THE VIRTUE IN DISCRETION: ETHICS, JUSTICE, AND WHY JUDGES MUST BE 'STUDENTS OF THE SOUL'

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The student of politics, then, must study the soul. . . .[1]

When Aristotle thought about what might be the highest good for humanity, one of his very first conclusions was that the road to virtue, was politics.[2] Needless to say, this appears a position of almost laughable naïveté in a world where vice seems a prerequisite to public office; however, there may still be something not quite ridiculous in the idea that ethics, when present, receives its fullest expression through public service.[3] Aristotle explained his position with eloquence:

> For even if the end is the same for a single man and for a state, that of the state seems at all events something greater and more complete whether to attain or to preserve; though it is worth while to attain the end merely for one man, it is finer and more godlike to attain it for a nation. . . .[4]

Implicit in this philosophy is an assumption of the value of the civil community, not at the expense of individuals, but as both means and end of individual moral development. Pursuing the goals of the state is "greater" and "finer" not because the state is more "godlike" than "a single man" but because the will to serve the state, to subjugate personal ends for the sake

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1. ARISTOTLE, THE NICOMACHEAN ETHICS 1102a (David Ross trans., Oxford Univ. Press 1991) (1925) [hereinafter NICOMACHEAN ETHICS].

2. *Id.* at 1094a-94b. Of course, Aristotle spoke not of humanity generally, but only of men, and male citizens at that. For present purposes, I will ignore his narrow vision and presume that his theory can be applied without distortion to all humans.

3. In this essay the terms "politics" and "political" are used in their literal sense, referring generally to any activity which serves the polity. Hence, judges can be understood to be "politicians" in this model without any of the modern dissonance warranted by worries about inappropriate influences on the judiciary; "politicians" here are merely public citizens. Of course, this is a much broader meaning than our current usage usually permits; however, it is closer to the sense that Aristotle intended. *See infra* text accompanying notes 6-9.

4. NICOMACHEAN ETHICS, *supra* note 1, at 1094b.

of the greater community, is an emblem of moral maturity which exalts both the servant and the served. For Aristotle and many who have followed him, virtue is simply incomplete if it fails to include participation in public life. Hence, it is to idealized politicians that we should look to find models of virtuous behavior, not because all public servants are virtuous (which was certainly false even in Aristotle's time), but because only public servants can be virtuous.

It is worth focusing on the Aristotelian vision of public life when embarking on an examination of judging, as this Article purports to do. What follows is a meditation of sorts, intended to be as much an aspiration for as it is a description of good judging in the United States. Relying on an array of philosophical and legal thinkers, the paper attempts to develop a theory of good judging as passionate and particularized, as well as impartial and fair. Recognizing, however, that such a theory does not reflect the prevailing view of legislators and legal theorists, the Article then considers what I take to be a modern paradigm of American judging: the Federal Sentencing Guidelines ("Guidelines"). Aristotelian principles will serve as a crucial theoretical backdrop throughout, as I try to reconcile judging under the Guidelines with a notion of virtuous public service. If good judging is *virtuous* judging (in the rich sense suggested by Aristotle and others), do the Guidelines permit good judging? In this argument I will simply assume the antecedent, and the first part of the paper will be devoted to an elaboration of what virtuous decision-making might entail. The second part will provide a discussion of judicial ruling according to the Federal Sentencing statutes. Finally, the conclusion will juxtapose the two, in the hope of provoking consideration of whether political virtue has been curtailed by enactment of the Guidelines, or whether judges simply have one more binding consideration among the panoply that constitute nuanced and attentive legal rulings.

Before commencing with the central arguments of the paper, however, I will take a moment to review two of its constraining assumptions. As noted, Aristotelian and neo-Aristotelian theories of virtue ethics and practical wisdom shape the inquiry and form a crucial foundation for its conclusions; hence, a brief overview of basic principles is included to provide context for the later arguments. In addition, no scholarly discussion of judicial decision-making in the U.S. would be adequate without reference to the abundant literature on rule of law theory, which itself often serves as a basic premise of any discussion of modern jurisprudence. While it is not my purpose here to offer any kind of thorough analysis or critique of either set of theories, they play a important roles as both constraint and foil for the arguments I will make. As such, a brief summary of the positions is warranted.

I.
MOVING FROM ETHICS TO JUSTICE

Part of the argument to come will assert that a vital element of virtuous judging is the ability to respond to particular facts of a situation with a kind of passionate attention.[5] It might be objected, however, that while an Aristotelian account of the role of particularity and passion in judgment may be appropriate to ethics, it cannot be fairly extended to justice—presumably the only legitimate province of the judiciary. The objection rests on the assumption that ethics and justice are significantly distinguishable, in that ethics governs private relationships within and between individuals, while justice governs the public relationship between individuals and the state. Rules for personal relationships may be particularist if anything is, but relations between a state and its citizens must be general and abstracted in a democratic society. Of course, on one level this argument parallels those of rule of law theorists; that line of thinking can be put to one side for the moment. More notably, this argument seems to suggest that justice cannot or should not encompass ethics, or that judges *qua* judges should not credit any ethical response they may have toward the individuals before them. This sort of strict separation between public and private morality was foreign to Aristotle, and would be rejected, I believe, by his modern inheritors. It is worth a moment to explore the reasons why.

As we have seen, Aristotle believed that public service was a vital part of individual moral development. On his view, ethics demands recognition of our responsibilities to others not merely as private individuals but as members of a civil community. What's more, civic involvement was seen as providing an ideal training ground for developing the kinds of individual moral traits which are crucial both to virtue and to happiness. Hence our beginning observation that for Aristotle, the way to virtue was politics. But Aristotle also believed that the road to politics was virtue; or more precisely, that the reason for entering politics was to nurture the virtue of the nation.[6] Public virtue—justice—was a politician's stock and trade, and was considered by Aristotle to be among the highest callings a citizen could pursue.[7] According to Aristotle, then, "the student of politics . . . must study the soul" in order to know more completely the human good and human happiness which is her duty to pursue for the nation.[8] In other words, just politics is impossible without an understanding of individual virtue, just as complete virtue requires political experience. For Aristotle, the

5. *See infra* text accompanying notes 47-87.
6. NICOMACHEAN ETHICS, *supra* note 1, at 1102a.
7. *Id.* at 1094a, 1102a.
8. *Id.*

public good (justice) and the private (virtue) are distinguishable, but always inseparable.[9]

To better understand this position, we must turn to its theoretical premises. In the Aristotelian version of "virtue ethics," at least three closely related concepts are central. First is the notion of *eudaimonia*—loosely translated as 'happiness'—which Aristotle ultimately identifies as the highest of human goals. Most commentators agree that our understanding of happiness is only a pale substitute for what Aristotle intended; a more accurate rendering might be "well-being throughout a complete life" or "living well and faring well" in the deepest sense.[10] Importantly, *eudaimonia* is not something that can be achieved in isolated acts, nor is it simply a state of enjoyment or contentment. It is a state of being, not of feeling or doing, and it must endure: "Happiness, then, is something final and self-sufficient, and is the end of action". . . . "But we must add 'in a complete life.' For one swallow does not make a summer, nor does one day; and so too one day, or a short time, does not make a man blessed and happy."[11]

The full connotation of *eudaimonia* can perhaps be better understood in light of the second central element of the theory, *arete*. The term is loosely translated as "virtue," or more carefully, "excellence," but again, simple translation only hints at an accurate understanding of the concept.[12] *Arete* is what Aristotle identifies as the end of humans; it is our highest goal and our essential function, and so it is by pursuing excellence or virtue that we come to find happiness. According to Aristotle, excellence can never be achieved by accident or by rote, but only through knowledge and an established character. As he says, "the virtue of man also will be the state of character which makes a man good and which makes him do his own work well."[13] Again, it is important to see that on this model the salient moral question is what kind of person to be, rather than which act to do; the focus of the moral inquiry is emphatically not on any given deed, but on the quality of a character developed over a lifetime.

One guide for developing the required sort of virtuous character lies in the third element central to the theory: action in accordance with the "golden mean." While the emphasis of Aristotelian ethics may be on states of character, actions play an undeniably crucial role as the means to the

9. *See id.* at 1130a ("What the difference is between virtue and justice in this sense is plain . . .; they are the same but their essence is not the same. . . .").

10. *See, e.g.*, Sandra Peterson, Aristotle's Ethical Theory and Method (Jan. 1996) (unpublished manuscript on file with the author); ARISTOTLE, THE NICOMACHEAN ETHICS, *Note on the Revision*, xxvii (David Ross trans., Oxford Univ. Press 1991) (1925) [hereinafter *Note on the Revision*].

11. NICOMACHEAN ETHICS, *supra* note 1, at 1097b, 1098a.

12. *See, e.g.*, Peterson, *supra* note 10; *Note on the Revision*, *supra* note 10, at xxvi.

13. NICOMACHEAN ETHICS, *supra* note 1, at 1106a.

twin ends of *eudaimonia* and *arete*. Aristotle acknowledges that "the virtues we get by first exercising them," and that "states of character arise out of like activities"; simply put, "we become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts."[14] Yet actions must be weighed: bravery must not foolhardy, temperance must not be prudish, justice must not become self-righteous. Identifying what will count as justice or temperance or courage becomes an exercise in identifying the mean between the vices of excess.[15]

But to return to our starting point, how does this brief overview of Aristotle's ethics explain Aristotle's belief that politics and virtue, or public and private goods, are inextricably linked? To answer that question we turn to Aristotle's treatment of justice, which he viewed as "not part of virtue but virtue entire."[16] In his words, "all men mean by justice that kind of state of character which makes people disposed to do what is just"; furthermore, "we call those acts just that tend to produce and preserve happiness and its components for the political society."[17] Civic or political excellence (i.e., justice) contributes to the *eudaimonia* of all citizens; this is an asset not only for the greater happiness it produces, but because concern for the well-being of distant others is virtue of character in itself. In fact, it is a signal of complete virtue—an ability not only to be brave, temperate, confident, truthful, ready-witted, fair and friendly with respect to oneself and one's private associates, but to express those qualities as a public citizen and as an agent of the civil community. This is the highest good, the greatest contribution to well-being. And while not every public citizen will achieve it, it can only be achieved by public citizens. Justice, then, not only encompasses ethical response, it *is* ethics on a grand scale. Failure to act as virtuously with respect to the state as you would to your close associates or to your own soul harms all three. It is impossible to separate obligations to particular others and obligations to generalized others, impossible to distinguish ethics and justice in a way that bears any analytic significance.

But even if we agree with Aristotle that justice is public virtue, and that the conditions of ethics are fairly translated to the realm of justice,[18] the question remains whether passionate attention to the particular is an

14. *Id.* at 1103a-03b.

15. This skill is an example of practical, as opposed to scientific, knowledge. *See infra* text accompanying notes 48-50.

16. NICOMACHEAN ETHICS, *supra* note 1, at 1130a.

17. *Id.* at 1129a-29b.

18. It is worth noting that we can accept Aristotle's connection between particularity and virtue while rejecting the larger eudaimonistic theory; that is to say, regardless of whether we believe that excellence and well-being are necessary to one another, it may still be the case that excellence requires the kind of nuanced perception that Aristotle describes. This may become more clear in the discussion of Aristotle's particularism; *see infra* text accompanying notes 48-49.

appropriate condition of justice. As we will see, neo-Aristotelian philosopher and legal scholar Martha Nussbaum believes that it is not only appropriate, but necessary. Her identification of "perception" as a crucial moral skill requires that judges develop a sophisticated intuition and empathic capacity in addition to the technical proficiency expected of legal professionals. Of course, not all scholars agree that passion and particularity are valued judicial skills. Many, in fact, suggest that such responses are wholly inappropriate in judges, whose job, ostensibly, is to apply the law with dispassionate equanimity. Before considering how theorists like Nussbaum can respond to such a basic (and widely accepted) premise of jurisprudence, we first turn to a summary of themes common to rule of law theory.

II.
THE RULE OF LAW AND THE LAW OF RULES

"Rule of Law" theorists have argued—perhaps for millennia—that justice requires a distancing from the idiosyncrasies and personal biases of individual litigants and judges.[19] Law, to be just, should be abstract and general; undue attention to particularity reduces law from a reliable system of well-ordered principles to a chaotic, capricious mix of personal preferences. While humans are unavoidably particular and biased, the law is (or should be) general and impartial; hence, we are more justly ruled by law than by humans. Stated this simply, the theory may be unobjectionable. While debates about the full meaning and implications of justice rage, it is almost certainly a premise of any democratic theory of justice that people be protected against the arbitrary exercise of state power via its appointed agents. But of course, rule of law theorists often claim more than this simple premise, deriving conclusions which have gained a wide currency in modern jurisprudence. What follows is an attempt to summarize some of the most commonly articulated results of the theory.[20]

In one of the more succinct statements of rule of law theory, Justice Antonin Scalia identifies at least three virtues of a system of general principles over personal discretion.[21] He is willing to acknowledge the value of judicial discretion in achieving "perfect" justice for individual litigants, noting that it is the supposed "genius of the common law system" that judges stick close to the facts and refuse to rely on "overarching generalizations,"

19. *See, e.g.*, Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997) (citing—ironically enough—to Aristotle as an early proponent of the rule of law theories).

