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# POWER, KNOWLEDGE, AND RELATIONSHIPS WITHIN THE FEDERAL SENTENCING GUIDELINES: A FOUCAULDIAN CRITIQUE

TIMOTHY NOONAN\*

“Perhaps the most fundamental flaw in the Sentencing Guidelines is that they are based on the assumption that you can, in the name of reducing disparities, isolate from the complexity that every sentence presents a few arbitrary factors to which you then assign equally arbitrary weights--and somehow call the result ‘rational.’”<sup>1</sup>

- Hon. Jed S. Rakoff

## INTRODUCTION

Since their inception, the Federal Sentencing Guidelines have been subject to criticism. Various commentators, both inside and outside of the judicial system, have raised issues ranging from the significant curtailment of judicial discretion to the failure to address the disparities that were the part of the impetus for their creation.<sup>2</sup> Over the years, some of these criticisms have been addressed, either through the actions of the Commission or through the judiciary,<sup>3</sup> while others, like sentencing disparities along racial lines, remain stubbornly persistent.<sup>4</sup> The Guidelines, contrary to their original intent,<sup>5</sup> formalize and codify these disparities. Just

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<sup>1</sup> Judge Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT. R. 6 (Oct. 2013)

<sup>2</sup> See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 281-84 (1993); Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85 (2005); Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173 (2010).

<sup>3</sup> See e.g., *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004) (finding a Sixth Amendment violation where the judge increased the sentence beyond the Guideline maximum based on judicial, not jury, fact-finding), *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005) (rendering the Guidelines effectively advisory finding 18 U.S.C.S. §§ 3553(b)(1) and 3742(e) unconstitutional under the Sixth Amendment).

<sup>4</sup> See William Rhodes et al., *Federal Sentencing Disparity, 2005-2012*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5432>

<sup>5</sup> Michael M. O'Hear, *The Original Intent Of Uniformity In Federal Sentencing*, 74 U. CIN. L. REV. 749, 752 (2006) (“[Showing respect for the dignity of criminal defendants] was a central, but now

as the prison system encourages and refines criminal activity by physically putting people in the same box,<sup>6</sup> the Guidelines serve as the conceptual equivalent, confining the analysis of the person to a series of boxes. The creation of centralized bureaucracy for the collection and dissemination of information not only analogizes itself to the Foucauldian Panopticon,<sup>7</sup> but it also furthers the removal of the unique aspects of the individual from the core dialogue surrounding criminal punishment<sup>8</sup> and establishes its own incentive for self-perpetuation.<sup>9</sup> This exercise of power through abrogation and objectification exacerbates the isolation of the individual from society, increasing the potential for recidivism and removing incentives for successful reintegration into society.<sup>10</sup>

The Guidelines, as proposed and as realized, fail to address the basic issue they were intended to solve, disparities in sentencing outcomes between similarly situated defendants. Ultimately, judges, and the judicial system as a whole, were unequipped to administer a rehabilitative

frequently overlooked, concern of Frankel's. [...] Uniformity, however, was originally supposed to be both rationalizing and humanizing.”).

<sup>6</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 266 (Alan Sheridan trans., Vintage Books 2d. ed., 1977) (“The prison cannot fail to produce delinquents. It does so by the very type of existence that it imposes on its inmates: whether they are isolated in cells or whether they are given useless work, [...], it is, in any case, not ‘to think of man in society; it is to create an unnatural, useless and dangerous existence’[.]”).

<sup>7</sup> Foucault, *supra* note 6, at 195-228 (trans. Alan Sheridan 1977). Foucault’s Panopticon was adapted from Jeremy Bentham’s concept of a circular prison with the individual cells set in an outer wall and open towards a central tower in the middle. The design could enable a single guard to exert power over the entire population through the constant specter of surveillance. For Foucault, this structure was a physical manifestation of a mechanism of social control, occurring not only in the penal system but throughout schools, the military and other social institutions.

<sup>8</sup> *Id.* at 200 (“He is seen, but does he not see; he is the object of information, never a subject in communication.”).

<sup>9</sup> Sharon Dolovich, *CONFRONTING THE COSTS OF INCARCERATION: Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 245 (2009) (“The most obvious mechanism for this form of [carceral] institutional parthenogenesis is the infliction of significant burdens on the incarcerated, both during the prison term and afterwards, which collectively increase the likelihood that they will commit new crimes after release.”); Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency*, 9 HASTINGS WOMEN’S L.J. 27, 68 (1998) (“The dimensions of the crime problem are so poorly and unreliably measured that the prison-industrial complex will prosper less by solving the problem than by investing substantial resources in creating, maintaining, and expanding its own markets.”).

<sup>10</sup> Isolation, both in the physical sense experienced through incarceration and in the social sense experienced through so-called collateral consequences, has a demonstrable relationship to recidivism. See Cynthia Calkins, et al., *Sexual Violence Legislation: A Review of Case Law and Empirical Research*, 20 PSYCH. PUB. POL. AND L. 443, 452 (2014) (stating a connection between social isolation and increased recidivism among sexual offenders); STANDARDS FOR CRIM. JUST., 3d ed.13 (AM. BAR ASS’N 2004) (promoting reduced recidivism through limiting collateral sanctions which further isolate convicts upon re-entry); Jim Earhart, *Overcoming Isolation: A College Program Challenges Prison Culture Through Engagement*, 33 ST. LOUIS U. PUB. L. REV. 329 (2014) (discussing an educational program of promoting engagement, even when limited, within the prison system as reducing recidivism).

sentencing regime.<sup>11</sup> Early reformers saw the wild disparities in sentencing as arbitrary and capricious.<sup>12</sup> Judges could, and did, increase sentences based on whims or pique.<sup>13</sup> These were the “bad” judges.<sup>14</sup> The proposed reform, a system of structured, factorized discretion promulgated by a central bureaucracy left the flawed judiciary largely untouched. The reform, as enacted, largely enabled a harsher and more punitive approach than was originally intended.<sup>15</sup> The resulting Guidelines have not only failed to ameliorate sentencing disparities but have, in many cases, exacerbated inequities in sentencing.<sup>16</sup> While some of this may be attributable to the political landscape in which the Sentencing Reform Act was passed, the fundamental flaw lies in applying a mechanistic, systematic approach to a uniquely individualized process.

This note will examine the sentencing process within the symbolic framework established by Michel Foucault in *Discipline and Punish: The Birth of the Prison*,<sup>17</sup> and further refined through his later works, by looking at the way the creation of the Sentencing Commission and promulgation of the Guidelines rearranges the relationships within the criminal justice system.<sup>18</sup> The first section will look at the historical context leading to the

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<sup>11</sup>O’Hear, *supra* note 5, at 762 (“Frankel’s critique of judicial discretion echoed much of the broader critique of the rehabilitative ideal: too much power was being given to officials in the criminal justice system who did not really know what they were doing, and who were prone to use their power in ways that were arbitrary and cruel.”)

<sup>12</sup>*Id.* at 760 (“‘There is dignity and security,’ [Frankel] wrote, ‘in the assurance that each of us - plain or beautiful, rich or poor, black, white, tall, curly, whatever - is promised treatment as a bland, fungible ‘equal’ before the law.’ No such assurance was available, however, in a world of vast, unguided judicial discretion at sentencing.”) quoting MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 11 (1973).

<sup>13</sup>*Id.* at 761 (recounting a paradigmatic anecdote wherein Frankel spoke disapprovingly a fellow judge for increasing a sentence by a year for “speaking disrespectfully.”)

<sup>14</sup>Rodney J. Uphoff, *Misjudging: On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 534 (2007) (“[A] significant number of criminal defendants are trapped in front of mediocre or “bad” judges whose attitudinal biases color their evidentiary rulings, factual determinations, and the sentences they mete out.”)

<sup>15</sup>Marvin Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 662 (1993) (“Sentencing commissions and guidelines are, first, to cure lawless disparity; then, more long range, to help educate legislators and the public to accept a more civilized (generally less harsh) sentencing regime.”)

<sup>16</sup>Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755, 1761 (1992) (“Notwithstanding laudable congressional goals, the guidelines continue to increase the number of men and women incarcerated in our federal prisons, resulting in abhorrent social and economic costs. The guidelines have generally resulted in longer sentences, prolonging the dehumanization of incarceration.”)

<sup>17</sup>Foucault, *supra* note 6.

<sup>18</sup>David Garland, *Foucault’s Discipline and Punish An Exposition and Critique*, 1986 AM. B. FOUND. RES. J. 847, n.2 (1986) (“Foucault is not a structuralist in the sense of one who strictly follows the methodological rules of structuralist analysis [...]. He is, however, concerned to identify the structures that define the shape and limits of discourses and of institutional practices.”)

creation of the Guidelines, particularly focusing on how the exchange of information between the defendant and the sentencer has evolved. The second section will introduce certain of Foucault's theories with reference to their relevance to the Guidelines. The third section will look critically at the effect of the guidelines on the central discourse in sentencing: the discourse between the judge and the condemned, the object of judgment.

## II. A BRIEF HISTORY OF AMERICAN SENTENCING

The procedural and theoretical aspects of sentencing seen today have grown and changed in relation to this base discourse. The modern sentencing relationship, and the specific power dynamic between the sentenced and sentencer, began developing at the start of the nineteenth century, along with the growth of the penitentiary, fully coalescing in the rehabilitative model of sentencing in the early twentieth century.<sup>19</sup> Early American law imported much of the English common law, complete with punishments that were largely fixed and largely capital, while, in some cases, adding a Puritanical severity.<sup>20</sup> While juries didn't directly decide sentences, they were at least generally aware of the punishment.<sup>21</sup> Functionally, this meant that the jury, in deciding guilt, was deciding the punishment. Further, colonial and early American juries were empowered to make findings on both facts and law.<sup>22</sup> The defendant could, and did, argue both the facts of the case and the law itself.<sup>23</sup> The defendant was still free to argue about not just the factual underpinnings of the charge but the

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<sup>19</sup> Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 694-95 (2010)

<sup>20</sup> SOL RUBIN, LAW OF CRIMINAL CORRECTION § 16 (2d ed. 1973) ("In respect of felonies, the unalterable judgment of life, with attainder and forfeiture implicit, was adopted, and the so-called discretion available in the cases of lesser offense portended only a choice between bodily afflictive sanction or a fine."). Rubin also notes the importance of the colonies' religious beliefs in informing the severity of punishments, particularly the proscription, banishment, and execution of Quakers by the Puritans of Massachusetts and Virginia. *Id.*

<sup>21</sup> Gertner, *supra* note 19 at 692 ("Jurors plainly understood the impact of a guilty verdict on the defendant because of the relative simplicity of the criminal law and its penalty structure, and often because of the process by which they were selected."); *see also Woodson v. North Carolina*, 428 U.S. 280, 303, 96 S. Ct. 2978, 2991 (1976).

<sup>22</sup> Matthew P. Harrington, *The Law-Finding Function Of The American Jury*, 1999 WIS. L. REV. 377 (1999).

