Dehumanization and Re-Creation: A Lacanian Interpretation of the Federal Sentencing Guidelines

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DEHUMANIZATION AND RE-CREATION: A LACANIAN INTERPRETATION OF THE FEDERAL SENTENCING GUIDELINES

BY STEVEN R. MORRISON*

This article examines the Federal Sentencing Guidelines using the theories of French psychoanalyst Jacques Lacan. It discusses specifically Lacan's theories on the creation of the "Other," through neglect, censorship, error, and speech/language, and argues that the Guidelines create the offender as "Criminal" and therefore dehumanize him. The article also argues that although the Guidelines are now merely advisory, they reflect the past, present, and future of American sentencing. The article also discusses the legislative and jurisprudential history of the Guidelines, from the Sentencing Reform Act in 1984, to the Booker decision in 2005, which made the Guidelines advisory.

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* Steven R. Morrison is a third-year student at Boston College Law School. He is interested primarily in understanding and reforming the system of criminal law from the standpoint of postmodern psychology and philosophy. He hopes to continue to write in this vein and introduce a Critical Legal Studies influence on mainstream law in a meaningful and lasting way. Upon graduation, Mr. Morrison will begin a year-long clerkship with the Honorable Warren M. Silver of the State of Maine Supreme Judicial Court. He plans to continue writing as well as practice law as a litigator. This is his second published article.
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Of two men who have committed the same theft, how much less guilty
is he who scarcely had the necessities of life than he who overflowed with
excess? Of two perjurers, how much more criminal is he on whom one has
striven from his childhood to impress feelings of honour than he who,
abandoned to nature, never received the benefit of education.

—J.-P. Marat

[If I have betrayed my country, I go to prison; if I have killed my
father, I go to prison; every imaginable offense is punished in the same
uniform way. One might as well see a physician who has the same remedy
for all ills.

—C. Chabrouh

INTRODUCTION

Since their promulgation in 1987, the Federal Sentencing Guidelines
(FSG) have been the topic of many a law review article and debate. This
conversation has continued even after the United States Supreme Court in
United States v. Booker/Panfan converted the FSG from a mandatory
system that federal judges were obliged to follow to one that is now
effectively advisory. Most scholarship is critical of the FSG, yet there are

1 MICHEL FOUCAULT, DISCIPLINE AND PUNISH 98 (Alan Sheridan trans., Vintage Books 2d
2 Id. at 117.
3 United States v. Booker, 125 S.Ct. 738, 743 (2005); we will see below that the advisory
   nature of the FSG has yet to be defined, and that this lack of surety characterizes the current
   federal sentencing climate and may compel Congress to act precipitously to reinstate a mandatory
   system.
diverging reasons as to what, precisely, is their most problematic aspect. One position holds that the mandatory FSG are well-intended but fundamentally deficient. Frank O. Bowman, III, a long-time supporter of the FSG, writes that “sentencing guidelines are a good idea[,] but] the Federal Sentencing Guidelines . . . have failed their promise because of flaws in their basic design.” The promise of the FSG was to reduce unwarranted disparity and provide a much higher level of uniformity in sentencing while maintaining judges’ ability to tailor sentences to the offender. Bowman, then, argues that the FSG are actually good policy, simply in need of “relatively modest changes.” His is thus a structualist argument: the principles of the FSG are sound, but their structure prevents the realization of those principles.

However, what if the structure of mandatory guidelines must of necessity prevent the realization of these principles? This thought underlies another thread in the tapestry of FSG scholarship. Kim S. Hunt and Michael Connelly, Executive Directors of the District of Columbia Sentencing Commission and the Wisconsin Sentencing Commission, respectively, write that in terms of reducing disparity, the FSG “have failed more than they have succeeded.” They implicate mandatory guidelines as a primary cause in the disparity in sentencing minorities and women defendants, who have recently received higher sentences and now represent a greater percentage of the federal prison population.7

While both of these criticisms identify different features of FSG that might be at fault, one unifying complaint from both sides of the debate is that the FSG have “resulted in an incursion on the independence of the federal judiciary, a transfer of power from the judiciary to prosecutors and a proliferation of unjustifiably harsh individual sentences.” Yet, the current solution to this problem, an advisory rather than mandatory system of guidelines, appears to dole out sentences just as uniform as the principles founding the FSG demand. In other words, opponents such as Hunt and Connelly suggest that that judges have not strayed far from the original FSG themselves, let alone dismiss them altogether.9

We have questioned the success of the FSG as well as the ability of its mandatory structure to achieve its principles, but what can be said of the principles themselves? To truly analyze the merits of this policy, it is

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5 Id. at 150.
7 Id.
8 Id.
9 Id.
important to understand the three objectives Congress hoped the FSG might achieve:

honesty in sentencing. . . uniformity in sentencing by narrowing the wide disparity in sentences. . . [and] proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.\textsuperscript{10}

The United States Sentencing Commission (USSC) admitted “a tension. . . between the mandate of uniformity (treat similar cases alike) and the mandate of proportionality (treat different cases differently).”\textsuperscript{11} Its solution, then, was the FSG policy, which stressed uniformity by focusing the process of sentence determination on characteristics of the crime, allowing individual offender characteristics to play a role in sentence mitigation only in “exceptional cases.”\textsuperscript{12} Thus, under the FSG, an offender’s age, education, mental and emotional conditions, drug or alcohol dependence, employment record, and family ties and responsibilities are “not ordinarily relevant,”\textsuperscript{13} even though one or more of these characteristics could greatly influence the offender’s culpability.

Cass Sunstein has highlighted this tension in his article “Problems with Rules.”\textsuperscript{14} He implicates the FSG in their detailed listing of relevant,\textsuperscript{15} not relevant,\textsuperscript{16} and not ordinarily relevant factors:\textsuperscript{17}

In most contexts. . . any given list of relevant factors is not exhaustive. Life may turn up other relevant factors that are hard or impossible to identify in advance. In most areas of law governed by factors rather than rules, it is understood that the identified factors, if described at a level of specificity, are not complete—or that if they are intended to be complete, they are stated in a sufficiently general and abstract way, so as to allow unanticipated, additional considerations to apply.\textsuperscript{18}

In light of this possibility, critics of such an unrelenting ruled based system such as Sunstein would push us toward a system of greater judicial discretion, promoting a regime in which there is a presumption in favor of privately adaptable rules, that is, rules that

\textsuperscript{11} Id.
\textsuperscript{12} Id. at 423.
\textsuperscript{13} Id. at 423-25.
\textsuperscript{15} USSC, Guidelines Manual, supra note 10, at 318-30; 347-364: relevant factors include, but are not limited to, an offender’s criminal history, victim-related adjustments, the offender’s role in the offense, and the offender’s acceptance of responsibility in the offense.
\textsuperscript{16} Id. at 427: factors that are not relevant include, but are not limited to, race, sex, national origin, and lack of guidance as a youth.
\textsuperscript{17} Id. at 423-25.
\textsuperscript{18} Sunstein, supra note 14, at 964.
allocate entitlements without specifying outcomes. . . [and] a recognition
of legitimate rule revision, in which public officials and private citizens
are allowed to soften the hard edges of rules. 19

In considering the debate over FSG, their shortcomings are evident:
they fail to live up to their promises, their structure is inherently flawed,
and they embody mutually conflicting sentencing goals. There is no doubt
that the authors of these criticisms are intelligent and perceptive people.
They do, in fact, see very real problems with the FSG. Despite the varied
attacks leveled against the FSG, there is a central issue at which all critics
are aiming: the necessary dehumanization and recreation of the defendant
as "Criminal," and the neglect of important mitigating factors in
sentencing.

When the FSG fail to live up to their promise of reducing unwarranted
disparity, when they increase race and gender gaps in sentencing, and when
they pigeon-hole offenders with rigid factors—relevant or otherwise—they
dehumanize the offender. The FSG dehumanize the offender in so many
other ways. They "equalize" all offenders by reducing them "to a box on
the Sentencing Guidelines Grid or a one-size-fits-all mandatory
minimum." 20 In treating each offender as equal to any other, we rob each
one of his or her human uniqueness. The call for humanization in
sentencing is far from a blindly sympathetic cry for the murderer or rapist.
By taking away an offender's uniqueness, we retreat from the long-held
sentencing principle of retribution, 21 which serves us all in myriad ways.

The FSG also tend to humanize offenders when it comes to
aggravating factors and neglect significant mitigating factors. In other
words, the FSG consider individual offender characteristics when those
characteristics call for a higher sentence, and ignore other characteristics
that would demand a lower sentence. 22 Not only does this dehumanize
offenders, but it re-creates them in society's eyes into ever more dangerous
predators. Given that the FSG have presided over a vast increase in the

19 Id. at 955.
20 David M. Zlotnick, The War Within the War on Crime: The Congressional Assault on
Judicial Sentencing Discretion, 57 SMU L. Rev. 211, 212 (2004).
21 Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the
Discretion of Sentencers, 101 Yale L.J. 1681, 1705 (1992): "In its overriding quest to forestall
disparity, the [USSC] tends to apply the same measuring rods to persons of widely varying
culpability."
22 Bowman, The Institutional Concerns Inherent in Sentencing Regimes: The Failure of the
"[T]he guidelines identify a host of offense-related aggravating factors (use of a weapon, injury to
a victim, size of the loss, role in the offense) that almost always increase the offense level, but
they restrict judicial consideration of the most common mitigating factors (age, family and
community ties, drug addiction, good works in the community, and the like) to determination of
what sentence should be imposed."
number of minority prisoners and a concomitant decrease in the number of white prisoners, it is likely that such a recreation works to unjustly punish minorities to a greater degree.

The FSG also neglect to consider the offender’s personal history. Instead, the only permitted information regarding the individual is his or her criminal record. The result is obvious: when one’s criminality is in view and her non-criminality is ignored, she becomes The Criminal, an archetype and no longer human.

The foundation for this impact lies in the fact that gender can never be a factor in sentencing. A large number of women sentenced under the FSG are sentenced for drug crimes, and are sentenced based on the quantity of drugs to which they have a connection, despite the fact that the majority of them only played limited roles in the drug operation. This dehumanizes them by placing upon them a level of criminality which they do not deserve. Given, furthermore, that women are the primary caregivers of the young and that family ties and responsibilities are not ordinarily relevant, women are more severely impacted by the FSG than are men. In addition, since one’s physical condition is not ordinarily relevant, a woman’s pregnant condition will not normally be considered either in sentencing or in imprisonment, where the pregnant woman will need treatment that a male prisoner will not require. If childbearing and the responsibility for caring for one’s children is central to what it means to be human, then the FSG cut against this and dehumanize the female in a way additional to those ways that dehumanize male offenders.

The FSG also allow a humanizing eye to gaze upon the wealthy offender by punishing the poor offender. 28 USCS §994, the USSC’s enabling act, orders the USSC to

23 Hunt & Connelly, supra note 6, at 233: “From 1982 to 2002, non-Hispanic whites in federal prison dropped from almost 60 percent of the total population to almost 55 percent, while Hispanics increased from 15 percent to 40 percent. Similarly, in the same period, average sentences went from near equality among blacks and whites at just over two years to almost six years for blacks but only almost four years for whites.”
28 Wallace & Wedlock, supra note 26, at 404.
30 Id. at 424.
31 Wallace & Wedlock, supra note 26, at 408.
assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant . . committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant’s income.32

Thus, those who already have wealth will escape serious punishment for certain crimes more easily than will the person who does not have wealth and who relies on crime to survive. No attention will be paid to the latter offender’s need, and no weight will be given to the wealthy person’s apparent greed in wanting—not needing—more. Paul Chevigny illustrates this tension in a different way.33 He notes that in contemporary American society, crimes of violence are treated more harshly than crimes of betrayal, such as white-collar crimes like fraud and embezzlement.34 This was not always the case, however. For Chevigny, then, the grading of crime is a social construction35 that turns upon whatever the upper classes need to maintain and enhance their upper class position.