20. Proponents of the rule of law theory are many and varied, and it is not my purpose to catalog the legion of arguments advanced in its defense or the proposed implications of its full-scale adoption. It is sufficient for me here merely to provide an overview of some widely shared and repeated elements of the theory.

21. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-80 (1989).

leaving room for future judges to distinguish relevant precedent as the particular case requires.[22] However, he is unwilling to sacrifice what he considers the more crucial legal values of equitability, uniformity and predictability to the goal of perfection; closely tailored individual justice should not come at the cost of a fair and reliable system of just principles.[23] Justice requires that law be applied, not made.

Scalia is not alone in identifying these virtues of the rule of law. Others have argued persuasively that the threats of anarchy, official arbitrariness, and the inability to plan for the future are real and serious threats to the stability of the nation and the freedom and dignity of citizens.[24] The appropriate defense against these threats, it is argued, is a system of deference to abstract and generally applicable principles which can be readily identified and followed by all citizens equally.[25] In other words, the rule of law requires a law of rules.[26]

A. Equitability

Perhaps the strongest argument for strict adherence to a system of legal rules lies in the tremendous value we assign to ensuring equal treatment under the law. The principle of *stare decisis* derives its legitimacy in part from this notion of equitability, as does the Equal Protection Clause of our Constitution. Both depend on the widely shared belief that like cases ought to be treated alike, that the law is not permitted to discriminate arbitrarily or to vary depending on the situation. Closely linked to the idea of equitability is impartiality, a value reflected on a grand scale in the general principle of due process, and more particularly in procedures for recusal, jury selection, admission of evidence, and so on. Fairness is central to our understanding of justice, and fairness requires deciding cases without regard for personal interest or even, perhaps, for personal ethics. On this model, a grant of judicial discretion may seem to be a grant of partiality, or

22. *Id.* at 1177.

23. *Id.* at 1178-80.

24. *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 219-20 (1979) (exploring manifestations of arbitrary power); *see also* H.L.A. HART, THE CONCEPT OF LAW 151-80 (1961) (discussing principles of justice and their diverse applications). *See generally* Fallon, *supra* note 19, at 7-8.

25. *See, e.g.*, Fallon, *supra* note 19, at 8-9; HART, *supra* note 24, at 151-80; RAZ, *supra* note 24, at 213-18.

26. It should be emphasized that most rule of law theorists describe their theory as an ideal, or as an heuristic model. Few argue that the elements of equitability, uniformity and predictability can (or should) ever be perfectly attained; most agree simply that these are presumptively the highest goals of a system of justice. *See, e.g.*, Fallon, *supra* note 19, at 38 ("[I]t is strongly arguable that no plausible legal system could avoid departing from [the rule of law] in some respects. . . . Because the Rule of Law ideal never can be completely attained, we must make judgments, not only about what is best, but about what should count as 'good enough' for some practical purposes."); RAZ, *supra* note 24, at 228 ("Conformity to the rule of law is a matter of degree. . . . Since the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force.").

a license to treat similarly situated people differently without legitimate cause. To ensure that all litigants are treated equitably, judges should subjugate their personal wills to the system of clearly identified rules, fitting particular facts to general principles, comparing the present case to those that have gone before. The argument is that equitability is at the heart of justice, and clear and general rules applied even-handedly to everyone are the best means to ensure that justice is done.

Beyond the moral or political value of fairness, commentators have also claimed a second, perhaps more pragmatic value for equitable application of neutral rules. Scalia notes that even-handedness in the law legitimizes judicial authority—and implicitly, that of the state as well.[27] If citizens can see that laws are not capable of manipulation by the powerful for their own benefit, that all persons, regardless of social standing or political status, are subject equally to the same rules, then citizens are more likely to respect the law as a legitimate constraint on behavior. When law is viewed not as a self-serving tool of the state and its administrators, but rather a principle to which even the state itself is subject, then judges are seen as instruments of the law and an otherwise rational fear of the abuse of judicial authority is mitigated. Echoing this point, Richard Fallon argues that one of the three purposes most commonly articulated for adherence to the rule of law is the guarantee against official arbitrariness, and that one of law's crucial elements is its supremacy—that is, that the law applies equally to all, including judges and other officials as well as common citizens.[28] Similarly, Joseph Raz argues that "the arbitrary use of power for personal gain, out of vengeance or favoritism, is most commonly manifested in the making of particular legal orders. These possibilities are drastically restricted by close adherence to the rule of law."[29] According to its proponents, then, conformity with the rule of law contributes not only to equity among litigants but to legitimacy for the judicial system as a whole.

B. Uniformity

A second reason offered by rule of law theorists for preferring strict legal rules to judicial discretion is closely linked to the first (equitability) and the third (predictability). Because in our system *stare decisis* is binding only vertically, it is possible for different courts to decide similar issues differently, with only the discretionary review of the U.S. Supreme Court available as a corrective. Justice Scalia reminds us that as a practical matter, the high court can hear "only an insignificant proportion" of appeals from the lower courts, making strict adherence to universally knowable rules all the more important as a kind of self-regulating effort to produce a

27. Scalia, *supra* note 21, at 1178.
28. Fallon, *supra* note 19, at 8.
29. RAZ, *supra* note 24, at 219.

uniform body of law.[30] The discretion-conferring approach, it is argued, would permit federal courts in Alabama (for example) to require very different behavior than U.S. courts in Alaska, violating the principles of equitability and predictability.

Uniformity, like equitability, has the further value of reinforcing a belief in the rationality of law. If judging is viewed as an analytic exercise, with judges deducing just outcomes from democratically identified and universally binding major premises, then it is reasonable to believe that those outcomes will be the same regardless of who does the judging. Stated differently, if outcomes differed depending merely on the identity of the judge, it seems an impermissible partiality is introduced into what is supposed to be a neutral and equitable system. Furthermore, variety in outcomes undermines the predictability of law: if decision-making isn't strictly rule-based and deductive, how are citizens to reasonably anticipate the law and conform their behavior to it? Uniformity offers demonstrable proof that the law is impartial and rationally derived, reassuring citizens that the judiciary is legitimate and reliable.

C. Predictability

Again, the third justification for adhering to the rule of law is reflected in the first and second, in that the value of predictability lies at least in part in the protection it offers against arbitrary or partial decision-making. Part of what we can predict about the law is that it will be equitably and uniformly applied, allowing us to anticipate with reasonable accuracy the outcomes of specific cases. Conversely, were the law lacking these first two virtues, we might accurately predict arbitrariness or partiality, but that very expectation would make reliable anticipation of specific outcomes impossible. It is the stability which is provided by equitable and uniform judicial decision-making which is valued by rule of law theorists—a stability which is guaranteed, it is argued, by strict adherence to the rules.

The virtues of predictability in the law are again both pragmatic and philosophical: predictability allows people to plan their affairs with confidence, but it also provides the sense of civic empowerment that comes with knowing what the law is.[31] Raz points out two unsavory consequences of violating this principle of stability. One is the uncertainty that accompanies "vagueness and . . . wide discretion."[32] When people are not empowered to predict future developments or to form definite expectations about legal requirements, their ability to plan and act in the world is unreasonably constrained. A second, and according to Raz, more grave consequence is the

30. Scalia, *supra* note 21, at 1178.

31. *Id.* at 1179; Fallon, *supra* note 19, at 7; RAZ, *supra* note 24, at 221-22.

32. RAZ, *supra* note 24, at 221-22.

frustrated or disappointed expectations that come with retroactive lawmaking or an unwillingness to enforce established legal rights.[33] While this kind of unpredictable legal authority will almost always have damaging practical effects for citizens, it is the affront to autonomy and dignity that Raz finds most offensive. A stable law

> treats people as persons at least in the sense that it attempts to guide behavior. . . . It thus presupposes that they are rational autonomous creatures. . . . [A retroactive or inconsistently enforced law, however, is] analogous to entrapment: one is encouraged innocently to rely on the law and then that assurance is withdrawn and one's very reliance is turned into a cause of harm to one. . . . Quite apart from the concrete harm [unpredictable laws] cause they also offend dignity in expressing disrespect for people's autonomy.[34]

Thus, predictability is valued as crucial both to the concept of democratic justice and to the legitimacy of the justice system; and predictability, it is argued, can be had only by judicial adherence to a common set of rules.

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While these broadly defined principles help to explain the reasoning of rule of law theorists, we have yet to see what sorts of practical expectations these theorists might have for a law of rules. Cass Sunstein suggests the following characterization which he believes captures the crucial elements advanced by a variety of rule of law theorists:

> A system committed to the rule of law seems to require (1) clear, general, publicly accessible rules laid down in advance; (2) prospectivity and a ban on retroactivity; (3) a measure of conformity between law in the books and law in the world; (4) hearing rights and availability of review by independent adjudicative officials; (5) separation between law-making and law-implementation; (6) no rapid changes in the content of law; (7) no contradictions or inconsistency in the law.[35]

Once again, it seems to me that this characterization must be fairly benign; that is, I think that few in our culture would object that the three principles Scalia identifies, or these seven expectations articulated by Sunstein on behalf of most rule theorists, are inconsistent with a democratic theory of

33. *Id.*

34. *Id.*

35. Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953, 968 (1995) (internal citations omitted). Sunstein attaches this proviso to his list: "These are the customary characteristics of a system committed to the rule of law. Of course, no legal system is likely to comply with these seven goals; failures of the rule of law, understood in such terms, are commonplace." *Id.*

justice, however understood.[36] The problematic conclusion is not that law must be open, accessible, stable and fair, or that a crucial step in realizing these values is the development of a generally applicable system of rules. What I find objectionable in rule of law theory is the clearly fallacious conclusion that if rules are necessary, they must also be sufficient; or even more strongly, that *rules cannot be supplemented in any way that is consistent with justice.* To be fair, many rule of law theorists recognize that strict legal rules can and should be augmented with particularized judicial discretion, at least to some extent.[37] But it is not clear that all do, and in fact it is evident that many legal practitioners and legislators believe firmly that discretion must be constrained at all costs.[38] This sentiment has been manifested in the Federal Sentencing Guidelines, which were enacted with the clear and explicit intent to limit the discretion of individual judges in sentencing.[39] As will become apparent, this is precisely the belief I want to challenge.

One way to begin revising the conclusion that preservation of the rule of law requires the elimination of judicial discretion is to look to a philosophy of rules. Onora O'Neill, noted analytic philosopher and Kantian scholar, provides just that in her analysis of moral imperatives.

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36. Of course, the specific understandings may be entirely objectionable to some, including myself and many of the theorists to whom I will refer throughout this paper. My point here is not to concede rule of law theory, but merely to note that stated in its most general form, it identifies premises which are neither unreasonable nor contested, even by those who would nevertheless oppose the theory's conclusions.

37. *See* text accompanying *supra* note 26. *See also* HART, *supra* note 24, at 156-58 (arguing that a general rule cannot determine its own particular application; i.e., while the law may be invariable, there is always room for legitimate disagreement regarding which facts are to be subject to it).

38. *See* Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 801-02 (1990):

> Allowing passion to play a role in the decisional process . . . is inconsistent with the very norms that govern and legitimate the judicial power and constitute its central disciplining mechanism: impartiality and the obligation of the judiciary to justify its decisions openly and on the basis of reasons adopted by the profession and the public.

See also Scalia, *supra* note 21, at 1183 ("[C]ourts properly assume that 'categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction'" (citing with approval dicta by Justice Stevens in *United States Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 776 (1989)). *But cf.* Fallon, *supra* note 19, at 40 ("[I]t is also possible that Justice Scalia's conception of the Rule of Law comprises a complex web of sometimes competing principles, the respective weights of which vary with changing context.").

39. UNITED STATES SENTENCING GUIDELINES MANUAL Ch. 1, Pt. A3, intro. comment (1999) [hereinafter SENTENCING GUIDELINES MANUAL]. *See generally* S. REP. No. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182; *Statement By President Ronald Reagan Upon Signing H.R. 4801*, 23 WEEKLY COMP. PRES. DOC. 934 (July 14, 1986), *reprinted in* 1986 U.S.C.C.A.N 1770; *Statement By President Ronald Reagan Upon Signing S. 1822*, 23 WEEKLY COMP. PRES. DOC. 1452 (Dec. 14, 1987), *reprinted in* 1987 U.S.C.C.A.N. 2135; James C. Coffer, *Official Defends Federal Sentencing Guidelines*, THE COMMENTATOR, Feb. 25 1998, at 8.

