

# EXTREME PRISON SENTENCES: LEGAL AND NORMATIVE CONSEQUENCES

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## TABLE OF CONTENTS

INTRODUCTION .....	60
I. PHILOSOPHICAL AND PSYCHOLOGICAL CONSTRUCTS FOR EXTREME SENTENCES .....	62
A. <i>Theories of Punishment</i> .....	63
B. <i>Proportionality of Penalty</i> .....	65
C. <i>Virtual Life Sentences</i> .....	67
D. <i>Exclusionist Mentality</i> .....	68
E. <i>Dehumanization</i> .....	69
F. <i>Numerosity</i> .....	71
1. Anchoring Effects .....	71
2. Scale Distortion .....	73
3. Anchoring and Scaling in Legal Judgments .....	74
4. Comparative Analysis in Penalty Determinations .....	77
II. AN EMPIRICAL STUDY OF EXTREME SENTENCES .....	78
A. <i>The Federal Sentencing System</i> .....	79
B. <i>Methodologies</i> .....	80
C. <i>The Dataset</i> .....	80
1. Demographic Data .....	84
2. Case Characteristics .....	87
3. Selected Case Studies .....	88
D. <i>Rationales for Extreme Sentences</i> .....	92
1. Statutory Explanations .....	92
2. Perpetual Incapacitation .....	96
3. Virtual Life .....	99
4. General Deterrence .....	101

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5. Retributive Ideologies .....	103
6. Dehumanizing Characterizations.....	103
E. <i>Normalizing Extreme Penalties</i> .....	106
1. Anchors.....	106
2. Scaling and Magnitude .....	106
3. The Ratchet Effect.....	110
4. Numerosity.....	111
F. <i>Legal Challenges to Extreme Sentencing</i> .....	113
1. Cruel and Unusual Punishment.....	113
2. Reasonableness Challenges .....	114
3. Enduring Proportionality Concerns .....	116
CONCLUSION.....	119

## INTRODUCTION

In 2015, a federal judge in Tennessee sentenced the sixty-one-year-old Barbara Lang, nicknamed “Aunt Bea,” to 280 years in prison. She had no previous criminal record and no known history of violence. Her crime? She operated an illegal pill mill where, in return for cash payments, physicians prescribed addictive pain killers to patients without medical need. Then Aunt Bea clandestinely pocketed much of the money in violation of IRS rules. After a three-months-long trial, Barbara Lang was convicted of two counts of conspiring to distribute and dispense controlled substances, five counts of maintaining a premises for the purpose of distributing controlled substances, and fourteen counts of structuring financial transactions to evade reporting requirements. The judge issued her a prison sentence of nearly three centuries, without the possibility of parole. Does a 280-year sentence—one clearly impossible for anyone to complete—make any sense in the first place? Even so, is such a penalty reasonable for a nonviolent, first-time offender? And what does such an implausibly long sentence in this context say about the state of our criminal justice system in America?

An interesting array of voices have been calling for criminal justice reform in recent years. The skyrocketing cost of maintaining prisons and the damage done to prisoners, their families, and communities have encouraged champions of both liberal and conservative causes to advocate for reducing America’s reliance upon lengthy terms of imprisonment. So far, changes that have been successfully implemented in various jurisdictions (such as pretrial diversion and increased

prisoner releases) have slightly reduced the country's combined prison population.<sup>1</sup> The likelihood of more substantive reforms and/or additional jurisdictions choosing to implement prison reduction measures remains questionable in light of both public and political attention toward issues outside of criminal justice. Nonetheless, we still have much we can learn from current and past practices that have played a role in America's evolution into a country known for its mass incarceration headache.

This Article takes a rather unique approach by reporting on an empirical study of what will be referred to herein as extreme sentences, such as the one imposed on Aunt Bea. The extreme sentences contemplated are unique in that they do not constitute capital punishment or represent technical life sentences. Yet they are similar in nature by serving as penalties that are meant to result in death in prison. The extreme sentences studied herein are defined as those that are at least 200 years long, and thus are clearly beyond any person's natural lifespan. The defendants who receive these penalties are part of a group that have been nicknamed "virtual lifers," as the probability they will serve the remainder of their lifetimes in prison is near certain.<sup>2</sup>

The study herein provides a dataset of extreme sentences issued in the federal criminal justice system. A high level purpose of the study was to understand which defendants are deemed to deserve them and to explore the legal, philosophical, and psychological bases for these extraordinary penalties. It undertakes quantitative and qualitative explorations of the circumstances underlying the extreme sentences and the discourses that report them. This mixed method study includes statistical data runs and a discourse analysis. The main sources of data are statistical sentencing databases, relevant case opinions, case filings, governmental press releases, and news reports. The project can help us to piece together at least a part of the puzzle of mass incarceration that is, to a significant degree, a product of reliance upon—and the normalization of—increasingly lengthier sentences.<sup>3</sup>

This Article proceeds as follows. Part I contains a literature review from legal and psychological disciplines. This background research informed certain expectations that the study tested. These expectations are offered as informal hypotheses. In sum, it was hypothesized that the discourses regarding extreme sentences would: (a) justify them using

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<sup>1</sup> Delphine d'Amora, *America's Prison Population is Falling, but Too Slowly to Undo Decades of Growth*, MOTHER JONES (Nov. 4, 2015, 7:00 AM), <http://www.motherjones.com/politics/2015/11/americas-prison-population-falling-not-fast-enough>.

<sup>2</sup> Alfred C. Villaume, "Life Without Parole" and "Virtual Life Sentences": *Death Sentences by Any Other Name*, 8 CONTEMP. JUST. REV. 265, 268 (2005).

<sup>3</sup> THE SENTENCING PROJECT, *THE STATE OF SENTENCING 2015: DEVELOPMENTS IN POLICY AND PRACTICE* 3–4 (2016).

one or more of the traditional theories of punishment relating to deterrence, incapacitation, and/or retributivism; (b) address the penalties being proportional to the offense and offender; (c) regard the penalties as representing the practical equivalent of life sentences; (d) represent an exclusionist mindset to justify banishing from civil society the defendants who receive them; (e) engage in dehumanization processes; and (f) present problems relating to numerosity, such as suggesting cognitive biases referred to as anchoring and scaling effects.

Part II provides an original contribution to our knowledge about severe sentencing practices by focusing on a subset of defendants whose prison terms are extreme in that they are at least 200 years in length. The federal sentencing system was the chosen jurisdiction because it often is seen as a model system, its coverage is nationwide, and the federal prison population is the largest in the country. More specifically, Part II contains an original dataset identifying federal defendants who have received these extreme sentences and the types of crimes they committed. Statistical information concerning demographic and case characteristics regarding the entire sample are provided. The fact scenarios of certain of the more intriguing cases are summarized for further context into this unique dataset. In addition, the results of the discourse analysis reflect upon the outcomes of the study in terms of the hypotheses presented. Conclusions follow.

#### I. PHILOSOPHICAL AND PSYCHOLOGICAL CONSTRUCTS FOR EXTREME SENTENCES

A scientific researcher who proposes to study a particular topic generally develops certain hypotheses, i.e., expectations or theories, about potential outcomes. The topic of interest itself informs the researcher in advance about the appropriate investigative inquiries to conduct. Based on the focus of this paper on how and why extreme prison sentences have come to be issued and normalized, this Part explores the applicable axioms that developed from a review of relevant legal and psychological literatures. This Part delineates rather casual hypotheses about what had been the expected outcomes from quantitative and qualitative analyses of the dataset of extreme sentences and the underlying discourses about them. Philosophical theories underlying legal punishments represent an appropriate starting point.

### A. *Theories of Punishment*

Many expository writings on prison sentences likely reference the traditional theories of punishment. This Article will do so as well in order to try to explain the existence of extreme penalties in terms of the potential theoretical purposes they serve. Still, as these primary sentencing philosophies have been discussed at length in other texts, rather concise versions are sufficient here.

The four major theories that underlie American sentencing jurisprudence include deterrence, incapacitation, retribution, and rehabilitation. The latter theory can be ignored here as the dataset of sentences of at least two centuries in a system without parole or other routine form of periodic review cannot reasonably be argued as intended to encourage individual reformation by the prospect of early release.

As for the theory of deterrence, the basic vision is summarily stated by the prominent Enlightenment philosopher Cesare Beccaria: “The end of punishment . . . is . . . to prevent the criminal from doing further injury to society, and to prevent others from committing the like offence.”<sup>4</sup> This statement succinctly conceptualizes corresponding perspectives on punishment in terms of deterring the individual (specific deterrence) and discouraging others from offending (general deterrence). The three key tenets of deterrence theory entail sureness, celerity, and severity of the punishment. The likelihood of a penalty being imposed is considered the most salient aspect among them in its deterrence value.<sup>5</sup> Yet the harshness of the punishment remains an important aspect, though it must be strictly regulated so as not to cause additional harm. As Beccaria noted, “[t]hat a punishment may produce the effect required, it is sufficient that the *evil* it occasions should exceed the *good* expected from the crime; including in the calculation the certainty of the punishment, and the privation of the expected advantage. All severity beyond this is superfluous, and therefore tyrannical.”<sup>6</sup> An overly punitive penalty is not only unnecessary, it can also be crime-inducing because “[i]f punishments be very severe, men are naturally led to the perpetration of other crimes, to avoid the punishment due to the first.”<sup>7</sup>

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<sup>4</sup> CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 43 (London, Printed for E. Newbery 1785).

<sup>5</sup> Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 205–06 (2013).

<sup>6</sup> BECCARIA, *supra* note 4, at 99–100.

<sup>7</sup> *Id.* at 99.

For a potential penalty to achieve its deterring effects in a given society, that penalty must be known to its members.<sup>8</sup> Thus, an additional deterrence value can be derived from the communicative function that a formal sanction system begets in educating the citizenry about societal values and expected standards of behavior.<sup>9</sup>

Deterrence has a utilitarian function, as does the incapacitative aspect of certain punishments. Banishment, capital punishment, and imprisonment represent responses that serve to directly prevent criminals from reoffending against civil society.<sup>10</sup> Yet with banishment (at least in the form of official expatriation) and the death penalty currently disfavored, the steadfast reliance upon prison directly serves the incapacitative function of criminal justice in contemporary America.<sup>11</sup>

Representing a distinctly nonutilitarian sentencing philosophy is retributivism. A retributive penalty is based on the notion of “just deserts” in that one who violates social norms invites a punitive response from the society he offends.<sup>12</sup> To be effective in serving the ends of civil society, a retributive penalty must be consistent with social expectations about what qualifies as an appropriate punishment.<sup>13</sup> Thus, an appropriately retributive response must be of a kind that is seen as sufficiently condemnatory for the crime committed, but at the same time not violate moral expectations by being unnecessarily excessive.<sup>14</sup>

The salience of these traditional theories of punishment remain as philosophical foundations for criminal sentencing in contemporary times. Hence, it was hypothesized that explanations by judges who issue lengthy prison sentences—particularly those amounting to extreme sentences of 200 years or more—and prosecutors and commentators discussing these sentences, would draw upon deterrence, incapacitation, and/or retributive rationales as justifications.

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<sup>8</sup> *Id.* at 100 (“Men regulate their conduct by the repeated impression of evils they know, and not by those with which they are unacquainted.”).

<sup>9</sup> Norval Morris & Frank Zimring, *Deterrence and Corrections*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1969, at 137, 140 (1969).

<sup>10</sup> FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 14–15 (1997).

<sup>11</sup> *Id.*

<sup>12</sup> ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

<sup>13</sup> Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 910 (2010).

<sup>14</sup> *Id.*

### B. *Proportionality of Penalty*

Each of the three theories of punishment just reviewed involve some aspect of the punishment bearing some proportionality to the offense and/or offender. Proportionality necessarily entails distinguishing between crimes of unequal severity. As Cesare Beccaria noted, at least with respect to deterrence theory, “[i]f an equal punishment be ordained for two crimes that injure society in different degrees, there is nothing to deter men from committing the greater, as often as it is attended with greater advantage.”<sup>15</sup> The eighteenth century English philosopher of utilitarianism, Jeremy Bentham, similarly recognized that “where two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.”<sup>16</sup>

Bentham also conceptualized that incremental increases in a punishment may be justified under certain circumstances. A penalty might be supplemented in discrete doses in order to “[p]unish for each particular of the mischief.”<sup>17</sup> Further, Bentham recognized that the penalty should scale for repeat offenders.

Where the act is conclusively indicative of a habit, such an encrease [sic] must be given to the punishment as may enable it to outweigh the profit not only of the individual offence, but of such other like offences as are likely to have been committed with impunity by the same offender.<sup>18</sup>

Retributivists likewise believe, considering their just deserts ideology, that the quality and quantity of punishment must be tailored to the crime(s) committed.<sup>19</sup>

Constitutional jurisprudence regarding criminal sentences expressly recognizes and promotes deterrence, incapacitation, and retributivism, and it also references proportionality prerequisites. The constitutional test for analyzing whether a punishment is compatible with the Eighth Amendment’s guarantee against cruel and unusual punishment consists of three considerations: (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences imposed for

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<sup>15</sup> BECCARIA, *supra* note 4, at 25–26.

<sup>16</sup> JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 36–37 (London, Printed for W. Pickering 1823).

<sup>17</sup> *Id.* at 20.

<sup>18</sup> *Id.* at 25.

<sup>19</sup> IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 197–98 (Edinburgh, T&T Clark 1887).

committing the same crime in other jurisdictions.<sup>20</sup> Importantly, the first prong of the test is a qualifying question. Unless the threshold contrast between the crime committed and the penalty imposed creates an inference of gross disproportionality, the next two prongs of the test are rendered superfluous.<sup>21</sup>

The Supreme Court has been relatively active in its Eighth Amendment jurisprudence in capital cases and with respect to prison sentences for juveniles.<sup>22</sup> Yet, its proportionality guidance otherwise has floundered. The Court has declined to order that the gross disproportionality test requires any strictly proportional tie between the severity of the crime and a noncapital sentence.<sup>23</sup> Rather, the notion of gross disproportionality remains vaguely developed and unrefined.<sup>24</sup> Significantly, the Court has declined in recent times to overrule any prison sentence applied to adults, with a single exception.<sup>25</sup> A divided court in 1983 found unconstitutional a life-without-parole sentence under a three-strikes law where the majority viewed the defendant as a repeat, but nonviolent, offender.<sup>26</sup> This ruling remains an anomaly in the Court's slate of Eighth Amendment decisions involving prison sentences. The Court has declined to find as grossly disproportionate penalties assigned to adults constituting a life sentence for three property offenses,<sup>27</sup> a life sentence for a first-time cocaine possessor,<sup>28</sup> twenty-five-years to life as a third-strike penalty where the index offense involved the theft of golf clubs valued at \$1200,<sup>29</sup> and a forty-year prison term for marijuana distribution.<sup>30</sup> In sum, the Court appears largely uninterested in policing prison sentences for adults.<sup>31</sup> A critic has rightly contended that the principles upon which these cases were decided are so subjectively oriented and perplexing that proportionality analysis for prison terms now basically exemplifies a judicial "hands-off" policy.<sup>32</sup>

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<sup>20</sup> *Solem v. Helm*, 463 U.S. 277, 292 (1983).

<sup>21</sup> *Harmelin v. Michigan*, 501 U.S. 957, 1001–05 (1991) (Kennedy, J., concurring).

<sup>22</sup> See Amanda Huston, Comment, *Jurisprudence vs. Judicial Practice: Diminishing Miller in the Struggle over Juvenile Sentencing*, 92 DENV. U.L. REV. 561 (2015).

<sup>23</sup> *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

<sup>24</sup> See generally Tom Stacy, *Cleaning up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475 (2005).

<sup>25</sup> See Michael P. O'Shea, *Purposeless Restraints: Fourteenth Amendment Rationality Scrutiny and the Constitutional Review of Prison Sentences*, 72 TENN. L. REV. 1041 (2005).

<sup>26</sup> *Solem v. Helm*, 463 U.S. 277 (1983).

<sup>27</sup> *Rummel v. Estelle*, 445 U.S. 263, 264–66 (1980).

<sup>28</sup> *Harmelin*, 501 U.S. 957.

<sup>29</sup> *Ewing v. California*, 538 U.S. 11, 20–21 (2003).

<sup>30</sup> *Hutto v. Davis*, 454 U.S. 370, 370–75 (1982).

<sup>31</sup> See Spearit, *Evolving Standards of Domination: Abandoning a Flawed Legal Standard and Approaching a New Era in Penal Reform*, 90 CHI.-KENT L. REV. 495, 501 (2015).

<sup>32</sup> Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 530 (2008).



Despite the permissive policy from a constitutional perspective regarding prison sentences, it is still expected that comments on extreme sentences would be concerned with proportionality themes as they remain relevant to the traditional theories of punishment. Proportionality would also seem an important criterion for penalties that are tantamount to life sentences.

### C. *Virtual Life Sentences*

This Article early on briefly referenced the idea of virtual life sentences. “Virtual life” is not itself a legally cognizable form of sentence, but acts as a descriptor for a genre of penalties. Hence, it may be necessary to provide a little more context for where in the scheme of sentencing that virtual life sentences might lie.

In contemporary American criminal justice, the most severe sentences available are the death penalty and a life sentence. I posit that several forms of life sentences exist. One is the life-without-parole (LWOP) version in which the relevant statute provides for a life sentence and the particular jurisdiction does not provide a legal avenue of parole. Thus, the LWOP prisoner is sent to die in prison unless some extraordinary relief somehow becomes available. Another is a “life” sentence in name—as in being “sentenced to life”—in a jurisdiction offering at least a possibility of parole. Then there is a third variety of life sentence. This one occurs in the form of a prison term so long that it exceeds the reasonably expected lifespan of the individual sentenced. Particularly in jurisdictions without second look review, these lengthy prison terms thus represent virtual life sentences, as the possibility of release is about as practically improbable as technical life sentences.<sup>33</sup>

The distinguishing attributes of a system that uses virtual life terms to permanently isolate certain criminals in penal settings are important to recognize. Pragmatically, judges who issue virtual life sentences presumably intend that they symbolically represent, and in reality result in, death in prison.<sup>34</sup> Life imprisonment provides figurative value to some. As one critic has noted, “[s]ome Americans find solace in the adage that there is just one way for [a lifer] to leave prison: in a hearse.”<sup>35</sup> It is expected, therefore, that judges who issue these sentences,

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<sup>33</sup> See Caitlyn Lee Hall, Note, *Good Intentions: A National Survey of Life Sentences for Nonviolent Offenses*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 1101, 1113 (2013).

<sup>34</sup> See Robert Johnson & Sandra McGunigall-Smith, *Life Without Parole, America’s Other Death Penalty: Notes on Life Under Sentence of Death by Incarceration*, 88 PRISON J. 328, 344 n.2 (2008).

<sup>35</sup> David J. Krajicek, *Mass Incarceration: As Legislative Season Ends, Where are the Broad Reforms?*, TRUTHOUT (June 16, 2015, 12:00 AM), <http://www.truth-out.org/opinion/item/31399-mass-incarceration-the-important-political-issue-of-2016-being-ignored>.

prosecutors who request them, and commentators who report on them will consciously understand that centuries-long penalties are virtual life sentences and thereby present as the moral and practical equivalent of lifetime penalties. Thus, it is hypothesized that their discourses will reflect such an understanding. A related ideology that would appear to rather uniquely apply to virtual life sentences is one that embraces an exclusionist mentality.

