Rule Complexity, Story Complexity, Mercy & Hope

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Introduction

Criminal law is about rules and stories. This Essay is about how those two things—rules and stories—intersect, tangle up, and oppose one another, a dance that shapes the way we limit the freedom of others through the processes of criminal law. In very broad strokes, rule complexity is a tool of power and a driver of incarceration, while story complexity more often offers mercy and hope for those subjected to the criminal justice system.

That dance played out in the life of my friend, Jason Hernandez. At age twenty-one, he received a sentence of life without parole for a nonviolent drug crime.[1] Even during the heart of the War on Drugs, to get to a life-without-parole sentence in such a drug case, a lot of rules had to be met. Sometimes (as in Jason's case),[2] the government used conspiracy laws that allow a person to be charged with narcotics possessed by someone else or not yet converted to crack cocaine from powder[3]—conspiracy laws complicated

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1. Technically, he was sentenced to life without parole plus additional years for crimes involving crack cocaine. *Oversight Hearing on Clemency and the Office of the Pardon Attorney Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 117th Cong. (2022) (statement of Jason Hernandez, Executive Director, ATLAST), https://docs.house.gov/meetings/JU/JU08/20220519/114782/HHRG-117-JU08-Wstate-HernandezJ-20220519.pdf [https://perma.cc/3A3K-C4GQ].

2. *See* United States v. Hernandez, 645 F.3d 709, 710 (5th Cir. 2011) (describing a 1998 pre-sentence report stating that, "[b]ased on the most conservative estimate, Jason Hernandez is responsible for 32.5 kg of cocaine base" because he "knew that members of his criminal conspiracy transported powder cocaine and later cooked that powder" (alteration in original)).

3. *See, e.g.*, 21 U.S.C. § 846 (subjecting a conspirator "to the same penalties as those prescribed for the offense" intended to be commissioned); United States v. Bingham, 81 F.3d 617, 625 (6th Cir. 1996) (quoting the district court's conclusion to hold each defendant accountable for at least ten kilograms of crack cocaine in a conspiracy in which the defendants knew their co-conspirators transported cocaine powder and would convert the powder into crack cocaine).

enough that they take a while to explain even to law students.[4] In many other cases, the government had to file a notice that it was seeking an enhanced sentence,[5] then show that two qualifying prior convictions and a sufficient quantity of drugs were in play, paying close attention to the definition of the qualifying priors.[6]

Whether through conspiracy or enhancement or both, rule complexity landed people like Jason in prison for life.[7] Rules put him in prison; his story got him out. Jason told his own story in a heartfelt clemency petition, which included a letter beginning with "Dear Mr. President" and ending with a description of his hopes: "[N]ot just dreams of being free, but dreams of becoming someone who is going to make a difference in this world."[8] He received a commutation of sentence from President Barack Obama in December 2013[9] and has indeed gone on to make a difference in this world—even taking over and converting the dumpy tobacco-and-beer store where he started selling pot at age fifteen into a true grocery store amid a food desert.[10] Mercy and hope came from the very human complexity of Jason Hernandez's story.

Rule complexity (that is, complexity of the codes, sentencing guidelines, and formal processes of law) and story complexity (the narratives engaged by the law) each have their place in criminal law. We have erred, though, in too often favoring rule complexity over story complexity, and that

4. *See* MARK OSLER, CONTEMPORARY CRIMINAL LAW 631–94 (2d ed. 2022) (requiring over sixty pages to explain fundamentals of conspiracy law).

5. *See* 21 U.S.C. § 851(a) (requiring the prosecution file and serve an information stating "the previous convictions to be relied upon").

6. 21 U.S.C. § 841(b)(1) (2012), *amended by* 21 U.S.C. § 841(b)(1).

7. The First Step Act amended the enhancements, First Step Act of 2018, Pub. L. No. 115-391, sec. 401(a)(2), § 401(b)(1), 132 Stat. 5194, 5220–21 (codified as amended at 21 U.S.C. § 841(b)(1)), now the highest minimum is twenty-five years. 21 U.S.C. § 841(b)(1)(A). Prior to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the sentencing guidelines were mandatory, *id.* at 245–46, and a person could receive a life sentence based only on the quantity of drugs involved, 21 U.S.C. § 841(b)(1) (2012) (amended 2018). However, such sentences still had to be predicated on a number of rules being met, including proof of the quantity of narcotics and the defendant's criminal history. *Id.* § 841(b)(1)(A)(i)–(viii).

8. Juleyka Lantigua-Williams, *What It Takes to Secure Clemency*, ATLANTIC (Oct. 7, 2016), https://www.theatlantic.com/politics/archive/2016/10/clemency-president-obama-commutation-life-without-parole-war-on-drugs-minimum-sentencing/502334/ [https://perma.cc/GK4Q-668S].

9. Jason Hernandez, Opinion, *The Power of Clemency*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/opinion/obama-prisoners-clemency.html [https://perma.cc/Q3FM-WV8X].

10. Haeven Gibbons, *Granted Clemency by Obama, McKinney Native Leases Store Where He Used to Sell Drugs*, DALL. MORNING NEWS (Mar. 16, 2023, 6:00 AM), https://www.dallasnews.com/news/2023/03/16/granted-clemency-by-obama-mckinney-native-leases-store-where-he-used-to-sell-drugs/ [https://perma.cc/LEV5-RW5P].

has played a role not only in over-incarceration but in the loss of mercy as an ancient value[11] embedded within a true system of justice. We need more room for story complexity—for the earthy realities of people's lives—and a smaller role for rules that limit our consideration of that humanity.

Much of this Essay is devoted to the prevalence of rule complexity and the problems it creates. The American affection for rule complexity has manifested itself through bloated statutory schemes, math-problem sentencing guidelines, and inscrutable procedures for exercising ancient rights like the ability to petition for habeas corpus. This isn't good. When the number of things outlawed (and the enhancements to those crimes) grows too thick and complicated, citizens no longer understand what is illegal and how severely a crime is punished, and law becomes less, not more, normative.[12] This kind of complexity undercuts the role of retribution and deterrence, as messaging becomes murky and unclear (if communicated at all). Rule complexity also means that those with greater resources have an advantage, and in the realm of criminal law, that advantage goes to the government. The remainder of the Essay will examine the nature of story complexity, its power, and ideas for restoring balance between the two.

