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TURNING RAT AND DOING TIME FOR UNCHARGED, DISMISSED, OR ACQUITTED CRIMES: DO THE FEDERAL SENTENCING GUIDELINES PROMOTE RESPECT FOR THE LAW?

Keri A. Gould

I. Introduction

The impetus for this article was a lunch I had with an attorney-friend who primarily represents indigent federal defendants. En route to the restaurant, my friend bitterly complained about the institutional injustices suffered by his clients, most of whom have been arrested on federal drug-related charges. "In particular," he decried, "the government makes all of its cases by 'turning rats'—by


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1 Nationally, over 1/3 of the combined state and federal new inmates are drug offenders. Over 60% of those in federal prisons have been convicted of drug offenses. Jack B. Weinstein, The War On Drugs Is Self-Defeating, N.Y. TIMES, July 8, 1993 at A19. In 1981, drug defendants numbered about 7,500, comprising close to 18% of the federal criminal caseload. By 1990, federal drug offenders numbered more than 20,000 or about one third of the caseload. Nationally, more than 64% of the federal criminal caseload increase over the past decade is due to drug cases. Terrence Dunworth & Charles D. Weisselberg, Felony Cases and the Federal Courts: the Guidelines Experience, 66 S. CAL. L. REV. 99, 124 (1992).

2 "Rats," "snitches," "stoolies," "finks," or persons who "turn" or "twist" are all terms which refer to informants. Popular imagery of such people is particularly negative. James W. Marquart & Julian B. Roebuck, Prison Guards and "Snitches", 25 BRITISH J. CRIM. 217, 217 (1985); Evan Haglund, Note, Impeaching the Underworld Informant, 63 S. CAL. L. REV. 1405, 1408-9 (1990) (a "twist" or immunized informant trades information for leniency on his charges).
shaking down the small-time criminals\textsuperscript{3} so that they inform on friends and family.\textsuperscript{4} Having practiced in the New York State system, where "turning"\textsuperscript{5} defendants is less common, I inquired about how federal prosecutors are able to turn rats with such ease and with such a high rate of success.\textsuperscript{6} My friend replied that Assistant United States Attorneys are able to compel compliance from defendants because the United States Sentencing Guidelines permit departures from the applicable guideline sentencing ranges\textsuperscript{7} or mandatory minimum


\textsuperscript{4} The federal government has increasingly used the defendant's former cohorts, other criminals acting as informants, and even family members coerced into informing on relatives, as the source of such witness testimony. Steven S. Nemerson, Coercive Sentencing, 64 Minn. L. Rev. 669, 679 (1980).

\textsuperscript{5} "Turning" occurs when a defendant is turned into a witness for the prosecution, for which he or she generally receives a more favorable sentence. Selwyn Raab, The Care And Feeding of a Mafia Turncoat, N.Y. Times, Mar. 8, 1992, § 4, at 16.

\textsuperscript{6} Success is measured here by the number of convictions sustained on the basis of "rat" testimony. No information is available on the number of cases which result in convictions based upon "rat" testimony. However, such information is available with regard to the number of informants used by law enforcement agencies. In one year the FBI reported using 2,800 informants and in the previous year, paying nearly 1.5 million dollars to informants, resulting in 2,600 arrests. Haglund, supra note 2, at 1411.

\textsuperscript{7} To sentence a person convicted of a federal crime which does not carry a statutory minimum (or maximum), judges must use the essentially mathematical calculation delineated in the United States Sentencing Guidelines Manual. See infra, notes 59-71 and accompanying text. Judges may depart downward from the presumptive range pursuant to the guidelines for rendering substantial assistance to the government resulting in a fruitful investigation or conviction upon the motion of the prosecutor. 18 U.S.C.A. app. 4 § 5K1.1 (West Supp. 1993). See also Wade v. United States, 112 S.Ct. 1840, 1843-44 (1992) (courts may only review prosecutor's refusal to file a motion for
sentences only when the prosecutor makes a motion to decrease the sentence due to the defendant's substantial assistance in the investigation or prosecution of another person.

There are a significant number of federal offenses which require statutory minimum periods of incarceration. Approximately 100 separate federal mandatory minimum provisions are currently codified. Only four of those statutes, relating to firearm and drug offenses, account for the majority of mandatory minimum sentences. Dunworth & Weisselberg, supra note 1, at 111. Judges may depart below the set minimum sentence pursuant to 18 U.S.C. § 3553(e) (1993), for rendering substantial assistance, which also requires a government motion.

See 18 U.S.C.A. app. 4 § 5K1.1 (West Supp. 1993) and 18 U.S.C. § 3553(e) (1988). "The guidelines provide only one way to avoid prison: the accused must 'cooperate' and furnish 'substantial assistance' to the government." John Lewis, Cooperation Under the Guidelines, N.Y.L.J., Apr. 30, 1993, at 2. However, this is not the only way to depart from the guideline minimum sentences. 18 U.S.C. § 3553(b) (1992) and 18 U.S.C.A. app. 4 § 5K2.0 (West Supp. 1993) allow judges to deviate in the "atypical case" where "mitigating circumstances exist which have not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The district court must state the "specific reason" for such a departure. 18 U.S.C.A. § 3553(e)(2) (West Supp. 1993). Any such departure may be reviewed by an appellate court. 18 U.S.C. § 3742(f) (1993). An upward departure is subject to appeal from the defendant and a downward departure is subject to appeal from the prosecutor. Under 18 U.S.C.A. app. 4 § 5K2.0 (West Supp. 1993), the guidelines allow judges to depart downward based upon the victim's conduct, 18 U.S.C.A. app. 4 § 5K2.10 (West Supp. 1993); lesser harm, 18 U.S.C.A. app. 4 § 5K2.11 (West Supp. 1993); coercion and duress, 18 U.S.C.A. app. 4 § 5K2.12 (West Supp. 1993); or diminished capacity, 18 U.S.C.A. app. 4 § 5K2.13 (West Supp. 1993). For instance, diminished capacity may be cause for a downward departure where "the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs and other intoxicants." 18 U.S.C.A. app. 4 § 5K2.13 (West Supp. 1993).

In practice, district courts have infrequently departed from guideline ranges and such departures have frequently been overturned by the appellate courts. Cf. Williams v. United States, 112 S. Ct. 1112, 1120 (1992) (adopting a two-part departure analysis where the reviewing court must first determine if there was an incorrect application of the guidelines under 18 U.S.C. 3742(f) (1993) and second, if the resulting sentence is an unreasonably high or low departure from the relevant guideline range); United States v. Restrepo, 999 F.2d 640, 644 (2nd Cir. 1993) (alien status may warrant leniency in an extraordinary case, but impending deportation of defendant is not enough to trigger
"It is no secret," my friend went on, "that federal sentences are excessive and overly harsh, particularly in relation to drug cases," which make up the large bulk of a Federal Criminal Justice Act attorney's caseload. When faced with the prospect of extraordinarily long incarceration, many defendants see no other option than to do or say whatever it is which will spare them from greater prison time."12

"As if that wasn't bad enough," he went on, "during the sentencing phase of the trial, the judges can consider evidence of
uncharged crimes, dismissed counts, and even charges for which the defendant has been acquitted."13 "Think of it," he exclaimed, "even if your client was acquitted of a crime, or the charges were dismissed pursuant to plea negotiations, those alleged crimes can still legitimately impact your client's sentence."14

13 A person may be sentenced to prison on the basis of conduct of which a jury has acquitted him, or on the basis of charges that did not result in conviction. Daniel J. Freed, Federal Sentencing in Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 YALE L.J. 1681, 1714 (1992). The argument, of course, is that the uncharged, dismissed, or acquitted crimes are related conduct which should be taken into consideration to apply a "just" sentence. William W. Wilkens & John R. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. REV. 495, 514 (1990). A decision was made by the United States Sentencing Commission ("Commission") to use a hybrid "real offense" sentencing system rather than a "conviction based" system. 18 U.S.C.A. app. 4 § 1B1.2 (1993). See generally Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 HOFSTRA L. REV. 1 (1988) (discussing compromises made in order to use this system). A "real offense" system allows the judge to consider factual information about the crime which was not brought out in the trial as well as other allegations against the offender which have never been "acknowledged by the defendant nor proven in court beyond a reasonable doubt." Freed, supra at 1712. See also United States v. Rodriguez-Gonzalez, 899 F.2d 177, 181-82 (2d Cir. 1990) (double jeopardy and due process are not violated when defendant's sentence is enhanced on basis of conduct which resulted in an acquittal of those charges), cert. denied, 498 U.S. 844 (1990). Contrary to the federal system, the Minnesota guidelines reject real offense sentencing (as did every other sentencing commission convened in the United States) with the rationale that due process is offended when the government or court allows the use of unadjudicated crime information to enhance guideline sentences. Freed, supra at 1713 n.168.

My friend believes that the system is fundamentally unfair, and is supported and promoted by legislative rules and prosecutorial procedures which oppose fundamental values established in our society. He finds it reprehensible that clients are forced to make impossible decisions between inordinately long periods of incarceration or "ratting" and placing themselves and their families at risk.