<sup>23</sup> Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 869-76 (1994). As explained by Alschuler and Deiss, it was the colonial jury's role in resisting English authority, particularly in enforcement of libel laws, that helped inform the inclusion of Sixth Amendment. They use, as a practical example the prosecution of John Peter Zenger under seditious libel laws. Alexander Hamilton's defense of Zenger argued, contrary to the law at the time, that the truth could be a defense. The jury, against the instructions of the judge, found for Zenger under that argument.

appropriateness of applying the law to those facts. While the existence of fixed punishments meant the defendant was not making a quantitative argument similar to modern sentencing, there was nonetheless a discourse about the fairness of a particular punishment in response to a particular action. The jury, in announcing the verdict, decided not only whether a crime had been committed, but whether the accused would be allowed to live among them.<sup>24</sup>

With the advent of the nineteenth century, the states began to dial back the use of the death penalty, increase the use of prisons, and allow jury discretion in selecting sentences for felonies.<sup>25</sup> As the law grew more complex, the sentencing decision began to shift to the province of judges.<sup>26</sup> The dichotomy we see today, where juries decide fact and judges decide law, coalesced under a rehabilitative theory of punishment. Judges became “sentencing experts,” responsible not just for the application of the law but an adjudication of the person being sentenced.<sup>27</sup> The rehabilitative theory sought to correct the problem of crime through sentencing, requiring (or allowing) the judge to weigh and assess a panoply of factors about the convict and their underlying offense.<sup>28</sup> The offender could, through corrective treatment, be retrained and reintroduced into society – the judge’s job was to determine the appropriate treatment.<sup>29</sup> The corporal, retributive punishments of the colonial era became theoretical, economic, and psychological, acting not on the body but on the mind.<sup>30</sup>

Beyond the general theory of rehabilitation, to which judges had widely varying degrees of sympathy, there was little guidance or procedural protection.<sup>31</sup> There was little meaningful appellate review beyond the

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<sup>24</sup> *United States v. Scroggins*, 880 F.2d 1204, 1206 (11th Cir. 1989) (“[I]ncarceration was not a sentencing option: the colonists accepted the prevailing belief in the basic depravity of humanity, ‘a feeling that made any notion of an offender’s possible rehabilitation absurd.’”) *citing to* A. CAMPBELL, *THE LAW OF SENTENCING* § 2, at 9 (1978) (footnote omitted)).

<sup>25</sup> Nancy J. King, *Lessons from the Past: The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937 (2003).

<sup>26</sup> Gertner, *supra* note 19 at 694-95.

<sup>27</sup> *Id.* at 695 (“Crime was a ‘moral disease,’ whose cure was delegated to experts in the criminal justice field, one of whom was the judge.”).

<sup>28</sup> *Id.* See also Douglas A. Berman, *Symposium: Sentencing And Punishment: Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 388-90 (2006).

<sup>29</sup> Douglas A. Berman, *Punishment and Crime: Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 3 (2005) (“The rehabilitative ideal often was conceived and discussed in medical terms, with offenders described as ‘sick’ and punishments aspiring to ‘cure the patient.’”).

<sup>30</sup> Foucault, *supra* note 6, at 139 (“What was being formed was a policy of coercions that act upon the body, a calculated manipulation of its elements, its gestures, its behavior.”).

<sup>31</sup> Adam Lamparello, *Introducing the “Heartland Departure”*, 27 HARV. J.L. & PUB. POL’Y 643, 644 (Spring 2004) (“Prior to the advent of the Guidelines, sentencing decisions were primarily the product of unfettered judicial discretion; no rules, principles, precedent, or purposes guided or controlled

permissive proportionality standards of the Eighth Amendment.<sup>32</sup> As such, judges didn't write sentencing decisions and no common law surrounding sentencing developed.<sup>33</sup> Due in part to a narrow doctrinal focus in legal education<sup>34</sup> and the relatively homogeneous demographic makeup in the legal profession as a whole,<sup>35</sup> the purported sentencing experts were being asked to do a job for which they had little training or experience.<sup>36</sup> This judicial discretion worked in tandem with the parole system, which had wide latitude as to how sentences were ultimately enacted.<sup>37</sup> Ultimately, this system resulted in widely varying sentencing outcomes and a perception of inequality and disingenuousness.<sup>38</sup>

This history is illuminating in two ways. The first is that the creation of the Guidelines was a reaction to the perceived lawlessness of the prior sentencing regime.<sup>39</sup> The most prominent reaction was from Judge Marvin Frankel of the Southern District of New York, who wrote extensively on the lack of guiding law or principles in sentencing. His work would largely inspire the eventual creation of the Guidelines, albeit not necessarily in the form he had imagined.<sup>40</sup> It was not a movement towards a particular goal but rather an intentional departure. If the creation of the Guidelines had a philosophic goal, that goal was the desire for order. The ultimate reform was significantly less concerned with what form that order would take. As

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district court judges in their determinatio[n] of particular sentences to impose.”); *see also* Erik Luna, *Misguided Guidelines A Critique of Federal Sentencing*, Policy Analysis No. 458, 3-4 (Cato Institute 2002) <https://www.cato.org/publications/policy-analysis/misguided-guidelines-critique-federal-sentencing> (“Under a favorable interpretation, then, federal trial judges were part social worker, part soothsayer—gauging the length of sentence based on an unguided evaluation of the necessary conditions for rehabilitation and indoctrination of pro-social behavior.”).

<sup>32</sup> *Ewing v. California*, 538 U.S. 11, 123 S. Ct. 1179, 1180, 155 L. Ed. 2D 108 (2003) (“Eighth Amendment does not require strict proportionality between crime and sentence [but] forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”) citing to *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2D 836 (1991).

<sup>33</sup> Lamparello, *supra* note 31, at 644-45; *see also* Gertner, *supra* note 19, at 696-97.

<sup>34</sup> Gertner, *supra* note 19, at 696-97 (“Sentencing was not taught in law schools; and to the extent there was any debate about deterrence and rehabilitation...it was not reflected in judicial training.”).

<sup>35</sup> AM. BAR ASS'N, LAWYER DEMOGRAPHICS (2016), available at: [http://www.americanbar.org/content/dam/aba/administrative/market\\_research/lawyer-demographics-tables-2016.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf).

<sup>36</sup> Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 528 (2007) (“It was as if judges were functioning as diagnosticians without authoritative texts, surgeons without Gray's Anatomy.”).

<sup>37</sup> Stith & Koh, *supra* note 2, at 226-27.

<sup>38</sup> *Id.* at 227-28.

<sup>39</sup> Jon O. Newman, *Remembering Marvin Frankel: Sentencing Reform But Not These Guidelines*, 14 FED. SENT. R. 319 (2002).

<sup>40</sup> *Id.* (“Wisely cautioning his readers not to ‘accept delusions of precision,’ [Frankel] pointed out ‘that numerical statements may serve, for obviously non-quantifiable subjects, as useful implements for clarification of thought, comparisons, and criticism.’” MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 113 (1973)).

such, the vestigial aspects of the preceding regimes remained intact. The reform simply overlaid a literal grid on top of the extant regime. The other important aspect of the history is the presence throughout the history of American sentencing of a discourse between sentenced and sentencer. While this relationship is relatively obvious in the rehabilitative era, it was paradoxically stronger under determinate sentencing than under the guidelines. The colonial jury, bound as they were by limited and fixed punishments, nonetheless was free to find for a defendant, not because the evidence failed to support a guilty verdict, but because the law was simply unfair as applied to the defendant or generally.<sup>41</sup> The defendant was still able to engage in the discourse. The essential relationship, the sentencing discourse, was between the defendant and the jury. While sentencing discretion later shifted to the judge, the base discourse remained the same.<sup>42</sup> The defendant had a voice with which to assert their humanity, either by asserting the unfairness of the punishment or of the law as applied to their circumstances.<sup>43</sup>

#### A. *The Creation of Federal Sentencing Commission and the Sentencing Guidelines*

The impetus for sentencing reform came to fruition during the presidency of Ronald Reagan in the form of the Sentencing Reform Act of 1984.<sup>44</sup> Although the underlying legislation had originally been introduced in 1975 by Senator Edward Kennedy, the final bill was signed in 1984 by President Reagan, who also signed into law a number of other reformatory measures.<sup>45</sup> The bill's journey from conception by the liberal reformer to actualization by the "get tough on crime" president saw significant changes

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<sup>41</sup> Alschuler & Deiss, *supra* note 23.

<sup>42</sup> Kate Stith & Jose Cabranes, *Judging Under The Federal Sentencing Guidelines*, 91 NW. U. L. Rev. 1247, 1252 (1997) ("Those present at a sentencing proceeding in a federal [...] witnessed a ritual of undeniable moral significance. It was critical that this proceeding took the form of a face-to-face encounter between individuals... The meaning of this solemn confrontation was clear: only a person can pass moral judgment, and only a person can be morally judged.")

<sup>43</sup> United States Sentencing Commission, 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 8, n. 28 (2011) [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_02.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf) ("Pardons, lack of enforcement, the fiction of "benefit of clergy," and jury nullification contributed to the lack of executions in the colonies." LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY, 41-43 (1993)).

<sup>44</sup> Pub. L. No. 98-473, §§211-300, 98 Stat. 1837, 1987-2040 (1984) (codified as amended 18 U.S.C. §§3551-3742 (2012); 28 U.S.C. §§991-998 (2012)).

<sup>45</sup> Stith & Koh, *supra* note 2.



in the text and purpose of the law.<sup>46</sup> Like much broad and far-reaching legislation, the passage of the final bill required much in the way of political compromise, with the “law-and-order” generally prevailing.<sup>47</sup> The result was the creation of a commission, appointed by the president, with a mandate to create the labyrinthine structure that governs federal sentencing today. The final bill, the Sentencing Reform Act of 1984, created the Sentencing Commission. The Sentencing Commission then created the Guidelines. Accordingly, the effects of the 1984 bill were to create an oversight body and a regulatory structure, each of which has a different impact on the sentencing system. To understand the impact on sentencing, each structure should be analyzed as a distinct body with a unique effect, creating a new bureaucratic discourse. This discourse has its own effect, separate and distinct from those of its component bodies. Each of these effects reorganizes relationships and redistributes power within the criminal justice system. As such, each aspect of the overall scheme is worth looking at separately.

*i. The Sentencing Commission*

The United States Sentencing Commission, an independent body within the federal judiciary, “sits at the intersection of all three branches of government and synthesizes the interests of the three branches to effectuate sound federal sentencing policy.”<sup>48</sup> The “core mission” of the Commission is to promulgate the sentencing guidelines and related amendments.<sup>49</sup> As a corollary purpose, the Commission serves as a research and information center for sentencing data, statistics, and issues, as well as providing training to the federal judiciary on sentencing issues.<sup>50</sup> Structurally, the Commission consists of seven voting members and one non-voting member, appointed by the President to staggered six-year terms,<sup>51</sup> and contains four advisory committees, representing practitioners, probationary officers, victims, and tribal interests.<sup>52</sup>

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<sup>46</sup> Stith & Koh, *supra* note 2, at 284 (“[W]hatever early proponents of guidelines may have expected, it is clear that Congress desired a significant degree of rigidity and harshness in the sentencing guidelines.”).

<sup>47</sup> Stith & Koh, *supra* note 2, at 285 (“[T]o the extent that ideological and political objectives did significantly affect outcomes in both Congress and the Sentencing Commission in the 1980’s, it is not surprising that “law-and-order” concerns dominated.”).

<sup>48</sup> U.S. SENTENCING COMM’N, ANNUAL REPORT, FISCAL YEAR 2015 A-1 (2015).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> 28 U.S.C. § 991(a).

<sup>52</sup> U.S. SENTENCING COMM’N, RULES OF PRACTICE AND PROCEDURE 9 (2016) [hereinafter COMMISSION RULES].

The Commission, in addition to amending and promulgating the Guidelines, engages in a quasi-rule-making procedure. Amendments to the Guidelines are proposed, considered, and released on a yearly cycle. The Amendments are subject to the same notice and comment provisions as the rest of federal administrative rulemaking.<sup>53</sup> Additionally, the Commission publishes, as a part of the amendment process, notice of the priorities the Commission will be using in the upcoming cycle.<sup>54</sup> The 2016-17 Priorities include several continuing studies, including encouraging the use of alternatives to incarceration, resolution of circuit conflict, and more specific provision, like the applicability of the “safety valve” provision<sup>55</sup> in a variety of circumstances.<sup>56</sup>

The oversight structure of the Sentencing Commission creates potential positives as well as significant concerns. While this structure provides a hitherto non-existent body specifically tasked with understanding federal sentencing norms and patterns, it also creates a new bureaucratic structure, removed from the defendants, with significant discretion and practical authority but very little in the way of definitive guidance.<sup>57</sup> Sentencing is a complex enterprise, involving not only the factual circumstances of the predicate crime but, potentially, the entirety of person’s life.<sup>58</sup> Reducing the panoply of potential mitigating and aggravating factors present in any human existence to quasi-scientific formula with any expectation of fairness is a fraught proposition,<sup>59</sup> particularly when doing so over a federal judiciary that handed down 73,125 sentences in the 2015 fiscal year.<sup>60</sup> The general oversight structure provides the framework for a feedback loop under which sentencing can be

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<sup>53</sup> *Id.* at 6-7; *see also* 5 USC § 553.

