EQUALITY AND JUSTICE: AN ESSAY IN MEMORY OF DAN MARKEL

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ABSTRACT

One of the traits that I admired most about Dan Markel was that he held legal scholarship to a very high standard. Whether it was his own work or the work of others, he believed that our work could only improve if we insisted on giving each other critical feedback.

It has been a decade since Dan's tragic death. And while a Festschrift is ordinarily seen as an opportunity to praise the work of one's colleagues,[1] *I want to celebrate Dan Markel in the way that I imagine he would respect most—by providing critical feedback about his work.*[2] *In particular, I plan to address a major theme in his work—his commitment to equal treatment under the law. This commitment led Markel to criticize several features in the criminal justice system and in the criminal law literature, including indeterminate sentencing and dispensations of mercy.*

While equal treatment under the law would seem to be an unobjectionable principle that most every law professor should support, I have serious reservations about making equal treatment a primary goal in punishment decisions. My reservations stem from a belief that the pursuit of equal treatment will often come at the expense of justice, especially if the pursuit for equal treatment includes the creation of ex ante rules about punishments. In light of this belief, I find myself in disagreement with Markel's rejection of indeterminate sentencing. That disagreement is discussed in more detail below.

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1. *See, e.g.*, David Schleicher, *From Here All-the-Way-Down, or How to Write a Festschrift Piece*, 48 TULSA L. REV. 401, 401-02 (2013) (suggesting that, in order to write a successful festschrift essay, one ought to "dole out as much fawning praise as you can muster for the honoree and her work").

2. I understand that successful festschrifts often include a section pointing out "a problem or a hole somewhere in the honoree's body of scholarship; preferably a minor one," *id.* at 402, but that is not the sort of critical feedback that characterized Dan Markel's life as a scholar. His critical feedback often included forceful criticism that went to the very foundation of a person's work, and those of us on the receiving end benefitted greatly from this probing appraisal of our scholarship.

I. MARKEL'S COMMITMENT TO EQUAL TREATMENT

Before I launch into my critique of Markel's work, let me first articulate the argument with which I want to engage—the idea that, in a liberal democracy, equal treatment before the law is of paramount importance. Markel argues that the criminal justice system ought not be either arbitrarily harsh or arbitrarily lenient. In order to avoid arbitrariness, Markel argues that punishment decisions must be uniform across people, and in order to ensure uniformity, decisions about punishment must be made for clearly articulable reasons.[3]

According to Markel, "[a]t it's heart, equal justice under law, in the context of criminal justice, means the sovereign's imposition of substantially similar punishments upon offenders who commit substantially similar crimes and who are similarly situated in all relevant respects."[4] This understanding of equal justice under law led Markel to conclude that reducing punishment in the name of mercy is inappropriate—a conclusion that he published early in his career in the provocatively titled article, *Against Mercy*.[5] In that article, Markel expressed a "concern about the role of mercy" that he located in "the principle of equal liberty under law."[6] As he explained:

> If everyone is entitled to the same package of liberties safeguarded by political and legal institutions, it is hard to see how granting mercy to some offenders but not to others effectuates this ideal. This might not be the case if there were nonarbitrary *reasons* why we granted leniency, such as [reasons that are tied to the offender's choice to commit the crime, or to the severity of the crime itself]. But then the leniency becomes tied to desert, broadly understood, and is therefore not mercy but rather the exercise of equitable or justice-enhancing discretion.[7]

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3. Markel's argument sometimes went a step further, insisting that reasons must be not only clearly articulable, but also defensible under his brand of retributivism. *E.g.*, Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1435-36, 1438, 1440-41, 1441-42, 1455-56 (2004) [hereinafter Markel, *Against Mercy*] (distinguishing "mercy" from "equitable discretion (or justice)," defining the latter as involving the reduction of punishment "for reasons that are tied to the offender's choice to commit the crime, or to the severity of the crime itself," and then criticizing only the former and not the latter). My criticism in this essay is largely confined to the first half of the argument—the argument about equal treatment—though I disagree with the second half of the argument as well. *See* Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 203-17 (2016) (arguing for "an inclusive approach to mitigation" under which "judges should reduce sentences whenever *any* of the punishment theories would support treating a fact or circumstance as mitigating").