My friend, a seasoned defense attorney, feels so ethically maligned by the system that he questions whether the federal sentencing guidelines, or the actions of those empowered under the guidelines, square with society's ideals of morality and fairness. It stands to reason that the same consternation is felt by federal defendants and inmates. This pervasive sense of injustice is support its probable accuracy. See United States v. Marshall, 519 F. Supp. 751 (D.C. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978). The Commission believes that the preponderance of the evidence standard is appropriate to resolve factual disputes. 18 U.S.C.A. app. 4 § 6A1.3 (1993); FEDERAL SENTENCING GUIDELINES MANUAL 339 (West 1993) (commentary). The Ninth Circuit defines preponderance of the evidence in sentencing as "a sufficient weight of evidence to convince a reasonable person of the probable existence of the enhancing factor." United States v. Restrepo, 903 F.2d 648, 654-5 (9th Cir. 1989); reh'g granted, 912 F.2d 1568 (1990), withdrawn in part on other grounds, 946 F.2d 654 (1991). Judges also rely heavily upon the hearsay information contained in the presentence report when determining the applicable sentence range. Probation officers conduct in-depth investigations and write the reports. FED. R. CRIM. P. RULE 32(C). See also United States v. Chaikin, 960 F.2d 171, 174 (D.C. Cir. 1992) (sentencing court may consider defendant's background and criminal history outside convicted counts and including charges in indictment dismissed by prosecutors). In addition, judges may consider evidence excluded from trial based upon Fourth Amendment violations when determining sentencing range. United States v. Lynch, 934 F.2d 1226 (11th Cir. 1991), cert. denied, 112 S.Ct. 885 (1992).

There is a long tradition of judicial leniency for informant testimony, but the Federal Sentencing Guidelines present the first time that the Supreme Court has sanctioned the codification of such behavior. See infra note 46 and accompanying text.

Jack B. Weinstein, The Informer: Hero or Villain?—Ethical and Legal Problems, N.Y.L.J., Nov. 8, 1992, at 1; Lewis, supra note 9, at 2 ("Cooperating is dangerous. Of the 13,000 people enrolled in the Federal Witness Protection Program, more than one half are at risk merely because they are related to actual witnesses.").

There is evidence that the basis of most inmate complaints is the manner in which they are treated. When inmates perceive that they are dealt with capriciously by the correctional administration or individual officers, psychological stress is created—even in the most humane of prisons. James Bonta & Paul Gendreau, Reexamining the Cruel and Unusual Punishment of Prison Life, 14 LAW & HUM. BEHAV. 347, 361 (1990).
worrisome and emphasizes the need and importance of analyzing the guidelines through a therapeutic jurisprudence perspective. In other words, essential to a policy-oriented assessment of whether the guidelines can and do fulfill their legislative goals is an investigation into the effects the guidelines have on those accused and/or convicted of federal crimes. This article begins such an inquiry by looking at particular guidelines provisions in relation to the specific goal of promoting respect for the law.

This article questions the practices of coercing defendants to "rat" in return for lesser sentences and using evidence of uncharged, dismissed or acquitted crimes to boost sentences. Specifically, this article questions whether these practices significantly contribute to the federal defendants' and inmates' perceptions of the system as immoral such that there is a measurable effect on trial behavior, correctional facility misbehavior, or on recidivism rates. In doing so, this article hopes to encourage behavioral scientists and members of the legal community to empirically study the following issues:

- Do federal defendants have the perception that the law does not support a commitment to "moral" norms?
- If so, which defendants are most likely to hold such beliefs and how, if at all, does this impact the federal criminal justice system?

One of the few studies of inmate perception of indeterminate sentencing found a disturbing theme wherein twenty percent of those interviewed (the majority of whom were serving time for serious crimes) believed that switching to a system of determinate sentencing would result in a "likely increase of violence both in and outside of prison." Calvin J. Larson & Bruce B. Berg, Inmates Perceptions of Determinate and Indeterminate Sentences, 7 BEHAVIORAL SCI. & L. 127, 132 (1989). For a definition of "indeterminate" sentencing, see infra note 111.

18 For a definition and discussion of therapeutic jurisprudence, see infra notes 22-47 and accompanying text.

19 Another aspect of this therapeutic jurisprudence perspective, although beyond the scope of this article, is the impact a defense attorney's frustration or ambivalence with adhering to certain criminal procedure provisions has on the system as a whole and on the individual client. How often, and in what manner are such frustrations communicated to clients and how do such explicit or implicit communications impact on the attorney-client relationship and case strategy? See Keri A. Gould, Therapeutic Jurisprudence and the Arraignment Process: The Defense Attorney's Dilemma—Whether to Request a Competency Examination, 16 INT. J. L. & PSYCHIATRY (forthcoming 1994) (therapeutic jurisprudence analysis of the attorney-client relationship during the arraignment process with regard to requesting a competency examination).
Do certain provisions of the Federal Sentencing Guidelines produce antitherapeutic effects on inmates? Should this have an effect on federal sentencing policy?

A discussion of these issues, examined with a therapeutic jurisprudence perspective, may enlighten us as to the faulty functioning of the federal criminal system and uncover issues to be investigated and resolved by interdisciplinary methodology.

This article proceeds in the following manner: Part II discusses therapeutic jurisprudence and its application to criminology; Part III gives a brief history and structural synopsis of the Federal Sentencing Guidelines; Part IV details the sentencing departure provisions; Part V relates those provisions to the general goals of sentencing and one specific guideline goal—promoting respect for the law; Part VI details the demographics of the federal inmate population and illustrates the way sentencing departure provisions provoke perjurious testimony at trial, correctional institution management problems, and perhaps increased recidivism rates; Part VII concludes by suggesting that if an empirical study can link the occurrence of those behaviors with inmate reaction to certain guideline provisions, then the guidelines are not promoting respect for the law as mandated by the legislature.

II. Therapeutic Jurisprudence

Therapeutic jurisprudence is an interdisciplinary approach to formulating investigative quests aimed at resolving some of the most difficult social science issues confronted by modern lawmakers. The development of this scholarly approach followed a shift within legal writings toward expanding the boundaries of interdisciplinary research, thereby promoting policy arguments to resolve social dilemmas. This shift follows a new concept of law which recognizes that legislatures and administrators, as much as judges, are primary

20 "Many such questions require analysis by economists, scientists, law enforcement specialists, sociologists, ethnicists, religious leaders and others." Weinstein, supra note 1, at A19. A multitude of difficult questions are raised in the effort to devise a more effective drug strategy. See David B. Wexler, Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship, 11 BEHAVIORAL SCI. & L. 17 (1993).
lawmakers. In today’s hands-on legal world, the analysis of a law’s direct impact on a particular social problem or set of social problems is heralded over less efficient appellate case analysis. A law is deemed successful if its results satisfactorily tackle the immediate social dilemma. This new legal scholarship often offers recommendations or reformulated areas of inquiry which instruct legislatures and other administrative bodies on how to achieve such law reform. This approach is particularly relevant when examining the federal policy on criminal justice sentencing. The federal sentencing policies were formulated by the legislature which in turn entrusted the United States Sentencing Commission to achieve its goals through the promulgation of the Federal Sentencing Guidelines.

Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent, exploring the extent to which substantive rules, legal procedures, and the roles of judges and lawyers produce therapeutic or antitherapeutic consequences. It promotes an interdisciplinary approach to assessing policy considerations in legal practice where the prescriptive focus is on the therapeutic value of the

21 Wexler, supra note 20, at 18.
22 Id. at 19.
23 Id. at 18.
24 Id. at 19.
process,\textsuperscript{27} within the boundaries set by principles of justice.\textsuperscript{28} However, such methodology does not suggest that clinical concerns predominate all others, nor does it presume to trump civil liberties.\textsuperscript{29}

\textsuperscript{27} Healthcare professionals may define the term therapeutic in its prototypical manner, such that its use as an analytically descriptive term is disputed:

I am troubled by the use of the term therapeutic and I am concerned that the good intentions [of those advocating therapeutic jurisprudence research] may be thwarted. Let me explain why:

1. The term therapeutic applies to an individual person usually. In that context it is easier (although it is still hard) to define what a therapeutic outcome should be. The use of the term as it applies to more than one person, such as with regard to the outcome of a criminal case where the impact of the process on the victim is as important as the impact on the defendant, becomes much more complicated. Almost all legal decisions are a balance of complex interests, and I don’t know if we can denote that by using the term therapeutic.

2. Even when dealing with the individual case, even in a clinical sense, it can be very difficult to decide what is therapeutic and what is not, and we [psychiatrists] go through a trial and error process trying to find that out. Wisely, the medical community has come to the notion of "above all, do no harm." This is a much more modest mandate than saying we have to be therapeutic.

3. Since we are all informed by our own training and philosophies, there is a danger that we inadvertently imbue those terms with our own meaning and I have heard therapeutic equated with civil liberties. It may be so in some cases that the greatest democracy may be the most therapeutic, but that is definitely not true in all cases. As lawyers you may be more prone to subscribe to that bias and then use the term therapeutic in a way which obviates or makes less clear where you are coming from.