<sup>54</sup> COMMISSION RULES, *supra* note 52, at 8.

<sup>55</sup> 18 U.S.C. § 3553(f).

<sup>56</sup> 81 Fed. Reg. 58004-01.

<sup>57</sup> Stith & Koh, *supra* note 2, at 281-84; *see also* Berman, *supra* note 29, at 12 (“Congress provided no express instructions concerning the specific application of sentencing purposes throughout the federal guidelines system. In turn, the United States Sentencing Commission, though making an initial effort to formulate guidelines premised on one particular theory of punishment, ultimately dodged these fundamental issues by relying primarily on the results of past judicial sentencing practices as the foundation for the initial federal sentencing guidelines.”).

<sup>58</sup> Stith & Cabranes, *supra* note 42, at 1252.

<sup>59</sup> *See* Luna, *supra* note 31, at 9 (“Distant government bodies such as Congress and the commission lack the capacity to evaluate the facts of a specific crime or the circumstances of a particular offender. [...] A far off agency can no more judge specific criminals than a blindfolded expert can appraise the worth of unseen paintings.”).

<sup>60</sup> U.S. District Courts—Criminal Defendants Disposed of, by Method of Disposition—During the 12-Month Periods Ending June 30, 1990 and September 30, 1995, 2000, 2005, and 2011 Through 2015 [http://www.uscourts.gov/sites/default/files/data\\_tables/Table5.04.pdf](http://www.uscourts.gov/sites/default/files/data_tables/Table5.04.pdf).

understood, organized, and guided.<sup>61</sup> Such a system could balance the inevitable outliers of a decentralized system and correct for the lack of expertise of the sentencing experts.<sup>62</sup> The Commission as it was enacted, and has further demonstrated in practice, exerts much more control over the process than a mere support and guidance function.<sup>63</sup> Even for the most ardent proponents of sentencing reform, the Guidelines went too far in restraining judicial discretion.<sup>64</sup> Even post-*Booker*, the Guidelines and, by extension, the Commission, exhibit significant control over sentencing.<sup>65</sup> For all the complaints about limiting judicial discretion, it appears that judges are generally unwilling to aggressively exercise the discretion they do have.<sup>66</sup> As such, the Sentencing Commission plays a dominant, centralized role in the broad landscape of sentencing.

ii. *The Guidelines: Discretion Within Boxes*

The precursor to the Federal Sentencing Guidelines, the Parole Guidelines promised "a scientific and objective means of structuring and

<sup>61</sup> See Eric S. Fish, *Criminal Law Sentencing and Interbranch Dialogue*, 105 J. CRIM. L. & CRIMINOLOGY 549, 556 (2015) ("Even the framework of the federal sentencing system is compatible with the logic of dialogue. The federal guidelines are now advisory, the federal Sentencing Commission collects exhaustive data about federal judges' sentencing practices, and the Sentencing Reform Act instructs the Commission to consult with judges and other actors when updating the guidelines.").

<sup>62</sup> Nancy Gertner, *Neuroscience and Sentencing*, 85 FORDHAM L. REV. 533, 538 (2016) ("To be sure, with the enactment of the Guidelines, there was considerably more judicial training in sentencing than there had ever been prior to their enactment, during the era of the 'old rehabilitation.' Significantly, this was training in the application of the Guidelines' formulas and how to compute the numbers, but there was still no training on the purposes of sentencing, alternatives to incarceration, what works to prevent recidivism or to effect deterrence.").

<sup>63</sup> *Id.* ("The Sentencing Commission would not permit any other agency to provide training on sentencing, even though the Federal Judicial Center, whose mission was to train judges, was well equipped to do so."); see also Stith & Cabranes, *supra* note 42, at 1274 ("[T]he Commission has gone out of its way to make it clear that it alone will determine the scope and application of concepts employed in the Sentencing Guidelines, regardless of any teachings of the substantive law of crimes or the experience of federal and state governments in elaborating the criminal law.").

<sup>64</sup> Jon O. Newman, *Remembering Marvin Frankel: Sentencing Reform But Not These Guidelines*, 14 FED. SENT. R. 319 ("Indeed, [Frankel] recognized, as did many supporters of sentencing reform, that the Commission's version of a guidelines system was an excessive displacement of the reasonable discretion sentencing judges ought to have, even though it should be subject to some degree of structure. Commenting on the guidelines in the fifth year of their operation, he agreed that complaints about their 'inflexibility' had 'considerable merit.'").

<sup>65</sup> Courts provided non-governmentally-sponsored Guideline departures in less than a quarter of cases. UNITED STATES SENTENCING COMMISSION, COMPARISON OF SENTENCE IMPOSED AND POSITION OF SENTENCE RELATIVE TO THE GUIDELINE RANGE BY YEAR, 2015 Sourcebook, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/FigureG.pdf>.

<sup>66</sup> Gertner, *supra* note 62, at 540 ("In effect, the Guidelines enabled judges to cede moral decision making to another body; their task became the application of an apparently rational formula to the case at hand - a purely cognitive process.").

institutionalizing discretion in parole release decision-making."<sup>67</sup> Both the Parole Guidelines, and the subsequent Sentencing Guidelines, attempt to quantify (almost) every aspect of the sentencing decision, applying a formulaic approach by assigning value to the myriad factors, combining the values, and then plugging the end result into a pre-determined grid. Prior to the implementation of the Guidelines, judges were generally only limited by the statutorily defined maximums and, less typically, minimums. The potential range of the sentence was defined in terms of years. Under the Guidelines, where the range is limited,<sup>68</sup> the discretion is defined in terms of months. While the Guidelines, since the Supreme Court's decision in *United States v. Booker*,<sup>69</sup> are advisory, only ten percent of 2015 federal sentences departed from the Guidelines for non-specified reasons.<sup>70</sup> Due in part to a degree of jurisprudential confusion, judges are understandably reticent to depart from the Guidelines.<sup>71</sup> The full Guidelines Manual is over 600 pages long. By far, the bulk of the Manual is contained within Chapter Two which lists the various offenses and assigns a number representing the offense's severity, as well as a variety of offense-specific factors which may be added to the base severity.<sup>72</sup> Once the offense severity is calculated, the offender's criminal history score is calculated.<sup>73</sup> The scores are then inputted into a grid, with offense severity on the vertical axis and the criminal history score on the horizontal. The grid is comprised of boxes which contain sentencing ranges termed in months.<sup>74</sup> Within the recommended range, the sentencing judge has unlimited discretion.

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<sup>67</sup> Stith & Koh, *supra* note 2, at 229 (quoting William J. Genego et al., *Project: Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 823 (1975)) (citing 38 Fed. Reg. 31,942 (Nov. 19, 1973); 38 Fed. Reg. 26,652 (Sept. 24, 1973)).

<sup>68</sup> 28 U.S.C.S. § 994 (b)(2) ("If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.")

<sup>69</sup> *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

<sup>70</sup> U.S. SENTENCING COMM'N, 2015 SOURCEBOOK (2015)

<http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/FigureG.pdf>.

<sup>71</sup> See e.g., *Tapia v. United States*, 564 U.S. 319, 131 S. Ct. 2382 (2011) (finding that an explicit abandonment of rehabilitation necessitated invalidated a sentence imposed so that the defendant could attend drug treatment); *Pepper v. United States*, 562 U.S. 476, 131 S. Ct. 1229 (2011) (finding evidence of an offender's post-sentencing rehabilitation could be considered when imposing a new sentence after a previously vacated sentence).

<sup>72</sup> U.S. SENTENCING GUIDELINES MANUAL §§ 2A1.1-X7.2 (U.S. SENTENCING COMM'N 2016).

<sup>73</sup> *Id.* §§ 4A1.1-B1.5 (An offender's criminal history is primarily based on the number of prior sentences, violent offenses, and crimes committed while on release.)

<sup>74</sup> *Id.* ch. 5 pt. A; see *infra* Appendix.

Without, the judge retains some discretion but generally must provide specific reasons for departing.<sup>75</sup>

The Sentencing Guidelines are structured around three statutorily defined goals: (1) to incorporate generally the purposes of sentencing, (2) to “provide certainty and fairness”, and (3) to qualifiedly reflect “the advancement in knowledge of human behavior as it relates to the criminal justice process”<sup>76</sup> with particular attention paid to “certainty and fairness.”<sup>77</sup> The formulation reflects, by declining to further address or define sentencing purposes, a lack of purpose-driven guidance and a focus on empirically driven guidance.<sup>78</sup> The enacting legislation explicitly declines to adopt a particular theory of punishment and, consequently, none has been adopted.<sup>79</sup> The prevailing political concerns of the time were headed towards greater severity.<sup>80</sup> The political impetus of sentencing oversight was guided, in part, by a shift from the rehabilitative model to an increased clamor for deterrence or retribution.<sup>81</sup> Further, the subsequent adoption of mandatory minimum sentences, career criminal enhancements, and three-strikes laws demonstrate a political commitment to more severe punishments.<sup>82</sup> The enacting legislation, though, was the result of a long series of compromises.<sup>83</sup> While Congress acknowledged the importance of purpose in sentencing, the task of defining the overarching philosophy fell to the Commission.<sup>84</sup> The Commission ultimately ignored the issue and

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<sup>75</sup> 18 U.S.C. § 3553(c)(1).

<sup>76</sup> 28 U.S.C. § 991(b)(1).

<sup>77</sup> 28 U.S.C. § 994 (f); The “certainty and fairness” dictate may be the Guidelines’ biggest failure. It has been widely argued that the Guidelines have brought neither. Some of this is due to the sheer complexity of the Guidelines and the subsequent difficulty in enacting and interpreting them. One can make the argument that creating a system that well-educated and experienced practitioners find confusing inherently undermines any degree of certainty on the part of general public. See Albert W. Alschuler, *supra* note 2, at 89 (“Adopting the viewpoint of a person of ordinary moral sensibilities rather than of the Sentencing Commission leads quickly to the conclusion that the Sentencing Guidelines have substituted new disparities for old ones.”).

<sup>78</sup> Stith & Koh, *supra* note 2, at 240-41.

<sup>79</sup> Lamparello, *supra* note 31, at 654. (“[The Guidelines] grid suffers from the same flaws that characterized pre-Guidelines sentences -- there exists no explicit purpose or stated principle justifying the criminal sanctions that are applicable for each particular offense.”).

<sup>80</sup> See Gertner, *supra* note 19, at 698 (“The public, and certain members of the academy, gave up on rehabilitation as a central purpose of sentencing, instead championing a philosophy known as ‘limited’ retribution”), Michael Tonry, *Sentencing in America, 1975-2025*, 42 CRIME & JUST. 141, 150 (2013) (defining a period from 1984 to 1996 as defined by a “tough on crime” approach to sentencing).

<sup>81</sup> Stith & Koh, *supra* note 2, at 240. The authors note that the Sentencing Reform Act’s Senate champion, Edward Kennedy, who was clearly a liberal, seemed to support a retributive model. *Id.* n. 100.

<sup>82</sup> Tonry, *supra* note 80, at 150.

<sup>83</sup> Stith & Koh, *supra* note 2, at 230-39 (chronicling the legislative history, debates, and failed precursors to the Sentencing Reform Act).