Part I will describe the types of rule complexity that make up our criminal justice systems, including not only our increasingly fat penal codes and complicated sentencing guidelines but also the rules and processes that often play as large a role in how criminal justice is actually performed. This will lead to a discussion of the problems created by rule complexity and describe how criminal law loses its normative value—and its core function of line drawing—when rule complexity makes it impossible for people to assess the size and shape of the wiggly line that divides the legal from the illegal.

Part II will explore the role of story complexity in American law and its use both as a vehicle for victims to describe their experience and, through a fuller understanding of the defendant, as a counterpoint to the excesses created by rule-based outcomes in a variety of contexts. The power of story within the larger culture is unmistakable, making its potential within the law that much stronger as a conduit through which the values of mercy and balance can be achieved in the face of too-harsh outcomes. Here, I will also

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11. *See Micah* 6:8 (New Revised Standard Version) ("[A]nd what does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God?").

12. Noting that the more complex criminal law is, the less normative it becomes is not a novel argument. In 1516, Thomas More wrote: "They say the only purpose of a law is to remind people what they ought to do, so the more ingenious the interpretation, the less effective the law, since proportionately fewer people will understand it—whereas the simple and obvious meaning stares everyone in the face." THOMAS MORE, UTOPIA 87 (Paul Turner trans., Penguin Books 2003) (1516).

describe the intricate interplay between rule and story complexity. For example, the conflict between uniformity and discretion in sentencing is in large part about rules and stories: uniform rules cabin the discretion of judges to consider the fullness of a story, whether it be the defendant's or the victim's story.

Finally, Part III will make discrete recommendations to right the balance between rule and story complexity in criminal law. My argument is not to get rid of rules but to pry open room in our processes for broader and deeper stories to create a system that provides accountability, truth-telling, mercy, and, maybe, sometimes, hope.

I. Rule Complexity

A. Rule Complexity in American Criminal Law

Rule complexity in American criminal law has been achieved in several ways: by criminalizing more actions; by creating crimes with obscure and poorly defined elements; by manufacturing overlapping federal and state systems that too often criminalize similar actions in different ways; by creating multiple areas of discretion in the criminal process; by ginning up indecipherable rules for basic constructs like habeas corpus; and by layering sentencing enhancements on top of one another in dizzying spirals.

Insistently, these complexities favor the powerful, and in the world of criminal law, that means the government. Complexity, in general, favors the powerful because they have greater resources to create, manipulate, and understand complications. This is certainly true in American criminal law, where (in the federal system) the Department of Justice has outsized influence[13] in creating statutes, rules, and guidelines;[14] in manipulating those statutes, rules, and guidelines;[15] and in training their people to understand

13. *See* Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 404 (2017) (describing the DOJ as "a behemoth whose very mass creates momentum only in the same direction it was already moving").

14. *See id.* at 395–97 (explaining how the interests of the chief prosecutor—the principal advisor on criminal law to the President—interact with reform efforts).

15. The unified national power of the Department of Justice allows for manipulation of complexity through appeals, for example. While a disconnected group of tens of thousands of defense attorneys throw up appeals at the behest of their clients in a wide variety of cases—often creating precedents unfavorable to defendants—the Department of Justice gives the Solicitor General control over approving appeals, meaning that they bring to appellate courts primarily those cases likely to produce precedents favorable to the government. Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. 1469, 1482–85 (2020).

them.[16] Every federal prosecutor is a full-time user of federal rules and guidelines, but many of their opponents—particularly panel attorneys[17] and privately retained attorneys—are only part-timers in federal court. As the federal rules, statutes, and guidelines become more complex, the power of specialization held by the Assistant United States Attorneys becomes more pronounced.[18] And as that power grows, so does the threat of racial disparities that grow in the fertile soil of unexamined discretion.

Even as it favors the powerful, complexity also undermines the very reason for criminal law—the establishment of social norms. The more complex a system becomes, the harder it is to understand as more and more conflicting messages become embedded within the growing web.[19] In making this point, I am building on a centuries-old critique of complexity in law generally that extends through Thomas More's *Utopia*,[20] Karl Llewellyn's *The Bramble Bush*,[21] and Richard Epstein's *Simple Rules for a Complex World*.[22] My aim, though, is to turn the ethic of simplicity towards the sprawl of rules that has grown and metastasized in nearly every corner of American criminal law today. It's fitting to use as an example one such corner that has a direct impact on tens of thousands of cases every year: the Federal Sentencing Guidelines.

Consider one of the most oft-used guidelines in the book. Guideline 2B1.1 covers a variety of theft, fraud, and other financial offenses.[23] It

16. *See, e.g.*, SACRAMENTO OFF, U.S. ATT'Y'S OFF. E. DIST. OF CAL., CRIMINAL AUSA DEVELOPMENT PROGRAM (2017), https://www.justice.gov/legal-careers/page/file/973621/download [https://perma.cc/5C74-M2LJ] (describing the Eastern District of California's "6-week, 28-module training course" and continuing education program for federal prosecutors).

17. "Panel attorneys" are those private attorneys assigned to indigent federal defendants under the Criminal Justice Act. 18 U.S.C. § 3006A(b).

18. Such a disparity does not exist between federal prosecutors and federal defenders, but the defenders are unable to represent all federal defendants because some are not indigent, some are conflicted out, and in some places the defenders are simply unable to meet the demand and panel attorneys must be employed.

19. Even simple rules are not as good at producing norms as stories. For example, if an army of conscripts—forced to fight by rules—goes into battle against a force animated by a common story, the smart money is on the latter.

20. MORE, *supra* note 12, at 87–88. In envisioning his utopia, More imagines that, "in Utopia everyone's a legal expert, for the simple reason that there are, as I said, very few laws, and the crudest interpretation is always assumed to be the right one." *Id.* at 87.

21. *See generally* KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL (11th ed. 2008) (1930) (describing the complexities of understanding case law).

