

Guilt. Punishment. Justice, but is it really?

By Stefania Cardenas

“...Punishment should not be an act of violence perpetrated by one or many upon a private citizen, it is essential that it should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law.”¹ Cesare Beccaria

Guilt. Punishment. Justice. Three simple words that define the basis for our actions for breaking a law in our legal system. Since the beginning of history, justice has been sought by the public to be the result of punishing a wrongdoer. “An eye for an eye, “is possibly the earliest theory concerning punishment for a wrong that is committed and most commonly representative of punishment, and hence, justice that humanity remembers.

After the jury voices their opinions and the judge enters judgment, the sentencing is the part that must be decided. While many court cases lead to predictable and expected outcomes, the sentencing system and the different possibilities behind it, are found troublesome by many. Famous cases such as Brock Turner’s or Ethan Couch’s include sentencing that has been found to be unduly lenient.² On the other hand, we find an extraordinary amount of cases in which sentencing for

¹ Cesare Beccaria (Italian Judge, 1738-1794), Brainy Quote, https://www.brainyquote.com/quotes/cesare_beccaria_729749, (last visited March 19, 2019.)

² Sean Lester, *While North Texas ‘affluenza’ teen went free, similar East Texas case led to 20 years in prison*, The Dallas Morning News, <https://www.dallasnews.com/news/crime/2016/02/15/while-north-texas-affluenza-teen-went-free-similar-east-texas-case-led-to-20-years-in-prison>, (last visited March 19, 2019.)

shoplifting has been awarded with life sentences.³ The violation of the Eighth Amendment seems to be present in many of these Supreme Court cases, but they have not been corrected to adjust a punishment that fits the crime as it was intended. The basic guidelines for sentencing must be analyzed along with cases that are set as examples of many of the disparities that are emerging.

The basic determination of punishment falls under current guidelines and statutes. Once the guilty verdict has been determined, a judge will follow guidelines based upon the current laws instituted to determine the final sentence. Guidelines found within our current justice system have been found to be too easily affected by bias, which may lead to possible Eighth Amendment violations and thus, ironically, injustice. Bias is emerging as a problem, along with laws instated that allow for harsh punishment for small crimes. Three strikes laws started in Washington State in 1993,⁴ later to be enacted by other states, and is a prime example of this injustice. Furthermore, the vagueness found within the guidelines that judges follow, allow for the implementations of things such as racial disparity and affluence to disturb the proper balancing of the sentencing of the recipient. The question presented are whether the current guidelines encourage, enable, and allow injustice within our justice system?

³ Fiona Keating, *Scores of prison sentences declared 'unduly lenient' after victims complain*, Independent Minds, July 30, 2017, <http://www.independent.co.uk/news/uk/home-news/prison-sentences-attorney-general-unduly-lenient-sentence-scheme-rapist-murderer-terror-offences-a7867351.html>, (last visited March 19, 2019.)

⁴ Michael Vitiello, *Three Strikes Laws: A Real or Imagined Deterrent to Crime*, ABA, June 30, 2017, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol29_2002/spring2002/hr_spring02_vitiello/, (last visited March 19, 2019.)

The Eight Amendment

The Eighth Amendment of the Constitution states “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁵ Bail is “excessive” in violation of the Eighth Amendment when it is set at a figure higher than an amount reasonably calculated to ensure the asserted governmental interest.⁶ When dealing with excessive fines, the court determined that “the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.”⁷ However, in *Austin v. U.S.*, the court held that the excessive fines clause can be applied in civil forfeiture cases.⁸ The concept of excessive punishment continued to evolve with the *Trop v. Dulles* case, where based upon its interpretation of cruel and unusual punishment, the court stated, “[we] must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁹ As stated previously, cruel and unusual punishment is determined by society and the standards that we are upholding in terms of decency. Public executions, guillotines and electric chairs may be a thing of the past and no longer tolerated by the public, but what are our current standards of decency and what are those things that we are willing to accept evolving as well?

⁵ *Further Guarantees in Criminal Cases, Eighth Amendment*, Government Publishing Office, <https://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-9-9.pdf>, (last visited March 19, 2019.)