\textsuperscript{28} Wexler, supra note 20, at 17.

\textsuperscript{29} Id.; Wexler & Winick, New Approach, supra note 26, at 982.
Therapeutic jurisprudence is primarily concerned with legal issues and proscribes deference to clinical expertise. Overall, therapeutic jurisprudence assumes a hypothesis-generating role which typically calls for further multi-disciplinary research.

Therapeutic jurisprudence was originally envisioned as an alternative to traditional constitutional doctrinal analysis of mental health law. Increasingly, however, there has been significant "spill-over" into other substantive fields including tort law, attorney-client relationships, criminal law, criminal procedure law, and juvenile law. This article seeks to apply the premises of therapeutic jurisprudence to generate empirical data so as to better understand the questions raised by the implementation of the Federal Sentencing Guidelines. Therapeutic jurisprudence can help to demystify the

31 Wexler, supra note 20, at 21.
33 Gould, supra note 19 (applying tenets of therapeutic jurisprudence to the lawyering skill of counseling criminal clients during the arraignment process with regard to the request of a competency examination).
application of social science in law. Thus, this article raises questions whether the effects of the perceived (or misperceived) injustices resulting from the downward departure provision for informants and the practice by which judges may consider uncharged, dismissed or acquitted crimes in determining presumptive sentence ranges, influence federal defendants and inmates in an antitherapeutic manner.

Despite voluminous materials on the public's normative judgment of appropriate federal sentencing, prosecutorial reaction to the guidelines, defense attorney opinion on the topic, and the federal judges' reactions, empirical evidence on the effects of the

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37 See Laurens Walker & John Monahan, Social Facts: Scientific Methodology as Legal Precedent, 76 CAL. L. REV. 877, 879 (1988) (stating court's reliance upon social science research should have precedential value only to the extent that it determines whether the methodology used is a legally acceptable way to prove a claim. The particular application in a single research effort would not be accorded precedential force.); John Monahan & Laurens Walker, Judicial Use of Social Science Research, 15 LAW & HUM. BEHAV. 571, 571 (1991) (increasingly courts have sought out research data on their own when the parties have not provided it).


39 The U.S. Attorney's Office in the Eastern District of New York has also acknowledged the excessive harshness of the required sentences for federal drug laws in certain circumstances. To get around the excessive sentences, charges against accused drug couriers of "mules" caught at Kennedy Airport are routinely "bumped down" to the next lowest level, a charge which does not carry a statutory minimum sentence. Daniel Wise, Procedure Allows Drug Couriers To Receive Lighter Sentences, N.Y.L.J., June 4, 1993, at 1.

40 In April 1993, Senior U.S. District Judge Jack Weinstein, of the Eastern District of New York, announced in a speech given at Benjamin N. Cardozo School of Law, that he was taking his "name out of the wheel for drug cases" because "I simply cannot sentence another impoverished person whose destruction has no discernable effect on the drug trade." At this same time, Senior U.S. District Judge Whitman Knapp of the Southern District of New York announced that he would preside over drug trials, but would refer the cases to other judges for sentencing. Both judges made these declarations based upon their belief that the government's emphasis on long imprisonment without treatment, rehabilitation or prevention was a failure. Henry J. Reske, Senior Judge Declines Drug Cases, A.B.A. J., July 1993 at 22. Judge J. Lawrence Irving resigned from the federal bench because he believed that the sentencing guidelines and the increasing number of mandatory minimum sentences were too harsh and were "dehumanizing the sentencing process." Criticizing Sentencing Rules, U.S. Judge Resigns, N.Y. TIMES, Sept. 30, 1990 at 22.
guidelines as interpreted by criminal defendants and offenders is very limited. This exemplifies the criminal justice system's condoned marginalization of criminal defendants. Unfortunately, because the courts and legislatures ignore or minimize "consumer" views and opinions on sentencing reform risks, they have "fail[ed] to obtain invaluable information from those in a position to offer unique and unanticipated insights."

The disparate treatment of criminal defendants is also shown in Michael Perlin's work on sanism, in which he describes the discriminatory, pretextual reasoning used by courts and the legal system against people with mental disabilities. Perlin persuasively argues that due to sanism, courts teleologically process social science information to ensure that the courts' preordained, pretextual result

State court judges have also joined in voicing dissatisfaction with excessive drug sentences which disproportionately affect low-level drug users. E.g., People v. Perez, 599 N.Y.S.2d 269, 270-71 (1993) (Carro, J., concurring) (defendant's sentence for drug offense modified downward in the interests of justice):

In considering this sentencing issue I cannot help but question whether the hemorrhage of taxpayer funds used to warehouse thousands of low-level drug users and sellers for long periods of time in our dangerously overcrowded prisons, at a cost of $35,000 per year per inmate in addition to the capital expenditure of $180,000 per prison cell, could not be more productively and humanely directed toward prevention, through education, and treatment of drug addiction. The increasingly unavoidable conclusion that with the passage of time is becoming more widely recognized and articulated by respected representatives of our criminal justice system, is that the primary method currently utilized to deal with the drug epidemic, essentially an effort to eliminate the availability of drugs on our streets, while increasing inordinately the length of prison terms for low-level drug offenders, has failed.

Id. (citations omitted).

One notable exception is Larson & Berg, supra note 17, at 132 (finding that more inmates in a Massachusetts maximum security prison were opposed to or undecided about, rather than in favor of, determinate sentencing. It is worth noting that at the time of the study Massachusetts had an indeterminate sentencing system, but that there was growing support for a bill seeking to implement a presumptive sentencing system which had been before the state legislature since 1884).

Larson & Berg, supra note 17, at 128.

occurs. Similarly, I opine that certain provisions of the guidelines, promulgated by the Commission and upheld by the courts, serve to marginalize defendants and inmates, ignore differing perceptions of fairness in the law, dismiss the psychological trauma of "ratting," and, in opposition to an express goal of the guidelines, breed contempt rather than respect for the legal process.

Is this simply "old law" methodology which needs to be infused with "new law" scholarship? Certainly there have been traditional constitutional challenges to aspects of the Federal Sentencing Guidelines as well as innovative theories advanced. But perhaps, as in mental health law, it is time to use an interdisciplinary approach to promote law reform in this area.

III. The Federal Sentencing Guidelines

Before considering the relationship between defendants or inmates most offended by the guideline provisions and the legislature's failure to attain its goal of promoting respect for the law, it is useful to briefly look at legislative history. The Sentencing Reform Act of 1984 was passed on October 12, 1984, to promote

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47 "In the meantime, real people in the real world face the consequences of the 'mathematization' of the criminal justice process wherein judges, lawyers, the accused and the system itself are reduced to integers in a pseudo-objective attempt to make sense out of human frailty which by definition makes none." United States v. Boshell, 728 F. Supp. 632, 642 (E.D. Wash. 1990).
honesty in sentencing and reduce sentence disparity.\textsuperscript{49} The most far-reaching provision of the 1984 Act provided for the creation of an independent commission in the judicial branch of the United States, known as the United States Sentencing Commission.\textsuperscript{50} In October 1985, President Reagan appointed seven persons to serve as the first members of the Commission.\textsuperscript{51} Congress entrusted the Commission with a mandate to promulgate binding "guidelines,"\textsuperscript{52} general "policy statements,"\textsuperscript{53} and commentary,\textsuperscript{54} to be known collectively as the Federal Sentencing Guidelines. These guidelines are contained in the United States Sentencing Guidelines Manual ("Manual"),\textsuperscript{55} and were meant to ensure a more just and effective sentencing system.\textsuperscript{56} In addition to promulgating the guidelines, the Commission also was charged with developing a way to assess the effectiveness of the guidelines in meeting the Congressionally defined goals of sentencing.\textsuperscript{57}

\textsuperscript{49} Nagel, \textit{supra} note 38, at 883 (author was the first Commissioner appointed to the Sentencing Commission); Breyer, \textit{supra} note 13, at 4.


\textsuperscript{51} Nagel, \textit{supra} note 38, at 884.


\textsuperscript{54} The Sentencing Reform Act does not specifically authorize commentary, but the Act does refer to it: "the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission [when determining whether to depart from guideline range]." 18 U.S.C.A. § 3553(b) (West Supp. 1993). \textit{See} Stinson v. United States, 113 S. Ct. 1913, 1915 (1993) (commentary which interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with or is a plainly erroneous reading of that guideline).

\textsuperscript{55} FEDERAL SENTENCING GUIDELINES MANUAL 1 (West 1993).


\textsuperscript{57} The purposes of the Commission are to:

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among
After several years of discussion, investigation and preliminary drafts, the controversial Federal Sentencing Guidelines became law in November 1987. The guidelines were greeted with an extraordinary amount of criticism and a plethora of conflicting court decisions which resulted in the guidelines' patchwork implementation. It was not until 1989, when the Supreme Court ruled in Mistretta v. United States that the guidelines were constitutional, that they were fully implemented in all jurisdictions.