III.
THE INSUFFICIENCY OF RULES

In *Abstraction, Idealization and Ideology in Ethics*, O'Neill sets out to understand the common complaint against moral theory that it is too abstract to be of any use.[40] After considering various interpretations of this complaint, she finally decides that it might just be a critique of "the supposed formalism and emptiness of all practical reasoning that invokes principles or rules" and which "lacks determinate implications for action."[41] She chooses four objections to this kind of formalism for her consideration.

First is the argument that ethics of principles (i.e., formalist ethics) cannot offer algorithms for decision-making; it leaves actions underdetermined. O'Neill responds to this charge by concurring with it. She makes two points: first, she emphasizes that "no principle or rule can determine every detail of its own application," since even highly specific rules can be implemented in different ways.[42] But she admits that this may be too easy; certainly there are some rules—for example rules of arithmetic—which we would like to call algorithmic even though such rules underdetermine the precise movements of our muscles or firing patterns in our brains as we do the problems. So she also emphasizes that even if we deny her first point and admit that perhaps some rules are algorithmic, "there is no reason to think that ethical principles either are algorithmic in a less strict sense or have been thought to be so by their advocates."[43] No reputable moral theorist, according to O'Neill, denies that judgment must play a significant role in ethics. To suggest that the formulation of moral principles is an attempt at reducing human behavior to tightly controlled, predictable, calculated actions is a caricature: even "Kant reminds us . . . that the thought of 'delegating' hard decisions to 'authorities' or 'codes' tempts but is a symptom of immaturity or bad faith. Algorithmic rules for conduct, let alone life algorithms, are fabulous: they belong in the fairyland of felicific calculation."[44]

A second objection is closely linked to the first; that is, that since there simply are no exceptionless rules, reliance on any principles seems arbitrary and unjustified. O'Neill again has a couple of responses. First, she

40. Onora O'Neill, *Abstraction, Idealization and Ideology in Ethics*, *in* MORAL PHILOSOPHY AND CONTEMPORARY PROBLEMS 55 (J.D.G. Evans ed., 1988).

41. *Id.* at 57.

42. *Id.* at 58. *See also* HART, *supra* note 24, at 157 ("[T]he law itself cannot now determine what resemblances and differences among individuals the law must recognize. . . ."). Hart goes on to note that the maxim "treat like cases alike and different cases differently" is by itself incomplete and, until supplemented, cannot afford any determinate guide to conduct. *Id.* at 155-56; Sunstein, *supra* note 35, at 961 ("Rules do not, and indeed cannot, contain all of the instructions necessary for their own interpretation.").

43. O'Neill, *supra* note 40, at 59. A similar argument is made by Aristotle and Nussbaum in distinguishing scientific from practical wisdom. *See infra* text accompanying notes 48-52.

44. O'Neill, *supra* note 40, at 59-60.

points out that even though there are exceptions to any rule, it is not necessary to abandon rules entirely as long as they can serve as reliable guides most of the time. Such rules might hold *ceteris paribus*, and yet still be taken seriously as constraints on our action. Second, she emphasizes that the complaint only holds given the assumption that rules must be algorithmic. If we don't expect rules to tell us what to do in every case—as O'Neill insists we don't—then it doesn't make sense to complain that there are cases when the rules don't apply. As she says:

> Advocates of ethical principles standardly deny they are or can be complete, and insist that they must be supplemented by procedures of deliberation if we are to apply (necessarily incomplete) principles to cases. The charge that advocates of ethics of principles fail to provide plausible exceptionless rules is implausible unless it is understood as the charge that they have failed to provide plausible exceptionless rules *from which decisions can be deduced.* That charge is true, but has little point, since those who advocate ethics of principle don't claim to provide such principles.[45]

In short, rules offer boundaries for our actions, they don't tell us exactly what to do in particular cases. That is precisely why we need abilities like judgment and imagination in order to operate morally in the world: we need to be able to interpret the rules, not follow them blindly. That there are exceptions is no obstacle to this project. In fact, it reinforces the importance of developing independent moral skill, since the rules alone will not always be able to guide us adequately.

Finally, O'Neill considers two practical problems for moral principles. One is the worry that doing ethics "by the book" or according to rules will blunt the moral sensibilities of agents, since all they need do in tricky ethical situations is "look up" the appropriate principle. This leads to the second worry, which is that ethics of principles are self-defeating, because they produce blunt moral agents rather than sophisticated ones. O'Neill admits that these may be the occasional consequences of principled moral theories, but contends that they are certainly not the *intended* consequence of such theories, for all the reasons stated above. Principles are *not* supposed to be substitutes for careful deliberation and judgment; they are guidelines, parameters for action which agents are expected to interpret and apply creatively, with due consideration for the particular details of their situation. She points out that we usually have a low opinion of the moral character of agents who claim to have "just followed orders" rather than engaged in their own moral deliberation. She also emphasizes that even people who claim to have simply followed the rules must have interpreted the rules in a certain way, and recognized that *this* situation was appropriate for their application—all of which *requires* a kind of moral sensibility, even if that

45. *Id.* at 61.

sensibility is underdeveloped by an undue dependence on the rules. O'Neill compares ethical behavior to speech:

> Those who need to refer explicitly to rules in guiding their action often do so in blunt and insensitive ways, just as those who need to refer explicitly to rules of grammar often speak or write in blunt and insensitive ways. . . . Too much concentration on rules or principles can mar performance. This does not show that principles or rules cannot guide reasoning in these matters, but rather that they do so best when deeply absorbed and internalized, as the rules of a language must be deeply absorbed and internalized for effortless and precise speech.[46]

According to O'Neill, we should no more depend on ethical principles to tell us what to do, than rely on grammatical principles to tell us what to say. The principles organize and constrain; they do not direct.

What this debate comes to in its most basic form is, I think, a dispute over the necessary and sufficient conditions for ethical action. O'Neill quite skillfully identifies the misunderstanding at the root of this debate. The critics she addresses seem to suggest that since principles are not sufficient for determining correct moral behavior, they are not necessary and ought to be forsaken. O'Neill does not dispute the claim of insufficiency—in fact she advocates it, arguing persuasively that agents who rely solely on principles to guide their action will be inept agents indeed. She insists that any respectable advocate of principles will readily admit the same, and that the person who claims principles are both necessary and sufficient for moral action is a straw person.

However, she emphatically disputes the claim of the critics that if principles are insufficient, they are unnecessary. This clearly does not follow logically, and O'Neill thinks there are good reasons for believing that principles play an essential role in moral behavior, much as grammar plays a role in language. Simply, it is not the only role; principles are necessary, but must be supplemented by deliberation and astute interpretation of particulars in order for moral theory to be complete. It is, perhaps, the difference between empty sentence forms and literature. This analogy is remarkably similar to the one Martha Nussbaum has elaborated in *Love's Knowledge* with respect to ethics, and in *Poetic Justice* with respect to judging, comparing and even equating moral, judicial and literary imagination. Her overall project is to describe one way in which moral or legal principles might be supplemented in order to construct a more complete theory of justice.

46. *Id.* at 63-64.

IV.
PASSIONATE JUDGING

Martha Nussbaum has developed a complex and comprehensive modern theory of practical wisdom which I can reproduce here only in small measure.[47] However, it is worth taking some time to try to summarize her central arguments, as they form the basis of my contention that virtuous judicial decision-making must include "passionate" attention to the particular as well as "dispassionate" regard for general legal principles. This kind of passionate attention—what Nussbaum also refers to as "aesthetic perception"—is what fills the gap described by O'Neill in strictly rule-based systems of judgment; with Nussbaum we learn how to make judging not only equitable, uniform and predictable (as the rule of law theorists would have it), but also flexible, imaginative and responsible.

An understanding of Nussbaum begins with an understanding of Aristotle and his distinction between practical and scientific wisdom. According to Aristotle, himself a natural scientist and mathematician as well as ethicist and political philosopher, practical wisdom could never—and in fact, *should* never—aspire to the precision and permanence of scientific truths. Scientific judgment may provide fixed and predictable answers, but that is simply not the goal of practical wisdom. It is the nature of moral and political judgment, insofar as it deals with human actors and social systems, that it be responsive and contextual. To expect one system of knowing to conform to the standards of another is to badly misconstrue the focus of the inquiry—a signal of unsophisticated scholarship:

> Our discussion will be adequate if it has as much clearness as the subject-matter admits of, for precision is not to be sought for alike in all discussions. . . . We must be content . . . to indicate the truth roughly and in outline. . . . In the same spirit, therefore, should each type of statement be *received*; for it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician demonstrative proofs.[48]

This distinction between scientific and practical wisdom becomes more clear in Aristotle's discussion of the "golden mean" as the appropriate guide for ethical behavior. Under this theory, we learn to identify virtuous acts by "aiming at the intermediate":

> By the intermediate . . . I mean . . . that which is neither too much nor too little—and this is not one, nor the same for all. . . . [I]f ten

47. *See, e.g.*, MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE (1995); MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE (1990).

48. NICOMACHEAN ETHICS, *supra* note 1, at 1094b.

> pounds are too much for a particular person to eat and two too little, it does not follow that the trainer will order six pounds; for this also is perhaps too much for the person who is to take it, or too little—too little for Milo [a famous athlete], too much for the beginner in athletic exercises.
>
> [I]f, further, virtue is more exact and better than any art, . . . then virtue must have the quality of aiming at the intermediate. I mean moral virtue; for it is this that is concerned with passions and actions, and in these there is excess, defect, and the intermediate. For instance, both fear and confidence and appetite and anger and pity and in general pleasure and pain may be felt both too much and too little, and in both cases not well; *but to feel them at the right times, with reference to the right objects, towards the right people, with the right motive, and in the right way, is what is both intermediate and best, and this is characteristic of virtue.*[49]

What is most striking about this passage is the linkage of imprecision and particularity in virtue as Aristotle describes it. Ethics is *imprecise* in that proper actions and attitudes cannot be dictated as abstract absolutes: the virtuous mean is always relative to the facts and circumstances of a given case, and can't be predetermined via scientific algorithm. Ethics is *particular* in that it is only by careful attention to the unique details of a situation that we can properly determine an appropriate moral response. Six may always and everywhere be the arithmetic mean of two and ten, but that kind of knowledge is unhelpful for practical decision-making. What we need in order to choose virtuously is an ability to recognize the right time, the right objects, the right people, the right motives—the right way of doing things. And that kind of knowledge is developed and refined over a lifetime, and is a product of experience and character, not scientific calculation.

Nussbaum refers to this skill of practical wisdom as "perception," which she describes as a "complex responsiveness to the salient features of one's concrete situation."[50] The vivid metaphor which she borrows from Aristotle to describe this sort of complex responsiveness is that of the Lesbian Rule—a thin, bendable strip of metal used by builders on the Greek isle of Lesbos to measure intricate curves and crevices with accuracy.[51] The analogy from the Lesbian Rule to practical wisdom is apt because it highlights the insufficiency of rigid codes for judging in the practical world of human actors:

> We could anticipate our point, not too oddly, by saying that Aristotle's picture of ethical reality has the form of a human body or

49. *Id.* at 1106a-06b (emphasis added).

50. MARTHA C. NUSSBAUM, *The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality*, *in* LOVE'S KNOWLEDGE, *supra* note 47, at 55.

51. *Id.* at 69-70.

> bodies rather than that of a mathematical construct. So it requires rules that fit it. Good deliberation, like the Lesbian Rule, accommodates itself to the shape that it finds, responsively and with respect for complexity.[52]

Given the practical reality of few straight edges, a flexible ruler is not only an asset, but is required if the job of measuring is to be done well. Following the analogy, if a legal code is too inflexible, not only will fail it to accurately assess cases which do not square precisely with the law, it may also do harm to "curvy" cases by forcing them to assume a shape not their own. More concretely, we might consider a sentencing code which strictly required a penalty of twenty years for stealing regardless of mitigating circumstances or particular details of the crime. Such a law is predictable, but when it fails to distinguish the theft of a loaf of bread from that of a trunk of gold, surely it fails to measure well. We might even say it does harm to the bread thief, twisting him into the shape of a greedy criminal rather than abject and hungry man. Furthermore, were a judge to try to fit such a rigid ruler to the contours of a particular case (by taking into consideration unique details in determining a sentence), the rule would break before bending; that is, without a built-in flexibility, the judge's option for a more careful assessment is foreclosed. Any desire to make the punishment fit the crime results, quite literally, in law-breaking.

It is important also to note that the Lesbian Rule's flexibility by no means compromises the equitability, uniformity or predictability of its measurements; in fact, it enhances all three by measuring more accurately the unique variations of any particular surface. Comparison to the pliant ruler also emphasizes that precision in judgment is not compromised by the acceptance of a responsive judge. Flexibility notwithstanding, an inch is still an inch, stealing is a crime. The questions that remain are ones of application, of determining how any particular case measures up to the standard: was this stealing? How was this like other cases of stealing we know about?