<sup>84</sup> Steve Y. Koh, *Reestablishing the Federal Judge’s Role in Sentencing*, 101 YALE L.J. 1109, 1116-17 (1992).

focused on mathematical averages and past practice.<sup>85</sup> The one guiding principle that survived was the need for order and structure.<sup>86</sup> The end result of the process was a systematic solution to a very human problem.

### III. GUIDELINES PANOPTICON: DOCILE BODIES AND POWER-KNOWLEDGE RELATIONSHIPS

Foucault has been referred to as a “theorist of paradox.”<sup>87</sup> His analytical critiques involved reversing the underlying assumptions and premises of the social institutions and developments that he studied. In *Discipline and Punish*, he questioned the orthodoxy of the reformist, rehabilitative model of criminal justice, in large part by shifting the focus from the macro-level institutions to the “micro-physics” of power.<sup>88</sup> While aspects of his methodology and analytical scope may be subject to criticism,<sup>89</sup> the core concepts and the symbolic framework he developed are nonetheless useful in examining social structures and their relationship to the individual person.<sup>90</sup>

<sup>85</sup> See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 18 (1988) (“It is important to realize that the Commission’s ‘past practice’ compromise does not reflect an effort simply to reconcile two conflicting philosophical positions. It reflects a lack of adequate, detailed deterrence data, and it reflects the irrational results of any effort to apply ‘just deserts’ principles to detailed behavior through a group process.”). It has been posited that the failure of the Commission to engage adequately with the question of sentencing philosophy was due to the inexperience of the original Commissioners. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers.*, 101 YALE L.J. 1681, 1741-42 (1992) (“In retrospect, the trouble began with the appointment of the Commission’s initial seven members....None of the members had extensive experience in sentencing offenders in a high-volume urban court....No member had significant experience with the process of change, with efforts to reform the criminal justice system, or with the obstacles to modifying a multidisciplinary decisionmaking process with long traditions and specialized roles.”).

<sup>86</sup> Breyer, *supra* note 85, at 18 (“The result of this compromise is that the Commission’s results will reflect irrationality in past practice, but only to a degree. Since the Commission employed typical past practices, the Guidelines tend to avoid unjustifiably wide variations in sentencing. This, after all, was part of the Commission’s basic statutory mission.”); see also Tonry, *supra* note 80, at 150 (“The focus [of sentencing reform] was on the sentencing process and on individual sentences, but not on their effects. The underlying values were procedural fairness, proportionality, equal treatment, and rationality.”).

<sup>87</sup> Garland, *supra* note 18, at 848.

<sup>88</sup> *Id.* at 852; see also Gerald Turkel, *Michel Foucault: Law, Power, and Knowledge*, 17 J.L. & SOC’Y 170, 170 (1990) (“Foucault conceptualized power as it is exercised, as multiple and decentralized, and as productive of social structures and knowledge.”).

<sup>89</sup> Garland, *supra* note 18, at 849 (Foucault’s focus on the prison as inextricably indicative of the wider social structure ends up as “alarmist and implausible.”).

<sup>90</sup> MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, 198 (Colin Gordon ed., Colin Gordon et al. trans., 1980) (“Power in the substantive sense, ‘le’ pouvoir, doesn’t exist. [...] In reality power means relations, a more-or-less organized, hierarchical, co-ordinated cluster of relations.”) see also Dany Lacombe, *Reforming Foucault: A Critique of the Social*

Fundamental to a Foucauldian analysis of an institution is the premise that power is not a thing that's possessed and exercised but a force that arises from the interaction between people and social structures.<sup>91</sup> Power arises from and may be exercised within a particular relationship. The judge's power to sentence arises, not from the state as an abstract body, but from the relationship between the state and the subject. Laws, such as they are, do not create and define power so much as they guide and direct it. Broadly speaking, *Discipline and Punish* traces the history of modern punishment from the "spectacle of the scaffold,"<sup>92</sup> wherein punishment was corporal and public, to the "punishment of the soul,"<sup>93</sup> which acted upon the mind and sought to correct the aberrant behavior. As such, punishment became corrective, subjecting the juridical object to discipline, rather than retributive. This shift occurs simultaneously with the development of the social sciences, expanding the knowledge of the human person,<sup>94</sup> and the development of more advanced systems of production, which depend on "docile bodies."<sup>95</sup> The prison was therefore a means of social control as opposed to the social reaction on which the historical regime was predicated.<sup>96</sup> The criminal, instead of being visibly severed from society, was accepted and internalized.<sup>97</sup>

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*Control Thesis*, 47 BRIT. J. SOC. 332, 334 (1996) ("This conception of power and the subject facilitates an understanding of law reform that does not reduce it to a structure that simply reproduces the dominant social order. On the contrary, Foucault's concept of power, understood in the context of 'governmentality', allows us to begin to reconfigure the complex relationship between structure and agency.").

<sup>91</sup> Turkel, *supra* note 88, at 179 ("[T]he juridical subject emerges from relations of power, from technical manipulations and moral discourse focused on the body.").

<sup>92</sup> Foucault, *supra* note 6, at 32.

<sup>93</sup> Garland, *supra* note 18, at 852 ("Foucault uses the notion of 'the soul' to refer to what psychologists variously term the psyche, the self, subjectivity, consciousness, or the personality. [...] For Foucault it is the soul that is 'the seat of the habits' and so is the target of disciplinary techniques.").

<sup>94</sup> *Id.* at 853.

<sup>95</sup> Foucault, *supra* note 6, at 135-38.

<sup>96</sup> In the beginning of Foucault's punitive timeline, the criminal was subjected to a range of violent and explicit acts, including drawing and quartering, hanging, and other forms of torture, all justified in the name of the king. Foucault, *supra* note 6, at 14. As society developed a greater reliance on individual property rights and a more democratic social structure, the criminal justice system moved to a more centralized political institution. *Id.* at 90 ("The right to punish has been shifted from the vengeance of the sovereign to the defence of society."). Punishment moved from a direct assault on the body of the criminal to an attack on the idea of the crime, both its genesis in the criminal's head and as a broader concept. The criminal became the representation of the crime; in punishing one, the state was attacking both.

<sup>97</sup> This process is simultaneously made possible by and the result of a transition towards more humane punishment. For torture to exist, there must be some segregation between the offender and the rest of the population. Otherwise, it's an unthinkable exercise of state power. See Peter Halewood, *Sameness/Difference, International Human Rights Law, and the Political Meaning of Torture*, 22 BERKLEY LA RAZA L.J. 257, 259 (2012) ("Dehumanization allows states to assert, to themselves and others, that they are not "torturing" a body possessing dignity.").

This process was achieved through the growth of “disciplinary power,”<sup>98</sup> a power based on knowledge.<sup>99</sup> This form of punishment “rest[s] on a whole technology of representation” which expands the punitive scope.<sup>100</sup> It is both a punishment and a message.<sup>101</sup> Each punishment, therefore, informs the next. To be effective, the punishment, its subject, and its object must be understood. So, the process of punishment becomes one of observation. Offenders, crimes, and behavior are objectified, classified, and normalized.<sup>102</sup> Psychology, sociology, and criminology all contribute to the idea of the offender as a subject, capable of being stripped down to data points. Once the subject is reducible, then the data can be compared and norms established. Once norms are established, the regime may be determined and deviations may be identified and corrected. Through correction, the deviation may be labeled and, as such, limited. The corollary to this is acceptance of deviance as a part of an overall scheme, which Foucault designated as “delinquency.”<sup>103</sup> As such, the system becomes softer, gentler, and pervasive. Once the system accepts deviance, it incorporates that deviance.

All of this takes place within a system which has both softened and expanded the view of crime or, in Foucault’s words, “crimes seemed to lose their violence, while punishments, reciprocally, lost some of their intensity but at the cost of greater intervention.”<sup>104</sup> Justice becomes the protector of the law-abiding individual. The state becomes responsible for both the criminal and the victim.<sup>105</sup> The law becomes more than a definition of the outer boundaries of socially acceptable behavior and develops into the

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<sup>98</sup> Lacombe, *supra* note 90, at 332.

<sup>99</sup> *Id.*

<sup>100</sup> Foucault, *supra* note 6, at 104 (“[Finding a suitable punishment] is an art of conflicting energies, an art of images linked by association, the forging of stable connections that defy time: it is a matter of establishing the representation of pairs of opposing values, of establishing quantitative differences between the opposing forces, of setting up a complex of obstacle-signs that may subject the movement of the forces to a power relation.”).

<sup>101</sup> Foucault, *supra* note 6, at 101 (The application of punishment shifts from “the body; with the ritual play of excessive pains, spectacular brandings in the ritual of the public execution; it is the mind or rather a play of representations and signs circulating discreetly but necessarily and evidently in the minds of all.”).

<sup>102</sup> Lacombe, *supra* note 90, at 332, Garland, *supra* note 18, at 859.

<sup>103</sup> Foucault explains the inevitable connection between prison and recidivism: by adopting the prison as the means of punishment, society accepts a certain amount of delinquency; by neither fully severing nor fully integrating the deviants, society accepts their continued existence. Foucault, *supra* note 6, at 257-92.

<sup>104</sup> Foucault, *supra* note 6, at 75.

<sup>105</sup> This trend even contributed to the Sentencing Guidelines. Among the initial impulses for criminal justice reform was the desire to simplify a sprawling and complex criminal code. Stith & Koh, *supra* note 2, at 232.



model for how to behave within society.<sup>106</sup> The institution becomes a means of enforcing conformity, establishing normative boundaries and assigning appropriately weighted punishments to transgression of those boundaries. Crime and criminal justice move into the realm of social control and economics.<sup>107</sup> Institutions become self-sustaining.<sup>108</sup> The prison becomes an entity in its own right, creating its own incentives.<sup>109</sup> The creation of the prison apparatus leads, implicitly, to the necessity of crime.<sup>110</sup> The imperative to “solve the problem of crime” is gone because crime, as represented by the criminal, has been quarantined, walled off both physically and psychologically.

Fundamental to the knowledge aspect is Foucault’s concept of surveillance.<sup>111</sup> For knowledge to be gathered, the subject must be arranged such that they can be observed. From this arises the adoption of the Panopticon as epitome of his central concept. It is an architectural scheme that allows for the few to maximally observe the many without fear of exposure themselves.<sup>112</sup> While Foucault vastly over-estimated the

<sup>106</sup> “Every year, additional crimes, increased punishments, and novel applications of the criminal justice system enter U.S. jurisprudence [...] Any expansion may appear gradual - another crime here and an enhanced sentence there - and the latest criminal provision or practice may seem trivial in effect. Over time, however, the United States has experienced a dramatic enlargement in governmental authority and the breadth of law enforcement prerogatives.” Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U.L. REV. 703, 703 (2005).

<sup>107</sup> Foucault, *supra*, note 6, at 138 (“What was being formed was a policy of coercions that act upon the body, a calculated manipulation of its elements, its gestures, its behavior. The human body was entering a machinery of power that explores it, breaks it down and rearranges it.”).

<sup>108</sup> Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 73 (2016) (“Support for the prison industry turns out to be widespread and tenacious, even among those who oppose mass incarceration, when it serves their financial or political interests. For example, Senator Durbin, a vocal critic of mass incarceration, recently trumpeted his support for the opening of Thompson Prison, calling it ‘a significant investment in the economic future of northern Illinois.’”).

<sup>109</sup> The total population of U.S. jails and prisons in 2015 was 2,173,800. OFFICE OF JUSTICE PROGRAMS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015 (2016). Supervising this population was a total of 427,790 corrections officers and jailers. BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES, MAY 2015, 33-3012 CORRECTIONAL OFFICERS AND JAILERS (2017). . At a mean annual wage of just over 45,000 dollars, that payroll cost for corrections officers, not including any other prison system employees, is over \$19 billion per year. *Id.* Even without considering the contractual expenditures for health care, food services, and other support services, this amount supports a lot of families and creates a lot of political capital. See Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1203 (2008) (“[S]elf-interested pro-incarceration advocacy is already common in the public sector - chiefly from public-sector corrections officers unions.”).

