and weights which were simultaneously proper from an ethical standpoint. Thus, it was not without a good deal of debate and soul-searching... that we eventually opted for inclusiveness on virtually all factors to be considered.\[129\]

Obviously, this is a tentative and transitional justification. We should err on the side of predictive efficiency, they say, because we are initiating a new methodology, and we should see at least how high a level of prediction is possible. For the future, however, the decision on which side we should err when faced with a conflict between our moral and pragmatic values really translates into a procedural question: Who should decide? The soul searching engaged in by experts might

the same breakdown was 70.1% and 29.9%, respectively. See M. HENDELANG, C. DUNN, L. SUTTON & A. AUWICK, SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 195 (1973) (LEAA Grant No. 72-SS-99-6006). This research shows that once we deviate from a normative ranking of crimes in terms of relative severity, the problem of the racial overlap of our criteria enters again by the back door.

129. SENTENCING GUIDELINES, supra note 35, at 23-24. See also Hoffman & Beck, supra note 110, at 197.
be equally well conducted in public, and public scrutiny might, as one court has already recognized, result in a different answer.\textsuperscript{130}

At this point, critics might respond that even if a majoritarian choice should be made, the legislature has already made it in the form of S. 1437, which mandates the consideration of many of the same socioeconomic variables utilized by the Salient Factor Score.\textsuperscript{131} This response, however, misconceives the nature of the sentencing agency. Its task is not static; rather, it is meant to "possess the flexibility to change with changed circumstances."\textsuperscript{132} So too will the potential trade-offs between moral and pragmatic values constantly change over time, indeed varying kaleidoscopically as prediction tables are revalidated and altered to meet new circumstances.\textsuperscript{133}

Examining the trade-offs faced by the designers of the Salient Factor Score clarifies this point. If we view the Salient Factor Score from a cost-benefit perspective, we can weigh the benefit achieved in terms of increased predictive efficiency against the cost to the moral coherence of the criminal law arising from the use of status-sensitive criteria. Although a precise cost-benefit calculus is impossible, it is certainly relevant to ask how much benefit was gained from using status-sensitive criteria. Surprisingly, and perhaps symptomatically, this question cannot be answered adequately because the designers of the Salient Factor Score have not told us,\textsuperscript{134} but we can say that

\begin{itemize}
\item 130. In Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974), the court examined the guideline matrix and noted that such a table narrowed the decisionmaker's field of vision, "minimizing the influence of other factors and encouraging decisive reliance upon factors whose significance might have been differently articulated had Section 4 been followed." Id. at 1113 (emphasis added). Because section 4 is the notice and comment provision of the APA, the court is saying here that public participation in the rulemaking process leading to the adoption of the guideline system might have changed its appearance.
\item 131. See note 78 supra.
\item 132. SENTENCING GUIDELINES, supra note 35, at 11. This "[a]daptability to changes in population concentrations, societal attitudes to given offenses, or prison conditions" is, the advocates of a sentencing agency assert and I think correctly, one of the major advantages of this approach over reliance on the legislature. Id. By accepting this model, we obviously intend that the sentencing agency maintain the discretion to adapt and thus continually face the question of trade-offs between moral and pragmatic values. Id. at 23.
\item 133. For example, a given socioeconomic variable originally might show a high correlation with parole failure coupled with little tendency toward racial sensitivity. Years later, on a subsequent revalidation, researchers might discern a decline in its predictive ability accompanied by a growth in its tendency to produce a higher risk group populated disproportionately by minorities. In short, the variables in a base expectancy rate table are dynamic; once validated, they do not remain justified forever.
\item 134. See Hoffman & Beck, supra note 110, at 197-202 (fullest description of the predictive power of each of the nine variables used in the Salient Factor Score). Although this study shows the level of efficiency of each of the nine variables (though not on a "stepwise" basis), it fails to show the racial impact of any of these criteria on the offender pool. For a discussion of the "stepwise" problem in measuring the utility of a prediction instrument, see text accompanying notes 163-70 infra.
\end{itemize}
culpability-oriented criteria seem to have substantially outperformed neutral socioeconomic criteria. Looking at the validation data on the Salient Factor Score, one finds that the criteria that most sharply differentiate between outcome groups were those that relate to the offender’s prior criminality—number of prior convictions and incarcerations. Of the nine variables used, not only did the absence of a prior conviction correlate with the highest rate of parole success (88.5%), but the margin produced between those who shared and those who lacked this factor was also the greatest. Those with two or more prior convictions had a 60.1% success rate, thus producing a 28.4% margin vis-à-vis those with no prior conviction. Similarly, prior incarcerations produced a 24.3% margin, and parole revocations resulted in a 21.1% margin. In sharp contrast, the effect of using a defined education level alone was to differentiate between a 72.8% expectation of parole success in the case of those meeting the education criterion versus a 64.2% expectation in the case of those failing to meet it. This yields only an 8.6% margin, one third that of prior convictions; moreover, the so-called high-risk group isolated by this criterion still will have nearly a two-thirds chance of parole success. Similarly, the employment variable produced only an 11.3% margin.

A likely response to this critique of the efficacy of such socioeconomic criteria is that it fails to consider the cumulative impact of such criteria. In short, this argument stresses that we should look not at the isolated impact of a single criterion, but at the

135. Hoffman & Beck, supra note 110, at 197. This focus on the marginal difference in the probability of recidivism between the two classes differentiated by any criterion seems essential. In assessing the utility of a prediction device, criminologists have recognized the need to balance the benefit in terms of true positives identified against the cost in terms of false positives that are overpredicted. The best known measure is probably the Berkson Mean Cost Rating, which estimates the cost in terms of the proportion of successful candidates rejected. See id. at 200; Inciardi, Babst & Koval, Computing Mean Cost Ratings (MCR), 10 J. OF RESEARCH IN CRIME AND DELINQUENCY 22 (1973).

137. Id.
138. Id. at 199.
139. Id.
140. The higher risk group distinguished by each of the education, employment, and living arrangement variables had a 64.2%, 60.9%, and 62.9% chance of success on parole respectively. Hoffman & Beck, supra note 110, at 199. Of course these percentages may be artificially high, given the short two-year period used to define parole success, but then the parole success statistics of the lower-risk groups also defined by these criteria may be equally inflated.
aggregate efficiency of all the criteria. There is some merit to this point. When one looks at the aggregate impact of the Salient Factor Score's eleven point scoring system, one finds that it yields a range of outcomes in the validation sample running from a high of 100% rate of success on parole for a perfect score of eleven, to a low of a 50.0% success rate for a score of two. Concededly, this is a much wider margin than any single variable yielded, but this argument fails to answer the critical question: What is the specific cost-benefit trade-off that results from using racially or status-sensitive criteria? The possibility is real that because of the overlap among predictive variables, little marginal utility results from adding such morally questionable criteria to a prediction system that otherwise is based on culpability-oriented variables.

As we have seen already, the two most highly predictive criteria—prior convictions and prior incarcerations—identify 88.5% and 80.9% success rates respectively. When we add to the predictive ability of these two factors the cumulative impact of the other four criteria earlier characterized as culpability-related, their aggregate predictive efficiency may fall only slightly short of that of the Salient Factor Score as a whole. In brief, the three neutral socioeconomic criteria may add little marginal predictive efficiency.

141. Hoffman & Beck, supra note 110, at 201. Two slight qualifications of this statistic are necessary. First, for a score of zero there was a 25% chance of parole success; however, only four individuals in the validation sample and none in the construction sample received this score. Second, a score of one yielded a 53.2% success rate. Id. The mode in both samples (i.e., the single most frequent score) was 4, which correlated with a 60.3% parole success rate in the construction sample and a 66.3% rate in the validation sample. It seems likely, then, that a categoric risk prediction system will operate to the prejudice of individuals whose success on parole still can be predicted as probable, but who are placed by the table in its lowest-ranking risk groups. In addition, relatively small marginal differences between groups may be magnified out of proportion. See note 142 infra.

142. The margin here is 50.0% as compared with 28.4% for prior convictions. See text accompanying note 135 supra. Of course, this comparison is somewhat unrealistic because the population in the 11 point score group was very low. As in the case of a Bell Curve, the majority of the population tended to cluster around the mean (scores three through six), where the difference in parole success rates was relatively small. Hoffman & Beck, supra note 110, at 201. Roughly a 15 percentage point difference separated the probability of parole success for an offender with a score of three from an offender with a score of six. Id. The Salient Factor Score, however, is constructed to place substantial emphasis on this slight difference. It places the offender with a score of three in the bottom "poor" category of the Salient Factor Score, and the offender with a six score in the "good" category, which is two levels higher. One can question whether such a disparity in treatment is justified by anything other than the administrative need to subdivide the offender population. See id. at 202.

143. See notes 163-70 infra and accompanying text (discussing problem of "overlap"). See generally Wilkins, supra note 34.

144. See Hoffman & Beck, supra note 110, at 197-98; text accompanying notes 134-136 supra.

145. See notes 124-26 supra and accompanying text.
This speculation about the limited marginal utility of the socioeconomic variables is corroborated by the evidence collected by Dr. Herbert Solomon, a Stanford statistician. Dr. Solomon employed a multivariate analysis technique and discovered that 93% of the variation in parole outcomes could be explained by using just four items of information, one of which was not even employed in the nine variable Salient Factor Score. To Dr. Solomon this merely meant that the analysis technique he utilized was a more efficient approach to parole prediction because those four predictors, if present, indicated odds in favor of parole success of almost 16:1. More important to the value-conscious observer, however, may be Dr. Solomon's demonstration that a virtually equivalent level of predictive efficiency to that of the Salient Factor Score can be achieved without using employment history or education level variables.

Despite an outpour of research published by the Parole Commission and the National Council on Crime and Delinquency (N.C.C.D.) on the subject of parole prediction, no researcher has yet addressed this question of the relative efficacy of culpability-oriented versus socioeconomic predictors. Yet, from a value-conscious perspective, the question seems both obvious and urgent. Once again, then, we encounter a juncture where the interests of the expert and those of the moralist diverge. If so, a mechanism may be needed by which the value-conscious layperson can compel the new actuarial criminologist to address the questions that the criminologist deems of lesser significance, but that special interest groups within society have a right to ask.


147. Id. at 109. One of the four variables was the planned living arrangements variable, which subsequently has been eliminated from the Salient Factor Score because of its subjectivity. See note 158 infra. The variable used by Solomon but not by the Salient Factor Score related to whether the offender previously had been paroled. See Solomon, supra note 146, at 109.


149. As of September 1977, the Research Unit of the Parole Commission has released 15 research reports. See RESEARCH REPORTS, supra note 72 (Reports 1-12). Earlier, the National Council on Crime and Delinquency produced 13 supplemental reports and a final summary as part of the Parole Decisionmaking Project. See note 72 supra. See also SELECTED REPRINTS, supra note 33 (other studies by the participants). None of these reports or studies, however, deals with the question here at issue.

150. Data in the Sentencing Guideline Project indicates, however, the predictive superiority of culpability-oriented data over socioeconomic variables. Both pilot studies involved in that project found the same six "most influential variables": (1) number of offenses of which the offender was convicted; (2) number of prior incarcerations (juvenile and adult); (3) seriousness of the offense at conviction; (4) weapon usage; (5) legal status of the offender at the time of offense; and (6) employment history." SENTENCING GUIDELINES, supra note 35, at 149. Of these factors only employment history can be described as a neutral socioeconomic variable.
Finally, any cost-benefit analysis of the use of socioeconomic criteria should consider whether the enhanced predictive efficiency obtained through its use is effectively employed. Here an irony emerges: Using prior convictions alone we have an outcome range of 88.5% parole success for offenders with no convictions to 60.1% success for those with two or more convictions. Adding all nine factors together, the margin is enhanced so that the outcomes range between 94.7%, the success rate for a Salient Factor Score of ten on the eleven point scale, and 50.0%, the rate for a score of two. Reasonable individuals might disagree about whether such an extension of our predictive capacity is worth the price paid, but the surprising fact is that the Parole Commission does not truly utilize this enhanced predictive capability in its guideline matrix. To do so would require assigning different guideline ranges for each single point on the eleven point scale. Because this is administratively cumbersome, the designers compressed the eleven point scale into four risk categories: “poor” (0-3); “fair” (4-5); “good” (6-8); and “very good” (9-11). Thus, it is necessary to look at the weighted averages of parole success for these four categories actually used; these are 55.4%, 68.4%, 79.1%, and 91.2% respectively. In effect, only an immaterial enhancement of predictive capacity has occurred—amounting to less than 3% at the top and 5% at the bottom—beyond the original 88.5% - 60.1% breakdown that a prior conviction record alone revealed.

Of course, additional advantages come from using multiple criteria. Administrative convenience requires us to break down the total pool of offenders into more numerically equal groups than a single criterion is likely to achieve. A hypothetical predictive system that produces a 2% “high risk” group and a 98% “low risk” group would lack utility. What is needed is a system that differentiates more subgroups with more equal populations, but even this goal might be approximated by less drastic means. For example, we can add to prior convictions the factor of prior incarcerations, which was scored in a tripartite manner and which yielded three risk categories having, respectively, an 80.9% success rate (if no prior incarceration), a 66.4% rate (if one or two prior incarcerations), and a 56.6% rate (if three or more). Together,

152. Id. at 201. The success rate on the construction sample for a score of two was 40.0%; the 50.0% rate is from the validation sample, which involved a substantially larger cross-section.
153. Id. at 202.
154. Id. These are the scores for the larger validation sample. For the construction sample, the scores were 49.8%, 60.8%, 77.4%, and 93.0%, respectively. Id.
155. Id. at 197.
156. Id. at 198.
these and the other culpability-related factors potentially would demarcate a number of intermediate categories. In short, at the cost of arguably compromising the moral integrity of our system of allocating punishment, the Salient Factor Score achieves only a four-category ranking instead of the tripartite one that prior convictions and incarcerations alone could give us. Greater predictability is achieved, but predictability is a means, rather than an end in itself. Much of the enhanced predictability attained by the Salient Factor Score is simply not put to meaningful use.

There remains, however, a more serious justification for the extensive effort made by the developers of the Salient Factor Score to utilize multiple factors rather than simply the one or two variables most strongly correlated with parole success or failure. The data available at the sentencing and parole stage is notoriously unreliable. Even if we are confident at the macro-level that we know what factors correlate with recidivism in principle, it does not follow that such an ideal system can be implemented at the micro-level of individualized sentencing and parole hearings. In a high percentage of cases the Parole Commission’s researchers found that the essential data on which the Salient Factor Score rating depends were simply lacking or garbled. Thus, the proverbial danger of putting all one’s eggs in the same basket arises if the Salient Factor Score were to use only two or three factors. Inevitably, a key variable often would be omitted or misstated in the presentence report, and thus sentencing disparities would persist.

Persuasive as this argument may be for increasing the number of variables to reduce the impact of misinformation, it does not fairly apply in the case of socioeconomic criteria. As these researchers themselves found, data relating to the offender’s social stability was “often subjective, usually outdated and . . . never the normal object of criminal investigation,” as was data relating to prior criminal conduct. Because such socioeconomic data most often is not verified, it is the weak link in the chain, and promises to raise, rather than lower, the likelihood of error in prediction. Partly in recognition of the problematic accuracy of such information, the Parole Commission revised the Salient Factor Score in 1977 to delete two of the most subjective variables: (1) the marital status or satisfactory living arrangements variable; and (2) the high school education level

158. SENTENCING GUIDELINES, supra note 35, at 26.
variable.\textsuperscript{159} Still remaining, however, is the employment record variable, which may prove the most racially sensitive variable at sentencing, given the disparity between minority and overall unemployment rates.\textsuperscript{160}

This purging of most of the socioeconomic criteria from the Parole Commission’s guidelines does not moot the issues of the fairness or efficacy of their use. Those issues are reborn with S. 1437 in the more racially sensitive context of sentencing. Section 994(d) of the bill instructs the Sentencing Commission it creates to consider the following criteria when framing guidelines: (1) education; (2) vocational skills; (3) drug dependence; (4) previous employment record; (5) family ties and responsibilities; and (6) community ties.\textsuperscript{161} Such consideration is mandated whether or not the factors relate to recidivism.\textsuperscript{162} Still, an obligation to consider these variables is not

\begin{footnote}{159} See 42 Fed. Reg. 31,786-88 (1977). Several reasons appear to have been responsible for the elimination of these variables. First, the living arrangements variable called for a subjective assessment of frequently “sketchy” information. J. BECK, S. SINGER, W. BROWN & G. PASERA, supra note 127, at 11. The Scoring Manual instructions were also far from objective. See note 125 supra. More importantly, however, according to the Parole Commission’s Research Director, inmates had learned the importance of this factor and were contriving fictitious planned living arrangements in order to earn a favorable point. A variable that the subject could manipulate was unsatisfactory. Interview with Dr. Peter Hoffman, Research Director of U.S. Parole Commission (Mar. 22, 1978). The education level variable had a racially sensitive impact and yet appeared to add little additional predictive power on a marginal basis (i.e., the aggregate predictive power of the Salient Factor Score, given the other predictive variables, was not materially enhanced). The decision to eliminate this variable, however, may have been as much the consequence of another factor as it was the result of its racial sensitivity and limited utility: Substantial inmate dissatisfaction existed over the failure to give credit for high school equivalency diplomas earned in prison, which apparently did not correlate positively with parole success. \textit{Id.} See also note 125 supra.

\textsuperscript{160} The Sentencing Guidelines Project also relied on the employment variable, principally “to tap the social stability dimension.” \textit{Sentencing Guidelines}, supra note 35, at 26. The Project justified its use because it was more “available” and less “subjective” than other measures of social stability, and also that it seemed “the least class-linked of those data items comprising the social stability dimension.” \textit{Id.} Although this latter statement recognizes that serious issues of fairness do surround the use of such data, the disturbing feature in this justification for using employment as a variable is that it was supported not by empirical research on the actual offender population, but only by prior studies. A British Home Office study had concluded that employment was the least class sensitive of the variables indicating social stability. See F. SIMON, supra note 54, at 67-71, 145-47, \textit{cited in Sentencing Guidelines}, supra at 26 n.26. This reliance on the conclusions of an English commentator seems a questionable cross-cultural comparison, given the existence of higher unemployment rates in the United States among minority groups. \textit{See note 70 supra.}

\textsuperscript{161} S. 1437, 95th Cong., 2d Sess., sec. 124, § 994(d) (1978); \textit{see note 78 supra.}

\textsuperscript{162} Consideration of factors that do not correlate positively with parole success may violate the equal protection clause of the fourteenth amendment under the relaxed test of McGinnis v. Royster, 410 U.S. 263 (1973), \textit{discussed in notes 69 & 75 supra}. No rational relationship would exist between such factors and any legitimate state interest; therefore, its discriminatory impact would not be constitutionally justified. This would not be true if the factor related to culpability
equivalent to an obligation to adopt them; accordingly, whether these factors are given substantial, little, or no weight will remain within the low-visibility discretion of the new Sentencing Commission.

**Scoring: Simple or Stepwise?** As noted earlier, one of the nagging problems of statistical prediction is that independent variables tend to overlap; that is, they cross-tabulate among themselves as well as with the dependent variable being investigated.\(^1\) To the statistician this presents a dual problem of efficiency. First, the statistician wishes to avoid collecting more information than he can usefully employ, because an increase in aggregate predictive capability does not result from the addition of a variable that fully overlaps with another independent variable. Furthermore, by focusing on the most positively correlated factors, he may miss others of relatively low but nonoverlapping predictive power.

The statistician guards against this problem by using what is known as a stepwise regression technique for analyzing data, which seeks to determine the incremental predictive power of each independent variable studied. In practice, the statistician first identifies the most powerful item of information in the field of information available to him, then searches for the next item which, when added to the first, yields the highest aggregate predictive power.\(^1\) This process repeats itself in successive passes through the field of information until the statistician is unable to find any item that adds marginal predictive power.

The relevance of this technique to our focus on the fairness of prediction based on factors unrelated to culpability is that it provides a means for determining the real marginal contribution of socio-economic variables. Does an overlap exist that reduces their utility? What do they add to the existing base of culpability-related variables? Here a surprising fact emerges: The Salient Factor Score is not based on a stepwise regression analysis. Thus, although we know rather than to status, because retribution is a purpose of sentencing that the Supreme Court has recognized as legitimate. See Gregg v. Georgia, 428 U.S. 153, 183 (1976) (death penalty not per se cruel and unusual punishment). Arguably, however, a discriminatory intent must still be shown even when status is a factor, under the test expressed in Washington v. Davis, 426 U.S. 229, 238-39 (1976). Here the Court held that adverse racial impact in the use of employment tests did not amount to constitutional discrimination in the absence of proof of discriminatory intent.

\(^{163}\) See Sentencing Guidelines, supra note 35, at 150-52; Wilkins, supra note 53, at 828.

\(^{164}\) See Wilkins, supra note 34, at 825-29 (description of stepwise process). See also Sentencing Guidelines, supra note 35, at 152 (example of a “stepwise” system used to predict the sentencing judge’s decision).
that the Salient Factor Score’s employment criterion distinguishes a lower-risk group, of whom 72.2% will succeed on parole, from a higher-risk group, of whom only 60.9% will succeed,\(^\text{165}\) we do not know whether the aggregate predictive power of the table is thereby increased by as much as 10% or as little as 1%.\(^\text{166}\)

Instead of using a stepwise regression technique, the framers of the Salient Factor Score used a simpler technique known as the Burgess method, which simply assigns one point to any factor positively correlated with parole failure.\(^\text{167}\) Why? First, they found that such a method was more resistant to the problem of prediction shrinkage.\(^\text{168}\) Second, because the overall quality of the accessible data was recognized to be frequently poor and uneven, they believed the Burgess technique, which gives equal weight to a potentially broad number of variables, was more reliable and consistent than stepwise methods that tend to employ fewer variables and thus are more susceptible to distortion.\(^\text{169}\)

Once again then we encounter a sensitive decision. Is the Burgess method better than a stepwise one? The answer to this question depends on how one defines the term “better.” If one is primarily concerned about the overall reliability of the system, it may be the better method. But if one is more concerned about the fairness of the system, a stepwise method may be preferable.\(^\text{170}\) The perspective of the statistician and the lawyer tend to conflict here. The lawyer may wish to distinguish between types of errors and decide that some errors are more serious from this value-conscious standpoint than

\(^{165}\) See Hoffman & Beck, supra note 110, at 199.

\(^{166}\) We do know, however, that 93% of the variation in parole outcomes predicted by the Salient Factor Score can be achieved without the use of an employment history variable, at least according to Dr. Solomon. See text accompanying notes 146-48 supra.

\(^{167}\) See Wilkins, supra note 34, at 830. This decision not to employ a multivariate technique has been at least implicitly criticized by Dr. Solomon. See text accompanying notes 146-48 supra. Dr. Solomon suggests that other multivariate techniques existed in addition to those considered by the Parole Commission’s researchers and rejected in favor of a Burgess scoring method.

\(^{168}\) Wilkins, supra note 34, at 831.

\(^{169}\) Id. at 831-33.

\(^{170}\) Hoffman and Beck make the following assertion, one which I think is open to debate depending on one’s perspective on “fairness”: “On a macroscopic level, the fairest policy is the one which makes the fewest errors overall.” Hoffman & Beck, supra note 110, at 203. This is the critical normative assumption underlying categoric risk prediction systems. On such a level they are clearly more accurate than individualized systems. Although I agree with this argument as a justification for preferring categoric prediction over a system that gives the judge unfettered discretion, I believe there is a philosophic counterargument that certain nonrandom kinds of errors may be more important than the total amount of error. Why it might be less important to minimize the total amount of error than to ensure that the costs of error are distributed equitably among all groups within society is a theme developed in the final section of this article.
others, even if they occur less frequently. Again, the issue is in which direction we prefer to err: Simpler techniques, such as the Burgess method, may be more reliable in general but are more prone to ignore the “overlap” phenomenon than regression techniques. Thus, when combined with socioeconomic variables, the Burgess method may result in our using criteria we consider questionable without obtaining any significant benefit in terms of predictive efficiency. Even if overlaps between variables did not exist today, the issue would not disappear. Overlaps can develop in the future. Therefore, a truly final cost-benefit decision with respect to the use of status-sensitive criteria cannot be made. Again, here is a juncture where sensitive decisions involving potential conflicts between values and efficiency will reoccur.

The Revalidation Problem. Prediction tables tend to shrink over time and between localities,\(^\text{171}\) and therefore should be subject to periodic revalidation.\(^\text{172}\) To be sure, some criminologists have asserted that a nonshrinkable table is possible. But such a goal—like the quest for the philosopher’s stone and the Northwest Passage—must be viewed with some skepticism considering the evidence to date. Again, this revalidation step seems to be yet another juncture where public visibility is important.