⁶ *Stack v. Boyle*, 342 U.S. 1, (1951), Justia, <https://supreme.justia.com/cases/federal/us/342/1/>, (last visited March 19, 2019.)

⁷ *BFI, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), Justia, <https://supreme.justia.com/cases/federal/us/492/257/>, (last visited March 19, 2019.)

⁸ *Austin v. United States*, 509 U.S. 602 (1993), Justia, <https://supreme.justia.com/cases/federal/us/509/602/>, (last visited March 19, 2019.)

⁹ *Trop v. Dulles*, 356 U.S.86, (1958), Justia, <https://supreme.justia.com/cases/federal/us/356/86/>, (last visited March 19, 2019.)

All “excessive” matters, in terms of bail, fines or punishment, are after all, determined by the court. The courts and judges who represent them, are the last point in which decisions are made to determine bail, fines or punishments that follow the guidelines set by the Constitution. The judges are all representative and influenced by the public in what the proper punishment is for the specific case. Although judges in 2019 may not be sentencing people to be beheaded in the guillotine, unjust and immoral punishments are being created that might fall outside the realm of what we consider our standards of decency. Realistically, excessive punishment might not involve public execution in our current times, but it might include excessive fines for petty crimes or life term sentences for drug possession.

History of the Federal Guidelines

Our most modern Federal Guidelines for sentencing began in 1984, with the creation of the Sentencing Reform Act of 1984 (SRA) and the Sentencing Commission. Prior to the SRA, federal sentencing orders were essentially unappealable if they fell within the prescribed sentencing range.¹⁰ Sentences for similar crimes were given sentences that were vastly different, since there were no mandated guidelines. Studies confirmed the devastating injustice. To cite one example, judges from the Second Circuit were asked to recommend sentences based on the identical presentation reports. The sentences that were administered in one extortion case varied from eight years with no fine to twenty years and a \$65,000 fine. This became a concern which was addressed

¹⁰ *Dorszynski v. United States*, 418 U.S. 424, (1974), Justia, <https://supreme.justia.com/cases/federal/us/418/424/> (last visited March 19, 2019.)

by the Sentencing Reform Act.¹¹ The passage of mandatory guidelines with the implementation of the SRA of 1984, resulted in a monumental retraction of judicial discretion in sentencing.¹²

As stated by Senator Edward M. Kennedy, “This Act established the Sentencing Commission for the purpose of formulating guidelines to be used by judges in the sentencing process and abolishes parole in the Federal system. Under the system established by the 1984 Act, people convicted of similar crimes will serve similar sentences, and the sentences imposed will reflect the actual time that must be served.”¹³

Federal mandatory minimum sentencing statutes demand that execution or incarceration follow criminal conviction, a category that covers drug dealing, murdering federal officials and using a gun to commit a federal crime.¹⁴ There are three categories that these statutes fall under, the first category includes a “safety valve” that allows some leniency for first time, small time offenders to serve penalties less than mandatory or

¹¹ *Sentencing Commission Guidelines*. Hearing before the Committee on the Judiciary, United States Senate, One Hundredth Congress, First Session, on Guidelines Drafted by the U.S. Sentencing Commission, October 22, 1987, ezproxy.fau.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,uid&db=cat06361a&AN=fau.027440489&site=eds-live&scope=site, (last visited March 19, 2019.)

¹² Henry Stegner, *An End to Arbitrary and Capricious Federal Sentencing Guidelines*, Idaho Law Review, Vol. 53, No.3, Sept.2017, ezproxy.fau.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,uid&db=lft&AN=124478813&site=eds-live&scope=site, (last visited March 19, 2019.)

¹³ *Sentencing Commission Guidelines*. Hearing before the Committee on the Judiciary, United States Senate, One Hundredth Congress, First Session, on Guidelines Drafted by the U.S. Sentencing Commission, October 22, 1987. ezproxy.fau.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,uid&db=cat06361a&AN=fau.027440489&site=eds-live&scope=site, (last visited March 19, 2019.)