This article seeks to examine the dehumanization recreation, and neglect that the FSG necessarily creates, but with the Supreme Court’s decision in Booker, it is important to question whether this exploration is still relevant. Booker declared the FSG to be effectively advisory, so judges should be able to depart from their strictures at any time. One may wonder then if the time of the FSG is over. Yet it has become clear that Congress, the Department of Justice, and the USSC are looking for ways around Booker and back to mandatory sentences, making this debate as significant as ever. Attorney General Alberto Gonzales stated on June 21, 2005, just five months after Booker was decided, that Booker “threatens the progress we have made in ensuring tough and fair sentences for federal offenders.”36 He went on to suggest that his office would work against advisory guidelines and for “serious sentences for serious offenders.”37 Christopher Wray, Assistant Attorney General, stated in a separate speech that the FSG were responsible for reduced crime levels and disparity.38 He noted that any advisory system would undoubtedly lead to greater disparity, and that any new system should require sentencing courts to consult the guidelines and “prohibit certain factors so that judges may not consider in sentencing

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34 Id.
35 Id. at 790.
37 Id.
grounds which would be improper to consider or which would create sentencing disparity based upon inappropriate characteristics of a defendant." 39 Finally, he stated that “the Department [of Justice] believes that guidelines sentences are presumptively reasonable, and that sentences outside the guidelines become less reasonable the more they vary from the guideline range.” 40 Judge Ricardo Hinojosa, the Chair of the USSC, hinted at this lingering support of FSG, noting that post-Booker, judges seemed to be continuing to sentence within the guideline range at pre-Booker levels, indicating that the rationale behind Booker is still being ignored. 41 As the Breyer majority in Booker wrote, however, “[t]he ball now lies in Congress’ court.” 42 To the extent that Congress believes a “tough-on-crime” approach will win its members votes, Congress will push against Booker and a return to the FSG or an even more severe, rules-based system.

In this article, I argue that the FSG represent American sentencing philosophy by dehumanizing and recreating a defendant into the Criminal other, while neglecting factors that might humanize the defendant’s situation. Furthermore, borrowing on the philosophy of Jacques Lacan, I argue that this dehumanization serves to split “us” off from “those criminals” so that we may feel law-abiding and good. Finally, I conclude that this process is detrimental to both defendants and our justice in general. Stigmatizing the offender forces the conclusion that anyone who would “humanize” an offender would fail to recognize the offender’s fundamental inhumanity. With this assumed, one could theoretically argue that this way of dehumanization is actually good: the offender is a Criminal, and therefore deserves serious punishment. However, I contend that the idea that dehumanization actually forces us away from the traditional sentencing goals of retribution, incapacitation, and rehabilitation. When we condemn all offenders to ever more severe sentences, we fail to dole out a just punishment and ignore the notion of rehabilitation. In this way, “humanization” of the offender ceases to be a blind (leftist) cry for the truly evil criminal. Instead, humanization comes to be seen as the primary goal in sentencing. It oversees all the other, now-subordinate goals: to humanize an offender means to appreciate his blameworthiness and therefore to dole out truly just punishment. To humanize an offender means to understand when he is dangerous and needs to be incapacitated and when it might be better to dole out a punishment consisting of something other than prison time. To humanize an offender

39 Id.
40 Id.
42 Booker, 125 S.Ct. at 768.
means to acknowledge when he is susceptible to rehabilitation and when he is not. I propose, therefore, that we consider humanization as a sentencing goal above all others—not to replace these others, but in acknowledgement that humanization is the sentencing goal that unifies all others and provides a guidepost for admittedly difficult sentencing decisions.

This is a simple proposal, but not an easy one. Much of the post-
Booker literature occupies its time with elaborating intricate structural responses to the failed FSG and Booker. Frank Bowman articulates well the many alternative plans extant today as well as his own.\textsuperscript{43} Not taking anything away from these proposed systems, this article rejects the notion that a new structure can solve the underlying problem of dehumanization in sentencing. Instead of a new structure, we need to understand dehumanization in the current system and install humanization as the highest sentencing goal. To that end, this article examines dehumanization in the FSG. It does so through the lens of the theories of French psychoanalyst Jacques Lacan. However, in order to approach the theoretical implications of dehumanization, recreation, and neglect, we must first analyze the principles and history of the FSG, and the Booker decision which has led to the current state of jurisprudence.

I.

THE DEVELOPMENT AND HISTORY OF THE FSG

The FSG were preceded by the Sentencing Reform Act, passed in 1984, which gave rise to the United States Sentencing Commission and, finally, the FSG in 1987.\textsuperscript{44} The Sentencing Reform Act (SRA), contained in 18 USCS §§3553 and 3742 as well as 28 USCS §994, listed as its sentencing goals retribution, deterrence, incapacitation, and, finally, rehabilitation of the offender.\textsuperscript{45} It went on to note that sentencing courts ought to consider both the nature and circumstances of the offense and the history and characteristics of the offender.\textsuperscript{46} This implied goal of proportionality in sentencing would butt heads with the SRA’s other goal, that of the need to avoid unwarranted disparities among offenders with similar records who had been found guilty of similar conduct.\textsuperscript{47} This tension between proportionality and uniformity would emerge to be fundamental to the operation of the FSG.\textsuperscript{48} The tough-on-crime milieu in

\textsuperscript{43} Bowman, supra note 4, at 149.
\textsuperscript{44} Id. at 1318-19.
which the SRA was passed, however, forced a dehumanization of offenders. They were no longer to be seen as individuals, with characteristics different from other offenders who had committed the same crimes.\textsuperscript{49} Instead, an entirely new system of sentencing was installed in which the offense, not the offender, was the focus of sentencing calculations. This approach would become institutionalized in the FSG’s move toward a “charge offense system” in which the crime itself, and not the conduct that the offender displayed in carrying out the crime (a “real offense” system), would be considered in formulating sentences.\textsuperscript{50} Thus, a bank robber who threatened nobody, harmed nobody, and robbed the bank to pay for a relative’s medical treatment might receive the same sentence as a robber who, in the course of the robbery, produced many more harms, violent or otherwise. Both committed bank robbery, so under a charge offense system, both would receive the same sentence.

The movement, therefore, was toward an offense-focused sentencing structure. The SRA, in fact, pushed toward this goal by installing a mandatory guidelines system.\textsuperscript{51} Paying some attention to offender characteristics, the SRA did provide that the sentencing judge could depart from the mandatory guidelines based on such characteristics if there were an aggravating or mitigating circumstance not adequately taken into account by the Sentencing Commission.\textsuperscript{52} In fact, however, from its inception, the SRA pushed away from consideration of offender characteristics in stating that an offender’s education, vocational skills, employment record, family ties and responsibilities, and community ties were generally inappropriate factors to consider.\textsuperscript{53} As we shall see, the course of federal sentencing from 1984 to \textit{Booker} in 2005 saw a gradual and continual narrowing of the ability of the judge to depart based on offender characteristics.

The SRA also required sentencing judges to state, in open court, their reasons for imposing the sentence that they did.\textsuperscript{54} This would become more important in light of the \textit{de novo} appellate review of sentences established in a 2003 amendment to the SRA.\textsuperscript{55}

Finally, the SRA provided that the sentencing judge would have

\begin{footnotes}
\footnotetext[49]{Bowman, \textit{supra} note 22, at 1335, 1347.}
\footnotetext[50]{USSC, \textit{Guidelines Manual}, \textit{supra} note 10, at 4.}
\footnotetext[51]{18 U.S.C. §3553(b)(1) (2006).}
\footnotetext[52]{Id.}
\footnotetext[53]{28 U.S.C. §994(e) (2006).}
\footnotetext[54]{18 U.S.C. §3553(c) (2006).}
\footnotetext[55]{28 U.S.C. §3742(e) (2006).}
\end{footnotes}
authority to decrease an offender's sentence based on his substantial assistance in the investigation or prosecution of another person. The judge could effect this downward departure, however, only upon motion by the Government. This, along with the reduced judicial discretion worked by Congress through the SRA and FSG, shifted discretionary power into the hands of prosecutors. Where judges once held discretion, prosecutors came to be able to manipulate the system to obtain higher or lower sentences for offenders. They held this power through their ability to manage investigations and sting operations, name the offender's criminal charge, bargain facts, and withhold information.

The SRA was perhaps most problematic because it sought to shape subsequent sentencing practices based, in part, on past sentencing practices—the practices it was ostensibly intended to end. In formulating the FSG, the Commission followed the SRA by examining cases from 1985—a period of heightened gang and drug activity and a resulting fear of and increased prosecution of black males. The upshot of this analysis was that the average sentence for each crime would remain nearly the same under the SRA as it was before 1984.

The SRA, therefore, while expressing an intent that the offender's characteristics be considered to some degree, set sentencing in the United States on a course that would lead to a consistent ratcheting up of the number of people incarcerated, increased sentence lengths, sentences more severe than necessary, rehabilitation and alternative punishments

57 Id.
59 Stith and Cabranes, supra note 24, at 4.
61 Id.
63 28 USCS §994(m) (2006): "The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served."
64 Stith and Cabranes, supra note 24, at 59.
65 Id. at 60.
replaced by simple prison time, and the power to sentence passing from judges to prosecutors, Congress, and the Department of Justice.

A. Implementation of the FSG, and Its Implications

The first major step after passage of the SRA was the promulgation of the FSG in 1987. One immediately recognized that offender characteristics were given less attention than the spirit of the SRA might have demanded. First, the Commission noted that “despite the courts’ legal freedom to depart from the guidelines, they will not do so very often.” This encouragement not to depart from the guidelines was unchecked by the Commission’s general prohibition against considering offender characteristics. Chapter Five of the Guidelines Manual describes such characteristics that may or may not be relevant. These 5H1 departures, named for the chapter and section wherein they are listed, list age; education and vocational skills; mental and emotional conditions; physical conditions, including drug or alcohol dependence or abuse; gambling addiction; employment record; family ties and responsibilities; and military, civic, charitable, public service, and prior good works of the offender as “not ordinarily relevant” in determining sentences. This means that the sentencing judge can consider these factors only in “exceptional cases” and if they are “present in the case to a substantial degree.” “Lack of guidance as a youth and similar circumstances” are simply not relevant in determining a sentence.