A threshold problem arises here: How do we find a control group on which to test the continued validity of the Salient Factor Score when we are already subjecting offenders to it? By its very existence such a guideline system tends to eliminate any unaffected control group on which its continued accuracy can be tested. Probably a majority of criminologists believe that “prison experience is criminogenic: prison breeds crime.”\(^\text{173}\) If so, and if we assign longer sentences to those perceived to be higher risks, we succeed in making these offenders even higher risks upon release than other prisoners confined for shorter periods. The net result again could be a self-fulfilling prophecy: Revalidation will confirm the perception that those possessing certain signs of social instability are higher risks not necessarily because of any inherent accuracy of this hypothesis, but possibly because such persons have been made higher risks through

\(^{171}\) See Gottfredson, supra note 32, at 173.

\(^{172}\) Id. at 183 (stating that a “continuous cycle of...repeated validation...is needed”); Hemple & Webb, supra note 97, at 37 (suggesting a revalidation “every year or two”).

longer confinement. Presumably a pure “control” experiment is not possible, because it is not politically feasible to release people who are honestly believed to be high risks simply to verify a theory.

Although the Parole Commission has not acknowledged this dilemma, there are signs that it has anticipated the argument that base expectancy rate tables cannot be revalidated on a population already subjected to them. A study coauthored by the Commission’s research director\(^{174}\) concluded that the “theory that longer prison terms will result in dramatically higher recidivism rates upon release” could be discounted.\(^{175}\) But the evidence underlying this conclusion is mixed and subject to varying interpretations. As with earlier studies, the researchers found: “In general, the percentage of cases with favorable release outcome tends to decrease as one moves within a risk category from the group serving the least amount of time to the group serving the most amount of time.”\(^{176}\) Because the relationship was neither uniform nor consistent, however, and only was deemed statistically significant in some cases,\(^{177}\) the researchers felt the evidence did not support the theory that incarceration is criminogenic. Still, when one examines more closely the data published by the Parole Commission, this conclusion seems tenuously related to the evidence. With one exception, those confined the longest in all risk categories studied performed more poorly on parole than those released the earliest.\(^{178}\) For example, for that class of persons whose Salient Factor Score was 3-4, those confined 3-19 months succeeded at a 70.9% rate; those confined 20-35 months, at a 62.7% rate; and those confined for longer periods at a 59.7% rate.\(^{179}\) In other

\(^{174}\) Id. (Hoffman is the Parole Commission’s Research Director).

\(^{175}\) Id. at 132.

\(^{176}\) Id. at 130.

\(^{177}\) Id.

\(^{178}\) Id. at 130-32. Each risk category was divided into three groups depending on the length of confinement: shortest, medium, and longest. In category V (offenders having a high Salient Factor Score of 10-11), those confined for the shortest term had a 94.4% performance rate and those confined the longest a 96.7% rate. The middle group had a success rate of 98.1%. In category IV (Salient Factor Score of 7-8), performance was again highest for the middle group at 91.7%, but the group confined for the shortest period of time had a better success rate (87.7%) than those confined the longest (78.0%). Id.

\(^{179}\) Id. at 131 (category III). The Beck-Hoffman study apparently made little attempt to control experimentally the factor of age level. Because crime is age specific, with younger offenders far more likely to become recidivists, the possibility that those confined longer may have been released at an older average age tends to undermine their conclusion that the length of confinement does not influence the likelihood of future recidivism. It is possible both that length of confinement is positively related to recidivism and that human maturation processes are also at work which after some point make older offenders less risky. The two factors may then partially offset each other. Rather than use experimental controls, the Beck-Hoffman study used “statistical” controls (i.e., a large enough sample to approximate the effect of experimental
cases the relationship was less striking, but again the issue may resolve itself into the degree of sensitivity we should have about this problem.\textsuperscript{180} If we are already troubled about the Salient Factor Score, the evidence here does not allay our fear that in the future it may be revalidated based in some part on a self-fulfilling prophecy.

Beyond the recurring theme about the need to make value judgments, a second problem is discernible on which lawyers have a special perspective: conflicts of interest. A basic conflict is likely to exist within any agency that is both an operating agency and the major research arm for the federal criminal justice system, as the Sentencing Commission will be in this area.\textsuperscript{181} Although the careful methodological studies released by the Parole Commission and the N.C.C.D. have provided a model for empirical scholarship about the criminal justice system, it must be recognized that once a prediction "over-aggregation" is, in short, inconclusive, but the significance one attaches to such results may vary depending on one's professional perspective. Dr. Hoffman informs me that, from a statistician's perspective, because the thesis that longer imprisonment is criminogenic has not been proven, it should be treated as false. Hence the sample used in the revalidation process should not be seen as biased. To the contrary, from a lawyer's perspective, it might be asserted either (1) that the burden of proof should rest on those who are seeking to establish the efficacy of their predictive system; or (2) that any system that measures the time of incarceration on a basis unrelated to the traditional standards of the criminal law (i.e., on a basis unrelated to blameworthiness or the need for general deterrence), and that uses racially sensitive variables, should have to meet a particularly high standard of proof. Finally, from a political perspective, society may wish to be hypersensitive about predictions based on status. In short, given that decisions must be made under conditions of uncertainty, different perspectives employ different standards for making those decisions, depending on whether the decision is viewed as a purely scientific one or one involving political or legal dimensions.

\textsuperscript{180} S. 1437, 95th Cong., 2d Sess., sec. 124, § 955(a)(13)-(15) (1978). These sections authorize the Sentencing Commission to undertake research, data-gathering, and training programs and to serve as a "clearinghouse and information center for the collection, preparation and dissemination of information on Federal sentencing practices." See id.
system is put into effect, powerful pressures build to justify action taken. Inevitably, agency embarrassment would result if it could be shown that a base expectancy rate table had systematically overpredicted in a particularly sensitive way for a number of years. At least in other agencies, the combined influences of such pressures and the natural tendency toward wish fulfillment, which exists whenever exciting new theories are tested, have led in the past to a tendency to ignore alternative hypotheses and on occasion even to suppress evidence. It is such dangers that the FOIA and the other elements of the APA guard against. The possibility of deliberate misbehavior may be small, but over time an unconscious process sometimes develops by which frightening results—such as racial bias caused by inadequately validated criteria—can be collectively repressed. For such reasons in part, some system of checks and balances at this new macro-level seems necessary.

THE ARCHITECTURE OF GUIDELINES: THE PROBLEMS OF DEFINING OFFENSE SEVERITY, BALANCING THE AXES, AND THE QUESTION OF MULTIPLE TABLES

We turn now from problems connected with ranking the offender to the problems of ranking the offense on the vertical axis of the Parole Commission's guidelines, and to the relative balance that should exist between the offense and the offender in the allocation of punishment.

Historical Versus Normative Guidelines: The Fly in Amber Problem. Given the high statutory maximums that characterize our criminal justice system, there are two basic options by which any agency seeking to even out disparities can determine a relative ranking of offenses. First, it can construct a normative scale, a scale that ranks offense $X$ as either morally more repugnant or socially more injurious than offense $Y$ but less so than offense $Z$. Here, the arguments for public visibility require little elaboration because issues in this area are more comprehensible to the layman: Are white collar criminals receiving overly lenient sentences; is the recidivist being dealt with adequately? At this point at least, the structure of S. 1437 seems adequate, because late in its drafting the Senate made the notice and comment provisions of the APA applicable to the agency's rulemaking activities.182

The second option is to engage in historical averaging of past sentencing practices. In short, one determines the average sentence

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182. See id. § 994(r). This provision did not enter S. 1437 until the final committee draft (Nov. 15, 1977).
for a given crime over the recent past and, in the aggregate, thereby achieves a ranking ostensibly representing an objective expression of the judiciary's collective opinion. The Parole Commission essentially followed such a descriptive rather than prescriptive course, and the recent Sentencing Guidelines Project has pursued it even more systematically. In both cases, however, the reason for taking such an approach had to do more with the political illegitimacy of permitting experts to make such obvious value judgments than with the inherent desirability of using historical averages.

Appropriate as such deference to prior practice was in an experimental project that lacked any legislative mandate to rank offenses normatively, there is a potential problem here. The momentum a successful research project develops may cause it to be adopted by the Sentencing Commission, and S. 1437 mandates that the Commission at least consider such historical averages. For several reasons, however, this approach is objectionable.

First, such a descriptive model of historical averages can have the effect of freezing sentencing practices in perpetuity like a fly in amber.

183. See Gottfredson, Hoffman, Sigler & Wilkins, supra note 45, at 38-39. See also P. O'Donnell, M. Churgin & D. Curtis, supra note 2, at 23, 53 (criticizing this approach). Dr. Hoffman has told me that he considers it inaccurate to portray the Parole Commission's guidelines as "historical" ones that are only "descriptive" of past sentencing practices rather than "prescriptive," because the Commission has consciously modified its guidelines on several occasions based on its normative judgments as to offense severity. It is debatable, of course, at what point a few such adjustments convert guidelines founded on historical practices into normative ones; arguably, such guidelines, even as adjusted, are considerably different from those that might have been developed had the starting point been a pure normative ranking. Interview with Dr. Peter Hoffman, Research Director, U.S. Parole Commission (Mar. 22, 1978).

In any event, my point is only to identify another sensitive low-visibility decision in the process of structuring judicial discretion. This same choice of starting points—past averages or normative rankings—will be faced repeatedly as more and more states turn to a guideline system.

184. Sentencing Guidelines, supra note 35, at 106. The Project's authors state:

The research which undergirds the guidelines developed and the guidelines themselves are essentially descriptive, not prescriptive. They summarize expected sentences in a given jurisdiction on the basis of recent practice, and they indicate the relative weights given to what apparently are the most important factors considered. They do not tell what either the sentences or the criteria ought to be. This is at once an important limitation and a major strength."

Id. In the Denver pilot project these descriptive guidelines accurately predicted in 90% of the cases whether the sentencing judge would imprison the offender. Also, in 85% of the cases the sentence imposed fell within one year of the range set by the guidelines. Id. at 81. Note, however, that the focus of the predictive effort has changed; now the system is predicting the judge's behavior, not the future conduct of the offender if released.

185. S. 1437, 95th Cong., 2d Sess., sec. 124, § 994(f) (1978) (instructing the Commission to take into consideration the average sentences imposed in such categories of cases prior to the creation of the Commission and the term actually served).
If this happens we may attain consistency at the price of fairness, because there are aspects of prior sentencing practices that we may not wish to memorialize forever. The frequently heard allegation that sentencing is racially biased is but one such example.\textsuperscript{186} Do we wish also to perpetuate past attitudes toward crimes like marijuana possession? Applied literally, the descriptive sentencing model has a reactionary impact.

Moreover, such a frozen sentencing model undercuts the flexibility and capacity to respond to changed circumstances; these are among the chief attractions of the administrative agency model.\textsuperscript{187} For example, if a particular crime reaches epidemic level, the Commission in theory could respond with tougher penalties much more quickly than could the legislature and much more comprehensively than could either individual judges or appellate courts.

Finally, a methodological problem accompanies the use of historical averaging to rank offenses. An element of double counting can creep into the system when we combine historical averages with a Salient Factor Score that measures the offender's likelihood of recidivism. In a guideline matrix, one axis rates the crime and the other, the criminal. Past sentencing averages do not, however express only the courts' view of the relative severity of the offense. Unquestionably, courts also base the sentences they impose on the character of the offender before them. If the offense severity axis necessarily incorporates some judgment about the relative dangerousness of individual criminals who commit certain crimes, because that axis is partly based on an average of past sentencing practices, and we then balance that axis against another that is expressly aimed at judging the offender and not the offense, we achieve a balance between the relative roles of the crime and the criminal in the allocation of punishment that may tilt more in the direction of the criminal than the crime. Thus, the balance may unintentionally aggravate the problem of the status sensitivity of the variables used to evaluate the offender.

It is of course premature to predict how a Sentencing Commission will behave in this area. A "strong" one will probably opt for normative guidelines; a "weak" one may seek the safety of following precedent and point to S. 1437's mandate to consider historical averages. Although this approach would misinterpret the bill's

\textsuperscript{186} See note 74 supra.
\textsuperscript{187} See note 132 supra and accompanying text.
intent, the need for political accountability again seems clear.

Balancing the Axes: The Overlap Issue. What relative roles should be given to the two axes? At first, it might seem obvious that each should be weighted equally, and this is certainly the impression that the matrix diagram initially conveys. In fact, the guidelines adopted by the Parole Commission are not a direct function of either axis, but instead have a high degree of overlap. Thus, a person convicted of a low-severity offense might receive the same sentence as someone who is convicted of a considerably more severe category of offense but who has a better Salient Factor Score.

Inevitably, the designer of a guideline system must consciously plan the balance between the two axes, and a continuum of options is available. At one extreme the designer may simply use offender characteristics to subdivide the guideline range for a given offense severity level. Under such a “step” design, the sentencing ranges between different offense levels do not overlap, much as the individual step treads on a stairway do not. At present, no jurisdiction has adopted such a system, but the new California determinate sentencing law points in this direction.

More likely, however, will be a different “step” design under which the sentencing ranges for different offense levels do overlap. The degree of this overlap is an issue of some jurisprudential importance, because it in effect signals the position that a particular sentencing structure occupies on the continuum between a retributive model focused on the crime and an incapacitative model focused on the criminal. The two simplified examples below will hopefully illustrate this point:

188. COMM. REP., supra note 3, at 1168 (expressly stating that “[i]t is not intended that the Sentencing Commission necessarily continue to follow the average sentencing practices of the past”). The requirement of S. 1437 is only that the Commission inform and educate itself as to these past practices. S. 1437, 95th Cong., 2d Sess., sec. 124, § 994(1) (1978).

189. See text accompanying notes 49-50 supra.

190. California’s new determinate sentencing law supplies an illustrative counterpoint to the Parole Commission’s guideline system. Under the California statute the degree of possible overlap between sentencing ranges for different crimes has been legislatively curtailed. See CAL. PENAL CODE §§1170-1170.6 (West Supp. 1977). For most felonies the California law now prescribes three time periods, and within this narrow range the California Judicial Council formulates guidelines to determine whether the higher, lower, or middle sentence should be imposed. For example, the crime of forcible rape is punishable by a three, four, or five year sentence, id. § 264, while the crime of second degree murder is punishable by a five, six, or seven year sentence. Id. § 190. Thus, the possibility that an offender committing a crime of lesser severity but having a poor parole prognosis would receive the same or longer sentence as an offender committing a crime of higher severity with a better parole prognosis is in most instances reduced. For an introduction to the Byzantine complexity of the California statute, see Cassou & Taughcr, Determinate Sentencing In California: The New Numbers Game, 9 PACIFIC L.J. 5 (1978).
Table II

A "High Overlap" Incapacitation Model

<table>
<thead>
<tr>
<th>Offense Severity Level</th>
<th>6 mos.</th>
<th>1 yr.</th>
<th>2 yrs.</th>
<th>5 yrs.</th>
<th>7 yrs.</th>
</tr>
</thead>
<tbody>
<tr>
<td>High</td>
<td></td>
<td></td>
<td>2 yrs.</td>
<td></td>
<td>7 yrs.</td>
</tr>
<tr>
<td>Medium</td>
<td>6 mos.</td>
<td>1 yr.</td>
<td>2 yrs.</td>
<td>5 yrs.</td>
<td>7 yrs.</td>
</tr>
<tr>
<td>Low</td>
<td>6 mos.</td>
<td>1 yr.</td>
<td>2 yrs.</td>
<td>5 yrs.</td>
<td>7 yrs.</td>
</tr>
</tbody>
</table>

A "Nonoverlap" Retributive Model

<table>
<thead>
<tr>
<th>Offense Severity Level</th>
<th>1 yr.</th>
<th>3 yrs.</th>
<th>5 yrs.</th>
<th>8 yrs.</th>
</tr>
</thead>
<tbody>
<tr>
<td>High</td>
<td>1 yr.</td>
<td>3 yrs.</td>
<td>5 yrs.</td>
<td>8 yrs.</td>
</tr>
<tr>
<td>Medium</td>
<td>3 yrs.</td>
<td>5 yrs.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Low</td>
<td>1 yr.</td>
<td>3 yrs.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Offender Prognosis Rating
In effect, the steeper the angle of inclination by which the steps of each guideline range rise, the more we are moving away from a "just deserts" model and toward the more indeterminate model favored by the advocate of incapacitation.

Either design has its characteristic dangers: If there is little or no overlap between the treads, then rapidly escalating sentence lengths result as one moves up the offense severity scale. On the other hand, a high degree of overlap is inconsistent with any common sense scale of proportionality, and again raises the danger of allocating punishment in a manner linked to status. Because this choice, or any of the choices in between, involves an important balancing of values, this article has argued that the process of choosing should be subjected to greater public scrutiny.

Unity or Multiplicity: One, Two, Many Guideline Tables? Logically, the first issue confronting a Sentencing Commission is how many guideline tables to adopt. By proliferating guideline tables we do magnify the dangers of sentencing disparities, but it is difficult to resist totally the arguments for multiplication. For example, a crime considered of the highest severity in New York may not be so considered in California. Also, given the phenomenon of prediction shrinkage, the same factors on the Salient Factor Score are not necessarily predictive to the same degree in all parts of the country. Additionally, regional needs for deterrence and incapacitation may differ.

The counterargument is that uniformity of application is an important value in the administration of criminal justice. But how strong is this value? If, for example, unemployment rates were at some point high and persistent in one part of the nation—such as Detroit during a downturn in the automobile industry or Appalachia during a lengthy coal strike—would it be fair to use an employment variable in such a locality when it provided no distinctive information? To use such a variable here approaches adopting a guideline that Appalachian coal miners deserve a marginally longer sentence than average offenders. Arguments can also be advanced that separate guideline tables should be used in the case of first offenders, women, juveniles, or narcotics-induced offenses, and indeed the Parole

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191. Hoffman and Beck acknowledge that "there may be more homogenous subgroups within the total sample..." covered by the Salient Factor Score. For these subgroups, "separate [Salient Factor] Scores might be developed... thus increasing overall predictive power." Hoffman & Beck, supra note 110, at 203.
A PRELIMINARY EVALUATION

The foregoing is simply a partial checklist of the issues that a Sentencing Commission should confront. In part, this article raises the issues to highlight a different question: Whether the safeguards attending the process of resolving these issues are adequate. To answer this question, we might begin by noting that the existing rulemaking agency within the judicial branch that most closely parallels the contemplated Sentencing Commission is the Judicial Conference. As a precedent, however, the recent history of the Judicial Conference is not reassuring. Almost uniformly, recent commentators have criticized its method of operation, citing a pattern of excessive secrecy, an unwillingness to listen to the views of interested groups, and a tendency not to disclose its deliberations until after significant decisions have been made. To some degree, more safeguards are already built into S. 1437 than apply today to the Judicial Conference. First, the Senate has made applicable section 553 of the APA, thus requiring prospective notice and an opportunity to comment on proposed rules. The Senate also inserted well-intentioned annual reporting requirements into the bill, although their

192. See Hoffman & DeGostin, supra note 45, app. I, II & III. The use of the Salient Factor Score on female offenders presents particularly troubling issues about the over-generalization of its predictive ability. Because the Salient Factor Score was devised and validated on a heavily male dominated population, there is little assurance that it performs equally well on women. Inherently, factors predictive of male parole failure need not perform as well on females. Indeed, a reasonable hypothesis might be the reverse. For example, the absence of an employment history may show social instability in a male, but may correlate frequently with a highly stable maternal background for some females. In fact, the unmarried “welfare” mother may face negative incentives in seeking employment under the current structure of welfare regulations. That feminists have not recognized these issues is again testimony to their invisibility.

193. See note 87 supra.

194. See MacKenzie, Dark Doings Among Judges, SATURDAY REVIEW, May 28, 1977 (probably the harshest of these critiques decrying the “passion for secrecy” within the Judicial Conference). Mr. MacKenzie was formerly the Supreme Court reporter for the Washington Post. For more diplomatic assessments, see Lesnick, supra note 66, at 581-82, and Weinstein, supra note 88, at 982-64 passim. Proposals by Senator Ervin and others that the Judicial Conference conduct its meetings in public and give advance notice of its agenda apparently have been rejected. See O’Keefe, Current Legal Literature, 63 A.B.A.J. 1143, 1145-46 (1977).

effectiveness is open to considerable question. And last, it imposed an obligation to consult with other interested agencies, including the federal Public Defender’s Office. More glaring, however, are the omissions: (1) the Freedom of Information Act, (2) the “government in the sunshine” section of the APA, and (3) the judicial review provisions of the APA.

For the political reflex to work, the legislature must hold the Sentencing Commission to the standards of an administrative agency. To understand how a redesign along such lines might affect the behavior of the agency, it is useful to consider a point best made by Leslie Wilkins. Early researchers in criminology frequently were confounded by the fact that the parole boards did not utilize the elaborately developed predictive instruments specially designed for their use. This involved a misperception on the part of these researchers: They simplistically believed that the parole board had the same needs and interests as the research worker. In fact, although the research worker tends to assume that everyone else shares his goal of the best possible theory, Wilkins notes that the public decisionmaker is interested less in accuracy than in “how others will see his decision—will they (i.e., his public critics) regard them as reasonable, fair, expedient, or unfair?” He then adds: “In a word, the assessment of a public decisionmaker is in terms of a value system, not a rational system.”

Given the presently limited prospect that existing constitutional doctrines will provide any satisfactory

196. See id. §§ 994(n), (p). In particular, subsection (p) seems intended to deal with the problem of discriminatory impact since it requires judges to report data on “age, race and sex” of the offenders they sentence. This requirement, however, misses the mark because it ignores the specific impact of individual variables on the Salient Factor Score. Far more sophisticated data must be recorded before any meaningful conclusions can be reached from them.

197. See id. § 994(m).


200. Id. §§ 701-706. Both Judge Weinstein and an ABA committee have favored “some method of appellate review at the behest of interested persons” when judicial guidelines are promulgated. They have urged also that such review be divorced from the application of the guidelines in any specific case because the facts will always be somewhat unique. Instead, review should be on a generic basis “since the guidelines are designed to be implemented outside the context of any particular case.” Weinstein, supra note 88, at 960 (citing ABA PROPOSAL RECOMMENDED COURT PROCEDURE TO ACCOMMODATE RIGHTS OF FAIR TRIAL AND FREE PRESS (1976)).

201. Wilkins, supra note 55, at 223.

202. Id.

203. Id. at 224.

204. Id. (emphasis in original).
remedy in this area, the best remaining hope of those concerned about the value of equality in dispositional decisionmaking seems to be a strategy that forces the new agency to be more responsive to, and more conscious of, its public critics. The administrative agency model facilitates this process of politicization.

 Alone, however, the administrative agency model is hardly sufficient to achieve this goal. The public at large is neither sophisticated about the criminal justice system nor particularly interested in the ethics of punishment. Still, because of the overall importance of the value of equality in our society, a constituency concerned with these issues might be developed. Such a wishful prophecy, however, points out long term needs that probably overshadow even the desirability of conforming the structure of the

205. Put simply, the rational basis test of McGinnis seems satisfied by most prediction tables that have been adequately validated. See McGinnis v. Royster, 410 U.S. 263 (1973). In comparison to clinical or other individualized approaches, such categoric risk prediction lowers the number of false positives. Thus, even if we say the least restrictive alternative must be used, it is arguable that the prediction table already represents that alternative. See Coffee, supra note 12, at 1447-50. The limitations imposed by McGinnis on an equal protection challenge are paralleled in the due process context by Dorszynski v. United States, 418 U.S. 424 (1974). In construing the Federal Youth Corrections Act requirement that the sentencing judge make a finding of "no benefit" from treatment under the Act's special provisions before he sentenced an eligible youth as an adult offender, the Court found the Act did not require an express finding supported by a statement of reasons. Although the decision avoided the constitutional issues of whether a statement of reasons is necessary at sentencing, id. at 431 n.7, the decision seemingly reaffirmed the traditional orthodoxy that a sentencing judge's discretion is largely unconfined.

Thus, it seems probable that prediction tables might be subjected to successful due process attack under existing case law standards only if they are used without adequate prior validation on the relevant offender population. In reaching this conclusion, however, it is necessary to distinguish a recent case. In City of Los Angeles v. Manhart, 98 S.Ct. 1370 (1978), the Supreme Court held that a pension plan's carefully validated mortality table that used gender as a factor and thereby operated to the disadvantage of women—who live longer as a class and had to contribute more under the pension plan—violated Title VII of the Civil Rights Act of 1964. If a mortality table can be discriminatory in its choice of concededly accurate variables, it can then be asked: Why is not a prediction table that uses racially sensitive variables equally discriminatory? Aside from the inapplicability of the Civil Rights Act of 1964 to sentencing, the answer basically is that base expectancy rate tables do not expressly use race or gender as variables, but only use factors that tend to overlap with these suspect classifications. The line between General Electric Co. v. Gilbert, 429 U.S. 125 (1977), and Manhart is the line between a plan that discriminated permissibly on the basis of a physical disability uniquely associated with gender (i.e., pregnancy) and a plan that expressly uses gender as a variable. Strained as this distinction may seem to many, it places variables that are merely racially sensitive on the permissible side of that watershed. See also Geduldig v. Aiello, 417 U.S. 484 (1975).