¹⁴ *Id.*

at least less severe prison sentence or fines than are considered mandatory.¹⁵ The second category involves flat or single sentence statutes that incur life imprisonment. The third category is described as the “piggyback” category, which are not mandatory minimums, but sentence defines the offenders by reference to underlying statutes including those that impose mandatory minimums.¹⁶

Under a 2005 case, *Booker v US*, the courts eliminated the binding effect of the sentencing guidelines. Post-verdict it was determined that guidelines cannot be characterized as a source of mandatory minimum sentence, although they continue to tilt heavily towards incarceration.¹⁷ Prior to the *Booker* case, all judges were forced to follow the sentencing guidelines for every case tried. However, they did have the option to not strictly follow the mandated guidelines as long as they explicitly stated the reasoning why the case was not appropriate to fall under the mandatory standards. After the *Booker* case, the rules changed and gave more freedom and less regulation to judges, only referencing the guidelines as a guide rather than a law that must be followed. The Sentencing Guidelines stated, “The *Booker* decision addressed the question left unresolved by the Court’s decision in *Blakely v. Washington*, 542 U.S. 296 (2004): whether the Sixth Amendment right to jury trial applies to the federal sentencing guidelines. In its substantive *Booker* opinion, the Court held that the Sixth Amendment applies to the sentencing guidelines. In its remedial *Booker* opinion, the Court severed and excised two statutory provisions, 18 U.S.C. § 3553(b)(1), which made the federal guidelines mandatory, and 18

¹⁵ *An Overview of the Federal Sentencing Guidelines*, 2019, https://www.uscourts.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf, (last visited March 19, 2019.)

¹⁶ *Id.*

¹⁷ *United States v. Booker*, 543 U.S. 220 (2005), Justia, <https://supreme.justia.com/cases/federal/us/543/220/>, (last visited March 19, 2019.)

U.S.C. § 3742(e), an appeals provision.”¹⁸

However, there is a strong feeling that mandatory minimum sentencing laws have been misused by the Department of Justice because they are frequently directed against low-level offenders, contrary to the original intent of Congress. Combined with sentencing guidelines, most of the sentences that have been imposed by federal judges in the past 30 years have been unjustly long for the conduct and culpability of the defendant. The justice system has been distorted by removing from judges the power to decide the proper sentence in their cases and allowing prosecutors to have influence over the determination of the final sentencing.¹⁹

Federal Sentencing Guidelines

The Federal Sentencing Guidelines created by the Sentencing Commission determines the length of the prison sentence or probation based upon the seriousness of the offense and the criminal history of the individual. Each type of crime is assigned a base offense level, which is the starting point for determining the seriousness of an offense. The seriousness of the offense can be categorized anywhere from one to forty-three. The more serious the crime, the higher the level. Adjustments are made based on characteristics and factors that applied during the crime such as if there was a plea, obstruction of justice or if there was a weapon involved or if it was used. Adjustments and factors vary from offense to offense. Multiple counts in a case and acceptance

¹⁸ *An Overview of the Federal Sentencing Guidelines*, 2019, https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf, (last visited March 19, 2019.)

¹⁹ *Mandatory Minimums and Sentencing Reform*, Criminal Justice Policy Foundation, 2019, <https://www.cjpf.org/mandatory-minimums>,(last visited March 19, 2019.)

of responsibility are factors that may increase or decrease levels of the offense.²⁰

The second determinant of the level of punishment being administered is based upon the criminal history of the individual. The categories are broken down from category one to six. The point at which the final offense level and the criminal history category intersect on the Commission's sentencing table determines the defendant's sentencing guideline range.²¹

After the final guideline range is determined, if it is found that a mitigating or aggravating circumstance exists, the judge is allowed to deviate from the guideline range. When departing from the sentencing guidelines, the judge must state in writing the reason why they chose to depart from the guidelines.

Below is a chart that breaks down and demonstrates the categories and the length of imprisonment based on the intersecting characteristics. For example, according to the chart if we determine an individual has committed a crime of level 35 and falls under a level four due to their criminal history, they are bound to receive a minimum of 235 months and a maximum of 293 months of imprisonment for the crime committed.