#### D. *Exclusionist Mentality*

The American carceral state, to the extent that it condones and produces lifetime prison sentences, epitomizes an *exclusionist* ideology, and not a universally *reintegrationist* system.<sup>36</sup> By definition, a correctional organization whose focus is on reintegrating prisoners would foster opportunities to make amends and embrace the humane importance of second chances. A lifer, though, is one who, uniquely among fellow men, society claims is excludable as he is “irredeemable, because one either deserves death in prison or has no hope for change. This eternal banishment means that the offender must simply wait to die.”<sup>37</sup> The official, yet unstated, message to the person seems obvious: “It doesn’t matter how much you’ve changed, no matter that you’ve aged out of committing crime, no matter how much you’ve tried to better yourself. There is no hope for you.”<sup>38</sup> In this way, lifers, as individuals who are perceived to pose a threat to legal order, are not only vilified, the system permanently rescinds their rights to live in mainstream society and revokes their moral and political identities.<sup>39</sup>

A life sentence may represent the modern equivalent of banishment. Centuries ago, Cesare Beccaria noted the societal purpose of banishment. “He who disturbs the public tranquility, who does not obey the laws, who violates the conditions on which men mutually support and defend each other, ought to be excluded from society, that is, banished.”<sup>40</sup>

In order to help justify extreme sentences entailing hundreds of years of prison time, it is therefore expected that discourses about them would draw on such an exclusionist mentality. An additional

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<sup>36</sup> See Sharon Dolovich, *Creating the Permanent Prisoner*, in *LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?* 96, 97 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

<sup>37</sup> William W. Berry III, *Life-with-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051, 1054 (2015) (footnote omitted).

<sup>38</sup> Krajicek, *supra* note 35.

<sup>39</sup> See Michael M. O’Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT’G REP. 1, 5 (2010).

<sup>40</sup> BECCARIA, *supra* note 4, at 89.

psychological ploy may be utilized whereby individuals seen as deserving this permanent segregationist treatment are perceived in subhuman terms.

### E. *Dehumanization*

Proponents of life sentences may employ various psychological constructs underlying dehumanization and infrahumanization processes in order to justify perpetually banishing certain criminals from civil society. Dehumanization involves “labeling a group as inhuman, either by using references to subhuman categories . . . or by referring to negatively valued superhuman creatures such as demons, monsters, and satans.”<sup>41</sup> Dehumanization can be viewed as part of a broader cultural engagement in intergroup aggression. When there appears to be a conflict of interest between groups, each group might seek an excuse to inflict pain on the other.<sup>42</sup> Plus, “[t]he more one dehumanizes the outgroup, the less they deserve the humane treatment enjoined by universal norms.”<sup>43</sup>

Infrahumanization is a related concept that concerns denying another those attributes which are uniquely human, such as rationality, civility, and moral sensibility.<sup>44</sup> The two main types of infrahumanization are mechanistic dehumanization and animalistic dehumanization whereby we perceive certain people or groups as machine-like or animal-like, respectively.<sup>45</sup> In sum, we may engage in dehumanistic and infrahumanistic thought to justify social and moral exclusion of individuals now objectified as subhuman.<sup>46</sup>

Criminals are a discrete group distinguishable by the significant social harms they cause by violating human law. Viewing criminals in subhuman terms allows the greater public to rationalize criminals being harshly punished, even ill-used, and excludable from moral society.<sup>47</sup> By dehumanizing criminals, however, we may be masking the extent to

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<sup>41</sup> DANIEL BAR-TAL, SHARED BELIEFS IN A SOCIETY: SOCIAL PSYCHOLOGICAL ANALYSIS 122 (2000).

<sup>42</sup> See Naomi Struch & Shalom H. Schwartz, *Intergroup Aggression: Its Predictors and Distinctness from In-Group Bias*, 56 J. PERSONALITY & SOC. PSYCHOL. 364, 365 (1989).

<sup>43</sup> *Id.*

<sup>44</sup> See Rebecca C. Hetey & Jennifer L. Eberhardt, *Cops and Criminals: The Interplay of Mechanistic and Animalistic Dehumanization in the Criminal Justice System*, in HUMANNESS AND DEHUMANIZATION 147, 147 (Paul G. Bain et al. eds., 2014).

<sup>45</sup> See Milica Vasiljevic & G. Tendayi Viki, *Dehumanization, Moral Disengagement, and Public Attitudes to Crime and Punishment*, in HUMANNESS AND DEHUMANIZATION 129, 131 (Paul G. Bain et al. eds., 2014).

<sup>46</sup> See *id.* at 129–31.

<sup>47</sup> See *id.* at 129.

which sentences have become exceedingly long and potentially disproportionate to the crimes.<sup>48</sup>

In terms of infrahumanization, while criminals are at times perceived in mechanistic terms, studies indicate that more often animal imagery is used.<sup>49</sup> For example, a research study found that subjects generally resorted to engaging animal-like imagery to describe violent criminals, including employing such terms as wild, barbaric, and savage.<sup>50</sup> The same participants were agreeable to such animalistic outcomes for violent offenders as hunting them down, catching, and caging them.<sup>51</sup> Researchers surveying a group of women found among them a common conceptualization of criminals as lacking human emotions, such as compassion and feelings, and running in packs like wild animals.<sup>52</sup> In addition, in a study focused on sex offenders, researchers observed that dehumanization processes predicted the acceptability of the offenders' social exclusion, with a stronger effect regarding child molesters than rapists.<sup>53</sup>

With respect to infrahumanization processes acting as a conduit to more punitive sanctions, other studies have shown that a subject's use of animalistic imagery in describing defendants predicted severe sentencing outcomes in criminal justice settings.<sup>54</sup>

Altogether, these study outcomes, which are supportive of the infrahumanization of criminals, suggest another hypothesis to test with the research project undertaken herein. One could predict that discursive justifications of sentences of such extreme lengths that they have the consequence of permanent banishment would include efforts to dehumanize the individuals to whom they are given. The next psychological construct to parse involves issues with numerosity, or in more colloquial parlance, our problem with numbers.

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<sup>48</sup> See J. Clark Kelso, *Corrections and Sentencing Reform: The Obstacle Posed by Dehumanization*, 46 MCGEORGE L. REV. 897, 899 (2014).

<sup>49</sup> See *id.* at 900.

<sup>50</sup> See Hetey & Eberhardt, *supra* note 44, at 156.

<sup>51</sup> See *id.* at 152.

<sup>52</sup> See Esther I. Madriz, *Images of Criminals and Victims: A Study of Women's Fear and Social Control*, 11 GENDER & SOC'Y 342, 346-47 (1997).

<sup>53</sup> See G. Tendayi Viki et al., *The Role of Dehumanization in Attitudes Toward the Social Exclusion and Rehabilitation of Sex Offenders*, 42 J. APPLIED SOC. PSYCHOL. 2349, 2357 (2012).

<sup>54</sup> See Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292 (2008); Eduardo A. Vasquez et al., *The Animal in You: Animalistic Descriptions of a Violent Crime Increase Punishment of Perpetrator*, 40 AGGRESSIVE BEHAV. 337 (2014); Viki et al., *supra* note 53, at 2355.

## F. Numerosity

In the United States, a term of imprisonment is typically constructed on some numeric scale (e.g., days, months, or years). It also is subject to a statutory maximum, and sometimes a statutory minimum time period. Hence, a particular crime might entail a statutorily permitted prison term of, perhaps, five to twenty years. Even experienced jurists, though, have trouble with translating qualitative assessments of culpability and offense severity into quantitative results. “Judges, like most people, lack the cognitive capacity to make reliable quantitative judgments in a complex environment. They can adopt mechanisms to produce a degree of reliability, but their judgments are inherently erratic.”<sup>55</sup> Psychological mechanisms referred to as anchoring and scaling help explain some of the adaptations that judges may engage in when determining punitive outcomes that necessarily entail numbers. Anchors and scaling are cognitive shortcuts that allow a person, when acting in a complex world, to more efficiently reach numerical outcomes.<sup>56</sup> But, as shall be seen, cognitive shortcuts can lead to irrational outcomes.

### 1. Anchoring Effects

Anchoring is an example of a heuristic shortcut that facilitates quicker decision-making.<sup>57</sup> Yet anchoring introduces a type of cognitive bias. Anchoring effects refer to the tendency for people to rely on numeric reference points when making numerically-based judgments.<sup>58</sup> The general idea is that the person’s evaluation may be heavily influenced by a given quantity—i.e., the “anchor.”<sup>59</sup>

As an example of an anchoring study, researchers directed participants to estimate the age at which Mahatma Gandhi died.<sup>60</sup> After the researchers asked the subjects first whether his death occurred

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<sup>55</sup> Jeffrey J. Rachlinski et al., *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L.J. 695, 701 (2015).

<sup>56</sup> See Tess M. S. Neal & Thomas Grisso, *The Cognitive Underpinnings of Bias in Forensic Mental Health Evaluations*, 20 PSYCHOL. PUB. POL’Y & L. 200, 205–06 (2014).

<sup>57</sup> See Bettina von Helversen & Jörg Rieskamp, *Predicting Sentencing for Low-Level Crimes: Comparing Models of Human Judgment*, 15 J. EXPERIMENTAL PSYCHOL.: APPLIED. 375, 377 (2009).

<sup>58</sup> See Rachlinski et al., *supra* note 55, at 695.

<sup>59</sup> Silvio Aldrovandi et al., *Sentencing, Severity, and Social Norms: A Rank-Based Model of Contextual Influence on Judgments of Crimes and Punishments*, 144 ACTA PSYCHOLOGICA 538, 546 (2013).

<sup>60</sup> See Yuval Feldman et al., *Anchoring Legal Standards*, 13 J. EMPIRICAL LEGAL STUD. 298, 299 (2016).

before the age of nine, the subjects generally guessed he had died at around age fifty. But when first asked whether Gandhi died before the age of 140 years, subjects guessed his death occurred around sixty-seven years-of-age.<sup>61</sup>

Anchoring effects can ensue from a single numerical reference or from a range, as when the person is given both low- and high-value anchors.<sup>62</sup> The anchoring imprint of prior figures upon numerical judgments has been shown to occur across multiple domains of interest, such as price appraisals, negotiation outcomes, and jury verdicts.<sup>63</sup> Remarkably, influential effects are observed even when the anchor was randomly generated or clearly implausible, such as in the Gandhi study.<sup>64</sup> Plus, anchoring effects remain relatively stable across research participants, that is, without regard to the individual's level of expertise on the particular subject matter.<sup>65</sup>

A general rationale for the salience of anchoring is that, in evaluating potential numerical values, people may attach significance to any piece of information made available to them.<sup>66</sup> Researchers have cited several psychological explanations for the phenomenon of anchoring, albeit with some overlap among them. The first is called anchoring and adjustment. A person's thought process is first oriented toward the anchor and then one makes mental adjustments toward a final conclusion.<sup>67</sup> The initial reliance upon the anchor, though, may shortcut mental processing, which may cause the final estimate to be overly biased toward the anchor.<sup>68</sup>

The second theory of anchoring is at times referred to as social implications.<sup>69</sup> The idea is that when offered an anchor, we may presume that it provides relevant information regarding the item at issue.<sup>70</sup> Thus, the presentation of the numerical anchor in the first place

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<sup>61</sup> See *id.* at 299.

<sup>62</sup> See Aldrovandi et al., *supra* note 59, at 546.

<sup>63</sup> See Ben R. Newell & David R. Shanks, *Prime Numbers: Anchoring and Its Implications for Theories of Behavior Priming*, 32 SOC. COGNITION 88, 91 (2014).

<sup>64</sup> See Feldman et al., *supra* note 60.

<sup>65</sup> See Ina Grau & Gerd Bohner, *Anchoring Revisited: The Role of the Comparative Question*, PLOS ONE, Jan. 14, 2014.

<sup>66</sup> See Feldman et al., *supra* note 60, at 303.

<sup>67</sup> See *id.*

<sup>68</sup> See Daniel Mochon & Shane Frederick, *Anchoring in Sequential Judgments*, 122 ORGANIZATIONAL BEHAV. & HUM. DECISIONAL PROCESSES 69, 69 (2013).

<sup>69</sup> This explanation has alternatively been referred to as conversational inferences. See Thomas Mussweiler et al., *Anchoring Effect*, in COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGMENT, AND MEMORY 183, 190 (Rüdiger F. Pohl ed., 2004).

<sup>70</sup> See Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. DISP. RESOL. 597, 602–03 (2006).

implies to the subject that the object's actual value must be proximate to the anchor.

A third explanation is numeric priming. When a person is given a numeric anchor, that number remains more accessible in memory because of the person's initial focus upon it.<sup>71</sup> Further, large and small anchor values facilitate cognitive connections with larger and smaller numbers, respectively, in the person's final estimates.<sup>72</sup> This observation helps explain the results of the study in which estimates of Mahatma Gandhi's age at death varied in the same direction towards a lower versus a higher age anchor, even though both anchors were implausible at face value.

Finally, anchoring may be a form of magnitude priming. When the anchor given is at a certain magnitude on the relevant scale, that magnitude provides an influential context. Subjects are then more likely to estimate the answer nearer the level suggested by that magnitude.<sup>73</sup> It may be because the magnitude itself becomes more accessible in one's cognitive process than it might otherwise have been.<sup>74</sup> For example, study subjects asked to judge the temperature of San Francisco Bay were influenced to guess higher when given an otherwise ridiculously high anchor of 558 degrees.<sup>75</sup> As this last example illustrates, at certain levels, anchors can result in a related cognitive bias known as scale distortion.

## 2. Scale Distortion

When judgments rely upon numbers, people can be influenced not only by anchoring; they can also be subject to the effects of scale distortion. In assessing the numeric value of an item, part of a person's cognitive process may be drawing upon what appear to be relevant comparisons.<sup>76</sup> As an example, the sun might be adjudged as shining more radiantly when one exits a dark movie theater than if one were to exit from a brightly lit supermarket. The sun's energy might in fact be the same in both scenarios, but the person's recent frame of reference differs. A pair of scholars have proposed that such a relative comparison modality can also occur when assessing the value of something based on

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<sup>71</sup> See *id.* at 603.

<sup>72</sup> See Grau & Bohner, *supra* note 65.

<sup>73</sup> See Andrew R. Smith & Paul D. Windschitl, *Biased Calculations: Numeric Anchors Influence Answers to Math Equations*, 6 JUDGEMENT & DECISION MAKING 139 (2011).

<sup>74</sup> See *id.*

<sup>75</sup> See Daniel M. Oppenheimer et al., *Anchors Aweigh: A Demonstration of Cross-Modality Anchoring and Magnitude Priming*, 106 COGNITION 13 (2008).

<sup>76</sup> See Shane W. Frederick & Daniel Mochon, *A Scale Distortion Theory of Anchoring*, 141 J. EXPERIMENTAL PSYCHOL.: GENERAL 124, 124 (2012) ("It is well established that perceptions and judgments are affected by the context of preceding or concurrent stimuli.").

some numeric scale.<sup>77</sup> The perceived magnitude of a value is not viewed in absolute or objective terms, but in comparative terms relative to other objects on that scale.<sup>78</sup> Yet if the magnitude of the relevant scale is shifted, then our judgment can be skewed. For instance, a 400-pound lion might appear larger if compared to a 100-pound lion than if compared to a 350-pound lion. These reflections suggest that no scale is inherently objective and that anchoring effects may alternatively be understood in terms of scale distortion.<sup>79</sup>

As another example, an anchoring study suggested scale distortion when subjects indicated they were more willing to travel twenty minutes to another store to save \$5 on a \$15 item than they were to travel the same time to save the same \$5 amount but on a \$125 item.<sup>80</sup> The time and savings were identical, so it appears the relevant difference was the monetary discount relative to the scaled value of the target item. Anchoring effects may in these cases derive from the alteration of the scale reference which can distort a person's cognitive mapping between internal representations of values and the numbers used to communicate these values.<sup>81</sup> In other words, the effect of anchoring may also be altered by a shift in the reference scale.

### 3. Anchoring and Scaling in Legal Judgments

The effects of anchoring and scaling have been shown to apply to a variety of legal decisions which depend upon numerically-based judgments. Studies indicate that monetary limits to compensation awards were positively correlated with higher awards as decision makers seemed to be influenced toward the upper limit.<sup>82</sup> Other research has found that mock judges in sentencing studies are highly influenced by anchors suggested by others even when they realized such anchoring numbers were generated by random chance.<sup>83</sup>

Actual judges, too, may be susceptible when rendering judgments dependent on dollars or years. Even though such units may appear to

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<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 347 (1984).

<sup>81</sup> See Frederick & Mochon, *supra* note 76, at 124.

<sup>82</sup> E.g., Feldman et al., *supra* note 60, at 304 (citing studies). Similar results have been observed for caps on punitive damages. E.g., Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353, 367 (1999).

<sup>83</sup> E.g., Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188, 191-92 (2005).



have objective meaning, a judge's assessment of the unit's true value is prone to the effects of scale distortions.<sup>84</sup> One rationale may be that legal decisions which rest upon numbers-based justice still entail subjective aspects that are not easily scaled.

Although the conversion of qualitative to quantitative judgments is required in many legal settings, it is a notoriously difficult undertaking. Categories do not always map naturally onto continuous scales. Errors in human judgment arise from the foibles of converting a subjective or qualitative judgment into a linear and quantitative scale. These errors can translate into mistaken judgments . . . .<sup>85</sup>

Thus, we may be attracted to the general idea that there is a correct monetary award or time-computed sentence for every civil plaintiff or criminal defendant. However, judicial decisions are made in individual cases, and the presence of unconscious cognitive biases caused by anchoring and scaling suggest that legal error may not necessarily be systematically constrained.<sup>86</sup> Consider the following ruminations on the matter.

Assume, for example, that a judge has to decide how much months of prison sentence she wants to award in a complex case. Before making the judgment she is asked whether the sentence should be higher or lower than a randomly generated number, a numeric anchor value. From a rational point of view, it should not matter whether the anchor value is high or low. The judicial judgment should in any case not be influenced by such an irrelevant anchor. Regardless, even experienced judges' sentencing decisions are influenced by randomly generated numbers, even if the judicial experts determined these anchors themselves by throwing dice.<sup>87</sup>

As quite relevant to the research herein, further exploratory exercises demonstrate that anchor numbers are influential in sentencing decisions despite being implausibly extreme or having originated from inexperienced sources.<sup>88</sup>

Certainly, sentencing recommendations regarding the length of a prison term, whether made by the prosecution, defense, or through calculations from sentencing guidelines, theoretically represent

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<sup>84</sup> See Rachlinski et al., *supra* note 55, at 711.

<sup>85</sup> Valerie P. Hans et al., *Editors' Introduction to Judgment by the Numbers: Converting Qualitative to Quantitative Judgments in Law*, 8 J. EMPIRICAL LEGAL STUD. 1, 1-2 (2011).

<sup>86</sup> See Rachlinski et al., *supra* note 55, at 700.

<sup>87</sup> Andreas Glöckner & Birte Englich, *When Relevance Matters: Anchoring Effects Can Be Larger for Relevant than for Irrelevant Anchors*, 46 SOC. PSYCHOL. 4, 4 (2015) (citing studies).

<sup>88</sup> For citations to supporting sources, see Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1541 (2001).

numerical anchors that influence sentencing outcomes.<sup>89</sup> Research confirms that prosecutors' demands for sentence length in real life tend to serve as anchors which influence judges' decisions.<sup>90</sup> This result also applies to judges with much experience in deciding criminal punishments.<sup>91</sup> Additional research likewise indicates a positive correlation between the prosecutor's recommended sentence length and the prison term actually issued.<sup>92</sup>

When the prosecutor's suggestion is the anchor, it generally represents a high anchor. In a guidelines-based sentencing system (i.e., one that yields a numerical range for the length of a purportedly reasonable penalty), it is not always clear, though, what will serve as the most relevant anchor. It could be that the more important anchor might be the floor or the ceiling, or perhaps the middle of that range.<sup>93</sup>

Importantly, when proportionality in penalties is a valued goal, an intention to punish must somehow be translated onto some type of relative value scheme regarding culpability and offense severity. A criminal justice system substantially reliant upon imprisonment generally involves a temporal scale, such as the number of days, months, or years of imprisonment to be imposed.<sup>94</sup> Systems of punishment that rely heavily on prison terms, consequently, are subject to the influence of cognitive bias by scale distortions. A study of judicial sentencing confirmed such a bias when the scale itself is replaced. Using the same case hypothetical, judges tended to impose shorter sentences when required to sentence using a months-based approach than judges who used a scale involving years.<sup>95</sup> The consequences were drastic. The judges who sentenced in months averaged what computes in years to about five years; the judges who sentenced in annual increments averaged ten years for the same cases.<sup>96</sup>

Issues with scale and magnitude might intensify with more severe crimes. Researchers suggest that when "the number of months grows

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<sup>89</sup> See Birte Englich, *Blind or Biased? Justitia's Susceptibility to Anchoring Effects in the Courtroom Based on Given Numerical Representations*, 28 LAW & POL'Y 497, 497 (2006); Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137, 138 (2006) (declaring federal guidelines' recommendations as "ready-made anchors"). Guidelines recommendations are lawful anchors throughout the adjudication process. See Daniel M. Isaacs, Note, *Baseline Framing in Sentencing*, 121 YALE L.J. 426, 443 (2011).

