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Integrity at Sentencing and the Issue of Judicial Discretion from a Dworkinian Perspective

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Abstract

Ronald Dworkin wrote nothing or very little about the fundamental political issues of crime and punishment. This article proposes a Dworkinian reading of such issues. It focuses on two aspects of Dworkin's work: 1) his criticism of judicial discretion, and 2) his "law as integrity" theory (legislative and adjudicative principle). Integrity of Law in Western legal traditions is examined from a bifurcated approach: on the one hand, in civil law jurisdictions, with a strong culture of legal positivism, the legislative principle is prominent; on the other hand, in common law jurisdictions, statutory provisions are less relevant, and other sources of law prevail (e.g., case law). Building upon Dworkin's writings, we examine statute-oriented, sentencing models from civil law jurisdictions, and the sentencing guidelines systems from the U.S. and England and Wales. Despite their differences, we set out to find some convergence between both models, aiming at promoting greater integrity at sentencing.

Keywords

Ronald Dworkin, Integrity, Discretion, Sentencing, Sentencing Guidelines

1. Introduction

Ronald Dworkin wrote nothing or very little about crime and punishment, even though these are fundamental political issues in any society. To be sure, his encompassing legal theory includes a notorious distinction between rules and principles (Dworkin, 1977), a strong criticism of judicial discretion and the concept of law as integrity (Dworkin, 1986). Throughout his academic life, Dworkin was a prolific writer. He is considered—rightly so—one of the most influential post-positivist legal scholars of our time (Patterson, 2019; Valles Santillán, 2022; Wacks, 2014). However, on very few occasions Dworkin let us know what he

thought about crime and punishment.

Bearing that gap in mind and given the relevance of Dworkin's work for legal scholarship, one can extrapolate his ideas and theories to the field of penology. Previous studies have already sought to identify possible effects of Dworkin's theories on criminal trials: the use of the principles of self-determination and equality in the development of a victim-centered theory of punishment (Chiesa, 2007); the approximation between a theory of morality and punishment theories (Huigens, 2007); and the use of extra-curial punishment as mitigating circumstances at sentencing (Fellows & Chong, 2016).

The question to be answered in this article is the following: how would a Dworkinian reading of questions related to punishment and sentencing look like? Or, even more specifically, it could be asked: does Dworkin's work help us think about better ways to structure sentencing?

To put it clearly, we can highlight at least two aspects of Dworkin's writings with strong potential effect to crime and punishment. First, Dworkin's anti-utilitarianism would allow us to reject, from a theoretical point of view, consequentialist sentencing purposes, such as deterrence, incapacitation, and actuarialism. However, this first claim will not be thoroughly examined in this article; suffice to say, the most common criticism levelled against any a priori anti-utilitarian stance is that of a lack of coherence (Simons, 2010). We are particularly interested in 1) Dworkin's criticism of judicial discretion, which recommends structuring sentencing legal regimes in order to limit the subjectivity of sentencing judges, and 2) in particular, the theory of law as integrity, which comprises both a legislative and an adjudicative principle, as shall be seen.

Integrity of law in Western legal traditions will be examined from a bifurcated approach: thus, we will see that the legislative principle is prominent in countries with a Roman-Germanic tradition and a strong culture of legal positivism; on the other hand, in common law jurisdictions, statutory provisions tend to have less relevance, and the development of law is gradual and centered on case judgement. Such a distinction will be crucial to identify the meaning and scope of integrity requirements in civil law countries, where sentencing is largely regulated by statutes, and in Anglo-Saxon countries, where other legal sources are abundant, especially the so-called sentencing guidelines (Ashworth & Roberts, 2013; Frase, 2005; Padfield, 2013; Tonry, 2016; Wasik, 2008).

