

# The Narrative of the Number: Quantification in Criminal Court

Mona Lynch

*Scholars have documented the explosion in quantification of social phenomena within organizational settings. A key site of the quantitative turn has been in the penal-legal field, with purported transformative effects. This article draws from a field research project examining the on-the-ground implementation of the federal sentencing guidelines to explore how the guidelines' numbers-based logic is both articulated and reconstituted by legal actors in the adversarial process. Complementing macro-level work that examines the transformative effects of quantification at the social-structural level, I take a micro-level, empirically grounded approach that analytically focuses on day-to-day interactions in court to reveal quantification's possibilities and limits. I identify three adversarial strategies that narrate the meaning of the guideline calculation to demonstrate how the complex quantitative guidelines system becomes incorporated into narrative form to know, assess, and judge legal subjects.*

## INTRODUCTION

The quantification of social phenomena has had transformative effects on modern life (Espeland and Stevens 1998, 2008; Davis, Kingsbury, and Merry 2012; Lamont 2012). Quantification processes, which can range from “marking”—where numbers are used as a form of identification—to commensuration, which transforms “difference into quantity” and assigns measures of value or worth to each element for the purposes of assessment, comparison, judgment, or action (Espeland and Stevens 2008, 408), also play an increasingly central role in contemporary governance.

Numerically based systems are mobilized to achieve an array of institutional goals, such as forecasting and measuring organizational outcomes, creating bureaucratic accountability, ordering complex inputs, competing for resources, and making risk predictions (Silver 2000; Espeland and Sauder 2007; Hansen and Porter 2012). Numbers can also have legitimizing effects for institutions, enhancing the appearance of accuracy and fairness, which in turn fortifies institutional power and authority (Hansen and Porter 2012).

Criminal justice institutions have not been immune to the quantification explosion. In particular, the use of actuarial quantitative tools is pervasive, where

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**Mona Lynch** (lynchm@uci.edu) is a professor of Criminology, Law and Society, and co-director of the Center in Law, Society and Culture at the University of California, Irvine. Direct correspondence to Mona Lynch, Department of Criminology, Law and Society, University of California, Irvine, Irvine, CA 92697-7080, (949) 824-0047. The author thanks Sarah Armstrong, David Greenberg, Lynne Haney, Kelly Hannah-Moffat, Joachim Savelsberg, Mariana Valverde, and the anonymous reviewers for their very helpful comments on earlier versions of this article. This research was supported by a grant from the National Science Foundation, Law and Social Sciences Program, Grant Number 1251700.

calculations of risk are used to categorize, aggregate, and intervene upon subjects. Indeed, some have argued that actuarial logic has eclipsed individualized, morally infused modes of judgment and intervention in the criminal justice field (Feeley and Simon 1992; Kempf-Leonard and Peterson 2000). In this article, I examine the on-the-ground implementation of the federal sentencing guidelines, an exemplar of quantitatively based systems used in the contemporary US penal-legal field, to examine how its numbers-based logic is both articulated and reconstituted by legal actors in the adversarial process. Complementing macro-level work that examines the transformative effects of quantification at the social-structural level, I take a micro-level, empirically grounded approach that analytically focuses on day-to-day interactions in court to explore how the quantified sentence calculation shapes the adjudication process.

I draw on data from a large-scale project on federal criminal courts to examine the interplay of numbers and narratives as modes for assessing and judging legal subjects. Focusing specifically on the quantified criminal history prong of the guidelines, I reveal the ways in which quantification provides a vocabulary for making assessments, while imposing both constraints and opportunities in the judgment process. Quantification provides stakeholders in the adjudication process—prosecutors, defense attorneys, and judges—with rhetorical material with which to construct a biography about the legal subject to be sanctioned. In the case under study, I suggest that quantification obtains its power through narrative, which is how we make sense of social phenomena. Specifically, the complex quantitative guidelines system becomes incorporated into narrative form to know, assess, and judge legal subjects.

## QUANTIFICATION, ACTUARIALISM, AND JUSTICE

The rise of quantified modes of governance was presupposed by the “avalanche of numbers” (Hacking 1990, 5) that occurred in Western societies as a means to know the populace. Numbers first had to constitute humans before they could be manipulated to produce effects. The emergence of printed numbers and “the enumeration of people and their habits” opened up the possibility for defining and measuring normalcy and deviancy, and predicting the likelihoods of each: “Society became statistical. A new type of law came into being, analogous to the laws of nature, but pertaining to people. These new laws were expressed in terms of probability. They carried with them the connotations of normalcy and of deviations from the norm” (Hacking 1990, 1).

Quantification of the social also opened up the possibility for probabilistic prediction as a governing strategy, including as a tool of social control. Those who measurably deviated from norms—regarding mental and physical health, sexuality, educational and vocational attainment, law-abiding behavior, and so on—could be identified and intervened upon by state and other actors (Hacking 1990; Rose 1998; Zuberi 2000; Muhammad 2011).

While the early manifestation of governance by numbers in the penal-legal field was essentially aimed at normalizing deviant individuals through disciplinary

strategies (Foucault 1977; Harcourt 2007), some scholars have argued that by the late twentieth century, those aims had shifted from individual reformation to group-based, actuarial risk management (Cohen 1985; Simon 1988; O'Malley 1992, 1996). In one of the pioneering papers along these lines, Jonathan Simon (1988) made a strong claim that actuarial governance was fundamentally changing social and political culture through its retreat from disciplinary logics and techniques of power (Foucault 1977). For Simon, subjects are not merely de-moralized, but they are essentially de-identified by actuarial practices of social institutions, with transformational ideological and material effects:

[I]ndividuals, once understood as moral or rational actors, are increasingly understood as locations in actuarial tables of variations. This shift from moral agent to actuarial subject marks a change in the way power is exercised on individuals by the state and other large organizations. Where power once sought to manipulate the choices of rational actors, it now seeks to predict behaviors and situate subjects according to the risk they pose. (Simon 1988, 772)

Feeley and Simon's (1992) theorization of a "new penology" epitomizes this line of thought in the penal-legal field. In the new penological world, norms favoring qualitatively ideographic and individualized moral assessments in addressing the problem of lawbreaking were displaced in the late twentieth century by actuarial logic. Individual subjects' motivations, deficiencies, needs, and potential were no longer central to the criminal adjudication process; instead, the focus turned to measure-based assessments of aggregated offender classes; risk management and prediction; and efficiency, internal accountability, and consistency in system administration (Feeley and Simon 1992, 1994). This trend has been observed in both adult and juvenile criminal justice settings, and it is exemplified by selective incapacitation types of schemes that use criminal history as a predictor of future risk, and that constrain individualized discretion in determining interventions (Feeley and Simon 1994; Kempf-Leonard and Peterson 2000; Logan 2000).

For Feeley and Simon (1992), the federal sentencing guidelines system represents a hallmark case of the shift from individualized consideration and assessment at sentencing to a quantitative system of aggregated, actuarial categorization. Other scholars, as well, have pointed to the guidelines as an important manifestation of governance by numbers. For Espeland and Vannebo (2007, 25), they represent "a vivid example of efforts to create quantitative accountability" that transformed legal practice *because* of the quantification process. The new system was "intended to improve sentencing performance, provide oversight, make sentencing a more visible and reviewable process, and create uniformity" (Espeland and Vannebo 2007, 25).