²⁰ *An Overview of the Federal Sentencing Guidelines*, 2019, https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf, (last visited March 19, 2019.)

²¹ *Id.*

SENTENCING TABLE
(in months of imprisonment)

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

Revisions to various areas of the minimum sentencing guidelines have been made and continue to be tweaked. The most recent revision occurred on November 1st, 2018. However, the most recent revision for the chart was made on November 1st, 2016.

Similar criteria exists for fines for individuals found to be guilty of the crime for which they were charged. The sections are broken down into two categories and the intersecting point becomes the guideline. Fines are required to be imposed for every case, except, if the offender has stated that they are unable to pay the fine or if there is a law or subsection in the statute that overrides their need to pay the fine. The following represents the chart for fines.

Offense	A	B
<u>Level</u>	<u>Minimum</u>	<u>Maximum</u>
3 and below	\$200	\$9,500
4 to 5	\$500	\$9,500
6 to 7	\$1,000	\$9,500
8 to 9	\$2,000	\$20,000
10 to 11	\$4,000	\$40,000
12 to 13	\$5,500	\$55,000
14 to 15	\$7,500	\$75,000
16 to 17	\$10,000	\$95,000
18 to 19	\$10,000	\$100,000
20 to 22	\$15,000	\$150,000
23 to 25	\$20,000	\$200,000
26 to 28	\$25,000	\$250,000
29 to 31	\$30,000	\$300,000
32 to 34	\$35,000	\$350,000
35 to 37	\$40,000	\$400,000
38 and above	\$50,000	\$500,000.00

As with any other law, there exists exceptions that permit the minimum sentencing to be entirely disregarded and for the individual to be

²³ Id.

sentenced according to the judge's discretion. As stated in the statute §5C1.2. Limitation on Applicability of Statutory Minimum Sentences in Certain Cases: Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth below:

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category);
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a

determination by the court that the defendant has complied with this requirement.²⁴

From a broad overview of the range found within the categories, it is obvious that there exist vast differences between the minimum and maximum terms and values within the imprisonment length as well as the fine amount. For example, when observing a level twenty-three offense, it is clear that, based on the category that the individual falls into based on their criminal history, the minimum term of imprisonment faced ranges anywhere from 46 months to 115 months, with fines ranging from a minimum of \$20,000 to \$200,000. Such large ranges demonstrate how a judge might make vastly different choices, and those choices might be based upon possible bias.

Judge power over sentencing is complete, and usually allows suggestions made by the prosecution and the defendant. Factors are listed that need to be taken into consideration, specific to every case tried, that might vary the outcome of the final sentence administered. Although efforts have been made to ensure justice and equality throughout cases, violations of the Eighth Amendment have been present throughout history. Cases have been presented in front of appellate courts accusing the court of violating the Eighth Amendment rules.

Eighth Amendment Cases

Perhaps one of the most popular Eighth Amendment cases is *Miller v. Alabama*,²⁵ in which the Supreme Court held unconstitutional roughly 2,000 life-without-parole sentences, which had been administered to

²⁴ Id.

²⁵ *Miller v. Alabama*, 132 S.Ct. 2455(2012), <https://www.supremecourt.gov/opinions/11pdf/10-9646g2i8.pdf>, (last visited March 14, 2019.)

juveniles in twenty-eight states and the federal government.²⁶ The constitutionality of the life-without-parole sentence was in question due to the realization that the sentence meant that the prisoner was meant to die in prison. Juveniles that received such sentences were being defended by stating that due to their age, decisions they made as youths should not be upheld to the same standards as adults.²⁷ Factors that affect youth differently than adults include their tendency for recklessness and ability to resist peer pressure. Furthermore, when the resulting sentence was compared internationally, it was found that no other nation was administering such sentences in which the convicted criminal was meant to die in prison. Therefore, why was the American justice system the only one upholding such severe sentences?