Hence, Nussbaumian "perception" is the Aristotelian ability to recognize the right time, the right objects, the right people, the right motives—the right way of doing things. Such perception requires attention to more than the general rules. Inability to perceive in this sophisticated sense leads to obtuse ethical behavior. As O'Neill points out, only the bluntest of moral agents would try to get by simply reading the rule-book. "Obtuseness is a moral failing; its opposite can be cultivated," says Nussbaum, and "to confine ourselves to the universal is a recipe for obtuseness."[53] To judge

52. *Id.* at 70.

53. Martha C. Nussbaum, *"Finely Aware and Richly Responsible": Literature and the Moral Imagination, in* LOVE'S KNOWLEDGE, *supra* note 47, at 148, 156-57 [hereinafter *"Finely Aware"*].

with perception is to see the value of both strict general rules and a deep and particularized empathy, and to find the mean between them.

The return to the mean is crucial; it cannot be overemphasized that when Aristotle and Nussbaum speak of perceiving well or knowing the right way to do things, they are not recommending that agents or judges rely merely on impulse or unguided intuition. In fact, the ability to perceive well comes only after years of training and practice in the technical and historical value of general and reliable rules. Like the rule of law theorists, these philosophers understand the value of well-defined community principles which can be consistently relied upon for stable, predictable articulations of law. Moreover, both insist that that kind of clear and consistent articulation requires years of experience and expertise; judges need to be masters of the technical aspects of law in order to be reliable and fair.

Having granted many of the premises of rule of law theory, however, Nussbaum next takes her aesthetic turn, comparing moral or legal deliberation to artistic judgment in a way most rule of law theorists would likely find objectionable. Complex responsiveness includes a refined analytic ability, but it also requires a sort of aesthetic sensibility, in that a good perceiver must display a willingness to imagine the life-situations of others and to appreciate the subtleties of their particular situations.[54] Excellent perceivers, like excellent artists, understand that creative work requires form as well as fancy; that rules establish crucial boundaries and offer structure to the interpretive variations of passion. Nussbaum analogizes to improvisational jazz, but she might as well have chosen eloquent or poetic speech, after O'Neill: again, the rules of grammar are critical, but absolutely insufficient for creating literature. As O'Neill notes, the rules must be present and respected, but deeply internalized and supplemented with substance. Rules underdetermine action; it is the responsibility of a good perceiver to improvise with both felicity and faithfulness. In fact, Nussbaum argues that the improvisational artist (or the Aristotelian judge) has *more* responsibility to the rules than others, because she cannot do anything by rote, without attention.[55] Precisely because she is being inventive and spontaneous, she has a greater obligation to be aware of the boundaries and to respect them. Good improvisation does not permit just anything at all; the choices made by the artist (or judge) must fit with the whole in order to be successful.[56]

54. It is for this reason that Nussbaum recommends the study of literary prose as both instruction and practice in developing a refined perceptive ability. *See generally* NUSSBAUM, LOVE'S KNOWLEDGE, *supra* note 47.

55. Justice Brennan makes a similar point in his essay. "[T]he difficulty of reconciling competing principles and passions, places an enormous responsibility on the judge." *See infra* text accompanying notes 83-86; William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 12 (1988).

56. *"Finely Aware," supra* note 53, at 155-56.

The artistic analogy makes it easier to see why passion must be a crucial element of good judging. Of course, this is at first a counterintuitive position: judges are expected to be *dis*passionate; how is it that passion could ever have a legitimate role in the deliberative process of a judge? To understand the position we need to attend more carefully to what is meant by passion.

First, as an emotional response, passion distinguishes human from mechanistic analysis.[57] Martha Minow and Vicky Spelman have noted that "[r]eason limited to logical analysis means harsh, uncaring, and mechanical treatment . . . [but] justice requires responsiveness to individual human beings and openness to changing and unique circumstances." They hypothesize a legal system based exclusively on logical analysis, and conclude: "[w]hat a system of justice by computer would lack is not reason, but understanding . . . people cannot be treated with dignity or respect, for there are no human agents around who could so treat them."[58] To see this as more than a platitude requires that we accept the perhaps still radical notion that reason and emotion are not antithetical, but are rather two methods of cognition that inevitably overlap.[59] Emotions are more than grease for the rational machine; they are themselves a way of knowing, a means of assessment or evaluation which provides otherwise unobtainable information to the human analyzer.[60] For example, Minow and Spelman describe the use of emotion in choosing between conflicting principles:

> Through reason we can apply either principle to the facts, but reason alone does not tell us which principles should govern under the circumstances . . . some other quality of human judgment is called upon in that moment of choice, a quality of empathy with one or another party (if not with both), a quality of understanding the circumstance due to experiences within a community with particular customs and patterns of values. . . . The choice about what to value, the choice about whose plight to find moving, and indeed, the choice about how to act in the face of uncertainty calls for more than what reason in the narrow sense can supply.[61]

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57. *See, e.g.*, Brennan, *supra* note 55, at 9; Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 39 (1988).

58. Minow & Spelman, *supra* note 57, at 41-42 (summarizing Justice Brennan's views).

59. Dan Kahan and Martha Nussbaum have described in detail the long-standing competition between the "mechanistic" and the "evaluative" theories of emotion. Most simply put, the mechanistic theory holds the emotions are "forces that do not contain or respond to thought" and are to be regarded as antithetical to, even as contaminants of, reason. The evaluative theory (which the authors advocate) holds "that emotions express cognitive appraisals, that these appraisals can themselves be morally evaluated, and that persons (individually and collectively) can and should shape their emotions through moral education." Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 273 (1996).

60. *Id.* at 285.

61. Minow & Spelman, *supra* note 57, at 46.

Furthermore, they note that a level of emotional engagement is more likely to generate new or innovative ideas about the interpretation of facts or the proper application of law. Enthusiasm and devotion are valuable emotional assets, and they can contribute as much to good judging as the skillful application of logic.

Another feature of understanding emotions as a companion cognitive skill rather than as a random, uncontrollable and disruptive force is the ability to subject emotional response to evaluation and criticism, in the same way that we evaluate and criticize rational responses. With this theory, we can say that some emotions are simply inappropriate—for example, the emotional response of a racist toward members of other races—and we can hold people responsible for their inappropriate emotional states.[62] This serves to counter fears that unchecked emotion will devastate all aspirations to equity and uniformity; on this model, emotion is never any more or less "unchecked" than is reason.[63]

However, Nussbaum argues not simply for the inclusion of emotion in judging, but specifically for the inclusion of passion. This is a crucial point. One could imagine a legal system in which judgments were made with attention to particulars and with well-formed and well-considered reasons and emotions that remained alienating, distant, and unresponsive to all involved.[64] While an array of emotional responses is important, not all emotions require the level of ruthless intimacy that Nussbaum believes is essential for careful, responsible adjudication. "Riffing" on Walt Whitman's poetic consideration of the equable judge, she explains her position:

> Here the contrast is between an abstract psuedomathematical vision of human beings and a rich and concrete vision that does justice to human lives. . . . [T]he poet does not merely present abstract formal considerations, he presents equitable judgments, judgments that fit the historical and human complexities of the particular case. . . . We can best get an idea of what his procedure is like, he suggests, by thinking of the way sunlight falls around a "helpless thing." This bold image suggests, first, enormous detail and particularity. When the sun falls around a thing it illuminates every curve, every nook; nothing remains hidden, nothing unperceived. So, too, does the poet's judgment fall, perceiving all

62. For a more thorough discussion of this point, see Kahan & Nussbaum, *supra* note 59, at 286-89.

63. In fact, it is an argument of this paper that unchecked reason (as well as emotion) will serve to devastate all aspirations to equity. *See infra* text accompanying notes 185-192.

64. For example, a judge may have powerful feelings about the value of the Federal Rules of Civil Procedure, and may credit those feelings equally with what he knows about the particular complaint of the *pro se* litigant before him, and sadly conclude that he must dismiss what is likely a meritorious claim for failure to comply with the captioning requirements of Rule 8. *See also* Minow & Spelman, *supra* note 57, at 43 ("Both our 'rational' and our 'emotional' responses can be rote, unresponsive, irresponsible. . . .").

> that is there and disclosing it to our view. (The image is thus similar to Aristotle's image of the architect's flexible ruler that bends to suit the shape of the stone.) In particular, the sun illuminates the situation of the helpless, which is usually shrouded in darkness. But this intimacy is also stern and rather pitiless: by comparing judgment to sunlight rather than gentle shade, Whitman indicates that the poet's commitment to fairness and fitness does not yield to bias or favor, that his confrontation with the particular, while intimate, is unswerving.[65]

This image of searing intimacy, of the bright light which illuminates the helpless, which knows "every nook" and yet permits no shadow, is frankly unsurpassable as an account of judicial passion. Nevertheless, a few words of explanation may be useful.

To understand the metaphor, it is important to see that like the sunlight, like the ruler that measures the curves of a body as well as the angles of an edifice, judicial attention must be not only particularized, but intimate. Of course this is not to say that judges must develop inappropriately personal relationships with litigants; what is meant here is that judges must be willing to get up close to the unique situations and persons with whom they are presented. They must imagine vividly what it is like for those persons, and participate in the struggles before them empathetically.[66] Again, judicial neutrality is no more to be sacrificed here than is the accuracy of the bendable ruler—and if it is, if a judge crosses the line into improper partiality, then she can and should be criticized, reprimanded, overruled. However, Nussbaum argues strenuously that before judges can fairly evaluate and ultimately decide human questions, they must first feel them as humans. This aids in providing valuable information to the judge to which she may not otherwise have had access, and serves to limit the potential of dehumanizing or stereotyped assumptions.[67] Returning to Whitman's analogy, we remember that sunlight falls around helpless things—and from Nussbaum's riff we understand that passionate attention illuminates the shadows in which the helpless are frequently obscured. She later gives the more concrete example of sexual harassment suits: if a judge cannot imagine what women suffer from being harassed on the job, he loses access to a vivid sense of the injustice of the act, and the urgent need for a remedy.[68] This is not to say that every woman bringing such a suit is necessarily a sympathetic victim, or that every such woman should win her case—that would be to forsake the law for unbridled sentiment, and to assert the general over the particular. What it does say, however, is that empathetic

65. NUSSBAUM, POETIC JUSTICE, *supra* note 47, at 81 (internal citations omitted).

66. Nussbaum emphasizes that this activity is very much like what we do when we read novels; she characterizes the novel-reader and the good judge as "judicious spectators." *Id.* at 86.

67. *Id.* at 91.

68. *Id.*

knowledge must be a starting place for critical analysis. Once one has imagined what it might be like for the woman-plaintiff, one can proceed with judgments about whether her pain is reasonably felt in light of all the other facts—rational and emotional—available to the judge, and more carefully and fairly decide whether the law offers any remedy for the felt injustice.

* * * *

Of course, Nussbaum is not the first modern scholar to identify the value of a richly responsive application of rules for a system of justice. Perhaps most famously, Justice Cardozo argued more than seventy-five years ago that judges have an obligation to be creative and humanistic as they deliberate in the interstices of legislative rules.[69] More recently, Justice Brennan affirmed Cardozo's vision of what Brennan called "the human reality of the judicial process," arguing that passion and imagination are not only desirable judicial attributes, but necessary elements of justice.[70] Since that public statement, others in the legal profession have examined the matter further, developing and refining the position staked out by the two Justices.[71] That philosophers and practitioners can come to similar conclusions via independent routes says something, perhaps, for the integrity of the theory; at the very least, it facilitates conversation in the nexus between Aristotle and the Federal Sentencing Guidelines.

Cardozo's approach begins with the assumption that "judge-made law [is] one of the existing realities of life."[72] While legislative decrees always have precedence over judicial interpretation, the fact is that rules, however comprehensive, will inevitably run out. On a theoretical level, this is just a product of the inherent imprecision of general principles. "Adhere to the law" may be a laudable premise, but several questions remain: How? Which law? What counts as adherence?[73] This is the point made by H.L.A. Hart, granting that the law can never determine its own application: "Treat like cases alike" is an empty principle until we know which differences count, and that question is subject to legitimate practical debate.[74] O'Neill makes the same point when she contends that rules can never be algorithmic in any strict sense, since they will always depend on interpretation of particular facts for their application.[75]

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69. BENJAMIN N. CARDOZO, THE NATURE OF JUDICIAL PROCESS (1921).

70. Brennan, *supra* note 55, at 3.

71. *See, e.g.*, Minow & Spelman, *supra* note 57, at 37; Lynne Henderson, *The Dialogue of Heart and Head*, 10 CARDOZO L. REV. 123 (1988); Edward de Grazia, *Humane Law and Humanistic Justice*, 10 CARDOZO L. REV. 25 (1988); Fiss, *supra* note 38, at 789; Richard D. Cudahy, *Justice Brennan: The Heart Has Its Reasons*, 10 CARDOZO L. REV. 93 (1988); Julius Cohen, *Justice Brennan's "Passion,"* 10 CARDOZO L. REV. 193 (1988).