The sentencing structure set up under the guidelines uses a mathematical calculation to arrive at the presumptive sentence. Under its scheme, the judge first uses a correlation table to match the statute under which the defendant has been convicted to the specific guideline which addresses that particular crime. The guideline chosen assigns a value, or base offense level, to the crime on a forty-

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58 Dunworth & Weisselberg, supra note 1, at 100-6; See Kenneth R. Feinberg, The Federal Guidelines and the Underlying Purposes of Sentencing, 3 FED. SENTENCING REP. 326 (1990) (stating that any meaningful discussion of the purposes to be served by the sentence are lost in the application of the guidelines).


60 488 U.S. 361 (1989) (holding Congress did not excessively delegate its legislative power and the creation of the Commission did not violate separation of powers).

61 This is not to say, however, that departure policies are the same in every jurisdiction. In fact, at least one study has shown that there are significant differences between districts. Nagel & Schulhofer, supra note 7, at 553.

three point scale. Then the judge adjusts the base level to account for "special offense characteristics" associated with the charges for which the defendant has been convicted. 63 Included at this stage are considerations such as whether a dangerous weapon was used in the commission of the offense. 64 The subtotal is then adjusted for special victim circumstances, 65 such as the defendant's role in the offense, whether there has been an obstruction of justice, whether the defendant was convicted of multiple counts, 66 and whether the defendant has accepted personal responsibility for the offense. 67 The resultant value equals the "total offense level." 68

Next the judge considers the defendant's criminal history and arrives at one of six criminal history categories. 69 Each category has a range of two to three criminal history points, which are determined by the length of the prior sentences. 70 The judge then plots the offense level and criminal history value on a sentencing chart made up of two hundred and fifty-eight sentence boxes on a two dimensional matrix. 71 The intersection of the two axes frames the permissible sentencing range. 72

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66 18 U.S.C.A. app. 4 §§ 1B1.1(d) and 3D1.1-.5 (West Supp. 1993).
67 18 U.S.C.A. app. 4 §§ 1B1.1(e) and 3E1.1 (West Supp. 1993). This section allows for a two-point decrease in offense level.
70 Each prior sentence of more than 13 months is assigned three points. 18 U.S.C.A. app. 4 § 4A1.1(a) (West Supp. 1993).
In reality, it is generally the probation officer, within the Pre-Sentence Investigation Report (PSI) who performs the technical calculations on behalf of the judge. At least one judge has voiced concern because "Probation reports are no longer designed to find out good as well as bad things about defendants. They merely mechanically describe what the guidelines consider relevant so that the judge often will not be aware that there is a basis for departure." In the vast majority of cases, judges simply accept the facts and calculations set forth in the PSIs.

Within the permissible sentencing range, the judge must determine an appropriate sentence, consistent with the concerns and purposes of the Act. These include the nature and circumstances of the offense, the history and characteristics of the defendant, the need to achieve the recognized purposes of sentencing, the kinds of sentences available, pertinent policy statements, the need to avoid unwarranted disparities among similarly situated defendants, the need to provide restitution to any victims of the offense, and the establishment of the sentence in the guidelines. The judge may consider any relevant information regarding the defendant’s background, character, and conduct. In practice, the phrase "relevant information," as used within the guidelines, has a

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73 FED. R. CRIM. P. 32(c) Rule 12.8.3 states:
The PSI must contain: (1) the history and characteristics of the defendant, including prior criminal record and any circumstances affecting the defendant's behavior that might be helpful in sentencing; (2) the guideline categories, types of sentences and the sentencing range that the probation officer believes apply to the particular case, and an explanation of any factors that might warrant departure; (3) pertinent policy statements issued by the Sentencing Commission; (4) the impact of the crime on the victim; (5) the nature and extent of non prison programs available to the defendant; and (6) any other information that may be required by the court in sentencing.

Criminal Procedure Project, 81 GEO. L.J. 1423, 1446-7 (1993).

74 Weinstein, supra note 12, at 8.

75 Dunworth & Weisselberg, supra note 1, at 108 (sentencing courts calculated different guidelines ranges from probation officers in only 10% of cases).


particular, rigid meaning and application. Judges generally are not free to use such information to fashion a sentence outside the boundaries set by the mathematical sentencing equation.

IV. Sentencing Departures

A. Downward Departures for Substantial Government Assistance

The guidelines that allow for judicial departure from the presumptive guideline ranges fall under two exception provisions. The first exception addresses "atypical cases" not "adequately addressed" in the guidelines, but which may warrant departure from them. The Commission promulgated a non-exhaustive series of policy statements which suggest such atypical factors.

The second departure exception is provided by Policy Statement § 5K1.1, termed "Substantial Assistance to Authorities." The § 5K1.1 departure provision does not derive its authority from § 3553(b), as in the case of the 5K2.0 departures, but was promulgated pursuant to 28 U.S.C. § 994(n), in a provision added as part of the Anti-Drug Abuse Act of 1986, and was expressly designed to function with the guidelines and the 1984 Act. In the 1986 Act, Congress also enacted mandatory minimum penalties for certain drug and weapons offenses. The number of congressionally

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82 Pub. L. No. 99-570 at § 1009.
mandated offenses with mandatory minimum sentences has increased steadily since that time.84

The Sentencing Commission issued Policy Statement § 5K1.1, effective on November 1, 1987. At that time, § 5K1.1 provided: "Upon motion of the government stating that the defendant has made a good faith effort to provide substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."85 However, amendments effective two years later, replaced "made a good faith effort to provide" with "provided."86 The Commission explained the amendment as a clarification of its intent that "departures under this policy statement [must] be based upon the provision of substantial assistance," not merely a willingness to provide such assistance.87 This amendment gave federal prosecutors even greater power to "squeeze" defendants than they previously. Now, even those who may want to "rat" may not be able to meet the high burden of providing information which results in the conviction of another. This allows prosecutors to demand even more dangerous levels of defendant criminal involvement such as wearing a "wire" or infiltrating protected conversations88 in order to qualify for the government motion for a departure below the guideline sentence or the minimum mandatory sentences.89

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84 Karle & Sager, supra note 59, at 418.
88 Cf. Nagel & Schulhofer, supra note 7, at 556 (AUSAs manipulate 5K1.1 departures for sympathetic informants).
B. Sentencing on the Basis of Uncharged, Dismissed or Acquitted Crimes

During its deliberations, the Commission debated the merits of a system where guideline range is determined entirely from the offenses resulting in conviction or from all alleged offense behavior. The Commission ultimately settled on a somewhat hybrid system. The guidelines use the conviction offense to determine the base-level offense and then, in the process of adjusting the base level offense, allow the court to consider all alleged criminal conduct of the defendant. Such information need only be established by a preponderance of the evidence. However, there have been several courts which, under certain circumstances, have required a heightened standard.

90 Wilkens & Steer, supra note 13, at 497; Breyer, supra note 13, at 8-9. See United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992) (PSIs form factual basis for judge's sentencing determinations); United States v. Boatner, 966 F.2d 1575, 1578 (11th Cir. 1992) (PSI forms factual and legal basis for judge's sentencing determination); United States v. Helmsley, 941 F.2d 71, 98 (2d Cir. 1991), cert. denied, 112 S. Ct. 1162 (1992) (PSIs provide objective and factual information); United States v. Terry, 916 F.2d 157, 160 (4th Cir. 1990) (PSI forms factual basis for judge's sentencing determinations); United States v Jackson, 886 F.2d 838, 842 (7th Cir. 1989) (court may rely upon information contained in the presentence report).

91 18 U.S.C.A. app. 4 § 1B1.2(a) (1993) (An exception to this provision states that "in the case of a plea agreement containing a stipulation that specifically establishes a more serious offense that the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.").

92 The parameters of the base level adjustments may be found in 18 U.S.C.A. app. 4 § 1B1.3 (West Supp. 1993).

93 United States v. Ross, 905 F.2d 1050, 1054 (7th Cir. 1990), cert. denied, 498 U.S. 863 (1990); United States v. Avila, 905 F.2d 295, 297 (9th Cir. 1990); United States v. Byrd, 898 F.2d 450, 452 (5th Cir. 1990); United States v. Frederick, 897 F.2d 490, 491-92 (10th Cir. 1990), cert. denied, 498 U.S. 863 (1990); United States v. Alston, 895 F.2d 1362, 1373 (11th Cir. 1990); United States v. Gooden, 892 F.2d 725, 728 (8th Cir. 1989), cert. denied, 110 U.S. 908 (1990); United States v. Silverman, 889 F.2d 1531, 1535 (6th Cir. 1989); United States v. Guerra, 888 F.2d 247, 251 (2d Cir. 1989); United States v. Williams, 880 F.2d 804, 806 (4th Cir. 1989); United States v. Urrago-Linares, 879 F.2d 1234, 1239 (4th Cir. 1989), cert. denied, 493 U.S. 943 (1989); United States v. Wright, 873 F.2d 437, 441 (1st Cir. 1989).