Another example of an Eighth Amendment violation was presented in the *United States v. Bajakajian* case.²⁸ During this case, the offender had brought through customs \$357,144 in cash, but had only claimed \$15,000 during his report to the customs inspector, after being notified that any amount in excess of \$10,000 needed to be reported per federal law.²⁹ The result was that the full total of the cash was forced to be forfeited, which led to the accusation of the violation of the Excessive Fines Clause of the Eight Amendment. There are four factors that

²⁶ Craig Lerner, *Sentenced to Confusion: Miller v. Alabama and the Coming Wave of Eighth Amendment Cases*, *George Mason Law Review*, Vol. 20, No. 1, Fall 2012, ezproxy.fau.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,uid&db=ift&AN=83823007&site=eds-live&scope=site, (last visited March 19, 2019.)

²⁷ *Id.*

²⁸ *United States v. Bajakajian*, 524 U.S. 321 (1998), Justia, <https://supreme.justia.com/cases/federal/us/524/321/>, (last visited March 19, 2019.)

²⁹ *Reports on Exporting and Importing Monetary Instruments*, 31 U.S.C. § 5316(a)(1)(A) (2012), <https://www.law.cornell.edu/uscode/text/31/5316>, (last visited March 19, 2019.)

constitute excessive fines according to the Supreme Court: (1) nature of the crime and its connections to other criminal activity, (2) whether the defendant fits into the class of persons at whom the statute was aimed, (3) the maximum sentencing or fine under the applicable statute and the sentencing guidelines, (4) and the harm caused by the offense.³⁰

Supreme Court cases have not been the only factor in witnessing Eighth Amendment violations. Statutes have been passed as well, that due to their inflexible finalities might lead to a conclusion of extreme consequences for undeserved crimes. The three strikes law originated in 1993 in Washington State,³¹ “three strikes and you’re out” was the fad at the time, in terms of statutes created for repeat offenders. This law would be the main example of the major flaw that would demonstrate how even laws that have been passed individually by states are subject to bias and a possible violation of the Eighth Amendment. The three strikes law states that criminals that have convicted with multiple previous felonies will automatically be sentenced to life imprisonment upon their third conviction. The requirement for the crimes to be tried under this statute are vague.³² Any crime that fall under a serious or violent category would possible fall under the purview of this statute. Although the state that began the trend was Washington, California’s

³⁰ Slavinskiy, Yan, *Protecting the Family Home by Reunderstanding United States v. Bajakajian*, *Cardozo Law Review*, Vol. 35, No. 4, Apr. 2014, ezproxy.fau.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,uid&db=ift&AN=96035799&site=eds-live&scope=site, (last visited March 19, 2019.)

³¹ Washington State RCWs, Title 9, Chapter 9.94A.570, *Persistent Offenders*, <https://app.leg.wa.gov/rcw/default.aspx?cite=9.94A.570>, (last visited March 15, 2019.)

³² *Id.*

legislature upheld the strictest and harshest version of this law.³³ In California, for the crime committed to fall under the statute, the first and second offense were required to be serious or violent. However, the third crime did not require such standards. As a result, California began sentencing people to life sentences for crimes like petty theft and drug possession.³⁴ The result of the harsh statute was a strained budget due to the oversized nature of the prison population due to the law. At the time, before the statute reform was passed, second and third strikers made up roughly a quarter of California's large prison population.³⁵ After the reform act was passed, defendants may only be sentenced 25 years to life if their crime was violent or serious, or they have disqualifying crimes among their priors such as sex crimes or violent offenses. The difference in numbers was tremendous when comparing cases between other states and California. According to a National Institute of Justice report, in the State of Washington, which began the three strikes, they only had 115 offenders admitted to the Washington State prison system between the years of 1993 to 1998. Georgia reported less than 10 cases per year, meanwhile California had sentenced nearly 40,000 offenders

³³ *Three Strikes Law, Repeat Felony Offenders, Penalties*, University of California, Hastings School of Law, Scholarship Repository, 2012, http://repository.uchastings.edu/ca_ballot_props/1315, (last visited March 15, 2019.)

³⁴ Lorelei Laird, *After Third Strike, Many Now Walk: California Begins to Release Prisoners after Reforming Its Three-Strikes Law*, ABA Journal, Vol. 99, No. 12, 2013, ezproxy.fau.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,uid&db=edsjsr&AN=edsjsr.24596007&site=eds-live&scope=site, (last visited March 19, 2019.)