72. CARDOZO, *supra* note 69, at 10.

73. *Id.* at 64 ("It is well enough to say that we shall be consistent, but consistent with what?").

74. HART, *supra* note 24, at 155-57.

75. O'Neill, *supra* note 40, at 58-60. *See also infra* text accompanying notes 190-92.

But even if we put aside the philosophical difficulties with general rules, Cardozo reminds us that on a pragmatic level cases arise quite regularly which the legislature never anticipated, or anticipated poorly. In these cases *stare decisis* fails as a necessary and sufficient decision procedure and judges must fill the gap.[76] This is why a judge must be more than a computer, why wisdom and inventiveness are required. If law were merely the process of deriving conclusions from major premises provided by the Congress, a Turing machine would do for a judge.[77] But law is inductive, and though logical consistency is a good, it is not the only good. Complete justice demands an artistic sensibility as well.[78]

Cardozo, knowingly or not, is Aristotelian in his understanding of judicial obligation. Cardozian judges are public citizens of practical wisdom, whose virtue lies in years of experience and practice. They are virtuosos of technical skill and understanding; their knowledge of the law is deep and almost reflexive, permitting them the liberty to respond to particular cases with responsible improvisation—that is, with aesthetic perception.

> There must be nothing in [the law] that savors of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent. . . . But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. . . . [E]quity and fairness or other elements of social welfare . . . may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses. . . . If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge . . . from experience and study and reflection; in brief, from life itself.
>
> . . . How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art. . . . [W]ithin the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative.
>
> . . . I know he is a wise pharmacist who from a recipe so general can compound a fitting remedy. But the like criticism may be made of most attempts to formulate the principles which regulate the practice of an art. . . ."[A book] on painting, offers little or no guidance to those who wish to become famous painters. Books on

76. CARDOZO, *supra* note 70, at 14-16.

77. *Id.* at 19-21.

78. *Id.* at 23, 32, 37-39. Cardozo made explicit use of the aesthetic analogy, suggesting that logic and legal rules were simply tools in the hands of the judicial artist: "Much must be left to that deftness in the use of tools which the practice of an art develops. A few hints, a few suggestions, the rest must be trusted to the feeling of the artist." *Id.* at 36.

> literary styles are notoriously lacking, speaking as a rule, in practical utility." After the wearisome practice of analysis has been finished, there must be for every judge a new synthesis which he will have to make for himself. The most that he can hope for is that with long thought and study, with years of practice at the bar or on the bench, and with the aid of that inward grace which comes now and again to the elect of any calling, the analysis may help a little to make the synthesis a true one.[79]

In Cardozo's view, then, judges must be rational, but more importantly they must be wise, and wisdom requires a kind of Lesbian flexibility and practiced artistry that reason alone can never capture. As one legal scholar has said, "Wisdom is more than reason. Born of experience, it is both. It has its 'intuitive' elements and its 'cognitive' elements. It is based on the dialogue of heart and head, and includes emotion and compassion."[80] Emphasizing the long history of segregating passion from reason in law and a host of other pursuits, Lynne Henderson argues that judges have been handicapped and justice debilitated by the persistent refusal to rely on emotion and intuitive response in addition to logic.[81] Without denying the obviously crucial role reason has to play in judgment, Henderson points out that "[j]udicial decisions do not take place on a purely defined field because many cases are messy and human," and that "[e]motion can be a mode of understanding and is a way of knowing something about oneself, one's environment, or a situation."[82] Without integrating affective knowledge with the analytic, judges may be rational, but they will never be wise.

Justice Brennan refers to this kind of judicial wisdom as "vital rationality," to which passion is "essential nourishment."[83] Like Henderson, he insists that reason alone is insufficient to sustain the integrity of the judicial process, if by reason we mean to include only "lumbering syllogisms."[84] Because law only has meaning in the realm of human experience, "[s]ensitivity to one's intuitive and passionate responses, and an awareness of the range of human experience, is therefore not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared."[85] Brennan further argues that strictly formalist conceptions of judging, while intending to preserve the legitimacy and independence of

79. *Id.* at 112-15, 162-63.

80. Henderson, *supra* note 72, at 139.

81. *Id.* at 125. *See also* Minow & Spelman, *supra* note 57, at 38-41 (focusing on how Justice Brennan's challenge to integrate passion and reason threatened the traditional legal devotion to reason "uncorrupted" by passion).

82. Henderson, *supra* note 72, at 131-32.

83. Brennan, *supra* note 55, at 9.

84. *Id.*

85. *Id.* at 10.

the judiciary by denying passion a role in decision-making, badly misperceive the role of passion. Like Cardozo, and like the formalists, Brennan argues strenuously that "it is the highest calling of a judge" to resist the tug of "spasmodic sentiment"—that is not what passionate judging is about.[86] With Nussbaum and with Aristotle, we know that passion can be indulged to vicious excess, and Brennan and Cardozo understand that as well. What all these theorists call for is emphatically not an indulgence of sentiment, but instead a recognition of the mean between reason and passion, and an ability to perceive well with both faculties. This perception is judicial wisdom, vital rationality; it is a vision of justice complete.

The question that remains is whether there is room in that vision of justice for the 258-box grid of the Federal Sentencing Guidelines—or perhaps more pragmatically, whether there is room within the Guidelines' grid for a vision of justice as passionate and reasoned. Before these questions can be fairly addressed, however, it is necessary first to examine the history and developing jurisprudence of sentencing under the Guidelines. Both are considered in the following two sections.

V.
THE GUIDELINES: HISTORY AND RATIONALE

Prior to the implementation of the Federal Sentencing Guidelines, federal criminal sentencing was characterized by indeterminacy in terms, broad judicial discretion, and tremendous deference to sentencing courts on appeal.[87] Statutes specified maximum criminal sentences, but permitted courts wide latitude in determining appropriate penalties; judges could consider any factors they deemed relevant, and assign penalties from fines to probation to imprisonment with few restraints.[88] Furthermore, while convictions could be appealed, sentencing decisions themselves were not reviewable.[89] Underlying this discretionary approach to sentencing was a reliance on a rehabilitative theory of punishment, which held that the primary goal of the criminal justice system should be to rehabilitate offenders

86. *Id.* at 11-12.

87. *See* Mistretta v. United States, 488 U.S. 361, 363 (1989) (finding that the adoption of the Guidelines ushered in a new era of guided discretion).

88. *See generally* Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 3-4 (1991); John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility Under the Guidelines*, 59 BROOK. L. REV. 551 (1993); Karin Bornstein, *5K2.0 Departures for 5H Individual Characteristics: A Backdoor Out of the Federal Sentencing Guidelines*, 24 COLUM. HUM. RTS. L. REV. 135 (1993); Michael S. Gelacak, Ilene H. Nagel, & Barry L. Johnson, *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 305 (1996).

89. *See* Koon v. United States, 518 U.S. 81, 97 (1996) ("We agree that Congress was concerned about sentencing disparities [in enacting the Guidelines], but we are just as convinced that Congress did not intend, by establishing appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions.").

and return them to society quickly.[90] This approach required highly particularized assessments by sentencing courts, coupled with a parole system which could review offender progress and adjust sentences accordingly.[91]

While some commentators emphasize the level of flexibility and individual attention this system of broad discretion was able to achieve,[92] no one denies that the old system also produced wide disparities in sentencing, raising concerns about equality, proportionality, and improper discrimination.[93] Studies done throughout the middle part of the century showed that sentences could span a range of as much as 20 years for nearly identical offenses, depending on region, gender, race, judicial ideology, and a variety of other factors.[94] Critics found such disparities intolerable; one article described the pre-Guidelines system as "a stark, classic regime of arbitrary power" and "the antithesis of the rule of law."[95] While advocates of the rehabilitative model surely felt less hostility toward the discretionary system, according to (now Justice) Stephen Breyer, one of the original members of the United States Sentencing Commission charged with writing the Guidelines, by the mid-1980s there was near-unanimity among academics and practitioners that some kind of federal guidelines were required.[96]

In 1983, the Senate Appropriations Committee published a lengthy report criticizing the old system of indeterminate sentencing and parole and the "unfettered" and "sweeping" discretion of judges. The report called for "greater certainty and uniformity in sentencing," and supported passage of the Sentencing Reform Act ("SRA") provision of the Comprehensive Crime Control Act of 1984.[97] The SRA proposed the creation of the United States Sentencing Commission ("USSC"), a seven person panel of federal judges and others charged with setting federal sentencing policy,

90. *See, e.g.,* S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182. *See also* Kate Stith & Jose Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1248-52 (1997) (explaining the pre-Guidelines sentencing process in which judges had wide discretion with advisory input from both parole and probation officers, and with an emphasis on the specific problems and needs of the defendant); Eric P. Berlin, *The Federal Sentencing Guidelines' Failure to Eliminate Sentencing Disparity: Governmental Manipulations Before Arrest*, 1993 WIS. L. REV. 187, 189 (1993) (describing the pre-Guidelines sentencing process as one that emphasized discretion to allow prisoners to be released when they were deemed rehabilitated); Selya & Kipp, *supra* note 88, at 4-5 (describing the pre-Guidelines sentencing process as one in which judicial discretion determined sentencing outcomes).

91. Selya & Kipp, *supra* note 88, at 4-5.

92. *See, e.g.*, Bornstein, *supra* note 88, at 138.

93. *See, e.g., id.* at 139; Gelacak, Nagel, & Johnson, *supra* note 88, at 299; Selya & Kipp, *supra* note 88, at 4; Walker, *supra* note 88, at 551.

94. *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5 (1988); Selya & Kipp, *supra* note 88, at 4; Gelacak, Nagel & Johnson, *supra* note 88, at 306.

95. Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 655 (1993).

96. Breyer, *supra* note 94, at 3.

97. S. REP. NO. 98-225 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182.

including federal sentencing guidelines.[98] In 1984 the SRA became law; by late 1985 the USSC had been appointed, and by April of 1987, the Federal Sentencing Guidelines were in effect.[99]

The goals of Congress in establishing the Commission were threefold. First, the USSC was instructed to "provide certainty and fairness" in sentencing; this was accomplished in large part by the elimination of parole in the federal system.[100] The sentences received by defendants after trial would now be the sentences they actually served; the possibility of mid-sentence assessment of rehabilitative progress was eliminated. Second, the SRA required the reduction of "unwarranted sentencing disparities" among similarly situated defendants.[101] This was to be accomplished through the development of the Guidelines, which, despite their name, are statutory and require satisfactory explanation when not followed.[102] The primary feature of the Guidelines is a grid, with forty-three offense levels on its vertical axis and six criminal history categories on the horizontal.[103] In simplest terms, each offense is assigned a number between one and forty-three, and each offender is assigned a number between one and six, depending on her conviction history. By tracing the intersection of these two numbers on the 258-box grid, a judge will find the appropriate sentencing range for the particular case before her. Since Congress provided that the top of any range cannot exceed the bottom by more than 25%, the sentence any defendant receives cannot vary from any other similarly situated defendant by more than that narrow amount.[104]

In addition to certainty and uniformity, however, Congress also required that the new system maintain "sufficient flexibility to permit individualized sentences when warranted."[105] This mandate of "proportionality," as it is usually characterized, has been the primary source of confusion and controversy among judges and others in the legal community. Justice Breyer identifies the tension between uniformity and proportionality as one of the fundamental compromises of the Guidelines, and in fact, as one

98. 28 U.S.C.A. § 991(a) (West 1999).

99. Breyer, *supra* note 94, at 6. In the introduction to the Guidelines, the USSC explicitly noted its intent to "rationalize" the sentencing process by "minimiz[ing] the discretionary powers of the sentencing court." SENTENCING GUIDELINES MANUAL, *supra* note 39, Ch. 1, Pt. A.2-3, p.s. It reiterated the congressional goals of certainty, uniformity and proportionality, and stressed that a "system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect." Furthermore, the Commission argued that granting broad discretion to judges to work out "wrinkles" in lieu of systemic provisions risked "a return to the wide [sentencing] disparity that Congress established the Commission to reduce." SENTENCING GUIDELINES MANUAL, *supra* note 39, Ch. 1, Pt. A.3, intro. comment.

100. 28 U.S.C.A. § 991(b)(1)(B) (West 1999).

101. *Id.*

102. 18 U.S.C.A. § 3553(b) (West 1999). *See also* SENTENCING GUIDELINES MANUAL, *supra* note 39, Ch. 1-5 (detailing Guidelines' the punishment and departure schemes).

103. Selya & Kipp, *supra* note 88, at 6.

104. 28 U.S.C.A. § 994(b) (West 1999).