<sup>90</sup> E.g., Englich & Mussweiler, *supra* note 88, at 1541.

<sup>91</sup> See Aldrovandi et al., *supra* note 59, at 546; Birte Englich et al., *The Last Word in Court: A Hidden Disadvantage for the Defense*, 29 LAW & HUM. BEHAV. 705, 716 (2005); Englich & Mussweiler, *supra* note 88, at 1546.

<sup>92</sup> E.g., Aldrovandi et al., *supra* note 59, at 546.

<sup>93</sup> See Isaacs, *supra* note 89, at 429 n.5.

<sup>94</sup> See Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1167 (2002).

<sup>95</sup> See Rachlinski et al., *supra* note 55, at 717.

<sup>96</sup> *Id.* at 716.

into the hundreds, judges might start to become insensitive to the length of the sentence. The difference between 300 and 360 months might not seem as notable as the difference between 25 and 30 years.<sup>97</sup> This reflection represents a scale distortion as the two ranges in actual time are identical.

Further, when considering proportionality, it is common for the decision-maker to weigh a potential penalty in comparison to sentences given in other crimes for similar offending.<sup>98</sup> Still, issues of scaling remain. In a relevant study, researchers found that subjects perceived the same sentence as about four times as severe when told it was the second longest sentence issued than when informed it was the fifth longest.<sup>99</sup>

Another issue with numerosity can be briefly mentioned. Two studies of actual sentencing decisions indicate that when judges have difficulty translating their qualitative sense of desert into numerical sentences, they may fixate on certain numbers.<sup>100</sup> Tendencies to round off numbers have been observed. Judges tended to sentence to the nearest whole number, to sentence in even numbers, and to use multiples of five and ten.<sup>101</sup> It is noted that legal outcomes in which qualitative decisions are issued in quantitative, yet rounded, numbers may reflect a cognitive scheme that reflects the decision-maker's gist of the case that effectively avoids exactness.<sup>102</sup>

#### 4. Comparative Analysis in Penalty Determinations

Despite proportionality analysis having no teeth any longer in constitutional challenges to prison sentences, the idea of proportionality is important to the continuing and significant influence of the main theories of criminal punishment. The general tenet that a punishment ought to be commensurate to the crime appears straightforward on its face. Yet there is no socially agreed-upon standard for setting the penalty for any specific offense. Thus, it is not necessarily intuitive in any individual case what the reasonable sentence ought to be. Instead,

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<sup>97</sup> *Id.* at 718.

<sup>98</sup> See Aldrovandi et al., *supra* note 59, at 543.

<sup>99</sup> *Id.* at 538.

<sup>100</sup> See Craig E. Jones & Micah B. Rankin, *Justice as a Rounding Error? Evidence of Subconscious Bias in Second-Degree Murder Sentences in Canada*, 52 OSGOODE HALL L.J. 110 (2014); Andrew Wiseman et al., *Sentencing and Conventional Number Preferences: A Research Note*, 8 JUST. RES. & POL'Y 67 (2006).

<sup>101</sup> See Jones & Rankin, *supra* note 100, at 118 (citing A DICTIONARY OF EPIDEMIOLOGY 47 (John M. Last ed., 3d ed. 1995)).

<sup>102</sup> See Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. EMPIRICAL LEGAL STUD. 120, 134 (2011).

we often need some frame of reference, which typically involves making relative comparisons from penalties issued for similar offenses.<sup>103</sup> Through such an iterative, comparative process, sentences for similar categories of harm then become normalized.<sup>104</sup> Consequently, penalties issued in other cases can come to represent sources of bias in terms of their anchoring and scaling magnitude effects.

Altogether, this evidence on anchoring effects and scale distortion suggests the same cognitive biases may occur with respect to the database of extreme sentences offered next. Thus, a relevant hypothesis to test is whether there is evidence of any such effects in sentencing data and the discourses embodied in the written opinions or oral statements by the judges who issue them or the appellate judges who review these sentences.

The next Part presents an empirical study of sentences in the federal system. The focus is on sentences of 200 years and more, which this Article will continue to refer to as extreme sentences as they represent outliers in sentencing practices overall. These extreme sentences, and the documentary evidence underlying them, allow a mixed method study of the various philosophical and psychological constructs just discussed.

## II. AN EMPIRICAL STUDY OF EXTREME SENTENCES

The criminological study presented herein concerns the federal sentencing system. The federal system is an appropriate focus for criminal justice research considering that the federal prison population is the largest in the country, federal justice policies and practices are often considered models for the states, and the U.S. Sentencing Commission rather uniquely makes available much data about actual sentencings.<sup>105</sup> In addition, the federal justice system represents judicial decision-making across the United States, which means that it thus provides a broad geographical coverage. Perhaps the results will, therefore, be more generalizable than would a study of a single state's practices. Before providing more details about the study, a quick summary of the federal system should suffice to explain the context.

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<sup>103</sup> See Aldrovandi et al., *supra* note 59, at 539; Sunstein et al., *supra* note 94, at 1170.

<sup>104</sup> See Sunstein et al., *supra* note 94, at 1171–72.

<sup>105</sup> See HUMAN RIGHTS WATCH, NATION BEHIND BARS: A HUMAN RIGHTS SOLUTION (2014); Steven L. Chanenson & Douglas A. Berman, *Sentencing's Wild Ride Continues*, 26 FED. SENT'G REP. 283, 284–85 (2014).

A. *The Federal Sentencing System*

In the federal criminal justice system, judges at the district court level are primarily responsible for issuing final sentencing outcomes, though guidance is made available. Congress has bestowed upon the U.S. Sentencing Commission the authority to promulgate sentencing policies and to publish relevant guidelines.<sup>106</sup> In general, the guidelines provide district judges a method for determining a guidelines-computed recommended range for a reasonable prison sentence in each individual case. This sentencing recommendation is basically derived from a grid with a vertical axis covering what is referred to as the final offense level and a horizontal axis with a final criminal history score. The final offense level, ranging from one to forty-three (lowest-to-highest), represents the severity of the offending conduct overall. The final offense total is then combined with a calculated criminal history score, itself ranging in ordinal fashion from I to VI (lowest-to-highest).<sup>107</sup> For each individual case, the sentencing judge selects the appropriate final offense level on the vertical axis and the assigned criminal history category from the horizontal axis, which together determines which cell in the grid applies. The applicable cell yields the recommended range of months of a prison term.<sup>108</sup> To be clear for the purposes of the study, the federal guidelines calculate sentences on a scale of months.

Since 2005, the federal sentencing guidelines have been discretionary in nature as a remedy for a constitutional flaw related to jury fact-finding.<sup>109</sup> District judges may vary from them if they believe a more reasonable sentence lies outside the recommended range. Nonetheless, sentencing judges are still required by both statute and Supreme Court mandate to compute in every case the guidelines' recommended range before issuing a final sentence.<sup>110</sup> As a result, the recommended range continues to provide relevant, even formalized, anchoring numbers.

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<sup>106</sup> See 28 U.S.C. § 991 (2012).

<sup>107</sup> See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(6) (U.S. SENTENCING COMM'N 2014).

<sup>108</sup> See *id.* at § 1B1.1(a)(7).

<sup>109</sup> See *United States v. Booker*, 543 U.S. 220, 245 (2005).

<sup>110</sup> See *Peugh v. United States*, 186 L. Ed. 2d 84, 95 (2013).

### B. *Methodologies*

The quantitative portion of the study set forth below principally includes simple counts and percentages.<sup>111</sup> The qualitative component, on the other hand, is, at its heart, a discourse analysis. Influenced by the work of Michel Foucault, discourse theory derives substance from interdisciplinary principles that highlight the societal importance of discourse: “Discourse is constitutive of social relations in that all knowledge, all talk, all argument takes place within a discursive context through which experience comes to have, not only meaning for its participants, but shared and communicable meaning within social relations.”<sup>112</sup> Discourse functionally and instrumentally uses language as social practice.<sup>113</sup>

As a research methodology, discourse analysis permits an exploration of the interplay between texts, discursive practices, and the larger social context that bears upon the text and the discursive practices.<sup>114</sup> Discourse analysis within the field of law, specifically, is appropriate and meaningful. In the practice of law, we strategically use language in individual cases which simultaneously influences power balances between individuals and groups.<sup>115</sup> The results of the discourse analysis conducted herein will follow the introduction of the dataset.

### C. *The Dataset*

This study provides an original dataset of all federal defendants who were sentenced to at least 200 years in prison over the last sixteen years (more specifically, the study period range includes the years 2000–2015). The dataset and the additional information underlying the quantitative and qualitative analyses running through this Part II were compiled through triangulating a host of public information repositories. Sources for the data primarily consist of case opinions, court filings, press releases, news reports, and statistical databases made available from the U.S. Sentencing Commission. To the extent possible,

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<sup>111</sup> The author has elsewhere conducted a more sophisticated logistic regression analysis of federal sentences of 470 months (about forty years) and higher. See Melissa Hamilton, *Some Facts about Life: The Law, Theory, and Practice of Life Sentences*, 20 LEWIS & CLARK L. REV. (forthcoming 2016).

<sup>112</sup> Trevor Purvis & Alan Hunt, *Discourse, Ideology, Discourse, Ideology, Discourse, Ideology . . .*, 44 BRITISH J. SOC. 473, 492 (1993).

<sup>113</sup> See generally LINDA A. WOOD & ROLF O. KROGER, *DOING DISCOURSE ANALYSIS: METHODS FOR STUDYING ACTION IN TALK AND TEXT* (2000).

<sup>114</sup> See generally NORMAN FAIRCLOUGH, *LANGUAGE AND POWER* (2d ed. 2001).

<sup>115</sup> See Pierre Bourdieu & Richard Terdiman, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 80910 (1987).

information was cross-verified against the other collected source materials.

Table 1 contains the name of each defendant, his/her sentence in both months and years, the federal district in which the defendant was sentenced, the fiscal year of sentencing,<sup>116</sup> the listed prison release date (unless the defendant as of the time of this writing was incarcerated in a state prison or deceased), and the general offense category. Overall, a total of fifty-five defendants received sentences of at least 200 years in the federal system since 2000.

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<sup>116</sup> The U.S. Sentencing Commission uses fiscal years that begin October 1.

Table 1. Extreme Sentences in the Federal System

<i>Defendant</i>	<i>Sentence in Months</i>	<i>Sentence in Years</i>	<i>District</i>	<i>Fiscal Year</i>	<i>Release Date</i>	<i>Offense Type</i>
Patricia Allana Ayers	19,080	1590	Ala. N.	2015	State <sup>a</sup>	Child pornography
Pierre Ernest Falgout	11,520	960	Ala. N.	2008	Life <sup>b</sup>	Child pornography
Sholam Weiss	10,140	845	Fla. M.	2000	11/23/2754	Fraud
Matthew David Ayers	9,000	750	Ala. N.	2015	State <sup>a</sup>	Child pornography
Bruce Warren Betcher	9,000	750	Minn.	2007	Deceased	Child pornography
Jordan David Huff	8,955	746.25	Cal. E.	2010	State <sup>a</sup>	Armed robberies
Marcus Major	8,941	745.08	Cal. E.	2010	10/2/2654	Armed robberies
Keith Pound	8,880	740	Fla. M.	2000	Deceased	Fraud
Stephen M. Howells II	6,960	580	NY N.	2016	2/14/2521	Child pornography
James Shawn Hulsey	5,760	480	Ala. N.	2009	7/2/2428	Child pornography
Christine Staggs McKim	5,400	450	Ala. N.	2009	11/9/2398	Child pornography
Darry Wayne Hanna	5,280	440	SC	2007	9/13/2389	Fraud
Lonny J. Andrews	4,860	405	Ky. E.	2003	Deceased	Child pornography
Timothy James Poole	4,800	400	SC	2010	10/27/2357	Fraud
Jason Montes	4,705	392.08	Tex. N.	2008	7/21/2348	Bank robberies
Margarito Armijo	4,692	391	Tex. N.	2008	5/15/2348	Bank robberies
Curtis Solomon	4,641	386.75	Fla. S.	2009	3/24/2345	Armed robberies
Andrew Jay McGrath	4,440	370	Ind. S.	2010	1/18/2332	Child pornography
Tony Hewitt	4,260	355	Tex. N.	2010	2/17/2274	Bank robberies
Corey Deyon Duffey	4,253	354.42	Tex. N.	2010	1/26/2274	Bank robberies
Jarvis Ross	3,960	330	Tex. N.	2010	4/1/2257	Bank robberies
Norman Schmidt	3,960	330	Colo.	2008	Deceased	Fraud
Gary Steven Vasiloff	3,900	325	Ala. N.	2008	9/27/2290	Child pornography
William Dunn	3,900	325	Tenn. M.	2009	12/13/2289	Drugs
William A. King	3,781	315.08	Md.	2006	9/25/2276	Armed robberies
David Ryan Bostic	3,780	315	Ind. S.	2012	5/4/2285	Child pornography



<i>Defendant</i>	<i>Sentence in Months</i>	<i>Sentence in Years</i>	<i>District</i>	<i>Fiscal Year</i>	<i>Release Date</i>	<i>Offense Type</i>
Myles W. Robinson	3,771	314.25	La. W.	2014	5/25/2286	Armed robberies
(N/A) <sup>117</sup>	3,720	310	Ala. N.	2007	---	Child pornography
Robert Thompson	3,708	309	La. M.	2010	2/14/2278	Fraud
Nicole F. Vaisey	3,600	300	NY N.	2016	4/24/2277	Child pornography
Roderick McNeal	3,484	290.33	Tenn. W.	2009	6/13/2260	Armed robberies
Leland Beasley	3,480	290	Mo. E.	2011	State <sup>a</sup>	Child pornography
Barbara Lang	3,360	280	Tenn. E.	2015	8/25/2257	Drugs
Dumonde Wiley	3,184	265.33	Ky. W.	2004	8/7/2235	Armed robberies
Sidney Fletcher	3,184	265.33	Ky. W.	2004	12/20/2235	Armed robberies
Felix A. Okafor	3,157	263.08	NC E.	2014	3/23/2241	Drugs
Philip Andra Grigsby	3,120	260	Kan.	2013	1/20/2239	Child pornography
James Phillip Edwards	2,940	245	Mo. W.	2013	3/24/2223	Child pornography
Jamail James Hogan	2,904	242	Fl. M.	2006	7/14/2080 <sup>b</sup>	Armed robberies
James Napier	2,880	240	Ohio S.	2014	2/20/2222	Child pornography
Maurice Gibson	2,880	240	WV S.	2014	12/3/2214	Drugs
Daniel T. Eckstrom	2,880	240	Ind. N.	2015	6/25/2222	Child pornography
Jason Wiley	2,847	237.25	Nev.	2012	6/7/2217	Armed robberies
David Metzger	2,820	235	Ind. S.	2010	8/14/2214	Child pornography
Larue Yusef Smith	2,790	232.5	Penn. E.	2009	2/15/2220	Armed robberies
Andre Lavon Jones	2,724	227	Mich. E.	2009	State <sup>a</sup>	Bank robberies
Kendricus M. Williams	2,719	226.58	NC E.	2009	9/19/2205	Armed robberies
Jeremiah Travis III	2,672	222.67	Ga. N.	2008	8/9/2200	Armed robberies
Leonard Earl Roulhac	2,654	221.17	Va. E.	2010	10/17/2207	Bank robberies
Tony Orlando Hughes	2,616	218	Va. E.	2005	2/6/2198	Drugs
Gary Eugene Chapman	2,580	215	Tenn. M.	2012	4/10/2198	Gang shootings

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<sup>117</sup> This defendant was unidentifiable by name.

<i>Defendant</i>	<i>Sentence in Months</i>	<i>Sentence in Years</i>	<i>District</i>	<i>Fiscal Year</i>	<i>Release Date</i>	<i>Offense Type</i>
Michael Joseph Pepe	2,520	210	Cal. C.	2014	5/27/2189	Child sex travel
Matthew C. Graziotti	2,520	210	Fla. M.	2015	6/25/2197	Child pornography
Salvador Magluta	2,460	205	Fla. S.	2003	6/11/2170	Drugs
Steven Lorenzo	2,400	200	Fla. M.	2006	1/23/2179	Drugs

Notes: a = Incarcerated in a state prison; b = Incarcerated in federal prison and release date listed questionable.<sup>118</sup>

The release date (if any) listed on the Bureau of Prisons' website was included as a column to illustrate that these penalties serve, both theoretically and practically, as virtual life sentences. With good time capped at 15% and with federal parole having been abolished by the Sentencing Reform Act of 1984,<sup>119</sup> it is clear that none of these defendants will be released in their lifetimes—bar some unforeseen event.

The next subsections contain additional data about the set of extreme sentence defendants, such as providing quantitative and qualitative information on selected demographic and case characteristics. Descriptions of some of the more interesting and tragic cases are then provided. At various times, the discussion will consider whether these extraordinary punishments are proportional to the crimes in all cases and whether these defendants generally represent the worst of the worst offenders for which these penalties ought to be reserved.

### 1. Demographic Data

Certain demographic data was discoverable for almost all of the defendants from reliable sources, and revalidated with other sources whenever possible. In terms of gender, all but four of the defendants were male. It might be of particular interest what types of offenses the women committed. Three of them share common storylines. These three women were convicted of child pornography production and each was sentenced along with her male husband or boyfriend for the same

<sup>118</sup> This is likely either a typographical error on the Federal Bureau of Prisons' website or, in the case of *Falgout*, the defendant was sentenced to LWOP for additional crimes. Pierre Ernest Falgout's sentence of 960 years was confirmed in 2013. *Falgout v. United States*, 2013 U.S. Dist. LEXIS 97491 (N.D. Ala. July 12, 2013). Jamail James Hogan's sentence of 242 years was affirmed in 2013. *United States v. Hogan*, 2013 U.S. Dist. LEXIS 180106 (M.D. Fla. Dec. 24, 2013).

<sup>119</sup> Pub. L. No. 98-473, §§ 211–300, 98 Stat. 1837, 1987–2040 (1984) (codified as amended 18 U.S.C. §§ 3551–3742 (2012); 28 U.S.C. §§ 991–998 (2012)).

offenses. Patricia Ayers, given the single longest sentence—at 1590 years—was convicted along with her husband of crimes related to videotaping their own sexual molestation of a minor child age six who had been in their care.<sup>120</sup> Ayers' husband received a far lesser, but still extreme, sentence of 750 years. It is notable that despite the extraordinary length of their federal sentences, the Ayers were also prosecuted in state court on sodomy and child pornography production charges, they pled guilty, and both were sentenced to life sentences at the state level.<sup>121</sup>

Nicole Vaisey and her boyfriend, Stephen M. Howells II, were similarly both convicted in the federal system for multiple child pornography production charges and sentenced to 300- and 580-year terms, respectively. The prosecutions followed their kidnapping of two young Amish girls from a roadside farm stand. The pair took the girls to the defendants' home where, over the course of about twenty-four hours, they drugged the girls, sexually molested them, and videotaped the crimes. They released the girls in a secluded area thereafter, allegedly because they had not yet completed soundproofing a room that would have allowed them to keep the girls longer without risking that the neighbors could hear screams.<sup>122</sup> The extreme federal sentences followed the pair's conviction for the sexual abuse at the state level, where they each received twenty-five-year sentences.<sup>123</sup>

James Shawn Hulsey and Christine Staggs McKim were a couple in this dataset also both convicted of child pornography production, which entailed sexually molesting their own two babies and taping the abuse.<sup>124</sup> A difference for this couple is that it does not appear that a state also convicted and sentenced them separately. The fourth woman in the dataset, Barbara Lang, has a completely different story from the other women. Introduced at the beginning of this paper, "Aunt Bea," presumably so nicknamed because of her age (sixty-one) and stocky

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<sup>120</sup> See Press Release, U.S. Attorney's Office for the N. Dist. of Ala., Florence Couple Sentenced to Hundreds of Years in Prison for Producing Child Pornography (Oct. 22, 2014), <https://www.fbi.gov/birmingham/press-releases/2014/florence-couple-sentenced-to-hundreds-of-years-in-prison-for-producing-child-pornography>.