³⁵ *Id.*

to prison under this law.³⁶ Multiple variations of this law existed. Some variations even included the “out” to be counted in the second strike rather than the third. Although the extremist cases originated in California, various states subjected themselves to this notion and it resulted in reforms that needed to be created due to the realization that punishments being delivered were sometimes not equivalent to the crime committed by the offenders.³⁷

Racial Disparity and Affluenza

Another factor often found to be affecting the effectiveness of sentencing is racial disparity. Through the years, the justice system has recognized and made an effort to correct inequalities in justice by increasing uniformity, certainty, equality, severity and transparency in sentencing, with a special emphasis on the growing concern over racial and ethnic inequality in punishment. The discrimination against non-whites, was clear in the early years of research, which allowed for a push from the public for better standards.³⁸

In the 1980’s, reforms emerged in the form of minimums and guidelines after the report concluded that young black men received the harshest sentences and that racial effects were not eliminated by guidelines.³⁹

³⁶ James Austin, John Clark, Patricia Hardyman, and Alan Henry *Three Strikes and You’re out : The Implementation and Impact of Strike Laws*, National Institute of Justice, 2000, ezproxy.fau.edu/login?url=http://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,cookie,url,uid&db=edsgr&AN=edsgr.ocn862120408&site=eds-live&scope=site, (last visited March 19, 2019.)

³⁷ Id.

³⁸ Id.

³⁹ Brian Johnson and Jacqueline G. Lee, *Racial Disparity Under Sentencing Guidelines: A Survey of Recent Research and Emerging Perspectives*, Sociology

Ultimately, the most recent research on the subject offer increasing evidence that racial and ethnic disparities continue to characterize punishment under sentencing guidelines, though the instances are subtle and indirect. Judges are no longer bound by the guidelines but it has been observed that sentencing allows for greater discretion from the judge, and is more likely to allow for the influence of societal stereotypes to affect sentencing.⁴⁰

It is a theory that these disparities exist, based on our own psychological motives, in which it is assumed that we are creating a link between race and ethnicity with assessments of culpability and dangerousness.⁴¹ Although the problem has been recognized, we seldom truly realizing the kind of change that needs to be brought in order to completely transform this predilection. Sentencing guidelines were created with positive motives in terms of increasing equality. However, it seems that negative attitudes go much further, for equality is not being followed under the influence of sentencing guidelines, as subconscious as it may be.

A factor that exemplifies the irregularities of sentencing is found behind the story of the ‘affluenza’ defense. Affluenza is a term referring to the particular circumstance in the upbringing of a wealthy individual, which might psychologically affect the decision making of the affected party so that they are unable to tell right from wrong. In other words, the defense for an individual was that they were too rich to tell right from wrong. The case that made this defense famous was that of Ethan

Compass, Vol. 7, No. 7, July 2013,
<https://onlinelibrary.wiley.com/doi/full/10.1111/soc4.12046>, (last visited March 19, 2019.)

⁴⁰ Id.

⁴¹ Id.

Couch, a teen that killed four people, as he rammed his truck into a crowd of people while drunk driving.⁴²

The offender originally was sentenced to 10 years of probation, defying prosecutors who sought a 20- year prison sentence. During his time on probation, he committed a parole violation that ultimately resulted in a sentence of 720 days incarceration for his crime. Families were outraged and criticized that he got special treatment because of his wealth.⁴³

Another story that brought light to this potential offense, was the comparison between this case and one of an immigrant teen who committed a similar crime, with similar circumstances, yet, he faced charges much harsher from the beginning to end. The case mentioned above refers to Jamie Arellano,⁴⁴ a drunken teen, who ran a red light and crashed into a pregnant woman's car, killing her and her unborn child. Arellano was charged with intoxication manslaughter and intoxication assault, the same counts that were filed against Couch. However, the main difference between the cases resulted from the choice to move Arellano's case to adult court, in which he took a plea deal that landed him 20 years in jail.⁴⁵ Was the reason for this significant difference racial disparity or wealth disparity?