Indeed, the law authorizing the guidelines' creation framed their purpose in just these terms. The reforms would "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct" (Public Law 98-473 1984). In a major shift from the individualized, highly discretionary sentencing practices that had prevailed, the only relevant considerations under the

new system were, essentially, a quantified measure of the past and present criminal acts of the defendant (Lynch and Bertenthal 2016).<sup>1</sup>

The use of criminal history, in particular, functioned as a rough actuarial measure in the new system. Federal parole personnel had been using a quantified version of criminal history as an actuarial tool for making release decisions since the early 1970s, and this tool migrated, nearly intact, from the back-end of the penal process to the sentencing stage in the new regime (Harcourt 2007; Lynch and Bertenthal 2016). From the earliest days of the guidelines, research staff at the US Sentencing Commission began an evaluation program that assessed how well the criminal history score predicted recidivism among sentenced federal defendants (US Sentencing Commission 2016). From that agency's perspective, criminal history has been central to the guidelines' very purpose, as the inaugural commission "chose to develop the Guidelines Manual's criminal history provisions in significant part on offenders' risk of reoffending" (US Sentencing Commission 2016, 3). Emblematic of this actuarial commitment, the most recent research report on criminal history is titled *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders* (US Sentencing Commission 2017).

The promulgated guidelines, contained in the multichapter, annually published *Federal Sentencing Guidelines Manual*, articulate how past and present criminal acts are to be quantified, and lay out the rules for determining and summing their values. The manual, which now exceeds 2,200 pages including appendices, sets out the complex instructions for transforming elements of the criminal acts, on the one hand, and defendants' prior criminal records, on the other, into numbers that are computed into, respectively, an "Offense Level" score ranging from one to forty-three and a "Criminal History Category" ranging from one to six. The "Sentencing Table," which prescribes sentence ranges at every junction of these two axes, is therefore made up of 258 cells (see Figure 1).

To meet the "accountability" goal of the guidelines, the US Sentencing Commission built in controls to ensure compliance by decision makers tasked with applying them, and to constrain the irrationalities of strategic human actors whose judgments may be subject to bias, emotion, self-interest, or other such influences. The guidelines especially restricted the discretion and individualized decision making of judges by specifying in great detail how both offense level and criminal history are to be calculated and what the appropriate sentence range is for each of the 258 possibilities that exist on the sentencing table. Their application was also mandatory, allowing only limited exceptions for judicial deviations from the prescribed sentencing ranges. Although this changed in 2005, when the US Supreme Court in *United States v. Booker* rendered the guidelines advisory,<sup>2</sup> they must still be

1. The guidelines emerged as a solution to what had surfaced as a broader crisis in sentencing and punishment, whereby unfettered discretion of judges came to be identified as producing injustice, and the very meaning of punishment was highly contested. For a specific history of the federal guidelines, see Stith and Koh (1993). For a more general account of the crisis in confidence about the purposes of punishment, see Allen (1981).

2. First, in *United States v. Booker*, the US Supreme Court rendered the guidelines "effectively advisory" (2005, 245), giving federal judges the discretion to impose a non-guidelines sentence as long as it

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

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

**FIGURE 1.**  
Sentencing Table

calculated and considered in determining all sentences. They are always the starting point of the sentencing process and remain a focal point, in effect anchoring the final determination (Bennett 2014).

The commission also tried to stop-gap prosecutorial circumventions around the guidelines by requiring the calculation of all conduct surrounding the underlying offense, even if not part of the crime of conviction. This was done to prevent prosecutors from plea bargaining away “actual” criminal conduct committed by the is consistent with the broad purposes of punishment. Two years later, the Court ruled in *Kimbrough v. United States* (2007) that judges are free to sentence outside of the prescribed guidelines’ range on the grounds of policy disagreements with the guidelines. In *Gall v. United States* (2007), decided at the same time as *Kim-brough*, the Court mandated deference to sentencing judges’ decisions and authorized judges to use individualized assessments of cases and defendants in deciding whether and how to depart from the guidelines. Mandatory minimums are still in force, though, so in cases in which both guidelines and mandatory minimums apply, the mandatory minimum trumps.

defendant (Schmitt, Reedt, and Blackwell 2013, 257). Finally, under the guidelines' regime, appellate courts were given authority, for the first time, to review imposed sentences in light of the calculated guidelines, upon appeal by either the prosecution or defense. This functioned as an additional constraint on individualized judgment that might otherwise stray from the guidelines' calculation (Stith and Cabranes 1998). Through defining and quantifying relevant sentencing criteria, coupled with the structural measures to constrain decision makers, the commission strove for the perfectly "dehumanized" bureaucracy imagined by Weber ([1956] 1978, 975) that would "eliminat[e] from official business, love, hatred, and all purely personal, irrational, and emotional elements which escape calculation."

### HUMAN CALCULATORS OR MEANING-MAKING AGENTS?

This ideal of the guidelines, of course, was not fully realized in practice. The "irrationalities" in outcomes were not so easily tamed, despite the imposing new quantitative system. Sentence disparities as a function of defendant demographics, geography, and court workforce composition, among other influences, persisted (see, e.g., Albonetti 1997; Mustard 2001; Kautt 2002; Ward, Farrell, and Rousseau 2009). Frontline legal actors quickly figured out ways to circumvent the dictates of the guidelines while creating the appearance of formal compliance (Nagel and Schulhofer 1992; Schulhofer and Nagel 1996; Lynch 2016).

As Savelsberg (1992) argues, the guidelines were an attempt to impose a rigid, neoclassical, formally rational logic on an organizational field that was infused with substantive justice concerns. Judges, among other frontline actors, were active agents who would resist being reduced to "automatons" under the new system (Savelsberg 1992, 1370; see also Gertner 2007). So, while the formally rational guidelines attempted to "redraw the borders that had separated state and society" (Savelsberg 1992, 1350) as a way to address perceived injustices, the field itself was so defined by broader social justice norms that this effort was bound to fail. Espeland and Stevens (2008) also suggest that the guidelines' legitimacy eroded over time due in part to the continued patterns of disparity and injustice in outcomes.

A long line of neo-institutional scholarship would predict this gap between policy ideals and practice (Meyer and Rowan 1977; Powell and DiMaggio 1991; Gray and Silbey 2014). In the criminal justice field specifically, the collision of actuarial/risk management bureaucratic ideals with often competing forces at the point of implementation has been documented within a variety of organizations, including in policing agencies (Willis and Mastrofski 2012), criminal courts (Tata 2007; McNeil et al. 2009), probation and parole offices (Lynch 1998; Fitzgibbon, Hamilton, and Richardson 2010), multi-agency criminal justice partnerships (Kemshall and Maguire 2001; Goddard 2012), and in prisons (Gartner and Kruttschnitt 2004; see also Cheliotis 2006 for a general discussion and critique).

My intervention here, though, goes further than just identifying and measuring the gap between institutional logics and ideals and on-the-ground action. At a more fundamental level, there is reason to question the hegemonic powers of quantitative schemes to completely reconfigure human social systems. Actuarialism and

commensuration are doing more than just “making up people” (Hacking 1990, 6). The processes are dual-directional, so people, in turn, “make up” and use numbers to label and order and categorize their a priori assessments. Given this, the numbers themselves can work to maintain and reproduce social processes (like inequality, capital accumulation, etc.) that exist both prior to the introduction of new systems and outside of those systems (Harcourt 2007; Hannah-Moffat 2013). Therefore, they can entrench power relations even while appearing to transform them.