206. Judge Marvin Frankel has summarized well the problem of the inherently low public visibility surrounding dispositional issues: "The subject lacks political 'sex appeal.' Neither prisoners, nor judges nor prison and parole officials, nor all of them together, loom weightily in legislative lobbies. When the spasms subside, things go on in the accustomed ways." Frankel, supra note 63, § E, at 21, col. 1-2. He adds, however, that "a measure of sympathetic, if critical, patience from an interested public" is part of the needed answer. Id.
Sentencing Commission to that of a conventional administrative agency. First, an institutionalized watchdog seems necessary; at this macro-level, it should be the analogue of the adversarial safeguards that protect the offender at the micro-level of individualized hearings. How could it be achieved? The answers that currently can be given are vague and largely unsatisfactory. The ABA, the Federal Public Defender, and similar public institutions could allocate more of their staff and budget to such an oversight responsibility. Greater congressional oversight is also possible. Finally, there is even a case for separating some of the Sentencing Commission's nonoperating responsibilities—chiefly its research and monitoring duties—and placing them in a different, more detached body having no potentially conflicting duties. This step would appropriately recognize the problems that exist when an agency both makes and reviews the impact of the same decision. A formalized ombudsman is also a conceivable, if at the moment a highly visionary possibility.

Second, a process of developing an educated constituency concerned about dispositional decisionmaking is a necessary concomitant to formalized oversight. Here it is only possible to exhort public interest law firms, foundations, and academics to reexamine an area that may now be in an epochal transition.

Like water and oil, values and technical expertise do not mix well. To expect decisionmakers to respond with greater sensitivity to problems of values in this area will ultimately require a public consciousness that today is still at an embryonic stage.

207. Judge Weinstein has urged with respect to the promulgation of all federal judicial rules that "Congress should retain the power to reject any proposed rule or amendment by joint resolution within a limited period." Weinstein, supra note 88, at 963. He suggests a six-month period. See also Lesnick, supra note 65, at 583-84. The "one House" veto or delaying power is another possible measure, but it can easily result in deadlock between the two Houses. See 28 U.S.C. § 2076 (Supp. V 1975).

Judge Weinstein makes clear that his proposals are intended as a supplement, not an alternative, to greater public participation in the rulemaking process. Weinstein, supra note 88, at 969, 983-84.

208. Potentially, the Federal Public Defender seems the best candidate for the oversight role. Giving it such a role would also make possible the fulfillment of the recommendation made by Judge Weinstein, generalizing an ABA committee proposal that judicial review of proposed rules should be implemented outside the context of any particular case. Weinstein, supra note 88, at 960 (citing ABA PROPOSAL, RECOMMENDED COURT PROCEDURE TO ACCOMMODATE RIGHTS OF FAIR TRIAL AND FREE PRESS (1976)). The appropriate standard of judicial review presents a difficult issue that this article will largely bypass; nevertheless, rather than simply specifying a general standard (substantial evidence or the like), Congress might give more specific substantive directions. For example, the draftsmen might include a provision instructing the Commission to avoid the use of criteria having a discriminatory impact unless they relate to relative blameworthiness or unless they materially increase predictive efficiency. This type of legislative direction would amount to a statutory "less restrictive alternative" test.
B. The Micro-Level: Can Discretion Be Controlled Without a Guideline System?

Given the problems inherent in a Sentencing Commission, the obvious questions that follow are whether such a guideline-drafting agency is truly necessary, and whether sentencing disparities can be controlled by more traditional methods, such as appellate review. This section suggests that the prognosis is poor for any remedy that does not follow the administrative agency model.

Control Over the Data-Gathering Process and the Sentencing Bureaucracy

We have today a system of trial by jury and sentencing by yenta. Virtually any form of gossip, however stale, unsupported, or tenuous in its relevance, on occasion will find its way into the presentence report. The professionalization of the probation bureaucracy coupled with the increased access to recorded information afforded by computerization has intensified this problem of informational quality. Presentence reports now contain allegations derived from school, public, and clinical records that previously were shrouded by the sheer logistical difficulty of obtaining records.

Reference to this trend usually generates a vague Orwellian sense of unease, but the critical point lies elsewhere. Because the exposure of different individuals to institutionalized recordkeeping varies greatly, probably depending on factors such as location, social class, race, and sex, the process is profoundly uneven. A methodology that simply directs the probation bureaucracy to collect all the data available, as most presentence manuals encourage, is a methodology that succeeds only in compiling a lot of information about some people and less about others. The net result is not only impressionistic and possibly biased in its effect, but it is also profoundly incongruent with what dispositional authorities are attempting to decide. As the Parole Commission recognized in developing an essentially comparative methodology, the public decisionmaker is not as interested in understanding the individual as a complex human being as he is in assessing relative risk and offense severity against some benchmark norms.

The popular conception that sentencing disparities are the product of differing judicial philosophies—some "hard," some "soft"—is only

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210. Id. at 1398-99.
partially accurate. In the main, judges tend to be idiosyncratic, sometimes hard, sometimes soft. This behavior is partly attributable to strong judicial personalities, resulting in individualistic styles of sentencing, but it may also be the product of unstandardized informational inputs that deny judges the means of seeing the basic similarities and differences among cases. Further compounding the question of what causes sentencing disparities is the possibility that variations in styles and approach among different probation officers may have a significant impact. As noted earlier, respected criminologists have suggested the probation officer may often be the critical variable in the sentencing equation. Whether the probation officer has a law enforcement perspective or a social welfare one; whether he writes his presentence report in a vivid, novelistic prose style or in a cold, bureaucratic one; whether he edits out unverified information or leaves the reliability of the data for the judge to determine—these and other factors are likely to have an impact on the sentencing judge's impression of the defendant, which is at least as important as whether defense counsel was conscientious at sentencing. Viewed in this broader perspective, the often erratic performance of the sentencing judge may be explained frequently by factors external to him. The lawyers' tendency toward a culture-bound vision of the legal system, however, leads to the belief that the sentencing process is one in which the only participants are lawyers and judges. Thus, the lawyer as reformer relies on remedies like appellate review, which ignore the impact of these extrinsic variables.

How should we respond to the problems of unequal and uneven data available at sentencing? Here the model of a Sentencing Commission offers the best hope. Although a Parole Commission must rely to a great extent on information generated at the sentencing stage, it has no control over this stage and so cannot act effectively to upgrade the reliability of the information. A Sentencing Commission can do so, for example, by adopting rules and policy statements covering such matters as (1) the form and content of presentence reports; (2) the kinds of verification a probation officer should obtain before including speculative, uncorroborated information in the presentence report; and (3) the question whether certain classes of information has been set forth in a string of cases beginning with United States v. Weston, 448 F.2d 826 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972). See Coffee, supra note 13, at 1425-29 (discussing right of defendant to require verification).
stale or unreliable information, such as records of arrests not followed by a disposition, old school or clinical records, and out-of-date police files, should not be entirely excluded from the presentence report.\textsuperscript{214} Clearly, administrative rules dealing with these questions have the potential of achieving more precisely tailored and balanced answers than does a court examining them through the prism of constitutional law. Moreover, it represents a more flexible approach, because unlike a court exercising constitutional power or a sporadically active legislature, an agency can retreat and seek a different accommodation if the real cost of its reforms proves too high.

The Sentencing Commission may be, then, the serendipitous answer to a problem its draftsman perhaps only vaguely contemplated: how to control the sentencing bureaucracy. There remains, of course, the question whether S. 1437’s Sentencing Commission has the jurisdiction to exercise such a power, and if it does, whether it will use it. Here, only a qualified “yes” may be given. Obliquely, S. 1437 authorizes the Commission to “monitor the performance of probation officers with regard to sentencing recommendations”;\textsuperscript{215} to “issue instructions to probation officers concerning the application of Commission guidelines and policy statements”;\textsuperscript{216} and to “devise and conduct periodic programs of instruction” for all persons “connected with the sentencing process.”\textsuperscript{217} On the other hand, S. 1437 adopts the provision found in 18 U.S.C. §3577 that the type of information admissible at sentencing is unrestricted, a provision that some courts have read to authorize the receipt of arrest records not followed by a disposition at sentencing.\textsuperscript{218} As revised, this new provision can be read consistently with a power in the Sentencing Commission to promulgate regulations covering the information usable at sentencing, but an ambiguity remains.\textsuperscript{219}

\footnotesize{\textsuperscript{214} See Coffee, supra note 13, at 1377-96 (discussion of this issue).\textsuperscript{215} S. 1437, 95th Cong., 2d Sess, sec. 124, § 995(a)(9) (1978).\textsuperscript{216} Id. § 995(a)(10).\textsuperscript{217} Id. § 995(a)(11).\textsuperscript{218} See id. § 3714 (“Admissibility of Evidence in Sentencing Proceedings”); 18 U.S.C. § 3577 (1970); Smith v. United States, 561 F.2d 1193 (10th Cir. 1977) (utilizing section 3577 to justify judicial reliance on records of arrest not followed by a conviction). But see United States v. Haygood, 502 F.2d 166, 171 & n.15 (7th Cir. 1974), cert. denied, 419 U.S. 1114 (1975) (defendant’s failure to object allowed trial court to inquire for sentencing purposes into pending charge on a separate offense; in dicta, court of appeals indicated that had defendant objected, future prosecution of pending charge would be barred).\textsuperscript{219} S. 1437 will rephrase 18 U.S.C. § 3577 so that information may not be received at sentencing “to the extent that receipt and consideration of such information for purposes of sentencing is expressly limited by a section of this title relating to sentencing or by any other federal statute.” S. 1437, 95th Cong., 2d Sess., sec. 101, § 3714 (1978). If one reads section 3714 consistently with the authority given the Sentencing Commission by other sections of S. 1437,}
The need for the Sentencing Commission to look beyond guidelines to the nature of the informational inputs at sentencing is best evidenced by the current absence of any institution seeking to rationalize practices in this area. At present, the only force inducing any degree of consensus and consistency among the approximately 30,000 presentence reports filed annually in different federal courts is the manual prepared by the Administrative Office of the United States Courts. Manuals, of course, have inevitable limitations; they give precatory advice when mandatory rules may be needed. In addition, the rules they do create typify the low visibility decision-making that occurs in this area. Although few outside the sentencing bureaucracy may ever read the Administrative Office’s manual on the preparation of presentence reports, its impact—both in the decisions it makes and in those it fails to make—may well outweigh the effect of most of the appellate court decisions on sentencing information. In redrafting this manual, the Administrative Office recently made a number of sensitive policy choices that once again were reached without their effect, or their very existence, being widely perceived.

one can conclude that the Commission has the authority to standardize the information inputs at sentencing notwithstanding the limitations in section 3714. See id. § 3614, sec. 124, § 995(a)(9), 995(a)(10), 995(a)(11). In short, the authority granted the Commission can be read to constitute “[a]nother federal statute” within the meaning of the above quoted language of section 7314. Id. § 3714. On the other hand, the use of “expressly limited” can be read to rebut any such implied power. See id.

220. See PUBLICATION 105, supra note 105. The most recent data available on the number of presentence reports filed annually shows that 29,482 full reports and 1,943 “limited” reports were filed in 1974. M. HENDELANG, C. DUNN, L. SUTTON & A. AUMICK, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 615 (1975).

221. The Staff Committee that supervised the preparation of Publication 105 was chaired by a federal judge and consisted of seven probation officers, three officials of the Parole Commission, two officials of the Bureau of Prisons, and four employees of the Administrative Office of the United States Courts. See PUBLICATION 105, supra note 105, at ii. The absence of a representative from the Federal Public Defender, civil liberties groups, the practicing bar, or academics (legal or non-legal) seems both noteworthy and symptomatic, particularly given the effort made in Publication 105 to interpret recent decisions of the United States Supreme Court. Id.

In a June 1977 cover letter enclosing a copy of Publication 105, the Assistant Chief of Probation of the Administrative Office outlined the sensitive decisions reflected in the manual. See Letter from Donald L. Chamlee to the Committee on the Administration of the Probation System (June 28, 1977) (committee is composed of federal judges) (copy on file at the Georgetown Law Journal). Recognizing that disclosure of the presentence report was perhaps the most sensitive issue faced in preparing the manual, Mr. Chamlee somewhat apologetically conceded that the treatment of this subject may be controversial where disclosure is frowned upon.” Id. (emphasis added). This statement underscores the difficult position of the Administrative Office, which, being exclusively responsible to the federal judiciary, may have been influenced by a fear that a more expansive interpretation of rule 32(c) of the Federal Rules of Criminal Procedure would have irritated federal judges unsympathetic to the purpose of that rule. Mr. Chamlee also concedes that the Recommendations and Plan section of the presentence report, which need not be disclosed under rule 32(c), “contains some items which arguably could be disclosed.” Id; see notes 228-32 infra and accompanying text.
This result might have been different if the exercise of discretion had been in the form of a proposed rule subject to the notice and comment provisions of the APA.

The hand that writes the manual rules the sentencing bureaucracy; that function should be performed by the Sentencing Commission. It is not reassuring that the Administrative Office is effectively an employee of the judiciary, while in contrast the Sentencing Commission will be principally appointed by the President. If one needs an effective watchdog, one does not hire an employee of those who are to be watched to do the job. Bureaucracies, if they are regulated at all, tend to be controlled best by those who set the standard operating procedure. It is this role that an administrative agency such as a Sentencing Commission can perform and an appellate court cannot.

To sum up, if sentencing is a decisionmaking process in which performance is a function of the quality of the informational inputs, a difference between relying on a Sentencing Commission and relying on appellate review without more becomes clear—only the former approach affords prospective controls over the informational inputs.

TRIAL JUDGE SOVEREIGNTY: THE FORCE OF INERTIA

Institutional resistance to sentencing reform is another factor that must be considered when assessing the merits of a Sentencing Commission. The point here is not that Publication 105 is a regressive document. In many ways, it contains progressive changes, particularly with regard to the use of juvenile records, and the position of the Administrative Office generally has been on the side of enforcing recent judicial precedents expanding the right of disclosure. See note 230 infra (further discussion of issue). It seems likely, however, that if Publication 105 had been subject to public comment and scrutiny, as proposed regulations of the Parole Commission and the Bureau of Prisons are at present, it would have been a different document. In particular, I think civil liberties groups might have sought to institutionalize the verification requirement set forth in United States v. Weston, 448 F.2d 626 (9th Cir. 1971), discussed at note 56 supra, and to curtail current evasions of the disclosure obligation. See notes 228-31 infra. In marked contrast to Publication 105, the need for a verification requirement applicable to presentence reports has been recognized and highlighted in several recent model sentencing codes. For example, the National Advisory Commission on Criminal Justice Standards and Goals provided in section 5.14(7) of its Standards on Corrections (1973), as follows:

All information in the presentence report should be factual and verified to the extent possible by the preparer of the report. On examination at the sentencing hearing, the preparer of the report, if challenged on the issue of verification, should bear the burden of explaining why it was impossible to verify the challenged information. Failure to do so should result in the refusal of the court to consider the information.

222. See S. 1437, 95th Cong., 2d Sess., sec. 124, § 991(a) (1978). The President shall appoint four members with the advice and consent of the Senate, and the Judicial Conference is instructed to submit a list of seven nominees from which the President shall select three. Id. The separation of powers issue thus raised by granting a nominating power to the Judicial Conference is beyond the scope of this article. See Buckley v. Valeo, 424 U.S. 1, 118 (1976).
Commission approach. Because guidelines involve greater intrusion on judicial autonomy, it is not surprising that they have been resisted by the Judicial Conference, which suggests instead that reliance be placed on greater substantive appellate review. If we look at the recent empirical research on sentencing, however, a common pattern emerges: Those reforms that do not place clear boundaries on the sentencing judge’s discretion seem to have had little effect.

The best example of this tendency for reform to be frustrated in practice is the experience with sentencing councils. Under a sentencing council procedure, the sentencing judge and two fellow judges from the same bench all review the presentence report and confer. The intent, of course, is that such collegiality will produce consensus, and at least the more extreme disparities will be evened out. In fact, this has not happened to any substantial extent. In a thorough statistical study, Zeisel and Diamond found that in the districts they studied, the actual reduction in sentencing disparities attributable to sentencing councils bordered on the trivial. Judicial independence, it seems, persists.

Disclosure of the presentence report is a second recent reform that has experienced a substantial bureaucratic nullification in actual sentencing practice. In theory, the obligation to disclose certain portions of the presentence report, now embodied in rule 32(c) of the Federal Rules of Criminal Procedure, should tend to upgrade the reliability of the information used at sentencing. Upgrading should occur by inducing the probation officer to filter out speculative or unsupported charges that he knows defense counsel will contest and that he may find embarrassing to defend. There are fragmentary

223. Considerable comment has recently focused on this theme of judicial opposition to the curtailment of sentencing discretion. See Robin, Judicial Resistance to Sentencing Accountability, 21 CRIME AND DELINQUENCY 201 (1975); Zalman, A Commission Model of Sentencing, 53 NOTRE DAME L. REV. 265, 284-85 (1977). These criticisms underscore the need for according a fairly strong presumption to the guidelines of any Sentencing Commission.

224. See P. O'Donnell, M. Churgin & D. Curtis, supra note 2, at 94. The Judicial Conference instead has favored amendment of rule 35 of the Federal Rules of Criminal Procedure to permit discretionary appellate review. Id. at 64.


226. Diamond & Zeisel, Sentencing Councils: A Study of Sentence Disparity and Its Reduction, 43 U. CHI. L. REV. 109, 147-49 (1975) (finding the average disparity between judges, approximately 40%, reduced by only about 10% through use of sentencing councils).

indications that this has sometimes occurred, but, as a forthcoming Federal Judicial Center study has found, the disclosure obligation often has been outflanked by a variety of means. The more damaging or speculative information now is being included in the confidential recommendation section of the report that need not be disclosed. Alternatively, such information may be relayed by supplemental communications to the court or during ex parte conferences between the probation officer and the sentencing judge. To their credit some federal judges have objected, but these judges seem to be the exception rather than the rule. In the meantime, defense counsel cannot challenge what he does not see.

228. The Chief Probation Officer of the District of Columbia Federal Probation Office has advised his staff to cease “our previously accepted practice of placing so-called ‘confidential’ information on the Recommendation page of the pre-sentence report” (the page that need not be disclosed under rule 32(c)). Memorandum from James R. Pace to District of Columbia probation staff (June 17, 1977) (emphasis added) (copy on file at the Georgetown Law Journal) [hereinafter cited as Pace Memorandum]. At the same time he advised his staff that “all allegations regarding a defendant’s alleged criminal activity, either involving the pending case or unrelated illegal behavior, should not be commented on by the pre-sentence writer unless the information in question can be verified.” Id. (emphasis in original). The Memorandum further instructs the staff that if law enforcement sources for such information are unwilling to agree to appear in court and document charges in the event the defense counsel contests them, “...you should omit the information in question ....”

It seems, then, that as a greater obligation to disclose more information is recognized, more internal editing and screening of unverified information will occur.

229. Since the summer of 1977, two former students of mine, Stephen Fennell and Philip White, both members of the Class of 1978 at Georgetown University Law Center, have been conducting an elaborate study for the Federal Judicial Center of current practices in federal probation offices with respect to rule 32(c). They have accumulated extensive statistical and empirical data through interviews and questionnaires, which I will not attempt to summarize prior to its publication.

230. See note 228 supra (discussion of this phenomenon). The Pace Memorandum also indicates that the District of Columbia’s cessation of using the undisclosed Recommendation page for the most damaging information was “prompted by the position of the General Counsel for the Administrative Office,” and by “at least one of the judges of this court.” Pace Memorandum, supra note 228. That the General Counsel of the Administrative Office took such a position suggests that the problem is not an isolated one. Messrs. Fennell and White, the authors of the forthcoming Federal Judicial Center Study, have informed me that in their study they found similar practices fairly common.

231. Again, I rely here principally on conversations with Messrs. Fennell and White, who visited a number of Federal Probation Offices during the summer of 1977 as part of the Federal Judicial Center Study. Also found in the Pace Memorandum was a suggestion that the probation officer might notify the court “via a separate memo” when it acquired “damaging information of a ‘hearsay’ nature” that had to be excluded from the main presentence report because it was unverified. Pace Memorandum, supra note 228 (emphasis added). Under this approach, it would be left to the courts to request to see the supplemental information. Obviously, there is considerable question whether such an approach complies with rule 32(c) unless defense counsel is given an adequate summarization of the information or unless one of the exceptions under rule 32(c) applies.

232. The Pace Memorandum notes that at least one judge in that court had objected to the inclusion of confidential information on the undisclosed Recommendation page. See note 228 supra; Pace Memorandum, supra note 228.
A last example of institutional inertia is the fate of recently adopted rule 11(e) of the Federal Rules of Criminal Procedure. Adopted after much study and debate,233 that rule permits a new form of plea bargaining under which prosecution and defense make an agreement as to sentence length, and then present it to the court for ratification. The judge may accept the bargain by adopting the sentence contracted, or he may reject it234 and recuse himself.235 This procedure attempts to protect the defendant from an illusory plea bargain under which he surrenders his right to trial in return for only an expectation of what the court might do—a trade, some have warned, in which the defendant often gives up something for nothing.236 Again, what has happened in practice? By circulating a questionnaire to United States Attorneys throughout the nation in early 1977, one researcher has come to the conclusion that the new rule has had virtually no impact.237 Reports of anything approaching a rule 11(e) plea agreement occurred only in a few isolated instances.

233. For the Advisory Committee Notes to the 1975 Amendments to rule 11, see 62 F.R.D. 271, 277 (1974). See also United States v. Werker, 538 F.2d 198, 200 (2d Cir. 1976) (judicial promise of sentence within agreed-upon range improper when rule 11(e) procedure not followed); Note, Revised Federal Rule 11: Tighter Guidelines for Pleas in Criminal Cases, 44 FORDHAM L. REV. 1010 (1976) (review of changes in new rule); Note, Restructuring the Plea Bargain, 82 YALE L.J. 286 (1972) (urging elimination of unregulated plea bargaining; advising that pre-plea stage be restructured to include advocacy proceeding in which judge takes responsibility for concessions defendant receives for plea).
235. See United States v. Werker, 538 F.2d 198, 204 (2d Cir. 1976) (judge "steeped" in knowledge of defendant's guilt and who has expressed opinion of punishment probably should recuse self from presiding at trial).
236. See Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 YALE L.J. 1179 (1975) (arguing in part that the economic pressures on the defense attorney induce him to accept and indeed seek valueless bargains under which only trivial concessions are made by the state, such as the dropping of a token number of counts from the indictment); Finkelstein, A Statistical Analysis of Guilty Plea Practices in the Federal Courts, 89 HARV. L. REV. 293 (1975) (arguing that a significant percentage of those who plead guilty would not in fact have been convicted at trial).
237. In 1977 a questionnaire was circulated to 90 U.S. Attorneys, of which only 20 responded, some incompletely. See Zokoff, The Use of Sentencing Recommendations in Plea Bargains: A Survey (unpub. 1977). Generally, those who responded indicated that judges in their District saw the rule 11(e) procedure as "an invasion of the sentencing provinces of the judge." Id. at 5. Several reported that although requests had been made by defense counsel to use the rule 11(e) procedure, they had been uniformly denied. Id. at 4, 5, 7, 10. Instances of actual use of the rule 11(e) plea agreement procedure were extremely rare. The response from the U.S. Attorney for the District of Connecticut noted that the procedure had been used once during 1976 (case load of roughly 250 cases) and only in an "extraordinary" situation. Id. at 6. An Assistant U.S. Attorney in Kansas reported that it has been used twice before a local court rule prevented its further use. Id. at 6. Several U.S. Attorney Offices—those in Baltimore, Maryland, the Northern District of West Virginia, and Wyoming—reported procedures roughly paralleling rule 11(e) under which the prosecution either concurred in, or failed to object to, a sentence recommendation from the defense counsel. Id. at 7-9. But these procedures lack the protection of rule 11(e) under which the bargain is finalized before the plea of guilty is made.
More typical were the U.S. Attorneys' statements that federal judges they dealt with would not permit such an intrusion on their autonomy. Elsewhere, U.S. Attorneys themselves barred participation in such plea agreements.  