These factors deny an offender his history. The FSG do just that, with the exception of the offender’s criminal history. Depending on the number and type of crimes the offender has committed in the past, the offender may move up in the criminal history category. Any move up would likely increase the offender’s guideline sentence. If, for example, an offender were convicted and sentenced under the offense of a Drug Offense Occurring Near a Protected Location and involving someone less than eighteen years of age, the base offense level would be 26. If there were no aggravating or mitigating circumstances and the offender had no prior

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69 Bowman, supra note 4, at 170.
70 USSC, Guidelines Manual, supra note 10, at 5.
71 Id. at 423-427.
72 Id.
73 Id. at 423.
74 Id. at 427.
75 Id. at 330.
76 Id. at 153-154.
criminal history, he would be placed in Criminal History Category I and would be eligible for 63 to 78 months incarceration.77 If, however, the offender had two prior sentences imposed on him, each exceeding one year and one month, the offender would be placed in Criminal History Category III and would be eligible for 78 to 97 months incarceration.78 With an especially serious criminal history, the offender could find himself in Category VI, in which he would be eligible for from 120 to 150 months incarceration.79 It might be noted that although these sentence enhancements for repeat offenders seem justified, they may become less so given that an offender’s criminal history is considered where his personal history—one that might indicate neglect, abuse, trauma, the susceptibility for rehabilitation, or the efficacy of an alternative punishment—is prohibited from consideration by the sentencing judge.

If one finds dehumanization in the way the FSG treat the above factors, the Commission itself implied a certain level of dehumanization. In the Guidelines, it acknowledged that “a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrence effect.”80 In other words, a system such as the FSG that is based on a structure of defined factors to be applied always, rarely, or not at all, will inevitably miss something important about the offender which, if considered, would lead to a more just sentence.

Alongside deterrence and proportionality rests the third and, arguably, most prioritized goal of the FSG: reduction of unwarranted disparities through uniform sentencing practices.81 This is in evidence most starkly in the fact that under the FSG race, sex, national origin, creed, religion, and socio-economic status are never relevant factors to consider.82 The problem with this is, as we shall see, the FSG have institutionalized such disparities such that they remain based on race, class, and gender and may have actually increased under the FSG.83 This disparity, argues one commentator, is not gone, it is simply hidden from view.84

With the promulgation of the FSG, it was clear that sentencing in the United States had entered a new paradigm characterized by a focus on the offense committed,85 consideration of offender characteristics when they

77 Id. at 377.
78 Id. at 350, 377.
79 Id. at 377.
80 Id. at 3.
81 Id. at 2.
82 Id. at 427.
83 Hunt & Connelly, supra note 6, at 233.
84 Freed, supra note 21, at 1683.
were aggravating factors and prohibition of such consideration when the characteristics would mitigate the sentence,\textsuperscript{86} displacement of discretionary power from the judge into the hands of the prosecutor, Congress, and the Department of Justice,\textsuperscript{87} and a steady increase in sentences doled out as well as the length of those sentences.\textsuperscript{88} This new paradigm, as one commentator put it, was “drained of its humanity.”\textsuperscript{89} It became even more resolved with passage of the PROTECT Act, or the Feeney Amendment, in 2003.

\textbf{B. PROTECT: Exacerbating the Problem}

Passed by the House on March 27, 2003, the main purpose of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Act (PROTECT) was to decrease the incidence of downward departures.\textsuperscript{90} This goal was to be served in a number of ways. PROTECT first overruled the Supreme Court’s decision in \textit{Stacey C. Koon v. United States}, in which the Court ruled that appellate review of sentencing decisions was to proceed under an abuse of discretion standard.\textsuperscript{91} After PROTECT, appellate courts were to review sentences \textit{de novo}.\textsuperscript{92} This, more than any other provision in PROTECT, served to reduce judicial discretion in sentencing.\textsuperscript{93} Other provisions were not, however, insignificant to reducing downward departures and curtailing judicial discretion.

PROTECT declared a number of factors no longer relevant to determining downward departures. No longer would an offender’s acceptance of responsibility, his aggravating or mitigating role in the offense, his decision to plead guilty, his restitution to victims, or his gambling addition be able to be considered by the judge in sentencing.\textsuperscript{94} PROTECT also prohibited downward departures for a number of other grounds, including family ties and responsibilities, community ties, and military, civic or charitable public service, in certain child-victim, sexual

\begin{flushleft}
\textsuperscript{87} Bowman, \textit{supra} note 4, at 171.
\textsuperscript{88} Lay, \textit{supra} note 66, at 1761.
\textsuperscript{89} Berman, \textit{supra} note 57, at 285.
\textsuperscript{90} Zlotnick, \textit{supra} note 20, at 224.
\textsuperscript{91} \textit{Koon v. United States}, 518 U.S. 81, 91 (1996).
\textsuperscript{93} Zlotnick, \textit{supra} note 20, at 231.
\textsuperscript{94} USSC, \textit{Downward Departures}, \textit{supra} note 52, at vi. \textit{See also} Zlotnick, \textit{supra} note 21, at 230-31, in which he notes that after PROTECT, only a Government motion can enable a judge to downwardly depart for “extraordinary acceptance of responsibility.”
\end{flushleft}
abuse, and obscenity cases.\textsuperscript{95} PROTECT also newly required sentencing judges to furnish \textit{written} reasons for any departure they effect.\textsuperscript{96} This requirement fed into another provision, which mandated that all district court chief judges report to the Sentencing Commission the reasons for each sentence imposed in their district, any downward departures effected, and the name of the sentencing judge in those cases.\textsuperscript{97} These reports would then be made available to Congress.\textsuperscript{98}

PROTECT also further drained power from the judiciary by mandating that on the Sentencing Commission, no more than three of the seven voting members would be federal judges.\textsuperscript{99} This replaced the prior provision mandating that at least three members were to be federal judges.\textsuperscript{100} PROTECT also attacked the Sentencing Commission, which had been showing signs of sympathy toward downward departures and a readiness to listen to courts regarding them.\textsuperscript{101} It did so by preventing the Commission from adding any new factors for downward departures until May 1, 2005.\textsuperscript{102} By prohibiting such action, PROTECT prevented the Commission from performing its mandated duty to periodically review and revise its guidelines, including a review of whether departures should be added to the FSG.\textsuperscript{103} PROTECT further encroached on the Commission's power by ordering it affirmatively to reduce substantially the incidence of downward departures.\textsuperscript{104} It ordered the Department of Justice to assist in this matter through prosecutorial action.\textsuperscript{105} As we shall see below, the Ashcroft DOJ was immediately on board.

\footnotesize
\begin{itemize}
\item[\textsuperscript{95}] American College of Trial Lawyers, \textit{supra} note 62, at 24-25.
\item[\textsuperscript{96}] USSC, \textit{Downward Departures, supra} note 92, at ii.
\item[\textsuperscript{97}] American College of Trial Lawyers, \textit{supra} note 62, at 25.
\item[\textsuperscript{98}] Id.
\item[\textsuperscript{99}] 28 USCS §991(a) (2006).
\item[\textsuperscript{100}] 28 USCS §991 (2006), History; Ancillary Laws and Directives.
\item[\textsuperscript{101}] USSC, \textit{Downward Departures, supra} note 92, at ii: "Departures play an important role in the federal sentencing guideline system for several reasons. There may be offense guidelines that do not specify a sentence adjustment for a particular circumstance... Departure decisions also provide the Commission with important feedback from courts regarding the operation of the guidelines and improve its ability to make ongoing refinements to the sentencing guidelines."
\item[\textsuperscript{102}] Id. at 1.
\item[\textsuperscript{103}] Id. at 5.
\item[\textsuperscript{104}] American College of Trial Lawyers, \textit{supra} note 62, at 27.
\item[\textsuperscript{105}] Zlotnick, \textit{supra} note 20, at 236.
\end{itemize}
III.
PERTINENT CASE LAW

A. Charles C. Apprendi, Jr. v. New Jersey: The Beginning of the End

Decided on June 26, 2000, Apprendi concerned a defendant charged in pertinent part with "shootings on four different dates, as well as the unlawful possession of various weapons."106 Defendant Apprendi admitted to firing "several .22-caliber bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood in Vineland, New Jersey."107 Apprendi, after his arrest, made a statement to the police, which he later retracted, "that even though he did not know the occupants of the house personally, "because they are black in color he does not want them in the neighborhood.""108 Prosecutors did not bring charges under New Jersey's hate crime statute.109

In a plea agreement, Apprendi pleaded guilty to two counts of second-degree possession of a firearm for an illegal purpose.110 The State reserved the right to request a higher "enhanced" sentence on the shooting offense "on the ground that that offense was committed with a biased purpose, as described in §2C:44-3(e),"111 New Jersey's "hate crime" law. The law provided "for an 'extended term' of imprisonment if the trial judge finds, by a preponderance of the evidence, that '[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'"112 Apprendi "reserved the right to challenge the hate crime sentence enhancement on the ground that it violates the United States Constitution."113

"After the trial judge accepted the three guilty pleas, the prosecutors filed a formal motion for an extended term."114 At the evidentiary hearing, the judge alone found by a preponderance of the evidence "that the evidence supported a finding 'that the crime was motivated by racial bias.'"115 Accordingly, the judge held that the hate crime enhancement applied and the judge sentenced Apprendi to a 12-year term on the shooting

106 Apprendi, 530 U.S. at 469.
107 Id.
108 Id.
109 Id.
110 Id. at 469-70.
111 Id. at 470.
112 Id. at 468-69.
113 Id. at 470.
114 Id.
115 Id. at 471.
charge.\textsuperscript{116} The Appellate Division of the Superior Court of New Jersey upheld the enhanced sentence, finding that the enhancement was a "sentencing factor" and not "an element of the underlying offense"\textsuperscript{117} to be found by a jury beyond a reasonable doubt.

The New Jersey Supreme Court affirmed the decision, holding that "due process only requires the State to prove the 'elements' of an offense beyond a reasonable doubt."\textsuperscript{118} "Sentencing factors," by contrast, could be found by a judge on a preponderance of the evidence standard, even if those factors increased the defendant's sentence.

The United States Supreme Court, however, reversed the decision. Writing for the majority, Justice Stevens stated that the issue was "whether the 12-year sentence imposed on count 18 [the shooting charge] was permissible, given that it was above the 10-year maximum for the offense charged in that count."\textsuperscript{119} The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."\textsuperscript{120}

In its reasoning, the Court relied on a few key points. First, it denied the distinction New Jersey had made between "sentencing factors" and "elements":

it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently.\textsuperscript{121}

In making this distinction,

[t]he New Jersey statutory scheme...allows a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon; after a subsequent and separate proceeding, it then allows a judge to impose punishment identical to that New Jersey provides for crimes of the first degree...based upon the judge's finding by a preponderance of the evidence, that the defendant's 'purpose' for unlawfully possessing the weapon was 'to intimidate' his victim on the basis of a particular characteristic the victim possessed.\textsuperscript{122}

\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 472.
\textsuperscript{119} Id. at 474.
\textsuperscript{120} Id. at 490.
\textsuperscript{121} Id. at 476.
\textsuperscript{122} Id. at 491.
The Court found justification for this argument in an originalist view:

...any possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding.123

Secondly, the Court looked to the Winship reasonable doubt standard:

Since Winship, we have made clear beyond peradventure that Winship's due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'124

Writing for the dissent, Justice O'Connor wrote:

Our court has long recognized that not every fact that bears on a defendant's punishment need be charged in an indictment, submitted to a jury, and proved by the government beyond a reasonable doubt. Rather, we have held that the 'legislative definition of the elements of the offense is usually dispositive.'125

Although we have recognized that 'there are obviously constitutional limits beyond which the States may not go in this regard...we have proceeded with caution before deciding that a certain fact must be treated as an offense element despite the legislature's choice not to characterize it as such.'126

O'Connor also mentions her concern that the Court's opinion "will have the effect of invalidating significant sentencing reforms accomplished at the federal and state levels over the past three decades"127 because it in the name of constitutional rights meant to protect criminal defendants from the potentially arbitrary exercise of power by prosecutors and judges, appears to rest its decision on a principle that would render unconstitutional efforts by Congress and the state legislatures to place constraints on that very power in the sentencing context.128

In other words, while the majority decision would protect criminal defendants from disparities meted out by lone judges, it at the same time serves to defeat the system of determinate sentences that came about over the previous three decades to prevent just such disparities, according to the dissent.