In that regard, the bifurcation of individualized, qualitative, ideographic modes of justice and stripped-down, aggregated, quantitatively driven modes may set up an unsustainable dichotomy. Carol Heimer’s (2001) useful schematic distinguishing “cases” and “biographies” provides a good launching point for complicating such a binary. Heimer (2001, 48) observes that:

Bureaucratic routines act on standard objects; legal systems abstract cases from the rest of life; standardized commodities with a single cost and price are bought and sold in markets. All of those acts are also done by people who are born, grow up, work, form families, sicken, and die. All acts in bureaucracies, legal processes, or markets are, then, both instances of general categories and pieces of people’s biographies.

In legal settings, “cases” do the work of both boxing out irrelevant information, and facilitating a measure of “fairness” in treatment and outcomes. This was an express goal of the guidelines—to limit cases to criminal acts only, past and present, and to make them comparable and equitable through the quantification process. However, as Heimer (2001) implies, cases cannot be fully de-humanized. They implicate people who have biographical narratives, whose past, present, and future are being adjudicated by other humans.

Quantification may therefore aim for “the erasure of narratives: the systematic removal of the persons, places and trajectories of the people being evaluated by the indicator and the people doing the evaluation” (Espeland 2015, 56), but that erasure can never be complete. Narratives are fundamental to how we make sense of the social world (Bruner 1991; Ewick and Silbey 2003). We understand and make sense of our social world “mainly in the form of narrative” (Bruner 1991, 4). So, while quantification has effects—it may amplify, mitigate, or reconfigure power imbalances, biases, sympathies, and irrationalities—those effects are generally made possible through the interpretative meaning-making of narrative.

Ultimately, the narrative form of meaning-making has consequences for judgment. Like numeric commensuration systems, narratives order messy “facts.” But unlike the ordinal or ratio formulation underpinning quantitative valuation systems, narratives work on a diachronic logic that is “irreducibly durative” (Bruner 1991, 6). Narratives also require agency and intent in their subjects. Their essence is normative, tied to prevailing values and ideals that begin with a “breach” for initial propulsion, and end with a resolution. In substance, narratives are concerned with the particular (as opposed to the general) and are rooted in specific contexts. However, narratives’ “truth” value lies in their hermeneutic qualities—their interpretability and resonance. Therefore, narratives are more than just a random collection

of stories; rather, they become categorized within genre-typologies that transcend micro contexts and that accrue to “create something variously called a ‘culture’ or a ‘history’ or, more loosely, a ‘tradition’” (Bruner 1991, 18).

In the coming analysis, I use the quantified criminal history component of the federal sentencing guidelines as a window into the narrative of the number. I focus on the criminal history calculation because it represents the best case for the hegemony and orthodoxy of quantification in this field. The criminal history score should be the most impervious to manipulation, subversion, or subsumption by the narrative, given its ideologically well-established role in sentencing across numerous Western jurisdictions, and its relatively straightforward translation into quantified form (Lynch and Bertenthal 2016). Defendants’ criminal records featured prominently in the federal system’s punishment scheme under the old sentencing regime, both at sentencing and in parole decision making. And as previously noted, parole’s criminal history-based actuarial tool was transported into the guidelines to become the basis for the criminal history score in the new sentencing regime (Harcourt 2007; Lynch and Bertenthal 2016) and has in fact played a similar actuarial role (US Sentencing Commission 2016).

Despite this “best-case” scenario, I demonstrate that rather than displacing existing logics and arrangements, the quantified form of criminal history provides additional arsenal to power holders who strategically incorporate it into a biographical narrative about a moral agent, the defendant. I identify three specific rhetorical strategies that illustrate how the numeracy of criminal history is transformed and given life in this juridical field. First, I identify an adversarial strategy aimed at delegitimizing the calculation, *the failure of the formula*. Second, I illustrate the adversarial strategy whereby legal actors provide contrasting *biographies of the number*, which entails differential meaning making of the defendant’s criminal past by the adversaries, even while the criminal history score itself is accepted as correct. Third, I identify the strategy of *making up numbers* whereby legal actors use the criminal history metric as a post-hoc label to legitimize a priori moral judgment of the defendant to be sentenced.

I conclude by returning to the narrative’s power in constructing “reality” (Bruner 1991, 1) to ask whether quantitative commensuration of people can ever be complete. I suggest that quantitative regimes can open up and facilitate new possibilities for understanding and categorizing people, but their potential is made possible through their narrative retelling, at least in this field. Narratives play a crucial role in social life, including in systems of justice, and cannot be erased no matter how sophisticated or tightly built the quantification system. Ultimately, I suggest that criminal history, through its elevation as a key, calculable factor in the guidelines, functions as both a global orientation by which federal defendants are characterized, and as a strategy of action in this adversarial setting. However, instead of transforming defendants into a set of criminal history points that help to determine sentence assignment from a table, the quantified criminal history provides another opening to a qualitative, ideographic narratively based debate about the moral makeup of the juridical subject to be punished.

## THE STUDY

### Data and Methods

I draw on several sources of data for this analysis that were collected as part of a large multiple methods research project on how drug trafficking cases are adjudicated in federal court under the guidelines regime. The larger project was designed to analyze the interplay between localized norms and imperatives in how drug laws are implemented, and the legal structure in which local courts are situated (Lynch and Omori 2014; Lynch 2016; Lynch and Bertenthal 2016). The first component of the project used official federal court data to model how local-level legal norms and practices predicted case outcomes as a function of both time and place. The second component was a qualitative analysis, using sentencing commission, congressional, and other archives to examine translation of the sentencing reform law into the particular sentencing formula at the inception of the “Guidelines Era.” The third component involved comparative field research, where I collected observational, interview, and case file documentary data in four purposively selected federal districts to tease out how case adjudication and sentencing happens on the ground.

I primarily use data from the field research component here to flesh out how the criminal history calculation is used in the adversarial process. I gained initial access for the field research through the federal defenders’ offices in the four sites, and made multiple visits to each site between December 2012 and July 2014. Data collection included making observations of court proceedings involving drug cases. I observed a total of over three hundred proceedings across my sites, the majority of which were guilty pleas or sentencing hearings. I was also a participant-observer in less formal activities in each district, primarily in federal defenders’ offices and in the courthouses. In addition, I conducted both informal and formal in-depth interviews with legal actors in each locale to assess how plea negotiations and sentencing are and have been done in each district. I interviewed seventy-five people across the four sites, including federal defenders, panel defense attorneys and privately retained counsel, active and former prosecutors, judges, and several federal law enforcement agents. I use pseudonyms for all the attorneys, judges, defendants, and others I interacted with to protect their privacy.

To illustrate the three adversarial strategies—failure of the formula, biographies of the number, and making up numbers—I use detailed examinations of exemplary cases for each as empirical support for my arguments (Stablein 1999; see also Small 2009 on case selection). This kind of close analysis of a smaller number of cases allows me to detail the narrative strategies at work to reconstitute the quantified sentence recommendation. I triangulate by drawing on interview and other data sources to reveal how criminal history is understood and strategically deployed by differently situated actors. Before presenting these findings, I outline the general

mechanics of the federal guidelines calculations and sentencing procedure in the next section.

### Background, Context, and Procedure of Federal Sentencing

Over the several-year period in which the commission developed its inaugural version of the guidelines, criminal history was generally acknowledged and accepted as having a place at the table.<sup>3</sup> Therefore, the primary task was technocratic: how to convert qualitatively different “entities”—criminal convictions for the full panoply of offenses defined by the myriad jurisdictions that constitute the United States—into a common metric that could be deployed by courtroom actors.