Behind the uniformly limited impact of these three reforms—sentencing councils, rule 32(c), and rule 11(e)—a common pattern is discernible that we will label "trial judge sovereignty." Judicial prerogatives appear zealously guarded even if those behind the throne might actually have the decisive influence on the outcome of the sentencing decision.

THE LIMITS OF APPELLATE REVIEW

Against this backdrop, the competing merits of substantive appellate review versus a guideline system look uneven. Studies of state systems of appellate review find such review to have at best a modest impact, generally limited to egregious cases. Commentators tend to agree that appellate review alone seldom yields clearly articulated standards or criteria to guide the sentencing judge in future decisions. Requiring the judge to explain his decision has similarly been found to produce boilerplate reasons, cited to rationalize a result actually reached on other grounds. Indeed, by particularizing the case at hand by stating, for example, that the defendant seemed "manipulative and unrepentant," the sentencing judge who wishes to protect his autonomy can utilize the statement requirement as a means of insulating his decision from effective review. Eventually, a laundry list of approved reasons for variation from the normal range might develop that the intransigent judge could use to justify desired results in all cases of less than extreme variation


240. P. O'Donnell, M. Churgin & D. Curtis, supra note 2, at 64; see Sentencing Guidelines, supra note 35, at 6 ("appellate courts tend to reach decisions on an ad hoc basis without always considering whether or not there should be a considered overreaching policy behind them").

241. Zeisel & Diamond, supra note 10, at 928-35. The authors conclude: "Merely requiring reasons from the sentencing judge or from the review board is unlikely to help much . . . ." Id. at 934. See Hoffman & DeGostin, supra note 36, at 198 (noting that "the mere statement of reasons has not had a great impact on disparity, and that the reasons given are usually pro forma or brief rationalizations of the sentence after the fact" (citing Rubin, Disparity and Equality of Sentence—A Constitutional Challenge, 40 F.R.D. 55, 57 (1966)).
from the sentencing norm. The most careful recent study of appellate review systems concluded that even when the sentencing court in good faith tries to explain its reasons, the appellate review process is still normally informed only by “intuitive and hence vague Gestalt perceptions.” The basic problem, Zeisel and Diamond argue after in-depth examination of Massachusetts and Connecticut sentencing review procedures, centers around the absence of any common point of reference from which the reviewing body can calibrate whether the reason advanced justifies a sentence increase or reduction, and if so, by what amount. “Word reasons” will suffice as full explanations, they decided, only when they establish “rules that translate circumstances into points on the sentencing scale.” In short, the best analogy is to the old story of seven blind men studying an elephant; each reports a different salient feature. The sentencing judge is, of course, not blind and may see the entire elephant, but the appellate court receiving his cursory statement of reasons is in the position of someone hearing the blind man’s tale. Unless we can standardize the sentencing judge’s statement of reasons into a more inherently comparable document, such as a sentencing scale, the reviewing court will be reading descriptions of trunks and tails without knowing that it is the same animal involved in both cases.

Such a conclusion brings us full circle to the point made earlier that sentencing is a decisionmaking process which, to be controlled, must be analyzed as a problem in cognitive psychology and not simply in terms of the reach of the due process clause. Due process conceivably can require a statement of reasons, but even at its highest watermark it cannot compel the sentencing scale and tariff system that Zeisel and Diamond’s research suggests is necessary. The constitutional perspective may therefore point us toward the wrong remedy to the extent that it acts as a set of intellectual blinders. From the considerations surveyed in this section, guidelines in the form of a sentencing scale appear essential if our goal is not simply to “constitutionalize” sentencing but is also to achieve a methodologically stable decisionmaking structure. In turn, although guidelines do not strictly require a Sentencing Commission for their implementation, it nonetheless seems clear that in a multi-circuit judiciary such a guideline-drafting agency provides the most direct route to the goal of consistency in decisionmaking.

243. Id. at 933. While successful English experience with appellate review of sentences is frequently cited by advocates of this reform, Zeisel and Diamond have concluded that the English system is in reality a guideline system in which the generally accepted “tariffs” for various crime-offender combinations are taken from the treatise of a leading commentator. Id. at 934. “All power to the academics,” however, seems the least accountable of possible solutions.
SUMMARY

A guideline-drafting agency such as a Sentencing Commission poses both opportunities and dangers that are without real precedent. So far, this article has argued that the opportunities probably outweigh the dangers, particularly if the visibility of the process can be raised. To reject wholly the use of categoric techniques in a criminal justice system that must assess offenders on a mass basis seems increasingly to place oneself in a position equivalent to that of the Luddites in their losing battle with the knitting frame. As with the machinery attacked by the Luddites, the base expectancy rate table is the sentimental, but not the real issue. Rather, the real problem centers around controlling the social consequences that flow from these prediction techniques. Just as accepting the inevitability of the knitting frame in 19th-century England did not imply the necessary acceptance of mass unemployment, so too can we distinguish between categoric prediction and prediction based on status.

Beyond this obvious point about the need to consider and control fully the consequences of any major change in criminal justice practice and ideology, a subtler observation should be made about the significance of guidelines. “Structuring discretion” sounds like a neutral goal, and perhaps it can be. There are distinct possibilities, however, that the process of structuring discretion may tilt it in directions no one intended. In particular, the behavior of legal decisionmakers under a guideline system may be altered in two highly significant respects.

First, it has been observed that lawyers as a class focus instinctively on issues involving the fairness of allocations.244 In contrast, such issues tend to be downgraded to a “second order” status by social scientists who characteristically prefer to concentrate on the attainment of maximum efficiency. Thus, when social scientists “structure” legal decisionmaking, their unconscious bias may be to reduce the emphasis given to issues of distributive fairness. There may be less inquiry into whether a decision that maximizes efficiency has an unfair or disproportionate impact on some discrete subgroup within the total population affected. For example, the continued use

244 A respected economist has recently acknowledged that disciplines other than law are frequently myopic about questions of allocation. Professor Peter Steiner has recently written: “Reformers, lobbyists and true believers ignore the problem of redistribution, while economists label it ‘2nd order,’ which is our technical phrase for something we are about to neglect. Lawyers embrace redistribution; they can revel and cavort in the quicksand where others sink.” Steiner, Legal Success and Legal Failure, 22 Law Quadrangle Notes 19, 20 (1977). Why do lawyers so focus on issues of allocation? They implicitly know, Steiner has asserted, that “process is vital to the integrity of the outcome.” Id. This phrase defines the problem of accountability that this article has sought to raise with respect to categoric risk decisions.
of the Salient Factor Score to evaluate the parole prognosis of female offenders, despite the fact that the table was validated on a heavily male sample, presents an issue of "over aggregation": Are women offenders being wrongly lumped into a broader pool and thus judged by criteria having no proven relevance to them? Such an issue, once raised, is one to which lawyers can respond with enthusiasm and apply their well-developed notions of equity and procedural regularity. For many social scientists, however, this is a question of only second order significance because, given the low percentage of women offenders, little increase in aggregate predictive power is likely if adjustments are made.

Second, as one commentator has recognized in a related context, attempts to quantify a legal process tend to result in the "dwarfing of soft variables." Quantification may be achieved, but often at the cost of draining the decisional process of its most meaningful inputs, namely those types of information that cannot be reduced to standardized, fungible units of data. Characteristically, such soft variables will relate to the "volition, knowledge, and intent" of the individual under examination, and thus the danger in formally structuring the decisionmaker's discretion is that the process will tend to downgrade these jurisprudentially critical considerations.

Such a tendency toward dwarfing soft variables can be observed in the Parole Commission's recent experience. As noted earlier, the Salient Factor Score is focused on objective variables, such as the number of prior convictions or parole revocations, rather than on "softer" variables, such as the gravity of those prior incidents.

245. See note 192 supra.
247. Professor Tribe writes: "The syndrome is a familiar one: If you can't count it, it doesn't exist. Equipped with a mathematically powerful intellectual machine, even the most sophisticated user is subject to an overwhelming temptation to feed his pet the food it can most comfortably digest." Id. at 1361-62.
248. Id. at 1365-66.
249. See notes 123-26 supra and accompanying text.
More importantly, the intent and volition of the offender are almost wholly ignored. Yet, uniformly, recent model sentencing codes have agreed that in order to reach a just sentence, the dispositional decision-maker must focus on exactly these soft variables.²⁵⁰ To be sure, a guideline system does not inherently require that these variables be ignored, but, if only some 5 to 6% of the Parole Commission's decisions are presently being made below guideline ranges that ignore these soft variables,²⁵¹ then a tendency toward such "dwarfing" seems apparent. In essence, these soft variables require the dispositional authority to make a moral judgment about the offender's intent or volition. If, as appears, that moral judgment is minimized by a guideline system, then we have an operational methodology that is at least out of synchronization with our normative theory of punishment.

This conclusion does not mean, however, that the goal of structuring judicial discretion must be rejected and sentencing guidelines abandoned. The new criminologist has built an impressive machine, and the goal therefore should be to control rather than destroy. Here, that means seeking to structure the soft variables that

²⁵⁰ For example, among the criteria that section 7.01(2) of the Model Penal Code directs the court to consider are the following "soft variables," which clearly cannot be compressed within the framework of a standardized sentencing matrix:

....

(b) The defendant did not contemplate that his criminal conduct would cause or threaten serious harm;
(c) The defendant acted under a strong provocation;
....
(h) The defendant's criminal conduct was the result of circumstances unlikely to recur;
(i) The character and attitudes of the defendant indicate that he is unlikely to commit another crime.

MODEL PENAL CODE § 7.01(2) (Proposed Official Draft 1962). The current draft of the proposed Uniform Sentencing and Corrections Act also adopts the first three of these factors and adds that it shall be a mitigating factor if the offender lacked "substantial judgment in committing the offense" because of his youth or old age, or if "substantial grounds exist tending to excuse or justify the defendant's conduct, though failing to establish a defense." Uniform Sentencing and Corrections Act §3-108 (Tentative Draft March 1, 1978). The Judicial Council of the State of California has similarly adopted sentencing rules that place special emphasis on the volition and intent of the defendant. Under its rule 423 ("Circumstances in Mitigation"), it is a mitigating factor if the defendant "exercised caution to avoid harm to persons or damage to property," if he "mistakenly believed his conduct was legal," or if he "was motivated by a desire to provide necessaries for his family or himself." CALIFORNIA RULES OF COURT, SENTENCING RULES FOR THE SUPERIOR COURTS, RULE 423 (effective July 1, 1977). See also NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, STANDARDS ON CORRECTIONS §5.2(3) (1973); TASK FORCE ON CRIMINAL SENTENCING, supra note 2, at 44-45.

²⁵¹ See note 47 supra.
we value back into the decisionmaking process. In this light, issues that might seem only tangentially related to questions of values may turn out to have a significant impact on them. For example, an unrecognized advantage of a Sentencing Commission structure over the current Parole Commission system of de facto appellate review may be that the former provides a much superior vehicle for accommodating this kind of compromise between values and methodology. Both because the sentencing judge can be more reliably instructed to deviate from the normal guidelines when a soft variable is present than can an administrative hearing examiner, and because appellate review would exist under such a structure to ensure that issues of volition and intent were not ignored, a Sentencing Commission system is likely to outperform any administrative review system, such as the Parole Commission's.252

So far, only the argument for greater accountability has been advanced, but ultimately this is an incomplete prescription. At some point a more rigorous explanation must be given of why it is unfair to use status criteria when we are neither imposing punishment disproportionate to the severity of the offense nor, let us assume, using an unsound methodology. Can we articulate a reasoned position that rests on more than an intuitive sense of unfairness?

It is to this problem that we now turn.

IV. DEFINING THE ROLE OF EQUALITY IN THE AGE OF THE PREDICTION TABLE: CAN PREDICTABILITY AND FAIRNESS BE BALANCED?

The development of validated prediction tables may prove a traumatic event in the history of jurisprudential thought about punishment. Until recently jurisprudential scholars have tended to focus more on who may be punished than on how much one may be

252. Under a sentencing commission structure, the special function of the sentencing judge might in fact be to focus on such soft variables by determining whether mitigating or aggravating factors specified by the legislature or the commission were present, thus justifying departure from the presumptive guidelines promulgated by the commission. In contrast to the parole release determination, there would then be an opportunity for appellate review of his decision, at least when he found such a factor present. S. 1437, however, does not contain a list of factors similar to those set forth in the Model Penal Code. See note 250 supra.
punished. Preoccupied by the insanity defense, they have debated vigorously the case of the individual whose culpability is mitigated by a diminished capacity for responsibility, but have failed to give much attention to the case of the individual who is admittedly guilty but still insists that punishment disproportionate to his degree of culpability violates his rights. Nevertheless, just as the insanity defense once focused jurisprudential concern on developing a theory of criminal responsibility, so may the prediction table equally rivet debate to the allocation of punishment.

Legal theorists have neglected punishment allocation in some measure because of the influence of a distinction drawn by H.L.A. Hart, long the leading scholar in this area. In a seminal essay Hart argued that different principles apply depending on whether one was debating the "justifying aim" of punishment or the rules for its distribution. By separating the issue of justification from that of punishment, Hart aimed to focus on the allocation of punishment, a concern that had been overlooked in the debate over criminal responsibility.

Legalistic requirements of personal responsibility are intellectual antiques, bearing no reasonable relation to the goal of prevention. Under her formulation, mental condition is relevant not to the issue of guilt, but to the choice of the treatment or sanction most likely to prevent future infractions. Wootton has attacked this aspect of the Hartian framework, arguing that legalistic requirements of personal responsibility are intellectual antiques, bearing no reasonable relation to the goal of prevention. Under her formulation, mental condition is relevant not to the issue of guilt, but to the choice of the treatment or sanction most likely to prevent future infractions.

253. John Rawls was probably the first modern jurisprudential philosopher to focus on why, under a utilitarian theory of punishment, we are not justified in punishing the innocent even though in a given case the social utility of the deterrence thus obtained would outweigh the cost to the innocent defendant. See Rawls, Two Concepts of Rules, in PUNISHMENT 58, 60-62 (J. Feinberg & H. Gross eds. 1975). Rawls sought to demonstrate that crude utilitarian arguments always proved too much and, unless constrained, would justify arbitrary results. A more sophisticated utilitarian position, he said, would acknowledge that unless legal excuses, such as insanity, were recognized, far more social anxiety and insecurity would be produced than increased deterrence, because the innocent as well as the guilty would be aware that they were subject to sanctions whenever it benefited the majority to apply them. See id.

The justification of legal excuses such as the insanity defense, diminished responsibility, and the absence of mens rea is one of the focal points in the highly respected work of former Oxford Professor of Jurisprudence H.L.A. Hart. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968). On the American scene, the late Herbert Packer of Stanford elaborated the arguments supporting the view that even a system keyed to crime prevention must limit its reach by recognizing legal excuses—that it must focus on past conduct rather than future propensity. See H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); text accompanying notes 294-309 infra.

254. In response to attacks by utilitarian critics, Professors Hart and Packer lately have focused on the insanity defense and mens rea requirement as preconditions to the imposition of punishment. Lady Barbara Wootton, a British magistrate and author, has been the most outspoken critic. She has attacked in particular the idea that intent should be a prerequisite to punishment in a criminal justice system that focuses on the "forward-looking aims of social protection." B. WOOTTON, CRIME AND THE CRIMINAL LAW, in RESPONSIBILITY 139 (J. Feinberg & H. Gross eds. 1975) (quoting H.L.A. HART, supra note 253, at 27-28 (1968)). Wootton has argued succinctly that legalistic requirements of personal responsibility are intellectual antiques, bearing no reasonable relation to the goal of prevention. Under her formulation, mental condition is relevant not to the issue of guilt, but to the choice of the treatment or sanction most likely to prevent future infractions. See B. WOOTTON, supra at 144-47; B. WOOTTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY (1958) (examining roots of antisocial behavior from sociological perspective); text accompanying note 284 infra. Hart has responded in detail to Lady Wootton, who appears to have succeeded in defining the parameters of the recent jurisprudential debate over punishment. See H.L.A. HART, supra note 253, at 178-80; Gross, Introduction, in RESPONSIBILITY, supra at 9-11 (overview of the Wootton-Hart exchange).

255. H.L.A. HART, PROLEGOMEN TO THE PRINCIPLES OF PUNISHMENT, in PUNISHMENT AND RESPONSIBILITY, supra note 253, at 3-4, 8-13. This same distinction has also been made by Rawls. See Rawls, supra note 253, at 58.
allocation and by giving a priority to justification, with all its corollary questions of legal excuses, mental defenses, and the role of mens rea, Hart shaped the contours of debate for the next decade. His brief and essentially common sense account of the issues of equality and proportionality in turn may have led others to dismiss these questions as unworthy of serious analysis. In any event, until recently they have experienced a period of at best benign neglect and at worst express subordination. Indeed, Hart himself argued that when a conflict arose between his answer to the issue of justification (for Hart—prevention) and his answer to the issue of allocation (basically, that like cases be treated alike), the former should prevail. In short, the goal of prevention outweighed the goal of equality.

Following Hart's lead, jurisprudential debate over punishment has centered on the tension between the preventive justification of punishment and the limiting concept of responsibility. As a partial consequence, an ironic time lag is now discernible: Although the current popular dissatisfaction with sentencing stems principally from problems perceived at the allocation level, contemporary theorists are still directing their proposals for change at the theories justifying punishment, not at the allocation problem itself. Today, most observers agree that any attempt to individualize punishment according to the character of the offender will yield frequently arbitrary disparities as its predictable byproduct. Yet, although this criticism is aimed at deficiencies at the allocation level, critics as diverse as James Wilson and the American Friends Service Committee analyze the distribution issue in two steps: who may be punished and how much may one be punished. H.L.A. Hart, supra note 253, at 11. In his Prolegomenon to the Principles of Punishment, Hart discussed the justification of legal excuses at length, asserting that their value lies in the security they provide to law-abiding citizens that society will intervene only in the lives of those who have freely broken its commands. Id. at 13–24. With respect to the question of amount, Hart briefly advocates a proportional system of penalties according to a "commonsense scale of gravity." Id. at 25. Not to recognize the principle of proportionality, he argues, would confuse common morality and as a result reduce public respect for the law, thereby interfering with our goal of prevention. Id. at 24–25. Thus, his justification for an allocative principle of proportionality is essentially utilitarian, focused as it is on maximizing crime prevention.

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257. See text accompanying notes 275–79 infra.

258. See, e.g., H. Packer, supra note 253, at 71–136; Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage, 77 Colum. L. Rev. 827 (1977) (review of the recent legal literature). See also United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc) (mental disease or defect bars imposition of criminal responsibility if as result thereof defendant lacks substantial capacity to appreciate wrongfulness of conduct and to conform to legal requirements). The recent works of the American Friends Service Committee and Professors Morris, von Hirsch, and van den Haag indicate that the emerging debate will concentrate on the issue of amount. See notes 1 & 2 supra.

259. See notes 1 & 10 supra.

260. See note 2 supra.
Committee\(^{261}\) have argued in response that we should therefore change the justifying aim of punishment from rehabilitation to deterrence, in large part to minimize irrational disparities at the allocation level. This view inverts Hart's rule of priority by evaluating the justifying aims of punishment in terms of the allocative results they yield. Judging theories by the results they produce may be inevitable. Certainly, this practice helps explain the current popularity of retributive theories of punishment, which seem intended to maximize equality among offenders. But can we not formulate an allocative model for punishment that achieves the same result more directly, with less subterfuge?

The initial problem with such a quest is that the meaning of equality in this contest is not self-evident. To illustrate: Consider the almost universally held allocative principle that like cases should be treated alike. Does this mean we should consider individuals who have committed the same number and grade of offenses as the relevant class of similarly situated persons, even though they are unlike in terms of their statistical likelihood of future recidivism? Or do we consider individuals to be similarly situated if they share the same risk level in terms of their statistical propensity to commit future criminal acts, even though one may have committed less culpable or fewer offenses than the other? Intuitively, most of us would argue for the first definition of equality because we view the issue from a retrospective frame of reference, but an adversary who takes a prospective view could make a serious argument for the second definition. We need, then, something more in a theory of punishment than an ability to produce the desired results. As Hart pointed out, discussions of this type are haunted by the tendency to define critical controversial words in a way that cuts off the debate semantically, but fails to convince—what he termed the "definitional stop fallacy."\(^{262}\)

The real issue here is whether allocative fairness should be decided by looking forward or backward in defining who is similarly situated—forward to future risks or backward to past culpability.

This issue is hardly new. Long before utilitarianism was a gleam in any philosopher's eye, Plato argued that a backward-looking model that tried to match punishment with the harm caused was pointlessly punitive; it was as futile, he said, as "lashing a rock."\(^{263}\) The utilitarians agreed, and argued that punishment should be imposed so that it advances the social welfare at the lowest possible cost to

\(^{261}\) See note 1 supra.

\(^{262}\) H.L.A. Hart, supra note 253, at 5-6.

\(^{263}\) Id. at 163 (quoting Protagoras). The past deed in his view is relevant only as a symptom and hence could not in itself constitute the measure by which punishment was to be allocated. Id.
individual freedom. The allocative rule resulting from such a cost-benefit analysis is simply to use the least drastic means: If two techniques will produce the same level of social protection, employ the one that causes less human suffering. In our own time, this starting point has led to widespread acceptance of the idea that we should differentiate between high-risk and low-risk offenders in assigning punishment—a goal that validated prediction tables have now made feasible.

The opposite perspective also boasts a rich historical heritage. Immanuel Kant was the prime opponent of the utilitarian justification of punishment. He synthesized the retributionist’s rebuttal, arguing that punishment was necessary to restore the social balance thrown out of equilibrium by the offender’s misbehavior. Because the offender has gained an unfair advantage over his fellows, this argument continues, society must punish him in proportion to the severity of his offense in order to uphold the social contract by which all have agreed to restrain their own self-interests. Even if it achieved no utilitarian end, the demand for punishment was for Kant inexorable: Society must impose the punishment deserved or else become the equivalent of coconspirator in the original offense. Although this rule seems harsh and inflexible today, the new retributionists have recognized that it is also in one respect humane, because the offender can only be punished to the extent warranted by his offense. To punish him more, whether to rehabilitate him or to deter others, violates Kant’s categorical imperative: treat each man as

264. Bentham recognized the need to consider the offender’s suffering as one of the costs to be balanced against the social benefits to society. J. BENTHAM, Principles of Penal Law, in 1 WORKS 398 (1843), quoted in F. ZIMRING & G. HAWKINS, DETERRENCE 42 (1973). Recent respected commentators also have postulated this idea as one of the fundamental principles of a “morally tolerable” system of punishment. See F. ZIMRING & G. HAWKINS, supra at 42-43, 51-61.

265. See PRISONERS IN AMERICA (L. Ohlin ed. 1973) (“High risk offenders may be required to serve fixed periods of time. Low risk offenders should be released to community-based programs as soon as possible”), quoted in N. MORRIS, supra note 2, at 63.

266. See A. VON HIRSCH, supra note 2, at 47-49 (concise summary of Kant’s position); F. ZIMRING & G. HAWKINS, supra note 264, at 35-37 (same); Gardner, supra note 39, at 786-87 (same).

267. Von Hirsch expressly adopts this position in Doing Justice, supra note 2, at 47-49, 160 n.4.

268. In a frequently cited passage, Kant argued:

Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves through the whole world—the last Murderer lying in prison ought to be executed before the resolution was carried out.

an end in himself, rather than as a means. In short, such a model imposes a retributive limit on punishment, because no excess of social benefits over social costs would be permitted to justify punishing the offender as a means to some greater social good. To a generation wary of the abuses perpetrated in the name of rehabilitation and dissatisfied with the disparities between the sentences assigned equally culpable middle class and poor offenders, this idea of a rigid maximum limit has definite attractions. Not surprisingly, then, Kantian notions of a retributive limit have surfaced in virtually all of the recent models offered to control punishment allocation.

Superficial and short as this account of the disagreements between utilitarian and retributive theories of punishment has been, it is sufficient to set the stage for what follows. This article will next examine the issue of equality as it is raised by the prediction table in light of the contemporary jurisprudential theories of punishment. What answers would these theories give to the fairness of such a system? Sequentially, the following models will be examined: (1) the basically utilitarian model that has been articulated independently by Professors H.L.A. Hart and Herbert Packer; (2) the increasingly important model of the economists; (3) the transitional model offered by Norval Morris, which has one foot in the utilitarian camp and the other in that of the retributionists; and (4) the essentially retributive model set forth by Andrew von Hirsch in Doing Justice. This examination will serve as a prelude to an attempt to design an alternative model, one that is hardly a synthesis of these warring views but that does attempt to incorporate elements of each and achieve a degree of coexistence between the forward-looking perspective of the utilitarian, focused on prevention, and the backward-looking viewpoint of the retributionist, with its orientation toward proportionality.