22. *See* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 21–36 (1995) (arguing that "[i]t is time to edge back toward the state of nature" and simplify legal rules). Notably, Epstein's admirable work includes chapters on torts and contract, but not criminal law. *See generally id.*

23. U.S. SENT'G GUIDELINES MANUAL § 2B1.1 (U.S. SENT'G COMM'N 2023).

includes a base offense level and enhancements based on the amount of loss,[24] all of which is reasonable to create proportionality between different offenders. Beyond that, though, 2B1.1 contains additional adjustments for the number of victims; for the use of mass-marketing; for the creation of financial hardship; for thefts from the person of another; for receiving stolen property; for crimes involving national cemeteries and veterans' memorials; for obtaining email addresses through improper means; for victimizing a federal health care program; for theft of a "pre-retail medical product"; for representing oneself as acting on behalf of a charitable, educational, religious, or political organization; for committing fraud in a bankruptcy proceeding; for making a misrepresentation in connection with student aid; for relocating to another jurisdiction to evade law enforcement; for operating a scheme outside of the United States; for using "sophisticated means"; for possessing "device-making equipment"; for possessing five or more fake IDs; for fraud in connection with disaster relief; for making false statements relating to social security; for misappropriating a trade secret; for committing a crime to benefit a foreign government; for dealing in stolen vehicle parts; for possessing a dangerous weapon; and for being an officer or director of a "futures commission merchant."[25] Whew![26]

And that's just one guideline in a thick book full of them, some of which slather additional enhancements on top of those included in 2B1.1.[27] While some of these enhancements arguably create proportionality between crimes and the harm they cause, many of the enhancements don't. And all of it rests on a Grand Myth: that someone, somewhere, is electing not to steal from a cemetery because they know it will invoke a two-level enhancement under Federal Sentencing Guideline 2B1.1(b)(5).[28] The complexity of this single guideline prevents it from becoming normative; few people know about it, and fewer understand how it works.

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24. *Id.*

25. *Id.*

26. Some might argue that the many specific facts accounted for are a form of "story," but that fails to take into account the chronological narrative strand that makes a story something more than disassociated facts.

27. Some enhancements outside of guideline 2B1.1 can even pile on top of those listed here. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 3A1.1 (for hate crime motivation or vulnerable victims); *id.* § 3A1.2 (for official victims); *id.* § 3B1.1 (for an aggravating role in the offense); *id.* § 3B1.3 (for abuse of position of trust or use of special skill); *id.* § 3C1.1 (for obstructing or impeding the administration of justice, if the defendant has the temerity to take the stand and deny the charges).

28. *Id.* § 2B1.1(b)(5).

B. Types of Rule Complexity and the Injustices They Cause

1. Penal Codes.—In Federalist No. 62, James Madison warned of the dangers of criminalizing too many acts, arguing that "[i]t will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood."[29] Madison's warning has gone unheeded, as American penal codes have bloated with new laws criminalizing actions (and inactions) that previously were lawful.[30] This trend has been condemned by the American Bar Association,[31] the National Association of Criminal Defense Lawyers,[32] the Manhattan Institute,[33] the American Civil Liberties Union,[34] the Heritage Foundation,[35] and so many academics that William Stuntz footnoted them simply as "too many to cite."[36]

Both state and federal systems have busily added new laws. One six-year average showed that South Carolina had created sixty new crimes per year, Oklahoma forty-six, and Michigan forty-five.[37] In 2013, Paul Larkin observed that, at that time, there were approximately 3,300 federal criminal statutes (up from a handful in the first penal code), but that the compound nature and non-centralized location of those statutes made it impossible to say exactly how many crimes were described by these laws—even the Justice Department was unable to give an accurate number.[38] While it might seem

29. THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961).

30. *See* Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 530 (2012) ("The continuous multiplication of laws creates problems. You end up adding more laws to the existing ones, without discarding any in the process. This dynamic is the problem of overcriminalization and overfederalization.").

31. Crim. Just. Section, Am. Bar Ass'n, *The Federalization of Criminal Law*, 11 FED. SENT'G REP. 194, 194–95 (1999).

32. Norman L. Reimer, *Inside NACDL: NACDL's Relentless Efforts to End Overcriminalization*, CHAMPION, June 2016, at 9.

33. JAMES R. COPLAND & RAFAEL A. MANGUAL, OVERCRIMINALIZING AMERICA: AN OVERVIEW AND MODEL LEGISLATION FOR THE STATES 4–5 (2018), https://media4.manhattan-institute.org/sites/default/files/R-JC-0818.pdf [https://perma.cc/8NDE-PL3J].

34. At Liberty Podcast, *The Overcriminalization of America*, ACLU, at 00:45 (June 23, 2022), https://www.aclu.org/podcast/the-overcriminalization-of-america [https://perma.cc/L6ZY-WD5W].

35. PAUL J. LARKIN, JR. & MICHAEL B. MUKASEY, THE PERILS OF OVERCRIMINALIZATION 1 (2015), https://thf_media.s3.amazonaws.com/2015/pdf/LM146.pdf [https://perma.cc/V2Y7-9NRB].

36. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 n.6 (2001).

37. COPLAND & MANGUAL, *supra* note 33, at 7.

38. Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 726 (2013).

logical to examine the criminal code of a jurisdiction to determine what has been criminalized, that would be a mistake; many crimes are set out in other sections of the code. For example, the federal criminal laws on narcotics are tucked into the code section covering food and drugs rather than the penal code.[39] Beyond even that challenge is the way in which violations of regulations have been criminalized. Rachel Barkow noted that upwards of 300,000 federal regulations subject violators to the possibility of criminal penalties and that "[m]any of these thousands of laws and regulations impose strict liability and therefore make no distinction between intentional violations and accidents that could not be prevented even with due care."[40]

The fattening of the statute books and the criminalization of regulations are troubling on their face and enlarge all the underlying issues we see with criminal laws. Whatever problem we generally find in legislation—vagueness, ambiguity, poor correlation between means and ends, or the skewing of principle through the lobbying of the powerful—is necessarily magnified as the corpus of law grows bigger. This magnified problem becomes more significant as new rules are tacked on without a sense of the existing body of law, and less attention is paid to each addition.[41]

These factors that come with quickly plumping a penal code create complexities of their own, which require throngs of lawyers and years in the courts to interpret. For example, one relatively new federal statute—the Armed Career Criminal Act of 1984 (ACCA)[42]—did a poor job of defining what a "violent felony" was within a residual clause, even as it created harsh penalties for firearm possession.[43] In *Johnson v. United States*,[44] the United States Supreme Court found the statute to be unconstitutionally vague.[45] That finding was followed by a welter of other, related cases that also made their way to the Supreme Court, including those asking whether the same analysis

39. 21 U.S.C. §§ 841–44, 846.

40. RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 30 (2019).

41. The specific harms created by this explosion in law will be addressed in Part III.

42. 18 U.S.C. § 924(e). The ACCA creates a mandatory minimum sentence of fifteen years for defendants who possess a firearm and have three qualifying priors of either a "crime of violence" or one involving narcotics trafficking. *Id.* § 924(e)(1).

43. *See id.* § 924(e)(2)(B) (defining "violent felony" broadly).

44. 576 U.S. 591 (2015).

45. *Id.* at 597. Damningly, Justice Scalia wrote that "this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy." *Id.* at 598.

applied to the advisory Sentencing Guidelines[46] and whether the ruling was retroactive on collateral review.[47] Other challenges to this vague law that made their way to the Supreme Court asked if crimes with a mens rea element of "recklessness" qualified as "violent,"[48] and if multiple criminal offenses that are part of the same criminal episode should be counted more than once as predicates under the ACCA.[49] Hundreds of cases were caught within this whirlpool of uncertainty—an inevitable feature of the too-complex legal system.

2. Sentencing Guidelines.—In 1980, Minnesota became the first American jurisdiction to implement a system of sentencing guidelines,[50] which are intended to guide (or force) sentencing judges into some measure of uniformity.[51] In the following years, guideline systems were implemented in "[eighteen] other states, the District of Columbia, and the federal courts."[52] Those systems vary, of course, in their complexity. Minnesota, at least at first, was one of the simpler systems, while the federal system has always been complex, making them a fit pair to examine.

a. The Minnesota Guidelines.—In 1978, the Minnesota legislature blazed a new trail, mandating that sentencing guidelines were to be promulgated by a new commission.[53] The new system, first implemented in 1980,[54] eliminated traditional parole and replaced it with a uniform supervised release term, which is now equal to one-third of the total

46. Beckles v. United States, 137 S. Ct. 886, 890–91 (2017) (rejecting a constitutional vagueness argument against the Sentencing Guidelines, which are "not subject to vagueness challenges").

47. Welch v. United States, 136 S. Ct. 1257, 1268 (2016) (holding that "*Johnson* is retroactive in cases on collateral review").

48. Borden v. United States, 141 S. Ct. 1817, 1821–22 (2021) (holding that a reckless offense cannot qualify as a "violent felony" under the ACCA).

49. Wooden v. United States, 142 S. Ct. 1063, 1067 (2022) (concluding that convictions arising from a single criminal episode can count only once under the ACCA).

50. Richard S. Frase, *Forty Years of American Sentencing Guidelines: What Have We Learned?*, 48 CRIME & JUST. 79, 80 (2019).

51. *See id.* at 115 (noting that sentencing guidelines seek to impose "excessive uniformity" and are "more or less 'advisory'" in practice).

52. *Id.* at 80. Guideline commissions were later abolished in five of those states. *Id.* at 80 n.3.

53. Act effective Apr. 6, 1978, ch. 723, § 9, 1978 MINN. LAWS 761, 765–67 (to be codified at MINN. STAT. § 244.09).

54. MINN. SENT'G GUIDELINES COMM'N, REPORT TO THE LEGISLATURE 1 (1980).

sentence.[55] Importantly, the sentencing commission saw its task not as codifying existing practices but as creating norm-changing and prescriptive rules—rather than looking at what judges had been doing, the commissioners created new baselines rooted in their own ideas of the relative severity of various crimes, rooted in a theory of "just deserts," or the proper amount of punishment proportionate to the amount of harm done by the defendant being sentenced.[56]

The structure of the new guidelines had a certain simplicity, rooted in a grid that features just eleven offense levels on the vertical axis and six criminal history categories on the horizontal axis.[57] Perhaps even more important in terms of simplicity is the fact that the Minnesota system employs "charge offense" rather than "real offense" sentencing—that is, the offense level is determined by the charge of conviction (which leads directly to a given offense level) instead of being the result of a calculation that includes factors not incorporated in the charge itself.[58] The Minnesota guidelines do not contain the kind of "relevant conduct" provision found in the federal sentencing guidelines that allows criminal acts not included in conviction to be included when deducing a guideline range.[59]

The simplicity of the Minnesota guidelines has struggled to survive the pressure to punish new aspects of a crime, enhance sentences for crimes in the news at a given moment, and fulfill the promises made by some politicians to be "tough on crime." In recent decades, the deference once given to sentencing experts has given way to the forces of electoral politics[60]—and those forces, with their piecemeal additions and momentary reactions to news stories,[61] inevitably complexify whatever they touch.

For example, in 1989, the Minnesota legislature enacted a number of "tough on crime" measures,[62] driven in part by the 1988 murders of Carrie

55. MINN. SENT'G GUIDELINES & COMMENT. § 1.B.7.b (MINN. SENT'G GUIDELINES COMM'N 2023). The 1980 guidelines imposed a supervised release term consisting of earned good time. Act effective Apr. 6, 1978 § 5 (to be codified at MINN. STAT. § 244.05).

56. Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J.L. & PUB. POL'Y 279, 285 (1993).

57. MINN. SENT'G GUIDELINES & COMMENT. § 4.A.

58. *Id.* § 2.A.1.

59. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.3 (U.S. SENT'G COMM'N 2023) (setting out factors that determine the guideline range).

60. BARKOW, *supra* note 40, at 105.

61. *See id.* at 106–07 (highlighting how Americans' reliance on news media and new media's obsession with crime stories interact to create the belief that crime rates are increasing).