After several iterations of how criminal history would be “counted” in the new guidelines system, the commission settled on a formula that remains substantially intact today. Very briefly, the prior conviction record is first converted into points on the basis of imposed sentence lengths (maximum sentenced imposed, not time actually served). The points are summed into “scores,” then collapsed into one of the six ordinal “criminal history categories” that constitute the x-axis of the sentencing grid. Prior convictions are subject to an expiration date that is dependent on the severity of the prior sentence, so the look-back period ranges from ten to fifteen years.<sup>4</sup> The basic criminal history formula is:

- (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
- (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add 1 point for each prior sentence not included in (a) or (b) up to a total of 4 points for this item. [Includes sentences of probation, and/or short jail sentences for misdemeanors and other petty offenses.]
- (d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
- (e) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection. (US Sentencing Commission 2015, 4A1.1)

The criminal history score is calculated, along with the offense level score, by a pretrial probation officer after the defendant has been convicted (most often by guilty plea) but prior to the sentencing hearing. The offense level scores are much

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3. One commissioner, Paul Robinson, did question its place, if the guidelines were to be put in place for retributive purposes. Relatively early in the process, he moved on to other fights about the development of the guidelines formula and its underlying philosophy.

4. It will be included if any part of a previous sentence was being served during that period, so if a current conviction is in 2016, the prior conviction was in 1996, but the defendant finished serving the sentence in 2002, it will count under the rules.

more likely to be contested as to the technical calculation than is the criminal history score. Offense level can be quite complicated because it can involve multiple elements and features of the underlying criminal act, some of which are subject to considerable interpretation. For instance, a defendant's relative role (aggravating or mitigating) in a multi-defendant case is subject to calculation and is often contested.

On the other hand, the actual calculation of the criminal history score is rarely contested or controversial. There is generally no denying the existence of prior convictions, which are documented by court records diligently obtained by probation. And the formula for calculation leaves little room for multiple interpretations. My observational and interview data confirmed that in this narrow sense, the criminal history calculation itself faced little resistance. As a defense attorney told me, "you can't do anything about criminal history points. Either you've got them or you don't." Or, in another attorney's words, "the criminal history [score] is what it is."

The process by which both criminal history and offense scores are finalized is as follows. The probation department works up the guideline calculation as part of a presentence report. The attorneys and judge receive probation's guideline determination prior to the scheduled sentencing hearing. Each side can file objections about the perceived accuracy of the offense level or criminal history scoring. Objections may be alleged errors of fact (i.e., counting a conviction that does not exist for the criminal history score), or differences in interpretation (i.e., whether someone is an "organizer or leader" of a drug conspiracy, or not, for the offense level score). Any objections are resolved in open court at the beginning of the sentencing proceeding, and the judge ultimately makes a determination on contested matters. The final offense level, criminal history category, and corresponding guideline sentence range are then formally stated and accepted for the record.

Once the guideline calculation terms are established, the meat of the sentencing hearing proceeds. It is here that each attorney is given the opportunity to argue for a particular outcome and/or for specific values to be given for any departures that are being sought or recommended. The defendant is also given an opportunity to make a statement prior to sentence imposition and, on occasion, other parties (such as family members of the defendant) may briefly speak. Often, the attorneys have filed memoranda detailing their respective arguments on sentencing, so their in-court oral colloquies usually summarize and expand on those written memos. The judge then pronounces sentence. In some cases, the judge has agreed to be bound by a plea agreement as to sentence or sentence range; otherwise, the judge decides on the sentence terms within any statutory constraints (including mandatory minimums).<sup>5</sup> The judge is supposed to begin with the guidelines, and make a record of reasons for deviations from the guidelines, including for any departures or variances.

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5. Prior to *Booker*, this was also bound by the guidelines, except under limited exceptions.

## FINDINGS

## Failure of the Formula

The first way that the quantified criminal history becomes narratively reconstituted in the adversarial process occurs when one or more parties involved in the sentencing process disagrees with the underlying rules that have led to the calculation. These are instances where, for example, the prosecutor argues that due to the time decay rule or some other formal feature of how criminal histories are calculated, the resulting criminal history score/category understates the true nature of the defendant's criminality. Alternatively, the defense might object to how a record of just very minor misdemeanors, when summed, overstates the seriousness of the criminal history. These objections make explicit the perceived limits of the criminal history calculus, and directly call into question the process of quantification and commensuration, at least in the given case.

A defense attorney shared how he approached using this strategy: “[W]hat I try and do is tie my argument to something in the guidelines. So, even though I really think the guidelines are bullshit—pardon my French—I’ll say, ‘Okay, you know, this guy has a criminal history, Category IV, but it really should be a II, because these three offenses occurred within two days of each other and he was on a drug binge. So, if you take away that, you know, and now he’s in rehab.’ So, you just have to key it to what you think will make the judge really start doubting the guidelines.”

When they could, defenders also proactively relitigated clients' prior convictions if there was a potential procedural or substantive defect in the original case. Getting convictions off the books meant criminal history scores—and potential sentencing enhancements—would be mitigated. In this way, defenders directly attempted to alter the constitutive elements in the criminal history calculation. In one of the courts where I conducted my fieldwork, challenging prior convictions was a commonplace strategy in drug cases during my time in the field. This was because a scandal in the state lab ended up invalidating a number of convictions that, it turned out, constituted a notable share of the criminal history for federal drug trafficking defendants. While it was an especially common practice in this court during my fieldwork, this kind of strategy was used across all my districts if and when there was any possible avenue for challenging the prior conviction.

Due to improprieties in the drug lab testing, a number of prior state court drug convictions that made defendants eligible for very lengthy “career offender” sentences in federal court were challenged and vacated. This meant that many defendants were now facing much shorter guideline sentences than either side anticipated at the start of the case. The vacated convictions struck a major blow to a punitive strategy in this district whereby law enforcement proactively targeted those with the requisite “career offender” criminal history—primarily African American men from select “problem” neighborhoods—in small hand-to-hand drug sales to obtain long federal sentences (Lynch 2016).

The federal prosecutors in these cases almost always used a *failure of the formula* strategy to argue that the vacated priors should still be considered in one way or another. They often marshaled the delineated guideline departure for “Inadequacy of Criminal History Score” to attack the requirement that priors must be legal convictions in order to “count.” As such, they made strong claims that the system of commensuration had failed in the case, even while using an element of that same failed system to legitimize their claim. But they did more than just challenge the legitimacy of the rules in these instances. They dismissed the calculation through a narrative construction of the criminal subject. In other words, the argument against the quantification system was, essentially, its inability to capture the true nature of the person to be sentenced.

Neal Deland’s case is illustrative of this form of contestation. In 2014, Deland was convicted and sentenced in federal court for selling 5.5 grams of crack cocaine to an undercover officer. Due to prior convictions for selling crack and a prior violence conviction, he was to be sentenced under the career offender guideline. The state court, however, vacated his two prior crack convictions due to the lab improprieties. The prosecutor described the situation in his written sentencing memorandum as one that demanded remediation due to the extreme impact that losing the prior convictions had on the guidelines calculation:

The effect of [the vacated prior convictions] on Deland’s sentencing could not be more dramatic. The Presentence Report . . . concluded that Deland was a Career Offender with three predicate convictions and was assigned a Total Offense Level of 29, a CHC [criminal history category] of VI, and an advisory guideline range of 151–188 months. Based on the state court orders entered last week, it now appears that Deland’s Total Offense Level is down to 15, his Criminal History Category will be only III, and his advisory guideline range reduced to 24–30 months. Based on the Sentencing Commission’s decision last Friday to lower drug offenses across the board by two levels, Deland’s guideline range will be further reduced all the way down to 13-III, or 18–24 months. Even the alchemists from the Middle Ages would wonder how such a transformation could take place when the defendant and his historic offending (i.e., who Deland is and what he has done) are unchanged.