A. THE HART-PACKER MODEL

As Ronald Dworkin recently observed, H.L.A. Hart is the modern successor to Jeremy Bentham and is the leading architect of contemporary legal positivism, which remains our "ruling theory of
law.” On our more specialized level, a careful critic has appraised Hart’s respected volume of essays, *Punishment and Responsibility*, and concluded that it sets forth “what is probably the most widely accepted model of punishment at the present time.”

To describe Hart only as a utilitarian is to risk oversimplification. Attuned to the modern temper, Hart has searched for limits that can be imposed consistently on the utilitarian model in order to restrain it from justifying socially intolerable results. At the same time, however, Hart adopts an orthodox utilitarian view in arguing that the general justifying aims of punishment must be the “forward-looking aims of deterrence, prevention and reform . . .” Even at the allocation level, the distribution of punishment is to be determined chiefly “by the utilitarian criteria of prospects for rehabilitation, need for preventive confinement, and concern for general deterrence.”

At this level, Hart does recognize the claims of equality and proportionality among offenders as having a “modest place,” but he warns that to permit them to outweigh his forward-looking aims would be “to subordinate what is primary to what is ancillary.” In fairness to Hart and in recognition of his extraordinary lucidity, it seems appropriate to quote his argument here at the point where the two perspectives collide:

> [The injunction ‘treat like cases alike’ with its corollary ‘treat different cases differently’ has indeed a place as a prima facie principle of fairness between offenders, but not as something which warrants going beyond the requirements of the forward-looking aims of deterrence, prevention and reform to find some apt expression of moral feeling. Fairness between different offenders expressed in terms of different punishments is not an end in itself, but a method of pursuing other aims which has indeed a moral claim on our attention; and we should give effect to it where it does not impede the pursuit of the main aims of punishment.]

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271. R. DWORKEN, *TAKING RIGHTS SERIOUSLY* ix (1976) (describing Hart’s approach as the “most powerful contemporary version of positivism”).

272. Gardner, supra note 39, at 800. Gardner describes Hart’s system as “impure legalistic utilitarianism,” because it incorporates elements of retributive theory but “emphasizes utilitarian considerations more heavily.” Id.


274. Gardner, supra note 39, at 800.


276. See id. at 172.

277. Id. (emphasis added). Hart characterizes the idea of any inherent proportionality between the crime and the punishment as a “semi-aesthetic idea which has wandered into the theory of punishment.” Id.
As an example of an instance in which “sacrifices of principles of equality between offenders” may become necessary, Hart points to the practice of exemplary sentences. When a given crime becomes frequent, judges are entitled, he says, to punish offenders more severely than similarly situated offenders were punished in the past, or than other contemporaneous offenders will be punished for committing equally serious but less prevalent crimes.

Hart assumes here a traditional utilitarian posture: the suffering of the individual is outweighed by the good to society; equality and like values become significant only when other concerns are not implicated or are in equipoise. Thus, the prediction table does not offend the Hart model. To the degree that it raises our predictive efficiency, and enables us to achieve more prevention at a lesser cost, Hart’s approach might even be interpreted to require the use of such devices.

If Hart had stopped at this point, it might be difficult to describe his work in this area as original. His real contribution, however, is in responding to the straw man arguments against utilitarianism by seeking to develop a more sophisticated justification that recognizes the need for placing limits on the goal of prevention. The retributionist’s traditional reply to the utilitarian’s assertion that the general welfare outweighs the individual’s was that such an argument proved too much; from such a premise, one could justify deliberately hanging an innocent man because the deterrent effect of such an execution after the charade of a seemingly fair trial might well produce a net social benefit by preventing more aggregate suffering than it visited upon the innocent scapegoat.

From such a reductio ad absurdum argument, the retributionist could then contend that more was required to justify punishment than the demonstration that it increased the general social welfare. Punishment, he would conclude, had to be deserved. In an early essay John Rawls dealt with this innocent man hypothetical and suggested that the appropriate rejoinder of the utilitarian would be to deny that such a corrupt charade would produce a net benefit. In the long run, he asserted, the secret would leak out, thereby undercutting the deterrent effect

278. Id.
279. Id. See also id. at 24-25 (exemplary sentence for especially prevalent though not necessarily grave offense imposed as warning to others justifiable because “some sacrifice of justice to the safety of society is . . . often acceptable . . . ”); text accompanying note 335 infra (further discussion of this problem of the exemplary sentence).
280. See H.L.A. HART, supra note 253, at 10.
281. See id. at 5-6.
and diminishing the psychological security of the innocent, who would then realize that the ability to avoid punishment was only partially within their control.\textsuperscript{283}

Such arguments may have an unreal sound, suited more to an academic tea party in the philosophy department than to courts of law, where no one has yet begun to urge the execution of the innocent. Yet at the time of Hart’s writing, a similarly extreme utilitarian argument was being debated widely and had met with considerable acceptance in Great Britain. Abolish all mental defenses, argued Lady Barbara Wootton, because the defendant’s state of mind is both essentially unknowable and irrelevant to the deterrent effect of punishment.\textsuperscript{284}

Indeed, by rejecting all excuses that might absolve one from criminal liability, the deterrent effect of the law would be enhanced, she insisted, because clever criminals would know that, if caught, they could not masquerade as insane to escape punishment.

For Hart, who profoundly disagreed with this argument, the issue thus raised was how a utilitarian concerned primarily with prevention could justify the criminal law’s preoccupation with states of mind and intentions. His answer was similar to Rawls’: mental defenses and the recognition of legal excuses are consistent with the utilitarian calculus because they increase the individual’s sense of personal security and foster a reassuring collective belief that each man controls his own fate. In short, the general welfare is increased when individuals know that punishment will be imposed only for acts committed with free will, even if this standard is hazy and sometimes lets true criminals escape.\textsuperscript{285} Hart’s elaboration of this theme is impressive and sometimes eloquent. But does it ultimately work? Professor Dworkin has criticized the argument because it rests on the debatable empirical premise that the injury caused by a marginally higher crime rate resulting from the recognition of mental defenses is less than the psychological insecurity that would result if such defenses were abolished.\textsuperscript{286} The accuracy of Hart’s calculus is questionable, and

\textsuperscript{283} See id. Hart endorsed this argument when he said that the “apprehension and insecurity” thereby awakened in the general population would exceed any shortrun deterrent benefit. H.L.A. Hart, supra note 253, at 11-12. Professor Packer also elaborated on this psychological security theme. See text accompanying note 303 infra.

\textsuperscript{284} See B. Wootton, supra note 254, at 139. See also H.L.A. Hart, supra note 253, at 178-180 (discussing Wootton’s arguments for abolishing mental defenses); note 254 supra.

\textsuperscript{285} See H.L.A. Hart, supra note 253, at 181-82 (arguing that the mens rea requirement guarantees us “the ability . . . to predict and plan the future of the law” and “maximizes the power of the individual to determine by his choice his future fate [and] to identify in advance the space which will be left open to him free from the law’s interference”).

\textsuperscript{286} See R. Dworkin, supra note 271, at 10. For his concise summary of Hart’s position on punishment, see id. at 8-11.
many welfare economists would respond that questions involving such interpersonal comparisons of welfare are inherently unanswerable.287

Hart tentatively advances a second argument for limitations on the preventive rationale. To be effective, the law must maintain some degree of congruence with common morality. Treating individuals simply as “alterable, predictable, curable or manipulable things” detracts from the moral power of the law.288 Again, however, this is an empirical proposition and does not resolve our concern over prediction tables, because it is far from certain that the morality of the man in the street is offended by treating apparently dangerous criminals more severely. The dominant public attitude toward offenders quite possibly is reflected by the familiar phrase “lock-em-up-and-throw-away-the-key.” In any event, Hart, more a utilitarian than a natural law theorist, retreats from this notion of tying a theory of punishment to the prevailing common morality, writing that the “principle of responsibility . . . may be sacrificed when the social cost of maintaining it is too high.”289

Hart’s approach may prove a more lasting contribution than any specific solution he offers. In overview, he recognized the necessity of what Harvard philosopher Robert Nozick terms “side constraints” on the pursuit of end goals.290 Although Hart rejects retribution as a justification for punishment, he concedes that it and other principles such as equality can function as side constraints on the unqualified pursuit of justifying aims.291 But, unlike natural law theorists such as Dworkin and Nozick, Hart seeks a utilitarian justification for such side constraints.

Whether Hart succeeds is open to question, but his approach has immediate relevance to our concern with the fairness of the prediction tables, or with any punishment system that distributes punishment partially in accordance with the individual’s social status. In order to object to the use of a prediction table under Hart’s approach, one must first identify a side constraint that Hart would recognize as qualifying our pursuit of the end goal of prevention. Such a

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287. The problem of interpersonal comparisons of welfare is inherent in any attempt to ascertain the net utility of imposing costs on some in order to obtain benefits for others. See A.K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 89-104 (1970).
289. Id. at 185.
290. Nozick has argued persuasively that we can develop an ethical model less likely to run afoul of internal contradictions if, instead of “incorporating rights into the end state to be achieved,” we “place them as side constraints upon the actions to be done . . . .” R. NOZICK, ANARCHY, STATE, AND UTOPIA, 29, 28-33 (1974). The model for punishment allocation developed in this article is a side constraint structure as opposed to one that postulates a desired end state.
requirement is not easily met. Punishment based in part on status, within carefully defined outer limits, offends common morality far less, if at all, than does punishing the innocent or the insane. Hart’s other argument for side constraints—the psychological insecurity that results when punishment is not firmly based on conduct—may similarly be inapplicable because the majority of society does not identify with criminals and does not perceive itself to be threatened by such a system. But Hart’s inventory of side constraints is not necessarily exhaustive. His treatment of retribution as a side constraint was in a sense topical, responding primarily to Lady Wootton’s challenge to academics to justify what she regarded as the lawyer’s obsession with inherently subjective concepts like mens rea. Other arguments for imposing side constraints on the preventive goals of the prediction table can be framed, but for a moment need to be postponed.

If Hart is the reigning deity of positivism, the American prophet of this school, at least on the issue of punishment, was Herbert Packer. In The Limits of the Criminal Sanction Packer embellished the Hart model without substantially changing it. In some respects, however, his Americanized version appears more doctrinaire in its justification of punishment and more qualified in its endorsement of side constraints. Packer is more emphatic than Hart in expressing his belief that prevention is the objective of the criminal law—he calls the case for it “unanswerable” and any other system “the merest savagery” —and yet he is also less certain that the criminal law must forever restrict its reach to those who have committed a crime. “Considerable tension exists,” he writes, “between the goal of prevention and the idea that the criminal law’s reach is limited to conduct.”

For the time being, at least, Packer was content with the same two-pronged justification for limiting punishment to actual offenses that Hart offered. First, side constraints are needed, Packer said, because a single-minded pursuit of prevention might “defeat the ultimate goal of law in a free society, which is to liberate rather than restrain”.

...
thus, individuals generally ought to be able to plan their lives with some assurance of avoiding entanglement with the criminal law. In short, this is Hart’s psychological security argument. Second, to be effective the criminal law must be perceived as equitable; it must not only be fair, it must be “seen to be fair.” In essence, this is Hart’s caution that the law must not deviate far from common morality. For both men, the relevance of side constraints seems limited to the question of who can be punished. Their answer: only the guilty.

Much more than Hart, Packer was skeptical of the concept of culpability, writing that it has no “inherent” place, but may, to the extent it “serves ends” he values (basically the two arguments just noted), be accorded recognition as a limiting doctrine. In addition, Packer seemingly denies that the offender has any entitlement to be punished on a basis proportionate to his relative culpability. The conduct that triggers punishment need not be morally offensive, he said, nor need the amount of punishment correspond to the degree of culpability. In a frequently quoted statement, Packer suggested that the citizen is legitimately entitled only to fair notice that specific conduct has been criminalized:

The dictates of individual culpability are satisfied if a person engages in forbidden conduct without having a valid excuse for it. He is culpable because he has behaved in a way that the law has told him is unacceptable. If he knows that the law forbids him to sell oleomargarine, he is culpable if he sells it, regardless of whether—the law apart—the sale of oleomargarine is morally good, bad or indifferent. He is culpable because he has knowingly violated a legal prohibition.... If he has been warned, punishment is justifiable, quite apart from the moral quality of the forbidden act.

This is, of course, the hardnosed position of the lawyer who knows from experience that the distinction between mala in se and malum...
prohibitum is unsatisfactory and that innocuous acts often can have serious consequences. It is also a position, however, that seems inconsistent with Packer's original emphasis on the psychological security produced by a system focused on conduct. As explained by Packer, the importance of fair notice is to guarantee the individual citizen the ability to arrange his affairs to avoid entanglement with the criminal law. Yet, any security that fair notice affords him is substantially undercut by the elimination of blameworthiness as a precondition to the imposition of punishment. Because the layman in fact neither peruses statute books nor consults a lawyer before he acts, the average citizen must be guided by an intuitive sense of community mores. This sense is fallible, and as a result the citizen may overstep a line and transgress a statutory prohibition; or, he may act with some knowledge that he is in a gray area, but assume that his act, if wrongful, is nonetheless a venial sin that courts will treat leniently. Such a situation is particularly likely to occur in the case of regulatory offenses, when the criminal law often is used as an alternative to a taxing system.

Packer might well call such acts committed with negligent inattention to a statute reckless and argue that reckless reliance on an unknown penalty structure is not an expectation that the law is obliged to uphold. Normatively, such a position would be tenable. Packer's objective, however, was not to develop a pure normative theory, but to present a utilitarian rationale for recognizing side constraints. Such an objective requires a balancing of the actual costs of lost psychological security against the benefits of increased deterrence. Viewed in this light, Packer's position becomes self-contradictory because it blends inconsistent normative and empirical assertions. His minimal fair notice requirement does not adequately uphold the expectations of the ordinary citizen upon which his psychological security argument is

303. Id. at 68.
304. For example, a citizen might be substantially deterred from committing a traffic offense by heavy jail sentences or capital punishment and the lives thereby saved through a reduction of traffic accidents might under a strictly utilitarian cost-benefit analysis justify the suffering imposed on selected offenders. But an analogy to the Hart and Packer analysis is suggested here. The psychological security of the general population would be seriously disturbed by the imposition of extraordinary penalties for crimes they may in fact frequently commit. Nor are traffic offenses unique in this regard. Empirical studies show that significant portions of the general population have engaged in conduct the law views as felonious. See note 429 infra and accompanying text. One student note has suggested recently that the criminal law should be structured to anticipate violations. Note, Laws That are Made to be Broken: Adjusting for Anticipated Noncompliance, 75 MICH. L. REV. 687 (1977). An analogous model for punishment allocation should recognize that crime is commonplace and that it is the characteristic type of crime, rather than its frequency, that is most likely to change among different populations and classes.
founded. More is required. If the goal is psychological security, then the legal system must not lightly frustrate the individual’s expectation that even if he has crossed the line he will be treated on the basis of his relative blameworthiness. Put simply, a legal system in which the layman cannot expect the penalty structure to be roughly commensurate with community mores is one of which he must continuously beware; in Packer’s phraseology, such a system is not one which “liberates rather than restrains.”

Assessed on its own utilitarian terms, the Hart-Packer model seems vulnerable to two criticisms: (1) It cannot be demonstrated that the benefits of controlling the reach of the criminal law by recognizing limiting doctrines, such as legal excuses, outweigh the costs of a possibly higher crime rate; and (2) the objective of psychological security requires more extensive side constraints than fair notice alone. If participation in illegal activities is as pervasive as many sociologists now believe, if laws were equally enforced against the middle class and poor alike, and if the citizen’s sole entitlement under our theory of punishment were fair notice, the resulting system of law would sadly enough be one in which only a minority of citizens could feel secure in their daily lives.

A particularly ominous note pervades Packer’s justification of side constraints. He concedes he has advanced only a transitional model. The day may come, he warns, when the “instrumental” role now played by concepts of culpability will no longer serve the ends of prevention because we will have attained the power to predict criminality accurately. He writes:

As we find ourselves gaining more nearly exact knowledge about the sources and control of deviant behavior, the pressure from the behavioral position upon this rationale will become strong and may prove to be irresistible. The more confidently we can predict behavior and the more subtly we can control it, the more powerful will be the temptation to relax the constraints that inhibit us at present from aggressively intervening in the lives of individuals in the name of crime prevention.

305. Those who disagree with this assertion might contemplate briefly the photograph reprinted in Griffiths, supra note 294, at 1456 n.266 (1928 photograph purporting to show a public display of the heads of motorists who were beheaded in Peking for exceeding the 15 miles-per-hour speed limit).
306. See note 297 supra and accompanying text.
308. Id.
When that day arrives, the “tension between the concept of blameworthiness as a prerequisite of punishment and the dictates of the incapacitative claim” may well have to be resolved by abandoning “blameworthiness as a condition for the imposition of punishment.”

Although Packer neither tells us when this millenium will arrive nor focuses at all on the methodological problems of prediction, advocates of an incapacitation model could already infer from such a statement that even the feeble constraints in Packer’s model do not apply to them.

In the end, it is open to question whether Parker has given us a justification or an epitaph for limiting principles. The Hart-Packer model thus leaves open the question whether better arguments can be advanced to justify stronger side constraints without abandoning the forward-looking objective of prevention.

B. The Economists’ Model

In making the transition from the Hart-Packer model to an economic model, we progress from a system that involves relatively modest side constraints to one having virtually none at all. At least within the discipline of economics, a consensus appears to be emerging that (1) criminals respond to changes in the opportunity costs confronting them in deciding whether to commit crimes, and (2) the amount of punishment as well as the risk of apprehension determines the offender’s perception of his own opportunity cost.

Based on these findings, Professor Richard Posner has advanced an economic theory of the “optimal criminal sanction.”

“The first task,” he writes, “in devising a scheme for punishing a particular crime is to choose the expected punishment cost.” As he sees it, this desired cost is simply the product of the probability of apprehension times the severity of the punishment if caught. Given this simple formula, Posner next points out that we can choose among a virtually unlimited number of combinations of probability and severity which yield the same total. For example, a fine of $1,000 can be combined with a probability of apprehension of 100%, or a fine of $1,000,000 can be combined with an apprehension risk of 0.1%; in each case we achieve the same punishment cost. If this is so, which combination of probability and severity is optimal? Ideally, Posner

309. Id. at 51.
310. For surveys of the recent literature, see note 42 supra.
312. Id. at 165.
313. Id. at 167.
writes, the most efficient combination is an apprehension risk “arbitrarily close to zero” and a penalty “arbitrarily close to infinity.” 314 This combination is optimal, he reasons, because the costs of increasing the risk of apprehension—more police, more prosecutors, more court officials and attorneys—are far greater than the costs of increasing the penalty—the costs of increasing prison capacities. It is therefore more efficient, Posner believes, to achieve the desired punishment cost by increasing the severity variable.

As Posner acknowledges, his theory points toward a policy of “combining heavy prison terms for the convicted criminal with low probabilities of apprehension and conviction”315—in short, a scapegoat system in which an unlucky few receive severe exemplary sentences. Is this unfair? Although such a formulation allows many to “go scot-free ... [while] others serve longer prison sentences than they would if more offenders were caught,” he argues that this “ex post inequality” among offenders is no more unfair than the typical lottery, which by its very nature “creates wealth inequalities among the players.”316 Both the lottery and a system of criminal justice that combines low probabilities of apprehension with high penalties are fair “so long as the ... costs and benefits are equalized among the participants” at the outset.317

In overview, this lottery analogy represents only a slight, though vivid, extension of Professor Packer’s fair notice rationale. At the time one buys a lottery ticket or commits a crime, one has fair notice of the rules by which the game is to be played; hence, the argument runs, unless the game is rigged the players have no right to object to the rules after the play has commenced.

Is there a reply to this argument, acceptable to someone who shares the economist’s perspective? One relevant distinction between a lottery and a criminal justice system is that the latter is a monopoly—the state has the only game in town. Thus, it can engage in price discrimination. The costs of deterrence for one crime can, for example, be raised in order to subsidize the deterrence costs for another crime.318 In this sense the prediction table is analogous to a discriminatory taxing system.

314. Id
315. Id at 170.
316. Id
317. Id. Others, however, have used this same lottery analogy to criticize, rather than to justify, a system of punishment which serves to instruct the general population. See F. ZIMRING & G. HAWKINS, supra note 264, at 47.
318. For example, assume that prison sentences imposed for a given crime deter to some degree not only the commission of that specific crime but the commission of related crimes as well. One can then posit a situation in which long sentences assigned for one crime—such as bank
Even more important, Posner’s cost-benefit analysis seems strangely shortsighted. Posner seems to believe that doubling the amount of punishment doubles the deterrent or incapacitative effect thereby obtained. But are the units involved really so fungible that sending one man to prison for two years produces the same deterrent effect as sending two men to prison for one year each? For three reasons this analysis appears faulty. First, unless economists have recently repealed the law of diminishing returns, the deterrent effect of additional punishment imposed on the offenders isolated by a scapegoat system should at some point begin to decline. For example, more social benefit should be obtained by sending ten men to prison for one year than one man to prison for ten years. Second, Posner’s analysis ignores the differences in the incapacitative benefits that imprisonment produces because of the clearly higher risk of recidivism posed by some individuals.

Finally, Posner’s implicit assumption that the costs in terms of individual suffering, which the traditional utilitarian has always conceded must be weighed in the balance, are constant between ten one-year sentences and one ten-year sentence is highly dubious. Interestingly, Posner observes that the concept of expected punishment cost is the same as that of an expected accident cost. But the leading theoretician on accident costs, Guido Calabresi, argues that costs should be spread rather than concentrated because cost spreading reduces the aggregate injury sustained.

Relying in part on an empirical generalization that the marginal value of money declines—that is, that 100 additional dollars are worth less to a millionaire than to a pauper—Calabresi argues that imposing costs on a select few is more likely to result in economic and social

embezzlement, typically committed by a lower echelon employee—are used to deter crimes committed by another class of persons—such as the making of illegal loans, typically committed by higher level executives. Then the artificially high price assigned to the first crime would be subsidizing the deterrent cost necessary to prevent the second, which has been assigned an artificially low price. We would be faced with a discriminatory pricing system made possible by the monopolistic position of the state as the sole dispenser of criminal justice. Because the state’s monopoly cannot be ended, the fairness of the lottery must be regulated.

320. In part, this assertion rests on the cost spreading and marginal utility arguments of Professor Calabresi, discussed at note 325 infra and accompanying text. In addition, the population we wish to deter cannot make fine distinctions between the costs involved; a sentence of 6.6 years does not produce 10% more general deterrence than does a sentence of 6 years, and may empirically produce no additional deterrence if the critical variable is the risk of apprehension. This hypothesis of diminishing returns on increased punishment has been accepted by others. See A. Von Hirsch, supra note 2, at 136.
321. See note 264 supra.
322. R. Posner, supra note 311, at 165.
dislocation than spreading the costs over a wider group. In his judgment this principle is not limited to purely economic costs: "social dislocations, like economic ones, will occur more frequently if one person bears a heavy loss than if many people bear light ones."\textsuperscript{324} The individual "feels his losses less if ... his neighbors ... suffer similar losses."\textsuperscript{325} This perception has equal validity as a critique of both Posner's analysis and the prediction table in general: The cost of deterrence should be spread rather than concentrated. Within the context of punishment, however, cost spreading is simply a synonym for equality among offenders.

We have now surveyed two predominantly utilitarian models of punishment—the Hart-Packer model and the Posner model. In each case the value of equality among offenders has been subordinated to the goal of prevention, but in each case counterarguments consistent with the principle of utility were advanced to demonstrate that equality deserves a greater role. It has been contended that in using the psychological security of the citizenry to justify limiting the application of punishment to the guilty, the Hart-Packer model must also recognize the need for a measure of proportionality between the crime and the punishment if it is to be intellectually consistent. In the case of Posner, this article has argued in favor of cost spreading on the traditional utilitarian grounds that it reduces the aggregate costs charged.

Despite these faults, each model has considerable utility. The Hart-Packer notion that the pursuit of goals must be kept within side constraints is a seminal concept. Posner's formalization of expected punishment cost represents a logical extension of the Hart-Packer focus on prevention. Determining such a cost in the abstract in turn permits us to view quite differently the process by which that cost is then allocated among offenders.

C. THE REHABILITATION OF RETRIBUTION

Within the last few years the concept of retribution has been brought down from the legal attic, dry-cleaned of its musty, Victorian odor, and presented as the au courant fashion in sentencing reform. The reasons for its return are fairly obvious. As evidence accumulated that individualization in sentencing had been carried to an extreme, retribution presented an alternative model that could justify radical reforms aimed at the chief perceived evils—indeterminacy and

\textsuperscript{324} Id. at 40.
\textsuperscript{325} Id. at 40 n.3.
unfettered discretion. There is almost a perfect fit between these recently diagnosed evils and the categorical imperatives of a Kantian system: The utilitarian goal of rehabilitation has led to imposition of more punishment than would have been assigned under a retributive system; therefore, critics are attracted to a system under which no man is treated as a means, rather than as an end, and given more punishment than he “deserves.”