Not only can the judge use hearsay information contained in the pre-sentence report to increase the sentence, but, he or she can also use conduct for which the defendant was acquitted at trial to adjust the sentence upwards.\textsuperscript{95} Pursuant to the "relevant conduct" provision,\textsuperscript{96} the judge must consider all conduct involved with the charged offense.\textsuperscript{97} Relevant conduct may include acts which were neither charged as a separate offense, nor elements of the offense of conviction.\textsuperscript{98} For instance, if the defendant was charged with possession of a firearm and possession of a certain amount of drugs, but was only convicted of possession of a lesser amount of drugs, the judge, despite a jury acquittal on the other two counts, could find by a preponderance of the evidence, that the defendant had a gun and the larger weight of contraband, and sentence him or her accordingly.

Unfortunately, this anomaly has lead to abuses of the system by government agents. For instance, drug enforcement agents who are knowledgeable about the guidelines, may negotiate with the defendants to buy a larger amount of drugs than originally bargained

\textsuperscript{95} See Sargent, supra note 94, at 476; Yale Summary, supra note 94, at 2073 ("The Guideline's approach to measuring relevant conduct is seriously flawed. It measures all relevant conduct against the same scale, whether or not the defendant has been tried and convicted for the conduct. This is bad penology and bad morality.").

\textsuperscript{96} See Wilkens \& Steer, supra note 13, at 497; Sargent, supra note 94, at 469.


\textsuperscript{98} Id.
for, so as to expose the defendant to an increased sentence or they may arrange for the deal to go down in a location, such as near a school, which will lead to increased sentences under mandatory minimum laws. Unscrupulous prosecutors can then rely on judges to use this information to increase sentences even if they are unable to build a strong enough case to prove the defendant's guilt beyond a reasonable doubt on the most severe charges at trial. Reliance upon unproven allegations increases the leverage available to prosecutors in plea-bargaining and specifically in inducing recalcitrant defendants to "rat."

Thus far, these practices have stood up to constitutional challenge. Prior to the imposition of the Federal Sentencing Guidelines, judges had great latitude in sentence determinations. The Court was loath to inhibit a judge's assessment of an offender's rehabilitation potential by precluding the judge from using so-called "related information" which was subject to the evidentiary procedures required at trial. This has remained the rule despite the fact that under the guidelines, the judge's discretion in fashioning an appropriate sentence has been severely curtailed.

V. The Goals of Sentencing

It is generally accepted that there are four purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation. Throughout history, one or the other of these purposes has dominated sentencing theory and practice. At the heart of each new sentencing philosophy is a series of goals which embrace the current favored purpose. At different times, the

100 Yale Summary, supra note 94, at 2074.
101 Kinder, 946 F.2d at 362.
103 Id. at 247.
104 Nagel, supra note 38, at 887.
105 See generally id. (reviewing sentencing theory from Moses to the present).
legislature, the sentencing judge, or various other administrative groups have been entrusted with the primary responsibility of fulfilling sentencing goals.

The Sentencing Commission began its work at a time when enthusiasm for rehabilitation theory was waning. Several studies indicated that criminal rehabilitation was a dead-end goal. Public outcry about increased violence and crime placed the pressure on lawmakers to move away from indeterminate sentencing, which was believed to produce disparate sentences, and move toward a "just

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106 Congress has met this responsibility by creating the Federal Sentencing Commission and by passing legislation which delineates mandatory minimum sentences for certain crimes.

107 Federal district judges were the prime arbiters of divining sentences under the indeterminate sentencing system in effect prior to the implementation of the Federal Sentencing Guidelines. Sentences, as long as they were within the broad ranges set down by statute, were essentially unreviewable by the appellate courts. United States v. Schneider, 502 F.2d 897, 898 (8th Cir. 1974); see United States v. DeBright, 710 F.2d 1404, 1405 (9th Cir. 1982) (limited appellate review to determine if district court properly exercised discretion); United States v. Barbara, 683 F.2d 164, 166 (6th Cir. 1982).

108 Under the present indeterminate sentencing system, the Commission, and perhaps the United States Attorneys, fulfill this role. Under an indeterminate sentencing system, the parole boards function in this way by determining when an inmate is ready to be released from the correctional institution.


111 In indeterminate sentencing, an offender is sentenced to a "flexible sentence"; that is, the length of actual incarceration is handed down by the sentencing judge in terms of a minimum-maximum range. The actual amount of time served is determined by both conditional "good time" early releases (approved by the correctional facility administration) and periodic evaluations of the prisoner's overall rehabilitation (as determined by the parole board). Marc Miller, Purposes at Sentencing, 66 S. CAL. L. REV. 413, 435 n. 94 (1992).
desserts" sentencing rationale.\textsuperscript{112} The "just deserts" sentencing theory imputes a ranking of criminal behaviors by severity and applies a similarly ranked order of punishments.\textsuperscript{113} Thus, in theory, the just desserts system of sentencing advocates a system which punishes individuals who violate the rights of others in accordance with their individual level of blameworthiness\textsuperscript{114} and satisfies the public hunger for the expression of communal blame upon the culpable.\textsuperscript{115} In this way, the criminal conduct is punished without regard to individual characteristics or circumstances.

Much has been written on the purposes of sentencing under the Federal Sentencing Guidelines.\textsuperscript{116} Rather than deconstructing the layers of political rhetoric contained in the legislative history,\textsuperscript{117} this article proposes a therapeutic jurisprudence paradigm which draws upon some of the statutory purpose language of promoting respect for the law\textsuperscript{118} and the language of the enabling act which directs the Commission to develop a means of measuring the effectiveness of the guidelines in meeting its goals.\textsuperscript{119}

\textsuperscript{112} Breyer, \textit{supra} note 13, at 15.
\textsuperscript{113} \textit{Id}.
\textsuperscript{114} Nagel, \textit{supra} note 38, at 898.
\textsuperscript{116} Miller, \textit{supra} note 111, at 417; Leonard J. Long, \textit{Millers Algebra of Purposes at Sentencing}, 66 S. CAL. L. REV. 483, 483-84 (1992) (responding to Miller's \textit{Purposes at Sentencing}); Breyer, \textit{supra} note 13, at 4 (Congress's purposes were to put "honesty in sentencing" and to reduce "unjustifiably wide sentencing disparity"); Karle & Sager, \textit{supra} note 59, at 397; Nagel & Schulberger, \textit{supra} note 7, at 501. According to some writers, the purposes of Congress and of the Commission are not always one and the same. Professor Miller, argues that there should be a match between offenders, sentence purpose, and the sentence, to be determined at the time of sentencing and that sentences should have a clearly articulated purpose or purposes, but that purpose may be different at different points in the criminal justice process. Miller, \textit{supra} note 111, at 415.
The Sentencing Reform Act of 1984 directed Congress to create a Commission and also provided instructions for federal judges. Congress directed the Sentencing Commission to establish guidelines which would serve the multiple goals and purposes of federal sentencing as established by Congress. The express statutory purposes are to promote respect for the law, to deter criminal behavior, to protect the public, and to rehabilitate criminals.

In turn, the Commission promulgated guidelines to aid the sentencing judge in adhering to the same goals of criminal punishment established by the enabling legislation so that the sentencing ranges in the guidelines were to be consistent with all of the provisions of Title 18 of the United States Code.

In reviewing the statutory sentencing purposes, the most intriguing purpose is the stated goal of "promoting respect for the law." What little authority there is seems to indicate that promoting respect for the law is a retributive goal, at least in as far as it is linked with the phrases "need to reflect the seriousness of the offense" and "provide just punishment." Promoting respect for the law is apparently aimed at the public's perception of the law rather than that of the individual offender. However, this author opines that it makes more sense to extract this goal from its retributive neighbor-phrases and investigate the internalization of a defendant's moral

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123 Id.
126 See United States v. Mercedes, No. S 90 Cr. 0450 (RWS), 1991 WL 210945 (S.D.N.Y. Oct. 4, 1991) (Sweet, J., sentencing opinion): A departure upward is appropriate is [sic] Mercedes's case. Respect for the law will be furthered by imposing a longer sentence here. Mercedes was a fugitive from a prior New York City arrest when most of the activities these charges were based on occurred. This arrest apparently did not give him pause to consider the legality of his actions, in fact, he ignored it.
Id. at *2 (emphasis added).
respect and compliance with the legal system. In turn, such an analysis could buttress the public's understanding and respect for the law, which may be the intent of Congress's retributive characterization of this goal. Presumably, laws which modify behavior or attitudes in a socially acceptable way should receive greater respect from society than laws which merely satisfy a sense of retribution without the concomitant behavioral adaptation.

In either paradigm, a relevant field of inquiry is whether it is possible to legislate attitudinal change within the correctional system. In other contexts, most notably the recently passed Americans With Disabilities Act, such attitudinal change has been attempted.