4. Dan Markel, Luck or Law: Is Indeterminate Sentencing Unconstitutional? 61 (2012) (unpublished manuscript) (on file with author) [hereinafter Markel, Luck or Law].

5. Markel, *Against Mercy*, *supra* note 3, at 1478-1480.

6. *Id.* at 1455.

7. *Id.* at 1455-56. The bracketed text is drawn verbatim from earlier language in the article. *See id.* at 1435-36.

Markel expanded on this argument about equal treatment in a sprawling manuscript, which remained unpublished at the time of his death. That manuscript, which Markel had titled *Luck or Law: Is Indeterminate Sentencing Unconstitutional?*, built upon the equal treatment principle in two important respects. First, he distinguished between different types of decisions that conflicted with the principle of equal treatment under law. In particular, he distinguished between discriminatory decisions (e.g., decisions based on race or other protected characteristics), arbitrary decisions (e.g., decisions based on reasons that would be deemed arbitrary or capricious, such as a defendant's name), and random decisions (e.g., decisions that are based on coin flips or roulette spins).[8] Second, he tied his arguments about equal treatment to several areas of constitutional law, including the Eighth Amendment death penalty jurisprudence, the void-for-vagueness doctrine, recent punitive damages cases, and cases involving claims of equal protection.

The *Luck or Law* manuscript offers these arguments in service of the contention that indeterminate sentencing schemes are unconstitutional. The manuscript defines indeterminate sentencing schemes as including systems of discretionary judicial sentencing, systems of discretionary parole release, and systems of discretionary jury sentencing.[9] Markel's critique appears to be focused on four features that these systems share:

a) they lack a requirement for officials to explain with particularity the basis for their sentences (or releases);

b) sentences are available within large bandwidths of discretion;

c) virtually no meaningful rules or standards exist by which to guide judicial or executive (parole) discretion regarding sentencing and

d) no meaningful review of either trial or parole decisions is available.[10]

Although Markel defines indeterminate sentencing to include parole release and jury sentencing, much of the manuscript focused on those systems in which judges possessed unconstrained judicial sentencing discretion—that is, the system that existed in federal courts prior to the passage of the Sentencing Reform Act in 1984 and similar systems that persisted in the states at the time Markel was writing. I too will focus on these systems of judicial discretion, both because that is what the bulk of Markel's manuscript addresses, and because those systems are more prevalent than systems of parole discretion or jury sentencing.

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8. Markel, Luck or Law, *supra* note 4, at 34-41.

9. *Id.* at 5-6.

10. *Id.* at 8 (citation omitted).

Markel was not the first scholar to criticize indeterminate sentencing as inconsistent with a commitment to equal treatment. As Markel recognized in his *Luck or Law* manuscript, Judge Marvin Frankel previously criticized mid-twentieth century federal sentencing as "lawless" and incompatible with the principle of legality.[11] As a cure for that lawlessness, Frankel suggested the development of "a detailed chart or calculus" dictating the appropriate sentence,[12] which has been developed by a "Commission on Sentencing,"[13] to whom authority has been delegated by the legislature.[14] Frankel's critique of indeterminate sentencing and his proposal for structured sentencing is often credited as prompting sentencing reform in the United States—in particular for prompting Congress's passage of the 1984 Sentencing Reform Act and the subsequent adoption of the Federal Sentencing Guidelines.[15]

While Frankel's critique of discretionary sentencing may be the most well-known, it was hardly the first such critique. Criticisms of indeterminate sentencing have existed nearly as long as the practice itself, spanning both decades and continents. In England, for example, the repeal of the death penalty as the punishment for many felonies resulted in the conferral of sentencing discretion on judges in the mid-nineteenth century.[16] Soon after, many commentators "decried the lack of consistency and proportionality in sentencing" and various proposals were offered to address the problem.[17] Similar histories and criticism can be found in other common law countries.[18]

Perhaps because it was unfinished, *Luck or Law* does not clearly indicate what Markel believed was the appropriate substitute for judicial sentencing discretion. The manuscript does indicate that Markel believed sentencing guidelines were constitutionally required,[19] and

11. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 3-5, 8 (1973).

12. *Id.* at 113.

13. *Id.* at 119.

14. *See id.* at 122.

15. For an account of how Frankel's book resulted in the passage of the Sentencing Reform Act and the adoption of the Federal Sentencing Guidelines see Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 97 n.50 (1999).