Building upon Dworkin's ideas, we will examine the pressing question of sentencing discretion, acknowledging, from the outset, the need to balance individualization and consistency (predictability). To be sure, a central element of Dworkin's work is his critique of judicial discretion, that is, the subjectivity of decisions ("decisionism"). Discretion would be controlled if there would be a "correct answer" to any *hard case*, which is the ingenious way Dworkin refers to a case to be dealt with where statutory provisions are not enough. The same problem—discretion—also occurs in the context of criminal adjudication. The mere existence of sentencing regimes has not been able to eradicate disparities at

sentencing outcomes, therefore jeopardizing the integrity of law in a Dworkinian sense.

Our objective, in this article, is twofold: first, to add new elements to the existing literature on Ronald Dworkin, specifically in the context of penology; second, to contribute somehow to the important academic debate around the discretion of sentencing judges, with profound repercussions in judicial practice. Briefly, our goal is to explore the possibilities of a Dworkinian stance on the fundamental questions of crime and punishment, which are of great interest to modern society.

2. Ronald Dworkin's *law as Integrity* as a Strong Theoretical Basis for More Strict Control of Judicial Discretion at Sentencing

2.1. Law as Integrity and the "One-Right-Answer" Thesis

Ronald Dworkin laid the foundations of his "law as integrity" thesis in "Law's Empire", first published in 1986. Engaging with political theory, Dworkin conceived the ideals of a political structure/community as virtues: virtues of equity, justice, and adjective due process of law. To these three ideals or virtues, one can add another ideal, sometimes identified under the principle "treat like cases alike". However, for Dworkin, such a catch phrase is not up to the true meaning of integrity, understood as a requirement of political morality, which "(...) requires government to speak with one voice, to act in a principled and coherent manner towards all its citizens, to extend to everyone the fundamental standards of justice or fairness it uses for some" (Dworkin, 1986: p. 165). This is the noble political meaning of integrity to Dworkin, which forms the basis of his legal theory, after all "(...) integrity rather than some superstition of elegance is the life of law as we know it" (Dworkin, 1986: p. 167).

The Dworkinian thesis of *law as integrity* can be said to comprise three different elements: function/purpose, content, and dynamics. With regard to the first element, integrity stands in direct relation to the moral authority of law itself, so that a State where integrity is accepted and practiced as a political ideal has a better argument in favor of the legitimacy of its coercive powers (Dworkin, 1986). If we consider criminal law as a State's most powerful instrument of coercion, therefore it is fair to claim that integrity is a necessary condition of criminal law's legitimacy.

In turn, regarding the content of integrity, Dworkin describes two principles deriving from the requirement of law as integrity: first, the principle of integrity in legislation, "which asks those who create law by legislation to keep that law coherent in principle" (Dworkin, 1986: p. 167). Taken as a legislative principle, integrity has a significantly strong negative aspect, constraining what legislators and other law-making actors can do when creating or altering public legal rules. Second is the principle of integrity in adjudication (adjudicative principle), "which asks those responsible for deciding what the law is to see and enforce it as cohe-

rent in that way" (Dworkin, 1986: p. 167). Every judicial deliberation must, therefore, interpret and apply the set of statutes in the most coherent or complete manner possible; in doing so, judges and courts will often need to discover implicit norms that help them to understand the moral coherence of the system of principles and rules.

The third above-mentioned element of integrity relates to its dynamics in the daily routines of legislators and judges. We are interested in understanding integrity as an interpretative key to judicial practices, allowing a political and moral assessment of the way judges decide difficult cases on a regular basis (Dworkin, 1986). The dynamics of the adjudication, in Dworkin's conception of integrity, involves understanding his critique of judicial discretion, the so-called "one-correct-answer thesis" and the analogy to literature known as *chain novel*.

Although the very meaning of the famous Hart-Dworkin debate, as well as its outcome, are controversial (Culver, 2001; Leiter, 2003; Shapiro, 2007; Streck, 2013), in essence the disagreement between H.L.A. Hart and Ronald Dworkin epitomizes the opposition between legal positivism and post-positivism traditions: what should a judge do when there is no applicable legal statute, therefore a hard case? Can he decide based on his discretion, sometimes creating legal norms? The issue of judicial discretion is at the heart of the debate between positivists and non-positivists. Because it is so crucial to sentencing, we need to pay more heed to Dworkin's criticism of creative judicial action and his one-right-answer thesis.