Apprendi opened up the door to further attacks on the FSG. It forced courts and legislatures to think about how the FSG could operate, now that judges might not be able to increase sentences for crimes found by juries

123 Id. at 478.
124 Id. at 484.
125 Id. at 524.
126 Id.
127 Id. at 549.
128 Id. at 550.
beyond a reasonable doubt, if the factors for which they increased sentences were found only by themselves on a preponderance of the evidence standard.

Justice Breyer, one of the people largely responsible for the creation of the FSG, issued a separate dissent in *Apprendi* that seemed to portend the downfall of the FSG as they moved closer and closer toward a pure charge offense system:

One could imagine, for example, a pure ‘charge offense’ sentencing system...[but such a] system would not be a fair system, for it would lack proportionality, i.e., it would treat different offenders similarly despite major differences in the manner in which each committed the same crime.129

Thus, Breyer could write that “[w]hether a robber takes money to finance other crimes or to feed a starving family can matter, and long has mattered, when the length of a sentence is at issue.”130

**B. Timothy Stuart Ring v. Arizona**

Decided on June 24, 2002, *Ring* involved the trial of Timothy Ring for murder, armed robbery, and related charges stemming from a 1994 hijacking of a Wells Fargo armored van by Ring and two accomplices. In the event, the driver of the van was shot and killed. At trial, the jury was presented with evidence that Ring was involved in the robbery, but on appeal, the Arizona Supreme Court found that the evidence “failed to prove, beyond a reasonable doubt, that [Ring] was a major participant in the armed robbery or that he actually murdered” the van driver.131 Lack of evidence as to Ring’s participation in, planning or, or expectation of the killing132 explains why the jury at trial found Ring guilty of felony murder and not premeditated murder.133

Under Arizona law, for felony murder Ring could be sentenced to death only if “further findings were made.”134 At the sentencing hearing, the judge heard testimony from James Greenham, one of Ring’s co-conspirators, tending to show that Ring was the “leader [of the conspiracy] because he laid out all the tactics,” and that Ring was the one who actually shot and killed the van driver.135 Despite the fact that on cross examination, Greenham admitted that previously he had told Ring’s counsel that “Ring

128 *Id.* at 555.
130 *Id.* at 565.
132 *Id.*
133 *Id.* at 591-92.
134 *Id.* at 592.
135 *Id.* at 593.
had nothing to do with the planning or execution of the robbery," and that he was now testifying "against Ring as 'pay back' for the threats and for Ring's interference in Greenham's relationship with Greenham's ex-wife."\footnote{136 Id. at 594.} The trial judge entered a special verdict sentencing Ring to death.\footnote{137 Id.} Because Ring was convicted of felony murder, not premeditated murder, the judge recognized that Ring was eligible for the death penalty only if he was [the van driver's] actual killer or if he was "a major participant in the armed robbery that led to the killing and exhibited a reckless disregard or indifference for human life."\footnote{138 Id.} Given Greenham's testimony, the judge found both to be established.

At issue in Ring was whether [an] aggravating factor [that raises a defendant's penalty from life in prison to death] may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.\footnote{139 Id.}

The Arizona law in question, Arizona Revised Statute §13-1105(c), and §13-703, directed the trial court judge to "conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances...for the purpose of determining the sentence to be imposed."\footnote{140 Id. at 597.} The statute further instructed that "[t]he hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state."\footnote{141 Id.}

The Supreme Court held that Apprendi applied. In Apprendi, the Court held that "the Sixth Amendment does not permit a defendant to be 'expose[d]...to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'"\footnote{142 Id. at 592.} This holding overruled Walton v. Arizona, in which the Supreme Court held that "Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as 'element[s] of the offense of capital murder.'"\footnote{143 Id. at 588-89.} Because "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'"\footnote{144 Id. at 609.} Apprendi and
Walton were “irreconcilable”\textsuperscript{145} and the Court held with Apprendi, that “[c]apital defendants, no less than noncapital defendants...are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”\textsuperscript{146}

C. Ralph Howard Blakely, Jr. v. Washington

Defendant Blakely had been married to his wife Yolanda since 1973. Blakely had been diagnosed several times with psychological and personality disorders, and his wife filed for divorce. In 1998, Blakely, in a misguided attempt to win her back, kidnapped her. In the process, he bound her with duct tape and forced her at knifepoint into a wooden box in the bed of his pickup truck. During this time, he implored her to dismiss the divorce suit.\textsuperscript{147}

Blakely was eventually charged in this matter with first-degree kidnapping.\textsuperscript{148} Upon reaching a plea agreement with prosecutors, however, his charge was reduced to second-degree kidnapping involving domestic violence and use of a firearm.\textsuperscript{149} Blakely entered a guilty plea admitting the elements of second-degree kidnapping and the domestic violence and firearm allegations, but no other relevant facts.\textsuperscript{150} Under Washington’s Sentencing Reform Act, for these charges Blakely’s sentence would fall within a “standard range” of from 49 to 53 months incarceration.\textsuperscript{151}

Under Washington’s SRA, a judge may impose a sentence above the standard range if he or she finds “substantial and compelling reasons justifying an exceptional sentence.”\textsuperscript{152} After hearing Yolanda’s description of the kidnapping, the judge imposed upon Blakely a sentence of 90 months, justifying this increased sentence on the finding that Blakely had acted with “deliberate cruelty,” which was a statutorily enumerated ground for departure in domestic violence cases.\textsuperscript{153} The State Court of Appeals affirmed the sentence\textsuperscript{154} on a “clearly erroneous” standard.\textsuperscript{155} The Washington Supreme Court refused to hear the case,\textsuperscript{156} and the United States Supreme Court granted certiorari.

\textsuperscript{145} Id. at 589.
\textsuperscript{146} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 298-99.
\textsuperscript{150} Id. at 299.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 300.
\textsuperscript{154} Id. at 301.
\textsuperscript{155} Id. at 300.
\textsuperscript{156} Id. at 301.
Decided on June 24, 2004, Justice Scalia wrote for the majority. The Court held that for a court to depart upward past the statutory maximum sentence given the facts proven at trial, the judge cannot use facts not proven by a jury.\textsuperscript{157} In other words, the judge can sentence a defendant to a period above the statutory maximum based only on facts found by a jury.

Basing its decision on \textit{Apprendi}, the Court held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”\textsuperscript{158} The Court did not, at this time, make a ruling that obviously implicated the FSG. In fact, the Court stated the opposite. In a footnote, the majority wrote that “The Federal Sentencing Guidelines are not before us, and we express no opinion on them.”\textsuperscript{159} The Court went on to say that “we are not . . . finding determinate sentencing schemes unconstitutional.”\textsuperscript{160}

As she did in \textit{Apprendi}, Justice O’Connor in dissent sounded the percipient death knell for the FSG. She wrote that the majority ruling in \textit{Blakely} “will either trim or eliminate altogether [Congress’ and States’] sentencing guidelines schemes and, with them, 20 years of sentencing reform.”\textsuperscript{161} She went on to note the benefits of the FSG and similar state schemes: “over the last 20 years, there has been a substantial reduction in racial disparity in sentencing across the State” of Washington.\textsuperscript{162} As well, prior to the FSG, “disparities too often . . . correlated with constitutionally suspect variables such as race.”\textsuperscript{163} Finally, the FSG were, she noted, designed “to bring some much-needed uniformity, transparency, and accountability to” the system.\textsuperscript{164} Unlike the majority, O’Connor did not deny the threat that \textit{Blakely} posed to the FSG: “Washington’s scheme is almost identical to the upward departures regime established by 18 U.S.C. §3553(b) and implemented in USSG [United States Sentencing Guidelines] §5K2.0.”\textsuperscript{165} “If the Washington Scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would.”\textsuperscript{166}

It would take less than a year for the Supreme Court to produce \textit{Booker} and with that decision hold that \textit{Blakely} did, in fact, apply to the FSG.\textsuperscript{167}

\textsuperscript{157} \textit{Id.} at 313-14.
\textsuperscript{158} \textit{Id.} at 301.
\textsuperscript{159} \textit{Id.} at 305.
\textsuperscript{160} \textit{Id.} at 308.
\textsuperscript{161} \textit{Id.} at 314.
\textsuperscript{162} \textit{Id.} at 317.
\textsuperscript{163} \textit{Id.} at 315.
\textsuperscript{164} \textit{Id.} at 316.
\textsuperscript{165} \textit{Id.} at 325.
\textsuperscript{166} \textit{Id.} at 326.
\textsuperscript{167} \textit{Booker}, 125 S.Ct. at 746.
D. United States v. Feddie J. Booker and Duncan Fanfan—An Imperfect Compromise

Booker involved two criminal defendants whose cases were joined in the Supreme Court because of their similarity. Defendant Booker was charged with possession with intent to distribute at least 50 grams of crack cocaine.\textsuperscript{168} He was convicted on this charge, the jury having found that he possessed 92.5 grams of crack.\textsuperscript{169} For this charge, federal statute 21 U.S.C. §841(a)(1) provided for a sentence of anywhere from 10 years to life incarceration.\textsuperscript{170} Based upon Booker’s criminal history and the quantity of drugs found by the jury, Booker’s “base” sentence under the FSG was from 210 to 262 months.\textsuperscript{171} After a post-trial sentencing proceeding, however, the court found on its own by a preponderance of the evidence that Booker had possessed an addition 566 grams of crack and that he was guilty of obstructing justice.\textsuperscript{172} Under the FSG, these findings mandated a sentence of between 360 months and life imprisonment.\textsuperscript{173} In the end, Booker received a 30-year sentence,\textsuperscript{174} 8 years more than than he would have received based on the facts found by the jury.

Defendant Fanfan was charged with conspiracy to possess with intent to distribute at least 500 grams of cocaine.\textsuperscript{175} Based on the facts found by the jury, under the FSG Fanfan would be eligible for a maximum sentence of 78 months.\textsuperscript{176} At Fanfan’s sentencing hearing, the court found additional facts that, under the FSG, authorized a sentence of from 188 to 235 months.\textsuperscript{177} These additional facts—that Fanfan possessed more drugs than the jury found and that Fanfan was an organizer, leader, manager, or supervisor in the criminal activity—were found by a preponderance of the evidence.\textsuperscript{178} The judge in that case, unlike the judge in Booker’s case, decided that he could not follow the FSG and thus refused to sentence Fanfan based on the facts found at the sentencing hearing.\textsuperscript{179}

The Supreme Court granted certiorari in both cases and consolidated them to determine whether Apprendi and its progeny applied to the FSG,
and if so, what portions of the FSG remain in effect.\textsuperscript{180} Two majority opinions were written. The Stevens majority essentially declared the FSG to be in violation of the Sixth Amendment.\textsuperscript{181} The Breyer majority declared that the remedy to this violation was that the FSG would become "effectively advisory."\textsuperscript{182} Stevens echoed Apprendi when he wrote that

\begin{quote}
[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.\textsuperscript{183}
\end{quote}

Thus holding, the Court also held that "the Sixth Amendment as construed in\textsuperscript{184} Blakely does apply to the Sentencing Guidelines."