16. *See generally* Leon Radzinowicz & Roger Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem*, 127 U. PA. L. REV. 1288 (1979) (recounting this history).

17. *See* Julian V. Roberts &Andrew Ashworth, *The Evolution of Sentencing Policy and Practice in England and Wales*, 2003-2015, 45 CRIME & JUST. 307, 308-09 (2016) (describing the history and collecting sources).

18. *See, e.g.*, THOMAS O'MALLEY, SENTENCING LAW AND PRACTICE § 1-04 (3d ed. 2016) (collecting Irish sources dating back to the mid-nineteenth century criticizing discretionary sentencing).

19. *E.g.*, Markel, Luck or Law, *supra* note 4, at 116 ("The argument advanced here in favor of requiring guidelines irrevocably strips from judges the power that some crave and that many once exercised, and that some now exercise again."); *id.* at 7 n.27 ("[M]andatory *Blakely*-compliant guidelines along with charge-based sentencing are my preferred responses to the problem of unwarranted disparity . . . .").

that those guidelines must be drafted either by the legislature or a designated government agency.[20] However, the manuscript was less clear about how much discretion judges could retain in making sentencing decisions without running afoul of equal treatment principles.[21] While it is unclear precisely how much discretion judges could retain while still satisfying Markel's conception of equal treatment under the law, at a minimum, his view requires sentencing decisions be structured through rules embodied in statutes or guidelines and that the discretion to deviate from those rules be somehow constrained.

Markel's argument about the need for equal treatment in punishment decisions is, on its face, a compelling argument. Arguments about fairness and equality find much support in modern democracies. And some of the most salient shortcomings of the modern American criminal justice system—such as racial profiling and the failure to hold police accountable for shooting unarmed civilians—are, at bottom, examples of where the system noticeably treats people differently and is thus perceived as unfair and unequal.

I have no interest in arguing that the American criminal justice system ought to be unfair or unequal, but I have serious reservations about whether equal treatment under the law ought to be a primary objective for sentencing. My reservations transform into objections if the pursuit of equal treatment includes the creation of *ex ante* rules about punishment—something that Markel appears to have

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20. *E.g.*, *id.* at 86 (stating that "the task of navigating between lawlessness and rigidity is the one the Constitution charges legislatures to accomplish in criminal sentencing"); *id.* at 47 ("Structurally, indeterminate sentencing also amounts to a separation of powers problem predicated on excessive delegation."). *But see id.* at 75 n.328 (referencing the possibility that "a legislature (or its duly accountable agency)" might "impermissibly create too much discretion anytime a range of punishment is established").

21. For example, at one point the manuscript suggests that any amount of discretion at sentencing—even in the form of a designated sentencing *range* as opposed to a precise sentence—might still offend the constitutional principles of equal treatment. But at another point, the manuscript indicates that the federal system in the wake of *United States v. Booker*, 543 U.S. 220 (2005), passes constitutional muster, even though that system not only provides judges with sentencing ranges, but also allows them to sentence outside of those ranges (subject to appellate review.) *Compare* Markel, Luck or Law, *supra* note 4, at 75 n.328 ("Does the argument here entail that a legislature (or its duly accountable agency) would impermissibly create too much discretion anytime a range of punishment is established, no matter how narrow that range? There will of course be a line-drawing problem worth exploration, and I will try to address it later on."), *with id.* at 7 n.27 ("Although it has its share of substantial problems . . ., the federal sentencing scheme following *Booker* is not an indeterminate sentencing scheme as I've defined it because of the following: (a) there are guidelines in place; (b) these guidelines must serve as consultative anchors for decisionmaking by federal judges; (c) the Supreme Court has committed the federal appellate courts to 'unreasonableness' review of district court sentences; (d) there is no parole board in the federal system to shorten new sentences on a case-by-case basis, and (e) judges must set out their reasons for sentence to allow for appellate review. Taken together, these requirements have had the felicitous outcome that most sentences are still imposed within guidelines, and therefore according to a specified plan, and that those falling outside the guidelines are explained and capable of being studied so that appropriate and informed democratic responses can be fashioned.").

supported. Indeed, my objections may be best understood as an affirmative argument—that *ex ante* rules are a poor fit for sentencing decisions because just punishment outcomes require individualized decision making. That argument is discussed in more detail below.