105. 28 U.S.C.A. § 991(b)(1)(B) (West 1999).

of the primary tensions of the criminal justice system as a whole.[106] On the one hand, uniformity dictates that like cases be treated alike; on the other, proportionality requires that individual differences and variations be recognized and accounted for. While these goals are not necessarily in contradiction, it is argued that the attention to detail required to sentence proportionately drains judicial resources and demands a level of discretion which undermines the goal of systemic uniformity.[107] Breyer also emphasizes another tension, manifested in the compromise between "real offense" and "charge offense" sentencing.[108] A charge offense system champions uniformity, basing sentences only on the offense charged, regardless of the details of its commission or the situation of the offender. All persons found guilty of X crime will receive Y sentence, irrespective of individual variations. While this system is procedurally efficient, it ignores substantive details that may be relevant for determining a just outcome. However, a real offense system, while vindicating proportionality and substantive justice, requires an exceptional amount of *ad hoc* judicial fact-finding in order to determine a level of punishment which accounts for all the relevant variations of a given case. As Breyer notes:

> [T]he more facts the court must find in this informal way, the more unwieldy the process becomes, and the less fair that process appears to be. At the same time, however, the requirement of full blown trial-type post-trial procedures, which include jury determinations of fact, would threaten the manageability that the procedures of the criminal justice system were designed to safeguard.[109]

So, while an exclusive focus on uniformity may frustrate substantive justice, too much emphasis on proportionality may undermine procedural concerns.[110]

The USSC addressed this difficulty via two mechanisms which introduce a limited measure of judicial discretion into the Guidelines. The first, which is utilized regularly in Guidelines sentencing, permits variations of the base offense level for "specific offense characteristics" (e.g., use of a weapon, amount of money stolen, etc.) and "adjustments" for facts such as the status of the victim or the offender's role in the offense.[111] These elements are considered prior to use of the grid; they influence the calculation of the offense level to be traced on the vertical axis in order to determine

106. Breyer, *supra* note 94, at 13.

107. *Id.* at 9-13.

108. *Id.* at 8-11.

109. *Id.* at 11.

110. Ultimately, the USSC decided that uniformity should be valued over proportionality, though the latter was not to be disregarded entirely. *See, e.g.*, SENTENCING GUIDELINES MANUAL, *supra* note 39, Ch. 1, Pt. A.3, intro. comment; Breyer, *supra* note 94, at 13-14.

111. SENTENCING GUIDELINES MANUAL, *supra* note 39, Ch. 2, 3.

the recommended sentence. However, they are not, strictly speaking, discretionary: Chapters 2 and 3 of the Guidelines prescribe specifically the level variance for a given list of circumstances. If a sentencing judge finds that a circumstance is present, she must apply the prescribed variance to the base offense level (e.g., add three levels for use of a gun in robbery[112]) before calculating the sentence.

The second mechanism provided by the USSC to address proportionality concerns is the possibility of "departing" from the grid-determined sentence in "substantially atypical" cases. The system of departures provides the most interesting and serious challenge to my thesis—if anything saves federal grid sentencing from a charge of excessive mechanism and an insufficient reliance on the practiced artistry of judges, it is the legal option of departing from the grid when necessary. Hence, a careful look at the procedures for departure and the emerging common law understanding of those procedures is crucial before any fair critique can be made.

VI.
DEPARTURES JURISPRUDENCE

The Guidelines have been in effect for over ten years, enough time for a jurisprudence and responsible academic commentary to have emerged. What follows is a brief survey of the actual statutory provisions for Guidelines departures, judicial interpretation of the statute, and reports from practitioners and theorists about how the provisions have been understood in the field.

A. The Statute

18 U.S.C. § 3553(b) describes how the Guidelines are to be applied by a sentencing court. Under the statute, the court must impose the grid-calculated sentence, "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[113] First Circuit Judge Bruce Selya and Matthew Kipp point out that the statute implicitly creates a two-part test for the reasonableness of departures: that the court (1) respond to circumstances "not adequately considered" by the USSC; and (2) that a departure "should result."[114] While the second prong may offer little guidance,[115] the first is directly addressed by the statute

112. SENTENCING GUIDELINES MANUAL, *supra* note 39, § 2B3.1(b)(2).

113. 18 U.S.C.A. § 3553(b) (West 1999).

114. Selya & Kipp, *supra* note 88, at 18.

115. In fact, the generality of this provision may provide the only remaining opportunity for unfettered judicial discretion within the framework of the Guidelines. *See infra* text accompanying notes 134-44.

itself, which states: "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."[116] Turning to Chapter One of the Guidelines, we find—not surprisingly—an entire section of commentary devoted to departures.[117]

The key provision of the USSC's approach to departures is what it calls the "heartland"—the imagined set of typical cases on which each grid box is based.[118] If any actual case reasonably falls within the heartland, the sentencing court is bound to apply the grid sentence. Inevitably, most cases will fall within the heartland, since it is just an amalgam of typical cases.[119] Furthermore, the particular details of any case in the heartland will necessarily have been "adequately considered" by the USSC, forestalling the option of departure in typical cases.

However, the USSC commentary continues: "When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted."[120] Several factors are banned from consideration, including race, sex, national origin, creed, religion, and socioeconomic status,[121] lack of guidance as a youth,[122] drug or alcohol dependence,[123] and the presence of coercion or duress.[124] Others are incorporated into the commentary associated with the considered offenses, and variations in base level are recommended; presumably, these factors have been adequately considered by the Commission, and cannot justify a departure.[125] Apart from these, however, the USSC recognizes "the vast

116. 18 U.S.C.A. § 3553(b) (West 1999).

117. SENTENCING GUIDELINES MANUAL, *supra* note 39, Ch. 1. Pt. A.4(b), intro. comment.

118. For a discussion of the empirical foundation of the Guidelines, see Breyer, *supra* note 94, at 7-8; SENTENCING GUIDELINES MANUAL, *supra* note 39, Ch. 1., Pt. A.3, intro. comment.

119. Breyer emphasizes that the Guidelines are "evolutionary," and that the continuing mission of the USSG is to collect empirical data regarding sentencing practices and to revise the heartland if the data indicate important shifts. Breyer, *supra* note 94, at 8. The introductory comment to the Guidelines explicitly note that

> The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for for doing so, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.

SENTENCING GUIDELINES MANUAL, *supra* note 39, Ch. 1, Pt. A.4(b), intro. comment .

120. *Id.* at Ch. 1, Pt. A.4(b), intro. comment.

121. *Id.* at § 5H1.10.

122. *Id.* at § 5H1.12.

123. *Id.* at § 5H1.4.

124. *Id.* at § 5K2.12.

125. *Id.* at Ch. I, Part A.4(b). Technically, variations of base offense levels in accordance with the USSG recommendations are considered "guided departures." However, most commentators use the general phrase "departures" to refer only to the unguided variety.

range of human conduct potentially relevant to a sentencing decision," and admits the impossibility of adequately considering all of it.[126] At the same time, it notes that "[w]here the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important," and that cases in which an unguided departure is actually warranted will be "highly infrequent."[127]

B. The Courts

In the thirteen years since the implementation of the Guidelines, the federal judiciary has had some opportunity to declare the meaning of the statute and to clarify its interpretation. Few generalizations can be made regarding federal jurisprudence on the Guidelines; while some courts have seized upon the possibility of departure and defended it vigorously against encroachment, others have concluded that departure provisions must be narrowly construed and only exceptionally relied upon. Privately, however, many trial judges seem to resent imposition of the Guidelines, variously describing them as "administrative handcuffs" which replace humanistic sentencing with "the clean, sharp edges of a sentencing slide rule" and turn judges into "rubber-stamp bureaucrats," "judicial accountants" or "computers" reduced to "connecting dots on a grid."[128] One prominent federal judge has gone so far as to state publicly that certain provisions are "so cruelly delusive as to make those who have to apply the guidelines to human beings, families, and the community want to weep."[129] Judicial opposition is often manifested on the job: at least one recent empirical study of six circuits suggests that departures are not always being limited to meaningfully atypical cases, and are instead used explicitly or implicitly to resist imposition of the grid-determined sentence.[130] However, other circuits have developed a rather strict policy disapproving departures, with Courts of Appeals consistently reversing sentencing decisions which do not conform to the grid.[131]

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126. *Id.* at Ch. 1, Pt. A.4(b), intro. comment.

127. *Id.*

128. Walker, *supra* note 88, at 551-53.

129. Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169, 169 (1996).

130. Gelacak, Nagel, & Johnson, *supra* note 88, at 364-65 (showing that judges may expressly disagree with the Guidelines, fail to articulate a reason for the departure, depart on inappropriate grounds, or depart based on locally determined standards). Michael Gelacak is a past Vice Chair of the United States Sentencing Commission. *See also* Bornstein, *supra* note 88, at 158-59 (stating that departures are often based upon the defendant's background and likelihood of rehabilitation).

131. *See, e.g.*, Barry L. Johnson, *Discretion and the Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of* Koon v. United States, 58 OHIO ST. L.J. 1697, 1749 (1998); Weinstein, *supra* note 129, at 174; Berlin, *supra* note 90, at 200; Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 910-13 (1991).

In the earliest Supreme Court case to consider the Guidelines, the Court decided that Congress had rejected a strictly determinate system of guidelines in favor of a more flexible one which permitted judicial discretion over particular facts.[132] It later affirmed the long legal tradition of affording great deference to trial courts' expertise in matters of fact, including sentencing, when it approved the First Circuit's decision in *United States v. Diaz-Villafane*—which remains the leading case on the issue of departure review.[133]

In *Diaz-Villafane*, the court identified three steps for review of district court departure decisions. First, the case must be sufficiently unusual to move it outside the heartland; this is a question of law and can be reviewed *de novo* by the appellate court.[134] Second, the unusual facts must actually be present in the case at hand; this is, of course, question of fact for the trier and can only be set aside for clear error.[135] Finally, if appropriately atypical facts actually exist in a case, the reviewing court must determine if the trial court's departure is "reasonable." On this point, the First Circuit had this to say:

> This third step involves what is quintessentially a judgment call. District courts are in the front lines, sentencing flesh-and-blood defendants. The dynamics of the situation may be difficult to gauge from the antiseptic nature of a sterile paper record. Therefore, appellate review must occur with full awareness of, and respect for, the trier's superior "feel" for the case. We will not lightly disturb decisions to depart, or not, or related decisions implicating decrees of departure.[136]

In its closing comments, the court indicated support for the particularized attention permitted by discretionary departures: "For our part, we reject [the] attempt to turn idiosyncratic departure decisions into mechanistic bean-counting."[137]

Three years later, the Supreme Court refined the reasonableness inquiry outlined in *Diaz-Villafane*, holding that the reasonableness of a legitimate departure could not be independently determined by the appellate court, and emphasizing that nothing in the Guidelines displaced the tradition of deference to district court sentencing decisions.[138] The following

132. Mistretta v. United States, 488 U.S. 361, 367 (1989).

133. United States v. Diaz-Villafane, 874 F.2d 43, 45 (1st Cir. 1989). *See also* Williams v. United States, 503 U.S. 193, 205 (1992) (following and refining the *Diaz-Villafane* approach); Johnson, *supra* note 131, at 1709 (stating that there are three standards of review for a trial judge's departures: de novo review for legitimacy of the basis of departure, clear error review for factual findings, and abuse of discretion for the direction and degree of departure).

134. *Diaz-Villafane*, 874 F.2d at 49.

135. *Id.*

136. *Id.* at 49-50.

137. *Id.* at 52.

138. *Williams*, 503 U.S. at 205.

year, the First Circuit spoke again (with subsequent Supreme Court approval[139]), in *United States v. Rivera*, stating unequivocally that "the Guidelines cannot dictate how courts should sentence in such special, unusual or other-than-ordinary circumstances."[140] The decision emphasized the differing institutional strengths of the courts and the Commission, pointing out that district courts are best positioned to use their experience and informed judgment to determine when the Guidelines ought to be applied in any particular case.[141] The Commission, according to the court, is better suited to identify general patterns in sentencing and thereby to carve out the heartland of typical sentencing practice.[142] Under this "theory of partnership" ostensibly embodied in the Guidelines,[143] district courts must be afforded discretion in their sentencing decisions, and should only be overturned for clear error.[144]

The most thorough judicial treatment of departures, however, came in the 1996 Supreme Court case of *Koon v. United States*. The explicit holding of the case was that appellate courts cannot consider sentencing decisions *de novo*; instead, they must use an abuse of discretion standard when reviewing district court departures.[145] More interesting, however, is the Court's extended discussion of the rationale for departures. The decision cites the "wisdom" and "necessity" of sentencing procedures that take into account individual circumstances.[146] After an analysis of the official commentary in Chapter One of the Guidelines, it concludes that the USSC did not "adequately take into account cases that are, for one reason or another, unusual," and that legitimate grounds for departure are only marginally limited under the statute.[147] It credits congressional concern over sentencing disparities, but asserts that Congress was equally concerned with preserving the traditional sentencing discretion of district courts.[148] It goes on to affirm *Rivera*'s position on the "institutional advantage" and "special competence" of district courts in sentencing, emphasizing that "a district court's departure decision involves the consideration of unique factors that are little susceptible . . . of useful generalization."[149] In that vein, the Court issues stern notice that judicial discretion and attention to particulars should not be obviated by undue emphasis on the Guidelines' goal of uniformity:

139. Koon v. United States, 518 U.S. 81, 97 (1996).
140. United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993).
141. *Id.* at 950.
142. *Id.*
143. *Id.*
144. *Id.* at 952.
145. *Koon*, 518 U.S. at 91.
146. *Id.* at 92.
147. *Id.* at 93.
148. *Id.* at 97 (internal citations omitted).
149. *Koon*, 518 U.S. at 98-99 (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1989) (internal citations omitted)).