The earliest full flowering of the idea of a retributive limit to punishment in recent legal literature was in the writings of Norval Morris and Alan Dershowitz. Dean Morris’ model is of particular interest because it seeks to reconcile utilitarian and natural law theories. As a thinker who agrees with Hart and Packer that prevention is the primary aim of the criminal law, Morris seems to use the idea of “just deserts” only as a means of setting an upper and lower limit on the allocation of punishment. He does not insist that punishment always be proportional to culpability. In effect, then, his model leaves a zone of indeterminacy between the floor and ceiling marked by the retributive concepts he employs; within this zone he rejects the enhancement of punishment based on predicted dangerousness. Thus, to a degree, we have at last a model that might be used to express our doubts about the prediction table. Morris seems willing, however, to tolerate within this zone some treatment of the individual as a means rather than as an end in order to accomplish deterrent objectives. With Hart, he believes that equality merits only second echelon status in our scale of sentencing values. He accords first

326. See notes 269-70 supra and accompanying text. See also A. Von Hirsch, supra note 2, at 46-49.
328. See in particular Morris’ attempt to balance the “preventive purposes” of the criminal law with the concept of “desert.” N. Morris, supra note 2, at 75-76.
329. See N. Morris, supra note 2, at 74, 60. In proposing that the criminal law require a “retributive floor to punishment,” Morris notes with approval section 7.01(e) of the Proposed Official Draft of the ALI Model Penal Code, which provides in part that imprisonment may be imposed when “a lesser sentence [would] depreciate the seriousness of the defendant’s crime.” Id., at 77-78. For a criticism of this position, see A. Von Hirsch, supra note 2, at 73-74.
330. N. Morris, supra note 2, at 76. He expressly rejects predictions based on individual, categoric, anamnestic, or intuitive factors. Id.
331. Id. at 76-77. Morris, however, accepts only a “general deterrent justification” and expressly rejects “special deterrence” since the latter would amount to incapacitation based on predicted dangerousness. Id.
332. In a recent address, Morris assumed a position on the question of equality in sentencing once again reminiscent of Hart: “[E]quality in punishment is not an absolute principle; it is a value to be weighed and considered among other values, no more; and there can be just sentences in which like criminals are not treated alike.” Address by Norval Morris, Toward Principled Sentencing, at University of Maryland Law School (March 10, 1977), at 14-15 (copy on file at the
priority to the "principle of parsimony," writing that "[t]he least restrictive, least punitive sanction necessary to achieve a defined social purpose should be chosen." Attractive as this notion is, its enshrinement as a first principle may in turn require subordinating the competing ideal that like cases be treated alike. For example, the principle of parsimony might justify on utilitarian grounds the imposition of an exemplary sentence in a highly publicized case on the premise that the greater visibility thereby achieved would provide more deterrence at a lower cost than could be obtained by simply increasing the average sentence in all similar cases. In contrast, those of a more egalitarian persuasion might still believe that treating like cases alike is a more important principle than parsimony.

Dean Morris' model occupies an intermediate position on the current continuum of sentencing proposals because it employs retribution only as a means to set a floor and a ceiling on punishment. Such a model responds to the perceived evil of indeterminacy but only indirectly to the problem of sentencing disparities. One facet of the disparity problem is the tendency toward inequalities between the sentences assigned to white collar offenders and those given to lower income criminals. A retributive model that insists that punishment be proportional to culpability goes further toward minimizing these disparities than does the Morris model. For example, although bank embezzlement and an unarmed night burglary of that same bank are substantially similar crimes from a retributive standpoint, they may appear very different to someone whose first premise is the principle of parsimony. If, under the latter principle, we insist on the use of the least restrictive alternative to accomplish our objective, the crime of embezzlement probably justifies less punishment, because the guilty bank teller will never again have a similar opportunity to embezzle, and others like him will probably be deterred by the social stigma and loss of employment incident to apprehension. Hence, neither the goals of deterrence nor those of incapacitation require that the quantum of punishment be the same for embezzlement as for burglary.

It was probably predictable in light of the widespread concern with sentencing disparities that a retributive model would surface re-
quiring that these two cases be treated equally. Such a model has now been elegantly expounded by Professor von Hirsch in Doing Justice. As with other retributive models, it begins by rejecting the utilitarian premise that punishment can be justified simply by showing that the benefits it produces outweigh its costs. It then sets forth a moral justification of punishment developed in three sequential steps. First, "[t]hose who violate others' rights deserve punishment." It describes this idea as the "prima facie justification of punishment." Second, because punishment adds to the total amount of human suffering, the moral obligation to minimize suffering counterbalances the first proposition that punishment is deserved; this then leaves us with an insufficient justification. Finally, to the extent punishment deters others and thus may "prevent more misery than it inflicts," punishment is justified because the second proposition no longer applies. Thus, the original just deserts principle comes back into operation.

The net effect of this theoretical progression is to justify punishment only when both retribution and deterrence overlap. Each is necessary, but neither is a sufficient condition. In effect, this model has elevated the role of retribution from that of a side constraint to that of a justifying aim. In so doing the approach advanced in Doing Justice eliminates the indeterminacy between the retributive floor and ceiling that characterized Norval Morris' model. Instead, the Doing Justice model requires that a strict proportionality be observed between the punishment and the offender's level of blameworthiness.

In some respects, the Doing Justice model is the mirror image of a utilitarian approach. For example, a true utilitarian is indifferent between sentencing two men to five years in prison and sentencing one man to ten years; at most, the utilitarian would recognize a role for

337. A. VON HIRSCH, supra note 2. Although written by Professor von Hirsch, the book is subtitled Report of the Committee for the Study of Incarceration. The Committee is a fifteen member group of nationally recognized experts in the fields of criminology, law, philosophy, and psychiatry.

338. Id. at 50-51. Interestingly, the committee relies in this instance on a Rawlsian justification that points in a somewhat different direction, as will hereinafter be argued.

339. Id. at 53-54.

340. Id. at 54.

341. Id.

342. For an incisive critique of this model, see Gardner, supra note 39, at 798-99 n.119, 802-06.

343. A. VON HIRSCH, supra note 2, at 73-74. Von Hirsch specifically criticizes the Morris model for leaving such an indeterminate zone. See id.

344. Id. at 69-74.
equality in breaking a tie—when each option results in the same net deterrent effect. The Doing Justice model takes the reverse position: It gives utilitarian goals a decisive effect only in the tie-breaking situation. Von Hirsch hypothesizes, for example, that if two types of punishment were equally severe, it would be permissible “to prefer one kind of sanction over another on utilitarian grounds,” because the principle of commensurate deserts had been satisfied by either sanction. Not surprisingly then, Doing Justice expressly rejects methodologies such as the Salient Factor Score that allocate punishment based on socioeconomic criteria.

If we are skeptical of preventive restraint, Doing Justice provides us with a highly articulate rationale for rejecting such a strategy. Nevertheless, there are several reasons why we should not accept that rationale. First, there is a somewhat clanking, mechanical sense about the resurrection of retribution in Doing Justice that may detract from its persuasiveness. One feels that ideas are being manipulated for ulterior purposes, that if retribution did not exist it would be necessary to invent such a useful doctrine. As Leslie Wilkins commented in an appendix to Doing Justice, “It seems that we have rediscovered ‘sin’ in the absence of a better alternative.” To its critics the rediscovery of retribution finds its justification in a subjective, tautological argument which, when reduced to its essentials, says only that people may be punished because they deserve punishment. From this perspective, the retributive rationale does not proceed from premises to conclusions but simply assumes what is to be proved—the nature of the justification for punishment. In so doing, it strays perilously far from the central idea shared by Hart, Packer, Posner, and the majority of other recent critics—that prevention is the first goal of the criminal law.

345. See notes 321-22 supra and accompanying text. This is basically the same summary of the utilitarian position that Rawls makes on a higher level of abstraction. See J. Rawls, A Theory of Justice 26 (1971).

346. A. von Hirsch, supra note 2, at 112 n.*.

347. Id. at 87-88.

348. Id. at 178.

349. For a critique of the idea that it is self-evident that the blameworthy deserve punishment, see Blandshard, Retribution Revisited, in Philosophical Perspectives on Punishment 59, 74-75 (E. Madden, R. Handy & M. Farber eds. 1968) (arguing that “this view that you should add another evil to one which already exists, is not only not self-evident; it seems to conflict with one that is”). Of course, the Doing Justice justification of punishment requires that desert and deterrence overlap; the issue it thus ignores is whether we should eliminate all the area of indeterminacy that exists in Morris’ model between his retributive floor and ceiling or only some elements of it. This article will suggest that a “side constraint” model produces a different answer than their end purpose model and permits some indeterminacy to remain. See text accompanying notes 407-09 infra.
Yet another more important and more practical objection to the retributive rationale exists: It may prove impossible to confine. Once Pandora's Box has been opened, the desire to punish the blameworthy may lead as easily to the assignment of punishment in excess of that required by the goal of prevention as did the desire to rehabilitate in the recent past. Once retribution becomes a purpose for punishment rather than an allocative limit on it, concepts of vengeance and spite, which always lurk at the periphery of the criminal justice system, may creep back sub silentio into our criminal justice ideology.

In fairness to the proponents of the Doing Justice model, they are emphatic in their belief that less punishment, not more, is needed; in general, they would set a ceiling on punishment not to exceed five years. They concede, however, that the choice of magnitudes is "somewhat arbitrary" and that the model could justify with equal validity a higher ceiling. Others who have espoused similar flat-time systems have suggested higher ceilings. Although the proponents of Doing Justice supplement their model by borrowing the principle of parsimony from Norval Morris, such a principle has no integral relationship to the structure of their model, which is founded on a notion that people deserve punishment, not on Morris' premise that the best system is that which punishes least to achieve its goals. Like training wheels on a bicycle, this cautionary restraint on the operation of a retributive model may be discarded by subsequent users.

Despite the modest judicial success enjoyed by proponents of retributive limits, conservative courts and legislatures may have far
different ideas of the degree of punishment deserved for a particular offense. Put bluntly, academics (at least since the day of that noted neurologist, Dr. Frankenstein) have often overestimated their ability to control their inventions or the uses to which their ideas would be put. Once retribution is accepted, the effect of a retributive criminal justice theory on a society already having the longest average prison sentences in the western world,\textsuperscript{356} and an extraordinarily high per capita rate of imprisonment,\textsuperscript{357} may not be that intended by the proponents of the Doing Justice model. In short, they may find themselves more captive than master of their brave new ideology. The purpose here is by no means to accuse the advocates of the Doing Justice model of intellectual irresponsibility—a conclusion as unjustified as holding Nietzsche responsible for Hitler. Rather, it is to suggest the comparative advantages of a model that could achieve similar results without accepting the dangerous notion that offenders deserve compensatory suffering for its own sake.

A second line of attack on the Doing Justice model has focused on its treatment of the concept of culpability. Some have claimed that the model takes an overly restrictive view of that concept, in recognizing only the severity of the crime and the offender’s past record of convictions while ignoring extenuating or aggravating circumstances such as the offender’s relative deprivation.\textsuperscript{358} Conversely, others have criticized the Doing Justice concept of culpability as too expansive, arguing that by introducing such a potentially subjective concept it defeats the original purpose of the model, which was to reduce sentencing disparities by minimizing opportunities for the sentencing judge and parole officers to exercise discretion.\textsuperscript{359} Such critics feel

\textsuperscript{356} See P. O’DONNELL, M. CHURGIN & D. CURTIS, supra note 2, at 54-55; Coffee, supra note 13, at 1384-85 nn. 7 & 8.

\textsuperscript{357} A study conducted in connection with the President’s Commission on Law Enforcement and the Administration of Justice reported that in 1965 1.3 million Americans were under some form of correctional supervision. It also estimated that by 1975 this figure would rise to 1.8 million; these figures translate into 0.66% and 0.82% of the United States population. See TASK FORCE ON CORRECTIONS, supra note 19, app. B at 215. More recent figures show that at December 31, 1973, the number of prisoners in state and federal institutions per 100,000 of the population was 97.8. M. HINDELANG, C. DUNN, L. SUTTON & A. AUMICK, supra note 220, at 642. In some jurisdictions, the per capita rate is much higher: District of Columbia (323.8 per 100,000); Georgia (173.2 per 100,000). \textit{Id.} Given these statistics and the rate of prison overcrowding that already exists, a retributive model may compound an already excessive tendency toward imprisonment.

\textsuperscript{358} See Gardner, supra note 39, at 806-14. I fear, however, that if the model suggested by Professor Gardner as an alternative to the Doing Justice approach were implemented in a large-scale criminal justice system, it would degenerate quickly into a new pursuit of individualization.

\textsuperscript{359} See A. von HIRSCH, supra note 2, at 171, 172-74 (partially dissenting statement of Professor Goldstein) (characterizing treatment in Doing Justice of concept of culpability as "just another discretionary sentencing scheme with a new and protean slogan"). To this writer, Doing
that the attempt to measure culpability places us again on a slippery slope leading back to pure individualization. They would prefer, therefore, to narrow the decisionmaker's focus exclusively to the crime and never to the criminal.\footnote{1080.} 

Because of the problems accompanying a retributive approach—its potential harshness, the subjectivity inherent in any definition of culpability, and the limited success that the concept of proportionality has had to date—the concept of retribution may be better suited as a side constraint than as a justifying aim. Although retribution may on occasion provide a useful restraint on a naked pursuit of utilitarian goals, it cannot safely carry the burden of being the foundation on which a theory of punishment is to be erected.

If we are sympathetic to Doing Justice's goal of proportionality but dubious of its retributive means, must we then accept as the sole alternative the Hart-Packer model with its corollary that the goal of equality deserves only second echelon status? This article will attempt to sketch a countermodel, one that turns elsewhere than to retribution for an adequate critique of the utilitarian justification for punishment, but which also adopts the central tenet of Hart and Packer that first priority in a criminal justice theory should be the goal of prevention.

D. A PROPOSED EGALITARIAN MODEL—WITH APOLOGIES TO JOHN RAWLS

Any attempt to formulate a wholly original countermodel in this the third millennium of western legal thought would be an audacious act, recalling less the heroism of Hercules than that of Don Quixote. Such an act would also be superfluous, because a well-developed and widely known model awaits extension to this area. More importantly, this model is capable of supporting a theory of punishment that is both egalitarian and forward-looking.

As others have already noted in this context, the leading modern critic of utilitarianism is John Rawls.\footnote{360.} In A Theory of Justice Rawls steers a sounder middle course between the antithetical and more extreme positions taken by Professors Gardner and Goldstein.

\footnote{360. Id. at 172.}

\footnote{361. The relevance of the Rawlsian approach to criminal justice and in particular to the problem of punishment has earlier been pointed out by Dean Morris and by Professor Griffiths. See N. Morris, supra note 2, at 81-83; Griffiths, supra note 294, at 1455-56. Rawls' model, however, produces distinctly different results than those advocated by Dean Morris and deserves a more extensive treatment than it has heretofore received in the literature of criminal law, primarily because it provides a more rigorous foundation for assertions about values that otherwise sound like ipse dixits.}

\footnote{362. J. Rawls, A Theory of Justice (1971).}
develops an elegant critique of the indifference of utilitarianism to the problems of allocation. He does so by turning the very tools of utilitarianism—economic utility theory—against it. This contribution alone is important because otherwise the arguments of the natural law theorist and the positivist tend to pass each other like ships in the night without meaningful interchange. Thus, the balance of this article will focus on the application of Rawls' techniques to the theory of punishment in order to develop a countermodel based on the foundation he laid.\footnote{363. The model outlined will treat punishment as a problem in distributive justice. Rawls, however, seems to assign all problems of criminal justice to a different category that he calls “partial compliance theory.” \textit{Id.} at 315. In this area, he simply refers the reader to H.L.A. Hart, see \textit{Id.} at 241 n.25, and emphasizes that punishment is “not simply a scheme of taxes and burdens designed to put a price on certain forms of conduct.” \textit{Id.} at 314-15. Even if the criminal law is more than a simple taxing system, one can use Rawls' own concepts in evaluating the fairness of the tariffs it assesses; indeed Rawls has seemingly acknowledged this elsewhere. See Rawls, \textit{supra} note 253, at 62, 63 n.14. Moreover, economists such as Posner have the better side of the argument when they assert that the criminal law should seek to optimize and reduce undesired behavior rather than eliminate it altogether, because total elimination would require excessively high penalties. See R. Posner, \textit{supra} note 311, at 164, 166. Rawls' separation of the problems of criminal justice from those of distributive justice will be considered further in text accompanying notes 424-33 \textit{infra}.}

In marked contrast to the retributionists, Rawls examines the failures of utilitarianism using a language in common with it. His central complaint is that the utilitarian’s concepts of efficiency and social benefit fail to take into account the resulting allocation of these costs and benefits.\footnote{364. See J. Rawls, \textit{supra} note 362, at 25-26, 77.} Thus, if a certain amount of individual liberty—$X$—must be surrendered to produce an aggregate social benefit—$Y$, the true utilitarian will argue that as long as $Y$ exceeds $X$, the surrender is required. Who pays the cost $X$ is not examined. For example, if the goal of general deterrence requires that offenders be sent to prison, the utilitarian is indifferent to whether one offender is sent to prison for ten years or ten offenders for one year as long as the same aggregate benefit is achieved in terms of deterrence at the same total cost. At most, the utilitarian would appeal to notions of equality to break a tie such as this,\footnote{365. See \textit{id.} at 26, 77.} and so on a slightly altered fact pattern he would prefer jailing one offender for ten years to incarcerating ten offenders for a year and a day each. This approach is, of course, blind to the fairness of the allocation.

Rawls criticizes precisely this blindness to allocation. Classical utilitarianism yields only a concept of efficiency—the greatest good at
the lowest cost. As such, this principle of efficiency, Rawls asserts, is indeterminate; a number of different allocations of costs and benefits can produce the same net result. Rawls illustrates his point using the economic concept of Pareto optimality. Assume that curve AB below represents the maximum outputs that can result as the allocation of some scarce resource is shifted between two contending goods. For example, in the familiar hypothetical, how should a fixed amount of government spending be allocated between guns and butter? Each point on the curve represents some maximum combination of guns and butter that can be produced as a fixed sum of money is allocated between them.

The curve AB can be said to be Pareto optimal as long as no redistribution exists that increases the available quantity of one good without decreasing the quantity of the other. Points 1, 2, and 3 on this curve are equally optimal, while point 4 is suboptimal, because point 2 yields the same quantity of butter with more guns. The AB curve is therefore efficient but indeterminate because it fails to yield a single

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366. See id. at 66-75.
367. Id. at 69.
368. Id. at 67-69, 75.
best point. Although we know we should choose a point on the AB curve, we can debate which trade-off is better.

To solve this problem of indeterminacy Rawls advocates reliance on a principle of justice, and then offers such a principle—what he terms the difference principle. Before explaining that principle, however, it is essential to describe the process by which he derives it.

Approaching the task of developing a satisfactory political theory by the same social contract route earlier followed by Hobbes, Locke, and Rousseau, Rawls argues that principles about the fairness of social institutions must be assessed from an “original position” in which those framing the principles are unaware of, and thus uninfluenced by, their own social rank or position. Behind this “veil of ignorance” representative citizens, fully aware of the structure of society yet blind to their own interests or position in that society, would choose two principles of distributive justice. Under Rawls’ first principle, “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.”

The more important principle for our purposes, however, is the second one, the difference principle, which holds that “social and economic inequalities . . . are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.” In his final restatement of this principle, Rawls advocates that social institutions “be arranged so that they are to the greatest benefit of the least advantaged.” In other words, not knowing whether they were slaves or masters, the representative framers of our social contract would choose principles that abolish slavery. They would do so even if slavery were shown to maximize social welfare, for to summarize Rawls’ key criterion, an institutional structure is just if, and only if, it is designed so that its “worst-off group” is at least as well off as the worst-off group (not necessarily the same group) under any alternative structure. As an operating rule, this criterion means that we should respond to significant issues of social choice by seeking to attain the best possible position for the representative worst-off group. In short, allocation has become as

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369. Id. at 68, 75.
370. Id. at 11-12.
371. Id. at 12.
372. Id. at 14-15.
373. Id. at 60, 14.
374. Id. at 14-15. The difference principle is given various restatements throughout A Theory of Justice. See id. at 60-61, 75-80, 302-03.
375. Id. at 302.
376. The best concise description of Rawls’ position is to be found in R. Nozick, supra note 290, at 183-97. I here paraphrase his summary. See id. at 190.
What does all this have to do with punishment? This article’s answer is that punishment is one of those social values such as “liberty and opportunity, income and wealth and the bases of self-respect” that under Rawls’ system must be “distributed equally unless an unequal distribution is to everyone’s advantage.” Indeed, this answer seems to follow as the third step in an unavoidable syllogism, once the difference principle is postulated and punishment is recognized as an important social institution.

Concededly, Rawls or his disciples might not agree that the rules for allocation of punishment should be subsumed under the difference principle. For the moment, however, the critical issue is whether prediction tables and other status-sensitive devices actually offend the difference principle. Although such tables may treat lower class or minority group offenders more harshly than other offenders, it still might be argued that if the problem of crime were serious enough, the worst-off group would be benefited more by a reduction in crime than by the elimination of status-sensitive prediction devices. Indeed, because crime rates are notoriously higher in urban and ghetto areas, the least fortunate in society may be the very group most victimized by crime. The difference principle requires not absolute equality, but only that any inequality be to the advantage of the worst-off group. Thus, is it not possible that the worst-off group—on whom the incidence of crime falls most heavily—would be less concerned about a discriminatory system than about a higher crime rate?

This is a serious question. To examine it, we need to take a much closer look at the tools by which Rawls developed his difference principle. Two are of particular relevance: (1) the “maximin” rule, and (2) the Pareto optimality concept noted earlier. Together, they can be used to demonstrate that within a Rawlsian framework, reasonable individuals would be extremely risk averse when faced with a punishment structure which utilizes nonculpable socio-economic criteria, at least if other alternatives could produce the same social benefit.

The first of these two concepts is best illustrated by the classic prisoners dilemma problem. To the game theorist, this problem is

378. Id. at 62. This statement is the crux, Rawls asserts, of his “more general conception of justice,” of which his two principles are “special case[s].” Id.
379. See note 363 supra and text accompanying notes 424-33 infra.
381. I here borrow an example from A Theory of Justice. Id. at 269 n.9.
known as a two-person, noncooperative, nonzero-sum game.\textsuperscript{382}

Assume there are two prisoners, A and B, who cannot communicate and are being interrogated separately about a crime in which they were coconspirators. Each knows that if the other confesses and turns state's evidence and he does not, he will receive a long sentence—life—and the other a short sentence—two years. If neither confesses both will go free, and if both confess each will receive a medium term of five years. Hence, the situation is inherently unstable. The various outcomes may be plotted as follows:

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<tr>
<th></th>
<th>A</th>
<th>B</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Decision</td>
<td>No Confession</td>
</tr>
<tr>
<td>No</td>
<td></td>
<td>0,0</td>
</tr>
<tr>
<td>Confession</td>
<td>2, life</td>
<td>5, 5</td>
</tr>
</tbody>
</table>

Because neither can control what the other will do, each faces two possible outcome ranges. For example, if A confesses he may be sentenced to terms of two or five years. If he does not he will be released or sentenced to life imprisonment. In comparing these alternatives and deciding whether to confess, A must decide whether to rank them in terms of the best or the worst outcomes—release as opposed to two years, or five years as opposed to life. Game theorists have developed a well-recognized rule for such situations: The reasonable person should choose the alternative that results in the best worst-outcome; he should maximize the minimum outcome, or "maximin." Thus, our hypothetical prisoner A should spurn the chance at freedom, because it carries with it the possibility of an unacceptable cost—life in prison—and accept the relative safety of confession. This maximin rule should be employed, game theorists maintain, when the costs of the worst outcome are unacceptable and the statistical probabilities are uncertain.\textsuperscript{383}

\textsuperscript{382} For a technical analysis of the two-person, noncooperative, nonzero-sum game and its application to the prisoner's dilemma, see R.D. Luce & H. Raiffa, Games and Decisions 88-113 (1957). The authors warn their readers that this model entails special preconditions and cannot be applied generally. Id. at 88-89.