II. RULES, STANDARDS, AND SENTENCING

As noted above, there is a long history of criticizing indeterminate sentencing. But it would be wrong to think of that criticism as free-standing. It is, instead, part of a larger debate about the amount of discretion that judges should have to individualize sentences. On one side of the debate are those who, like Markel, stress the costs of judicial sentencing discretion. On the other side are those who stress the benefits of individualization.

In the context of this long-running debate over sentencing, it may appear that judicial sentencing discretion is simply a question of tradeoffs. When it comes to tradeoffs, reasonable people can disagree whether the benefits of a particular approach outweigh the costs. But if we take a step back from the debate over sentencing discretion, it appears that this is more than an isolated question of tradeoffs; it is a specific example of a broader legal dilemma: when to adopt bright-line rules and when to adopt flexible standards.[22] Sentencing guidelines are bright-line rules, which are written *ex ante*. Judicial sentencing discretion, on the other hand, involves the *ex post* application of flexible standards.[23]

The so-called rules-versus-standards debate is a debate about whether or when the law should be expressed in bright-line rules or flexible standards.[24] An example may help illustrate the terms of that debate. Imagine a state has built a new highway, and it is trying to decide how fast people should be permitted to drive on that highway. It could adopt a bright-line rule about speed, such as a speed limit of no more than 65 miles per hour. Alternatively, it could adopt a flexible standard, such as a prohibition on "driving at unreasonably high speeds in light of the traffic and weather conditions." As a general

22. *See* Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CALIF. L. REV. 447, 447 (2016) ("Sentencing law and practice in the United States can be characterized as an argument about rules and standards.").

23. Some may dispute that judicial sentencing discretion is appropriately characterized as an example of flexible standards because the standards are not laid out *ex ante*. But Russell Covey has noted that "implicit standards" guided judicial discretion in pre-guideline sentencing. Covey, *supra* note 22, at 450 n.13 ("[N]o formal standards governed judicial sentencing practice, but judges nonetheless regularly acknowledged a small set of theoretical purposes—retribution, deterrence, and rehabilitation—as establishing the framework within which sentencing decision making was expected to occur.").

24. WARD FARNSWORTH, THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW 164 (2007) ("The choice between rules and standards comes up all the time in law. . . . Whoever drafts the directive has to decide whether to put them in the form of rules or standards or some combination . . ..")

matter, bright-line rules have certain benefits—namely because rules are clear, they provide notice to the public, they reduce the likelihood of biased enforcement, and they make adjudication more efficient and consistent with the wishes of those who wrote the rules.[25] On the other hand, because they are inflexible, bright-line rules tend to be either over- or under-inclusive, and thus they sometimes fail to achieve the ends that were the initial justification for adopting the rule.[26] Conversely, flexible standards allow for outcomes that are tailored to the specific circumstances, but they do so at the expense of clarity, resulting in less notice to the public, the possibility of biased enforcement, and more expensive adjudication.[27]

There is an extensive literature on the rules-versus-standards debate.[28] In that literature, it is generally accepted that flexible standards are preferable to bright-line rules when "a precise advance determination" of the optimal legal rule would be too difficult to accomplish.[29] Such difficulty is more likely to be present when the precise facts and circumstances will differ from case to case, and those differences are material to the outcome.[30] Civil negligence is a classic example of this phenomenon; the law is presented as a flexible standard, and so it can be applied to many different accident scenarios, which are unlikely to recur in an identical fashion.[31] In those circumstances, flexible standards that are applied *ex post* are preferred to bright-line rules that must be crafted *ex ante*.

Recast as a question of rules-versus-standards, the debate over sentencing discretion becomes less two-sided. The general principles from the rules-versus-standards debate point decidedly in favor of adopting flexible standards for sentencing, rather than bright-line rules. A sentencing decision depends on many relevant facts, which are unlikely to recur in an identical fashion, and the case-specific combination of those facts matters in determining a sentence that is proportionate to the crime that a defendant has committed. Consequently, a sentencing

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25. *See, e.g.*, Covey, *supra* note 22, at 457-58; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976).

26. *See, e.g.*, Covey, *supra* note 22, at 458-59; Kennedy, *supra* note 25, at 1688-89, 1695-96.

27. *See* FARNSWORTH, *supra* note 24, at 165 (discussing these tradeoffs).