> The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so to reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This too must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District judge. Discretion is reserved within the Sentencing Guidelines, and reflected by the standard of appellate review we adopt.[150]

So, while the Court has acknowledged Congress's authority to fix federal sentencing via the Guidelines,[151] it has done so with the proviso that judges' unique ability to attend to particulars be preserved in the interest of justice. Put differently, judges should not be treated as computers; or, the judicial artistry which aims at proportionality cannot be sacrificed for the sake of the laudable, but limited goal of uniformity and the rule of law. Whether this was actually the purpose of Congress will remain an open question, and the high court's success in guiding the lower courts continues to be debated.[152] What is clear at least is that some courts, including the Supreme Court, have struggled to ensure that departures are construed as an opportunity for the maximal exercise of judicial discretion in federal sentencing decisions.

C. The Commentators

Supreme Court decisions notwithstanding, many commentators on the Guidelines have been reserved in their assessment of departures, and remain skeptical about their ability to emancipate judges from the handcuffs of the grid.[153] Of course, not everyone agrees that judicial emancipation

150. *Id.* at 113.

151. Mistretta v. United States, 488 U.S. 361, 364 (1989) (stating that "Congress, of course, has the power to fix the sentence for a federal crime. . . and the scope of judicial discretion with respect to a sentence is subject to congressional control.").

152. *See, e.g.*, Johnson, *supra* note 131, at 1746-50; Stith & Cabranes, *supra* note 90, at 1278-82. *See infra* text accompanying notes 157-60.

153. *But see, e.g.*, Walker, *supra* note 88, at 551-53 (stating that criticism of departures as limited and limiting is overstated; that in fact, the Guidelines encourage careful consideration of the individual characteristics of offenders); Gregory N. Racz, *Exploring Collateral Consequences:* Koon v. United States, *Third Party Harm, and Departures from Federal Sentencing Guidelines*, 72 N.Y.U. L. REV. 1462 (1997) (arguing that the available grounds for departure are "nearly limitless," and that the ensuing liberal use of departures has reintroduced the arbitrariness in sentencing that Congress explicitly intended to eliminate).

was or should be the purpose of departures; some view their limited availability as an intentionally narrow concession to proportionality in sentencing. Former USSC Vice Chair Michael Gelacak and his co-authors admit that departures are the mechanism by which individual judges exercise discretion under the Guidelines, and that they provide a "crucial safety valve" in a system that is "primarily designed to limit judges' discretion and impose some manner of uniformity in sentencing."[154] As such, Gelacak argues that departures must be limited, guided and rare in order to avoid undermining the primary Congressional goal of uniformity; he and his colleagues are emphatic in asserting that departures, while perhaps a "safety valve," were never intended to be an "escape hatch" from the legislative discipline of the grid.[155] If departures are used at all, they must be limited to "meaningfully atypical" cases not already considered by the Commission.[156]

Furthermore, many commentators contend that precatory language to the contrary, the Commission has considered a wide variety of factors which are likely to be relevant in discretionary sentencing rendering them unavailable for judicial consideration. Specifically, individual offender characteristics are largely considered irrelevant by the Guidelines. Judge Selya and Matthew Kipp point out that Congress intended the Guidelines to be offense-oriented rather than offender-oriented, and directed the Commission generally to disregard factors such as age, family ties, education, vocational skills, employment record, community ties and physical condition of the offender in sentencing.[157] The result is that individual offender characteristics do not factor in the grid calculus at all, and are strongly discouraged as circumstances warranting departure.[158] Furthermore, as noted earlier, many factors are banned entirely as grounds influencing sentencing whether within the heartland or not.[159]

While many hoped that the 1996 decision in *Koon* and its seemingly unfettered approval of sentencing court discretion would relax the some of the statutory constraints imposed by the USSC, that hope appears to have been misplaced. Both opponents and supporters of Guidelines sentencing have criticized the Court's ruling as "flawed," "puzzling," "misleading" and "ambiguous."[160] Both emphasize that the Court's language in support of

154. Gelacak, Nagel, & Johnson, *supra* note 88, at 318.

155. *Id.* at 319.

156. *Id.*

157. Selya & Kipp, *supra* note 88, at 24-25.

158. *Id.* at 25-26. *See generally* 28 U.S.C.A. § 994(c) (West 1999); 18 SENTENCING GUIDELINES MANUAL, *supra* note 39, at § 5.

159. Selya & Kipp, *supra* note 88, at 25.

160. Johnson, *supra* note 131, at 1718, 1723, 1731-43. *See also* Stith & Cabranes, *supra* note 90, at 1279-83 (arguing that *Koon* has not altered the authority of sentencing courts; rather, it leaves them with the departure authority "only in cases that are 'atypical' in ways neither proscribed from consideration by the sentencing commission nor already considered").

judicial discretion was dicta, and that the holding itself leaves the USSC system of departures as described by Gelacek essentially untouched.[161] The "heartland" of cases defined by the Commission remains unaltered, as do the Commentaries prohibiting departure on grounds already "adequately" considered by the USSC. That is to say, after *Koon* there is no more room for judicial discretion in Guidelines sentencing than there was before. Although there may now be less doubt about the value of discretion when it is exercised, it still will be exercised extremely rarely—as the Commission intended.[162]

In light of the statutory history of the Guidelines and their subsequent interpretation by the federal courts, one conclusion is that while departures may exist as the last bastion of judicial sentencing discretion, the bastion is extraordinarily narrow and hemmed in on all sides. Judges may exercise their discretion "to consider every convicted person as an individual and every case as a unique study in . . . human failings,"[163] but only in the rare instances where the case is "meaningful[ly] atypical" and only to the extent that the convicted person's "individuality" does not encompass their age, family ties, education, vocational skills, employment record, community ties, physical condition, drug or alcohol dependence, race, sex, national origin, creed, religion, socioeconomic status, lack of guidance as a youth or the presence of coercion or duress in the commission of their crime.

Given these limitations, one wonders that departures are exercised at all. In fact, Karin Bornstein's survey of departure jurisprudence shows that

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161. Johnson, *supra* note 131, at 1724, 1746 ("[T]he Court's dicta extolling departure as a manifestation of the individual sentencing judge's residual discretion under the Guidelines is highly misleading." . . . "*Koon* does not substantially change the departure review process. It merely obscures the nature of that process, introducing unnecessary confusion."); Stith & Cabranes, *supra* note 90, at 1279:

> The truth is that *Koon* itself is a puzzling decision; its pronouncements on the extent of deference due to sentencing judges are difficult to reconcile with the reasoning and holdings stated elsewhere in the decision. In our view, a thorough and candid assessment of *Koon* compels the conclusion that the decision has not changed matters significantly and perhaps not at all.

(internal citations omitted).

162. While it is still too early to know the long-term judicial effects of *Koon*, Barry Johnson has examined post-*Koon* departure review practice in an attempt to discern any interpretive trends among the circuits. His conclusion indicates that things haven't changed much since the decision; *Koon* has apparently failed to resolve any circuit split. Johnson, *supra* note 131, at 1747-49:

> An examination of departure review practice after *Koon* reveals contrasting approaches to applying the teachings of that case. . . . Some appellate courts appear to have taken to heart the language emphasizing sentencing judge discretion and the need for appellate deference [citing cases from the Second and Ninth Circuits]. . . . In contrast, analysis of other appellate cases suggests a business-as-usual approach to *Koon*.

(internal citations omitted).

163. *Koon*, 518 U.S. at 113 (1996).

some circuits have concluded that the Guidelines bar consideration of individual circumstances altogether, while others have decided to limit departures as a matter of course, permitting only truly extraordinary individual variations to merit a departure from the grid.[164] To complicate matters further, Fred Bernstein describes the difficulties presented by congressionally mandated minimum sentences for the discretionary use of departures.[165] Mandatory minimums trump Guidelines sentences; wherever the Guidelines would permit a sentence lower than the statutory minimum, the minimum prevails. When sentencing by the grid, the systems are somewhat redundant, since the USSC incorporated the statutory minimums into the sentences recommended by the Guidelines.[166] However, if a judge determines that a departure is warranted in a case where a mandatory minimum applies, she is powerless to exercise the discretionary departure absent a motion by the prosecution.[167] As Bernstein notes, in the absence of the prosecution's motion, "the judge's task is largely ministerial; a computer could impose the mandatory term."[168]

The question raised by the commentators on the Guidelines—supporters and detractors alike—is the extent to which departures actually permit judicial discretion back into a system explicitly designed to exclude it.[169] It seems that debate will continue on this point as long as opinions vary on the role of discretion in sentencing: Guidelines defenders complain about "departure abuse" while critics insist that judges have been reduced to calculators. However, although the extent of discretion remaining under the Guidelines may be debated, no one can deny that federal sentencing is formally far less discretionary than it was prior to imposition of the Guidelines. The question to be raised in the final pages of this comment is this: to the extent that discretion has been excluded from federal sentencing decisions, what effect does this new system of decision-making have for the virtue of judges and the political communities in which they judge?

VII.
THE VIRTUE IN DISCRETION

An obvious and often overlooked consequence of deciding to limit judicial sentencing discretion is the effect such a limitation will have on judges as moral and political agents. If Nussbaum and Cardozo are right,

164. Bornstein, *supra* note 88, at 147-55.

165. *See generally* Fred A. Bernstein, *Discretion Redux—Mandatory Minimums, Federal Judges, and the "Safety Valve" Provision of the 1994 Crime Act*, 20 U. DAYTON L. REV. 765 (1995).

166. *Id.* at 768-69.

167. *Id.* at 769-70.

168. *Id.* at 770.

169. *Cf.* Johnson, *supra* note 131, at 1742-43 ("In short, the essence of the guidelines scheme is the creation and enforcement of a rule of law in sentencing . . . [in part] by controlling the exercise of departure authority by district judges [through independent review].").

then it is crucial to the moral character of a judge that she exercise a particularized and creative discernment which is at all times faithful to deeply internalized social principles or laws. A ban on discretion incapacitates judges by denying the possibility of creative or passionate expression. The result is either that judges, as agents of the law, are stunted as humans (surely a disquieting result for a system of justice), or that judges, as humans, distort and subvert the law (again, anathema to any reliable judicial system). Both effects are seen in the wake of the Federal Sentencing Guidelines. Albert Alschuler describes the personal toll of limited discretion, citing one federal judge reduced to tears as he imposed a federally mandated sentence he believed unjust, and another who chose to resign from the bench rather than continue to impose Guidelines sentences.[170] Alternatively, he describes judges who engage in a kind of civil disobedience, explicitly refusing to impose Guidelines sentences, or more covertly, simply making tenuously supported "findings" which permit them to depart from a grid sentence they deem unjust for the particular case.[171] Both results are damaging to judges as persons, as both require a sacrifice of integrity. The delicate balance between public and private ethics is destroyed as judges are forced to side with one or the other; either way, the careful artistry which obviates the need for "siding" is lost, and judges are left alienated and bereft.

This is true not merely as a matter of moral theory, but often, as a matter of straightforward judicial assertion. On choosing the side of law, one judge announced: "We are required to follow the rule of law, but . . . in the process we lose our soul." On choosing the side of conscience, another stated: "[T]he Guidelines . . . have made charlatans and dissemblers of us all. We spend our time plotting and scheming, bending and twisting, distorting and ignoring the law. . . ."[172] It's certainly true that such hard choices between public and private morality will necessarily be demanded of any public servant, and it may be true that personal sacrifice is therefore inevitable. However, it should never be our conclusion that because agonizing decisions cannot be avoided, that they shouldn't be minimized where possible. The point here is not that judges should be permitted to side with their conscience in every case, but rather that the system we have chosen exacts a real toll on its agents, which must be accounted for in any analysis of its adequacy.

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170. Alschuler, *supra* note 131, at 924-25.