The Breyer majority discussed the impact of the Court's holding and what changes were to be made to the FSG. The changes that this majority made were to excise from the SRA 18 USCA §3553(b)(1) and 18 USCA §3742(e), which were the provisions that made the FSG mandatory.\textsuperscript{185} So excised, the Court confused all commentators\textsuperscript{186} by then announcing that, although the FSG were advisory, sentencing courts are nonetheless required to "consider Guideline ranges" but are permitted "to tailor the sentence in light of other statutory concerns as well."\textsuperscript{187}

Although Booker threw the world of federal sentencing into upheaval, it seems to have landed us in a fortuitous spot. Read plainly, Booker serves to the extent possible Congress' goal of uniformity in sentencing by "maintaining a strong connection between the sentences imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended."\textsuperscript{188} It also, however, grants to the judge the ability to tailor the sentence to the offender, and not just the offender's criminal conduct. In so allowing, the Court looked to the language of the SRA: "the statute's text states that '[t]he court' when sentencing will consider 'the nature and circumstances of the defendant.'"\textsuperscript{189}

\textsuperscript{180} \textit{id.}

\textsuperscript{181} \textit{id.} at 746.

\textsuperscript{182} \textit{id.} at 756-57.

\textsuperscript{183} \textit{id.} at 756.

\textsuperscript{184} \textit{id.} at 746.

\textsuperscript{185} \textit{id.} at 756-57.

\textsuperscript{186} It is impractical and unnecessary to note here the myriad interpretations that authors, judges, legislators, and other government officials have taken on Booker. These interpretations conclude just about every possible result of Booker, from the theory that the FSG are still mandatory to the idea that they may be considered—or not—as just one in any number of factors at the sentencing judge's disposal.

\textsuperscript{187} Booker, 125 S.Ct. at 757.

\textsuperscript{188} \textit{id.}

\textsuperscript{189} \textit{id.} at 759.
Perhaps recognizing the vital role appellate review had played in giving teeth to the FSG as mandatory, the Court also excised the provision in the SRA—§3742(e)—that mandated de novo appellate review.\textsuperscript{190} The new standard was to be one of reasonableness.\textsuperscript{191}

In a fit of unwarranted optimism and unmerited back patting, the Court announced the wonderful new post-\textit{Booker} sentencing regime: the SRA as excised remains consistent with Congress’ initial and basic sentencing intent.\textsuperscript{192}

...to provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities.\textsuperscript{193} [and] maintaining sufficient flexibility to permit individualized sentences when warranted.\textsuperscript{194}

According to the Court, all sides in the sentencing debate would be pleased. Given the lively debate that has followed \textit{Booker}, we can see that no one, in fact, is happy. Those who bemoan the loss of mandatory FSG wish their return,\textsuperscript{195} and those who hope for the return to the days of judicial discretion see shadows of mandatory sentencing lurking and machinations in Washington, D.C. working to bring a mandatory system back.\textsuperscript{196} No one is quite happy, but they all agree: \textit{Booker} plunged us into a period in which the federal sentencing system is anything but clear\textsuperscript{197} and up for grabs.\textsuperscript{198} Something will change, and the debate now concerns what new system we want to install.

III.

LACANIAN THEORY AND THE FSG

Having outlined the jurisprudential history of the FSG and suggesting how the FSG dehumanize offenders, we now look more deeply into this dehumanization by examining the FSG through the lens of Lacanian theory. The section that follows interweaves a further description of the FSG with a number of Lacan’s ideas that, hopefully, will shed light on the FSG and the dehumanization that they engender.

I first discuss why Lacanian theory is an appropriate lens for

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\textsuperscript{190} \textit{Id.} at 764.
\textsuperscript{191} \textit{Id.} at 765.
\textsuperscript{192} \textit{Id.} at 767.
\textsuperscript{193} See Gonzales, supra note 36, at 324.
\textsuperscript{195} Bowman, supra note 4, at 182: “The...puzzlement is figuring out what Booker means.”
\textsuperscript{196} Kevin R. Reitz, The Enforceability of Sentencing Guidelines, 58 STAN. L. REV. 155, 167 (2005): Congress is watching the post-\textit{Booker} sentences “like a hawk” and could at any time replace the \textit{Booker}-ized FSG with mandatory minimums or any number of other regimes that obliterate judicial discretion.
deconstructing a legal structure. I then go on to argue that the FSG dehumanize the offender by refusing to acknowledge him by ignoring his unique personal characteristics and history. This process inflict itself on racial minorities as well as female offenders. It functions by censoring the offender—by refusing to acknowledge his good acts, which are speech acts because they declare something about the offender. It functions also by erring—that is, where there is confusion or uncertainty as to whom the offender is (Criminal or Law-Abiding Citizen), the FSG work to fix the defendant as Criminal. The FSG also assume a defendant’s ability to act completely independently of his own subjective context, thus making him an actor unburdened by his past or current external conditions. This allows the offender to be a Criminal—one who is such of his own nature and volition.

I then go on to discuss how the FSG recreate the offender as essentially Criminal. Once convicted, the offender is no longer human. He is placed onto a sentencing grid and given a numerical value that determines not only his sentence, but also the extent to which his nature is that of Criminal.

I finish the following section with a note on language and speech. The FSG speak, and in so doing declare offenders Criminal. Offenders cannot speak, and so cannot protest their humanity. Through acts of individual, structural, and institutional speech, the Criminal is created and reality constructed.

A. Adapting Lacan?

Jacques Lacan’s theories have been used to frame and understand many fields of intellectual endeavor, from straightforward psychoanalysis of the individual, to film,197 to literature,198 and also to law.199 Lacan himself encouraged others to boldly and creatively adapt his ideas to their own fields:

The fact that you have been given a number of keys is no excuse for you to use them not to think anymore and to endeavor, as is the general inclination of human beings, to leave everything as it is. There are certain ways of using categories such as the unconscious, the drive, the pre-oedipal relation, and defense that consist in drawing none of the authentic consequences that they imply and considering that this is an affair that concerns others but does not go to the heart of your own

197 See generally EVERYTHING YOU EVER WANTED TO KNOW ABOUT HITCHCOCK BUT WERE AFRAID TO ASK LACAN [Hereinafter Zizek] (Slavoj Zizek ed., 1991).
relations with the world.\textsuperscript{200}

It is therefore our task, in the best Lacanian tradition, to take Lacan’s words on psychoanalysis, play around with them in our own respective fields, make connections that at first blush seem not “authentic,” and use these words and theories to shed light on areas traditionally unassociated with psychoanalysis. In this essay, I apply Lacan’s ideas to the area of law, specifically that of the Federal Sentencing Guidelines, which is exactly as Lacan would want it.

\textbf{B. Lacan and the Law}

Jacques Lacan mentioned “the law” often in his work. It is important to note two things about this term as Lacan used it. First, he for the most part did not mean to implicate the law of statutes, cases, civil and criminal penalties, and so on. Instead, his “law” is “the totality of the system of language, in so far it defines the situation of man as such, that is to say in so far as he is not just a biological individual.”\textsuperscript{201} Since language for Lacan is the network of symbols, of signifiers, into which we are born\textsuperscript{202} and which shape and determine our understanding of the world, the law is “the symbolic order which founds interhuman relations.”\textsuperscript{203} The law is symbolization and symbolization is the law.\textsuperscript{204} Lacan’s law, therefore, is one that includes human-created institutions but extends beyond them to illuminate every aspect of human existence, from familial relationships, to narcissistic self-images.

Understanding the applicability of Lacan to American law and FSG, it is important now to illustrate how a policy such as FSG necessarily leads to dehumanization, neglect, and recreation.

\textbf{IV. DEHUMANIZATION AND NEGLECT}

As the FSG dehumanize the sentenced criminal by neglecting the human aspects of his history, they lead to the recreation of the sentenced as Criminal.


\textsuperscript{202} Id. at 2: “At first there is language, already formed.”

\textsuperscript{203} Id. at 197.

\textsuperscript{204} Lacan, \textit{Book III}, supra note 200, at 83.
A. Dehumanization defined

In judging a person’s actions—in sentencing an offender—dehumanization is the failure to consider the condition in which that particular person finds herself. The FSG dehumanize because they do not allow the judge to consider an offender’s family history, her history of drug use, or the offender’s traumatic childhood. The FSG do, however, humanize the offender in that they compel the judge to consider the offender’s criminal history. The FSG, therefore, encourage dehumanization that is both partial and biased and that shunts the offender toward the label Criminal by considering her criminal past and ignoring other aspects of her past that may mitigate her guilt. This dehumanization is the worst kind because, once it takes away the offender’s humanity, it redefines the offender. Where once the offender was human, that humanity is removed, and a new personal reality, that of the Criminal, is imposed upon the offender.

B. Sentencing under the FSG as a dehumanizing symbol

Since Lacanian law is symbolism itself and this symbolism is created by humanity, Lacanian law extends only to human-created institutions. Institutions such as marriage or parentage may be seen as the same law as that of cases, statutes, and sentencing schemes. Both are human-created institutions, and both have the same characteristics and effects. Thus, Lacan’s approach to the law includes the law that governs a large part of our society.

Lacan clearly suggests that the law tends to dehumanize people and recreate them as less than human but more suitable for governance. Marvin Frankel has described the “gross evils and defaults in what is probably the most critical point in our system of administering justice, the imposition of a sentence.”205 Frankel goes on to assert a need to “humanize criminal sentencing.”206 He calls to Lacan in stating that “the Guideline range is not sufficiently broad to accommodate relevant differences among offenders. The judge’s power to depart therefore became the crucial mechanism for avoiding undue rigidity.”207 This argument derives from Lacan’s notion of law that “universalizes significations,”208 meaning that law does away with individuality. It ignores individual uniqueness and instead installs a system

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206 Id.
207 Id. at 581.
with a philosophy of human sameness, a kind of blind equality. The FSG thus, by universalizing the offender, become “offensive to the whole notion of human dignity” by ignoring the offender’s personal characteristics.209

In fact, by dehumanizing the offender, we dehumanize all of society in a number of ways. First, by punishing offenders excessively and without regard to their personal history, we take good people out of society. In one case, a judge was forced under the FSG to sentence a first time offender to five years. His crime was selling some of the marijuana that he grew to prop up his legitimate business, which had fallen on hard times. While in jail, the offender lost both his business and his family.210 Second, when we punish an offender, we as a society punish him. By failing to consider an offender in his uniqueness, we are denying the uniqueness of ourselves. Where the offender is dehumanized and reformed into a Criminal, we dehumanize ourselves and reform ourselves into Law-Abiding Citizens, which is just as inhuman a designation as the Criminal. Lacan alludes to this relationship between the dehumanized punisher and the dehumanized punished. He writes: “for every human being, everything personal which can happen to him is located in the relation to the law to which he is bound. His history is unified by the law, by his symbolic universe, which is not the same for everyone.”211