28. *See* FARNSWORTH, *supra* note 24, at 171 (collecting sources); Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 52 n.11 (2007) (same); *see also* Covey, *supra* note 22, at 450 ("The literature on the nature of and contrast between rules and standards, or between rules and discretion more generally, is extensive.").

29. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 561-62 (1992).

30. *Cf.* FARNSWORTH, *supra* note 24, at 168 (noting that writing rules "takes time and investigation, especially if the rules are going to apply to lots of situations with different details").

31. *See Kaplow*, *supra* note 29, at 563-64 (making a similar observation about negligence).

decision is precisely the sort of decision for which standards are superior to rules.

Even if we ignore the rules-versus-standards debate, and instead consider the merits of indeterminate sentencing as a question of tradeoffs, we must be clear about what is being traded off. As Russell Covey has explained, the tradeoff is between uniformity and proportionality.[32] That is because any attempt to reduce sentencing to bright-line rules will do so at the expense of at least some relevant factors:

> Regardless of how many distinctions the sentencing rules reflect, constraints will always ensure that some potentially relevant distinctions are ignored. For example, the sentencing rules might result in varying sentences based on whether offenders use guns, steal large amounts of money, or cause harm to victims, but there will always be other distinctions that the rules omit. . . . [T]he omission of potentially relevant distinctions means that even under the most complex guidelines, some offenders will receive sentences that understate their culpability, while others will receive sentences that overstate it.[33]

Indeed, the primary author of the Federal Sentencing Guidelines—the most complex sentencing rules in the country—acknowledged that the rules are not sufficiently detailed to achieve proportionality in all cases because "the Commission realized that the number of possible relevant distinctions is endless."[34] In other words, those who wrote the guidelines recognized that their adoption of bright-line rules sacrificed justice in some cases for uniformity.

Not everyone will think that proportionality is the primary goal of sentencing. For those who believe that sentencing rules should be crafted to achieve utilitarian goals, those utilitarian goals may be more important than ensuring proportional sentences.[35] But for those who consider themselves retributivists—and Markel certainly did consider

32. "[U]niformity and proportionality cannot both be pursued at the same time; any attempt to increase one of these values necessarily results in a decrease in the other." Covey, *supra* note 22, at 451.

33. *Id.* at 466-67.

34. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 13 (1988).

35. *Cf.* Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) (noting that proportionality "is inherently a concept tied to the penological goal of retribution" and that it is "difficult even to speak intelligently of 'proportionality" when considering deterrence, rehabilitation, and incapacitation (quoting Harmelin v. Michigan, 501 U.S. 957, 989 (1991))).

himself one[36]—proportionality is an important (if not the *most* important) goal of sentencing.[37]

Indeed, for a retributivist, resolving the tradeoff between uniformity and proportionality ought to be a no brainer—proportionality ought to trump uniformity. And when it comes to ensuring proportionality, flexible standards are superior to bright-line rules. Proportionality is about ensuring that sentencing are "fair" or "just" based on the harm that a defendant caused and the culpability in causing that harm. As a general rule, whether an outcome is fair can only be determined from an *ex post* perspective,[38] and while value judgments are entirely *ex ante* in a system of rules, standards ensure that such judgments are also made *ex post*.[39]

It is not simply the logic of the rules-versus-standards debate which suggests that flexible standards are sometimes necessary in order to achieve just outcomes in criminal cases. Substantive criminal law suggests the same. Substantive criminal law—that is, the law surrounding criminal liability—often relies on flexible standards. For example, some criminal statutes contain qualitative standards, which are designed to distinguish between legal and illegal conduct only on a case-by-case basis—such as statutes that turn on whether the defendant's conduct was unreasonable.[40] Every jurisdiction in this country has at least one criminal statute that employs such a standard,[41] and many major criminal defenses contain a reasonableness or proportionality requirement.[42] Those standards fail to give any real guidance about how they will be applied. Consequently, they suffer from the same shortcomings as all flexible standards—they leave people uncertain

36. Indeed, much of Markel's scholarship was devoted to articulating a particular view of retributivism. *See* Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1165 n.6 (2009) ("Over the last ten years, I have tried to chart the topography of the implications of this view of retributive punishment as communicative action for our criminal justice system.")