<sup>110</sup> See Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 79 (“The prison industry is an archetypal example of an established industry preventing public-spirited reform because of the incentives of existing stakeholders.”).

<sup>111</sup> Garland, *supra* note 18, at 859 (“‘The examination’ is, for this system, a central method of control, allowing close observation, differentiation, assessment of standards, and the identification of failure to conform.”).

<sup>112</sup> *Id.* at 860 (“It took the form of a circular building, with individual cells around its perimeter whose windows and lighting were arranged so as to make their occupants clearly visible to the central

importance of this structure to society as a whole, the central metaphor remains particularly relevant in the digital age. As advanced means of data collection become more insidious and pervasive, symbolic architecture of the Panopticon becomes more and more appropriate.<sup>113</sup> For present purpose, the symbolic structure may be viewed as any centralized accretion of knowledge.<sup>114</sup> The gathering of information itself becomes a means of control wherein the objects of surveillance conform their behaviors in response to the possibility of being observed.<sup>115</sup> This structure enables institutions collect information, analyze, normalize, and then regulate accordingly.<sup>116</sup> Subjects, which in Foucault's analysis are prisoners, are thereby subject to rigors of discipline designed to retrain their habitual functioning, making them fit for release into society.<sup>117</sup> This system, however, cannot but produce delinquency.<sup>118</sup> This may be because it seems to confuse the action with the purpose. The process of observing and understanding societal norms becomes a purpose in and of itself, independent of any greater notion. A prisoner is considered fixed, in this system, when they are normalized. But the desirability of normalizing and

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inspection tower, though it remained opaque to them. It is thus an architectural form designed to render individuals constantly subject to the knowledge and power of the central authorities.”).

<sup>113</sup> See e.g. Neil Richards, *The Electronic Panopticon*, CHRON. OF HIGHER EDUC. (Mar. 16, 2015) <http://chronicle.com/article/The-Electronic-Panopticon/228419>; Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 152-53 (2016) (describing online ratings and review systems as “creat[ing] a true Foucauldian panopticonote ”); Bryan Druzin & Jessica Li, *Censorship's Fragile Grip on the Internet: Can Online Speech Be Controlled?*, 49 CORNELL INT'L L.J. 369, 377-81 2016 (Characterizing Chinese internet regulations as creating a “cyber-Panopticonote ”). This list is certainly not exhaustive. The idea of a central entity surveilling a much larger population has proved to be a remarkably useful metaphor for describing everything from CCTV to DNA databases.

<sup>114</sup> Turkel, *supra* note 88, at 184 (“The prison, the characteristic form of punishment that emerges through the nineteenth century, works both as an ‘apparatus of knowledge’ that develops a ‘whole corpus of individualizing knowledge’ around the criminal potential within the individual, and as an institution that attempts to change the behaviour, the habits, and the very attitude of the inmate through therapeutic regimes. In this endeavour, the prison shares with other institutions - the school, the hospital, the asylum, the factory, the military - the formation of techniques and knowledge that discipline the individual for socially useful ends.”).

<sup>115</sup> Foucault, *supra* note 6, at 201 (“[T]he major effect of the Panopticon: to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power.”).

<sup>116</sup> See e.g., David Garland, *Criminological Knowledge and Its Relation to Power*, 32 BRIT. J. CRIMINOLOGY 403, 405 (1992) (“Criminology is thus viewed as a ‘technology of the soul’, a normalizing discourse which emerged out of the prison and which now feeds back into the disciplinary process of modern penalty, endlessly repeating itself in order to sustain the power mechanisms which it supports.”).

<sup>117</sup> Turkel, *supra* note 88, at 186 (“Normalization, ‘one of the great instruments of power’, makes people both formally equal, since they are judged by the same standards, and individuated, since they are seen as different in terms of this standard.”).

<sup>118</sup> Turkel, *supra* note 88, at 187 (“From the standpoint of capitalist political economy and class conflict, the prison has been perpetuated because it ‘has succeeded extremely well in producing delinquency, a specific type, a politically or economically less dangerous - and, on occasion, usable - form of illegality.’”).

any objective critique of the distribution of the norm are at best secondary. The process is a success when it works because it works. It is, again, order for the sake of order.

#### IV. THE PANOPTICON AND THE GUIDELINES: PUTTING PEOPLE INTO BOXES

Foucault saw the prison, and its institutional framework, as integral to a modern political economy.<sup>119</sup> The prison, and its attendant mechanisms,<sup>120</sup> was designed to appropriately sequester crime—to minimize its effects, by building literal and philosophical walls between the citizen and the criminal.<sup>121</sup> The Sentencing Guidelines operate similar mechanisms. By objectifying and classifying offender and offense characteristics and by constraining the exercise of human judgment to a mathematical equation, the Guidelines disrupt the base sentencing relationship,<sup>122</sup> ossify social stratification, and encourage recidivism. While some of these effects are exacerbated by the past and present iterations of the Guidelines, the fundamental flaws are rooted in the base concept.

##### *A. Sentencing Matters: Sentencing Arguments Allow the Defendant To Be Heard*

The application of a top-down structured system of decision-making will inevitably fail to meet the individualized needs of all practical

<sup>119</sup> Foucault, *supra* note 6, at 272 (“Penalty would then appear to be a way of handling illegalities, of laying down the limits of tolerance, of giving free rein to some, making another useful, of neutralizing certain individuals and of profiting from others. In short, penalty does not simply ‘check’ illegalities; it ‘differentiates’ them, it provides them with a general economy.”); *see also* Garland *supra* note 18, at 856 (“More generally the development of a capitalist economy brought about new and stricter attitudes towards the nonobservance of law on the part of the rising classes.... This framework was thus designed to deter the incipient criminality of the lower classes in a new and efficient manner but also to limit the arbitrary power of the sovereign at the same time.”).

<sup>120</sup> Foucault, *supra* note 6, at 267-68. In his estimation, prisons encourage recidivism, by gathering criminals together in one place “mak[ing] possible, even encourag[ing], the organization of a milieu of delinquents, loyal to one another, hierarchizd, ready to aid and abet any future criminal act[;]” through collateral consequences preventing a return to a law-abiding existence; and through the subsequent impoverishment of the convict’s family. *Id.* *See also* Sharon Dolovich, *Confronting The Costs Of Incarceration: Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 245 (2009) (“The people who have been marked out for incarceration may become through the experience of incarceration the very ‘anti-social’ misfits whose exclusion from society was thought so necessary.”).

<sup>121</sup> Foucault, *supra* note 6, at 301 (“In short, the carceral archipelago assures, in the depths of the social body, the formation of delinquency on the basis of subtle illegalities, the overlapping of the latter by the former and the establishment of a specific criminality.”).

<sup>122</sup> *See* Stith & Cabranes, *supra* note 42, at 1252.

applications in any sufficiently complex body.<sup>123</sup> These imperfections underlie the axiomatic truisms forming the basis of our criminal justice system.<sup>124</sup> In many areas of the law, such acceptable losses may make sense.<sup>125</sup> Where particularity is a fundamental value, however, acceptable losses become more problematic. For a process with immense consequences for people's lives, such failures are troubling and lead to the question of how much failure is acceptable.<sup>126</sup> This interaction, between two individuals, forms the core discourse. Whether pleading for mercy, arguing for leniency, or simply stating defiance, it is the accused's moment to tell their story. In a criminal justice system increasingly dependent on plea bargaining,<sup>127</sup> it may be the only time the defendant is heard. Even in the increasingly rare circumstances where a case goes to trial, the real story, such as it is, does not necessarily bear a direct relationship to the trial narrative.<sup>128</sup>

Structurally, trials and investigations are limited factual inquiries into specific circumstances, structured around a series of legal elements.<sup>129</sup> The defendant is still presumed innocent and in possession of rights and protection from the potential excesses of the state. Both have narrative progression, dramatic tension, and clearly delineated conflict.<sup>130</sup> The

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<sup>123</sup> See Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CALIF. L. REV. 447, 488-91 (2016) (discussing the different effects of rules and standards in sentencing).

<sup>124</sup> *In re Winship*, 397 U.S. 358, 372, 90 S. Ct. 1068, 1077 (1970) ("In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.")

<sup>125</sup> Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 Yale J. on Reg. 435 (1995).

<sup>126</sup> Albert W. Alschuler, *supra* note 2 (Examining the Guidelines continuation and exacerbation of unwarranted disparity).

<sup>127</sup> William Pizzi, *American Exceptionalism: The Effects of the "Vanishing Trial" on Our Incarceration Rate*, 28 FED. SENT. R. 330 (2016) ("In 1974, 80 percent of our convictions came from plea bargaining; now the percentage is much higher – close to 96 or 97 percent.")

<sup>128</sup> Lisa Kern Griffin, Article: *Narrative, Truth, and Trial*, 101 GEO. L.J. 281 (2013) ("Narrative provides a deep structure inside the courtroom just as it does outside of it, not only so that triers of fact can 'organize and reorganize large amounts of constantly changing information,' but also so that they can decide what it means. In order to reach a verdict, jurors construct a story, learn of their decision alternatives and the 'verdict category attributes,' and then classify the story 'into the best fitting verdict category.'")

<sup>129</sup> See Dan M. Kahan & Martha C. Nussbaum, Article: *Two Conceptions Of Emotion In Criminal Law*, 96 COLUM. L. REV. 269, 368 (1996) ("In determining an offender's guilt or innocence, and the grade of her offense, the law evaluates her actions, including her emotional motivations; and at that point, the law - at least if it takes an evaluative stance on emotions - is ordinarily unconcerned with how the defendant came to be the way she is.")

<sup>130</sup> Jennifer Lee, Article: *Binary Determinations Of Guilt Or Innocence: Reading Between The Lines Of People V. Du*, 37 COLUM. J.L. & SOC. PROBS. 181, 184 (2003) ("In criminal law, the determination of guilt or innocence is a primary example of the binary predicate: the defendant must be

process consists of assembling bits of disparate information into a narrative.<sup>131</sup> The entire process is structured for, and around, story-telling, reconstructing prior events in a convincing and compelling way.<sup>132</sup> The pathos is built in; something bad has almost always happened to someone. The ethos, too, is inherent; there's a good guy and a bad guy. Lastly, there is a natural conclusion. Either a person will be punished or they will not. While there are inevitable complexities within the structure, the structure itself remains both basic and fundamental.<sup>133</sup> Each side is looking to either establish or discredit a predetermined set of legally significant facts. A trial, therefore, generally doesn't seek to establish anything beyond a binary calculation of whether or not a series of events occurred.

Trials are generally unconcerned with the person; the nature of the person is, in theory, less important than their actions. If the defendant says, "I did this because...", generally only the first three words matter. The trial aspect, wherein guilt is decided, is a controlled, limited exchange of information.<sup>134</sup> The nullification aspects of early American jurisprudence are negated by the limited function of the jury; the modern criminal jury does not decide what's "fair" or what the defendant "deserves."<sup>135</sup> The guilt phase of criminal trial has rules and structure. While there is a great deal of latitude in what narratives can be told, the jury ultimately is left to decide whether or not a series of things happened. It is up to the court, in adjudicating the sentence, to decide what the fact of those happenings means.<sup>136</sup>

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either guilty or innocent. Ultimately, the criminal law system entirely revolves around the resolution of this issue.").

<sup>131</sup> See Awol K. Allo, Article: *The 'Show' In The 'Show Trial': Contextualizing The Politicization Of The Courtroom*, 15 BARRY L. REV. 41, 48 (2010) ("The adversarial trial is particularly suited for this reductive categorization of complex issues that the trial seeks to grasp only in legal-jurisprudential terms, and the spectacle it allows intensifies the consolidation of the pseudo images created by lawyers intent on theatricalizing the proceeding because the 'means' are strategically decided to achieve the end.").