The prosecutor tellingly invoked historical, pre-science figures to highlight the failures of the late twentieth-century calculative system in this case, but that was just the beginning of his complaints. “Wholly apart from the vacated convictions in this case, the record shows that the CHC III grossly underrepresents the seriousness of Deland’s criminal record and his likelihood of recidivism. The government believes that a substantial departure/variance is needed in this case because of Deland’s 12 years of continuous, increasingly serious offending, the substantial leniency the state court system has wasted on him, and a serious record of prison misconduct and violence.”

This was the prosecutor’s opening to invoke the guidelines’ exceptions that authorize upward sentence departures when the criminal history category substantially

underrepresents the seriousness of the criminal history. So, while the prosecutor denigrated this system for its failure to capture the essence of Mr. Deland's criminal being (i.e., "who Deland is and what he has done"), he simultaneously marshaled the built-in provisions of this system to make the case for the sentence he desired: seventy-two months in prison, four times higher than the new guidelines minimum sentence, which was a huge, bold departure request.

In the prosecutor's twenty-five-page memorandum, defendant Deland was constructed as not much more than his past and present criminal acts. But that construction was not just points and counts of prior convictions on an x-axis and elements of the crime of conviction on the y-axis. Deland's acts constituted a fully agentic criminal being who "has many victims;" who inflicts pain on others, and who is driven by greed. So, for example, while acknowledging that Mr. Deland himself had grown up in a troubled neighborhood, his criminal acts were evidence that he "chose to add to the misery that crack cocaine and other drugs wreak on these neighborhoods." Criminal history, as a window into Mr. Deland's very being, was then expanded well beyond the calculative points to encompass an array of known crime-related shortcomings, whether resulting in convictions or not. Eight full pages of text were devoted to the memo's section titled "Criminal History," opening with a schoolyard fistfight (not "countable" as criminal history)<sup>6</sup> that the defendant, now in his mid-twenties, engaged in at the age of thirteen. The prosecutor stitched together the subsequent known criminal justice contact into a narrative of incorrigibility, punctuated with repeated displays of "disrespect not only for his community, but for the criminal justice system as well."

The prosecutor also filed supplemental "exhibits" documenting Mr. Deland's many rule infractions while in custody (again, not countable criminal history) as additional support for the above-guidelines sentence he sought in the case. In this district, this kind of "where there's smoke, there's fire" strategy is relatively common among prosecutors. In this and other cases, it provides the narrative glue for the argument in support of the recommended sentence, fleshing out the defendant as someone who is actively involved in bad behavior even if it does not all end in formal convictions that count in the sentencing calculus.

The defense attorney, conversely, became the spokesperson for the appropriateness of a guideline sentence in this case, an unusually conservative position for the defense in this district, but one that made sense in light of the prosecutor's stance. He defended the calculative logic of the guidelines, which defense attorneys normally argue against in their clients' defense, and requested a sentence of twenty-four months for his client. Although this recommendation was at the top of the guidelines range, it was three times lower than the prosecutor's recommendation. In his sentencing memorandum, the defense attorney characterized the prosecutor's request to deviate from the guidelines as "earnest yet fundamentally unreasonable." The memo chided the prosecutor for his claim that Mr. Deland's "criminal history

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6. This was not countable under any scenario. It did not even involve an arrest, much less a conviction, it was "stale" since it happened so long ago, and based on the rules pertaining to juvenile convictions, it would be uncountable given his age.

is suddenly substantially under-represented after the inevitable demise of these two [lab]-tainted state court convictions.”

While much of the fifteen-page defense memo made an argument against including the vacated priors in consideration of an above-guidelines sentence, marshaling case law and policy statements in support of that position, it also provided a fleshed out biographical narrative of Mr. Deland that contrasted with the prosecutor’s. A section that made the case for Mr. Deland’s “potential to move beyond his past” opened with his tragic birth:

Neil Deland could not have a more heart-rending story. He was abandoned as an infant by his young mother and has never had any kind of meaningful relationship with either of his parents. It is miraculous that he even knows the identity of his parents at this time. After apparently being dumped in a garbage can as a newborn, he was adopted by his great aunt . . . at a very young age. Although that was certainly a fortunate development for Mr. Deland, it came with a price.

The narrative continued through his rejection by his family, becoming homeless and alone by the age of fifteen, and his “inevitable” involvement with the juvenile justice system and run-ins with the law. It highlighted signs of positive change. Before this arrest, Deland had enrolled in college and was doing well. The life story was then put back into the language of the guidelines to crystallize the argument in favor of a guidelines sentence: “Sadly, his situation is reminiscent of far too many cases that come before this Court alleging street-level drug distribution. More importantly, all of these factors are captured by the applicable guidelines range.” In this sense, Mr. Deland’s narrative represented a genre (the tragic childhood contributing to criminality) that could appropriately be served by the “13-III” box offered up by the guidelines’ calculation.

These themes were repeated in the actual sentencing hearing. Stretching beyond Mr. Deland’s more serious run-ins with the law, the prosecutor expanded his argument to include traffic violations, each worth one point in the criminal history calculation, as evidence of danger and incorrigibility. “[T]o be fair, a number of [his priors] were for automobile offenses, but even if you look at those, they say some important things about Mr. Deland. Just by way of example, your Honor . . . at least in one, if not more, he created a real hazard as he went through an intersection and almost hit a cop car.” The traffic violations, for this prosecutor, were more than just points to be summed. They demonstrated Deland’s penchant for being around trouble and his utter disregard for the law: “[H]e’s not where he’s supposed to be, where he’s not doing what he’s supposed to do, and he’s saying to the criminal justice system, ‘Look’—just like ‘I’m going to keep driving a car. I don’t care. I don’t care what you say to me. I’m just going to keep doing what I want to do.’”

Before knowing how large an upward departure the prosecutor sought, Deland’s attorney shared that he expected the request would be a sentence from thirty to forty-eight months since “he would completely lose credibility if he came in at seventy-two.” Upward departures, in general, are exceptionally rare in drug cases,

especially in this district. A mere one-half of 1 percent of all drug cases between 1992 and 2012 received upward departures for any reason in this district. Even in the wake of this drug scandal, only 1 percent of the sentenced drug cases resulted in upward departures in the district. The judge in this case had not granted any upward departures on the drug scandal cases, so Deland's attorney thought that if he granted one at all, it would only be just a few months above the guideline range of eighteen to twenty-four months. He was wrong. The prosecutor lost no credibility despite asking for seventy-two months. The judge granted the upward departure, and imposed a sentence of forty-eight months.

### Biographies of the Number

The second, more prevalent strategy to reconstitute the criminal history calculation was through the interpretive meaning making that is done by the adversarial parties during the sentencing process. In contrast to those cases where the calculation rules are explicitly called out for their inadequacy, in these cases, the countable criminal record, and its translation into criminal history points, is not contested. Nonetheless, the meaning of that quantified record is up for debate. This divergent meaning-making was done through biography—making sense of the number through telling a tale of a moral agent.