37. *E.g.*, Mary Sigler, *Just Deserts, Prison Rape, and the Pleasing Fiction of Guideline Sentencing*, 38 ARIZ. ST. L.J. 561, 563 (2006) ("Retributivism . . . is centrally concerned with the imposition of suffering in proportion to an offender's moral desert.").

38. The idea that fairness is an *ex post*, rather than an *ex ante*, consideration is often attributed to Frank Easterbrook. *See, e.g.*, Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 593 (1988) ("As Frank Easterbrook quite bluntly states it, fairness is an ex post consideration; he apparently puts it second to the greater productivity he associates with the ex ante position.") (citing Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 11-12 (1984)).

39. *Cf.* FARNSWORTH, *supra* note 24, at 165 (noting that a standard "calls for a more personalized administration of justice" than a rule).

40. *See* Ernst Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437, 437 (1921) (noting that legislatures sometimes write statutes using "terms involving an appeal to judgment or a question of degree").

41. *See* Supplemental Brief for the United States at 1a-99a, Johnson v. United States, 576 U.S. 591 (2015) (No. 13-7120) (collecting federal criminal statutes and state criminal statutes that employ qualitative standards).

42. *See* 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 121 (1984).

whether their conduct will be deemed unreasonable or disproportionate, they are susceptible to arbitrary enforcement by law enforcement, and they require a significant amount of effort by judges or juries to apply them.[43] Nonetheless, these flexible standards endure because they allow decisions about guilt or innocence to be individualized, thus increasing the ability to ensure just outcomes.

The continued presence of flexible standards in substantive criminal law contradicts Markel's claim that the courts would never permit decisions about criminal liability that could result in "random" outcomes.[44] Criminal statutes that employ flexible standards are routinely tolerated by the courts. As Justice Holmes once said:

> [T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death.[45]

The idea that criminal liability can legitimately depend on qualitative standards is not some outdated notion from the early twentieth century. As recently as 2015, the Supreme Court reaffirmed "the constitutionality of laws that call for the application of a qualitative standard . . . to real-world conduct."[46]

To be sure, Markel does not frame his discussion about criminal liability in terms of "reasonableness" and other qualitative standards. Instead, he uses the example of a roulette wheel or a coin toss as the sort of random decision making that the courts would not abide.[47] But hypotheticals about games of chance do not prove the broader point that indeterminate sentencing offends principles of fair notice, nonarbitrariness, and equal treatment. That is because, unlike games of chance, indeterminate sentencing is not designed to be arbitrary or random. It is designed to be flexible, even though flexibility can sometimes result in outcomes that appear to be arbitrary or random.

This is, at bottom, Markel's argument. His complaint is that, in failing to provide substantive rules or appellate review, indeterminate sentencing *allows* discriminatory, arbitrary, or random decision making. On that front, he is correct. But the fact that discriminatory, arbitrary, or random decision making *may occur* does not mean that indeterminate sentencing—that is, a sentencing system which relies on judicial discretion—is, in fact, a discriminatory, arbitrary, or random system.

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43. *See, e.g.*, Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1146 (2016) (explaining how the qualitative standards in child neglect statutes fail to give parents and caregivers sufficient notice about what conduct is criminal).

44. Markel, Luck or Law, *supra* note 4, at 54-56.

45. Nash v. United States, 229 U.S. 373, 377 (1913).

46. Johnson v. United States, 576 U.S. 591, 603-04 (2015).

47. Markel, Luck or Law, *supra* note 4, at 54-56.

Indeed, there is case law suggesting the opposite. There is widespread consensus that appellate courts may and should reverse trial court sentencing decisions that are discriminatory.[48] Some courts have indicated that arbitrary sentences are also reviewable and reversable.[49] What is more, to say that a decision is discretionary does not mean that it is permissible to make that decision in an arbitrary manner. To the contrary, random decision making—such as flipping a coin—is incompatible with the very nature of legal discretion itself.[50] As Chief Justice Marshall famously said, judicial discretion does not mean the ability to decide based on "inclination" but instead calls for "judgment . . . guided by sound legal principles."[51]

Markel is correct to criticize American systems of judicial sentencing discretion for failing to require judges to articulate their reasons for imposing punishment and for failing to provide for appellate review. Other countries that have relied on judicial discretion for sentencing, rather than *ex ante* rules, have not made the same mistake.[52]