<sup>132</sup> Lee, *supra* note 130, at 189 ("In shutting out the chaotic elements of the human experience, the binary method enables the construction of meta-narratives in criminal law, such that every story becomes reduced to a neutral, non-contingent set of logical relations."). This creates potential conflict with the truth-seeking function of trials.

<sup>133</sup> *Id.* at 190. ("In effect, the deterministic nature of criminal law organizes people into categories and rationalizes the result to make it appear both natural and logical.").

<sup>134</sup> See e.g. Fed. R. Evid. 404 (limiting the use of character evidence to demonstrate propensity); Fed. R. Evid. 801-02 (limiting the use of out of court statements).

<sup>135</sup> Douglas G. Smith, *Structural And Functional Aspects Of The Jury: Comparative Analysis And Proposals For Reform*, 48 ALA. L. REV. 441, 450 (1997) ("The role of the jury in the modern trial is generally that of a passive observer rather than an active inquirer.... Historically, the jury exercised [a sentencing] function indirectly, if not directly, and artificially separating a determination of outcome from the determination of sanction unduly restricts the scope of the jury's power.").

<sup>136</sup> Stith & Cabranes, *supra* note 42, at 1254 ("[I]t is in the nature of moral and juridical principles that they must be informed by a particular set of facts before they can be applied." Ronald M. Dworkin,

As such, sentencing can be, and often is, the only time the accused person has the opportunity to fully explain themselves and their actions.<sup>137</sup> While the full dialogue includes input from a variety of parties, it is the accused's story to tell and the judge's decision to make. Structurally, the major source of tension is gone; the person is guilty. With the guilty verdict comes a stripped down set of rights.<sup>138</sup> The procedural complexity of the trial is gone. The defendant may no longer *demand* certain things; he or she can only request. Sentencing, even under the Guidelines, is a less structured process: evidence is nearly unlimited,<sup>139</sup> the standard of proof is lowered,<sup>140</sup> and the relevant questions become broader and more philosophical.<sup>141</sup> This discourse necessarily involves a juxtaposition of several social understandings, and is one of the only areas of criminal law where the offender, the subject of the criminal justice system, begins to take on some individual characteristics.<sup>142</sup> The offender, seen during the preceding phases as the subject of evidence, rights, and procedures, is treated as unique.<sup>143</sup>

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*Is Law A System of Rules?*, reprinted in THE PHILOSOPHY OF LAW 44-48 (Ronald M. Dworkin ed., 1977) (distinguishing between principles and rules in law).

<sup>137</sup> It is worth noting that an estimated 6 million people cannot vote because of a felony conviction. Christopher Uggen, Ryan Larson, & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement* (2016) <http://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016>.

<sup>138</sup> See SOL RUBIN, THE LAW OF CRIMINAL CORRECTION, Ch. 17, §A1 (characterizing death penalty, incarceration, and fines as loss of right to life, right to liberty, right to property respectively), GEORGE BROOKS, FELON DISENFRANCHISEMENT: LAW, HISTORY, POLICY, AND POLITICS, 32 FORDHAM URB. L.J. 851 (2005); see also, e.g., United States v. Knights, 534 U.S. 112, 121 (2001); Samson v. California, 547 U.S. 843, 126 S. Ct. 2193 (2006) (discussing the limits of Fourth amendment right of probationers and parolees).

<sup>139</sup> See 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); see also Erik Lillquist, *The Puzzling Return Of Jury Sentencing: Misgivings About Apprendi*, 82 N. C.L. REV. 621, 682 ("The nature of many modern American sentencing schemes means that a large amount of evidence that is normally inadmissible at trial could be admissible for sentencing purposes. For instance, prior convictions are often the most important information in determining a sentence. Under the Federal Sentencing Guidelines, such evidence can double or even sometimes triple the sentence").

<sup>140</sup> Lillquist, *supra* note 139, at 685 ("In most modern sentencing schemes, the standard of proof is lower than proof beyond a reasonable doubt; usually, it is a preponderance of the evidence, although sometimes it might be clear and convincing evidence.")

<sup>141</sup> Stith & Cabranes, *supra* note 42, at 1252 ("We take as an established truth of our constitutional order that the criminal justice system exists not only to protect society in a reasonably efficient and humane way, but also to defend, affirm, and, when necessary, clarify the moral principles embodied in our laws. In the traditional ritual of sentencing, the judge pronounced not only a sentence, but society's condemnation as well.")

<sup>142</sup> *Id.* ("The judge's power to weigh all of the circumstances of the particular case and all of the purposes of criminal punishment represented an important acknowledgment of the moral personhood of the defendant and of the moral dimension of crime and punishment.")

<sup>143</sup> See e.g. United States v. Meacham, 27 F.3d 214, 217 (6th Cir. 1994) ("Even under the Sentencing Guidelines, particularized sentencing is mandated."); John Garry, *Why Me?: Application And*

The central structure is no longer a binary conflict between guilt and innocence but a conversation in which the potential outcomes are, theoretically, nearly unlimited.<sup>144</sup> While the underlying process still revolves around stories, those stories are not held up to a set of defined elements but, rather, judged against broad and potentially ambiguous social principles.<sup>145</sup> The relatively simple dichotomy of good and bad have been replaced with a spectrum—a qualitative evaluation of weight and degree.<sup>146</sup> The operative judgment is not a binary true or false, but an evaluative comparison of an individual’s moral culpability with a range of somewhat ambiguous interests.<sup>147</sup> Sentencing guidelines attempt to overlay a sense of order on top of this dialogic process by narrowing the range of discretion, quantifying behavioral characteristics, and creating a centralized bureaucracy overseeing the process.<sup>148</sup> While the desire to impose some order on such a system has nobility of purpose, the rigid application of top-

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*Misapplication Of 3a1.1, The Vulnerable Victim Enhancement Of The Federal Sentencing Guidelines*, 79 CORNELL L. REV. 143, 180 (“While such presumptions [relating to Guideline sentencing enhancement] may offer the illusion of furthering the overall congressional goal of uniformity in sentencing, Congress never intended to purchase uniformity at the price of sacrificing particularized inquiry into criminal conduct.”).

<sup>144</sup> In practice, there are constraints. Sentencing guidelines, the subject of this writing, and plea negotiations both serve as examples that impose limitations on the sentencing outcome. They are, however, generally discretionary. With the exception of Eighth Amendment and some procedural constraints, few sentencing limitations are strictly mandatory. This note is discussing the Guidelines through a primarily theoretical, the practical limitations are secondary. See *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), Fed. R. Crim. P. 11 § (c)(3).

<sup>145</sup> Stith & Cabranes, *supra* note 42, at 1252 (“The judge’s power to weigh all of the circumstances of the particular case and all of the purposes of criminal punishment represented an important acknowledgment of the moral personhood of the defendant and of the moral dimension of crime and punishment.”).

<sup>146</sup> Kahan & Nussbaum, *supra* note 129, at 368 (“[D]uring the sentencing process, the law has traditionally permitted the story of the defendant’s character-formation to come before the judge or jury in all its narrative complexity, in such a way as to manifest any factors hidden in the background of this life that might, once presented, give rise to sympathetic assessment and to a merciful mitigation of punishment.”).

<sup>147</sup> 18 U.S.C.S. § 3553(a)(2); see also Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 281-84 (1993) ([The Sentencing Reform Act of 1984], failed to adopt any particular philosophy of penology. Instead, it simply identified the four generally recognized justifications for criminal sentencing—retribution, deterrence, incapacitation, and rehabilitation—as factors for the sentencing court “to consider,” without acknowledging the differences and tensions among these rationales. Yet at least since the Enlightenment, philosophers, penologists, and public officials have debated the propriety and efficacy of each of these purposes or objectives of criminal sentencing”), Marc Miller, *Purposes At Sentencing*, 66 S. CAL. L. REV. 413, 419 (1992) (“The failure of the Commission and the courts to incorporate and advance these purposes underlies many of the system’s critics’ strongest complaints.”).

<sup>148</sup> United States Sentencing Commission, *Guidelines Manual*, §1A1.3 (Nov. 2016) (stating the enacting legislation’s purpose of “enhancing the ability of the criminal justice system to combat crime through an effective, fair sentencing system” by focusing on three basic objectives: honesty, uniformity, and proportionality).

down rules is both problematic within American jurisprudence<sup>149</sup> and contradictory to the concept of individualized sentencing. Adopting a structured, rule-based approach similar to the guilt phase—the result of an immense amount of litigation—creates a troubling dynamic in the sentencing phase. The Guidelines, by imposing structured discretion according to a predetermined formula, subvert the fundamental dialogue and create a recursive discourse that stands in the way of developing a coherent sentencing law and normalizes the inequities in the criminal justice system.

### B. *Managing Disparate Discourses*

In attempting to corral this discourse and create a sense of order, the Guidelines created an alternative discourse, occurring between the oversight body, the Commission, and the overseen, the judge.<sup>150</sup> This additional discourse has an enormous effect on the process. The most prominent effect was to shift the relevant discretionary authority to the prosecutor by making the eventual sentence more dependent on the charging decision.<sup>151</sup> Additionally, though, the creation of a complex decisional architecture created a mechanism for direct political involvement in the meting out of criminal punishment.<sup>152</sup> Overall, the state, as a whole, still retains its power while the defendant, the individual who serves as the object of both discourses, is diminished and externalized.<sup>153</sup>

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<sup>149</sup> See *Eddings v. Okla.*, 455 U.S. 104, 112 S. Ct. 869 (1982) ("By requiring that the sentencer be permitted to focus 'on the characteristics of the person who committed the crime' the rule in *Lockett* recognizes that 'justice ... requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'" (alterations in original) (citation omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 197 (1976); *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 61 (1937))).

<sup>150</sup> *Id.* ("[I]t would be wrong to assume that one can change the behavior of one player in the system without that change having an impact on all of the others. Discretion is hydraulic; you take it away from one and it flows to another.").

<sup>151</sup> Ian Weinstein, *Fifteen Years after the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 87 (2003) ("The results of [mandatory minimums and sentencing guidelines] are significantly longer federal prison sentences, as was the intent of these reforms, and the emergence of federal prosecutors as the key players in sentencing.").

<sup>152</sup> Frank O. Bowman, III, *Beyond Band-Aids: A Proposal For Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 171 ("Once the Sentencing Commission gave birth to a 258-box sentencing table with detailed instructions for placing defendants in those boxes, the options available to Members of Congress seeking a legislative response to a specific type of crime mushroomed.").

<sup>153</sup> Alschuler, *supra* note 2, at 115 ("Increasing prosecutorial power and the severity of criminal punishments was not the unintended consequence of Guidelines designed to reduce sentencing disparity. Instead, it was the point all along.").



The SRA removed a portion of the sentencing judge's nearly unlimited discretion and placed it in the hands of an oversight body in the name of honesty, uniformity, and proportionality.<sup>154</sup> Because there is no guiding principle or theory, ambiguities and areas lacking in clarity, as are inevitable in any complex system, cannot be subject to reasonably unifying interpretation.<sup>155</sup> This incentivizes staying within the overarching structure.<sup>156</sup> By "institutionalizing discretion" without addressing the underlying concerns that lead to the sentencing reforms, the Guidelines split the dialogue: the discourse between the sentenced and sentence is constrained to the empirical dictates of the Guideline formula.<sup>157</sup> In shifting the discretion, the Guidelines have merely shifted the disparities.<sup>158</sup> Differently situated defendants,<sup>159</sup> accused of the same or similar crimes, are less able to argue the importance of those differences.<sup>160</sup> Consequently,

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<sup>154</sup> Federal Sentencing Guidelines Manual §1A3, postscript (U.S. Sentencing Comm'n 2016).