VI. The Federal Offender Population

A. Significant Numbers of Federal Inmates Have Mental Disabilities

Surprisingly, there is very little literature on the psychological makeup of prisoners in general, and even less on those serving time in federal correctional facilities. In fact, if there is evidence that

[127] I suspect that this phrase was included as a response to the public's outcry against indeterminate sentences. This perception was inflamed by the belief that sentences did not accurately reflect the amount of time the defendant remained incarcerated. "[T]he recent 100 years or so of indeterminate sentencing—meaning largely unmeasured and uncontrolled judicial discretion in fixing sentences—was the era that could properly be characterized as one of 'lawlessness'." Marvin E. Frankel & Leonard Orland, A Conversation About Sentencing Commissions and Guidelines, 64 U. COLO. L. REV. 655, 658 (1993).

[128] The Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (1990), has been hailed as the most significant civil rights law since the 1960's. Peter Susser, The ADA: Dramatically Expanded Federal Rights for Disabled Americans, 16 EMPLOYEE REL. L.J. 157, 157 (1990); Lowell Weicker, Historical Background of the Americans With Disabilities Act, 64 TEMP. L. REV. 387, 387 (1991) (stating that the ADA expresses a national goal of assuring equal opportunity, full participation, independent living and economic self-sufficiency, and eradication of continuing unfair and unnecessary discrimination and prejudice against those having or perceived as having mental and physical disabilities).

[129] Henry J. Steadman et al., A Survey of Mental Disability Among State Prison Inmates, 38 HOSP. & COMMUNITY PSYCHIATRY 1086, 1086 (1987) (stating that there is a paucity of empirical studies on the occurrence of mental disorder in prisons); Edward
a significant percentage of inmates maintain a perception of unfairness with regard to their treatment under the Federal Sentencing Guidelines, can we make demographic predictions about how certain prisoners will respond? Research in this area may provide us with increased insight into prison populations and the connection between sentencing practices, correctional programming, and recidivism.

In the meantime, we know that the prison population is growing by leaps and bounds. The federal inmate population which was thought to be 53,347 at the end of 1989, has in 1992, approached 66,000 inmates housed in sixty-eight institutions. In 1992 the institutions were being operated at one hundred and forty-five percent of design capacity. The number of federal prisoners continues to grow much faster than the rate of growth in the state systems. In 1993, federal inmates numbered 80,259, an increase of over twelve percent from the year before. With every increase, correctional efficiency must continue to focus on the provision of appropriate services, including mental health services to prisoners and the safety concerns of inmates and employees. Therefore, any information which could shed proactive light on potentially volatile situations could be a great service.

Zamble & Frank Porporino, Coping, Imprisonment, and Rehabilitation, 17 CRIM. JUST. & BEHAV. 53, 54 (1990) (stating that there is a dearth of methodologically rigorous psychological research on the effects of imprisonment); Richard J. Bonnie, The Competence of Criminal Defendants With Mental Retardation to Participate in Their Own Defense, 81 J. CRIM. L. & CRIMINOLOGY 419, 421 (1990) (stating that empirical data on "under-identification" theory, which purports that the mentally retarded evade accurate identification within the criminal justice system, is sparse).

130 EDGARDO ROTMAN, BEYOND PUNISHMENT 15, 16 (1990) ("Unfairness is essentially a disproportion between offense and punitive reaction. An unfair sentence is bound to generate antisocial reactions. A fair sentence favors the process of reconciliation between the lawbreaker and the community.").

131 Peter Kerr, The Detoxing of Prisoner 88A0802, N.Y. TIMES MAG., June 27, 1993, at 23, 26 (the present number of prisoners in the United States is expected to rise from 1.3 million to more than 2 million people by the year 2000).

132 Yale Summary, supra note 94, at 2063.

133 Id.

It seems likely that inmates with mental disorders may express anger, fear and disillusionment in maladaptive ways. Most researchers agree that a significant proportion of inmates have some degree of diminished self-esteem and marginal maladjustment to societal concerns which may be reflective of underlying personality disorders or emotional distress. One study found that upon entering prison, inmates reported a higher incidence of psychiatric disorders than a control sample from the surrounding area. Often disorders are not diagnosed even with the most diligent of screening efforts because the symptoms are subtle or easily hidden by the inmate. The disorder may also remain in remission until a time later in the prisoner’s continued retention. The same is true for mentally retarded prisoners, whose disabilities are often unrecognized by attorneys, courts and prison administrators. Empirical evidence has consistently shown that diagnosed mental retardation is found in about ten percent of the correctional population.

Studies show that prisons have a large, relatively predictable number of inmates with severe mental illness. These numbers may

135 J.P. Prestelli, Maximum-Security Hospital Ward, 32 MED. SCI. & L. 337 (1992) (stating that personality disorders are more prevalent in prisoners than in the general population); Donald G. Dutton & Stephen D. Hart, Risk Markers for Family Violence in a Federally Incarcerated Population, 15 INT. J. L. & PSYCHIATRY 101, 110 (1992) (finding a high prevalence rate for personality disorders in Canada’s federal system, with narcissism and borderline personalities over-represented). See Zamble & Porporino, supra note 129, at 58 (finding very strong evidence that offenders were unable to cope adequately with ordinary life situations. Seven percent of the inmates had at least a mild level of depression, and almost 1 in 10 had scores indicating they were severely depressed. 53% had ranges of high anxiety as defined by another standardized test). Id. at 64. However, the authors found that over the course of the next few months of incarceration, the combined total of those who were either depressed or highly anxious fell by almost one-third to 37%. After another year, the total dropped to about 21%, indicating that at least some inmates can satisfactorily adjust to the prison setting. Id.

136 Bonta & Gendreau, supra note 17, at 356.


138 Id.

139 Bonnie, supra note 129, at 420-21.

140 Id. at 421.

141 Cohen & Dvoskin, supra note 137, at 463.
include relatively large numbers of persons diagnosed as psychopaths. Consequently, in one study, "fifteen to thirty percent of a sample of federal inmates met the 'commonly used research criterion for the diagnosis of psychopathology,' depending on the security level of the correctional institution."'

A study of the New York State prison population found that eight percent of the state's inmates have severe psychiatric or functional disabilities that clearly warrant some type of mental health intervention and another sixteen percent have significant mental disabilities which require periodic services. "[S]ubstantial impairments to functioning in the general prison population" were found in nearly one-quarter of the New York state prison population. However, the specific nature and extent of those disabilities was not assessed.

B. Empirical Methodology Must Devise an Instrument to Measure Inmate Morals

It seems reasonable to suspect that the system cannot instill respect for the law where the law is perceived to be incompatible with personal or group values. Respect in this context is important because it influences everyday behavior toward the law. In the correctional context, everyday behavior is measured in terms of compliance with facility rules. Thus, the psychological constructs

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143 Id.
144 Id.
145 Id. An older, less extensive study of prisoners in Oklahoma found that 10% were severely or acutely disturbed and 35% required some mental health treatment. Id. at 1086 (citing J.F. James et al., Psychiatric Morbidity in Prisons, 11 HOSP. & COMMUNITY PSYCHIATRY 674 (1980)).
146 Studies suggest that when assessing the impact of participation in the legal process on a person's respect for the law and legal authorities, the primary influence is the person's evaluation of the fairness of the judicial procedure itself, not the evaluation of the legal outcome. Tom R. Tyler, The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings, 46 SMU L. REV. 433, 437 (1992) [hereinafter Tyler, Psychological Consequences]; Tom R. Tyler, Why People Obey the Law 94-112 (1990) [hereinafter Tyler, People Obey].
147 Tyler, People Obey, supra note 146, at 94-95.
with which an inmate enters the facility may have implications for behavior within the correctional institution as well as future behavior when the inmate is released from incarceration.

When devising an empirical instrument which can accurately reflect inmate morals, one difficulty which may be encountered is the identification of individual values. This may be a particularly pernicious problem if the inmate is from a subculture which embraces some values not held by the larger or dominant society. Thus, any empirical methodology used should take into account an understanding of social and cultural factors in order to avoid an ineffective and offensive ethnocentric approach. For instance, at least one study has found that persons involved in felony cases, who may be unfairly characterized as marginal adherents to society’s value system (the poor, the poorly educated, minorities, or the unemployed) are most influenced by procedural fairness rather than the leniency of the sentence they receive. Similar findings hold true across a spectrum of research participants. Studies conducted on non-incarcerated people, who have experienced a legal procedure that they judged to be unfair, found that those persons had less respect for the law and legal authorities and are less likely to accept judicial decisions. This can lead to a "gradual erosion of obedience to the law." The recognition of the relation between fair legal procedures and the development of a participant’s sense of justice has not been lost on the judiciary. The Supreme Court relied on the psychological impact of the judicial process in establishing the right to judicial hearings in several contexts.

149 Id.
150 Tyler, Psychological Consequences, supra note 146, at 438.
152 Shuman & Hamilton, supra note 151, at 451.
C. The Morality of "Ratting"

Despite the myriad of moral and ethical differences held by a multicultural prison population, the societal ban against informing spans many cultures and religions and has persisted since ancient times. Even the words we use to describe an informant indicate that it is something bad. Prison studies have offered little systematic research on "snitches" or the "sociology of treachery." What little work has been done simply declares that the role of the "rat" exists and is negatively valued.