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48. *See, e.g.*, United States v. Kaba, 480 F.3d 152, 156 (2d Cir. 2007) ("A defendant's race or nationality may play no adverse role in the administration of justice, including at sentencing." (quoting United States v. Leung, 40 F.3d 577, 586 (2d Cir. 1994))); United States v. Borrero-Isaza, 887 F.2d 1349, 1355-57 (9th Cir. 1989) (vacating a sentence that appears to have been partially based on defendant's national origin); *see also* United States v. Gomez, 797 F.2d 417, 419 (7th Cir. 1986) (remarking that it "obviously would be unconstitutional" to punish a defendant more severely solely based on nationality); Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 55 (2011) ("Courts have also held that the Constitution prohibits sentencing courts from considering factors that could lead to unwarranted discrimination.").

49. For example, sentencing decisions have been overruled if they were based on false information, *see* Townsend v. Burke, 334 U.S. 736, 740-41 (1948); *see also* United States v. Tucker, 404 U.S. 443, 447 (1972) (reaffirming *Townsend*), or if the maximum statutory sentence was imposed based solely on the crime of conviction, *see, e.g.*, United States v. Hartford, 489 F.2d 652, 654-55 (5th Cir. 1974); United States v. Thompson, 483 F.2d 527, 529 (3d Cir. 1973); Woosley v. United States, 478 F.2d 139, 143 (8th Cir. 1973); United States v. Daniels, 446 F.2d 967, 970-71 (6th Cir. 1971); United States v. McCoy, 429 F.2d 739, 743 (D.C. Cir. 1970).

50. "Discretion is not merely the ability to choose; it is the ability to choose rationally based on the exercise of judgment and principle. The word 'discretion' derives from the Latin word *discernere*, which means to separate or to distinguish, and it conveys the idea of separating away the good from the bad." F. Andrew Hessick & Carissa Byrne Hessick, Facts, Policy, and Discretion 10-11 (unpublished manuscript) (on file with author) (Feb. 7, 2025).

51. United States v. Burr, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d); *see also* Daniels v. Allen, 344 U.S. 443, 496 (1953) ("We must not invite the exercise of judicial impressionism. Discretion there may be, but 'methodized by analogy, disciplined by system.'") (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 139, 141 (1921)).

52. *See, e.g.*, MIRKO BAGARIC ET AL., SENTENCING IN AUSTRALIA 155-196 (10th ed. 2022) (describing the process of sentencing appeals and the development of sentencing jurisprudence in Australia); Geoff Hall, *Appeals Against Sentence: The Role of the New Zealand Court of Appeal in Determining Sentencing Policy*, 5 OTAGO L. REV. 635, 637-51 (1984) (chronicling the early development of appellate sentencing law in New Zealand and describing the sentencing appeals process); Tom O'Malley, *Living Without Guidelines*, *in* SENTENCING GUIDELINES: EXPLORING THE ENGLISH MODEL 218, 228 (Andrew Ashworth & Julian V. Roberts eds., 2013) ~~218, 228~~ ("[C]riminal appeal courts established in Britain and Ireland in the early twentieth century were endowed with extensive powers to vary sentences imposed by

That is not to say the countries which have eschewed guidelines and retained sentencing discretion have satisfied Markel's insistence that similar defendants receive the same sentence. There is still variation in sentencing across judges. But that variation has been moderated by the accretion of sentencing law developed by the countries' courts of appeals. That law indicates which sentencing factors are permissible and impermissible, and it sometimes suggests sentencing ranges for different types of cases.

The development of appellate case law is a far cry from the promulgation of sentencing guidelines. But it fits comfortably within our traditions of the rule of law, and it is hardly "inconsistent with the meaning of the Constitution's terms or tradition."[53]

CONCLUSION

In making this critique, I am not raising an argument that Markel failed to consider. To the contrary, in his discussion of "why indeterminate sentencing schemes might rationally have persisted across time and place in the United States,"[54] Markel included a discussion of retributivism, which contained the following passage:

> [R]etributivists are typically thought to be guided by a belief that sentencing should be proportionate to the culpability of the offender and the gravity of the wrong. The desire to have sentences cohere with fine-grained equitable judgments about justice and desert would seem to welcome indeterminate sentencing as a grand way to distribute punishment. After all, sentencing judges can make those fine-grained decisions in a way that mandatory sentencing of one stripe or another cannot. . . . When a judge has lots of information about the offense and the offender's past, she can fashion a punishment that she feels is just and appropriate in light of all the particulars of which she is aware.[55]