<sup>155</sup> Or, at least, is at odds with the common-law nature of the American judicial system. Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 576-577 (2010) ("The SRA and the complex Guidelines that had been promulgated created an ideology of interpretation not unlike one in a civil code country: The Guidelines were comprehensive; they were the work of 'experts, and if there were gaps, the experts had to fill them; and judges were to be expert clerks, not interpreting the document, but rendering sentencing 'answers.' The result was a jurisprudence wholly alien to a common law court.").

<sup>156</sup> In 2015, 47.3% of sentences, for which data were available, were within the Guidelines with a further 29.3% of departures coming at the request of the government. UNITED STATES SENTENCING COMMISSION, NATIONAL COMPARISON OF SENTENCE IMPOSED AND POSITION RELATIVE TO THE GUIDELINE RANGE, Table N (2015) <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/TableN.pdf>; see also Gertner, *supra* note 62, at 540 ("In effect, the Guidelines enabled judges to cede moral decision making to another body; their task became the application of an apparently rational formula to the case at hand – a purely cognitive process.").

<sup>157</sup> Stith & Cabranes, *supra* note 42, at 1263 ("The sentencing proceeding itself has been recast from a discretionary into a formal adjudicatory process, in which the court makes findings of fact that translate into sentencing requirements under the Guidelines...The judge who conducts the sentencing is now, by design, little more than the instrument of a distant bureaucracy.").

<sup>158</sup> Alschuler, *supra* note 2, at 89 ("Adopting the viewpoint of a person of ordinary moral sensibilities rather than of the Sentencing Commission leads quickly to the conclusion that the Sentencing Guidelines have substituted new disparities for old ones.").

<sup>159</sup> See e.g., Rakoff, *supra* note 1, at 3 (Comparing two defendants charged with defrauding different amounts from different victims, \$1 million from "high-rolling" investors or \$100,000 from subsequently impoverished widows, and relative moral culpability of each); Alschuler, *supra* note 2, at 89-95 (discussing the normative disparities of the Guidelines).

<sup>160</sup> For examples of current and former judges discussing sentencing under the Guidelines: Stith & Cabranes, *supra* note 42, at 1266 ("The judicial fact-finding required by the Guidelines is both tedious and difficult. Little may hinge on the issue in dispute because the existence of a particular aggravating or mitigating circumstance may ultimately have little effect on the length of a sentence. Yet many minor factual distinctions are often exceedingly difficult to resolve because they are complicated or ambiguous."); Gertner, *supra* note 62, at 533 ("Everything that I thought was important - that neuroscientists, for example, have found to be salient in affecting behavior - was irrelevant to the analysis I was supposed to conduct."); Rakoff, 26 Fed. Sent. R. 6 at 3 "Such bizarre results under the Guidelines are, in my experience, more the norm than the exception: a function of singling out one factor for emphasis, and then ascribing it overwhelming weight.").

the sentencing decision becomes less a matter of the defendant's moral culpability than whether or not their factual scenario fits into certain predetermined ratios.

The Guidelines, while most directly aimed at judges, have the most troubling impact on defendants, most of whom come from already marginalized groups.<sup>161</sup> By denying these groups the opportunity to share and be judged on the particulars of their unique experience, the Guidelines also deny them agency within the system.<sup>162</sup> Since commonly-incarcerated populations often face barriers to political engagement and generally lack the resources to pursue civil complaints,<sup>163</sup> sentencing may be one of the few areas where defendants engage in a meaningful discourse with a government actor. In discourse designed to produce a sentence based on an individual's moral culpability, the defendant's unique knowledge, that of their own personal history and motivations, has value.<sup>164</sup> Under the Guidelines, that value is excised.<sup>165</sup> By defining the meaningful terms of the discourse, the Guidelines move the locus of the conversation towards the institution, diminishing and marginalizing the defendant's

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<sup>161</sup> See Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015)

<https://www.prisonpolicy.org/reports/income.html> (July 9, 2015) (“[I]n 2014 dollars, incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages.”); Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*,

<https://www.prisonpolicy.org/reports/rates.html> (May 28, 2014) (“Nationally, according to the U.S. Census, Blacks are incarcerated five times more than Whites are, and Hispanics are nearly twice as likely to be incarcerated as Whites.”).

<sup>162</sup> Turkel, *supra* note 86, at 176 (“[T]here are ‘procedures of exclusion’ which limit and control discourse through its internal relations. Included here are procedures that place certain topics and objects of knowledge outside of major locations of discussion and analysis. This marginalizes these topics and objects of knowledge to the peripheries of discourses.”).

<sup>163</sup> See Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389, 441-42 (2014) (Describing institutional barriers, fewer skills and resources conducive to political engagement, discouragement, and residential segregation as contributing to declining rates of political participation among the poor).

<sup>164</sup> Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOTIATION L. REV. 1, 26-27 (discussing information power in the context of negotiation relationships).

<sup>165</sup> Stith & Cabranes, *supra* note 42, at 1263 (“The defendant may implore the court to consider the full circumstances of his crime and his humanity, but the judge generally is not permitted to consider most of these circumstances in sentencing.”).

participation.<sup>166</sup> The process is no longer an adjudication of an individual but, instead, a reiteration of social norms.<sup>167</sup>

### C. *Normalization By Incorporation*

The offender has become, to a great extent, the object of an overarching and expanding body of knowledge, both institutionally and academically.<sup>168</sup> This knowledge body, both implicitly and explicitly, classifies and normalizes the offender and the offensive conduct.<sup>169</sup> The criminal justice apparatus is seen as a central institution. The offensive behavior is studied, understood, and accepted. By putting the behavior within an institutionally-determined box, the institution accepts the behavior, endorses it, and perpetuates it.<sup>170</sup> The assignment of a given value, in the form of a calculated punishment aimed at deterrence, implicitly accepts the behavior as a part of the economic calculus.<sup>171</sup> The criminal justice system has, indeed, become integral to the functioning of society, or at least aspects of society. The federal criminal code in the United

<sup>166</sup> Turkel, *supra* note 86, at 177 (“Discourses are controlled by the conditions that restrict access to communication and shape the process of communication, limiting discourse to speakers who are deemed ‘qualified’ in terms of formal education and professional certification, patterns of language and gestures that delimit discourse, communications through specialized languages and journals, and the particular groups to which discourse is restricted.”).

<sup>167</sup> Garland, *supra* note 18 at 859 (“[Normalization] involves, first of all, a means of assessing the individual in relation to a desired standard of conduct: a means of knowing how the individual performs, watching his movements, assessing his behavior, and measuring it against the rule.”).

<sup>168</sup> See U.S. SENTENCING COMMISSION, 2015 ANN. REP., A-5 (2015) (“In order to conduct the type of research outlined in the previous section and produce accurate and timely reports, the Commission collects data regarding every felony and class A misdemeanor offense sentenced each year.”) see also Jonathan Simon, *Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-first*, 84 TEX. L. REV. 2135, 2167 (2006) (“During the ‘War on Crime,’ the federal government has pumped research funding into this science project and, as a result, criminology as a discipline has grown rapidly.”).

<sup>169</sup> *Id.* at 2136 (“Positivist criminology, broadly conceived, is the project of subjecting criminal behavior to scientific study and bringing the findings of this science to bear in the practice of criminal justice.”).

<sup>170</sup> Roger-Pol Droit, *Michel Foucault, On the Role of Prisons*, N.Y. TIMES (Aug. 5, 1975), (“Criminal psychiatry and psychology risk becoming the ultimate alibi behind which the prevailing system will hide in order to remain unchanged.”)

<https://www.nytimes.com/books/00/12/17/specials/foucault-prisons.html>. See also Foucault, note 6 at 296 (“The supervision of normality was firmly encased in a medicine or a psychiatry that provided it with a sort of ‘scientificity’; it was supported by a judicial apparatus which, directly or indirectly, gave it legal justification.”).

<sup>171</sup> Foucault, *supra* note 6 at 300 (“The carceral network does not cast the unassimilable into a confused hell; there is no outside....In this panoptic society of which incarceration is the omnipresent armature, the delinquent is not outside the law; he is, from the very outset, in the law, at the very heart of the law, or at least in the midst of those mechanisms that transfer the individual imperceptibly from discipline to the law, from deviation to offense.”).

States has greatly expanded.<sup>172</sup> Many of these new crimes are regulatory in nature, putting people into the criminal justice system for behavior or actions that would not have historically warranted sanction.<sup>173</sup> The failure or inadequacy of the predicate social institutions has put considerably more pressure on criminal institutions.<sup>174</sup> Police and the courts are the primary point, and sometimes only, point of contact for mental illness<sup>175</sup> and drug addiction.<sup>176</sup> Inadequate investment in other social institutions becomes the court system's problem to solve. By incorporating these factors, either implicitly or explicitly, as fundamental to the act of judgment, the Guidelines accept these problems as within the purview of the criminal justice system. But the criminal justice system is wildly inadequate at dealing with the result of the rest of the social system's failures. Criminal justice is inextricably linked with poverty, mental illness,<sup>177</sup> and drug addiction.<sup>178</sup> These are issues for which the system is wildly inappropriate.<sup>179</sup> The primary action of the criminal justice system is

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<sup>172</sup> Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538 ("Federal criminal law has been growing at a breakneck pace for generations. According to a 1998 American Bar Association report, an incredible 40% of the thousands of federal criminal laws passed since the Civil War were enacted after 1970.").

<sup>173</sup> *Id.*

<sup>174</sup> Sarah E. Redfield & Jason P. Nance, *American Bar Association: Joint Task Force on Reversing the School-to-Prison Pipeline*, 47 U. MEM. L. REV. 1, 7 (2016) ("The school-to-prison pipeline - the metaphor encompassing the various issues in our education system that result in students leaving school and becoming involved in the criminal justice system - is one of our nation's most formidable challenges.").

<sup>175</sup> Gary Howell, *The Dark Frontier: The Violent And Often Tragic Point Of Contact Between Law Enforcement And The Mentally Ill*, 17 SCHOLAR 343 (2015) (discussing the circumstances and problems surrounding the growing amount of police engagement with the mentally ill.).

<sup>176</sup> Gregory A. Knott, *Cost and Punishment: Reassessing Incarceration Costs and the Value of College-in-Prison Programs*, 32 N. ILL. U. L. REV. 267, 277 (2012) ("In general, as many as 35.6% of convicted jail inmates were under the influence of some substance when they committed the crime that landed them in jail. Over 2/3 of jail inmates fell under the definition of substance abuse or substance dependence in the year before their arrest.").

<sup>177</sup> E. FULLER TORREY ET AL., TREATMENT ADVOCACY CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 6 (2014)

<http://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf> ("In 2012, there were estimated to be 356,268 inmates with severe mental illness in prisons and jails. [...] [T]he number of mentally ill persons in prisons and jails was 10 times the number remaining in state hospitals.").

<sup>178</sup> CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS 2004, 6 (2006) <http://www.bjs.gov/content/pub/pdf/dudsfp04.pdf> (revised Jan. 19, 2007) (finding that 53% of state prisoners and 45% of federal prisoners met the criteria for drug dependence).