62. Frase, *supra* note 56, at 292.

Coonrod and Mary Foley.[63] Coonrod was a college student who was on her way to a job interview, while Foley was attacked in the parking lot of her employer.[64] Both were sexually assaulted, and both of their attackers had recently been released from prison.[65] The resulting 1989 Crime Bill not only doubled the guidelines sentences for sex offenders but also created new mandatory minimums for some sex offenders and drug crimes.[66] It also added to the list of aggravating factors that could support an upward departure from the guidelines and gave judges other forms of latitude to both aggravate and mitigate a guideline term.[67]

The ensuing decades were not kind to the simplicity of the Minnesota guidelines. Even that one simple grid was a casualty, as the Minnesota system now features three separate grids: one for sex offenses,[68] one for narcotics,[69] and a third for nearly everything else.[70] Meanwhile, statutes and guideline provisions have steadily added to the factors an advocate or judge has to consider. If a crime is committed for the benefit of a gang, for example, some months are added,[71] and criminal history scores for batches of convictions sentenced at once are now subjected to a process referred to as "Hernandizing,"[72] which often baffles new criminal lawyers (among many other added twists).

These increasingly complicated guidelines don't work in isolation, of course—and they interlace with a criminal code that has also become denser and trickier. For example, Minnesota now has two categories of statutory mandatory sentences, known as "mandatories" and "mandatory mandatories." The "mandatory" laws require a certain sentence be imposed but allow the court to depart from the guidelines on its own accord "if the

63. John Stuart & Robert Sykora, *Minnesota's Failed Experience with Sentencing Guidelines and the Future of Evidence-Based Sentencing*, 37 WM. MITCHELL L. REV. 426, 432 (2011).

64. ATT'Y GEN.'S TASK FORCE ON THE PREVENTION OF SEXUAL VIOLENCE AGAINST WOMEN, FINAL REPORT 1 (1989), https://www.lrl.mn.gov/docs/pre2003/other/890323.pdf [https://perma.cc/6KPF-6Q5Y].

65. *Id.*

66. *See* Frase, *supra* note 56, at 292 & n.45 (noting judges could now "impose the statutory maximum prison term" for "dangerous sex offenders").

67. *Id.* at 292.

68. MINN. SENT'G GUIDELINES & COMMENT. § 4.B (MINN. SENT'G GUIDELINES COMM'N 2023).

69. *Id.* § 4.C.

70. *See id.* § 4.A (establishing sentencing guidelines for murder, aggravated robbery, financial exploitation of a vulnerable adult, residential burglary, felony DWI, fleeing a peace officer, etc.).

71. *Id.* § 2.F.206.3.

72. *See id.* § 2.B.1.e (requiring multiple offenses in one sentencing hearing to be sentenced chronologically and then included in the next offense's criminal history).

court finds substantial and compelling reasons to do so."[73] "Mandatory mandatories," on the other hand, must be respected by the court.[74] And thus, even in a state that strives for simplicity, we see the inexorable creep toward complexity.

b. The Federal Guidelines.—While the Minnesota guidelines seemed rooted in a just deserts approach focused on the crime of conviction,[75] the federal guidelines that were implemented seven years later in 1987 went in a very different direction: they rejected any one guiding principle (such as just deserts) in favor of creating guidelines that reflected what judges already did[76] and implemented a "real offense" system that allowed sentencing judges to consider not just the crime of conviction but also "Relevant Conduct,"[77] which could include actions that were not charged,[78] resulted in a hung jury,[79] or were even subject to an acquittal at trial.[80]

In part, the complexity implanted into the federal guidelines was a product of the shockingly large and often contradictory body of directives they were supposed to fulfill—at least thirty-one distinct statutory directives setting forth goals for sentencing.[81] Not surprisingly, many of these statutory directives conflict with one another. For example, one statute (18 U.S.C. § 3553(a)) asserts that sentences must be "sufficient, but not greater than necessary" to comply with the highly individualized traditional goals of sentencing (retribution, incapacitation, deterrence, and rehabilitation),[82]

73. MINN. STAT. § 609.11(8)(a) (2023). This subsection bears the somewhat misleading title of "Motion by prosecutor." *Id.*

74. *See id.* § 609.11(8)(b)–(c) (prohibiting the court from sentencing a defendant "without regard to the mandatory minimum sentences" established if certain prior convictions are present).

75. *See supra* subsection I(B)(2)(a) (explaining the purported purpose of Minnesota's sentencing guidelines and the resulting flaws of the system).

76. Stephen G. Breyer, *The Original U.S. Sentencing Guidelines and Suggestions for a Fairer Future*, 46 HOFSTRA L. REV. 799, 801–02 (2018).

77. U.S. SENT'G GUIDELINES MANUAL § 1B1.3 (U.S. SENT'G COMM'N 2023).

78. U.S. Sent'g Guidelines Manual § 1B1.3, comment, backg'd (U.S. Sent'g Comm'n 2023).

79. *See id.* ("Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines").

80. *See* United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam) (holding that a sentencing court could consider "conduct underlying the acquitted charge" if the "conduct has been proved by a preponderance of the evidence").

81. Mark Osler, *Policy, Uniformity, Discretion, and Congress's Sentencing Acid Trip*, 2009 BYU L. REV. 293, 294 n.4 (listing 31 directives).

82. 18 U.S.C. § 3553(a).

while others, such as the congressionally mandated career-offender provision, make that kind of individualized consideration impossible.[83]

The federal Sentencing Commission considered the Minnesota system but rejected it. Then-Judge Stephen Breyer, a member of the Commission, later explained: "Minnesotans may agree, for example, that building new prisons is undesirable or impractical; they may be willing to tailor prison sentences to create a total prison population of roughly constant size. There is no such consensus, however, throughout the nation as a whole."[84] Oddly, his explanation ignored the fact that Congress directly instructed the Commission, via statute, that "[t]he sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission."[85]

The guidelines have only become more complicated over time. The extensive provisions of federal guideline section 2B1.1 are just one example.[86] Another is the strange and confusing placement of the "safety valve" provision, which has allowed mitigated sentences and an exception to mandatory minimums for some narcotics defendants since 1994.[87] Given that it exclusively affects those charged with drug offenses, it would seem that the provision should be placed within the body of the guideline addressing those offenses, section 2D1.1, or incorporated into the functioning of that guideline.[88] Instead, it is lopped onto the guidelines in section 5C1.2—a defendant or inexperienced counsel might easily miss it if focused on the primary guideline, which only mentions the provision (and even then without using the phrase "safety valve") in a short passage on the fifth page of a fourteen-page guideline.[89] While this safety valve is set out in a statute,[90] it's

83. *See* Osler, *supra* note 81, at 315 (referencing the career-offender provisions and explaining how the harsh sentences cover "both drug kingpins" and those with "three relatively minor [narcotic] convictions).

84. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 3–4 (1988) (footnotes omitted).

85. 28 U.S.C. § 994(g).

86. *See supra* subpart I(A) (outlining numerous enhancements in section 2B1.1).

87. *See* Celesta A. Albonetti, *The Effects of the "Safety Valve" Amendment on Length of Imprisonment for Cocaine Trafficking/Manufacturing Offenders: Mitigating the Effects of Mandatory Minimum Penalties and Offender's Ethnicity*, 87 IOWA L. REV. 401, 402–03 (2002) (analyzing the effect of the safety valve provision and its five requirements for avoidance).

88. U.S. Sent'g Guidelines Manual § 2D1.1(b)(18) (U.S. Sent'g Comm'n 2023).

89. U.S. Sent'g Guidelines Manual § 5C1.2(a) (U.S. Sent'g Comm'n 2023).

90. 18 U.S.C. § 3553(f).

not in the statute (nor in the same title) that sets out the narcotics trafficking violations[91] and their penalties.[92]

Don't just take my word for it. Even Justice Breyer, thirty years after the guidelines he helped create were implemented, looked back at his creation and urged the Sentencing Commission to take on the task of "simplification" because "[s]implification is important and everyone knows that."[93]

3. Habeas: Process and Access Complexity.—Rule complexity can be embedded in statutes and guidelines, as discussed above. Often, though, the law can create the most damaging complexities by limiting access to justice through processes with restrictions that are not only onerous but confusing. The best—well, worst—example of this would be the route to federal habeas corpus under the Anti-Terrorism and Effective Death Penalty Act of 1996 (commonly known as the AEDPA)[94] and the judicial opinions that have mashed it into a tangled quagmire.[95]

Though it followed decades of study on the problem of "how to revise and reform federal habeas corpus" review,[96] the impetus for the AEDPA was the April 19, 1995 bombing of the Murrah Federal Building in Oklahoma City by Timothy McVeigh.[97] The hope was that the new law would bring more order to habeas proceedings without impinging on rights.[98]

That's not how it turned out. The reviews have been scathing. In the *Washington Post*, Radley Balko kicked off a series of opinion essays about the AEDPA in 2021 under the headline *It's Time to Repeal the Worst Criminal Justice Law of the Past 30 Years*.[99] Lee Kovarsky concluded that

91. 21 U.S.C. § 841(a).

92. *Id.* § 841(b).

93. Breyer, *supra* note 76, at 804.

94. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–08, 110 Stat. 1214, 1217–26 (codified as amended in scattered sections of 28 U.S.C.).

95. Larry Yackle surmised that the Supreme Court has used the AEDPA in a "proxy battle over capital punishment" that "translate[d] obdurate questions of substantive value into ostensibly more tractable procedural issues." Larry Yackle, *AEDPA* Mea Culpa, 24 FED. SENT'G REP. 329, 329 (2012).

96. Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORNELL L. REV. 1739, 1749 (2022).

97. *Id.* at 1750.

98. *See id.* (noting how the AEDPA Conference Committee sought reforms in part to "curb the abuse of the statutory writ of habeas corpus" (quoting H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.))).

99. Radley Balko, Opinion, *It's Time to Repeal the Worst Criminal Justice Law of the Past 30 Years*, WASH. POST (Mar. 3, 2021, 4:09 PM), https://www.washingtonpost.com/opinions

the AEDPA "has become the means by which courts express an illegitimate hostility towards exacting standards of criminal procedure."[100] David Dow and Eric Freedman performed a statistical study showing that success rates in habeas cases declined sharply,[101] even as the evolution of DNA analysis began to exonerate innocent prisoners.[102] Larry Yackle, originally an apologist for the legislation, later concluded that "[t]his statute has been a conceptual and practical nightmare . . . at best, squandering resources on endless and pointless procedural digressions."[103]

And yet, this is a process largely navigated by prisoners trying to figure out what to do without the advice of an attorney. In a system riven with needless rule complexity, it could be that the AEDPA has turned habeas into the worst process we have—one where those rules give humanizing story complexity no play at all.

II. Story Complexity

A. Story Complexity in American Criminal Law

Unlike rule complexity, story complexity often is exactly what bends a system toward justice and equity. In other words, beyond a certain tipping point, rule complexity robs a system of normative value and justice, while fuller narratives cut the other way. Stories have always been the tool of the relatively powerless, and for good reason: they often undermine the rationale for strict rules meant to lock in a certain power dynamic in a society. Rules enforce power; stories more often subvert power.[104]

An example of this dynamic comes from my own religious tradition. Jesus often opposed a strict interpretation of the rules of his society with parables—he countered rule complexity with story complexity. At one point,

/2021/03/03/its-time-repeal-worst-criminal-justice-law-past-30-years/ [https://perma.cc/6VK7-DLL4].

100. Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 507 (2007).

101. David R. Dow & Eric M. Freedman, *The Effects of AEDPA on Justice*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY 261, 261 (Charles S. Lanier et al. eds., 2009).

102. *See* Balko, *supra* note 99 ("At the same time [that the AEDPA became law], though, early DNA testing had begun to show the criminal justice system was far more fallible than commonly thought.").

103. Yackle, *supra* note 95, at 329.

104. This generality, of course, is occasionally countered by the use of story by those in power—for example, the foundational myths of the Romans, or the tales of royalty being bestowed by a deity.

for example, a lawyer confronted Jesus[105] to ask him which of the Mosaic commandments is the most important,[106] which could be like asking a parent which child he loved best. Jesus answered, though, citing the Two Great Commandments: love your God, and love your neighbor.[107] Later, an "expert in the law" followed up by asking, "who is my neighbor?"[108] Rather than reverting to rules, Jesus went to a story—the parable of the Good Samaritan, in which a Samaritan helps a Jewish crime victim after others pass by without stopping (at a time when Jews and Samaritans were bitter enemies).[109] His radical message—that even our enemy deserves our love—was a counter to a mass of rules that too often created division and was delivered effectively through a story rather than a new set of rules. Jesus used story complexity to pivot from rules to principles; and in turn, principles rest on an understanding of story as they are applied to our world.