<sup>121</sup> See *Shoals Couple Sentenced on Child Sex Abuse Charges*, WAFF 48 (Feb. 26, 2015, 7:04 AM), <http://www.waff.com/story/27970064/shoals-couple-sentenced-on-child-sex-abuse-charges>.

<sup>122</sup> See *Judge Imposes Lifetime Prison Terms in Amish Kidnapping Case*, NBC NEWS (Dec. 17, 2015, 8:45 PM), <http://www.nbcnews.com/news/us-news/judge-imposes-lifetime-prison-terms-amish-kidnapping-case-n482161>.

<sup>123</sup> See *Sicko Couple Who Sexually Abused Amish Girls Get Centuries Behind Bars*, N.Y. POST (Dec. 17, 2015, 5:09 PM), <http://nypost.com/2015/12/17/sicko-couple-who-sexually-abused-amish-girls-get-hundreds-of-years-behind-bars>.

<sup>124</sup> See Jason Morton, *Child Abuser Gets 480 Years*, TUSCALOOSA NEWS (Dec. 10, 2008, 3:30 AM) [hereinafter Morton, *Child Abuser Gets 480 Years*], <http://www.tuscaloosaneews.com/article/20081210/NEWS/812090193>.

appearance, operated a pill mill in Tennessee. The operation entailed a medical clinic out of which doctors improperly prescribed addictive pain killers to scores of drug abusers. Lang was also convicted on federal charges of illegally structuring financial transactions to shield the profits from authorities.<sup>125</sup> This is the first case to be introduced that raises the question of proportionality in sentencing. Lang had no criminal history and there were no allegations of her prescribing or directly distributing drugs to patients. There is also no evidence of Lang ever having committed violent acts in connection with the pill mill or otherwise.<sup>126</sup> In any event, for now, additional information on other demographic characteristics of the dataset will be summarily provided.

Racial discrimination in criminal justice is a common topic of interest, but it was not a focus of this study. Still, it should be noted that racial disproportionality (considering the current racial makeup of the country) was observed. Just over half (twenty-nine out of fifty-five) of the defendants were white. Of the twenty-six defendants who were minority, the vast majority (twenty-three) were black, while the remaining three were Hispanic. There existed clear racial divisions in terms of the type of crimes committed. White defendants accounted for almost all of the child pornography and fraud offenders in the dataset. Minority defendants accounted for the vast majority of the armed robberies (including bank heists) and drug offenses.

The age range for the group was twenty-one to seventy-two years-of-age, with a mean age of thirty-eight. Age-based differences in terms of the crimes were also evident. Defendants who were aged forty-years and older tended to have been convicted of child pornography or financial fraud. The younger ones were more likely to have been armed robbers or bank robbers. The age range for the drug offenders was more varied. Overall, the group was relatively well-educated. While there were missing data in two cases, the general picture was that roughly eight out of ten of those with known educational backgrounds had at least a high school diploma, with half of that number having at least some college credits. Seven of the defendants (13%) were college graduates; they tended to be child pornography producers.

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<sup>125</sup> See Press Release, U.S. Attorney's Office for the E. Dist. of Tenn., Chattanooga Pill Mill Operator Sentenced to 280 Years in Prison (Aug. 28, 2015), <https://www.justice.gov/usao-edtn/pr/chattanooga-pill-mill-operator-sentenced-280-years-prison>.

<sup>126</sup> The author gathered this information from the absence in the reports and governmental press releases of any mention of any other illegal activity, and statements made by the prosecutor about seeking the sentence because of her pill mill operations.

## 2. Case Characteristics

The cases in this extreme sentence dataset generally fell within the offense categories of child pornography production, armed robberies, bank robberies, financial fraud, and drug distribution. It might be a surprise that just over half of the defendants receiving these extreme sentences were assigned the minimum criminal history score (Criminal History category I per the guidelines' structure). Less than a quarter ranked at the top end of the criminal history score (Criminal History categories V and VI). Thus, many of these prisoners facing virtual life in prison were not known to be recidivists. Only a minority of them appeared to be career offenders. The final offense levels (on a scale of 1 to 43) ranged from 21 to 43, with a mean of 38. Just over half of the defendants were at the maximum 43 levels, with most of them being the child pornography defendants. In other words, most of the defendants receiving extreme sentences were not adjudged the absolute worst of offenders on either the criminal history or the offense severity scales as computed by the Sentencing Commission's guidelines. Yet these defendants still received the longest sentences in the system.

The federal criminal justice system is heavily reliant upon efficient case processing through pleas. Typically, about 97% of all federal defendants plead guilty.<sup>127</sup> The extreme sentence group is distinguishable in this regard. During the study period, approximately 40% of the extreme sentencing group pled guilty, meaning that 60% went to trial. It could be that so many of them chose to go to trial because, as related further below, each of them faced multiple charges and thus risked consecutive sentencing.

A noticeable geographic disparity existed. A significant majority of the extreme sentencing defendants were in southern states. More specifically, most of them were sentenced in the southeastern part of the country. The Northern District of Alabama counted the greatest number of extreme sentences at seven defendants, followed by the Northern District of Texas<sup>128</sup> and the Middle District of Florida each with five defendants. All of the Northern District of Alabama cases were for child pornography. All of the Northern District of Texas cases involved bank robberies. In contrast, the Middle District of Florida's cases represented a variety of offenses. It is beyond the scope of this Article to be able to adequately explain these regional deviations other

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<sup>127</sup> *E.g.*, U.S. SENTENCING COMM'N, PRELIMINARY QUARTERLY DATA REPORT: FISCAL YEAR 2015, at 42 (2016).

<sup>128</sup> The Northern District of Texas is otherwise known for its extraordinary sentencing practices. In separate data analyses, this district has the highest rate of upward departures for combined fiscal years 2008–2015.

than to note that it might represent geographic and offense-based disparities in sentencing.

Unexpectedly, almost two-thirds of the extreme sentence defendants had codefendants. Indeed, more than a few of the codefendants are within this dataset, meaning that they received extreme sentences by the same courts for their shared offending. Previously mentioned were the three male-female couples jointly convicted of child pornography offenses, and all six of those individuals received sentences of at least 200 years. Several other groups were armed robbers or bank robbers.<sup>129</sup> Among these were Tony Hewitt, Corey Duffy, and Jarvis Ross, who committed multiple armed bank robberies together. Their three sentences were correspondingly bunched together in the 330- to 355-year range. Jordan Huff and Marcus Major were codefendants convicted of armed robberies and gang involvement and their sentences were both at just under 750 years each. Another couple of codefendants in this dataset, Keith Pound and Shalom Weiss, committed financial fraud together and they received the longest federal sentences for white-collar crime at 740 and 845 years, respectively.

While not a focus of the study, an implication of the frequent presence of co-offenders in a set of extreme sentences could be linked to the rationale that underlies a criminal justice policy of adding punishment when criminals conspire with others to commit crimes. The idea is that a criminal may be considered a greater threat to others when he acts in concert with another.

### 3. Selected Case Studies

The facts of at least a few of the cases stood out, not just in terms of the extraordinary sentences imposed, but for idiosyncratic reasons. Further facts on several of these are summarized here in order to further contextualize this outlier set of defendants. For example, Michael Joseph Pepe was not a typical sex offender. Pepe, a former Marine, traveled to Asia with the intent to have sexual contact with Cambodian girls.<sup>130</sup> A local prostitute acted as his broker. Pepe paid her a finder's fee and compensated the families for access to the girls, who were aged nine to

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<sup>129</sup> Dumonde Wiley and Sidney Fletcher were codefendants convicted of armed robberies and sentenced to the same penalties exceeding 200 years. *See United States v. Wiley*, 132 F. App'x 635 (6th Cir. 2005). Jason Montes and Margarito Armijo committed bank robberies together and each was sentenced to just over 390 years. *See Press Release*, U.S. Attorney's Office for the N. Dist. of Tex., Federal Jury Convicts Two Bank Robbers (Apr. 15, 2008), [https://www.justice.gov/archive/usao/txn/PressRel08/montes\\_armijo\\_bank\\_rob\\_conv\\_pr.html](https://www.justice.gov/archive/usao/txn/PressRel08/montes_armijo_bank_rob_conv_pr.html).

<sup>130</sup> *See Victoria Kim, Man Gets 210 Years in Overseas Molestations*, L.A. TIMES (Feb. 28, 2014), <http://articles.latimes.com/2014/feb/28/local/la-me-0301-sex-tourism-sentencing-20140301>.

thirteen.<sup>131</sup> After Pepe was arrested, prosecutors flew six of the girls he abused into the United States to testify, with the help of a translator, against him.<sup>132</sup> This case is distinguishable from most criminal justice prosecutions in representing the United States' interests at times in pursuing crimes occurring outside its geographic boundaries.

Several cases involved stereotypical visions of the combination of drug trafficking and violence within the federal war on drugs. Maurice Taft "Mo" Gibson<sup>133</sup> was sentenced for running a drug ring and ordering the murder of a drug dealer whom he learned was cooperating with a police investigation into Gibson's drug operation.<sup>134</sup> Gibson was reported to have flaunted his riches by wearing Rolex watches and mink coats, driving Cadillac Escalades, and acquiring multiple homes and other real estate.<sup>135</sup> Felix A. Okafor perhaps also presents what is envisioned as the common criminal in federal sentencing in terms of his crimes. Okafor is a Nigerian national convicted of multiple charges related to the distribution of marijuana and heroin, gun charges, and money laundering.<sup>136</sup> Neighbors had become suspicious after Okafor purchased a neighborhood convenience store. Okafor only halfheartedly operated it, keeping it sparsely stocked. Yet strangers arriving in expensive cars would enter the store at all hours. Eventually, undercover agents made drug purchases at the store and thereafter made the arrest.<sup>137</sup>

Salvador Magluta's life could have been a movie. A reporter thought so, referring to Magluta as mimicking the movie figure Scarface in being a Cuban-born drug kingpin similar to the part that Al Pacino played in the movie of the same title.<sup>138</sup> In the 1980s, Magluta was

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<sup>131</sup> See Press Release, Dep't of Homeland Sec., Ex-Marine Receives 210-Year Federal Prison Term for Drugging and Raping Girls in Cambodia (Feb. 28, 2014) [hereinafter Dep't of Homeland Sec., Ex-marine Receives 210-Year Prison Term], <https://www.ice.gov/news/releases/ex-marine-receives-210-year-federal-prison-term-drugging-and-raping-girls-cambodia>.

<sup>132</sup> Scott Glover, *Abused Girls Testify in U.S.*, L.A. TIMES (Sept. 26, 2008), <http://articles.latimes.com/2008/sep/26/local/me-kids26>.

<sup>133</sup> Justin Fenton & Madison Park, *Trial Tactic Decried: Murder Accusation May Figure in Dealer's Term*, BALT. SUN (May 16, 2008), [http://articles.baltimoresun.com/2008-05-16/news/0805150357\\_1\\_sentencing](http://articles.baltimoresun.com/2008-05-16/news/0805150357_1_sentencing).

<sup>134</sup> See Tammie Toler, *Former Drug Kingpin Sentenced to 2 Centuries*, BLUEFIELD DAILY TELEGRAPH (Oct. 26, 2007), [http://www.bdtonline.com/archives/former-drug-kingpin-sentenced-to-centuries/article\\_d9313f1d-fafc-53ac-b771-e01743c1bc8b.html](http://www.bdtonline.com/archives/former-drug-kingpin-sentenced-to-centuries/article_d9313f1d-fafc-53ac-b771-e01743c1bc8b.html).

<sup>135</sup> See *id.*

<sup>136</sup> See *Nigerian Man Sentenced to 263 Years in U.S. Prison for Drug Dealing/Money Laundering*, BELLA NAIJA (Dec. 7, 2014, 10:48 PM), <https://www.bellanaija.com/2014/07/nigerian-man-sentenced-to-263-years-in-u-s-prison-for-drug-dealingmoney-laundering>.

<sup>137</sup> See *id.*

<sup>138</sup> See Marcus Warren, *205 Years for 'Scarface'*, TELEGRAPH (Jan. 25, 2003, 12:01 AM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1420054/205-years-for-Scarface.html>.

considered a cocaine cowboy, running one of the largest cocaine importation operations in the world at the time.<sup>139</sup> Operating out of Miami, Florida, Magluta and his crew would smuggle into the country by speedboat large shipments of cocaine obtained from Colombian drug cartels. Monies from the illicit drug operations were then laundered through various businesses and real estate purchases. Magluta and his colleagues enjoyed the high life in public view. They were considered untouchable.<sup>140</sup> It turned out that they were not entirely immune. Prosecutors tried Magluta in 1996 for drug offenses. Jurors found the defendant innocent. Yet the circumstances were curious. Several witnesses turned up dead, the juror foreperson appeared to have suddenly become rich, and a prosecutor resigned after a strange incident in a strip club.<sup>141</sup> It was also discovered that Magluta used part of the laundered money to pay his defense lawyers.<sup>142</sup> Nonetheless, prosecutors eventually brought new charges. After another lengthy trial in 2002, Salvador Magluta was found guilty on about one-fourth of the charges brought regarding money laundering and the bribery of witnesses and jury members in connection with the first trial.<sup>143</sup> The judge sentenced the kingpin to 205 years in prison. The odd tale did not end there. When his co-defendant handed over to prosecutors the cash that he had agreed to forfeit, prosecutors discovered that several of the bills were counterfeit and some of it missing.<sup>144</sup>

The dataset also includes a corrupt drug cop who could easily have fit in with any storyline on the popular HBO television series *The Wire*. The show revolved around the tragedies of the drug war on the streets of Baltimore, Maryland. William A. King was an actual Baltimore police detective. He used his position to stop known drug users and then threaten them with arrest unless they gave up their drugs and cash.<sup>145</sup> King claimed that he was merely pursuing a proper police investigation by developing sources and using the money to pay informants. Authorities began investigating King and his partner after they were identified by name as being corrupt cops in a video called “Stop Snitchin” that warned drug users not to cooperate with police.<sup>146</sup>

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<sup>139</sup> See Jim Defede, *Falcon and Magluta*, MIAMI NEW TIMES (Feb. 12, 1992, 4:00 AM), <http://www.miaminewtimes.com/news/falcon-and-magluta-6364835>.

<sup>140</sup> See *id.*

<sup>141</sup> See Warren, *supra* note 138.

<sup>142</sup> See *United States v. Magluta*, 418 F.3d 1166 (11th Cir. 2005).

<sup>143</sup> See *Magluta v. United States*, 2011 U.S. Dist. LEXIS 153182 (S.D. Fla. Aug. 2, 2011).

<sup>144</sup> See Ann W. O’Neill, *Trafficker Sentenced to 20 Years in Prison: Counterfeit Notes Found in Forfeited Cash*, SUN SENTINEL (July 23, 2003), [http://articles.sun-sentinel.com/2003-07-23/news/0307230085\\_1\\_falcon-cocaine-sentencing](http://articles.sun-sentinel.com/2003-07-23/news/0307230085_1_falcon-cocaine-sentencing).

<sup>145</sup> See *United States v. King*, 270 F. App’x 261, 263 (4th Cir. 2008).

<sup>146</sup> See *Drug Cases in Jeopardy After Feds Indict Officers*, WBAL-TV (May 13, 2005, 5:34 AM), <http://www.wbal.com/Drug-Cases-In-Jeopardy-After-Feds-Indict-Officers/8890268>.



The individual whose sentence is at the lowest end for this dataset, i.e., at 200 years, was also convicted of drug distribution charges and found to have committed violent acts, though his story is quite different. Steven Lorenzo met men in bars, slipped a date rape drug into their drinks, took them home, and then bound and tortured them during sexual escapades.<sup>147</sup> Additional evidence indicated that Lorenzo and a colleague jointly raped two of the men, murdered them, dismembered their bodies, and disposed of the remains.<sup>148</sup>

Some of the defendants with extreme sentences were property offenders. One of the white-collar defendants became notorious for the sheer size of the fraud he committed, as well as having escaped during his trial. Sholam Weiss was convicted on various charges related to racketeering, money laundering, and fraud in connection with the failure of a company he co-owned named the National Heritage Life Insurance Company.<sup>149</sup> While the jury was deliberating during his criminal trial, Weiss fled the country.<sup>150</sup> The district judge sentenced him to 845 years in absentia.<sup>151</sup> Weiss' attorney had argued at the time that his crime was about "money, not murder" and that "[h]is weapon was a pen, which is not dangerous."<sup>152</sup> Presumably, the attorney would think the resulting sentence disproportionate for a non-violent, white-collar case. Weiss was eventually found in Austria and extradited back to the United States. During his year as a fugitive, Weiss spent time in South America, Europe, and Israel in the company of his much younger Brazilian girlfriend, allegedly using for living expenses some of the cash he had stolen by looting the insurance company.<sup>153</sup> Weiss was later featured on an episode of a television documentary called *American Greed*, where he was called a "bold and brazen dealmaker" and "a consultant to con men and the brains behind one of the largest scams in history."<sup>154</sup>

Thus far, the population of extreme sentence defendants has been presented, along with information about their demographic and case facts. Additional descriptions about certain of the more intriguing

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<sup>147</sup> See *Man Sentenced to 200 Years for Drugging, Raping Men*, FREE REPUBLIC (Jan. 28, 2006, 4:03 PM), <http://www.freerepublic.com/focus/f-news/1566995/posts>.

<sup>148</sup> See Press Release, U.S. Drug Enf't Admin., Tampa Man Convicted for Drug Facilitated Crimes of Violence (Nov. 10, 2005), <https://www.dea.gov/pubs/states/newsrel/mia111005.html>.

<sup>149</sup> See *Weiss v. Yates*, 2008 WL 5235162, at \*2 (M.D. Fla. Dec. 15, 2008).

<sup>150</sup> See *Weiss v. Yates*, 375 F. App'x 915, 916 (11th Cir. 2010).

<sup>151</sup> See *Yates*, 2008 WL 5235162, at \*2.

<sup>152</sup> Susan Clary, *Insurance Crooks to Serve Life-Plus*, ORLANDO SENTINEL (Feb. 16, 2000), [http://articles.orlandosentinel.com/2000-02-16/news/0002150484\\_1\\_fawsett-weiss-heritage-life-insurance](http://articles.orlandosentinel.com/2000-02-16/news/0002150484_1_fawsett-weiss-heritage-life-insurance).

<sup>153</sup> See William K. Rashbaum, *Fugitive Arrested in Austria after a Year on the Run*, N.Y. TIMES (Oct. 26, 2000), <http://www.nytimes.com/2000/10/26/nyregion/fugitive-arrested-in-austria-after-a-year-on-the-run.html>.

<sup>154</sup> *American Greed: Sholam Weiss* (CNBC television broadcast Mar. 24, 2010).

subjects provided a bit more context. The discourse analysis presented next will answer whether the hypotheses that drove its undertaking were supported.

#### D. *Rationales for Extreme Sentences*

The discourses by judges, litigants, and media professionals regarding the 200-year-plus prison terms provide quantitative and qualitative insights into the justifications given, and those understood, for these outlier, extreme sentences. The discourses were obtained from the various source materials previously mentioned, such as case opinions, governmental press releases, and news reporting. Some of the justifications are more practical in terms of compliance with statutory mandates, while others are more philosophical and judgmental.

##### 1. Statutory Explanations

In approaching this study, the idea was to test certain philosophical and psychological constructs that would be relevant to extreme sentences. The interest was not statutory in nature. Nonetheless, an exploratory analysis of the materials revealed clear statutory drivers that should be mentioned. The pivotal statutory basis that permitted the extreme sentences was the imposition of consecutive sentencing for multiple counts of conviction. Notably, consecutive sentencing in these cases was in contrast to the typical practice of concurrent penalties in cases of more than one charge. These defendants were convicted of between seven and eighty-one counts, with a mean of twenty-six. The presence of more than a few conviction offenses makes this set of defendants unique at the outset. A separate statistical analysis of the Sentencing Commission's datasets from fiscal years 1999 to 2015 indicates that 83% of all cases involved a single count of conviction, and another 11% entailed two counts. At the other extreme, only 2% of cases during that time frame involved at least five counts of conviction.