This strategy also may begin in the written sentencing memoranda that are filed with the court prior to the sentencing hearing. In these dueling documents, each party, again, offers up a narrative of what the criminal history says about the defendant as a person. As such, they are a formal attempt at interpretation, moving away from the numbers to give them life and meaning for the sentencing task at hand. Criminal history is central to this life narrative *because* of its punitive value in the sentencing formula, but it also opens up the conversation about the human actor to be sentenced. And that holistic evaluation, put also in the context of the crime of conviction and any other background information deemed relevant to the document author, helps form the basis for the recommended punishment.

Dominic Chessman's case brings to life how the countable record becomes differentially interpreted by the opposing sides in support of their respective positions, even when the formal calculations are agreed upon as both appropriate and adequately representative of the prior record. Mr. Chessman was forty-eight-years-old when he pled guilty in 2013 to a drug and money laundering conspiracy involving fifteen to fifty kilograms of cocaine. In this case, the prosecution and defense had reached a plea agreement where neither side could argue for a sentence outside a specified guidelines range of 168–210 months.<sup>7</sup> If the judge did not sentence within that range, the guilty plea could be voided. This meant that the stakes at sentencing, if the judge agreed to be bound to those terms and accepted the plea agreement, were over where in that range the sentence should fall.

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7. The agreement specified that he was correctly at Offense Level 35 and Criminal History Category III, but he would be sentenced at 33-III.

Early in her sentencing memorandum, the prosecutor assured the court that “[a]ll parties agree that the defendant is in criminal history category III.” Yet she used the convictions that brought Mr. Chessman to Category III to make a strong argument for a sentence at the top of the agreed-upon range, 210 months. She began by recounting his distant criminal past that did NOT count in the calculation as a way to paint a picture of Mr. Chessman’s criminal essence. Unlike the circumstances of Mr. Deland’s case, where the uncountable history was offered as evidence of the guideline’s limitations, in this construction, the criminal history is offered up as a way of knowing who Mr. Chessman is as a person.

As the [probation report] ably lays out, the defendant has been amassing a criminal history for almost his entire adult life. By the age of 28 he had received convictions for attempting to commit a crime, possession of burglary tools, negligent operation of a motor vehicle (following a high-speed pursuit that endangered the lives of others on the road), conspiracy and possession of heroin and cocaine with the intent to distribute, and other offenses. Notably, because of their ages none of those offenses result in criminal history points in the instant case, and also they do not include his numerous other arrests that did not result in convictions.

She then narrated his prior countable history, which was one previous conviction for heroin distribution and money laundering for which he had been sentenced “in this very courthouse.” To preempt the defense argument about Mr. Chessman’s positive attributes, she directly counterposed his strengths against his criminal history to make clear his agency in choosing to offend. “Unlike so many defendants who lack language or work skills, fight debilitating addictions, and/or have no support network to fall back on, this defendant has demonstrated the knowledge, dedication, and ability not only to obtain gainful employment, but to be a successful legitimate businessman. . . . He just does not have any excuse for his persistent criminal behavior.” She concluded this biography-by-criminal record argument, asserting that “the defendant, in a word, is incorrigible.”

The criminal record also provided the prosecutor’s narrative with a proposed resolution. Mr. Chessman’s incorrigibility was predictive of his future, so therefore required the incapacitative measure of a long prison term. However, the prosecutor did not need an actuarial formula to draw that conclusion; she could divine it just through her reading of his criminal biography. “The defendant is going to re-offend. That is almost a given. Whatever opinion one may hold about the relative worth of mandatory minimum sentencing . . . some people simply will not abide by the rules of society.”

Mr. Chessman’s criminal history also signaled his lack of appropriate respect for and fear of the law. “Sentences that minimize the significance of habitual criminal behavior undermine respect for the law, and encourage younger offenders to believe that they can break the law with impunity. Sentencing the defendant to any sentence that approximates his previous sentence will accomplish little other than confirming his suspicion that the consequences of his behavior will never be greater than what he has already decided he is willing to bear.”

In support of his argument for a 168-month sentence, the defense attorney's memorandum, in contrast, made the case that Chessman was more than just his criminal past. Needless to say, the attorney only discussed the single conviction that constituted Mr. Chessman's calculable criminal history. That conviction had occurred nineteen years earlier, but still counted against the defendant since he had been released eight years prior to this conviction (so within the fifteen-year window). The defense attorney elaborated Chessman as a psychologically complex, yet fragile, man. His psychological problems, including his "histrionic personality disorder and anxiety," were offered up to explain his criminal involvement; his positive features, including his successes as a parent, his talents, and his capacity for change, were offered as a counternarrative of his life. The defense attorney's portrait of the defendant pivoted away from the "incurable criminal" construction offered by the prosecutor, pointing out that "Dominic will be 62 years old" when he gets out of prison, if the judge gives the lower sentence. He assured the judge that recidivism is a low risk for "senior citizen" reentrants.

At the sentencing hearing, the prosecutor hit hard on her point that Chessman's prior record "tells us, more clearly than any argument he can make today, that his persistent criminal behavior is not going to change." She argued that the judge who imposed his previous sentence of 151 months had told the defendant: "This is a serious sentence, you need to take this seriously, the next time you come back, the penalty will be even harsher." Since this was his "next time," she implied, he had to be punished even more severely. For her, that meant the top of the agreed-upon range. The judge cited this exact logic when he pronounced the sentence:

What struck me was the comment [the prosecutor] made about ... the earlier sentence of 151 months. What I did was take that sentence and I thought an appropriate escalation was an additional three years, so the sentence I'm going to impose is 187 months.

The 187-month sentence was initially structured by the guidelines' calculation. However, what propelled the judge to come to that number was, at least as he told it, the truth value that resonated from the prosecutor's narrative about Mr. Chessman's fundamental incorrigibility and inability to be deterred. So even if the sentence did not stop Chessman from reoffending, it would send a message to the public, including would-be criminals, about the normative value of the court's power and will to punish.

As Mr. Chessman's sentencing revealed, judges also navigate the score as they construct a narrative about the defendant before them as to what an appropriate sentence should be. The quantitative metrics end up being absorbed, almost as prose, into the biographical narrative. A judge at one of my sites described how he dealt with conflicts between the technical calculation by probation and the attorneys' arguments about the defendant. Rather than debate the policy-intent minutia of the guidelines, he engages in a form of "craft work" (Tata 2007) to reach an acceptable judgment: "I just end up kind of stirring that into the soup, so to speak. There's a little bit of oregano from the probation officer, there's garlic from the

government and then there's—I don't know, honey from the defense counsel, and the different proportions go into what I end up deciding. Usually everybody has got a piece of the truth." In this forum, truth is not contained in the quantified calculation, but emerges through adjudicating competing narratives about whether, for instance, the defendant is a "good kid who made a mistake in judgment" or a "rat."

## Making Up Numbers

In one of the districts in my study, judges have maintained considerable allegiance to the guidelines even since they became advisory. Therefore, attorneys have had a harder time moving sentence lengths through narrative reformulation. Nonetheless, the biographical narratives still prevailed; they were just more tightly tied to the guidelines' metrics in the articulations. A defense attorney practicing in this district described how she tried to mitigate the criminal history while keeping it in the guidelines' language. "I'll go and try to find cases where they talk about someone's criminal record and what category they were. And, I've done like tables where I've compared like, 'Look, my guy's a Category III, these are his four offenses. But, in these ten other cases, look at what has made someone a Category III, and what charges, and you see the difference between these charges. And, my guy just isn't as bad as some of these other guys, and so you should give him a reduction.'"