171. *Id. See also* Stith & Cabranes, *supra* note 90, at 1265 ("When the Guidelines-mandated sentencing range seems inadequate or too harsh, the judge may be tempted to reconsider the factual 'findings' in order to alter the Guidelines calculation. . . ."). *See generally* Sunstein, *supra* note 35, at 994-95 ("When rules yield a good deal of inaccuracy in particular cases, people in a position of authority may simply ignore them. Discretion is exercised through a mild form of civil disobedience.").

172. Alschuler, *supra* note 131, at 924 (internal citations omitted); Stith & Cabranes, *supra* note 90, at 1265 (internal citations omitted) (relating similar stories of judicial choice between conscience and the Guidelines).

A second, and perhaps more noted consequence of limiting judicial discretion in sentencing is the effect it has on the civic community generally. Professor Kate Stith and Judge Jose Cabranes posit that criminal sentencing, in addition to whatever pragmatic social role it may play, also serves as a powerful cultural ritual, producing catharsis and clarity and an opportunity for public exposition of a shared moral/legal code.[173] Considered apart from any particular judge or judged person, sentencing is one way we demonstrate and develop our moral status as a society.[174]

Expanding on this point, Kahan and Nussbaum emphasize the two phases of criminal adjudication—guilt and sentencing—and compare this legal process to moral assessment.[175] In both law and ethics, it is not only possible but common to distinguish a finding of wrong-doing from a finding of responsibility or blame; the first stage is largely a factual determination, while the second requires more complex contextual analysis and the exercise of sympathy and compassion.[176] For example, it may be indisputable that my friend has lied to me; nevertheless, attention to the circumstances of the lie and her subsequent actions, coupled with concern for her well-being and the value of our relationship, may persuade me to forgive her wrong-doing. Likewise, a woman may be convicted on overwhelming evidence that she "muled" drugs for her husband; however, attention to his history of spousal abuse and her diminished psychological well-being, coupled with concern for her children and her own ability to recover a productive life may be relevant factors for the judge in considering alternatives to imprisonment. Skill in distinguishing fairly between guilt and blame, without denying the significance of either, is the foundation of what we call mercy, and the capacity for mercy, it is argued, is the measure of virtue for any system of justice.[177]

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173. Stith & Cabranes, *supra* note 90, at 1252.

174. Of course, this position resembles the Aristotelian understanding of justice as public ethics described at the outset. *See supra* text accompanying notes 6-18.

175. Kahan & Nussbaum, *supra* note 59, at 366-72.

176. *Id.* at 368-70.

177. *Id.* at 368-72. *See also* Stith & Cabranes, *supra* note 90, at 1283, in which the metaphor of "blind justice" is interpreted as follows:

> Justice has sometimes been represented by the blindfolded icon, Justicia. This ancient metaphor is appropriate for adjudication. In deciding guilt or innocence, it ought not to matter whether the defendant is rich or poor, nor whether the defendant has erred in the past, or suffered unusual disadvantages, nor even whether the defendant is likely to break the law again. . . . The character of this determination is represented by the icon's scales. Essentially a matter of weighing evidence and determining facts, the process of adjudication has more in common with scientific than with moral reasoning.
>
> But Justicia is depicted also holding a sword, representing not the power to determine guilt or innocence, but the power to punish. Before that power is exercised, before the sword is raised, Justicia must raise the blindfold. When it comes to the imposition of punishment, the question is always one of degree. The need is not for blindness, but for insight, for equity, for what Aristotle called "the correction of the law where it is defective owing to its universality," and this can only occur in a judgment that takes account of the complexities of the individual case.

The question, then, is whether mercy can be exercised absent discretion. Stated thus, the question seems to answer itself. Mercy as described here requires empathetic attention to particular circumstances, but neither empathy nor particularity is possible when sentencing derives from a grid founded on abstractions. Alschuler points out that the Sentencing Commission did not consider particular cases, but only aggregations of cases when designing the sentencing grid.[178] While the Commission almost certainly intended sentences to be fair, by establishing the Guidelines on generalizations and then limiting individual judicial discretion in actual cases, they have made it impossible for sentences to be merciful. Insofar as judges are constrained to refer only to the chart when fixing a sentence, they are denied the possibility of responding with passionate attention to the persons before them, and that denial strips sentencing judgments of their moral substance and authority.[179] As Stith and Cabranes say, "[b]y replacing the case-by-case exercise of human judgment with a mechanical calculus, we do not judge better or more objectively, nor do we judge worse. Instead, we cease to judge at all."[180] Without judgment, we may be an efficient bureaucracy, but we cannot be a virtuous society.

At this point it is fair to consider the objections of those concerned with upholding traditional rule of law principles of equitability and uniformity. Passionate attention and merciful assessment may be noble *moral* qualities, but how can they be fairly incorporated into a system of *justice*, which must strive to treat like cases alike if it is to retain any sort of democratic legitimacy? These critics might argue that by limiting the inappropriate exercise of discretion, the Guidelines help to uphold a rational and consistent rule of law, which is crucial for the stability of the nation.[181]

There are at least three ways of responding to such critics. The first is neither appealing nor wise: it is simply to reject the values asserted by rule of law theorists, and to insist that perfect justice for individuals trumps systemic fairness or efficiency on a scale of priorities. Justice here would require highly individualized and discretionary tailoring of general laws to particular cases, with systemic consistency relegated to secondary status. Cass Sunstein describes this as a system of "untrammeled discretion," which grants "the capacity to exercise official power as one chooses, by reference to such considerations as one wants to consider, weighted as one

(internal quotations omitted).

178. Alschuler, *supra* note 131, at 906-77. *See also* Stith & Cabranes, *supra* note 90, at 1263 ("[T]he Guidelines threaten to transform the venerable ritual of sentencing into a puppet theater in which defendants are not persons, but kinds of persons, abstract entities to be defined by a chart. . . .").

179. *See* Stith & Cabranes, *supra* note 90, at 1263 ("Without moral authority, neither mercy nor moral condemnation are [sic] possible. Under the Guidelines, mercy . . . has been rendered largely obsolete. . . .").

180. *Id.* at 1253.

181. *See, e.g.,* Johnson, *supra* note 131, at 1697.

wants to weight them."[182] While this position is not inconsistent, it is certainly naive.[183] The concerns of rule of law theorists for public legitimacy and procedural fairness are proper concerns—a system of "justice" serves no one well when it is widely perceived to be biased or inconstant. It is important to guarantee that any system of passionate judging retains mechanisms for ensuring equitable decision-making. Rejecting such concerns would be foolhardy.

A more useful response, perhaps, would point out that even accepting equitability as a priority for any system of judging, and granting that a limit on discretion is the most direct route thereto, the structure of the Federal Sentencing Guidelines fails to preserve equitability. While judges are constrained in their discretion to sentence under the Guidelines, police are (comparatively) unconstrained in their discretion to arrest, investigators are unconstrained in their discretion to collect evidence, prosecutors are unconstrained in their discretion to charge, and juries (or in bench trials, judges) are unconstrained in their discretion to find facts.[184] One could argue that permitting such broad discretion throughout the criminal justice system while denying it to sentencing judges nearly guarantees that inequities will go unremedied. If judges are not permitted to note and respond to the varying procedural histories and unique facts of the cases before them, they cannot adjust for inappropriate disparities resulting from the legitimate exercise of discretion earlier in the process.[185] Crimes in the same grid box will get the same sentence, but there is no guarantee that what put them in the same grid box was an equitable application of the rule of law.[186] And, as noted earlier, this state of affairs sorely tempts many judges to find ways around the Commission's limits—ways the Commission will be hard pressed to anticipate or regulate.[187]

182. Sunstein, *supra* note 35, at 960.

183. And, as Sunstein subsequently notes, "[i]n the real world, untrammeled discretion is quite rare. Even people with considerable discretion usually understand that some factors are irrelevant in light of their roles." *Id.*

184. *Cf.* Berlin, *supra* note 90, at 187 (arguing that the Guidelines enable law enforcement and prosecutors to increase defendants' prison terms by manipulating investigations and sting operations, leading to disparate sentences because the sentences do not adequately relate to defendants' actual culpability).

185. While one remedy might be to write strict guidelines limiting discretion in each of these areas, the overwhelming complexity of such a system is almost mind-boggling. Not only would such a project take years and require a massive regulatory bureaucracy, it would also likely be ineffective in many of the enumerated areas. E.g., how to develop a manageable grid for criminal investigation and evidence collection? What guidelines for the evaluation of the credibility of a witness?

186. For a particularly bold judicial articulation of this problem in the context of racist police practices, as well as what I would deem a "virtuous" exercise of discretion in sentencing under the Guidelines, see *United States v. Leviner*, 31 F. Supp. 2d 23 (D. Mass 1998). There, the defendant's criminal history should have placed him in the second highest category for sentencing according to the Guidelines, but the bulk of his criminal transgressions resulted from motor vehicle offenses, probably due in some part to racial profiling practices among traffic police.

187. *See supra* text accompanying notes 170-72.

But beyond any practical concern with the ability of the Guidelines to preserve equitability among convicted defendants, is a more fundamental question about the meaning of equitability—and specifically, why inflexible rules are thought to preserve it better than other mechanisms. The guiding principle of rule of law theory is the command to treat like cases alike; however, an important corollary to that principle, as H.L.A. Hart points out, is that *un*like cases must be treated differently.[188] Furthermore, while the law can ordain the *class* of persons to whom it will be applied (e.g., adults, thieves, persons using a weapon), Hart insists that only human judgment, replete with moral and political views and accompanied by doubt and disagreement, can determine whether any individual person justly belongs to the specified class—that is, whether she is sufficiently like or unlike other persons subject to the particular law. In Hart's words:

> The connexion between [the impartiality and equitability] of justice and the very notion of proceeding by rule is obviously very close. Indeed, it might be said that to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest or caprice. This close connexion between justice in the administration of the law and the very notion of a rule has tempted some famous thinkers to identify justice with conformity to law. Yet plainly this is error unless 'law' is given some specially wide meaning. . . . [I]t is plain that the law itself cannot now determine what resemblances and differences among individuals the law must recognize if its rules are to treat like cases alike and so be just.[189]

Of course, this position is one discussed at length earlier; the point again is simply that rules run out, that they will always be insufficient for their own just application.[190] Stated differently, rules alone cannot guarantee equitability. In fact, Cass Sunstein argues that rules alone, unsupplemented by discretionary judgment at the point of application, are likely to produce arbitrariness and to mask inappropriate bias.[191] Because general rules cannot account for particular variations in advance, mechanical application of a rule to all cases will inevitably fail to account for relevant but unanticipated differences—that is, it will not only treat *like* cases alike, but *all* cases alike. In some cases, this inability to account for difference will serve to privilege some groups over others: for example, a rule requiring everyone to use stairs has obviously discriminatory effects for people in wheelchairs, notwithstanding its status as a clearly articulated rule.

188. HART, *supra* note 24, at 156-57. *See generally* Sunstein, *supra* note 35, at 994; Kahan & Nussbaum, *supra* note 59, at 373; Alschuler, *supra* note 133, at 916, 920.

189. HART, *supra* note 24, at 156-57.

190. *See supra* text accompanying notes 74-76.

191. Sunstein, *supra* note 35, at 991-95.

What does all of this mean for the Federal Sentencing Guidelines? Importantly, it is not a rejection of principles of equitability, uniformity and predictability. A theory of "passionate judging" or "virtuous discretion" does not deny the value of the rule of law; it merely denies that a law of rules is sufficient to achieve a fair system of justice. Hence, the problem with the Guidelines lies more in their limits on discretion than in the grid itself. Were the Guidelines actually *guidelines*—that is, were they offered merely as one of many tools for assisting judges in achieving goals of equitability and proportionality—they would be far less offensive.[192] As it is, however, judges have become the tools of the grid.

Some may find this state of affairs unproblematic. After all, judges can be corrupt, they can be immoral or improperly biased, or they can simply be hasty and careless. Given these realities, it is tempting to seek the reassurance of a fixed system of rules, knowable in advance, in order to limit inappropriate judicial influences. I am convinced, however, that such a system creates more problems that it cures. Sadly, bad judges will exist under any system of law, and while we should do what we can to limit their influence (such as retaining a program of appellate review), prophylaxis should not be the dominating feature of our justice system. The means we choose to express our shared code of ethics are as important as the ends served by it. If justice cannot be richly responsive, creative and passionate at the same time that it is fair, efficient and responsible—if it cannot be human rather than mechanical—then there is no virtue in justice.

192. For a much more thorough discussion of recommended alternatives to the Guidelines, see Alschuler, *supra* note 131, at 939-51 (suggesting that sentencing guidelines be analogized to binding precedent); Kahan & Nussbaum, *supra* note 59, at 371 (describing a system of "qualified determinate sentencing"). For alternatives to strict legal rules generally, see Sunstein, *supra* note 35, at 1016-23 (recommending casuistry and a system of "privately adaptable rules").