Resorting to the option of stacking sentences on multiple counts of conviction is not necessarily impermissible, but is uncommon in federal sentencing overall. By statute, when multiple terms of imprisonment are imposed on an individual defendant at the same time, such terms are assumed to run concurrently unless the court expressly orders otherwise or a statute specifically mandates the terms to run consecutively.<sup>155</sup> The

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<sup>155</sup> See 18 U.S.C. § 3584(a) (2012).

Sentencing Commission provides a general rationale for the presumption that multiple terms presumably are to run concurrently.

Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum, and be made to run concurrently with all or part of the longest sentence.<sup>156</sup>

Hence, outside of statutory mandates to the contrary, consecutive sentencing is only appropriate if the judge determines that no count will carry an adequate statutory maximum for the full punishment deemed necessary to achieve a reasonable sentence.<sup>157</sup>

Thus, all of the extreme sentences in this dataset were generated by the accumulation of multi-year prison terms across numerous counts of conviction. In some cases, the math was quite simple. For example, in *United States v. Poole*, the sentence of 400 years consisted of the statutory maximum of twenty years on each of twenty counts to be served consecutively (20 x 20 years = 400 years).<sup>158</sup> In *United States v. Lorenzo*, the judge sentenced the defendant to the statutory maximum of twenty years on each of ten charges, to be served consecutively, to achieve the total 200-year sentence (10 x 20 years = 200 years).<sup>159</sup> Similarly, in another case the sentence of 440 years was attained for consecutive sentences of twenty years each for one count of conspiracy to commit mail fraud and wire fraud, nineteen counts of mail fraud, and two counts of wire fraud (22 x 20 years = 440 years).<sup>160</sup>

For other defendants, the accumulation of sentences on multiple counts was a little more complicated. For example, in *United States v. Betcher*, the court sentenced the defendant to 750 years, which was the cumulative maximum on twenty-six counts.<sup>161</sup> The *Betcher* sentence included twenty-four counts of child pornography production at a statutory maximum of thirty years each, one count of the receipt of child pornography at a maximum of twenty years, plus one count of child pornography possession at a maximum of ten years ( $[(24 \times 30 \text{ years}) + (1 \times 20 \text{ years}) + (1 \times 10 \text{ years})] = 750 \text{ years}$ ).<sup>162</sup> Then in *United States v. Weiss*, the judge sentenced the individual to a total of 845 years

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<sup>156</sup> U.S. SENTENCING GUIDELINES MANUAL § 5G1.2 n.1 (U.S. SENTENCING COMM'N 2014).

<sup>157</sup> *See id.*

<sup>158</sup> *United States v. Poole*, 451 F. App'x 298, 300 (4th Cir. 2011).

<sup>159</sup> *See* Press Release, U.S. Drug Enf't Admin., *supra* note 148.

<sup>160</sup> *See* *Hanna v. United States*, 2012 U.S. Dist. LEXIS 96274, at \*1 (D.S.C. July 12, 2012).

<sup>161</sup> *United States v. Betcher*, 534 F.3d 820, 823 (8th Cir. 2008).

<sup>162</sup> *Id.* at 823 n.2.

in prison with a series of concurrent and consecutive sentences of five to twenty years each for seventy-eight counts of conviction.<sup>163</sup>

The application of mandatory minimum statutes on at least one count was common, though not universal. At least one count triggering a mandatory minimum was evident in 80% of the cases. Two types of mandatory minimum offenses predominated in this dataset. One of these involved a conviction for child pornography production, which carries a mandatory minimum of fifteen years for first-time offenders,<sup>164</sup> and was present in nineteen out of the fifty-five cases. The other prevalent statute explaining many extreme sentences is of the hybrid variety, requiring multiple, consecutive, and mandatory minimum sentencing. This latter one implicates the statutory provision of 18 U.S.C. § 924(c), a law that criminalizes carrying a firearm during a crime of violence or drug trafficking offense.<sup>165</sup>

In simple terms, § 924(c) liability requires conviction on a predicate offense involving either violence or drug trafficking. With a qualifying predicate offense, § 924(c) provides for additional punishment if a firearm was involved. Section 924(c) sentencing is sufficiently harsh and contested frequently enough that it is distinctly known in federal sentencing circles by its numerical statutory number. An individual's first § 924(c) conviction triggers a five to thirty-year sentence depending upon the type of weapon and how it was used.<sup>166</sup> Subsequent § 924(c) convictions carry a mandatory minimum of at least twenty-five years.<sup>167</sup> In addition, each § 924(c) sentence must be served consecutively by statutory mandate.<sup>168</sup> Indeed, to ensure that a sentencing judge does not attempt to ameliorate the harsh consequences of the law, the statute explicitly states that a court may not avoid these mandatory minimums by imposing a probationary sentence, or by ordering that a § 924(c) minimum mandatory sentence be served concurrently with some other sentence, including the punishment meted out for the predicate violent or drug offense.<sup>169</sup>

A contested issue in the law at one time involved whether § 924(c) consecutive sentencing for subsequent offenses applied at all when multiple predicate offenses involving firearms are charged in the same indictment or prosecuted in the same trial. The Supreme Court has

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<sup>163</sup> See Clary, *supra* note 152.

<sup>164</sup> See 18 U.S.C. § 2251(e) (2012).

<sup>165</sup> Another statute requiring consecutive, mandatory minimums in the data was 18 U.S.C. § 1028A, requiring consecutive sentences of two years for each aggravated identify theft conviction. Section 1028A increased the sentence in *United States v. Thompson* by a relatively small degree. *United States v. Thompson*, 523 F.3d 806, 813 (7th Cir. 2008).

<sup>166</sup> 18 U.S.C. §§ 924(c)(1)(A)(i), (B)(ii).

<sup>167</sup> § 924(c)(1)(C)(i).

<sup>168</sup> § 924(c)(1)(D)(ii).

<sup>169</sup> §§ 924(c)(1)(D)(i), (ii).

resolved the answer in the affirmative.<sup>170</sup> Section 924(c) can further increase sentences substantially in multi-defendant trials as liability extends to co-conspirators and aiders and abettors of the predicate offenses involving drugs or violence.<sup>171</sup> A recent congressional report acknowledges that the practical effect of § 924(c) can mean a prison term equivalent to life imprisonment.<sup>172</sup>

The exceptional impact of this particular gun enhancement law was observable in this study. Almost half of the extreme sentences were subject to § 924(c) mandatory minimum, consecutive sentences. As a representation of its ratchet effect, one defendant's 215-year term was computed as thirty years concurrent for the predicate offenses, plus consecutive sentences of ten years for the first § 924(c) offense, and twenty-five years for each of the seven subsequent § 924(c) convictions, for a total sentence of 215 years  $((1 \times 30 \text{ years}) + (1 \times 10 \text{ years}) + (7 \times 25 \text{ years})) = 215 \text{ years}$ .<sup>173</sup>

Statutorily required mandatory minimums and mandated consecutive sentencing drove up the penalty scales in most cases in this dataset, yet do not explain all of the extreme punishments. In 20% of the cases, neither type applied. In other words, in these eleven cases comprising the 20%, no statute required any sentence of imprisonment. Without a required statutory prison term, and considering that federal sentencing guidelines are now discretionary, the judge in those cases legally could have sentenced the defendant to probation or a fine only if the judge believed a nonprison sentence to be a reasonable penalty. Of these eleven cases not involving mandatory minimums, six were convicted of some form of financial fraud, three for drugs, and two for child sexual exploitation crimes (not involving child pornography production).

In sum, the term of any single mandatory minimum offense was never by itself sufficient to explain these extreme sentences. Instead, in a significant minority of cases, mandatory consecutive sentencing under § 924(c) were nondiscretionary drivers. In the remainder of the cases, the discretionary use of consecutive sentencing for multiple crimes was the cause. From a theoretical perspective, the imposition of consecutive penalties is consistent with Jeremy Bentham's utilitarian philosophy, mentioned earlier, of punishing for "every part of the mischief" and for every offense the individual committed.<sup>174</sup> In these cases, an additional

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<sup>170</sup> See *Deal v. United States*, 508 U.S. 129, 132 (1993).

<sup>171</sup> See CHARLES DOYLE, CONG. RESEARCH SERV., R41412, FEDERAL MANDATORY MINIMUM SENTENCING: THE 18 U.S.C. 924(C) TACK-ON IN CASES INVOLVING DRUGS OR VIOLENCE 11 (2013).

<sup>172</sup> *Id.* at 11 nn.73 & 77

<sup>173</sup> See *United States v. Chapman*, 551 F. App'x 850, 852 (6th Cir. 2014).

<sup>174</sup> BENTHAM, *supra* note 16, at 20.

harm was evidently counted for almost every single crime of conviction and for the presence of a weapon in certain crimes of violence or drug trafficking.

After conducting a qualitative review of relevant discursive materials concerning the cases in this dataset, it is apparent that the explanations for these extreme sentences can also largely be accounted for in the pragmatic, philosophical, and moral judgments of the judges and prosecutors who advocated for such penalties and the reporters who publicize them. Descriptions of these judgments follow.

## 2. Perpetual Incapacitation

In passing down these extreme prison sentences, judges often clearly expressed that their intention was for these defendants to be permanently imprisoned. These sentiments confirm the two expectations that the philosophical theory of punishment regarding incapacitation and that an exclusionist mindset would be represented in at least some of the extreme sentence materials. For example, a judge granted the prosecutor's request for a 235-year sentence in one case to ensure that the armed robbery felon "will now be incarcerated for the rest of his life."<sup>175</sup> Similarly, an appellate court approved a sentence of 290 years to ensure the child pornography defendant "remains incarcerated for life."<sup>176</sup> A judge in another case in issuing a sentence of over 700 years for armed robbery indicated he felt there was a need "to take you out of society."<sup>177</sup>

Prosecutors have literally cheered these sentences as practically and symbolically representing life in prison. In a press release to announce sentences of 750 years and 1,590 years for two codefendants, a prosecutor professed, "I applaud the sentences handed down today, as the [defendants] will spend the rest of their natural lives behind prison bars."<sup>178</sup> Another U.S. attorney in his press release reporting on a 245-year sentence for a repeat child molester affirmed that it meant the

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<sup>175</sup> Government's Sentencing Memorandum, *United States v. Smith*, No. 07-735 (E.D. Pa. Sept. 14, 2009).

<sup>176</sup> *United States v. Beasley*, 688 F.3d 523, 536 (8th Cir. 2012).

<sup>177</sup> Press Release, U.S. Attorney's Office for the E. Dist. of Cal., "Old Navy Crew" Robbers Sentenced to Hundreds of Years in Prison (Mar. 25, 2010), <https://www.fbi.gov/sacramento/press-releases/2010/sc032510.htm>. The judge also indicated that "I am going to do my utmost to make certain that neither of you ever spends another free day for the rest of your lives." John Ellis, *Robbery Spree Nets Long Jail Terms*, FRESNO BEE (Mar. 25, 2010, 11:27 PM), <http://www.fresnobee.com/news/local/crime/article19504149.html#!>.

<sup>178</sup> Press Release, U.S. Attorney's Office for the N. Dist. of Ala., *supra* note 120.

offender is “guaranteed to spend the rest of his life in prison.”<sup>179</sup> Such an exclusionist mentality is similarly represented in another case when a federal prosecutor announced a sentence of 325 years for child pornography production because “[c]hild predators have no place in society except in a federal prison.”<sup>180</sup>

Several sentencing judges appeared to make it personal by indicating their express intentions to eternally exclude the defendants from civil society. In a financial fraud case with one of the highest sentences ever issued, the judge contextualized the penalty as signifying that the defendant “should be removed permanently from society.”<sup>181</sup> A judge in another case in issuing a sentence of over 700 years for armed robbery indicated he felt there was a need “to take you out of society because you are not civilized.”<sup>182</sup> Similarly, a sentencing judge in declaring a 235-year penalty expressed to the individual defendant that “[t]his sentence, Mr. Metzger, make no mistake, is designed so that you will be in [prison] for the rest of your life.”<sup>183</sup>

In some cases, the lengths of the prison terms were nods to the expected wishes of direct and indirect victims for their offenders’ banishment. A prosecutor in commenting on a lengthy sentence in a murder-for-inheritance scheme, sympathized that “[w]e hope that the family, friends, and community will sleep a little better tonight knowing that the person who committed these horrific crimes will remain in prison.”<sup>184</sup> A judge in a separate case issued sentences of 300 years and

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<sup>179</sup> Press Release, U.S. Attorney’s Office for the W. Dist. of Mo., Kansas City Man Sentenced to 245 Years for Drugging 13 Children, Videotaping Molestations (Nov. 6, 2012), <https://archives.fbi.gov/archives/kansascity/press-releases/2012/kansas-city-man-sentenced-to-245-years-for-drugging-13-children-videotaping-molestations>; see also James Queally, *Amish Girls’ Kidnappers to Spend Their Lives in Prison, Officials Say*, L.A. TIMES (May 14, 2015, 2:11 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-amish-kidnappings-plea-20150514-story.html> (quoting prosecutor in case of sentences of 300 years plus for codefendants as stating they would “spend their lives in federal prison”).

<sup>180</sup> *Leesburg Man Gets 325-Year Sentence*, GADSDEN TIMES (Jan. 17, 2008, 12:13 AM), <http://www.gadsdentimes.com/lifestyle/20080117/leesburg-man-gets-325-year-sentence>.

<sup>181</sup> Clary, *supra* note 152.

<sup>182</sup> Press Release, U.S. Attorney’s Office for the E. Dist. of Cal., *supra* note 177. The judge also indicated that “I am going to do my utmost to make certain that neither of you ever spends another free day for the rest of your lives.” Ellis, *supra* note 177.

<sup>183</sup> *United States v. Metzger*, 411 F. App’x 1, 3 (7th Cir. 2010); see also *Judge Metes Out 200 Years for Rape*, THELEDGER.COM (Jan. 28, 2006, 12:01 AM), <http://www.theledger.com/article/20060128/NEWS/601280400> (noting judge in issuing a 200-year sentence asserted that “I hope that he never sees the light of day again”); Stephanie Taylor, *Woman in Child Porn Case Sentenced to 450 Years*, TUSCALOOSA NEWS (July 1, 2009, 3:30 AM), <http://www.tuscaloosanews.com/article/20090701/NEWS/906309939> (noting judge in issuing a 450 year sentence declared that “I don’t think that you’ll ever be released from prison”).

<sup>184</sup> Press Release, U.S. Attorney’s Office for the Dist. of S.C., Former Florence County Deputy Sentenced to 400 Years’ Imprisonment (June 4, 2010), <https://archives.fbi.gov/archives/columbia/press-releases/2010/co060410.htm>; see also Press Release, U.S. Attorney’s Office for the S. Dist. of Ind., Hogsett Announces 115-Year Sentence for Evansville Man Guilty of Production, Distribution of Child Pornography (May 31, 2012), <https://archives.fbi.gov/>

more for codefendants convicted of sex crimes against children after one of the victims wrote a letter to the judge asking for a penalty that would “[i]solate them for life.”<sup>185</sup>

Several judges and prosecutors invoked incapacitation specifically by underscoring that the extraordinary sentences would preclude the defendants’ ability to recidivate by committing similar crimes. A prosecutor in publicly commenting on a 280-year sentence for Barbara Lang, the female operator of a pill mill involving painkillers, stated, “[s]he will never be able to participate in the illegal distribution of prescription drugs again.”<sup>186</sup> This type of perpetual preventive detention rationale particularly resonated in cases involving child sexual exploitation.<sup>187</sup> Prosecutors in several cases declared that centuries-long terms meant that the defendants can “never again be able to prey on innocent children,”<sup>188</sup> “never victimize another child for the rest of his life,”<sup>189</sup> and “never be able to abduct, drug and sexually abuse children again.”<sup>190</sup>

In sum, then, the purpose of complete incapacitation and an exclusionist mindset were strong in the discourses regarding these cases. An obvious related question, and the subject of another hypothesis, is whether participants and observers understood that sentences of 200 years and more were, for all practical purposes, equivalent to technical life sentences in a system with no parole.

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archives/indianapolis/press-releases/2012/hogsett-announces-115-year-sentence-for-evansville-man-guilty-of-production-distribution-of-child-pornography (sentencing judge commented “[a]lthough these horrible acts can never be undone, today we can at least say with certainty that this man will never walk the streets of Evansville again”).

<sup>185</sup> Tim Nudd, *Couple Get 880 Years in Jail for Kidnapping and Abusing Amish Girls in Upstate New York*, PEOPLE (Dec. 18, 2015, 11:15 PM), <http://www.people.com/article/couple-sentenced-880-years-amish-girls-kidnapping-abuse>.

<sup>186</sup> ‘Aunt Bea’ Gets 280-Year Federal Prison Term for Operating Pill Mill, TIMES FREE PRESS (Aug. 29, 2015), <http://www.timesfreepress.com/news/local/story/2015/aug/29/aunt-bea-gets-280-year-federal-pris-term-opera/322391> (referring to defendant as “grandma”).

<sup>187</sup> E.g., *Montevallo Man Sentenced for Producing Child Porn*, SHELBY COUNTY REP. (Dec. 9, 2008, 5:25 PM), <http://www.shelbycountyreporter.com/2008/12/09/montevallo-man-sentenced-for-producing-child-porn> (quoting prosecutor: “May the light of day be denied to anyone who would abuse a child in this manner.”).

<sup>188</sup> Laura Lane, *Bloomington Man Sentenced to 315 Years for Child Pornography*, HERALD-TIMES (Nov. 22, 2011, 12:19 AM), <http://www.heraldtimesonline.com/stories/2011/11/22/news.qp-0403609.sto>.

<sup>189</sup> Press Release, U.S. Attorney’s Office for the W. Dist. of Mo., *supra* note 179.

<sup>190</sup> Nudd, *supra* note 185; see also *Man Sentenced to 235 Years for Making Child Porn*, RTV 6 ABC (May 17, 2010, 11:18 AM), <http://www.theindychannel.com/news/man-sentenced-to-235-years-for-making-child-porn> (noting prosecutor’s comment that the “incapacitating sentence” prevents defendant from victimizing more children).



### 3. Virtual Life

Curiously, neither federal law nor the Sentencing Guidelines provide for a numerical time equivalent in terms of months or years for a life-without-parole sentence.<sup>191</sup> While the Sentencing Commission has used 470 months as the numerical proxy for a LWOP penalty in its statistical databases, it does so for convenience in order to statistically adjudge average sentences.<sup>192</sup> In policy and practice, then, federal law and the Guidelines treat any length of a prison sentence as a *lesser* penalty than a technical LWOP sentence.<sup>193</sup> Thus, a sentence of, say, 400 years, could be treated as guideline-compliant even though by the relevant statute(s), the count(s) of conviction precluded a LWOP sentence.<sup>194</sup>

A couple of defendants challenged this treatment of any term of imprisonment as legally constituting a lesser sentence than LWOP. In the case of a white-collar offender, the defendant argued that since a guidelines-based sentence suggested a LWOP sentence, the judge's "translation" of the life recommendation to a 330-year term was improper.<sup>195</sup> The appellate court disagreed, admitting that as none of the offenses of conviction statutorily permitted a LWOP sentence, the sentencer could not have issued such a formal life sentence.<sup>196</sup> At the same time, the appellate court determined that a guideline-computed sentence recommended life imprisonment and, therefore, a sentence that was functionally equivalent to LWOP was still proper.<sup>197</sup> A similar argument was made in another case involving a child pornography defendant in which it was argued that the 750-year prison term unlawfully counted as greater than a technical life sentence.<sup>198</sup> The appellate court there also denied the claim, indicating that while a LWOP sentence was not statutorily permitted, one that was functionally

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<sup>191</sup> See 28 U.S.C. § 994(b)(2) (2012) (stating a guideline recommended range of 30 years or more means the maximum is life, thus signifying LWOP is the maximum possible prison sentence); *United States v. Christensen*, 582 F.3d 860, 862 (8th Cir. 2009).