While that passage seems to concede that retributive justice is best achieved in systems of judicial sentencing discretion, another passage suggests that retributivists might have reservations about such a system:

> [R]etributivists of all stripes might be concerned that indeterminate sentencing schemes would allow some offenders to escape their just deserts based on factors unrelated to their culpable wrongdoing. Perhaps they also think such discretion will be abused based on perniciously discriminatory or arbitrary grounds. Perhaps they think that any coincidence between the sentence an offender serves and what he morally deserves would be purely accidental. Perhaps they would fear that offenders who are scary-looking would be over-punished notwithstanding

trial courts and were thus furnished with the opportunity to develop general principles and other forms of guidance . . . .").

53. Markel, Luck or Law, *supra* note 4, at 75.

54. *Id.* at 40.

55. *Id.* at 43-44 (footnotes omitted).

> relatively minor wrongdoing serving as the basis for conviction. This would run afoul of a commitment to desert-constrained proportionality.[56]

Markel ultimately did not offer his own conclusions about whether retributive justice is best achieved in a rule of flexible standards or bright-line rules.[57] Instead, he based his arguments against judicial sentencing discretion on constitutional values and principles.

Markel's view of constitutional law was based almost entirely on the broad principles that he extracted from decades of case law. This is a common method for lawyers, judges, and law professors to speak about the Constitution and what it requires. I too have written articles bemoaning the fact that, in one area or another, the courts have failed to live up to such principles.[58] Indeed, for many years, I thought that one of the most important contributions that law professors can make is to clearly articulate broad principles and then explain how to change our legal system to better conform with those principles.

But in recent years, I find myself less convinced that the best legal scholarship follows this deductive model of articulating broad principles and then applying them to specific circumstances. Indeed, I am beginning to doubt that we can sensibly craft law or advocate for legal reform that rests only on abstract principles. Instead, I find myself increasingly more enamored of the common law system of developing law—a system in which legal rules are derived from many independent instances of case-by-case decision making. Incremental decision making and inductive reasoning are not only good ways to develop law; they may also be promising paths for legal scholarship. The legal system—especially the system that deals with crime and punishment—does not operate only on abstraction or on principle. It operates through the adjudication and resolution of individual cases. Uncovering what is wrong with that system often requires us to look at what repeatedly goes wrong in those individual cases, and then attempt to articulate broader principles and craft potential solutions based on those lessons. It also likely requires us to be more humble and less certain about the principles that we derive and the solutions we suggest. Just as the common law method allows for the creation of exceptions based on new circumstances or the adjustment of legal rules over time based on experience, so too should legal scholars remain open to

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56. *Id.* at 46 (footnote omitted).

57. *See id.* at 46 ("I have my own views about which conceptions of retributive justice are more persuasive than others and to my mind those determinations help explain my concerns about indeterminate sentencing. But I am not interested in critiquing indeterminate sentencing simply as a matter of punishment theory.").

58. *See, e.g.*, Hessick, *supra* note 43; Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 CORNELL L. REV. 45 (2011); Hessick & Hessick, *supra* note 48.

revisiting their conclusions and acknowledging that their conclusions have changed based on further work and reflection.

My appreciation for the virtues of incremental decision making, the common law model, and academic humility developed only after nearly two decades in the academy—much of which were devoted to offering my own (at times overly confident) views about how to improve the criminal justice system based only on abstract principles. Because my views on the value of abstract principles versus case-by-case decision making have changed since his death, the ideas and arguments that I offer in this essay are, unfortunately, not ideas that I ever had the chance to share with Professor Markel.

I wish that Danny were still with us, not because I think I would have convinced him that it is a poor idea to prioritize equal treatment as a punishment value—though perhaps I might have!—but rather because I would have wanted to hear his response to these arguments. It is possible that he would have convinced me that I am mistaken. And even if he did not convince me, my own views and arguments would have been sharper and stronger for the engagement. Indeed, to the extent that my views about the virtues of incremental decision making have been tested and refined, that occurred in large part though the community that Danny created and nurtured, such as the annual CrimFest workshop that he founded many years ago.

Dan Markel was an incredibly smart and thoughtful person, and his voice was lost far too soon.