Indeed, the FSG as law are not the same for everyone. We have seen above that race is a factor in treatment under the FSG. Although an idealistic notion of equality lies at the heart of the FSG through its pursuit of equal treatment for equal offenders,212 judges under the FSG are prohibited from considering each offender as unique and thus from assigning truly equal sentences to truly equal offenders. Offenders of all races therefore receive the sentence listed in the FSG, even if all parties involved, including the prosecutors, disagree with the sentence and case-specific factors argue against it.213

The FSG’s goal of uniformity assumes that all disparity is

209 Farabee, supra note 205, at 629.
210 Id. at 571.
211 Id. at 612-13.
212 Lacan, Book I, supra note 201, at 197.
214 Zlonick, supra note 20, at 215.
215 Id. at 242: The FSG, PROTECT, and the DOJ’s new policies will lead to every defendant in a particular class of crime receiving the same sentence as any other defendant in that class. “[T]his similarity will exist regardless of whether those closest to the case agree that this person does really not need the substantial incarceration called for; where his or her role in the offense was minimal; or where addiction, desperation, or personal relationships motivated their conduct more than greed or anti-social animus.”
unwarranted.\textsuperscript{216} As a result, female offenders are treated generally more harshly than male offenders under the FSG,\textsuperscript{217} which were formulated with a male offender in mind. In addition, in response to United States v. Lara, in which a small bisexual defendant received a downward departure based on the increased likelihood of his victimization in prison, the Commission amended the 1989 Guidelines to make physical appearance, including physique, a discouraged factor.\textsuperscript{218} The only conclusion to be drawn is that blind equality is not equality at all because it treats unequal cases alike.\textsuperscript{219}

\textbf{C. Neglect and gender}

The dehumanization caused by the FSG is created by its tendency to neglect the human characteristics of those who are sentenced according to its guidelines. One of these neglected human characteristics, as has been identified above, is gender. The FSG, created primarily by men with male offenders in mind, reject gender in sentencing as "not relevant."\textsuperscript{220} Along with rejecting physical condition\textsuperscript{221} and family ties and responsibilities\textsuperscript{222} as "not ordinarily relevant" to sentencing, the FSG reject the facts that sentences imposed impact women differently than they impact men.\textsuperscript{223} Women get pregnant. While some states have made provisions for the different and additional needs of pregnant offenders, the federal system has not.\textsuperscript{224} Women are the primary caregivers of children.\textsuperscript{225} Thus, when women are incarcerated, they usually suffer emotional strife not suffered by male offenders, in part because they will likely have to relinquish custody of their children.\textsuperscript{226} Finally, when a female caregiver is incarcerated, it is possible that the child will no longer be taken care of by either parent.\textsuperscript{227} This problem exacerbates itself. In part because family ties and responsibilities are not ordinarily considered relevant, the number of women in federal prisons has grown faster than the number of men.\textsuperscript{228}

This ignorance of a woman's situation as possibly pregnant and the primary caregiver, as well as her child's only parental support, is consistent

\begin{footnotesize}
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\item \textsuperscript{216} Farabeg, supra note 205, at 617.
\item \textsuperscript{217} Washington, supra note 27, at 136.
\item \textsuperscript{218} Koon, 518 U.S. at 107.
\item \textsuperscript{219} Berlin, supra note 60, at 199-200.
\item \textsuperscript{220} USSC, Guidelines Manual, supra note 10, at 427.
\item \textsuperscript{221} \textit{Id}. at 424.
\item \textsuperscript{222} \textit{Id}. at 425.
\item \textsuperscript{223} Wallace & Wedlock, supra note 26, at 395.
\item \textsuperscript{224} \textit{Id}. at 405-06.
\item \textsuperscript{225} \textit{Id}. at 404.
\item \textsuperscript{226} \textit{Id}. at 404-05.
\item \textsuperscript{227} \textit{Id}. at 404.
\item \textsuperscript{228} Stith & Cabranes, supra note 24, at 62.
\end{enumerate}
\end{footnotesize}
with the FSG's focus on the offense and not the offender. It remains
dehumanizing, however, in that it fails to treat the offender in a way that
would lead to true proportionality in sentencing. This ignorance, moreover,
is founded on misunderstanding. In a system of sentencing that assumes a
male offender, female offenders are not understood through their gender.
Instead, they become pseudo-males, offenders who are essentially male
because they are connected to male offenders through the common thread
of criminality. When you are Criminal, you are typecast, and that typecast
is male.

D. Neglect and Equitability

Hannah T.S. Long has written about Jeremy Bentham's idea of
"equability" in sentencing. She argues that because two offenders of
differing physical stature stand to be treated better or worse in prison
depending on these statures, then the severity of their sentences, even if
equal in time, will be vastly different. The small offender will be abused
more than the larger one. An offender's mental health, life expectancy,
HIV status, and gender can also have "immeasurable and uncontrollable
effects on an individual's carceral suffering." Through the inequity of the
FSG, we fail to achieve any of the traditional goals of sentencing.
Instead, one might note, we re-create the offender not as individual but as a
unit. Each criminal amounts to one unit of Criminal. Larger or smaller
criminals are valued the same. One's family ties and responsibility do not
affect the unit value.

E. Neglect and Censorship

If speech creates, then the FSG censor the offender's good speech—
her family responsibilities, ties to the community, good works—and focus
on the one speech of hers that will condemn her: her criminal history. The
FSG use an offender's criminal history (the "Criminal History Category",
or CHC) to determine culpability and predict the likelihood of recidivism. The CHC, while considering relevant factors such as the

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230 Id. at 349.
231 Id. at 347.
232 Id. at 328.
233 Id. at 347.
234 United States Sentencing Commission, A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission...
frequency and seriousness of an offender’s criminal history,\textsuperscript{235} fails to consider age, even though the Sentencing Commission acknowledges that “findings suggest that the offender’s age is a powerful component of recidivism prediction.”\textsuperscript{236} In fact, the Sentencing Commission notes that the U.S. Parole Commission’s Salient Factor Score (SFS) has a greater predictive power due to its use of age as a predictive factor.\textsuperscript{237} By declining to include age as a factor, the Sentencing Commission works to create the truth that 15 year-old offenders may be as culpable as 30 year-old offenders. The case of Ronald Evans, a 19 year old who received life in prison for being a lookout, packager, transporter, and courier of heroin and drug money, exemplifies this injustice.\textsuperscript{238}

The list of FSG factors that are relevant and not relevant also shapes the truth that is the offender by limiting him and dehumanizing him.\textsuperscript{239} The Garrison brothers are such an example.\textsuperscript{240} Lamont Garrison received 19 years in prison and his brother Lawrence received 15 years on cocaine and crack charges. They were convicted on sparse evidence and an alleged co-conspirator’s testimony which probably contributed to his sentence of a mere three years. There exists much evidence to suggest that the brothers are innocent. Their backgrounds also demand some mitigation in their sentences. Neither had any prior criminal convictions, and

Lamont and Lawrence were arrested just months after their graduation from Howard University. Both had worked part-time for five years to pay their tuition, and both were excellent students who were planning on becoming lawyers. At the time of his arrest, Lamont was working full-time as a juvenile counselor in Maryland, and both he and his brother had previously worked at the Department of Energy and the Department of Justice.\textsuperscript{241}

The Garrison brothers, innocent or not, were sentenced in 1998 under the FSG. Their employment record and education were likely not considered. Both their promising futures, and Lamont’s job as a juvenile counselor were ignored. The speech of the FSG denied these aspects of their histories. In this gap created by the FSG was filled a mere drug

\textsuperscript{235} Id. at 5.
\textsuperscript{236} Id. at 13-14.
\textsuperscript{237} Id. at 15.
\textsuperscript{239} Sunstein, supra note 14, at 995; One section of Sunstein’s article is entitled “Rules Can Be Dehumanizing and Procedurally Unfair; Sometime It Is Necessary or Appropriate to Seek Individualized Tailoring.”
\textsuperscript{240} FAMM, Profiles, supra note 238.
\textsuperscript{241} Id.
quantity: 10 kg of powder cocaine and 500 g of crack cocaine. The Garrison brothers have become Criminal, marked with the modern-day scarlet letter of Drug Dealer.

F. Neglect and Error

The costs of error under a rule-based system such as the FSG are high.\textsuperscript{242} Marsha Cunningham is a testament to this notion. She was convicted in 1998 of possession of 283 g of powder cocaine and 123 g of crack cocaine.\textsuperscript{243} She received a sentence of 15 years. At trial, no evidence was admitted that tended to show that Cunningham had any contact with drugs or participated in any way with the drug deals in which her live-in boyfriend was apparently engaged. The evidence that convicted her was circumstantial, such as the facts that she paid her rent in cash, owned three cars, and had closed her checking account because she had developed a problem with writing bad checks. If she is innocent of the drug charges, the error here has led to serious consequences.

It is not a stretch to say that the court in Cunningham’s case had some level of doubt as to her guilt. Based on circumstantial evidence, it has to be admitted that the court and jurors could not have known of what exactly she was guilty, or whether she was guilty at all. And when the court or jury as speaker does not know something, it is forced into mental automatism, and into making sense by equalizing unequal individuals. The attempt to achieve consistency through a constant, uniform structure creates ignorance of dehumanization and re-creation of the human. The FSG produce such dehumanization by engaging directly in mental automatism. The goal of the FSG is to “avoid the confusion...that arises out of the present [discretionary] sentencing system.”\textsuperscript{244} The FSG would replace this confusion with “uniformity” and “honesty”—or certainty—in sentencing.\textsuperscript{245} This confusion, this doubt as to an offender’s true culpability and this fear of judging\textsuperscript{246} the individual, drives a mental automatism that demands predictability and rule-based uniformity. Where this system abandons the rehabilitative ideal of sentencing, it also abandons notions of hope and faith. If these two notions are fundamentally human, then the FSG, in demanding certainty, and by that certainty, a refusal to consider the offender, produce dehumanization. The offender becomes a Criminal, and the judge an automaton.\textsuperscript{247}

\textsuperscript{242} Sunstein, supra note 14, at 1014.
\textsuperscript{243} FAMM, Profiles, supra note 238.
\textsuperscript{244} USSC, Guidelines Manual, supra note 10, at 2.
\textsuperscript{245} Id.
\textsuperscript{246} See generally Stith & Cabranes, supra note 24.
\textsuperscript{247} Zlotnick, supra note 20, at 212.
G. Neglect and the Autonomous Ego

Lacan abhors what he sees as an American notion of the "autonomous ego," a concept that American therapists introduce as "a stable value... a standard by which to measure reality." This is the man-as-an-island concept, the idea that one can be free from the influence of others, stand on his own feet, and, despite societal disparities, be equal to anyone else. This was the unstated assumption in Lochner v. New York, and seems implicit in the Federal Sentencing Guidelines. We are all equal, regardless of our backgrounds. Thus, the FSG reject as "not relevant" an offender's "Lack of Guidance as a Youth and Similar Circumstances." Thus, the offender from a broken home full of physical and sexual abuse and drug addiction on the part of her caregiver will be treated the same, and assumed to be as culpable, as an offender from a stable family who had consistent opportunities to learn good lessons of morality from exemplary role models. Lacan's American autonomous ego thus rejects one's personal history as a force shaping one's life today.