⁴² Id.

⁴³ Daniel Victor, *Ethan Couch, 'Affluenza Teen' Who Killed 4 While Driving Drunk, Is Freed*, NY Times, April 2, 2018, 2018, <https://www.nytimes.com/2018/04/02/us/ethan-couch-affluenza-jail.html>, (last visited March 19, 2019.)

⁴⁴ Id.

⁴⁵ *Affluenza Teen Ethan Couch got probation for killing 4 while poor immigrant Texas teen got 20 years prison for fatal drunken crash*, The Associated Press, Feb. 16, 2016, <https://www.nydailynews.com/news/national/affluenza-case-highlights-disparity-sentencing-article-1.2533960>, (last visited March 19, 2019.)

Cases with controversial sentences for crimes committed are still a recurring spectacle we encounter today. One of the most recent cases, made well-known by the media, is the one of college student Brock Turner.⁴⁶ Turner was charged with sexual assault with intent to commit rape when he sexually assaulted a 22-year old woman after she had blacked out from drinking at a campus party. He was sentenced to a total of six months in jail, with three years probation. He only served three months of jail for his crime. The short sentence drew much attention because of the leniency of the sentencing as well as the topic of sexual assault on college campuses.⁴⁷ Reports after the sentencing recorded the judge as saying that the Judge believed Turner's side of the story, that the woman gave consent.⁴⁸

Conclusion

Ultimately, guidelines have been created to help ensure justice and equality in the sentencing of individuals. However, not enough attention has been paid to ensure the results. Multiple factors come into play when the overall effectiveness of the fairness within the guidelines for sentencing are analyzed thoroughly.

⁴⁶ *People v. Turner*, Case #B1577162, Superior Court for the State of California in Santa Clara, <https://www.paloaltoonline.com/media/reports/1465602925.pdf>, (last visited March 15, 2019.)

⁴⁷ Christine Hauser, *Brock Turner Loses Appeal to Overturn Sexual Assault Conviction*, N.Y. Times, Aug. 9, 2018, <https://www.nytimes.com/2018/08/09/us/brock-turner-appeal.html>, (last visited March 19, 2019.)

⁴⁸ Marina Koren, *Why the Stanford Judge Gave Brock Turner Six Months*, The Atlantic, June 17, 2016, <https://www.theatlantic.com/news/archive/2016/06/stanford-rape-case-judge/487415/>, (last visited March 15, 2019.)

An examination, study and further discussion among lawmakers is certainly necessary to begin any kind of reform. Revision is essential in order for anyone to believe that the guidelines are close to ensuring justice for all. Furthermore, a stricter, and perhaps clearer set of rules are necessary regarding the use of these guidelines. Judges need to know when guidelines must be followed strictly, what kind of exceptions could be made and what the necessary steps are to be followed if revision or exceptions are to be created for certain sentencing. Guidelines must be written and tested meticulously, and the goal of equality for all must be constantly at the forefront of discussions, debate, and efforts to reform. Vast differences in sentencing for similar crimes and situations should not be available, nor should they be accepted in the justice system of the United States.

The presence of guilt is not the item in question, but the degree of punishment assigned to that illegal activity must be the focus in order to ensure justice is served. Although in the United States we have the Eight Amendment as our guarantee to avoid injustice in punishment, there have been so many cases in history and modern times that may be violating this Constitutional provision. Yet, no grand, wildly public reform has been demanded. As Italian criminologist Cesare Beccaria said, "Men's most superficial feelings lead them to prefer cruel laws. Nevertheless, when they are subjected to them themselves, it is in each man's interest that they be moderate, because the fear of being injured is greater than the desire to injure."⁴⁹ Reform for cruel laws are a necessity, for they do not only violate some of our basic human rights, but no person ever knows the unfortunate day that the consequences of a mistake might determine the fate of a loved one or our own fa

⁴⁹ Cesare Beccaria (Italian Judge, 1738-1794), Brainy Quote, https://www.brainyquote.com/quotes/cesare_beccaria_729749, (last visited March 19, 2019.)