From the schoolyard 'tattletale' to the police officer's 'confidential informant' to the Pentagon 'whistle blower,' our society is deeply ambivalent toward those who report the wrongdoing of others to the authorities. On one hand, society values informers. . . . On the other hand, society scorns informers as betrayers of confidence. Even one who violates an antisocial pact such as the police officer's code of silence is viewed as having breached a trust. Such breaches leave all of us less secure in our reliance on the confidence of others.

Citizens generally have no legal duty to report criminal activity of which they may be aware. However, the law deviates

154 Weinstein, supra note 16, at 4 (relating orthodox Jewish law's disdain of informers back to Roman times). Informing is also an unforgivable sin to the Irish, and understandably so in a country where the government and the police were for centuries the enemy of the people. Id.
155 Id. at 3.
156 Marquart & Roebuck, supra note 2, at 218.
158 Id.
160 Failure to report a felony was the misdemeanor "misprision" at common law. The crime evidently still exists in England and in South Carolina (State v. Carson, 262 S.E. 2d 918 (S.C. 1980)) but it has been historically criticized from the beginnings of our system of modern justice: "It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case, for not performing this duty, is too harsh for man." Marbury
from this general rule to make distinctions based upon the degree of
harm presented to some classes of particularly vulnerable victims.
For instance, certain classes of people may be legally obligated to
report certain kinds of actual and suspected activity, including
physicians, teachers and other childcare professionals who are
obligated by statute to report all suspected instances of child abuse.\textsuperscript{161}
Even without statutory obligation or sanction, most people
acknowledge a prevailing moral duty to protect their subjectively-
defined community from harm. Generally, if citizens have
information about an intended or completed heinous crime, it is
expected that they will give such information to the law enforcement
authorities, absent an overwhelming fear of personal or familial
harm.\textsuperscript{162} Of course, the decision about what criminal activity tips the
balance so as to compel a person to go to the authorities is a
subjective call which balances the harm to self or community and the
ambivalence of informing.

Because society's ambivalence toward informing is rooted in
the complex interplay of moral values, it deserves the respect of our
justice system,\textsuperscript{163} at least insofar as to recognize its impact on legal
rules and practices. For instance, informing in a criminal case has the
presumptive social benefit of aiding in the conviction of an offender.
That presumptive societal benefit, however, must be weighed against
the moral costs to the informer.\textsuperscript{164}

According to Professor Lynch, the most important factors to
be weighed in balancing the risks to the defendant with the attendant
risks imposed upon the criminal justice system are "the connection
between the potential witness and the crime, the relationship between

\textsuperscript{161} See Levine, supra note 36.

\textsuperscript{162} Despite the seduction of fulfilling a moral imperative, most people find the idea
of reporting another's less heinous legal transgressions to be morally reprehensible. The
subjective nature of drawing such a line results in an inexact determination of moral
conviction. For example, in the early 1980s there were several news stories about high
school students who learned of the killing of a classmate by someone they knew. No
students came forward to the authorities, and when later questioned about their actions,
the students persisted in their belief that it was wrong to "tell." Weinstein, supra note
16, at 4.

\textsuperscript{163} Lynch, supra note 159, at 492.

\textsuperscript{164} Id. at 522.
the witness and the perpetrator, and the seriousness of the crime. These relationships are most influential in the case of a non-victim witness-informer. It is in this situation that the "rat" is most likely to be negatively perceived as the betrayer of confidences.

"Ratting" means that you are informing on someone who has a legitimate claim on your silence. The relationship between the informant and offender is a key ingredient in determining the morality of informing, both in the eyes of the public and from the perspective of the informant. Public condemnation of "ratting" typically forms the opinions supporting a moral obligation of silence. Where there has been an explicit promise not to reveal certain information, the informant has a moral duty not to reveal the information. Likewise, where the structure of a personal bond contains an implied promise of loyalty to a relationship, such as family membership or ethnic ties, there is an expectation of silence. This moral commitment may also be grounded in a social or professional relationship. Some of these relationships are so prized in our society that they are accorded protection through evidentiary privileges. In such cases, even where the need for such information is great, the law "has determined that the social benefits of preserving some relationships outweigh the need for information."

When can a person justify subordinating larger loyalties in favor of self-preservation? The propriety of informing seems to vary

\[165 Id. \text{ at } 523.\]
\[166 Id. \text{ at } 528.\]
\[167 \text{See Lynch, supra note } 159, \text{ at } 530.\]
\[168 Lynch, supra note 159, \text{ at } 529. \text{ For example, a person is not required to testify against his or her spouse because they share a close confidential relationship. The marital relationship is protected because of its social benefit and because it is intrinsically valuable to the parties involved. "To impose on such a fundamental relationship would be to violate human dignity." Id. \text{ at } 530. Other relationships are not as fundamental, but nevertheless are of enormous value, both to society and to the individual. Family relationships, professional associations, religious affiliations, friendships, and even the vague ties of acquaintance and fellowship that bind neighbors or people from the same hometown are all relations essential to both social and individual well-being. Id. Professor Lynch goes on to make the point that even the bonds which unite criminals joined in a common venture have moral value as an expression of human solidarity. However, the potential danger posed by criminals increasing the scope and efficiency of their criminal activities by banding together may outweigh any benefit that results from the relationship. Id.}\]
with the gravity of the offense in question. Under any consequentialist moral system, the harm that the informer seeks to prevent must be weighed against the wrong that will result from the betrayal of friends and associates. "It is anomalous but I think true, that destroying these ties [between parent and child, spouses, extended family and tribe through the overuse of informers] creates grave problems for a society that can lose all sense of humanity because its members lose much of their feelings for those near to them."169

VII. CONCLUSION

The bottom line is do we care? Or should we care? Are the inmates who are presumably most at risk, the young,170 those jaded by excessive sentences,171 racial and ethnic minorities,172 and at least twenty-five percent of the prison population which are believed to have mental disabilities,173 a group significant enough to impact on policy considerations? Because of the dramatic effect their behavioral reactions may have on the system as a whole, they are significant.

Development of this hypothesis must begin with the query, do accused and/or convicted federal offenders perceive the Federal Sentencing Guidelines provisions as unjust?174 Second, are federal


171 One study found that longer sentences were associated with greater levels of recidivism than shorter sentences. See Paul B. Paulus & Mary T. Dzindolet, The Effects of Prison Confinement, in PSYCHOLOGY AND SOCIAL POLICY 327 (Peter Suedfeld & Philip E. Tetlock eds., 1992).

172 "Most alarming, however, is the disproportionate number of minority offenders in our state and federal prisons. We incarcerate African American males at four times the rate of South Africa." Debra L. Dailey, Prison and Race in Minnesota, 64 U. COL. L. REV. 761, 761 (1992).


174 An important finding by studies of people's reactions to judicial procedures is that people are not primarily influenced by the outcome of their experience but by their assessment of the fairness of the case disposition process and the fairness of the sentence.
defendants and inmates sophisticated enough to differentiate between their overall feelings of disempowerment within the system and their specific response to treatment under Guideline provisions? Third, can an empirical instrument be designed to test such an inquiry? Fourth, once we have this information, can the offending legal provisions be modified to increase the defendant-inmates’ perception of fairness and promote cooperation and compliance with socially desirable goals?

If we assume that there is a significant proportion of defendants and inmates who can articulate a specific resentment from their perceived unjust treatment under the guidelines and that an instrument can be devised to measure such responses, then social scientists should be able to correlate these feelings of unfairness with empirical evidence of behavioral trends within the trial system, the correctional facility, and possibly with trends in recidivism. These correlations could be used to initiate policy considerations in future amendments to, or applications of, particular provisions of the Federal Sentencing Guidelines.

One conclusion which may be substantiated by such research is that persons forced to "rat" against others have a greater


175 On a management level, some have observed decreased incentives for good behavior from inmates because of the reduced amount of sentence reduction time available for forfeiture in the disciplinary process. On the other hand, the reduced sentence disparity and increased certainty of release dates tended to lessen a source of frustration in the inmate population. Yale Summary, supra note 94, at 2063 (comments of Harlen W. Penn).


177 See Wexler, Health Care Compliance, supra note 35, at 27-28 (stating judges at conditional release hearings could use principles of health care compliance such as behavioral contracts); Bruce J. Winick, Harnessing the Power of the Bet: Wagering with the Government as a Mechanism for Social and Individual Change, in ESSAYS, supra note 26, at 219, 239 (stating that when criminal sanctions have not succeeded in deterring socially harmful behavior, we need to devise new approaches to supplement criminal sanctions).

178 The term "rat" is used here to distinguish between the coerced testimony of some witnesses from the volitional desire of others to testify against another.
propensity to give perjured testimony, thereby throwing the trial process into chaos. The probative value of any potentially coerced testimony is suspect; courts have recognized the power of emotional coercion as well as physical intimidation. Unfortunately, there is a history of "jailhouse rats" who use the system both to manipulate the government into lenient sentences and as a means to continue criminal enterprises. There is always a danger in using informants to make cases because the "rats," due to emotional lability, greed, or sociopathic personality, may have no compunction about using perjured testimony to achieve an objective.