<sup>192</sup> See CHRISTINE KITCHENS, U.S. SENTENCING COMM'N, FEDERAL SENTENCING DATA AND ANALYSIS ISSUES 3 (2010).

<sup>193</sup> See *United States v. Eckstrom*, 626 F. App'x 640, 643 (7th Cir. 2015).

<sup>194</sup> See, e.g., *United States v. Grigsby*, 749 F.3d 908, 909 (10th Cir. 2014) (noting statutory maximum of 260 years is less than life); see also *United States v. Cobler*, 748 F.3d 570, 574 (4th Cir. 2014) (noting that "because none of Cobler's criminal charges provided for a sentence of life imprisonment, Cobler's guidelines sentence ultimately was calculated to be 1,440 months, or 120 years, which represented the sum of the statutory maximum sentences available for each count of conviction").

<sup>195</sup> See *United States v. Lewis*, 594 F.3d 1270, 1275 (10th Cir. 2010).

<sup>196</sup> See *id.*

<sup>197</sup> See *id.*

<sup>198</sup> See *United States v. Betcher*, 534 F.3d 820, 827 (8th Cir. 2008).

equivalent to life in prison was still an option and one it found to be reasonable.<sup>199</sup>

Even though statutory law and the guidelines treat LWOP sentences as the most severe penalty available in the federal system (outside capital punishment), judges often realized that these centuries plus terms were practically equivalent to LWOP sentences.<sup>200</sup> A couple of opinions in cases involving extreme sentences reiterated that “because [the defendant’s] life expectancy is but a fraction of his sentence . . . a sentence of such length is, for ‘practical purposes . . . a life sentence, and that’s how we view it.’”<sup>201</sup> An additional judge was forthright in his analogy: “Although [the defendant’s] argument that his sentence is just too much has some intuitive appeal, no qualitative difference exists between a sentence of hundreds of years and a life sentence.”<sup>202</sup> Several prosecutors, too, translated these extreme prison terms as representing an equivalent proxy for an otherwise technical LWOP sentence.<sup>203</sup>

Often, media reporters clearly understood that these extreme sentences practically meant life in prison as well.<sup>204</sup> Reporters described several of the extreme sentences in this dataset as “lifetime federal prison terms,”<sup>205</sup> “effectively a life sentence,”<sup>206</sup> or “tantamount to life.”<sup>207</sup> Regarding another case, the news article implied such a result,

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<sup>199</sup> See *id.*

<sup>200</sup> E.g., *Lewis*, 594 F.3d at 1275; see also *United States v. McNeal*, 364 F. App’x 214, 217 (6th Cir. 2010) (calling a 290 year sentence “effectively a life sentence”); *United States v. Thompson*, 523 F.3d 806, 814 (7th Cir. 2008) (“The district court thought a life sentence was warranted, and it did not err when it imposed consecutive maximum sentences on each count of conviction to reach an equivalent sentence.”); *Vasiloff v. United States*, 2013 U.S. Dist. LEXIS 171054, at \*14, (N.D. Ala. Aug. 14, 2013) (commenting that a sentence of 325 years “is basically just another way of saying life”).

<sup>201</sup> *United States v. Poole*, 451 F. App’x 298, 309 (4th Cir. 2011) (quoting *Betcher*, 534 F.3d at 827–28).

<sup>202</sup> *United States v. Metzger*, 411 F. App’x 1, 3 (7th Cir. 2010).

<sup>203</sup> See Government’s Sentencing Memorandum, *United States v. Smith*, No. 07-735 (E.D. Pa. Sept. 14, 2009) (prosecutor’s memorandum indicating a sentence of 235 years is an “effective life sentence”); Morton, *Child Abuser Gets 480 Years*, *supra* note 124 (quoting prosecutor describing a sentence of 480 years as “essentially a life without parole sentence”).

<sup>204</sup> E.g., Lane, *supra* note 188 (indicating child pornography defendant with a 315 year penalty, had “been sentenced to spend the rest of his life in jail”); *Reputed Drug Lord Gets Life in Prison: The Engineer of a \$2-Billion Cocaine Empire is Sentenced to 205 Years for Corrupting a 1996 Trial*, ST. PETERSBURG TIMES (Jan. 23, 2003), [http://www.sptimes.com/2003/01/23/State/Reputed\\_drug\\_lord\\_get.shtml](http://www.sptimes.com/2003/01/23/State/Reputed_drug_lord_get.shtml) (indicating 205 year sentence was “life in prison”).

<sup>205</sup> *Judge Imposes Lifetime Prison Terms in Amish Kidnapping Case*, NBC NEWS (Dec. 17, 2015, 8:45 PM), <http://www.nbcnews.com/news/us-news/judge-imposes-lifetime-prison-terms-amish-kidnapping-case-n482161>.

<sup>206</sup> Kim, *supra* note 130.

<sup>207</sup> Bruce Tomaso, ‘Scarecrow Bandit’ is Sentenced to 330 Years, DALL. MORNING NEWS (Feb. 19, 2010, 5:20 AM), <http://www.dallasnews.com/news/community-news/dallas/headlines/20100219-Scarecrow-Bandit-is-sentenced-8782.ece>.

indicating that the defendant “was sentenced to 11,520 months—960 years—in federal prison without the possibility of parole.”<sup>208</sup>

At times, reports were sarcastic in tone regarding the apparent hypocrisy of extreme prison terms.<sup>209</sup> A primary example of this concerns the case of Norman Schmidt, a prominent figure in white-collar sentencing in recent times.<sup>210</sup> According to a 2008 news report, a “federal judge sentenced 72-year-old Norman Schmidt last week to a mind-bending 330-year prison sentence after he was found guilty last May of a laundry list of conspiracy and fraud charges. Barring a scientific breakthrough in cryogenic technology, Schmidt will spend the rest of his days behind bars.”<sup>211</sup> In the same case of Norman Schmidt, a popular sentencing law and policy blogger responded, obviously tongue-in-cheek, commenting that “with 15 percent good-time credit, Schmidt may be able to get out as early as the year 2289.”<sup>212</sup> These latter examples remain consistent with the hypothesis that the discourses regarding the extreme sentences would conceptualize them as virtual life terms.

#### 4. General Deterrence

It was hypothesized that, in addition to relying upon the need for perpetual incapacitation through penalties that represent virtual life sentences, the relevant discourses would cite the value of general deterrence. As expected, many of the judges in these cases expressly invoked general deterrence in their sentencing opinions.<sup>213</sup> At its philosophical core, general deterrence justifies punishing one individual as a signal to others that they face painful consequences, too, if they violate similar norms that civil society holds dear. This rationale explains the government’s position when it argued that a 235-year

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<sup>208</sup> Jason Morton, *Child Porn Gets Man 960 Years: Videotapes Made by Vernon Man Were ‘Malicious, Sadistic’*, TUSCALOOSA NEWS (Apr. 26, 2008, 3:30 AM) [hereinafter Morton, *Child Porn Gets Man 960 Years*], <http://www.tuscaloosaneews.com/article/20080426/NEWS/37624528>.

<sup>209</sup> See also *infra* text accompanying notes 301–03 (similar criticisms by appellate courts and judges of extreme sentences).

<sup>210</sup> See *American Greed: Money for Nothing: Fraud in Paradise* (CNBC television broadcast Mar. 19, 2012), <http://www.cnbc.com/id/100000540>.

<sup>211</sup> Luke Mullins, *A White-Collar Sentence of 330 Years: Fraudster Gets an Apparently Unprecedented Term*, U.S. NEWS & WORLD REP. (May 7, 2008, 11:06 AM), <http://money.usnews.com/money/blogs/the-collar/2008/05/07/a-white-collar-sentence-of-330-years>.

<sup>212</sup> *Id.*

<sup>213</sup> E.g., *United States v. Okun*, 453 F. App’x 364, 373–74 (4th Cir. 2011); *United States v. Lewis*, 594 F.3d 1270, 1278 (10th Cir. 2010); *Falgout v. United States*, 2013 U.S. Dist. LEXIS 97491, at \*25 n.4 (N.D. Ala. July 12, 2013).

sentence was needed in an armed robbery case to “deter all others who would commit similar offenses.”<sup>214</sup>

Criminal justice officials often distinctly invoked the general deterrence purpose of a particular extreme sentence by utilizing the terminology of sending a “message,”<sup>215</sup> though usually also invoking some additional emphasis. Thus, in announcing a prison term involving hundreds of years, prosecutors at times publicly proclaimed that the sheer enormity of the sentence should send a “powerful message,”<sup>216</sup> a “clear message” to others that they will be held accountable,<sup>217</sup> or that, regarding a 315-year penalty for a child pornography producer, “today’s sentence sends a strong message that child sexual exploitation will be punished severely.”<sup>218</sup> Notably, prosecutors and other governmental agencies often issued press releases in these cases to specifically publicize the sentences issued.<sup>219</sup> Press releases containing detailed information about the crimes committed and the penalties issued as a result certainly represent a nod to the communicative function of general deterrence by putting the public on notice of the potentially severe consequences for violating federal criminal laws.

Similarly, another frequent refrain was that lengthy prison sentences were meant to serve as a “warning” to other would-be criminals.<sup>220</sup> For example, a local article reported that “[a]uthorities portrayed the stiff sentence as a warning to anyone involved in child pornography.”<sup>221</sup> In the same case, a special agent with Homeland Security proclaimed that “[t]his sentence should serve as a sobering

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<sup>214</sup> Government’s Sentencing Memorandum, *United States v. Smith*, No. 07-735 (E.D. Pa. Sept. 14, 2009).

<sup>215</sup> *E.g.*, *Kansas Man Gets 260 Years for Producing Child Porn*, KSNT.COM (May 20, 2013, 2:59 PM), <http://ksnt.com/2013/05/20/kansas-man-gets-260-years-for-producing-child-porn/?iframe=true&preview=true>.

<sup>216</sup> Morton, *Child Abuser Gets 480 Years*, *supra* note 124.

<sup>217</sup> Press Release, Dep’t of Homeland Sec., *Indiana Child Pornography Producer Sentenced to 235 Years in Prison* (May 17, 2010) [hereinafter Dep’t of Homeland Sec., *Indiana Child Pornography Producer Sentenced to 235 Years*]; *see also* Press Release, U.S. Attorney’s Office for the Middle Dist. of Fla., *Former Teacher Sentenced to 210 Years for Sexually Exploiting Children* (Jan. 26, 2015), <https://www.fbi.gov/contact-us/field-offices/jacksonville/news/press-releases/former-teacher-sentenced-to-210-years-for-sexually-exploiting-children> (citing FBI agent lauding a 210-year sentence to send “clear message to others involved in this horrendous crime that exploits the most innocent among us”).

<sup>218</sup> Lane, *supra* note 188; *see also* Kim, *supra* note 130 (noting judge’s intent in “sending a message to any American who would consider traveling abroad to have sex with children”).

<sup>219</sup> *E.g.*, Press Release, U.S. Attorney’s Office for the Middle Dist. of Fla., *supra* note 217; Press Release, U.S. Attorney’s Office for the N. Dist. of Ala., *supra* note 120; Dep’t of Homeland Sec., *Ex-Marine Receives 210-Year Prison Term*, *supra* note 131.

<sup>220</sup> Dep’t of Homeland Sec., *Ex-Marine Receives 210-Year Prison Term*, *supra* note 131 (noting prosecutor’s statement that “[t]his lengthy sentence should serve as a stern warning to other pedophiles”); Press Release, U.S. Attorney’s Office for the E. Dist. of Cal., *supra* note 177.

<sup>221</sup> *Leesburg Man Gets 325-Year Sentence*, *supra* note 180.

warning to every sexual predator who thinks they can hide from the law by violating the innocence of children overseas.”<sup>222</sup>

Extreme prison terms were highlighted specifically in certain child pornography cases to publicly represent domestic law enforcement’s intent to pursue and prosecute cases involving child sexual exploitation offenses more generally.<sup>223</sup> Thus, in several cases involving child pornography production, prosecutors in their press releases stressed the extreme sentences as symbolizing the federal government’s continued and marked interest in pursuing these types of offenders in order to reduce child sexual exploitation offending.<sup>224</sup>

## 5. Retributive Ideologies

Unexpectedly, considering the extraordinary nature of 200-year sentences, retributive rationales were not as salient in the discourses. Still, retribution as a point was present in two cases. In a case involving child molestation, the prosecutor suggested the retributive “eye-for-an-eye” ideology, stating that the defendant “impacted a child’s life forever, and the federal judicial system has returned the favor.”<sup>225</sup> In a broader context, a prosecutor contended that the 205-year sentence given to a drug money launderer who had successfully bribed a juror to acquit him in a previous trial would “send an unmistakable message that justice in our court cannot be bought.”<sup>226</sup>

## 6. Dehumanizing Characterizations

An earlier focus of this Article oriented toward some unique ideological mindsets that serve to justify virtual life penalties.<sup>227</sup> An exclusionist mentality may instrumentally justify the permanent

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<sup>222</sup> Dep’t of Homeland Sec., Ex-Marine Receives 210-Year Prison Term, *supra* note 131.

<sup>223</sup> See Press Release, U.S. Attorney’s Office for the N. Dist. of Ala., *supra* note 120 (prosecutor stating: “Children must be protected from sexual exploitation, and we remain committed to prosecuting child pornography cases. I thank the FBI for its diligent work on this disturbing case.”).

<sup>224</sup> E.g., Lane, *supra* note 188 (noting prosecutor’s statement: “No prison term can undo the pain and suffering Mr. Bostic has caused, but today’s sentence sends a strong message that child sexual exploitation will be punished severely.”); *A Federal ‘Hammer’ for Producers of Child Porn*, PIONEER PRESS (Dec. 17, 2007, 11:01 PM), <http://www.twincities.com/2007/12/17/a-federal-hammer-for-producers-of-child-porn> (noting then Attorney General highlighting exemplary penalty of 750 years for child pornography production at the National Project Safe Childhood Conference).

<sup>225</sup> *Leesburg Man Gets 325-Year Sentence*, *supra* note 180.

<sup>226</sup> *Reputed Drug Lord Gets Life in Prison: The Engineer of a \$2-Billion Cocaine Empire is Sentenced to 205 Years for Corrupting a 1996 Trial*, *supra* note 204.

<sup>227</sup> See discussion *supra* Sections I.D., I.E.

consignment of individuals to the bowels of prison. It was expected that an exclusionist mindset underlying virtual life sentences would also engage dehumanization processes. For many of these extreme sentencing cases, commentators referenced the sheer barbarity of the offenders' crimes to substantiate the isolating consequences.<sup>228</sup> The term "heinous" to describe the crimes was often used,<sup>229</sup> as had been the relatively synonymous adjectives of "atrocious"<sup>230</sup> and "horrific."<sup>231</sup> Government officials also in some cases described the criminal actions in some of these extreme sentencing cases in terms indicating that they invoked physically repulsive responses, such as being "disturbing, inexcusable and sickening,"<sup>232</sup> "abhorrent,"<sup>233</sup> or the "most egregious and despicable."<sup>234</sup>

Another frequent dehumanizing tactic in justifying extreme sentences that practically and symbolically banished individuals from civil society to die inside prison was to orient them as somehow *other* than normal human beings entitled to respect. Thus, molesters of children to produce child pornography were described as "scumbag[s]" in one case,<sup>235</sup> and in another a "sicko couple" for a girlfriend/boyfriend pair.<sup>236</sup> Several armed robbers were characterized in broader terms as representing domestic terrorists.<sup>237</sup>

Even more distinctly dehumanization practices were confirmed and notable. Descriptive devices drew upon themes that several of these defendants were deficient in engaging basic human morality, such as

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<sup>228</sup> E.g., *Falgout v. United States*, 2013 U.S. Dist. LEXIS 97491, at \*25 n. 4 (N.D. Ala. July 12, 2013) (referencing crimes as "unspeakable"); Lane, *supra* note 188.

<sup>229</sup> E.g., *United States v. Grigsby*, 749 F.3d 908, 909 n.2 (10th Cir. 2014); Kim, *supra* note 130; Morton, *Child Porn Gets Man 960 Years*, *supra* note 208; Jeff Weiner, *Child Pornographer Matthew Graziotti Gets 210-Year Sentence*, ORLANDO SENTINEL (Jan. 26, 2015, 5:07 PM), <http://www.orlandosentinel.com/news/breaking-news/os-matthew-graziotti-child-predator-sentencing-20150126-story.html>.

<sup>230</sup> Taylor, *supra* note 183.

<sup>231</sup> Press Release, U.S. Attorney's Office for the Dist. of S.C., *supra* note 184; *see also* Press Release, U.S. Attorney's Office for the S. Dist. of Ind., *supra* note 184 (using the term "horrible").

<sup>232</sup> Press Release, U.S. Attorney's Office for the N. Dist. of Ala., *supra* note 120.

<sup>233</sup> *Id.*

<sup>234</sup> *United States v. Graziotti*, 619 F. App'x 980, 981 (11th Cir. 2015) (per curiam).

<sup>235</sup> Sarah Fenske, *Leland Beasley: Sentenced to 290 Years in Child Porn Case*, RIVERFRONT TIMES (July 5, 2011, 3:30 PM), <http://www.riverfronttimes.com/newsblog/2011/07/05/leland-beasley-sentenced-to-290-years-in-child-porn-case>.

<sup>236</sup> *Sicko Couple who Sexually Abused Amish Girls Get Centuries Behind Bars*, *supra* note 123.

<sup>237</sup> *See* Press Release, U.S. Attorney's Office for the E. Dist. of Cal., *supra* note 177; Press Release, U.S. Attorney's Office for the E. Dist. of Va., *Chesapeake Man Sentenced to 221 Years in Prison for Bank Robberies and Related Firearms Charges* (July 6, 2010), <https://archives.fbi.gov/archives/norfolk/press-releases/2010/nf070610.htm>.

being labeled “morally depraved,”<sup>238</sup> “morally reprehensible,”<sup>239</sup> “not civilized,”<sup>240</sup> and having no “bounds of decency.”<sup>241</sup> Defendants were at times also described as lacking human empathy, including having no “mercy on their victims”<sup>242</sup> or acting with “extreme indifference and cruelty to his victims.”<sup>243</sup> A news article about codefendants convicted of sexual crimes against children referred to them as representing the “basest among us,”<sup>244</sup> thus implying subhuman character. In several cases, the defendants or their crimes were described as “monstrous,”<sup>245</sup> which certainly connotes evil, but subhuman actors. Similarly, the prosecutor in a white-collar case justified the penalty by describing the defendant in demonic terms as an “evil” being who “steals souls.”<sup>246</sup>

Characterizations of repeat child molesters at times drew upon the infrahumanization technique involving animalistic imageries of uncontrolled predators seeking to satisfy their own selfish sexual satisfaction without regard to the rights or health of their vulnerable victims.<sup>247</sup> Another animal-like reference included several depictions of child pornography defendants in terms of their “prey[ing]” on vulnerable children,<sup>248</sup> with “prey” being a uniquely focused term that

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<sup>238</sup> Press Release, U.S. Attorney’s Office for the S. Dist. of Ohio, Cincinnati Man Sentenced to 240 Years in Prison for Producing Child Pornography (May 13, 2014), <https://www.fbi.gov/contact-us/field-offices/cincinnati/news/press-releases/cincinnati-man-sentenced-to-240-years-in-prison-for-producing-child-pornography>.

<sup>239</sup> *Falgout v. United States*, 2013 U.S. Dist. LEXIS 97491, at \*25 n.4 (N.D. Ala. July 12, 2013).

<sup>240</sup> Press Release, U.S. Attorney’s Office for the E. Dist. of Cal., *supra* note 177. The judge also stated “I am going to do my utmost to make certain that neither of you ever spends another free day for the rest of your lives.” Ellis, *supra* note 177.

<sup>241</sup> Press Release, U.S. Attorney’s Office for the E. Dist. of Cal., *supra* note 177.

<sup>242</sup> *Id.*

<sup>243</sup> *Falgout*, 2013 U.S. Dist. LEXIS 97491, at \*25 n.4 (referencing further to his “abject cruelty”).