For this reason, one aspect of Lacanian analysis is "the putting into effect of a reintegration of history." This is an important point for Lacan since "language is completely burdened with our history." To understand our real selves, we must understand the network of symbols in which we operate, and to understand that, we must understand our history that shapes and informs that network. History, therefore, leads to humanization by leading to a real understanding of the human. As Lacan writes, "the restitution of the subject's wholeness appears in the guise of a restoration of the past." The FSG deny this reintegration and humanization wholeheartedly by rejecting the offender's history in sentencing. They reject this history, more precisely, when that history would mitigate the offender's sentence. Thus, when an offender has a criminal history, the FSG readily calculate that to determine both culpability and risk of future...
recidivism.\textsuperscript{256}

If a subject remains unwhole without an integration of her past, then without history, people remain dehumanized. For Lacan, this is the condition in the United States: “the condition...of ahistoricism...is widely recognized as a major feature of ‘communication’ in the United States.”\textsuperscript{257} The notion of an autonomous ego and ahistoricism hand in hand serve to tie us off from the history that can give us knowledge of the network of symbols. The network exists to delude, to fragment, to dehumanize, and the knowledge is necessary to enable us to grasp the real, ambiguous human outside of dehumanizing definitions.

It is an optimistic sign that post-\textit{Booker} decisions seem to be integrating the offender’s history in formulating sentences.\textsuperscript{258} At the very least, courts post-\textit{Booker} are able to do so. Whether Congress acts in the future to prevent this integration remains to be seen. Hopes in this regard, however, cannot be high.

\section*{IV.}
\textbf{RE-CREATING THE OTHER}

Lacan’s work points to a dehumanization of the other that is characterized by imposed uniformity, unitization, and equality of all human objects. This is an imposition because it is an assertion founded upon misrecognition of the other.\textsuperscript{259} Lacanian dehumanization finds the human subject essentialized because he is located in a symbolic structure.\textsuperscript{260} One of Lacan’s seminar attendees, M. Hyppolite, suggests this in protest, when he comments that “\textit{If one arrive at the integration of being, man must forget the essential.}”\textsuperscript{261} The human subject, moreover, is objectified.\textsuperscript{262} In the FSG, the goal is uniformity\textsuperscript{263} through rejection of subjective factors and an embrace of objective ones.\textsuperscript{264}

Indeed, there is ample evidence that the FSG presided over a system that essentialized offenders. Rejection of numerous offender-focused

\textsuperscript{256} Freed, \textit{supra} note 21, at 1717: “In the end, the Commission chose to acknowledge the relevance only of a person’s criminal characteristics, and tallied them up arithmetically in its matrix categories I, II, III, IV, V, and VI.”


\textsuperscript{258} See generally 18 U.S.C. §3553, commentary.

\textsuperscript{259} Id.

\textsuperscript{260} See \textit{Lacan, Book I, supra} note 201, at 65.

\textsuperscript{261} Id. at 192.

\textsuperscript{262} Lacan, \textit{Écrits, supra} note 257, at 22: “systematic misrecognition and objectification...characterize ego formation.”

\textsuperscript{263} Farabees, \textit{supra} note 205, at 613.

\textsuperscript{264} Hofer & Allenbaugh, \textit{supra} note 213, at 70.
factors placed offenders on an external matrix that determined their culpability without determining who they were as individuals. Without consideration of such factors injustice ensues.\textsuperscript{265} This judge, furthermore, links consideration of non-relevant factors to mandatory minimums, which also lead to injustice. Federal District Court Judge Paul A. Magnuson concurs. He has stated that “mandatory minimum sentences—almost by definition—prevent the Court from passing judgment in a manner properly tailored to a defendant’s particular circumstances.”\textsuperscript{266} This essentialization rests on the assumption that offenders are all alike: when he comes into the courtroom for the first time, we already know who the offender is and what he is about. We need not, therefore, consider his individuality, which is nonexistent. He is a Criminal, and so we apply the same presumptive sentence to him that we apply to other Criminals involved in the same crime. The offender ceases to be a person and becomes a \textit{type} of person—a criminal.

\textit{A. Creating the Criminal, “Raceing” the System}

The FSG as Lacanian law-giver create people as Criminal through the language of higher or lower sentences imposed for certain crimes. This language carries the utmost power—the power to mark a person throughout his or her life (with the modern-day scarlet letter, ) Is this an appropriate? Do you need to keep this? the mark of the Criminal\textsuperscript{267} through sentencing, the offender receives his dehumanization alongside his new identity as Criminal. By receiving this mark, the FSG symbolizes the offender and place one in relation to others—others now are to fear and suspect the Criminal, and never to pity or have compassion for her(why use her?..Used him earlier in paragraph- Be consistent). The offender is re-created in the harshest, most personal way. He becomes a mere unit in “a box on the Sentencing Guideline grid.”\textsuperscript{268} He becomes an embodiment of criminality that is beyond reform.\textsuperscript{269}

By bestowing marks of greater or lesser criminality on people, the

\textsuperscript{265} FAMM, Judges, supra note 67: “Statutory mandatory minimum sentences create injustice because the sentence is determined without looking at the particular defendant...it could make no difference if the day before making this one slip in an otherwise unblemished life the defendant had rescued 15 children from a burning building or had won the Congressional Medal of Honor while defending his country.”—J. Spencer Letts, U.S. District Judge, Central District of California, Senior Status 2000.

\textsuperscript{266} Id.


\textsuperscript{268} Id.

\textsuperscript{269} Walton, supra note 48, at 390.
FSG track racial divides (What do you mean by this sentence..clarify) If we compare FSG policies and sentences for economic (white-collar white crimes), drug, immigration (Hispanic), and violent (white) crimes, we find that minority crimes are treated to more dehumanization and more serious sentences than economic crimes. We also find the (lie) Choose a better word- reorganize sentence given to those who claim that drug crimes are simply more dangerous (read: violent) than white-collar crimes, and therefore must be punished more severely.

Drug crimes—charged predominantly to black and Hispanic defendants—can in a few cases call for a base offense level of 43, the highest level and thus equated with first-degree murder and treason. Smuggling, transporting, or harboring an unlawful alien, charged overwhelmingly to Hispanic defendants, may carry with it a base offense level of 23, five levels higher than that of statutory rape and, ironically, one level higher than that which may apply to a defendant engaged in slave trade. The Commission has made it clear that ever-increasing sentences for drug offenses are the mark of the FSG’s success. Immigration cases have also been subject to this policy of increase. In fact, drugs and immigration have driven the growth of the federal prison population under the FSG.

Inequality is found in the policy dealing with offenders. Crimes committed primarily by white offenders, such as fraud, tax crimes, and embezzlement have actually seen lower imposed sentences under the

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270 USSC, Sourcebook, supra note 270, at Table 4.
272 Id. at 377.
273 Id. at 44.
274 Id. at 255.
277 Id. at 57.
278 Id. at 213.
279 USSC, Fifteen Years, supra note 68, at vii: praising itself, the USSC wrote that “there has been a dramatic increase in time served by federal drug offenders following implementation of the guidelines...time served by federal drug traffickers was over two and a half times larger in 1991 than it had been in 1985.”
280 USSC, Downward Departures, supra note 92, at 37: from 1991 to 2001, “the proportion of immigration offenses...more than doubled...from 6.9% in fiscal year 1991 to 17.5% percent in fiscal year 2001...By fiscal year 2001, 10,457 immigration offenses were sentenced under the guidelines compared to 2,300 in fiscal year 1991.”
281 USSC, Fifteen Years, supra note 66, at 47-48: “[a]t the beginning of the guidelines era, approximately half of the persons sentenced under the new laws were drug offenders...that proportion has decreased to about 40 percent in recent years, largely due to a substantial increase in immigration offenses.”
282 USSC, Sourcebook, supra note 270, at Table 4.
Although the actual length of the sentences has remained constant at around 15 months, sentences imposed have decreased from around 29 months in 1984 to around 18 months in 2002. (Elaborate on data and statistics)

B. The Master Unitizes the Hysteric

This unitization of the human, this making of each person a unit ostensibly equal in the eyes of the law to every other human, is embedded in a Lacanian system that structures institutional and interpersonal relationships. The Federal Sentencing Guidelines have a real impact on individuals because of it’s’ structure and follows that they are susceptible to Lacanian analysis, since “an act, a true act, always has an element of structure.”

The structure of the has many aggravating factors and a few mitigating ones. The unit by which all offenders are to be judged is the offense level—their temporal period of incarceration. For example: no longer is the offender to be judged based on his susceptibility to rehabilitation. No longer will the offender be able to make good in prison and receive early parole. No longer will a judge be able to sentence someone to a treatment facility. Offenders become units, variables in calculation that results not in a sentence that answers to traditional sentencing goals, but in sentence that results from a system that is determined to reform all offenders into Criminals.

Lacan elaborates and goes deeper with the idea of re-creation. He suggests that something must drive the dehumanization and re-creation of people in the law, referred to as the Lacanian master. This powerful entity controls the definitions of things and people who must maintain this power in order to "sustain [itself] as a concrete reality." This is analogous to the white and wealthy master in the FSG. This master protects its own by setting low sentences for economic crimes and punishing those who hurt its kin: one commentator notes that “[a] number of studies suggest that African-American defendants are more likely to be incarcerated and

283 USSG, Fifteen Years, supra note 68, at 59.
284 Id. at 58.
285 Id. at 59.
286 Lacan, Book II, supra note 253, at 34 “a law [consists of] certain structural relations.”
288 Bowman, supra note 22, at 1326.
289 Walton, supra note 48, at 390.
290 FAMM, Profiles, supra note 238.
291 DRAGAN MIOVANOVIC, POSTMODERN CRIMINOLOGY 57 (1997).
receive more severe penalties when the victims and the judge are white." 292
(Explain quotation and insert one or two sentences about purpose of paragraph)

Congress has proven to be this master. This legislative body has consistently
pushed for higher sentences against offenses charged primarily to blacks. 293 In fact, Congress has
rejected the Sentencing Commission’s recommendation to change the much-vilified 100:1
crack:coke cocaine ratio, which disparately impacts the black community. 294 Given this
recommendation and the Commission’s apparent skepticism toward
PROTECT and Congress’ assault on downward departures, 295 there are
indications that the Commission is moving away from its position as one-time master which worked a policy of blind sentence increases. As a result, Congress has assumed this position. Doubtful feelings arise because the master’s language includes emphasis on sentence increases and criminals—particularly drug criminals—as “inhuman...non-citizens...a scourge...[and] animals.” 296 Furthermore, Congress will perform the tough-on-crime role for political survival, 297 resulting in a societal perspective that portrays offenders as animals, a scourge, and generally non-human. (Citation?) The problem of dehumanization is not one, therefore, of a structure that can be more intelligently and humanely made; it is, rather, about people’s underlying psychological make-up. This is where the problem lies and the reason the problem is so intractable. (Good)