\textsuperscript{383} See J. Rawls, supra note 362, at 152-57. See generally R.D. Luce & H. Raiffa, supra note 382, at 275-326 (discussion of individual decision making under conditions of uncertainty; maximin rule included in list of possible decision making criteria).
Social contractors are confronted by just such conditions, Rawls says, at the original position. Uncertainty exists, the probabilities of being in the worst-off group are considerable, and the costs of being in that group are unacceptable. On this logic, Rawls maintains that the original position contractors should obey the maximin rule and therefore adopt the difference principle. Similarly, if punishment is, as here contended, a relevant social institution, the original position contractors should again opt for the best worst-outcome for the worst-off group. This means they would reject incapacitation determined by social and economic predictors, because the cost of that alternative is unacceptably high, unless there were no other means available to minimize the even worse outcome of being victimized by crime.

In applying Rawls' theory to punishment it is important to pause and take heed of the chief criticism that logicians and other technical critics have leveled at the Rawls model: We cannot know that rational people would choose the maximin rule in the original position. Noting the extreme pessimism reflected in the rule, these critics have questioned whether Rawls' original position contractors would be as risk averse as he claims. The comments of welfare economist A. K. Sen are representative:

The theory of decision-making under uncertainty does not yield very definite conclusions on problems of this kind. Certainly with a predominantly pessimistic outlook, the maximin rule will be the only one to choose.... In several institutional questions the appeal of the maximin approach is well demonstrated by Rawls. Nevertheless, the fact remains that Rawls' maximin solution is a very special one and the assertion that it must be chosen in the original position is not altogether convincing.... To choose one particular decision rule, viz, maximin, out of many may be appropriate sometime, but to claim that it must be chosen by rational individuals in the "original position" seems to be a rather severe assumption.

Rawls' choice of the maximin rule may be correct for some decisions, but not necessarily for all. Even so, the critical point here is that even if Rawls overstated the applicability of the maximin rule for a

385. Id.
386. A.K. SEN, supra note 287, at 140.
universal theory of justice, it remains the correct model for our special case, the theory of punishment, which operates within the narrow context of extreme risk.

Punishment is different. In no other situation is it likely that reasonable people would be as risk averse. To paraphrase Samuel Johnson, nothing concentrates the mind like the knowledge that one is to be hanged. In short, the prospect of punishment involves unacceptable costs and entails considerable uncertainty. Thus, even if reasonable individuals in the original position might prefer a social structure favoring the upward mobile over the more egalitarian Rawlsian system, they should retreat to the maximin rule when confronted with the possibility of a social institution that measures imprisonment based on socioeconomic criteria that disfavor the worst-off. For our purposes, nothing more need be established about the rules for decisionmaking under uncertainty.

But one final counterargument remains. Given that the maximin rules should be followed, what is the worst possible outcome it tells us to avoid? Does not the victim of a serious crime suffer a worse outcome than the offender who is sentenced to a marginally extended prison term? If so, the maximin rule might be read to require rather than reject incapacitation. But there is an answer to this criticism. There are alternatives to the prediction table that can generate the same degree of social protection; in fact, the table basically serves not to increase benefits but to reduce total costs by concentrating them on the higher risk offender. Because neither the prediction table nor any other approach totally obviates the risks of being the victim of a serious crime, the rational strategy is to employ those alternative means if they leave us no worse off vis-à-vis death—or any other worst possible outcome—while enabling us to avoid the second worst category of outcomes, preventive confinement based in part on social status.

To understand the argument in favor of employing alternative means that hold the individual no worse off with respect to the

387. This is particularly true when devices such as the Salient Factor Score result in only marginal enhancement of punishment, on the order of six months to a year, for those in the higher risk group. See notes 47-50 supra and accompanying text.

388. In other words, once we have maximized the minimum outcome, the next step from the pessimistic viewpoint of the maximin rule should be to maximize the second worst outcome for those in the worst-off group. If two alternative social policies produce the same level of protection from the worst possible outcome (murder, rape, injury, etc.), we should focus next on which allocates the lesser cost to the worst-off group. Rawls also suggests that we must consider the second worst outcome after we have dealt with the first. See J. Rawls, supra note 362, at 83 (advocating maximization of successive worst-off groups until welfare of best-off group maximized).
arguably greater danger, it is necessary to return to our earlier concept of Pareto optimality. In a variant of the difference principle, Rawls argues that an inequality is not justified if some other institutional structure will produce the same desired benefit with less inequality. Because the unique feature of prediction tables is the precision with which they calculate the relative risk of recidivism presented by various classes of offenders, such tables enable us to quantify the social benefit we expect to realize from them. By the same token, they also permit us to consider alternative routes to the same end.

Let us consider the following heuristically simplified example. Assume our only interest for the moment is in incapacitation, which is, after all, the raison d'être of such tables, and that a hypothetical table can segregate offenders into two groups as follows: (1) a high-risk group having as a group a 60% chance of recidivism within two years, and (2) a low-risk group having a 40% risk over the same period. Possessing this knowledge, a Parole Commission adopts a guideline system that for a given crime assigns four years confinement to the high-risk group and two years to the low-risk group. We can now quantify the expected social gain. If each risk group has a population of 1,000 offenders, we have interdicted 600 criminal careers for an additional two years by doubling the sentence of the high-risk group. Now the issue becomes what other alternatives produce the same coldblooded social benefit with less inequality. The answer is most easily visualized schematically:

![Diagram](image)

<table>
<thead>
<tr>
<th>High Risk Group</th>
<th>Low Risk Group</th>
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<tbody>
<tr>
<td>(0,0)</td>
<td>(8,0)</td>
</tr>
<tr>
<td>(2,4)</td>
<td></td>
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<tr>
<td>(3,2, 3.2)</td>
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<td>(5,2)</td>
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<td>(½,5)</td>
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</tbody>
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389. See notes 368-69 *supra* and accompanying text.
391. It is necessary, however, to distinguish prediction tables from guideline systems in general, because the latter have other functions: they structure discretion, reduce disparities, and so produce more equality. But prediction of future misconduct is a means of achieving only incapacitation; it cannot achieve general deterrence or retribution.
Point A, with the coordinates 2 and 4, represents the sentences assigned by our hypothetical guideline system. We know that the marginal effect of such a differentiated sentencing structure is to interdict temporarily 500 more criminal careers than does a system that simply assigns two years to all offenders convicted of the same crime. Calculated differently, the total benefit is the interdiction of 3,200 man-years of criminal careers—400 low-risk group offenders times two years plus 600 high-risk group offenders times four years. But now consider point B with the coordinates 0.5 and 5. By assigning five years to the high risk group and six months to the low risk group, the total sum of criminal man-years interdicted is still 3,200, though of course, the relative inequality has increased. Next, for the sake of deliberate perversity, consider point C, with the coordinates 8 and 0. Here, the low-risk group receives eight years and the high-risk group receives probation. Although this allocation may appear insane, the total benefit under our formula remains constant at 3,200.

Of course, parameters must be placed on the operation of any system. On the other hand, the eighth amendment limits the maximum sentence that may be assigned to any person or group. In turn, the goal of general deterrence should generate minimum boundaries. Otherwise there would not be an adequate disincentive for other persons who resemble the group given the lower sentence. Finally, consider point D with the coordinates 3.2 and 3.2. Now we have an "equal" resolution that also produces the same constant benefit of 3,200.

Connecting these points with line BC, it is possible to speak of this line as Pareto optimal in the sense that all points yield the same level of efficiency, albeit at different costs. It is impossible both to hold constant the total amount of incapacitation desired—3,200 man-years—and also to change the position of either risk group to make it better off without also making the other group worse off. Once again then, we face the problem that a principle of efficiency standing alone yields an indeterminate solution. The Rawlsian catechism at this point seemingly dictates that we turn to a principle of justice—the difference principle—and choose the alternative that minimizes the inequality, obviously point D with its equal coordinates.

The close observer may have noticed with some dismay, however, that the various points on line BC involve very different costs when the total prisoner population is considered. Point D, which is only the

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392. To be sure, the mere risk of conviction may be sufficient to deter some, because of the associated stigma and possible civil penalties and forfeitures attached. Thus, it is possible that the minimum boundary could consist of a guideline sentence of zero to six months.
weighted average of 4 and 2 given the different populations of recidivists in the two groups, raises the per unit cost of incapacitation over that of point B or A. That is, although all the points on line BC produce the same benefit in terms of the interdiction of crime, the cost of point D for the total prisoner population is substantially higher than that of point A. At point D we have imprisoned 2,000 citizens for an average of 3.2 years each for a total of 6,400 man-years, as opposed to only 6,000 man-years at point A, the sum of 4,000 high-risk years plus 2,000 low-risk years. In short, we pay a price for equality—400 man years in the above example. The pure utilitarian sees the same benefit obtainable at a lower cost and concludes that point A is more efficient, or indeed that point B is the most efficient. The Rawlsian observer, however, believes that efficiency must be subordinated to justice. Rawls has argued that a less efficient but more fair allocation must be preferred: “In justice as fairness, the principles of justice are prior to considerations of efficiency . . . .”

Thus, using a similar diagram, Rawls adds that even non-Pareto optimal points below and interior to our line BC must be chosen over “efficient points which represent unjust distributions.” In favor of such a conclusion, it may well be argued that, given the choice, the rational individual would be risk averse and would follow the maximin rule, thereby choosing the certainty of 3.2 years over the possibility that a differentiated system might assign him a substantially longer sentence.

Whatever the Rawlsian would argue, however, the debate does not end here. A grim trade-off persists between liberty and equality. The principle that like cases should be treated alike, from a backward-looking perspective focused on culpability, appears to collide here with the libertarian principle that the least drastic alternative should govern the application of punishment.

If we descend from the abstract unreality of economic utility theory to a world of greater factual complexity, it is possible that this egalitarian prescription derived from Rawls may entail a lower cost than first appears likely. If at present some 45% of offenders receive probation while a few selected offenders receive long term sentences, the weighted average sentence necessary to achieve equality
among similarly situated offenders may be lower than it first appears. Still, a host of other objections to flat-time sentencing materializes. For example, longer average sentences may acculturate offenders to crime and breed more criminals,\(^{397}\) the families of offenders also will be adversely affected, and some persons will suffer more from imprisonment than others. A partial reply to these objections is that made earlier in the discussion of Professor Posner's model: Loss spreading reduces the aggregate suffering because it is easier to bear a deprivation that others are also experiencing. The evidence for this proposition, however, is more intuitive than empirical, and welfare economists have long debated whether interpersonal comparisons of such a kind are possible at all.\(^{398}\)

But there exists another solution to this conflict between libertarian and egalitarian principles. A Rawlsian approach does not necessarily mandate rejection of either incapacitation or the prediction table.\(^{399}\) It simply holds that reliance on socioeconomic criteria that prejudice the worst-off group violates the central axiom of the difference principle. To honor that principle we need not abandon statistical prediction; we need only observe a side constraint that rejects the use of status as a means of prediction. Other factors have predictive validity, and most prediction tables are already primarily based on indicators such as prior convictions and incarcerations, which relate to culpability.\(^{400}\) The conflict between predictability and fairness can be avoided by turning to prediction systems based on prior criminal conduct rather than social or economic status.\(^{401}\) Any loss in predictive efficiency

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397. But see Beck & Hoffman, supra note 173, at 127 (longer imprisonment not criminogenic). While the evidence is not conclusive for either side in this debate, it is arguable that when forced to make a decision under conditions of uncertainty, we should at least provisionally opt for more equal sentences and respond to the argument that this will produce more offenders prone toward recidivism only when that argument has been more fully demonstrated.

398. See A.K. Sen, supra note 287, at 4-5.

399. Indeed, there are circumstances under which Rawls expressly rationalizes preventive confinement. See J. Rawls, supra note 362, at 242-43. Rawls' rationale simply requires that the justification for such confinement not be based on the utilitarian balancing of the good for most against the loss to some, but on the preservation of "basic equal liberties" for all. Id. Punishing the more culpable with greater severity but within retributive limits achieves a social good, namely crime prevention, at a lesser cost than equal sentences for all, and thus satisfies utilitarian goals without offending the Rawlsian notion of basic equal liberties. See notes 413-16 infra and accompanying text.

400. See text accompanying notes 134-50 supra.

401. Why do sentences based on prior misconduct not also violate the difference principle when they result in longer terms of imprisonment for minority group offenders than for others? The Research Director of the Parole Commission has informed me that no variable on the Salient Factor Score was more racially sensitive than prior convictions. Interview with Dr. Peter Hoffman, Director of Research, United States Parole Commission (March 22, 1978). But the difference principle is not applicable, according to Rawls, to the consequences of voluntary action. See note 418 infra. Rawls distinguishes between inequalities of birth and inequalities arising from "men's voluntary actions," and applies his principle only to the former. J. Rawls, supra note 362, at 96.
caused by the elimination of variables unrelated to relative blameworthiness can be compensated for by raising the average sentence.

To return to our earlier example of the 60% recidivist high-risk group and the 40% recidivist low-risk group, we may find that the elimination of neutral socioeconomic variables reduces our predictive efficiency. Assume that after we purge our prediction table of all variables unrelated to culpability, the expected recidivism rate of the high-risk group falls from 60% to 55% with a necessarily corresponding increase in the expected recidivism rate of the low-risk group from 40% to 45%. The membership of the two groups may also change by an even greater amount, but in any case the total number of recidivists will remain constant because we are dealing with the same population but only subdividing it differently. The result of this decline in predictive efficiency is that it would now take more incapacitation to obtain the same aggregate amount of social protection.

Rather than choose point D, which designates equal sentences, it now seems fair to choose a point on line BC whose coordinates assign to the low-risk group two-year sentences, or whatever minimum sentence seems desirable from the standpoint of deterrence or incapacitation, and to the high-risk group that longer sentence necessary to hold constant the level of incapacitation desired. For example, point A (with coordinates 2 and 4) would produce approximately the same benefit in terms of the interdiction of recidivist criminal careers, but with less total deprivation of liberty than point D. By extending the high-risk sentence to 4.18, the total incapacitation could be held exactly constant. It is not suggested that any fixed point is mandated, but only that we can make conscious choices, based on our justifying aim for imprisonment, that do not involve measuring punishment based on status.

Of course, some problems will remain regarding equality among offenders. For example, is the difference in degree of culpability between two groups in our hypothetical sufficient to justify the disparity between the sentences at coordinates 2 and 4? If it is not, we can move the sentence closer to a weighted average of the two, thereby sacrificing once again a degree of liberty as the price of equality. In short, discretion is largely preserved under such a model. Nothing forces us to hold sentences strictly proportional to culpability; instead, a far less intrusive negative injunction commands us only to forego prediction systems that are unnecessarily adverse to the least favored within society.
E. A COMPARISON OF THE EGALITARIAN AND RETRIBUTIVE MODELS

Heuristic examples have a way of antagonizing readers. Either they seem unreal and irrelevant, or the reader may begin to feel that he has been patronized and force fed an ideological position that is either less novel or more questionable in its assumptions than the author is willing to acknowledge. For the reader who has now patiently plodded through such an example, two questions may stand out to make him wonder whether it has been worth the effort to journey so far afield from the comfortable homeland of case law.

- If the Constitution did not enact Mr. Herbert Spencer’s Social Statics, presumably neither will it enact Mr. John Rawls’ A Theory of Justice. In short, what is the relevance of jurisprudential arguments that cannot be directly addressed to courts?
- Does not the foregoing model simply follow a less traveled path to produce the same results as the retributive model of Doing Justice? Both approaches seem to key the allocation of punishment to relative blameworthiness and reject reliance on socioeconomic criteria unrelated to culpability. Is not the proposed model simply a more complicated route to the same end?

The issue, then, is whether the game has been worth the candle. Several overlapping reasons can briefly be given to point out both the operational differences between the two models and the importance of the abstract foundation on which we rest any applied theory of punishment.

Initially, our purpose was to demonstrate that if we could not accept the naked utilitarian justification for punishment, we could better articulate our objections by using the Rawlsian syntax than by resorting to highly subjective natural law concepts such as retribution. On the narrowest of grounds—that of Ockham’s Razor—\(^{403}\) a Rawlsian model takes us to our goal more directly: We adopt the principle of justice that we claim reasonable men, blind to their own position, would be forced to choose. In contrast, the starting point of the retributive model involves a more mysterious assumption: that it is desirable to punish those who commit crimes because they “deserve” it. For many, this “just deserts” principle is the problem, because unlike deterrence or incapacitation it does not adequately explain the end that is sought. Thus, as the principle of Ockham’s Razor teaches,


\(^{403}\) William of Ockham, a fourteenth century English philosopher, first formulated the rule—known as Ockham’s Razor—that superfluous concepts are to be avoided and the simplest model that explains the observed phenomena should be preferred.
unnecessary arguments are to be avoided; here the superfluous concept is retribution, and it can be eliminated by focusing on Rawlsian principles of justice.

In addition, the rationale of retribution is not only mysterious in its subjectivity; it is also dangerous. Abstract concepts can develop a momentum of their own, sweeping up theorists and technicians in their wake. Keynes said it best when he noted that even the most practical man of affairs is often at heart the slave of some defunct economist. Here, the dangers of legitimizing retribution, pointed to earlier, also show the importance of how we articulate ideas. Concededly, it is unlikely that courts will ever read the equal protection clause as if it had been written by Rawls' representative citizens in the original position. But such models do shape the consciousness of so-called practical men, and in so doing they shape the jurisprudential framework within which practical men of law, including the new sentencing bureaucrats, will labor.

In addition to these theoretical distinctions, major operational differences between the Rawlsian and retributionist approaches should be noted. First, our proposed model is essentially Janus-faced in allowing us to look both ways—forward to prevention in justifying punishment and backward to culpability in framing a side constraint on the allocation of punishment. In contrast, a purely backward-looking system must inquire into what level of punishment is deserved by a given offense—an inquiry that often seems hopelessly subjective. Under the suggested model, one could begin instead by seeking to establish the desired "expected punishment cost," to borrow Posner's phrase but not his formula for deriving it. Having thus looked forward to prevention, we would then look backward to determine that the allocation of that cost treats like cases alike.

In short, the minimal allocation requirement is not a rigid scale of proportionality between offenses, but only a scale under which persons guilty of the same offense are not differentiated in a way that violates side constraints protecting the least favored. For example, from the retributive perspective the spouse murderer commits a crime of high gravity, but from a prospective orientation that crime requires a relatively low expected punishment cost. Because no punishment is required under our model for nonutilitarian reasons, the sentence assigned to the spouse murderer may be equal or even

404. Cases such as McGinnis v. Royster, 410 U.S. 263 (1973), do suggest that there is little possibility that courts will utilize the equal protection clause to invalidate punishment allocation decisions that bear a reasonable relationship to some legitimate objective. As noted earlier, however, there are hints in the dicta of earlier constitutional decisions that punishment should be proportional to culpability. See note 69 supra.

405. R. POSNER, supra note 311, at 165.
less than that given the extortionist or the armed robber, whose crimes are less serious but more deterrable and more likely of repetition. By no means is a common sense scale of proportionality irrelevant, but under the proposed model it should serve as a prudential guide rather than a fixed star.

The implementation of expected punishment costs may not sound feasible. Yet with the advent of quasi-administrative sentencing agencies, it is now within the realm of the possible. These institutions eventually will be in a position to do what the individual sentencing judge cannot do—take a systemwide view. From such perspective, the agency should be able to determine (1) the desired aggregate punishment cost, or at the very least the amount of increase or decrease desired from the current level; (2) the probable number of individuals coming before it—the relevant offender pool within which that aggregate cost would have to be allocated; and (3) a fair ceiling on the per unit cost allocable to any one individual, in essence the retributive limit concept.

Another virtue of the retention by the proposed model of a forward-looking prevention orientation is the flexibility it offers. A backward-looking perspective is largely static; it cannot easily change its view of the relative culpability of a particular crime simply because of a need for greater social protection. Assume a particular crime, such as drug sales or antitrust violations, reaches epidemic proportions. To defend itself society wishes to raise the expected punishment cost. Under a retributive model, this would be a difficult matter, because the fact that “everyone is doing it” hardly increases the gravity of an offense. Rather, it tends to diminish it.

406. A far more complex approach to determining the optimum sentence length through cost-benefit analysis has been recently suggested by a University of Illinois research team headed by Professor Stuart Nagel. They would determine a recidivism cost curve and an incarceration cost curve and, after plotting them on the same graph, set the standard sentence at their intersection. Innovative and novel as their approach is, I remain skeptical as to whether these costs are truly comparable and whether their proposals show the full human costs of either recidivism or incarceration. Research, however, has begun in Illinois on how these proposals might be implemented. See Nagel, Neef & Weiman, A Rational Method for Determining Prison Sentences, 61 JUDICATURE 371 (1978).

407. Packer has suggested that not only do the retributive and incapacitative rationales produce different results on given facts, but they naturally tend toward diametrically opposed results: “Baldly put, the incapacitative theory is at its strongest for those who, in retributive terms, are the least deserving of punishment.” H. PACKER, supra note 253, at 50-51. The incapacitative claim is weakest, he added, for the gravest offenses, and deterrence as a justification works far better against “high-risk deliberate crimes and crimes committed by the law-abiding” than against other crimes that may be at least as serious from a retributive perspective. Id. at 269. Zimring and Hawkins have reached a similar conclusion that a deterrence-based rationale for punishment may result in an allocation that is inversely proportional to culpability. F. ZIMRING & G. HAWKINS, supra note 264, at 41.
increased popularity of some crimes does give rise to a need for greater deterrence. Thus, another comparative advantage of our proposed model is that we can periodically raise the punishment cost to respond to changing circumstances without employing the strained intellectual rationalizations that would be necessary under a retributive model. Equally important, we can reduce that cost once the epidemic subsides, thereby achieving greater parsimony in the use of punishment. How does this differ from the use of exemplary sentences previously criticized? Here we are spreading costs; under our retrospective allocation principle, all offenders receive the same level of punishment, subject to variation only for differences in their degree of culpability. A select few are not isolated as scapegoats.

In sum, these differences indicate that egalitarian side constraints involve a less fundamental frustration of the preventive aims of a utilitarian criminal justice system than does the imposition of a retributive framework. At worst, the proposed model raises the costs of achieving our aims by preventing the use in some instances of highly predictive criteria that fail the difference principle test. This is a far lesser sacrifice than under a retributive theory that would force the criminal justice system to change its end goal from prevention to the dispensation of just deserts.

A final operational difference between a retributive model and an egalitarian one involves their differing use of information suggestive of culpability. Doing Justice suggests that one must look at the individual’s prior crimes. Others would go much further. Certainly, current sentencing law allows evidence of uncharged crimes and even misconduct short of crime to be considered at sentencing as a basis for enhanced punishment. But what if such information has no measurable predictive power? Under a retributive model, this is not relevant: the more blameworthy deserve more punishment. Under our proposed system, we need respond only to gross differences in culpability that relate to some utilitarian consideration. The real difference here is likely to be in the degree of inquiry into the offender’s past history that the two rival models tend to encourage. If we postulate as our first principle that punishment must be

408. See J. Rawls, supra note 362, at 242-43.
409. See notes 358-59 supra and accompanying text (views of Professors Gardner and Goldstein).
410. See, e.g., United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972) (evidence relating to charges may be considered at sentencing despite defendant’s acquittal; acquittal does not disprove all evidence introduced against defendant); United States v. Doyle, 348 F.2d 715, 721 (2d Cir.) (counts dismissed from indictment because of statute of limitations may be considered in sentencing; criminal activity of defendant, particularly activity related to instant crime, highly relevant), cert. denied, 382 U.S. 843 (1965).
proportional to culpability, we authorize a more elaborate inquiry into
the offender’s past life and general character. The current
presentence inquiry already errs in this direction, and the substitution
of a “just deserts” model for a “treatment” model may only change
the type of information sought. If, as argued earlier, a zealous attempt
to unearth all signs of an individual’s prior culpability tends to
produce an impressionistic methodology, one that will most likely
prejudice that social underclass relatively more exposed to institu-
tionalized recordkeeping, then another basis exists for preferring
the proposed model over a retributive one. Other social values are
also implicated here: Even the ex-offender deserves some measure of
privacy and a “forgiveness point” at which old records self-
destruct. The tendency of a system of punishment geared to
relative culpability is to override these values.

A counterargument surfaces here. Is not this willingness to be
nearsighted about evidence of culpability inconsistent with the
proposed egalitarian side constraint when persons unequal in terms of
prior culpability receive the same sentence? At this point it seems
necessary to refine the concept of equality that arises from the
difference principle. Traditionally, the idea of equality among
offenders has been understood as having two components: Like cases
should be treated alike, and unlike cases should be treated
differently. Surprisingly, it is hard to find a theorist who has
considered whether we can accept the first proposition without fully
endorsing the second. Any system of punishment, however, inevitably
treats dissimilar persons similarly when it places a ceiling on
punishment. This would occur even in capital cases unless different,
excruciating tortures were devised for the most culpable.