In our own time, story complexity's power has become evident in those corners of the law where it has been given more leeway. For example, there has been a remarkable drop in the number of death sentences in the United States in the past twenty-five years, from a high of 295 in 1998 to just 21 in 2022.[110] One factor in this decline is likely the development of effective "mitigation" techniques in the sentencing phase of capital cases, in which defense attorneys humanize a defendant by telling their client's story beyond the facts of the crime, describing childhood trauma, handicaps and disabilities, and other factors that provide story complexity.[111] Data shows that this kind of mitigation works, even in cases where the facts of the crime are deeply unsettling.[112]

105. Lawyers are often used as a foil for Jesus in the Gospels, and Jesus rebukes them, saying, "Woe to you lawyers!" *Luke* 11:45–52 (New Revised Standard Version).

106. *Matthew* 22:34–36 (New Revised Standard Version).

107. *Id.* at 22:37–39.

108. *Luke* 10:25, 10:29 (New Revised Standard Version Updated Edition).

109. *Luke* 10:29–37 (New Revised Standard Version).

110. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Jan. 25, 2024), https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf [https://perma.cc/LE6S-44JS].

111. *See* Jesse Cheng, *Compassionate Capital Mitigation*, 18 OHIO ST. J. CRIM. L. 351, 352–53 (2020) (discussing the concept of "compassionate mitigation," in which evidence is presented concerning nearly any part the defendant's life, ranging from birth conditions to dreams). Cheng begins by noting that "[i]t is a truism in capital defense advocacy that compassion is *the* antidote to the fear and vengeful anger that otherwise compel jurors to return sentencing verdicts of death." *Id.* at 351.

112. *See* Russell Stetler, Maria McLaughlin & Dana Cook, *Mitigation Works: Empirical Evidence of Highly Aggravated Cases Where the Death Penalty Was Rejected at Sentencing*, 51 HOFSTRA L. REV. 89, 207–11 (2022) (analyzing statistics on death sentences and comparing to homicide statistics in context of mitigation).

Another example comes from the world of executive clemency, the Constitution's portal to mercy.[113] For his first term, President Barack Obama almost completely ignored the tool of pardoning, granting only twenty-two pardons and a single commutation of sentence through 2012.[114] In April 2014, though, Obama's administration announced the details of a clemency initiative that was meant to lead to significant grants and named a new Pardon Attorney, Deborah Leff.[115] Hope was high, as the ACLU's deputy legal director, Vanita Gupta, announced that the plan was "a momentous opportunity to correct these injustices in individual cases."[116]

But the project bogged down. Though Attorney General Eric Holder had said he hoped for 10,000 grants, by the end of March 2016—nearly two years after that hopeful announcement—Obama had granted only 187 commutations and seventy pardons.[117] Deborah Leff had quit as pardon attorney, frustrated by the lack of resources given to her office and a broken line of communication to the White House.[118] With ten months left in Obama's last term, the project seemed to be an abject failure.

However, in those last months, the productivity of the project jumped. It is probably not a coincidence that at the end of March 2016, Obama met personally with a group of clemency recipients and then took seven of them

113. U.S. CONST. art. II, § 2, cl. 1.

114. *Clemency Statistics*, OFF. OF THE PARDON ATT'Y, https://www.justice.gov/pardon/clemency-statistics [https://perma.cc/RZL6-9SSZ]. Some of the grants were notably easy or for trivial offenses; for example, a man named Ronald Lee Foster was pardoned of the crime of coin mutilation, for which he had received probation and a $20 fine in 1963. Josh Gerstein, *Obama Pardons His First Convicts*, POLITICO (Dec. 3, 2010, 5:34 PM), https://www.politico.com/story/2010/12/obama-pardons-his-first-convicts-045943 [https://perma.cc/6255-SXAQ].

115. Sari Horwitz, *Justice Department Outlines Criteria for Clemency to Nonviolent Prison Inmates*, WASH. POST (Apr. 23, 2014, 7:56 PM), https://www.washingtonpost.com/world/national-security/justice-department-outlines-criteria-for-clemency-to-nonviolent-prison-inmates/2014/04/23/1c5e9932-cad7-11e3-95f7-7ecdde72d2ea_story.html [https://perma.cc/B899-QYCZ].

116. *Clemency Project 2014 Praises Justice Department for Breathing New Life into Clemency Process*, ACLU (Apr. 23, 2014), https://www.aclu.org/press-releases/clemency-project-2014-praises-justice-department-breathing-new-life-clemency-process [https://perma.cc/X6QZ-XXKB].

117. Gregory Korte, *Former Administration Pardon Attorney Suggests Broken System in Resignation Letter*, USA TODAY (Mar. 28, 2016, 5:37 PM), https://www.usatoday.com/story/news/politics/2016/03/28/former-administration-pardon-attorney-suggests-broken-system-resignation-letter-obama/82168254/ [https://perma.cc/72CH-8APJ].

118. *Id.*; Sari Horowitz, *Attorney Overseeing Clemency Initiative Leaving in Frustration*, WASH. POST (Jan. 19, 2016, 7:07 PM), https://www.washingtonpost.com/world/national-security/attorney-overseeing-clemency-initiative-leaving-in-frustration/2016/01/19/903ee75a-bec6-11e5-bcda-62a36b394160_story.html [https://perma.cc/FR89-S35V].

out to lunch at Busboys and Poets.[119] In a later law review essay, Obama described the effect their stories had on him—and even included a few of those stories in his article.[120] Those stories took root. By the time he left office, he had granted over 1,900 petitions for clemency or pardon.[121] Story complexity, at least to a degree, won out.

Thus far, I have discussed only one interaction between rule and story complexity: the undoing of rule complexity's outcomes through story complexity, as we saw in the story of Jason Hernandez. But that is not the only intertwining of the two in American law. Story complexity can also play a role in creating rule complexity, though sometimes that story is false or misleading. For example, the story of Len Bias—a famous college basketball player who had been drafted by the Boston Celtics—dying of an overdose played a role in the creation of rules that then jacked up the sentences for crack cocaine.[122] While it was assumed at the time that he had overdosed on crack, it later became apparent this wasn't true;[123] but an untrue story can have its own kind of unfortunate power.