<sup>244</sup> *Sicko Couple who Sexually Abused Amish Girls Get Centuries Behind Bars*, *supra* note 123.

<sup>245</sup> Press Release, U.S. Attorney’s Office for the N. Dist. of N.Y., Stephen Howells and Nicole Vaisey Sentenced for Child Exploitation (Dec. 17, 2015), <https://www.fbi.gov/contact-us/field-offices/albany/news/press-releases/stephen-howells-and-nicole-vaisey-sentenced-for-child-exploitation>; *see also* Nudd, *supra* note 185 (noting prosecutor’s indicating sentence a “reflection of the monstrous crimes committed by [the defendants] against the most vulnerable amongst us—our children”); Dep’t of Homeland Sec., Ex-Marine Receives 210-Year Prison Term, *supra* note 131 (“Monstrous does not begin to capture the horror of the crime or the impact on the victims.”).

<sup>246</sup> Clary, *supra* note 152.

<sup>247</sup> *E.g.*, Press Release, U.S. Attorney’s Office for the Middle Dist. of Fla., *supra* note 217; Press Release, U.S. Attorney’s Office for the W. Dist. of Mo., *supra* note 179; *see also* Press Release, U.S. Attorney’s Office for the S. Dist. of Ohio, *supra* note 238 (declaring defendant “an active and enthusiastic participant in a community of morally depraved individuals who trade child sex abuse images and videos to satisfy their sexual desires”).

<sup>248</sup> *E.g.*, *Falgout*, 2013 U.S. Dist. LEXIS 97491, at \*25 n.4 ; Christin Nance Lazerus, *Lake Station Man Gets Life for Photographing Abuse, Sharing it*, CHI. TRIB.: POST-TRIB. (May 12,

usually depicts blood-thirsty carnivores in the animal world. Similarly, a defendant was reported to have “used his own son as bait” to lure other young children over for sleepovers in order to victimize them.<sup>249</sup> Thus, the prediction that discourses would embrace dehumanization and infrahumanization in the form of animal imagery was supported in this study. Considering the extreme sentences in this dataset regarded prison terms of 200 years and more, the next topic to consider involves the hypotheses regarding issues with numbers.

### E. *Normalizing Extreme Penalties*

It was hypothesized that this set of extreme sentences would provide indications of anchoring bias, scale distortions, and other troubles with numbers. Of course, it was not possible to directly test the cognitive processes of judges with respect to these psychological constructs. Still, the data collected and studied provide relevant insights. It was clear that a consequence was to normalize extreme prison sentences.

#### 1. Anchors

The expectation that sentencing guidelines would act as anchors can be answered succinctly and positively. It was clear across cases that the sentencing guideline recommendations acted as reliable anchors for almost all of the severe sentences. The vast majority of cases were compliant with guidelines’ recommended ranges. Indeed, in about half of the cases, the resulting sentence was set precisely at the recommended minimum term.

#### 2. Scaling and Magnitude

At face value, a system subject to comparative analysis, which is based on a numerical set with equal distances, appears to be easily ranked. For example, people probably generally understand the difference between pursuing a community college degree, generally taking two years, and a college degree at four years, is a difference of two years; or, that it will generally take half the time for the community college degree. One might likewise presume that sentences involving

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2015, 4:58 PM), <http://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-eckstrom-child-porn-st-0513-20150513-story.html>; Weiner, *supra* note 229.

<sup>249</sup> Weiner, *supra* note 229.



prison terms would represent a linear, additive model in which punishment is finely scaled to the offending behavior.<sup>250</sup> Yet, this study of extreme penalties highlighted several problems with scaling and the magnitude of these punishments.

In several cases, observers who attempted to provide a descriptive adjective to the resulting sentence did so in vague, though stark terms. A court referred to a 745-year plus penalty for armed robberies simply as “harsh.”<sup>251</sup> Similarly, an official depicting sentences of over 750 years and 1,500 years for a husband and wife team, respectively, described both merely as “stern.”<sup>252</sup> In a different case also involving a 750-year sentence for child pornography a court termed it “extraordinary,”<sup>253</sup> while a reporter regarding the same case deemed it a “federal hammer.”<sup>254</sup> Utilizing similar object imagery, a reporter commenting on a 218-year sentence indicated the defendant “sure got hit with a whopper of a sentence.”<sup>255</sup>

There is evidence from case law suggesting the effects of both scaling and magnitude in terms of the normalization of virtual life sentences in the first place. Then the increasing magnitude of the accepted scale of the lengths of prison sentences served to “up the ante,” so to speak. This normalization effect resonated from the sentences within the dataset presented herein on other cases both within and without this dataset. The 310-year sentence given in *United States v. Lewis* that is part of the dataset has specifically influenced the upward scaling of sentences in white-collar fraud cases. In upholding a forty-five-year term for financial fraud, an appellate court cited the 310-year term as “imposing a comparably stiff sentence for a fraudulent scheme of this magnitude.”<sup>256</sup> Similarly, in another case, the court stated that the 100-year sentence given that defendant for a Ponzi scheme “is in line with sentences imposed in similar white-collar cases,” such as the 310-year sentence in *Lewis*.<sup>257</sup>

The presence of some of these extreme sentences represent a magnitude scaling effect whereby penalties that might otherwise be viewed as unreasonably harsh pale in comparison. In a case of three

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<sup>250</sup> See Bettina von Helversen & Jörg Rieskamp, *Predicting Sentencing for Low-Level Crimes: Comparing Models of Human Judgment*, 15 J. EXPERIMENTAL PSYCHOL.: APPLIED 375, 379 (2009).

<sup>251</sup> *United States v. Major*, 676 F.3d 803, 812 (9th Cir. 2012); see also *United States v. Bostic*, 491 F. App'x 731, 732 (7th Cir. 2012) (noting 315-year sentence “extremely stiff”).

<sup>252</sup> Press Release, U.S. Attorney’s Office for the N. Dist. of Ala., *supra* note 120.

<sup>253</sup> Dan Heilman, *Recent Sentence in U.S. District Court Highlights Seriousness of Child-Porn Charges*, MINN. LAW. (May 21, 2007).

<sup>254</sup> *A Federal ‘Hammer’ for Producers of Child Porn*, *supra* note 224.

<sup>255</sup> *Norfolk Judge Gives Man 218 Years for Drugs, Guns*, HIGHBEAM RES. (Dec. 4, 2004), <https://www.highbeam.com/doc/1G1-125837940.html>.

<sup>256</sup> *United States v. Allmendinger*, 706 F.3d 330, 344 (4th Cir. 2013).

<sup>257</sup> *United States v. Okun*, 453 F. App'x 364, 374 n.6 (4th Cir. 2011).

codefendants convicted for a series of armed robberies, a news reporter wrote that one of them who received a sentence of 112 years in prison “got off easy” as his codefendants received 149- and 386-year sentences.<sup>258</sup> This perspective seems odd considering none of these defendants can possibly survive to complete their terms.

Normalization of long prison terms was strongly evident in cases involving child sexual exploitation offenses. Several cases in the extreme sentencing database directly influenced the acceptability of prison terms at various lengths and thus provided anchors themselves. The 235-year sentence in *United States v. Metzger* has been an influential anchor in normalizing sentences in other cases of 27 years,<sup>259</sup> 120 years,<sup>260</sup> even 150 years.<sup>261</sup> Similarly, the 290-year term given in the child pornography production case of *United States v. Beasley* has directly impacted judgments made by other judges. Citing the *Beasley* penalty, courts approved sentences of fifty years<sup>262</sup> and sixty years.<sup>263</sup> The 750-year sentence in a child pornography production case that is part of the extreme sentence dataset has also had a scaling effect. Referring to it, another court indicated that the 110-year penalty issued in that case, while “lengthy, it is not unprecedented.”<sup>264</sup>

Some jurists in making these comparisons are presented with issues in comprehending significant differences (both in terms of percentage and sheer number of decades) that various sentence lengths entail. As an illustration, in an opinion rejecting the claim that a sixty-year sentence for child sexual abuse offenses was unreasonable, the appellate panel wrote that the penalty was not unfair considering the “similarly severe sentences” for like offenses, referring as examples to prison terms of 40 years, 100 years, and 750 years.<sup>265</sup> Reviewing these numbers, though, it does not appear clear that they are “similarly severe.” The sixty-year sentence approved is 150% of the forty-year sentence cited, while representing just 60% and 8% of the higher two of 100 years and 750 years, respectively. In another case, an appellate court affirmed a 100-year sentence for child pornography production because other courts had already approved lengthy sentences in such cases,

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<sup>258</sup> Rafael Olmeda, *3 Sentences: 112 to 386 Years*, SUN SENTINEL (July 14, 2009), [http://articles.sun-sentinel.com/2009-07-14/news/0907130415\\_1\\_hollywood-7-eleven-federal-jury-robbery](http://articles.sun-sentinel.com/2009-07-14/news/0907130415_1_hollywood-7-eleven-federal-jury-robbery).

<sup>259</sup> See *United States v. Nania*, 724 F.3d 824, 842 (7th Cir. 2013).

<sup>260</sup> See *United States v. Demeyer*, 665 F.3d 1374, 1375 (8th Cir. 2012) (per curiam).

<sup>261</sup> See *United States v. Olmeda*, 2014 U.S. Dist. LEXIS 170420, at \*14–15 (N.D. Fla. Nov. 5, 2014).

<sup>262</sup> See *United States v. Ratigan*, 581 F. App'x 587, 591–92 (8th Cir. 2014).

<sup>263</sup> See *United States v. Smith*, 795 F.3d 868, 872 (8th Cir. 2015) (citing *Beasley* and *Betcher* in affirming sixty-year sentence).

<sup>264</sup> *United States v. Stong*, 773 F.3d 920, 926 (8th Cir. 2014).

<sup>265</sup> *United States v. Goergen*, 683 F.3d 1, 5 (1st Cir. 2012).

referring to prison terms issued in six cases, which actually ranged widely from 35 years to 750 years.<sup>266</sup> These cases signify cognitive scale distortions.

Problems of scaling distortion because of the presence of these extreme sentences were likewise present in additional cases. Two cases upheld sentences of almost 30 years and of 120 years in part because of preexisting penalties between 80 and 750 years.<sup>267</sup> A sentence of 150 years was upheld because “numerous courts” have affirmed sentences of 100 years and more for similar offenses.<sup>268</sup> Likewise, in the case of *United States v. Graziotti*, the court’s approval as reasonable a sentence of 210 years, which it conceded was “clearly longer than the defendant’s remaining life expectancy,” was due in part to the existence of other cases affirming sentences of 100 years, 140 years, and 750 years.<sup>269</sup>

The 750-year sentence mentioned in several of the foregoing cases is from *United States v. Betcher*,<sup>270</sup> a case that is part of the dataset. This particularly extraordinarily long sentence has come to represent a significant magnitude effect, drawing up the length of many other sentences. To the court in *United States v. Beasley*, for instance, the seven plus centuries penalty helped it approve an extreme 290-year sentence to its defendant.<sup>271</sup> It is not as if the *Betcher* appeals panel did not understand the rationality-challenged nature of such a penalty. It expressly commented about the “absurdity of a 750 year sentence, or even a 10,000 year sentence,” but then immediately contextualized that it “should not detract from the gravity of [the defendant’s] crimes.”<sup>272</sup> This phrasing and the magnitude reframing sentiment it reflects has been positively repeated in other court opinions affirming lengthy sentences.<sup>273</sup> The magnitude adjustment caused by *Betcher*’s 750-year sentence reflects another ramification related to scale distortion that was observed, though it was not one of the original hypotheses. The exploratory analysis of the discourses revealed a consequence of lengthening prison terms, which will be referred to as a ratchet.

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<sup>266</sup> See *United States v. Sarras*, 575 F.3d 1191, 1221 (11th Cir. 2009).

<sup>267</sup> See *United States v. Cobler*, 748 F.3d 570, 580 (4th Cir. 2014); *United States v. Nania*, 724 F.3d 824, 842 (7th Cir. 2013).

<sup>268</sup> *United States v. Olmeda*, 2014 U.S. Dist. LEXIS 170420, at \*14–15 (N.D. Fla. Nov. 5, 2014).

<sup>269</sup> *United States v. Graziotti*, 619 F. App’x 980, 981 (11th Cir. 2015) (per curiam).

<sup>270</sup> 534 F.3d 820 (8th Cir. 2008).

<sup>271</sup> *United States v. Beasley*, 688 F.3d 523, 536 (8th Cir. 2012).

<sup>272</sup> *Betcher*, 534 F.3d at 828.

<sup>273</sup> E.g., *Graziotti*, 619 F. App’x at 981; *United States v. Smith*, 795 F.3d 868, 872 (8th Cir. 2015) (sixty-year sentence); *United States v. Stong*, 773 F.3d 920 (8th Cir. 2014) (110-year sentence); *United States v. Demeyer*, 665 F.3d 1374, 1375 (8th Cir. 2012) (per curiam) (120-year sentence).

### 3. The Ratchet Effect

Normalization and magnitude scaling indicated a ratchet effect in many cases in which actors push the length of sentences even further into the abyss of time, often for seemingly symbolic reasons. Public documents concerning these severe sentences indicated a preference in some instances for one-upmanship. Some of the observers appeared to be enamored with either offenses or penalties that represent the worst of the worst. Judges in several of the cases involving child pornography production case described the offenders as representing the most despicable offenders in their experience.<sup>274</sup> The sentencing judge in one case indicated that it merited the “dubious distinction” of being one of the worst cases to be heard in his district.<sup>275</sup> In another child pornography case, the judge commented that “I have been on the bench since 1998, and this is the worst case I have personally dealt with, including murders.”<sup>276</sup> Similarly, a separate jurist commented that it was “the single-most disturbing case that I’ve had in 12 or 13 years as a judge.”<sup>277</sup>

Prosecutors in a few cases also highlighted that the sentences were justified as the child pornography codefendants were “among the most dangerous offenders ever prosecuted by this office”<sup>278</sup> and in another case that the offending was “the most horrific in the state,”<sup>279</sup> and thereby deserved some of the longest sentences ever issued.

A few commentators were enticed by potentially record sentence lengths, too. A news report of a 750-year sentence for child pornography production blatantly referred to it as the “longest on record.”<sup>280</sup> A reporter indicated that a sentence of 315 years for child pornography, was “one of the longest prison terms ever handed down in the U.S. Attorney Office for the southern district of Indiana.”<sup>281</sup> Along the same lines, a news report announced that a sentence of 309 years constituted a “record,” representing the longest white-collar sentence in the district

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<sup>274</sup> See *United States v. Falgout*, 325 F. App’x 775, 779 (11th Cir. 2009); Weiner, *supra* note 229 (noting judge’s commenting case the most heinous he’d ever seen).

<sup>275</sup> Morton, *Child Porn Gets Man 960 Years*, *supra* note 208.

<sup>276</sup> Press Release, U.S. Attorney’s Office for the N. Dist. of Ala., *supra* note 120.

<sup>277</sup> *United States v. Eckstrom*, 626 F. App’x 640, 642 (7th Cir. 2015).

<sup>278</sup> Press Release, Dep’t of Justice, Indiana Man Sentenced to 315 Years in Prison for Producing and Trafficking Child Pornography (Nov. 22, 2011), <https://www.justice.gov/opa/pr/indiana-man-sentenced-315-years-prison-producing-and-trafficking-child-pornography>.

<sup>279</sup> Morton, *Child Porn Gets Man 960 Years*, *supra* note 208.

<sup>280</sup> Pamela Jean, *Child Pornography Producer Receives 750-Year Sentence, Longest on Record*, DIGITAL J. (May 10, 2007), <http://www.digitaljournal.com/article/179791>. It was actually not the longest on record, even in the federal system, as prior to that Sholam Weiss received an 845-year term. See *Weiss v. Yates*, 2008 WL 5235162, at \*2 (M.D. Fla. Dec. 15, 2008).

<sup>281</sup> Lane, *supra* note 188.

while being the fourth longest white-collar sentence in American history.<sup>282</sup> Similarly, a press release by the district's prosecutor proudly announced in its headline concerning a sentence issued in 2011 of 290 years for child pornography charges that it was the "Largest Sentence Ever Imposed in the Eastern District of Missouri."<sup>283</sup>

Of course, a danger to the ratchet effect is to encourage further sentencing creep into the oblivion of time. One can wonder whether the 10,000-year sentence posited by the *Betcher* court is merely allegorical or if it was prescient. In any event, it was predicted that the extreme sentences would represent additional issues with numerosity.

#### 4. Numerosity

In the federal guidelines system, prison sentence recommendations (with the exception of those specifically recommending life in the form of a technical LWOP sentence) are meted out in units of months. Thus, the guidelines provide for calculations based upon the recommended number of months of imprisonment. As a result, the culture of issuing sentences using a scale of months is imbedded in practice even when judges vary from the guidelines' recommendation. In the database of extreme sentences provided herein, in every case (with a single exception) the formal months-long designated sentence was at some point, though, translated by some reporting source into a higher metric. This means that across all cases, either the relevant sentencing decision, appellate opinion, prosecutorial press release, and/or news report retooled the months-based formal penalty to a presumably more understandable measurement. Toward the higher end, a reporter indicated that a sentence, which totaled 11,520 months, amounted to "almost a millennium behind bars."<sup>284</sup> Several other reports depicted sentences as representing "centuries" of imprisonment.<sup>285</sup> Still, across

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<sup>282</sup> See *Record 309-Year Sentence Upheld for White-Collar Criminal*, BATONROUGECRIME.COM (Mar. 30, 2011), <http://www.batonrougecrime.com/2011/03/baton-rouge-crime-news/record-309-year-sentence-upheld-for-white-collar-criminal>.

<sup>283</sup> Press Release, U.S. Attorney's Office for the E. Dist. of Mo., Local Man Sentenced to 290 Years in Prison on Federal Child Pornography Charges: This is the Largest Sentence Ever Imposed in the Eastern District of Missouri (July 5, 2011), <https://archives.fbi.gov/archives/stlouis/press-releases/2011/local-man-sentenced-to-290-years-in-prison-on-federal-child-pornography-charges>.

<sup>284</sup> Morton, *Child Porn Gets Man 960 Years*, *supra* note 208.

<sup>285</sup> E.g., *Sicko Couple who Sexually Abused Amish Girls Get Centuries Behind Bars*, *supra* note 123; Nathan Gorenstein, "Mandatory Minimum" Laws Can Mean Grossly Disparate Sentences for Gun Crimes, PHILLY.COM (Feb. 7, 2012), [http://articles.philly.com/2012-02-07/news/31034299\\_1\\_federal-prison-mandatory-minimum-laws-mandatory-prison-terms](http://articles.philly.com/2012-02-07/news/31034299_1_federal-prison-mandatory-minimum-laws-mandatory-prison-terms); Tammie Toler, *Former Drug Kingpin Sentenced to 2 Centuries*, BLUEFIELD DAILY TELEGRAPH

cases the most prevalent measurement was to report the long sentences in terms of the number of years involved.<sup>286</sup> The implication of the tendency to translate sentences of 2,400 months and more is that at such a high number we may have trouble cognitively processing what it means in those terms. Instead, the practice of reframing the formal months-long penalties into higher scales, such as years or centuries, suggests doing so provides us with a more relatable measurement, even though it is clear that none of these defendants can actually complete their sentences.

Interestingly, in most of the cases in the dataset, the number of months of the sentence were evenly divisible by twelve without a remainder, which, obviously, translates into whole years.<sup>287</sup> Thus, in terms of the psychological draw of clean numbers, the judges in extreme sentence cases seemed to pay more attention to the number per annum than the number of months, despite the requirement of computing in months-based guideline ranges. Overall, 70% of the cases represent these whole-year types of sentences. Further, the vast majority of these whole-year terms were set at either five- or ten-year intervals—such as 325 years or 750 years. The frequency of translating these extreme sentences into clean and more understandable years-long terms suggest troubles with scaling and the extraordinariness of the sheer magnitude of the length of these prison sentences.