411. See Coffee, supra note 13, at 1394-1405, 1458-62; text accompanying notes 33-35, 209-
10 supra.

412. See Coffee, supra note 13, at 1395, 1459-60 nn.370 & 371. Old police and juvenile records
may be of little predictive value because of staleness; while records remain static, the individuals
described change over time. Moreover, such reports may be highly prejudicial, subject as they are
to “Gresham’s Law of Information”: the unfavorable information overtakes the favorable
information because it is easier for a probation or parole officer to rely on outdated accounts than
to conduct his own independent investigation. Finally, the application of old records to a new
context may be of questionable validity. Id. at 1395. It may therefore be desirable to reduce
information disparities by generally restricting the decisionmaking process to classes of data that
are available on a relatively equal basis for all offenders, thus excising reports resulting from the
subject’s overexposure to recordkeeping. Id. at 1459-60.

413. See, e.g., H.L.A. HART, supra note 253, at 24-25, 172.

414. Because death was used more commonly as a sanction for crime, medieval thinkers
worried about this problem and sought to devise crueler forms of execution for the more severe
varieties of capital offenses, lest criminals who committed a capital offense would face no
disincentive to commit additional crimes. See R. POSNER, supra note 311, at 171.
The difference principle standing alone only partially incorporates these two ideas. Because it focuses on structural inequalities that disfavor the social underclass, it requires as its minimum side constraint only that disproportionate punishment not be imposed on members of that class for reasons unrelated to individual culpability. Strictly interpreted, the difference principle does no more; inherently, it is not offended by treating members of more favored classes, such as white collar offenders, more harshly than would be justified under a retributive scale of offense gravity. It would thus be permissible to set a higher per unit punishment cost for a white collar crime that had reached an epidemic stage than that concurrently imposed for crimes of higher gravity.\textsuperscript{415} Nor is the difference principle offended by treating unlike cases similarly if we accomplish this result by compressing the punishment scale; thus, for example, use of probation as a sentencing alternative seems more compatible with an egalitarian model than a retributive one. This is not to argue that we should abandon either of these traditional rules of equality, which can be defended on the utilitarian ground that the appearance of justice and a respect for common morality must be maintained if the system is to be respected. But again, we find that the side constraints of this model impose fewer restrictions on our preventive aims than would a retributive approach. A scale of proportionality among offenses seems required under a strict interpretation of the difference principle only to the extent necessary to preclude disproportionately high punishment costs for crimes that are disproportionately committed by the worst-off group.\textsuperscript{416}

On the continuum of currently available theories of punishment, the model now outlined probably fits somewhere between those of Morris and Doing Justice. The zone of indeterminacy permitted by the Morris model is here reduced by an allocation principle that generally

\footnotesize{\textsuperscript{415} Note, however, that because our basic justification was preventive, we must believe that such increased punishment would result in greater deterrence, and the penalty must still be within an outer retributive limit.\

\textsuperscript{416} Although crimes are the result of voluntary action and differences in sentence lengths do not automatically offend the difference principle should they adversely affect the worst-off groups, see note 401 supra, structural inequalities between the amount of punishment given for different crimes of similar gravity does offend the quintessential Rawlsian notion of "basic equal liberties" if the disparity prejudices the worst-off group. This problem is aggravated by the tendency of different groups to commit different crimes. See note 399 supra. The converse is not necessarily true, however, because members of better-off groups already enjoy more advantages, which can be justified within a Rawlsian framework only if such inequality improves the position of the worst-off. Therefore, to assess a higher expected punishment cost against such better-off groups only restores the balance and does not necessarily violate the idea of basic equal liberties. Put differently, it constitutes not a discriminatory pricing system, but a form of progressive taxation. See note 318 supra.}
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will produce either equality in sentences assigned persons who have committed the same level of offense, or proportionality in accordance with their prior culpability.\textsuperscript{417}

F. SOME FINAL COUNTERARGUMENTS: THE ASSUMPTION OF RISK OBJECTION AND THE CLAIMED PRIORITY FOR LIBERTY

Tempting as it might be to write Q.E.D. at this point, some objections must still be addressed concerning whether one can utilize the difference principle as the basis for developing a theory of punishment. These counterarguments are:

(1) Participation in crime is voluntary; punishment, therefore, even if unequal, is knowingly risked and hence not unfair;\textsuperscript{418}

(2) A theory of punishment should not have to meet the standards of an ideal normative theory such as that developed by Rawls, but may instead be judged by less rigorous standards;\textsuperscript{419} and

(3) When trade-offs exist between liberty and equality, the Rawlsian system itself always assigns a clear-cut priority to liberty.\textsuperscript{420}

The first of these arguments derives apparent support from the Rawlsian catechism which holds that “inequalities... arising from men’s voluntary actions” are not inherently unjust.\textsuperscript{421} Obviously, some distinction between voluntary and involuntary actions is inevitable. It would be beyond the capacity of any social structure to hold everyone harmless for differences in wealth or power brought about through their own volition. Moreover, the internal mechanics of

\textsuperscript{417} Morris rejected, for sentencing purposes, the concept of enhanced punishment based on the prediction of dangerousness or future misconduct of the particular defendant, but he accepted the enhancement of punishment within an outer retributive limit in order to achieve general deterrence. See N. Morris, supra note 2, at 76. Once we no longer seek to reconcile utilitarian and retributive concepts in one model, but seek only to circumscribe a utilitarian model with an egalitarian side constraint borrowed from Rawls, it becomes possible to predict future recidivism within Morris’ zone of indeterminacy on the basis of prior culpable acts. To permit, of course, is not to require, and some methodological obstacles may remain, although the success of the Salient Factor Score suggests they are not insurmountable.

\textsuperscript{418} Rawls states that the difference principle does not apply to the consequences of voluntary actions. See note 401 supra.

\textsuperscript{419} Cf. J. Rawls, supra note 362, at 241-43, 315 (“question of criminal justice belongs for the most part to the partial compliance theory”).

\textsuperscript{420} See id. at 243-51, 541-48.

\textsuperscript{421} See id. at 96.
the Rawlsian system would break down if the relative position of groups in society, and hence that of the worst-off group, were to be determined in part on the basis of voluntary decisions. Consider the absurdity of deeming prisoners the relevant worst-off group. To justify the imposition of punishment, the difference principle would then require a showing that punishment worked to the advantage of the worst-off group—a virtual impossibility now that the age of faith in rehabilitation has ended. Not surprisingly then, Rawls emphasizes that the worst-off group is to be determined by involuntary differences, such as race, sex, or economic status.\footnote{233}

Once we follow this directive and identify the worst-off group as comprising not prisoners or criminals but that social underclass defined by limited education, substantial unemployment, long term poverty, and typically minority group status, we must still examine whether a particular system of punishment improves the welfare of that group as much as would an alternative system of punishment that produces the same level of social protection. We may thus consider how a particular institution (punishment) treats voluntary action taken by the worst-off group. Our system of punishment is in part a taxing system. If it charges a discriminatory price by using status-sensitive criteria, that price is not beyond the scrutiny of the difference principle simply because the conduct taxed was voluntarily undertaken.\footnote{234} To confer a wider immunity on voluntary actions from the operation of the difference principle would be to overread Rawls, whose purpose here is only to set up a limiting criterion by which to define his least-favored group. Where the reason for the rule stops, so should the rule.

The second argument for rejecting the difference principle—that problems of criminal justice belong not in the domain of pure theory but in that of applied theory\footnote{235}—overlaps with the question of the

\footnote{232. See id. at 99. But see text accompanying note 441 infra (discussion of the gray area in which factors relating to conduct overlap with those relating to status).

233. Put simply, voluntary action does not define the least-favored group, but once that group is properly defined we must consider whether its members are charged a higher price than others for participation in a given activity.

Questions then arise regarding the use of culpability-related predictors, as opposed to neutral socioeconomic factors, because predictors such as prior convictions tend to be disproportionately associated with minority group offenders, at least in the case of the validation of the Salient Factor Score. See text accompanying notes 127-28 supra. Two answers may be given. First, the multiple offender may legitimately be charged a higher price than the first offender because repetition of a crime is an activity qualitatively different from its original commission. Thus, the differential in penalties is nondiscriminatory. Second, the level of culpability within the worst-off group is not a relevant characteristic of that group, and only differentials in treatment that relate to the relevant characteristics of that group can offend the difference principle.

234. See note 419 supra.
consequences of voluntary action. Having assigned problems of criminal justice to partial compliance theory, Rawls seems to suggest that more relaxed standards should govern this area. Although this distinction between pure and applied theory approaches the kind of definitional stop fallacy that Hart has warned haunts all discussions of punishment, there still are two reasons why the difference principle should govern, even within the context of partial compliance theory.

First, poverty is criminogenic. The representative citizens in Rawls’ original position, therefore, would be concerned that they and their descendants might be exposed to an unequal risk of punishment. Second, and perhaps more important, if our representative citizens truly understood the structure of society, they would probably view crime in a different light than does Rawls. Studies tend to show that surprisingly high percentages of citizens have committed crimes. Legal theorists have increasingly come to view noncompliance with law as inevitable and to call for remedies aimed at reducing crime to optimum levels rather than striving for total prevention.

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425. See H.L.A. HART, supra note 253, at 5; text accompanying note 262 supra.
426. See N. MORGAN, supra note 2, at 83 (defining a “highly criminogenic social group” as one suffering “disrupted family setting in an underclass whose life experiences are typified by fortuitous involvements in crime”).
427. See J. RAWLS, supra note 362, 137-38 (original position contractors presumed to know general facts about human society, such as political affairs, economic theory, social organization, and laws of human psychology).
428. When Rawls turned to the topic of punishment, he immediately focused on the issues of responsibility and the need for a fair opportunity to ascertain the law’s directives. See id. at 241. He consigned the problems of punishment allocation largely to partial compliance theory. See id. at 315. In short, his representative citizens in the original position appear to have attended Professor Hart’s Oxford classes on mens rea, but not to have learned that noncompliance with the law is a pervasive fact in modern society.
429. For example, Marvin Wolfgang’s classic study of a birth cohort showed that over one-third of the boys studied acquired a police record. See Wolfgang, supra note 41. Yet this figure related only to the level of detected crime—crime resulting in either apprehension or some form of police-citizen contact. Various estimates suggest that only 15-25% of all crimes committed are actually reported. See R. HOOD & R. SPARKS, supra note 24, at 15 (data gathered in England). Studies of juveniles have shown that a majority of male youths have admitted at least one serious offense. See, e.g., id. at 21 (data gathered in Stockholm). Even among adults, the percentages reported for some less serious crimes and for white collar crimes has run as high as 85%. Id. at 47-51 (data based on New York study). See also Erickson & Empey, Court Records, Undetected Delinquency and Decision-making, 54 J. CRIM. L.C. & P.S. 456 (1963); Gold, Undetected Delinquent Behavior, J. OF RESEARCH IN CRIME AND DELINQUENCY 27 (1966); Short & Nye, Extent of Unrecorded Juvenile Delinquency, 49 J. CRIM. L.C. & P.S. 296 (1958). For a general assessment of self-reporting studies see F. ZIMRING & G. HAWKINS, supra note 264, at 321-27.
430. See generally R. POSNER, supra note 311, at 166; Stigler, The Optimum Enforcement of Laws, 78 J. POL. ECON. 526 (1970); Note, supra note 304. Earlier utilitarians also recognized that “a certain amount of non-observance is rather advantageous... .” Note, supra at 687 n.3 (quoting H. Sidgwick).
of the “normality of crime,” to stress its pervasiveness as a social phenomenon, and to reject the view of the criminal as qualitatively different. But the concept of the criminal as different—whether he is regarded as “sick” or as “wicked”—remains deeply embedded in the ideology of our criminal justice system. Indeed, this concept has roots in the Calvinistic origins of that system.

How we view crime and how we deal with it are closely related. If our hypothetical citizens saw crime not as a phenomenon unique to criminals but as one “common to human beings,” they would be less likely to ignore the allocation of the costs imposed. In this light, punishment emerges as a social institution that must concern the original social contractors. The relative immunity to punishment enjoyed by less disadvantaged citizens (who would be considered low risks according to prediction tables) resembles a structural inequality closely tied to social and economic circumstances. In sum, a theory of punishment is too important to the fabric of any rational society to be consigned to the second order status that Rawls seemingly gives it.

A final problem with extending the difference principle to the criminal justice context is that Rawls seems to give a priority to liberty over the value of equality. The short answer here is that “liberty” in the Rawlsian sense should not mean freedom from lawfully imposed punishments. Rawls’ first principle that all should enjoy the most extensive liberty compatible with a like liberty for others may logically be applied to questions about who may be punished, but not to questions of punishment allocation. If we view punishment as a taxing system, as does the utilitarian, the difference principle and not Rawls’ first principle naturally applies to all questions of punishment allocation. Indeed, to apply the first principle in this context would seem to force one to make seemingly self-contradictory statements. Can one, for example, meaningfully talk about the “most extensive liberty to commit crimes compatible with a like liberty for others”? Finally, even if one concludes that the first principle applies, it does not logically yield a principle of parsimony such as that offered by Morris.

431. See, e.g., R. Hood & R. Sparks, supra note 24, at 46-47; Griffiths, supra note 294, at 1416, 1402-05.
433. See Dershowitz, Background Paper, in Fair and Certain Punishment 83 (1976).
434. Griffiths, supra note 294, at 1416.
435. See J. Rawls, supra note 362, at 250 (liberty “can be restricted only for the sake of liberty”).
436. See id. at 60.
437. Id. at 60, 250.
438. N. Morris, supra note 2, at 60-62.
Rather, the first principle so used would still have its built-in rule of equality, namely that the liberty recognized must be compatible with a like degree of freedom for others. In effect, this means any sanctions imposed must be equally imposed.\textsuperscript{439}

We can now reexamine critically the tension between the goals of liberty and equality that arises when we attempt to justify a theory potentially requiring more punishment than alternatives producing the same social benefit. Whether the conflict between those goals is real or spurious depends on our definitions. If liberty means the maximization of happiness, our proposed model may involve a potentially higher cost because it may sacrifice a degree of predictive efficiency. But if we define liberty as Rawls did, to mean rights that all can possess equally, then the conflict between liberty and equality dissolves, because there cannot be a right to less than equal punishment. This does not mean that all must be punished equally or even according to their culpability; it means only that to the extent the individual can have rights in this context, the rights given by a Rawlsian system should be to equal treatment, rather than to the minimum sanction possible.

G. FROM THEORY TO PRACTICE: WHAT SHOULD A SENTENCING COMMISSION DO?

The proposed model indicates that it is unfair to allocate punishment on the basis of status, but permissible to do so on the basis of conduct. This conduct-status distinction cannot be avoided by asserting that the intent of the system is to predict recidivism rather than to discriminate deliberately.

What kind of guideline system should a Sentencing Commission then adopt? Surprisingly, it could look much the same as it does now. The important difference is that the X axis would have to be purged of predictive criteria relating to status. Once this is done, a side constraint model is compatible with a system that predicts recidivism on the basis of voluntary conduct and so increases punishment on the basis of prior culpable acts. The two axes then might compare the

\textsuperscript{439} One could read the first principle to require a rule of similar sentences for the similarly situated and hence a scale of proportionality. But to do so changes our model from one involving a side constraint to one positing end state goals, because our goal would then be to maximize equal liberty for all rather than the more modest objective of preventing a disproportionate allocation of costs to the least favored. Moreover, such goal is illusory. The interests of victims and those of offenders inevitably conflict. It is therefore nonsensical to conclude that at some level of punishment these two groups possess equal basic liberties. The difference principle supplies a superior mode of analysis because it offers a means of allocating costs but does not purport to define the aggregate punishment cost that must be imposed.
present offense and the past level of culpability—to the extent the latter positively correlates with recidivism—and thereby determine a guideline range. Other contemporary models deny us this flexibility. Norval Morris’ system wholly rejects predictions of future misconduct, and the Doing Justice model locks us into a rigid scale of proportionality, which entails various dangers.440

A final complication must be acknowledged. The line between conduct and status is frequently blurred. Indeed, most predictors fall into a gray area; they are neither purely the consequence of voluntary action nor wholly the result of involuntary status. For example, consider the use in the Salient Factor Score of prior incarcerations.441 Such a factor appears to measure the offender’s level of prior culpability. Presumably, the prior sentencing judge confined him to prison rather than releasing him on probation largely because of the severity of his crime or the existence of prior culpable acts indicated in the presentence report. This often may be the case, but it is also possible that other considerations such as race, socioeconomic status, or derivatives of that status affected the judge’s decision.442 To the extent that marked disparities exist between the rates of imprisonment for white collar offenders and for other offenders,443 prior incarcerations may serve as a measure more of the category of law previously violated than of the gravity of prior offenses.

The problem of distinguishing measures of conduct from those of status cannot be ideally resolved in a real world setting. Even if criteria such as prior incarcerations were eliminated, there would remain the problem that other, more clearly culpability-oriented factors such as prior convictions, are subject to related criticisms. Apprehension rates, for instance, differ markedly for different crimes. Nevertheless, although the dividing line between conduct and status is often blurred, we should not discard the distinction. It retains a fundamental and easily perceived equity despite problems in its application. Few would deny that there is a difference between

440. See text accompanying notes 330 & 343-44 supra.
441. See note 124 supra. The blurring of conduct and status is also present in the use of prior parole revocations, because of the ability of parole officials to revoke parole for technical reasons other than commission of a crime.
442. See Dershowitz, supra note 433, at 105-06 (considering all factors); Tiffany, Avichai & Peters, A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial 1967-68, 4 J. OF LEGAL STUDIES 369, 386-88 (1975) (discussing impact particularly of appointed versus retained counsel).
443. Seymour, 1972 Sentencing Study for the Southern District of New York, 45 N. Y. St. B. J. 163, 164 (1973) (reporting a 36% rate of imprisonment for white collar offenders versus a 53% rate for defendants convicted of nonviolent common crimes in general and an 80% rate for those convicted of violent common crimes).
increasing the offender’s sentence because of a prior conviction and increasing that same sentence because the offender was unmarried or had failed to finish the twelfth grade. These difficulties in drawing exact distinctions should not cause us to reject the goal of minimizing the degree to which punishment is based on status, but should instead bring us back full circle. Because there are no perfect solutions, we need a system that yields politically visible and accountable answers. Because the line drawn between conduct and status will be somewhat arbitrary, the process of line drawing should be subject to public scrutiny.

V. CONCLUSION

Lawyers tend to defer to experts. During the last decade, the legal profession learned to view skeptically the asserted clinical ability of the psychiatrist to predict dangerousness. During the next decade, the legal profession must come to terms with the actuarial methodology of the criminologist-cum-statistician. Because the number of offenders facing sentencing or parole decisions is far greater than the number of those pleading the insanity defense, the stakes are now considerably higher.

The problems are also different today. The danger most frequently encountered in the lawyer-clinician relationship was the tendency of the clinician to overpredict and to seek to preempt the legal decisionmaker. Now the hazards are more subtle. Because the structuring of discretion may also tilt the exercise of discretion in ways that are themselves predictable—namely, toward the objective factor of risk and away from the subjective factor of culpability—greater visibility is necessary to ensure that value questions are not subordinated.

Properly controlled, a guideline system need not “dehumanize” sentencing, but to guard against the dangers that “soft” variables will be ignored and questions of distributive justice downgraded, an adequate accommodation must yet be worked out between the lawyer and the expert on this new macroscopic level. This article has suggested that the special responsibilities of the lawyer on this level are two-fold: (1) He must compel the expert to frame issues, rather than permit him to resolve them himself, and to frame them in a way that maximizes the political visibility of the relevant options; and (2) he must offer normative critiques of this new science of prediction—a task for which he is uniquely well suited. In the aftermath of the criminologist’s new achievement, the ethics of prediction remain largely unexplored. This article has offered at best a tentative model. At the heart of that model are three core ideas.
1. **Cost Spreading.** Social costs should be distributed evenly rather than disproportionately loaded on a select few. Although this idea constitutes Rawls' basic critique of utilitarianism, it can also be articulated from a conventional utilitarian standpoint, because loss sharing reduces the perceived costs to those who must bear them.\(^4\)\(^4\) Categoric risk prediction systems thus become objectionable because of their tendency to focus costs rather than to spread them. This does not mean that categoric risk techniques must be rejected entirely. But when we choose to deviate from a basic norm of cost spreading, that departure may be justified on the grounds of some overriding moral principle, such as the desirability of allocating punishment in proportion to culpability.\(^4\)\(^5\)

2. **Side Constraints.** This article has sought to formulate an architectural critique of the design of jurisprudential models in this area. Those that employ a side constraint structure possess definite comparative advantages over those that seek to define a desired end state. To insist only that status not be used as a basis for the allocation of punishment interferes far less with legislative prerogatives, with common sense considerations, and with our ability to respond to changed circumstances in the future than does the assertion that punishment must always be proportional to the gravity of the offense. Flexibility is one of the key justifications for a Sentencing Commission. A more rigid theoretical model might thus tend to disable such a Commission. A side constraint model also better avoids the perils of ipse dixitism. As Hart, Packer, and Nozick have shown, it is far more persuasive to demonstrate why a limitation is necessary than to make a bald assertion about the end goals society should pursue.

3. **Predictability.** Prediction is a means, not an end. Knowing who is more likely to become a recidivist does not dictate how one should act on the basis of that knowledge. Such knowledge should instead raise two questions. By what alternative means can we produce the same benefit as can be obtained by differentiating offenders according to

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\(^4\) See, e.g., G. CALABRESI, supra note 323; notes 323-25 supra and accompanying text.

\(^5\) This article has sidestepped the problem of defining culpability, in part out of cowardly recognition that all such definitions are highly vulnerable to criticism. See, e.g., Griffiths, supra note 294, at 1446-47. In addition, a side constraint model that speaks in terms of negative injunctions requires a less elaborate definition of culpability. Although the problem of formulating such a definition must inevitably be faced, I suspect that on the operational level of a categoric risk system the only alternatives are to rely on prior convictions and possibly prior incarcerations or on an expanded real offense hearing procedure. See note 57 supra (criticism of the incongruous lack of procedural safeguards governing current hearing procedures of the U.S. Parole Commission). The classic work on the general topic of defining culpability is J. FEINBERG, DOING AND DESERVING (1970).
their propensity toward recidivism? Which of the available alternatives is more fair?

Others will undoubtedly discern more points of contact between criminal justice and welfare economics that have escaped this writer’s attention. In part, a new vocabulary is needed because normative theory has yet to catch up with the developing practice of prediction. Until it does, one must settle for a second-best answer: a system in which value decisions are more visible and decisionmakers are subject to greater accountability through the political process.

446. A particularly interesting approach has recently been mapped from such a starting point by Professors Calabresi and Bobbitt in the field of welfare economics. See G. CALABRESE & P. BOBBITT, TRAGIC CHOICES (1978). Because they use the term “tragic choice” to refer to the social dilemmas caused by the need to allocate scarce but vital resources (such as artificial kidney machines), it does not quite apply in our context of punishment allocation, since punishment is a cost rather than a benefit. Still, their analysis offers some penetrating insights.

Typically, they say, society refuses to respond to the necessity of making tragic allocations with any truly rational mechanism—be it a pure market approach, an accountable political process, or an egalitarian lottery. Instead, the “customary approach” is “the avoidance of self conscious choice: The method of choosing is not explicitly chosen and may not even be known by the mass of people.” Id. at 44-45. In the language of this article, such issues are repressed. One technique of avoidance, they add, is to decentralize the decision by giving it to what they term an “inresponsible agency,” which is representative and decentralized, and need give “no reasons for its decisions.” Id. at 57. As an example of such an agency that can decide cases without articulating reasons that would necessarily give rise to value conflicts, they cite the role of juries in euthanasia cases. But the sentencing judge may be an even better example. His capacity to decide the issue without articulating any consistent, if socially divisive, body of principles will, however, be curtailed by a sentencing commission, with the result that increased conflict over issues of punishment will be likely.

Finally, they note that where a rationale must be expressed for an allocative decision, the tendency is to convert such a decision “from one of allocation to one of absolute worthiness,” because society seeks to avoid making naked, allocative decisions. Id. at 64. Arguably, the recent revival of interest in retribution is consistent with this phenomenon: In the name of administering “just deserts,” legal theorists are converting an allocation decision into a “worthiness” decision.

A concluding observation made by these authors offers an additional interesting thought: all allocative processes they studied eventually led to substantial dissatisfaction and ultimately forced decisionmakers to turn their attention from the “second order” issue of allocation to the “first order” issue of how to increase the supply of the scarce resource being allocated. Id. at 190. Will the problems of allocating punishment by more formalized criteria analogously cause decisionmakers to reconsider the total amount of that cost (i.e. punishment) to be imposed? This may be an overly optimistic prophecy, but a more egalitarian sentencing structure could well have the effect of inducing society to reduce the aggregate punishment costs levied in order to lessen the per unit costs imposed on the more privileged offender. In the long run, then, equality and parsimony might in this sense co-exist.