Dworkin always rejected the positivist logic according to which, in the absence of a valid rule, there would be no legal obligation, allowing judges to create the law in hard cases. For him, there would always be some normative standard—rule or principle—that judges could use to decide the case at hand. Judges are not allowed to decide at their own discretion, according to personal standards of justice. "Decisionism", essentially subjective, is denied from a Dworkinian perspective. Regardless of whether a case is easy or hard to decide upon, there will always be one single correct answer, which applies the rules and principles in force with integrity. Thus, Dworkin's legal theory is essentially anti-discretionary.

A possible question to be asked deals with the problem of how judges can decide hard cases without resorting to personal judgment criteria, therefore applying the existing law. "Chain novel" is a kind of didactic tool developed by Ronald Dworkin to explain how integrity in law would play out in judicial practice. Law as integrity, especially in common law jurisdictions, asks a deciding judge to regard himself as an author in the chain of common law. Judicial decisions do not happen in a vacuum, but in constant dialogue with the institutional history and tradition of the Judiciary. As Dworkin puts it: "He knows that other judges have decided cases that, although not exactly like his case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be" (Dworkin, 1986: p. 239).

Evidently, the whole idea that adjudication is somehow analogous to the task

of a writer who needs to continue a work in progress and write his novel as a single and coherent text, is nothing but a very ingenious metaphor. The writer's creative freedom is limited; it is expected that he gives the novel the best possible continuation. Dworkin's fertile comparison between literature and Law allows us to understand crucial aspects of his legal theory, the critique of judicial discretion (freedom) and, above all, his powerful notion of integrity.

One of his most prominent critics, Jeremy Waldron laments that Dworkin himself did not develop his integrity thesis in more depth after "The Rule of Law". To be sure, this could have been done in Dworkin's penultimate work, "Justice for Hedgehogs", released in 2011. In this book, Dworkin focused on developing another thesis, that of the unity between Law and morality. For Waldron, Dworkin's "cryptic argument" about integrity in "The Rule of Law" should have been clarified (Waldron, 2019: p. 2). Nevertheless, we believe the initial thesis of integrity remains robust at present, meriting continuous interpretation.

2.2. Judicial Discretion and Sentencing

Our goal in this section is to discuss some elements of Dworkin's work that could possibly reflect in the field of penology, more precisely at the sentencing stage of criminal proceedings.

Sentencing is essentially discretionary. Each case must be dealt with by a judge according to its characteristics, since no two cases are exactly alike. However, the exercise of judicial discretion can bring about a problematic effect on the administration of justice: disparity in criminal sentences. If similar cases result in different sentences, the idea of justice and the credibility of the criminal justice system are most certainly undermined.

Uncontroversially, this is a universal problem. Legal solutions and judicial practices aimed at limiting and controlling discretion at sentencing vary worldwide (Ashworth, 2009). To put it simply, in civil law Roman-Germanic jurisdictions, legislators establish general and abstract rules which provide guidance to judges in determining the most appropriate sentence for the case at hand. The amount of freedom that such legal regimes allow judges will depend on a series of factors, the most relevant of which concerns language. We will return to this problem later. On the other hand, common law jurisdictions followed a different path in defining guidance to sentencing judges. Since the 1980s, sentencing guidelines emerged, first in the United States and shortly after in England and Wales. Approved by commissions legitimately created for this purpose (sentencing commissions), the guidelines are typically based on actual sentencing patterns and vary significantly in their form and methodology. For instance, a sentencing guideline might resemble a numerical grid, as in the state of Minnesota and in the U.S. federal jurisdiction. It can also take the form of guidance by words, as in England and Wales. In any case, guidelines systems aim to reduce judicial discretion, most often providing presumptive sentences compatible with the seriousness of the criminal offense committed and the culpability of the offender (Ashworth & Roberts, 2012, 2013; Frase, 2005; Padfield, 2013; Tonry,

2016; Wasik, 2008).