Generating data on the cognitive responses of "turned" inmates may lead to important insights in predicting the occurrence

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179 Haglund, supra note 2, at 1416 (Jailhouse informants are remarkably unreliable and intuition suggests that they are cut from the same cloth as other informants so that the ingenuity of jailhouse informants' lies illustrate the potential for perjury committed by others. When an informant does not have any or enough information to bargain for leniency, he or she may be tempted to fabricate information.). "It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence." United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987).

180 Arizona v. Fulminante, 499 U.S. 279, 287-88, 292-93 (1991) (holding that prisoner's confession to undercover jailhouse informant was involuntary and violated the 14th Amendment).

181 As interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant to be a more significant factor. Fulminante, 499 U.S. at 286 n.2.


183 Over the last 10 years the Los Angeles District Attorney used jailhouse informants to obtain convictions in more than 120 cases. Jana Winograde, Note, Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceeding, 78 CAL. L. REV. 755, 756 (1990). However, a scandal broke in 1988 involving jailhouse snitch Leslie White. White testified in three unrelated murder cases and one burglary case within a span of 36 days. He was released from jail three weeks later, several months ahead of his scheduled release. "Every time I come here," White boasted, "I inform and get back out." A Snitch's Story, TIME MAG., Dec. 12, 1988, at 32. White said that he and other informants commit perjury "because we have learned that the reward, the privileges, the favors and the freedom offered by the district attorney for jailhouse informant testimony far outweighs any reward for the truth." Ted Rohrlich, Jail Inmate Says He Lied in Role as Informant, L.A. TIMES, Dec. 1, 1988, at 1.

184 Nonetheless, informant testimony is used in a huge number of cases. See Haglund, supra note 2, at 1412.
of related administrative concerns within correctional management. When "ratting" is seen as the only means of decreasing draconian sentences, the potential for racing to the prosecutor is inevitable. This leads to disparity in sentencing, depending upon which criminal actor reaches the prosecutor’s ear first. Persons known to be informers are often obliged to remain in protective custody for the duration of their sentence, at a significantly increased cost to the government. For example, the state of Arizona implemented a determinate sentencing system in July of 1978. During that year, the state correctional complex housed thirty people in protective custody beds. Three years later, the number of inmates requiring protective custody increased to three hundred and thirty, a jump of 1100 percent. This increase has been attributed to the vast numbers of criminal defendants seeking sentencing leniency by informing on others, thereby requiring specialized treatment in state facilities.

Of course, not all defendants possess the right kind or quality of information to qualify for the assistance reduction. This is often true of so-called "skells," who typically face extraordinarily long prison terms even when charged with the distribution of small quantities of drugs. Even if the government does not offer the "skell" a deal, potential leaks as to the identity of the informant often oblige the government to provide protection to such persons in the interests of safety within the institution.

185 "It was quite common that the lookout would get 20 years, the triggerman three years, because the triggerman got to the prosecutor first." Joel Dvoskin, Address at New York Law School Journal of Human Rights Symposium, Therapeutic Jurisprudence: Restructuring Mental Disability Law (Apr. 23, 1993) (video tape on file with author). See Yale Summary, supra note 94, at 2058 (Joe B. Brown, former U.S. Attorney, Nashville, Tennessee, urges the rejection of a proposal to allow judges to depart).


187 Dvoskin, supra note 185.


189 Id. at 270 n.136 (stating that a defendant who is charged with distributing less than five grams of crack, has two similar prior convictions, and is over 18 years old is looking at a guideline range of roughly 22 to 27 years imprisonment if convicted).
Another area ripe for inquiry is whether inmates who are demoralized by a system they find to be at odds with their own moral code and who believe that the system is merely a charade of justice are the same people who will have difficulty conforming their behavior to that mandated by the correctional institution. Research in this area is sparse as well. However, some research regarding certain inmate groups may be found. For example, persons with untreated mental disabilities are more likely to be involved in disciplinary incidents, young prisoners cause the most institutional disruption, and incidents related to racial discord may explain increased disciplinary infractions. Are these the inmates who find the system the most unfair? A research strategy is needed to answer these questions.

It may be possible to gain some insight by looking at studies on motivation and to apply those findings to the situations encountered by prisoners sentenced under the Federal Sentencing Guidelines. The work of Edward Deci is particularly instructive. Deci has distinguished three types of motivational systems: intrinsic, extrinsic and amotivational. The amotivational system takes over when a person perceives "that there is no relationship between behaviors and rewards on outcomes. Perceived competence, self-determination and self-esteem tend to be extremely low. People who are amotivational feel helpless, incompetent and out-of-control." If inmates feel demoralized by the procedural injustice they

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190 Larson & Berg, supra note 17, at 136 (Inmates interviewed for purpose of study expressed the contention that determinate sentencing is irrational and vindictive. It was "obvious" to these inmates that the same crime may be committed in different ways and for different reasons.).

191 Cohen & Dvoskin, supra note 137, at 463 (stating untreated mentally ill inmates are more likely to be involved in serious disciplinary infractions including assaults on staff and other inmates, as well as being victimized themselves by predatory inmates).

192 Ruback & Carr, supra note 170, at 131 (stating that disciplinary infraction rates and assault rates are primarily a function of an increasing proportion of young inmates in the prison population).

193 Id. at 135.


experience under the guidelines, and continue to feel this way upon entering the correctional institution, then subsequent maladaptive behavior and the inability to follow correctional directives may be expected pursuant to the operation of the inmate’s amotivational response system.\(^{196}\)

A third issue to consider is that of recidivism. Can we make the claim that the same inmates who are most likely to give perjured testimony or cause disciplinary problems within the institution, are those with recurrent recidivism statistics? There is support for the proposition that inmates who participate in correctional programs, those who see the system as working in a rational way, may continue to use the system in an acceptable way once they get out, therefore, maintaining a reduction in criminal recidivism.\(^{197}\) A variety of current behavioral or cognitive measures were related to recidivism. Prisoners who had little respect for the system were the most likely to become recidivists.\(^{198}\) However, there is little evidence that psychiatric programs in prison have any direct relationship on recidivism rates outside prison.\(^{199}\)

By Congressional mandate, the guidelines seek to promote respect for the law. This goal, in a therapeutic jurisprudence formulation, should be aggressively pursued. In keeping with the Congressional mandate, the Commission is to develop a "means of

\(^{196}\) Id. at 29.

\(^{197}\) Paul Gendreau & Robert R. Ross, Revivification of Rehabilitation: Evidence from the 1980's, 4 JUST. Q. 349, 350-51 (1987) (stating that reduction in criminal recidivism may be possible through correctional rehabilitation). The notion of prison "therapeutic communities" is based upon similar concepts, where participants are resocialized and eventually forced to embrace responsibility, honesty and caring for others. Researchers have been cautiously optimistic about the success of therapeutic communities in lowering recidivism rates. Id.; Harry K. Wexler et al., Outcome Evaluation of a Prison Therapeutic Community for Substance Abuse Treatment, 17 CRIM. JUST. & BEHAV. 71, 89 (1990) (convincing evidence that prison-based treatment can produce significant reductions in recidivism rates). Likewise, the "bootcamp" approach focuses youths on changing their attitudes toward themselves and toward criminal behavior. Paulus & Dzindolet, supra note 171, at 333.

\(^{198}\) Zamble & Porporino, supra note 129, at 59.

\(^{199}\) Cohen & Dvoskin, supra note 137, at 464. Contra Zamble & Porporino, supra note 128, at 53 ("It has become increasingly clear that appropriate application of contemporary behavioral and cognitive treatments can change offender's behavior, even when judged by the bottom-line criterion of recidivism rate.") (citations omitted).
measuring the degree to which the sentencing . . . practices are effective in meeting the . . . purposes set forth." The therapeutic jurisprudence formulation offers an interdisciplinary paradigm for assessing the therapeutic effect of certain provisions of the guidelines on federal offenders. Unfortunately, the guidelines have not decreased criminal activity. Even though the guidelines receive overwhelmingly negative reviews, they appear to be a fixed part of our federal criminal procedure. Despite the ever-increasing explosion of articles on all aspects of the guidelines, there are few normative or empirical studies which assess the guidelines provisions from the perspective of the defendant or inmate. This article suggests a research agenda which challenges others to generate empirical data to decrease that gap.

I suspect that such empirical data will show that the offender’s consternation, anguish, and rebellion cannot be relieved over carrot soup and salad in a trendy Tribeca lunch spot. However, we must begin to acknowledge the offender’s emotional and behavioral responses from trial through incarceration, and consider the role these responses may play in recidivism rates.

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201 Weinstein, supra note 12, at 8.
202 Only four out of hundreds who testified before the Federal Courts Study Committee supported the guidelines. Those four were the Attorney General Richard Thornburgh and three members of the commission. Michael Tonry, The Success of Judge Frankel’s Sentencing Commission, 64 U. COLO. L. REV. 713, 715 (1993).