The master perpetuates itself as a concrete reality through the
language of the law. 298 To maintain its power, the master marginalizes its
opposite, the hysterical, which represents the out-groups, the people not in
power, 299 the people who receive the “imperativeness and simple
tyranny” 300 of the master’s pronouncements. The master gets away with this
paternalistic definition and commanding of the other because it cloaks itself
in its obvious paternalism: the law takes the place of the father,

one of the people who makes the laws or presents himself as a pillar of

292 Floyd D. Weatherspoon, The Devastating Impact of the Justice System on the Status of
293 See DERRICK BEL, SILENT COVENANTS 44 (2004).
294 USSC, Fifteen Years, supra note 68, at 51.
295 USSC, Downward Departures, supra note 92, at iv-v.
296 Margaret P. Spencer, Sentencing Drug Offenders: The Incarceration Addiction, 40 VILL. L.
297 Id. at 338.
298 Milovanovic, supra note 291, at 71: “Lacan’s work...offers...mechanisms by which
agency in relationship to social structures could be understood. Legal ideology is transmitted by
dominant linguistic coordinate systems, most importantly the juridic form. This represents the
discourse of the master.”
299 Id. at 60.
300 Lacan, Book I, supra note 201, at 102.
faith, as a paragon of integrity or devotion, as virtuous or a virtuoso, as
serving a charitable cause whatever the object or lack thereof that is at
stake, as serving the nation or birth rate, safety or salubrity, legacy or
law, the pure, the lowest of the law, or the empire.\footnote{Lacon, Ecrits, supra note 257.}

The pillar of faith must have the last word and accordingly must be the
tyrant. The FSG took this power away from judges and deposited it in
Congress through the Commission. PROTECT further de-paternalized
judges by installing de novo appellate review.\footnote{American College of Trial Lawyers, supra note 62, at 25.} After PROTECT, trial
judges—the judges who see first-hand the defendant, witnesses, and
evidence—became little more than a rubber stamp. (Choice of related
examples...use different example) If they exhibited the slightest amount
of discretion, their entire sentencing process could be reviewed and
overturned. PROTECT went further, de-paternalizing the Commission by
preventing it from installing new factors for downward departures.\footnote{Id. at 25-26.} The
Act also made the DOJ father to the courts by requiring the Attorney
General to report all downward departures and the name of the judge
issuing the departure to the House and Senate Judiciary Committees.\footnote{Farabee, supra note 205, at 607.} The
tyrant must always watch his subjects for insubordination. In response, the
subjects—the judges—try to “get around” the tyrant’s rules.\footnote{Id. at 617.} As in all
tyannies, the law is “foisted on the public”\footnote{Lacon, Book I, supra note 201, at 156-57.}: on the judges who can no
longer judge, on the Commission which seems to be more and more a tool
of Congress and skeptical of Congress’ policy of sentence increase, and,
most of all, on criminal defendants who have no say in the system but who
stand to lose the most in it. The period of the FSG thus emerges as a
Freudian battle between master and subject. When finally the subject finds
power through his voice by deciding Booker, the master moves to erase the
voice, just as Congress is moving to get around, limit, and otherwise
eradicate the decision.

At this point, we have discussed how the law denies a person’s
humanity. However, it creates something new in its place, since “[a]t each
instant of its intervention, this law creates something new. Every situation
is transformed by its intervention.”\footnote{Id. at 198.} The re-creation of an individual
depends on what will best eliminate discordant ideas, since “[a] discordant
statement [is] unknown in law.”\footnote{Id. at 187.} This may be seen as Lacan’s way of
saying that the law as a master will do what it must to preserve its power,
that is, to preserve "the existing relations of production and the moral and social order." Therefore, if society views minorities as criminal, then the FSG will shape itself to fulfill that prophesy. If judges are seen as abusive of their discretion in judging, then the FSG will create judges that are "mere automatons, permitted only to apply a mathematical formula." If the Sentencing Commission becomes sympathetic toward the idea of downward departures and the rigid strictures of PROTECT, then Congress will create a Commission that becomes a mere tool for a tough-on-crime policy of sentence increases. The master wants uniformity, predictability, and severity, and will censor and re-create others in its drive to achieve these goals.

C. Language

[In linguistics there is the signifier and the signified and . . . .the signifier is to be taken in the sense of the material of language. . . The signified is . . . the meaning. . . The system of language . . . never results in an index finger directly indicating a point of reality; it's the whole of reality that is covered by the entire network of language.]

Language is therefore the stuff of the network of signifiers that cover the real signified concepts. This is not a benign cover-up. Language is central to the Lacanian symbolic register, but since we establish our own egos through reflection off of others and we use language to do so, language is also a part of the imaginary register. Thus, it enables the objectification (read: dehumanization) of the other:

Language is so made as to return us to the objectified other, to the other whom we can make what we want of, including thinking that he is an object, that is to say that he doesn't know what he's saying. This objectification of the offender, beyond simply dehumanizing him, neglects an offender's true culpability and elevates objective factors, such as drug quantity or dollar amounts, to a significance beyond their worth. The FSG perform this dehumanizing through creating a system of imprisonment sentences as

309 Milovanovic, supra note 315, at 82.
311 Zlotnick, supra note 20, at 212.
312 Lacan, Book III, supra note 200, at 32.
313 Lacan, Book II, supra note 253, at 244.
314 Hofer & Allenbaugh, supra note 213, at 70.
315 Id.
signifiers. Crimes, aggravating and mitigating factors, base offense levels, and sentence ranges all conspire to signify something about the offender—namely, that he is a lesser or greater Criminal. The FSG, through language, thus separates the offender from his reality as human.

The “wall of language” separates people from each other, and our reliance on imagery to establish our egos forces upon us “a relation of gap, of alienating tension” with others. Language and the network of symbols it creates and in which we operate thus enables us to split others off from us and thereby to dehumanize them. This may be easily done, since “language is as much there to found us in the Other as to drastically prevent us from understanding him.”

D. Speech Creates and Transforms

In making truth, speech also transforms the object of speech: in its symbolizing function. . . [speech] tends toward nothing less than a transformation of the subject to whom it is addressed by means of the link it establishes with the speaker—namely, by bringing about a signifying effect.

Speech, as we have seen, turns the offender into a single Criminal unit, and this transformation often follows racial and class lines. The power of speech to create truth and the human, for Lacan, cannot be underestimated. He writes that

[Founding speech, which envelops the subject, is everything that has constituted him, his parents, his neighbors, the whole structure of the community, and not only constituted him as symbol, but constituted him in his being. The laws of nomenclature are what determine—at least up to a point—and channel the alliances from within which human beings copulate with one another and end up by creating, not only other symbols, but also real beings, who, coming into the world, right away have that little tag which is their name, the essential symbol for what will be their lot.]

Federal Sentencing Guidelines and the legal process leading up to their application engage in speech: they communicate to the defendant and the community who the defendant is, and once the defendant is labeled as “convict,” “rapist,” or “prisoner,” that defendant becomes that label, both in symbol and reality. When the defendant has done his time, has ostensibly paid his due back to the community, the tag remains, and he will

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316 Lacan, Book II, supra note 253, at 244.
317 Id. at 232.
318 Id. at 244.
319 Lacan, Ecrits, supra note 257, at 82.
forever be convict, rapist, or prisoner. The Federal Sentencing Guidelines create truth by condemning certain acts to certain degrees—some drug offenses are more condemnable than rape, for example—and they label transgressors as "criminal" with all the associated negative connotations of that word. The transgressors become criminal, because the legal power structure has spoken this word and society has believed it.\footnote{231}

The offender as criminal becomes unitized. The male drug dealer convicted of possession with intent to distribute 500 g of cocaine becomes equal to his girlfriend who helps him out by holding the money and the drugs.\footnote{232} The underlying idea here is that women and men are equal—regardless of gender, relational dynamics, need, and any other relevant offender or situational characteristic, both man and woman are equalized and unitized, most often through the singular lens of drug quantity. Vicenta Villarreal was thus unitized. She assisted her family’s heroin distribution ring by buying lactose, a substance used to dilute the purity of heroin, and providing heroin to one particular street vendor.\footnote{233} She was charged with and convicted of conspiracy to possess in excess of 1 kg of heroin, and received a sentence of 12 years, 7 months. At her sentencing hearing, the judge remarked that, “the guidelines here are stiff and frankly ... I don’t think that they need to be this high in your case.”\footnote{234} Drug crimes are not the sole repositories of the unitization of women, however. Monica Clyburn was pregnant and she and her boyfriend had no money and numerous bills to pay.\footnote{235} They decided to sell her boyfriend’s gun at a pawnshop. Since her boyfriend did not have any identification, Monica left her thumbprint and signed the pawn slip. Because of this action and her three prior drug arrests, Monica came to be considered a felon in possession of a firearm. She was sentenced to 15 years, where she had never even held the gun in question.\footnote{236}

We look for language that universalizes, that unitizes the human through instauration of ostensible “equality” among people. We look for structure and definition. In the FSG, we may find this in the “institutionalized unfairness” of the system, which the Commission itself acknowledges.\footnote{237} We look for paternalism in a master-hysterical discourse.

\footnote{231} Lacan, Book I, supra note 201, at 240: “Speech is precisely only speech in as much as someone believes in it.”
\footnote{232} FAMM, Profiles, supra note 238: see the profile of Stephanie George.
\footnote{233} FAMM, Profiles, supra note 238.
\footnote{234} Id.
\footnote{235} Id.
\footnote{236} Id.
\footnote{237} USSC, Fifteen Years, supra note 68, at 135,137: “if unfairness continues in the federal sentencing process, it is more an ‘institutionalized unfairness’...built into the sentencing rules themselves rather than a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges. Most of the difference between the average sentences of Blacks, Whites,
view to reduced crime levels and the achievement of all the above goals, support the FSG and Congress’ tough-on-crime approach. By placing humanization as the primary goal in sentencing, we seek to apply a sentence that is truly proportionate to the blameworthiness of the offender. In so doing, we must consider the offender’s personal history, the offender’s mental and emotional condition, his age, and all the other factors—and more—that the FSG prohibit. In this, there must be a large space for judicial discretion to go beyond any structure that would be in place.

Humanization also works for rehabilitation of offenders who can benefit by it, and against rehabilitation efforts for offenders who would not thereby benefit. If an offender can be helped by job training, mental health counseling, or sentencing to a halfway house as opposed to prison, we owe it to society at large to do our best to re-introduce into that society an offender that has made improvements and is thereby ready to contribute to society in a positive way. If, on the other hand, the offender is not susceptible to rehabilitation, humanization may also lead to incapacitation.

The goal of humanization does not mean that we treat offenders leniently. It means that we seek to appreciate the offender in all her complexity, that we understand her potential, her danger, her culpability. If, through this process, we learn that the offender cannot be rehabilitated and is a danger to society, then we incapacitate that offender through imprisonment. This too is humanization.

Finally, humanization may actually serve the goal of deterrence by the likelihood that a system that treats offenders as unique individuals will be accorded greater legitimacy by society. If we humanize the offender in sentencing, we will work to resolve unwarranted disparities in sentencing between white and minority offenders. We will work to formulate punishments that address the unique needs of female offenders. We will accord poor offenders the same opportunities, responsibilities, condemnations, and salvations that we accord wealthy offenders. In so doing, these groups, who have been forever marginalized and discriminated against in our country’s criminal sentencing system, may be more likely to buy in to the system. To the extent that a system’s increased legitimacy means that others are more likely to obey that system’s rules, humanization in sentencing will serve the goal of deterrence.

It is a simple thing, but not an easy one. How do we infuse humanity into sentencing? How do we both present as a concrete, consistent principle a notion that relies on nondefinition, ambiguity, and unpredictability? It is not easy. If, however, we are to construct a sentencing system that is both humane to the offender and responsible to society, we must place the goal of humanization at the top.