<sup>179</sup> E. Lea Johnston, *Conditions Of Confinement At Sentencing: The Case Of Seriously Disordered Offenders*, 63 CATH. U.L. REV. 625, 638 (2014) ("Prisons generally apply the principle of least eligibility, deliberately maintaining the level of health care a step below the services that the government provides to the non-incarcerated population that relies on public assistance. Under this principle, 'the level of prison conditions should always compare unfavorably to the material living standards of the

punitive, generally either through use of fines or imprisonment.<sup>180</sup> These tools are, at best, heavy-handed. At worst, they serve to further victimize and traumatize already vulnerable populations by not only ignoring legitimate impetuses for their malfeasance but assigning a level of moral culpability to circumstances that may not be fully within the defendant's control.<sup>181</sup> By implicitly incorporating these as factors into sentencing, the Guidelines adopt the proposition that the criminal justice system is capable of defining and understanding these factors, while explicitly declining to address them in a constructive way.<sup>182</sup>

#### D. *The Development of Guidelines Experts: A Missed Opportunity*

Sentencing under the rehabilitative regime was predicated, in part, on the premise that judges were experts who are able to assess an individual's moral culpability and assign the appropriate amount of punishment.<sup>183</sup> With a functional lack of appellate review, the judge's power to sentence was subject to few external constraints.<sup>184</sup> Even within the individual sentencing process, the judge had few limitations as to the information underlying the

laboring poor,' because prisoners 'are the least eligible or least deserving members of society for any free benefit from the government.'").

<sup>180</sup> See Shima Baradaran, *Drugs And Violence*, 88 S. CAL. L. REV. 227, 231 (2015) ("The edifice of drug policy relies on the premise that drugs cause violence, with incarceration as the primary tool.").

<sup>181</sup> Mirko Bagaric, *A Rational (Unapologetically Pragmatic) Approach to Dealing with the Irrational - The Sentencing of Offenders with Mental Disorders*, 29 HARV. HUM. RTS. J. 1, 35 (2016) ("While mental disorders vary greatly in terms of nature and intensity, by definition, all mental disorders to some degree inhibit an individual's use of optimum levels of cognitive, emotional, and normative understanding and reasoning.") (citing Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* xxi (4th ed. 1994)).

<sup>182</sup> This is illustrated in Part H of the Guideline Manual which lists addiction, lack of education, or psychological issues as "not ordinarily relevant." U.S. SENTENCING GUIDELINES MANUAL §§5H1.2-6. Race, sex, national origin, creed, religion, socio-economic status, and disadvantage or lack of guidance or disadvantage as a youth are not relevant. §§5H1.10, 12. By either discouraging or preventing courts from considering some of the obstacles facing marginalized populations, the Guidelines, in essence, criminalize the failure to overcome these obstacles. See *California v. Brown*, 479 U.S. 538, 545 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring) ("In my view, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.").

<sup>183</sup> Gertner, *supra* note 19, at 571 ("The judge's role was essentially therapeutic, much like a physician. The judge was seen as an 'expert' in individualizing the sentence to reflect the goals of punishment, including rehabilitation and deterrence.").

<sup>184</sup> *Id.* at 696 ("Judges and parole authorities had the most power relative to the other sentencing players. They were the acknowledged sentencing experts. There were few a priori rules or standards. Each case was resolved on its own merits; to the extent there were standards, they evolved from the day-to-day experience of sentencing individuals.").

decision.<sup>185</sup> However, the experts were significantly lacking in expertise.<sup>186</sup> Sentencing was not, and is still not, a particularly widely taught topic.<sup>187</sup> Judges, as a whole, tend to be from similar socioeconomic backgrounds, which are often not shared by the people they are sentencing, a circumstance leading to potential bias concerns.<sup>188</sup> These are all issues that can be alleviated through better training and education.<sup>189</sup> To the extent that sentencing reform was an effort to address these issues, it failed.<sup>190</sup> There was, and possibly still is, an opportunity to incorporate a much broader knowledge base into sentencing policy.<sup>191</sup> Although the creation of the Guidelines has necessitated, both statutorily<sup>192</sup> and practically,<sup>193</sup> extensive training, this training is primarily, if not solely, focused on the use of the Guidelines themselves.<sup>194</sup> The knowledge accrued is not about the potential externalities<sup>195</sup> surrounding the crime and the criminal but about the

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<sup>185</sup> *Id.* at 695 (“The rationale was straightforward: it made no more sense to limit the kind of information that a judge should get at sentencing to exercise his or her “clinical” role than to limit the information available to a medical doctor in determining a diagnosis.”).

<sup>186</sup> Gertner, *supra* note 36 at 528.

<sup>187</sup> Gertner, *supra* note 19, at 696- 97 (“Whatever the criminological literature, judges did not know about it. Sentencing was not taught in law schools; and to the extent there was any debate about deterrence and rehabilitation [...] it was not reflected in judicial training.”)

<sup>188</sup> Compare AM. BAR ASS’N *supra* note 34 (reporting that the judiciary is largely comprised of white men) with Raby & Kopf *supra* note 158 (reporting that the median defendant makes under \$20,000 a year), Sakala *supra* note 158 (reporting on the overrepresentation of blacks and Hispanics in the criminal justice system); see also Jeffrey J. Rachlinski, et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) (finding that judges have implicit biases that affect their judgments).

<sup>189</sup> See e.g., Bernice B. Donald & Erica Bakies, *A Glimpse Inside the Brain's Black Box: Understanding the Role of Neuroscience in Criminal Sentencing*, 85 FORDHAM L. REV. 481, 482 (“Without disregarding the criminal justice system's ability to hold those accountable for their actions, neuroscience can be utilized to demonstrate that certain actions may actually be the result of developmental problems associated with the brain, like the effects of complex trauma on children. A judge may also use neuroscience to combat her implicit biases, which have ways of manifesting themselves in the courtroom and therefore need to be explicitly acknowledged.”).

<sup>190</sup> Given the political compromises that led to the Guidelines and the varied punitive philosophies of the various decision-makers responsible, any intent beyond a desire for consistency is merely speculation. However, it is reasonable to assume that neither end of the ideological spectrum fully trusted the judiciary.

<sup>191</sup> See Douglas A. Berman, *Punishment and Crime: Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 44 (2004).

<sup>192</sup> 28 U.S.C.A. § 995(18) (West, Westlaw through Pub. L. No. 115-45).

<sup>193</sup> Gertner, *supra* note 62, at 538.

<sup>194</sup> *Id.* at 538 (“Significantly, this was training in the application of the Guidelines' formulas and how to compute the numbers, but there was still no training on the purposes of sentencing, alternatives to incarceration, what works to prevent recidivism or to effect deterrence.”).

<sup>195</sup> See e.g. Joshua Greene & Jonathan Cohen, *For The Law, Neuroscience Changes Nothing And Everything*, 359 Phil. Transactions Royal Soc'y London B 1775 (2004) (asserting that, while unlikely to undermine the basic assumptions of criminal responsibility, “advances in neuroscience are likely to change the way people think about human action and criminal responsibility by vividly illustrating lessons that some people appreciated long ago.”).

procedural complexities governing the judicial response. Sentencing expertise becomes about expertise in the Sentencing Guidelines. In doing, the Commission creates its own internalized, recursive discourse.

## V. ORDER WITHOUT PURPOSE

The desire for sentencing reform was, and still is, a laudable one. While the body of criminal law is primarily comprised of trial and pre-trial legal issues, sentencing has a far greater impact on defendants.<sup>196</sup> Designing any broad system that achieves its social purpose is an immensely difficult task and one that requires, as a necessary predicate, a sense of purpose.<sup>197</sup> The Sentencing Guidelines, fundamentally, lack a sense of purpose.<sup>198</sup> The purported reasons for the Guidelines, certainty and fairness, are contradictory and create an inherent tension in their application.<sup>199</sup> In a society where a tremendous amount of behavior could be subject to criminal sanction and the criminal code is an increasingly regulatory device,<sup>200</sup> the operative question is not what constitutes criminal behavior but how we respond to it. When a person is asking why we, as a society, are deciding to deprive them of their life, liberty, or property, it would behoove us, and them, to have a reason. A system which serves as its own justification provides little or no incentives for growth or change, either for the system itself or for the people whom it affects.<sup>201</sup>

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<sup>196</sup> Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1152 (2001) (“The ninety-one percent of defendants who plead guilty will never be heard at trial. Their only hearings are at sentencing, where they can dispute various enhancements and other sentencing facts.”); *see also* Covey, *supra* note 123, at 452 (“Ensuring that our sentencing structures create opportunities for each important constituency to have a voice in the process is, ultimately, the true mark of a well-designed legal system.”).

<sup>197</sup> Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 6 (2006) (“Building sentencing systems that are rational, just, and effective starts with understanding what sentencing is for and what it can do.”).

<sup>198</sup> *Id.* at 15 (“The pre-Booker federal sentencing guidelines are a case study in what can happen when policy makers fail to be clear about their purposes and functional goals.”).

<sup>199</sup> *See* Covey, *supra* note 123, at 488-89 (“Regardless of how the rules-standards problem is negotiated, outcomes will always violate the uniformity-proportionality test from one perspective or the other. The root problem is the infinite number of factors that might be deemed relevant under varying circumstances, accompanied by the difficulty of determining a priority among them.”).

<sup>200</sup> Smith *supra* note 172, at 538 (“Contemporary criminal codes reach conduct that, in previous generations, would not have been subject to punishment.”).

<sup>201</sup> On the individual level, this may be demonstrated by the increasingly severe penalties for continued recidivism, regardless of the nature of the offense, and the inability of decreasing those penalties despite a negative correlation between recidivism and age, something the Sentencing Commission has acknowledged but decline to act on. Melissa Hamilton, *Back to the Future: The Influence of Criminal History on Risk Assessments*, 20 BERKELEY J. CRIM. L. 75, 128 (2015) (“Overall, a common theme of life course criminology is the finding that a majority of one-time offenders do not go on to lead lives of crime but indeed age out of, or otherwise desist from, criminal activity. For this reason, the United States Sentencing Commission has suggested that factoring criminal history along

This is the Guidelines biggest failure and it is one that is inherent to the concept of structured guidelines. By creating an alternative discourse which pulls the focus of the dialogue away from the core relationship, the Guidelines push the offender further away from society, not through banishment or “civil death,” but by contributing to the creation of an alternative existence, one in which the cycle of poverty and prison now have an institutional justification.<sup>202</sup> The Guidelines subvert the primacy of the human interaction underlying the punitive decision. Improving judicial training,<sup>203</sup> strengthening and adding resources for the sentencing process,<sup>204</sup> and creating a corpus of sentencing law that can then be interpreted individually are all methods of reform that respect this relationship. It is the person being judged and the person doing the judging that matter most. One of the messages of *Discipline And Punish* was that putting people in boxes in response to crime only increases crime.<sup>205</sup> Putting judges in boxes in the name of “certainty and fairness” has created a similar irony in judicial outcomes.<sup>206</sup> A system without a rationale can seem arbitrary and capricious to those outside the system while seeming self-evident to those who work within it. In criminal sentencing, where the power of the state directly and powerfully impacts the individual, such divisions only serve to further marginalize the already vulnerable.<sup>207</sup> Ultimately, a system which does not acknowledge or respond to the individual cannot create a place for the individual.

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with age would improve the predictive validity for recidivism.”) (internal quotations and citations omitted).

<sup>202</sup> See *Brown*, 479 U.S. at 545.

<sup>203</sup> See Gertner, *supra* note 62, at 545 (“Judicial training can go beyond Guidelines-speak. Judges can be trained in how to evaluate what works and what does not and what offenders would be amenable to which sentencing alternatives.”).

<sup>204</sup> *Id.* at 542 (“Guidelines sentencing, at least in some courts, is rote; post-Booker discretion should take more time, more resources, different training and analysis, different sources of information, a different kind of monitoring, and, as I describe below, different evidentiary rules.”).

<sup>205</sup> Garland, *supra* note 18, at 862 (“[Foucault] argues that the prison did not “discover” the delinquent, but rather it fabricated him[.]”).

<sup>206</sup> See Alschuler, *supra* note 2.

<sup>207</sup> See Redfield & Nance, *supra* note 174; Howell, *supra* note 175; Knott, *supra* note 176 at 277.



APPENDIX A<sup>208</sup>

**SENTENCING TABLE**  
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A 5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B 10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
Zone C 13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D 28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

<sup>208</sup> Sentencing Table taken from 2015 Sentencing Guidelines.