There is one final interplay that matters: rule complexity can mask bias in a way that story complexity cannot because stories (unlike rules) contain embedded facts that can be either verified or disproven. The untruth of the Len Bias story—which was wrapped around the racist assumption that a black man was probably smoking crack—quickly came undone while it took decades to undo the rule that resulted: the 100–1 ratio between powder and crack cocaine.[124] Here, a rule's veneer of "race neutrality" provided cover for exercises of discretion that produced unprincipled racial disparities,[125] a dynamic that plays out differently when true stories emerge.

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119. Jordan Fabian, *Obama Takes Former Prisoners Out to Lunch*, HILL (Mar. 30, 2016, 1:05 PM), https://thehill.com/blogs/ballot-box/presidential-races/274691-obama-takes-former-prisoners-out-to-lunch/ [https://perma.cc/S38W-WVFB].

120. Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 837–38 (2017).

121. *Clemency Statistics*, *supra* note 116. But while the number of grants was significant, the rush at the end and the Administration's failure to fix a broken evaluation system meant that it fell far short of its potential. *See* Barkow & Osler, *supra* note 13, at 425–35 (2017) (explaining how the Obama Administration's stated commitment to criminal justice reform did not align with actual progress).

122. Mark Osler, *1986: AIDS, Crack, & C. Everett Koop*, 66 RUTGERS L. REV. 851, 861–64 (2014).

123. Bias most likely died after taking powder cocaine, not crack. *Id.* at 863.

124. Mark Osler, *The First Step Act and the Brutal Timidity of Criminal Law Reform*, 54 NEW ENG. L. REV. 161, 164–68 (2020).

125. *See* Mark Osler, *Short of the Mountaintop: Race Neutrality, Criminal Law, and the Jericho Road Ahead*, 49 U. MEM. L. REV. 77, 86–90 (2018) (explaining how racial disparities exist at each component part of the criminal justice system); Mark Osler, *What We Got Wrong in the War on*

III. The Corrective: Balancing Rule and Story Complexity

Balance is at the center of many moral compasses; even the *Star Wars* universe was built on mythologist Joseph Campbell's idea of balance between good and evil as epitomized by the Jedi and Sith.[126] A moral system of criminal law requires a balance between rule and story. As set out above, we have too long favored rule over story—to the detriment of our society. We can, though, begin to restore that essential balance.

First, we must moderate the complexity of our rules. We should follow the advice of Justice Breyer and simplify the sentencing guidelines. The byzantine procedural rules for habeas must be cast out. Our criminal statutes should be reviewed for the kind of complexity that even lawyers struggle to understand, such as felony-murder in conspiracy cases. We have complexified for too long; it is time to reverse that process.

Second, we should re-introduce story to our decision-making processes. For example, mitigation at sentencing needs to expand broadly beyond capital cases, as many have urged,[127] and the fuller stories of defendants should be known as they are being held accountable.

Drugs, 17 U. ST. THOMAS L.J. 968, 970–73 (2022) (arguing against the myth of race neutrality in the War on Drugs).

126. *See The Mythology of 'Star Wars' with George Lucas*, MOYERS (June 18, 1999), https://billmoyers.com/content/mythology-of-star-wars-george-lucas/ [https://perma.cc/4WWA-2QZ7] ("What these films deal with is the fact that we all have good and evil inside of us and that we can choose which way we want the balance to go."). Within Christianity, that balance is found (among other places) in the Two Great Commandments, which direct love of God and love of neighbor. *Matthew* 22:34–40 (New Revised Standard Version). Judaism, too, engages with the balance between chesed (kindness) and gevurah (strict justice). Moshe Miller, *Chesed, Gevura, & Tiferet*, CHABAD, https://www.chabad.org/kabbalah/article_cdo/aid/380796/jewish/Chesed-Gevura-Tiferet.htm [https://perma.cc/W3UH-DD89]. The Chinese taiji and the Korean taegeuk (seen at the center of the South Korean flag), represent the balance between yin and yang, while the Buddhist "middle way" and Hindu idea of Santulan both seek to avoid imbalance. Jwing-Ming Yang, *The Meaning of Taiji*, YMAA, https://ymaa.com/articles/philosophy/meaning-of-taiji [https://perma.cc/249K-DKTB]; *The National Flag – Taegeukgi*, MINISTRY OF THE INTERIOR & SAFETY, https://www.mois.go.kr/eng/sub/a03/nationalSymbol/screen.do#:~:text=The%20taegeuk%2C%20which%20has%20long,interaction%20of%20yin%20and%20yang [https://perma.cc/C6GN-MAVG]; *What Is the Middle Way?*, TRICYCLE, https://tricycle.org/beginners/buddhism/middle-way/ [https://perma.cc/Z4RN-KRY4]; *Santulan: 1 definition*, WISDOM LIBR., https://www.wisdomlib.org/definition/santulan [https://perma.cc/3KBP-ESAM].

127. *See, e.g.*, John B. Meixner Jr., *Modern Sentencing Mitigation*, 116 NW. U. L. REV. 1395, 1463–67 (2022) (arguing that "[c]riminal justice would be better served by" requiring mitigation "in all felony cases"); Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty: Alternative Model for Ordinary Criminal Justice or Exception that Justifies the Rule?*, 22 NEW CRIM. L. REV. 359, 389 (2019) ("Distinctive protections in the capital sphere also have the potential to stabilize and legitimize the much broader noncapital sphere."); Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 212–14 (2016) (endorsing an "inclusive approach to mitigation").

Third, we need to revive and animate those processes like clemency that emphasize storytelling and move beyond rules. "Second look sentencing"[128] of all types offers this kind of emphasis, as do problem-solving courts, restorative justice practices, and earned expungements.

Finally, in our policymaking, we should include a larger voice for those with lived experience within the criminal justice system. Their view is shaped by story and can moderate the rule-intensive patterns we too often fall into as we craft laws, guidelines, and processes.

There must be room for mercy if our criminal justice systems are to be humane. Mercy is brought forth through story; and without a story being known, true mercy is impossible. The hope I set out through re-balancing is not just for those enmeshed in the system; it is for all of us who long to live in a more just world.

128. Second look sentencing encompasses clemency and processes such as compassionate release, parole, and prosecutor-initiated resentencing.