The sentencing of Franklin Samuels, an elderly African American man who had originally been indicted for conspiracy to distribute heroin, exemplifies how the quantitative metric functioned as a legitimizing label for the qualitative judgment made. Mr. Samuels had a history in this court. Fourteen years earlier, he had pled guilty to distributing crack cocaine and was sentenced to eighty-four months in prison, followed by five years of supervised release. A longtime addict, he violated his supervision conditions soon after release by using cocaine and heroin, for which he was sent back to prison for two more years.

After he got out again, Mr. Samuels successfully got off supervision and stayed out of trouble. By this point, his health was failing, and he was primarily dealing with his life-threatening cardiac and pulmonary problems. Mr. Samuels, however, was briefly lured back into the drug trade. Federal agents had decided to target Mr. Samuels's adult son in a "buy-bust" drug sting after his name had come up in another case. A confidential informant working with police contacted the son, seeking to purchase heroin. The son did not have any heroin so asked his father for connections to help out. Mr. Samuels gave the name of a potential supplier. The son obtained the drugs from that source, and sold a single gram of heroin to the confidential informant. Both Mr. Samuels and his son were arrested and indicted in federal court for conspiring to distribute heroin. Mr. Samuels ended up pleading guilty to aiding and abetting the one-gram drug sale. His guideline sentencing range was calculated to be eight to fourteen months in prison based on his Criminal History Category II and Offense Level 10.

Ten days before the scheduled sentencing proceeding, the defense received a copy of the prosecutor's motion seeking a sentence above the guidelines. The motion asserted that Mr. Samuels's criminal history score substantially underrepresented his

“true” criminal history. The motion recounted his entire criminal record, dating back to when he came of age in the early 1970s. He had two felony convictions from his late teens and early twenties that no longer counted against him since they were nearly forty years old, and some very old misdemeanor convictions that also did not count. His previous federal drug conviction did count, which brought him to the Criminal History Category II. More bad news came to Mr. Samuels four days before his sentencing hearing. His judge, who is usually a “guidelines” judge, issued a notice that he was contemplating an “upward variance” in this case “based on the apparent inadequacy of previous periods of confinement to promote respect for the law and deter criminal conduct.” To the extent that both these legal actors explicitly identified the guidelines as inadequate in this case, it fits the *failure of the formula* typology. What distinguishes it, however, is the resolution to that failure, which was to directly tinker with the quantitative system to label the judgment with the “correct” metric.

The prosecutor’s and judge’s filings were dealt with at the sentencing hearing. The proceeding began with the judge’s standard confirmation that the guidelines had been correctly calculated by the probation officer. After that, the critical part of the sentencing proceeding began in earnest when the prosecutor argued her motion for a higher sentence. Her telling of Mr. Samuels’s life was—in its entirety—his criminal past and his continued failures to be deterred. His criminal history also revealed that Mr. Samuels “shows no respect for the law.” These are the themes the judge himself often echoes: the need for deterrence and to promote respect for law. According to the prosecutor, the consequence of Mr. Samuels’s utter failure on both counts results in the “substantial likelihood he will re-offend.” Therefore, the prosecutor argued, his criminal history category should instead be V, based on all the older, “uncounted” criminal history. If the judge agreed, this would increase the sentencing guideline range to twenty-one to twenty-seven months. She concluded by requesting Mr. Samuels be sentenced in that range.

The prosecutor later told me why she was so set on increasing Mr. Samuels’s criminal history score. For her, his history of drug use signaled certain recidivism for the remainder of his life. “He’s always gonna be involved [in the drug trade] because he’s got a lifetime addiction. He’s never going to get over it. . . . That’s why he did it. Not an excuse, but that’s why. That’s his motivator. It wasn’t greed. It was addiction. . . . Because of that, when you look at his criminal history, you say, ‘The likelihood that he’s gonna reoffend is, you know, 98.9 percent.’” Although in other districts, the prosecutor may not have taken the step to convert this assessment into a higher criminal history score, in this district, the numerical language of the guidelines was the formally legitimate form in which the final sentence would be couched. Nonetheless, for both the prosecutor and the judge, this was mere form and the underlying substance was the narrative biography of the defendant-as-recidivist.

The defense had a much tougher go of it in front of the judge. In his sentencing memorandum, Mr. Samuels’s attorney had asked the judge to sentence his client within the calculated guidelines, as a fair and just outcome for an ailing man “in his twilight years.” In court, he could not get through his argument without push-back. First, he made the point that the worst of the offenses not “counted” in the criminal history score happened nearly forty years ago when Mr. Samuels was a

young man. He tried an empathetic strategy, saying he himself had also made mistakes when he was young. The judge interrupted: “But you learned from your mistakes, he has not.” The attorney then pivoted to the health issue, and the litany of problems his client had dealt with, including while in custody this time around. The judge interrupted a second time—“Let’s cut to the chase here”—then he detailed each sentence Mr. Samuels had served and concluded, “none has deterred him.”

The attorney tried once again to portray his client sympathetically in terms of how minor his crime was this time. He was abruptly cut off, and the floor belonged to the judge. Referring to himself in the third person, the judge announced that “the court gave notice of a contemplated upward variance. The guidelines in this case are inadequate.” He once again narrated Mr. Samuels’s history of convictions and punishments that had not deterred him in the past, and stated that his goal in sentencing was to promote respect for the law and achieve deterrence. He then declared that rather than move Mr. Samuels’s criminal history to a Category V, as requested by the prosecutor, he would move the criminal history to the highest category available, Category VI.

Moreover, even though no one suggested that the calculated offense level—for helping his son sell a single gram of heroin—was too low, the judge decided to tinker with that as well. Based on some internal calculation that was never elucidated, he announced that the offense level should really be a “fifteen” instead of a “ten.” So even though there was no debate over the seriousness of the crime, the judge moved to the offense scale to increase the sentence range once the criminal history scale was topped out. The consequence of these adjustments was that Mr. Samuels’s new guideline range was forty-one to sixty months in prison. The judge settled on forty-eight months—six times longer than the low end of Mr. Samuels’s calculated guidelines—plus three years of supervised release as the appropriate sentence.

For the judge in this case, the criminal history metric worked in two ways. First, it allowed him to construct a holistic picture of the defendant before him as no more than a criminal being who did not have the capacity to learn from his past sanctions. In other words, by the construction of the guidelines formula—limited to past and present criminal acts—he could dismiss the defense’s broader mitigation efforts. And while he declared the score in this case “inadequate,” it gave him the language to get to where he wanted to go within the guidelines regime that he respected. Mr. Samuels was a 15-VI, not a 10-II. But ultimately, the score did not determine the culpability; it was a mere technical category for assignment pasted on the more morally infused and intuitive rendering of Mr. Samuels’s criminal life.

Indeed, the judge ended the proceeding with a coda to his version of Mr. Samuels’s life narrative about an alternative future that might be rendered through this punishment. First, he warned Mr. Samuels to “learn your lesson” and not commit any more violations, then he framed the sentence as, essentially, a life-saving intervention for Mr. Samuels’s benefit:

As a fellow human being, I am sensitive to your health care needs and will recommend you get sent to a facility where you can get care. You may get better care than if you are out. . . . I hope you profit from this experience and you do not need to spend the rest of your life in prison.