In sum, the data collected confirm the occurrence of these extreme sentences engaging in, and causing, anchoring effects and scaling distortions. Issues with numerosity resulted in many instances of translating months-based numbers into a more relatable metric, usually the number of years. In addition, judges in most cases simply rounded to whole years, often at the five- and ten-year intervals. When proportionality in penalties is a strong foundational concern, it would also be expected that defendants who receive these extreme prison terms would face incentives to challenge their legality.

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(Oct. 26, 2007), [http://www.bdtonline.com/archives/former-drug-kingpin-sentenced-to-centuries/article\\_d9313f1d-fafc-53ac-b771-e01743c1bc8b.html](http://www.bdtonline.com/archives/former-drug-kingpin-sentenced-to-centuries/article_d9313f1d-fafc-53ac-b771-e01743c1bc8b.html).

<sup>286</sup> E.g., *United States v. Huff*, 2014 U.S. Dist. LEXIS 162776, at \*1 (E.D. Cal. Nov. 20, 2014); Matthew Dolan, *Judge Criticizes Prison Term: Ex-City Officer Sentenced to Mandatory 315 Years for Gun Crimes, Robbing Drug Dealers*, HIGHBEAM RES. (June 17, 2006), <https://www.highbeam.com/doc/1G1-147152204.html>.

<sup>287</sup> See *supra* Table 1.

### F. *Legal Challenges to Extreme Sentencing*

A significant majority of the defendants receiving extreme sentences have appealed them.<sup>288</sup> Notably, though, none of the fifty-five cases in the dataset of federal defendants sentenced to prison terms of at least 200 years have as of yet been successful in overturning their punishments on constitutional grounds or as being unreasonably excessive in violation of federal sentencing statutes. Nonetheless, it will be noted that proportionality in at least a few cases remains questionable considering their circumstances.

#### 1. Cruel and Unusual Punishment

In a 2012 law review article, Professor Michael Mannheimer highlighted the case of a fifty-five-year sentence issued to a federal defendant convicted of three counts of possessing a firearm in furtherance of a felony drug trafficking crime (§ 924(c)) after selling marijuana to an informant.<sup>289</sup> Evidently, this length of a sentence caused an uproar at the time. “An extraordinary coalition of 163 individuals consisting of former United States District and Circuit Judges, former United States Attorneys, and even four former Attorneys General of the United States, filed a brief *amicus curiae*, arguing that the sentence constituted ‘cruel and unusual punishment’ in violation of the Eighth Amendment.”<sup>290</sup> Even though the sentencing judge called the fifty-five year penalty (which was required by mandatory minimum laws) “cruel, unjust, and irrational,”<sup>291</sup> he issued the statutorily required sentence anyway, and it was affirmed on appeal.<sup>292</sup>

Despite the collection of prominent and outspoken critics of the fifty-five-year sentence in that case, none of the defendants receiving prison terms of 200 years and more have enjoyed a similar outcry. Further, none of them to date has convinced an appellate court of the unjustness of their sentences on Eighth Amendment grounds. As the appellate court in a case of a sentence of 300 years for armed robberies

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<sup>288</sup> *E.g.*, *United States v. Ross*, 582 F. App'x 528 (5th Cir. 2014) (per curiam); *United States v. Major*, 676 F.3d 803 (9th Cir. 2012); *United States v. Montes*, 602 F.3d 381 (5th Cir. 2010). More defendants are likely to appeal their sentences in the future. At the time of this writing, several defendants had recently been assigned their penalties and, therefore, there was insufficient time for them yet to have perfected their appeals.

<sup>289</sup> Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 71 (2012).

<sup>290</sup> *Id.*

<sup>291</sup> *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006).

<sup>292</sup> *See United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006).

noted, a successful challenge to any sentence based on its length will be “rare.”<sup>293</sup> Another court was even more skeptical, noting that the Supreme Court had never ruled that any term of years in prison constituted cruel and unusual punishment.<sup>294</sup>

Consistent with the foregoing observations on the improbability of finding any non-life prison sentence to be unconstitutional, appellate courts responding to Eighth Amendment challenges to these extreme sentences have generally rejected them summarily.<sup>295</sup> The explanations have been rather simple. Some courts simply cited precedents upholding sentences of fifty years and more.<sup>296</sup> Thus, the potential effects from anchors and magnitude scaling seem to have impacted appellate judges as well. Courts have also rejected constitutional claims on these extreme sentences, despite acknowledging that in practical terms they constitute life sentences.<sup>297</sup>

The courts in these cases that have issued opinions have also rather quickly spurned constitutional objections to mandatory minimums that drove many of these extreme sentences. The courts generally deferred to congressional intent, such as when Congress establishes mandatory minimums to reflect their vision of the seriousness of the offending,<sup>298</sup> even when having mandated consecutive sentencing in the case of § 924(c) cases.<sup>299</sup> Another court also rejected a challenge to mandatory minimums where prior courts have generally upheld such laws, even though they may not permit individualized sentencing.<sup>300</sup>

## 2. Reasonableness Challenges

Nonetheless, at least a few judges, practitioners, and commentators have called out these extreme sentences for their inanity. A judge, in dissenting to sentences of about 750 years each for codefendants, chastised the majority: “No known human being has the capacity to live

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<sup>293</sup> *United States v. Smith*, 609 F. App’x 180, 190 (5th Cir. 2015) (per curiam).

<sup>294</sup> *See United States v. McNeal*, 364 F. App’x 214, 217 (6th Cir. 2010).

<sup>295</sup> *E.g.*, *United States v. Lewis*, 433 F. App’x 844 (11th Cir. 2011) (per curiam) (rejecting Eighth Amendment challenge without further comment); *United States v. Falgout*, 325 F. App’x 775, 779 (11th Cir. 2009) (per curiam) (declining defendant’s conclusory argument).

<sup>296</sup> *United States v. Major*, 676 F.3d 803, 807 (9th Cir. 2012); *United States v. Wiley*, 132 F. App’x 635, 643 (6th Cir. 2005).

<sup>297</sup> *E.g.*, *United States v. Eckstrom*, 626 F. App’x 640, 641–42 (7th Cir. 2015); *McNeal*, 364 F. App’x at 217; *Vasiloff v. United States*, 2013 U.S. Dist. LEXIS 171054, at \*50–51 (N.D. Ala., Aug. 14, 2013).

<sup>298</sup> *United States v. King*, 270 F. App’x 261, 265 (4th Cir. 2008) (per curiam); *Vasiloff*, 2013 U.S. Dist. LEXIS 171054, at \*50–51.

<sup>299</sup> *See United States v. Smith*, 609 F. App’x 180, 190 (5th Cir. 2015) (per curiam).

<sup>300</sup> *See United States v. Huff*, 2014 U.S. Dist. LEXIS 162776, at \*6–7 (E.D. Cal. Nov. 20, 2014).



700 years. No living human being is likely to live 700 years. On its face, the sentence is impossible to execute.”<sup>301</sup> This dissenting judge further complained that the government was asking that the court “affirm a sentence that cannot be carried out. I do not believe that we should participate in this utterly empty gesture.”<sup>302</sup> An appellate court in a different case noted the “absurdity of a 750 year sentence, or even a 10,000 year sentence,” but affirmed it anyway because of the heinous nature of the defendant’s crimes.<sup>303</sup>

Of course, defense counselors are likely candidates to highlight the sheer extravagance of these penalties. They have complained that sentences of 200 years or more are “absolutely crazy”<sup>304</sup> or “physically impossible to serve.”<sup>305</sup> Another defense lawyer lamented that “common sense has been breached.”<sup>306</sup> In similar terms, a journalist in reporting on a 330-year sentence referred to it as of “mind-bending” magnitude.<sup>307</sup>

Yet, again, despite some questions concerning the rationality of these sentences, none of the defendants have as yet been successful in getting a favorable ruling on reasonableness grounds. Two appeals courts approved extreme sentences while conceding that they are impossible to complete.<sup>308</sup> Some appellate courts, in affirming these extreme sentences, despite reasonableness challenges, referred to their appropriately reflecting within-guidelines ranges, and thus enjoying a presumption of reasonableness.<sup>309</sup> This legal presumption can be viewed in psychological terms as a formal confirmation of anchoring effects in which the guidelines’ recommendation are deemed legally cognizable anchors. Finally, in another opinion, the appellate court quipped, in an oddly pun-like way, that the defendant “contends that a 235-year

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<sup>301</sup> *United States v. Major*, 676 F.3d 803, 815 (9th Cir. 2012) (Noonan, J., concurring and dissenting).

<sup>302</sup> *Id.*

<sup>303</sup> *United States v. Betcher*, 534 F.3d 820, 828 (8th Cir. 2008). The phrase has been quoted in other opinions upholding sixty and over sentences. *See, e.g.*, *United States v. Smith* 795 F.3d 868, 872 (8th Cir. 2015) (per curiam); *United States v. Beasley*, 688 F.3d 523, 536 (8th Cir. 2012); *United States v. Demeyer*, 665 F.3d 1374, 1375 (8th Cir. 2012) (per curiam).

<sup>304</sup> ‘Aunt Bea’ Gets 280-Year Federal Prison Term for Operating Pill Mill, *supra* note 186 (calling defendant “grandma”).

<sup>305</sup> *United States v. Graziotti*, 619 F. App’x 980, 981 (11th Cir. 2015) (per curiam).

<sup>306</sup> Jeff German, *Man Sentenced to 237 Years for Robbery Spree*, LAS VEGAS REV.-J. (May 24, 2012, 11:05 AM), <http://www.reviewjournal.com/news/crime-courts/man-sentenced-237-years-robbery-spree>.

<sup>307</sup> *Mullins*, *supra* note 211.

<sup>308</sup> *See Graziotti*, 619 F. App’x at 981; *United States v. Poole*, 451 F. App’x 298, 309 (4th Cir. 2011).

<sup>309</sup> *See e.g.*, *United States v. Ross*, 582 F. App’x 528, 530 (5th Cir. 2014) (per curiam); *United States v. Beasley*, 688 F.3d 523, 536 (8th Cir. 2012); *United States v. Falgout*, 325 F. App’x 775, 777 (11th Cir. 2009) (per curiam).

sentence, which is ‘just shy of eight times greater than necessary to cause [his] statistically likely *death in prison*,’ is *overkill*.”<sup>310</sup>

### 3. Enduring Proportionality Concerns

Despite the failure of any of the extreme sentence defendants to get their sentences overturned on grounds of unfairness (to date), it is not evident that these penalties are proportional in all cases. Many of the study’s subjects committed heinous acts of violence where severe punishment may be seen as appropriate. Several of the defendants were found at sentencing to have been involved with a homicide and penalized on that ground, even if their convictions did not formally include murder charges.<sup>311</sup> Gary Eugene Chapman was convicted of charges related to retaliatory gang-related murders involving the Vice Lords, a major Chicago street gang.<sup>312</sup> In the other cases, the federal convictions were for offenses other than homicide, likely because of a lack of jurisdiction in federal court. Still, these defendants’ purported involvement in a murder was still relevant to the punishment at sentencing.<sup>313</sup> For example, two of the defendants were convicted on mail and wire fraud charges. The cases were not related, but each was actually sentenced for the relevant conduct of murdering a relative and trying to profit from the decedent’s life insurance proceeds.<sup>314</sup>

The cases involving child pornography production are typically tragic cases in that they often entail the contact offenses involving sexual molestation of children. The three male-female couples convicted on federal child pornography production charges mentioned briefly involved multiple acts of child molestation by them against multiple young kids. But not all of the child pornography cases appear to be the worst of the worst from a comparative perspective, which would seem to be required for a proportionality of penalty analysis considering the extreme sentences issued. As an example, Bruce W. Betcher was sentenced to 750 years.<sup>315</sup> His crimes entailed surreptitiously taking pornographic and erotic photographs of his two granddaughters and

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<sup>310</sup> *United States v. Metzger*, 411 F. App’x 1, at \*3 (7th Cir. 2010) (emphasis added).

<sup>311</sup> These include Timothy Poole, Darryl Hanna, Jarvis Ross, Jamail James Hogan, Maurice Gibson, and Gary Chapman.

<sup>312</sup> See Carley Gordon, *Violent Gang Members Convicted*, WMSV.COM (Aug. 24, 2011, 10:22 PM), <http://www.wsmv.com/story/15329030/violent-gang-members-convicted>.

<sup>313</sup> The federal sentencing system permits a defendant to be punished for any “relevant conduct.” U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (U.S. SENTENCING COMM’N 2011).

<sup>314</sup> See *United States v. Hanna*, 353 F. App’x 806 (4th Cir. 2009); Press Release, U.S. Attorney’s Office for the Dist. of S.C., *supra* note 184.

<sup>315</sup> See *United States v. Betcher*, 534 F.3d 820, 823 (8th Cir. 2008).

their three friends aged eight to eleven.<sup>316</sup> Yet there appears to be no evidence, not even any allegation by authorities, that he or anybody else touched any of them in a sexual way or that the girls engaged in any sexualized conduct.<sup>317</sup> Case facts suggest the girls were largely oblivious to his actions. Similarly, Gary Steven Vasiloff's sentence of 325 years was for taking pornographic images of his fourteen-year-old stepdaughter.<sup>318</sup> Even the sentencing judge conceded there was no allegation he had touched the girl, though he had given her beer and taught her how to use a dildo on herself while he took the photographs.<sup>319</sup>

Then, Roderick McNeal, instead of appearing to embody the epitome of violent criminals, seems more to represent a potentially garden-variety, though prolific, armed robber. Roderick McNeal robbed eleven fast food restaurants and three gas stations in Texas and Louisiana over a three-week period.<sup>320</sup> Acting alone, he would enter, demand employees give him the bills from cash registers, and then flee.<sup>321</sup> In total, his crimes are estimated to have netted him a total of about \$3,000.<sup>322</sup> His sentence was 290 years.<sup>323</sup>

Not all the bank robbers seemed to represent the most heinous of violent offenders, either. Jason Montes and Margarito Armijo committed multiple bank robberies over a several month period around the state of Texas.<sup>324</sup> Yet the pair's criminal behavior does not seem to rise to any particularly heinous level to justify their almost 400-year terms. Indeed, as the court described their basic modus operandi, their tactics seemed minimally risky to the health of others considering how dangerous some bank robbers may be—such as those who shoot their victims or take hostages. The court outlined the codefendants' usual routine:

[They] drove to the target location in a stolen, four-door Honda Accord; ran into the bank wearing dark clothes, gloves, and ski masks and carrying guns; demanded money from the tellers and put it in a large, dark-colored duffel bag; and exited the bank within one minute of entering. They drove off in the Accord and left the car—still running, with at least one of the doors open—within a mile of the bank and had someone pick them up, usually in a white Ford Expedition, to continue their escape.<sup>325</sup>

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<sup>316</sup> *See id.*

<sup>317</sup> *See id.*

<sup>318</sup> *See Vasiloff v. United States*, 2013 U.S. Dist. LEXIS 171054, at \*3 (N.D. Ala. 2013).

<sup>319</sup> *See id.* at \*16–17.

<sup>320</sup> *See United States v. McNeal*, 364 F. App'x 214 (6th Cir. 2010).

<sup>321</sup> *See id.* at 215.

<sup>322</sup> *See id.*

<sup>323</sup> *Id.*

<sup>324</sup> *See United States v. Montes*, 602 F.3d 381, 384 (5th Cir. 2010).

<sup>325</sup> *Id.*

The scenario sounds like a typical bank robbery that presumably the guidelines already cover in the bank robbery offense characteristics in adjudging a final offense level. For Montes and Armijo, their criminal history was insufficient to account for their extreme penalties. Montes had a minor criminal background (Criminal History II for a guidelines calculation) while Armijo was a first offender.

For some of the fraud defendants, even though they may have bilked people out of a lot of money, there is no evidence of violence, drugs, or other type of incredible harm to the physical welfare of victims. Sholam Weiss and Keith Pound drained assets out of an insurance company they owned and defrauded insurance regulators.<sup>326</sup> Pound was a first-time offender. Then there was the 309-year sentence handed to Robert Thompson.<sup>327</sup> His crime? Identify theft.<sup>328</sup> The FBI's own press release recounts what is presumably their grimmest view of the facts.

The matter involved Thompson engaging in multiple conspiracies with numerous co-conspirators to obtain and use the personal and financial information of more than 61 individuals, churches, financial institutions and businesses, without their knowledge or authorization, to steal from their bank accounts, and use their credit to obtain things of value, including attempting to steal \$20,000,000 from one victim's bank accounts. To facilitate the scheme, among other things, Thompson bribed a corrections officer at Elyan Hunt Correctional Center \$10,000 to provide Thompson with cell phones while an inmate at the facility.<sup>329</sup>

For identify theft, Thompson received what was then reported as the fourth longest white-collar sentence in U.S. history and the longest in the history of the Middle District of Louisiana.<sup>330</sup>

Finally, the last example of a seemingly disproportionate penalty to be addressed regards Barbara Lang, a.k.a. Aunt Bea. Her story is where this Article began. Yes, she operated a pill mill where prescription medications were inappropriately made available to drug abusers.<sup>331</sup> Yes, she was greedy in her motive.<sup>332</sup> But if greed itself in this capitalistic society is sufficient to distinguish her as monstrous and to justify a

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<sup>326</sup> See Clary, *supra* note 152.

<sup>327</sup> See *United States v. Thompson*, 417 F. App'x 429, 430 (5th Cir. 2011).

<sup>328</sup> See *id.*

<sup>329</sup> Press Release, U.S. Attorney's Office for the Middle Dist. of La., White Collar Defendant Sentenced to 309 Years in Prison (Feb. 17, 2010), <https://archives.fbi.gov/archives/neworleans/press-releases/2010/no021710.htm>.

<sup>330</sup> *Record 309-Year Sentence Upheld for White-Collar Criminal*, *supra* note 282, see also U.S. Attorney's Office for the Middle Dist. of La., *supra* note 329.

<sup>331</sup> See *United States v. Lang*, 2014 U.S. Dist. LEXIS 184310, at \*2 (E.D. Tenn. July 10, 2014).

<sup>332</sup> See *id.* at \*2-3.

sentence of 280 years, then the notion of proportionality as a general goal appears to hold no boundaries.

#### CONCLUSION

This study focused on extreme sentences of at least 200 years issued in the federal criminal justice system. The import of these sentences is that while they do not constitute technical life sentences, in reality they act as life sentences since the penalties cannot possibly be fully executed in a system without parole and with strictly limited good time.

The hypotheses that preceded the mixed method study were generally supported. The discourses concerning the extreme sentences in the database justified them using the traditional theories of deterrence, incapacitation, and retribution, though the latter theory was uncommon. Sentencing judges and appellate courts approved the penalties as proportional to the offenses and offenders, though usually in summary terms. The discourses appropriately conceptualized these sentences as being equivalent to life sentences. An exclusionist mentality that also drew upon dehumanization practices and imagery resonated in much of the discourses.

The expectation that the cognitive biases presented by anchoring and scaling effects was supported. The sentencing guidelines' recommended range and lengthy sentences issued in comparable cases suggested obvious anchors that appeared to influence normalizing extreme prison sentences. Scaling effects presented in the form of translating sentences from a guidelines-based scale of months into years, presumably to better cognitively map their degree. Rounding prison terms to whole years and the common use of numbers ending in five and ten suggest the judges who issued them were punishing based on their general feeling for the cases and for the symbolic value of such sentences. A ratchet effect was also observed in that many judges explained that the presence of these extreme sentences supported even longer prison terms in other cases.

The study results are concerning for a few reasons. As these defendants have had no success to date in convincing courts of the unreasonableness of their penalties, more sentences in this range and increasingly longer sentences are likely in the future. The normalization of extreme sentences and the ratchet effect may have just begun. The most extreme 1,590-year sentence issued just recently in 2015 is evidence for those prophecies. Plus, sentences of at least 200 years were issued to nonviolent and first-time offenders, suggesting disproportionality. Traditional sentencing philosophers would likely call these extreme sentences tyrannical, constituting a significant threat to a

foundational principle for just sentencing. In the end, the continued support for extraordinarily lengthy prison sentences challenges the hope that America's penchant for imprisonment has waned in all respects. Still, hopefully this study adds to our knowledge about some of the consequences of the policies that underscored mass incarceration.