## DISCUSSION

In Simon's (1988) dystopian vision of the contemporary actuarial world, the federal sentencing guidelines reduce subjects once thought to be morally problematic and in need of intervention to mere numbers on the sentencing table. My observations of the contemporary penal-legal field challenge that vision. They instead suggest that the manifestation of cases—with living, breathing actors and subjects—are neither contained by the quantitative system that was to regulate the power to punish, nor reducible to the numerical representations that the system imposes. Quantitatively based commensuration systems like the guidelines may provide new material for legal actors to ply their craft and may indeed shape the parameters of possibility, but they cannot overtake the narrative mode by which those actors know and assess those to be punished.

Across the three strategies I identified, criminal history was probative as to the soul of the legal subject. The score itself provides a hook within each narrative. It could be the opening to the story, capturing or failing to capture—depending on the case and narrator—a particular life history. Or it could be the punctuation mark at sentencing pronouncement, a way to summarize and categorize the narrated biography that preceded it. It could also be the antagonist, to be challenged as inadequate for the purposes of judgment. But even in the most routine cases that I observed, for instance, where plea agreements stipulated to all sentencing terms, the criminal past (and criminal present) was narrated as a way to help explain the sentence. Ultimately, the quantified symbolic representations—offense levels, criminal history categories, and sentencing tables—stand in, as needed, for long-established norms and mores about criminality, culpability, and justice.

This suggests the limits of epochal theories that cite dramatic shifts in logics, structures, and techniques as evidence of fundamental social transformation, at least in the sociolegal field. Such theorizations often seem to be working on a unidirectional causal model—that the new logics cause change. Doing so elides the human agency that underpins social and technological innovation in the first place. The logics and techniques are inventions, born of the power relations that constitute the core engine of sociality: they emerge *from* those relations that constitute social life (Foucault 1982). Their articulations are therefore better understood as products as much as producers—elements in a feedback loop in which power relations give rise to new articulations that then reshape, incrementally, the landscape in which those power relations continue.

Savelsberg (1992) chronicled, at the macro level, the particular power struggles that gave rise to the late twentieth-century guidelines movement, and that ultimately limited their ability to unseat the substantive modes of justice entrenched in the legal

system. At the micro-interactional level, my findings illustrate how those substantive concerns are articulated, and reinforced, within the guidelines' formal framework through adversarial social relations. The consequence is that the "deductive, logical, and gapless system of rules" (Savelsberg 1992, 1350) that structures sentencing procedure becomes absorbed into the competing accounts that advocate for particular outcomes.

The defendant's biography is initially preempted and presupposed by the guidelines, as the legal procedure at sentencing requires the calculation of the two culpability scores. She is transformed into a quantified version of a case, an "Offense Level 34-CHC III," where both numbers allow for commensuration to other "cases" and compute an appropriate sentence range. But as I illustrated, the quantified case logic then melds with and becomes absorbed into the biographical narrative. To be sure, evaluation efforts, ranking exercises, and "adding up" the value of criminal history happen in both the sterile calculation as dictated by the Guidelines Manual and the narratives offered by opposing attorneys and contemplated by judges. However, as my field observations revealed, the quantitative form functions more to provide an opening to the qualitative narrative than as the last word. When it does serve as an endpoint, or bookend, as in Mr. Samuels's case, it is still, functionally, dressing on the qualitative, ideographic, morally infused assessment of the defendant to be sentenced.

Ultimately, criminal courts are social spaces that do more than just process people as dehumanized cases, despite the imposition of systems designed to do just that. Even in their most mass-processing, assembly-line form, criminal courts are engaged in creative, coercive, and individuated social regulation, imbued with moral judgment (Feeley 1979; Kohler-Hausmann 2013; Van Cleve 2016). Defendants may be reconstituted into case types, to be disposed of efficiently through guilty pleas and standardized sentences in line with local "going rates" (Church 1985), but even those processes mask behind-the-scenes adversarial negotiations about agentic legal subjects possessing biographies and psychological complexities (Emmelman 1996; Kohler-Hausmann 2013).

In other criminal justice agencies, as well, frontline actors may formally comply with the numbers-driven actuarial tasks, but those activities mask affectively rich, individualized judgment processes that substantially drive intervention (see, e.g., Lynch 1998). For Cheliotis (2006, 408), the human agency of organizational actors represents a formidable counterforce to dehumanized actuarialism in the penal field: "Professionals incarnate their agentic capabilities [and] . . . actuarial logics have far from supplanted traditional goals of punishment like rehabilitation and/or retribution."

It may be that the penal-legal field provides an exception to the hegemonic power of quantification. It is not only imbued with substantive justice ideals that seem to demand moral assessment, but its mode of seeking adjudicatory "truth" via adversarialism also lends itself to ongoing contestation. The distinct—indeed oppositional roles—that adversarial actors assume in US criminal courts ensure that variations in how policy mandates are deployed not only cut across different sites and localities, but also occur within individual ones. In the federal criminal justice context, the guideline numbers function as rhetorical and material tools for legal adversaries to wield in support of their positions for particular outcomes. In this context, everything about the guideline calculation is potentially open to questioning and cross-examination—the system of valuation itself, the particular calculation made in a case, the "fit" of the calculation to the case at hand, to name just a few aspects.

The question remains as to how hegemonic the narrative is in other arenas of our increasingly quantified social world. Bruner (1991, 21) argues that narrative plays an essential role in how we make sense of the social world: it “organizes the structure of human experience,” and so serves as the conduit by which actors make sense of those subject to intervention. Narratives also provide “the means through which organizations are reflexively constructed,” and help actors to imbue meaning and purpose into their roles (Rhodes and Brown 2005, 171). In the face of organizational change, narratives can work to reiterate and reinforce organizational values and ideals, to help maintain continuity despite the force of reform. In that sense, the sterile quantitative system imposed on federal courts changed the manifest form of sentencing—judges, lawyers, probation officers, and defendants have to contend with the guidelines calculations—but those calculations are narratively reconstituted to fit with the visions of justice that those involved seek to impose.

Yet, as some scholars have amply demonstrated, the quantified logic of metrics has become much more hegemonic in some spheres, dominating operations and transforming practices (Davis, Kingsbury, and Merry 2012; Espeland and Sauder 2016). For instance, to the extent that those governed are dispersed, numerous, and spatially removed from governing entities, they are more easily converted into quantified abstractions. Social psychological theory would, in fact, predict a continuum of quantification’s influence as a function of proximity and individuating opportunities (Henderson and Wakslak 2010). The hegemonic powers of the guidelines *should* be expected to be blunted inside the courtroom, where multiple actors are focused on assessing and acting upon a single defendant (or a small number of defendants).

In that regard, I have demonstrated that something happens between the quantitative calculation of the appropriate sentence for the “case” and the pronounced sentence upon the defendant. What happens is the synergistic making of a criminal being, made possible in part by the quantified criminal record, but elaborated by a biographical narrative. The adversaries incorporated the criminal history calculations as elements of a life story featuring the juridical subject to be punished. Therefore, the determination of a subject as a “Criminal History Category III” is imbued with a full panoply of meaning—for predicting her future, for judging her morality, for imputing her intention and will—through its narrative retelling. In the dueling narratives, those quantifiable criminal records “supply the analytic context by fashioning an account of a person’s past and hinting at an extended future” (Heimer 2001, 72).

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