Dworkin considered judicial discretion to be a serious problem. Indeed, subjectivism at sentencing undermines the idea of integrity in law. Excessive decisionism could lead to a lack of consistency at sentencing or even arbitrariness. Our claim is that sentencing could benefit from the Dworkinian idea of integrity, with numerous theoretical and practical implications.

Many scholars consider sentencing to involve a permanent tension between individualization and consistency (predictability). On the one hand, the fundamental idea of doing justice requires that judges have enough discretion to find the most "correct" sentence as possible, that is, one which reflects the unique character of each criminal offense and its perpetrator. This is the ideal of individualization: hardly two sentences will be the same, even when the relevant circumstances of the cases are similar. Indeed, if we are to pursue this ideal, and even unavoidable (Krasnostein & Freiberg, 2013). Individualization is necessary due to what has been called "polymorphism" in the criminal process (Rodrigues, 2014: p. 54). Consistency at sentencing, on the other hand, means that two similar cases must result in similar sentences; therefore, predictability prevails over the capability of judges to find a fit sentence. Consistency as an ideal has been described as a virtue (Tata & Hutton, 1998) or "a goal in its own right" (Pina-Sánchez & Linacre, 2016: p. 69).

Between the two ideals of individualization and consistency, sentencing could be challenging. Structuring judicial discretion is crucial if we are serious about preventing judges from passing inconsistent and arbitrary sentences. Marvin E. Frankel notoriously considered the unlimited discretion American judges had in the U.S. back in the 1970s as "lawlessness" (Frankel, 1972). Such a state of affairs have changed significantly ever since, both in the federal system and in many state jurisdictions. Sentencing guidelines became highly influential. They intend to limit or control judicial discretion by promoting integrity at the adjudication process. In civil law countries, it is up to the legislators primarily, and for the appeals courts secondarily, to provide guidance to sentencing judges, therefore reducing the potential for sentence disparities.

Integrity is often considered a synonym for consistency (coherence), that is, ruling like cases alike. However, according to Dworkin, integrity is not the same as coherence. Sentencing judges must interpret their jurisdictions' public norms—statutes or sentencing guidelines—in such a way as to express "a single, coherent scheme of justice and fairness in the right relation" (Dworkin, 1986: p. 219). Therefore, coherence is a logical consequence of the requirement of integrity. Integrity, though, is somewhat a broader idea; it is integrity, as Dworkin himself put, that imposes greater consistency in at sentencing, as a fundamental value to the adjudication of criminal cases.

3. Integrity at Legislation and Some Crucial Elements of Sentencing Regimes in Civil Law Jurisdictions

As seen, Dworkin's idea of integrity had two distinct requirements: a legislative

principle, concerned with the creation of public legal rules by legislators, and an adjudicative principle, related to the decision-making process of sentencing judges. Taken together, these two requirements of integrity aim to ensure that Law is created, interpreted, and applied consistently and in accordance with the values and principles shared by the community.

In the previous section, we made the connection between Dworkin's law as integrity thesis and sentencing. To be sure, his critique of judicial discretion, which in turn stems from the one-correct answer thesis, clearly influences the way any given legal system approaches the issue of how to allocate punishment. Dworkin's ideas, therefore, are perfectly compatible with a central concern in all sentencing regimes and judicial sentencing practices: how to limit judges' discretion without compromising their ability to find a fit sentence. In Dworkinian language: how to promote greater integrity at sentencing, so that sentences form a coherent set of judicial decisions that expresses ideals of the community itself.

Given the variety of mechanisms adopted worldwide to resolve this intriguing issue, our approach, from now on, will necessarily be bifurcated: first, we will examine how integrity in law operates in civil law legal systems, pointing out some of its main strengths and weaknesses; second, we will seek to identify the same strengths and major shortcomings across common law countries, with a focus on how sentencing guidelines impact judicial practices—Dworkin's integrity at adjudication.

3.1. Sentencing Purposes, Minimum and Maximum Sentences, and "Starting Points"

In civil law jurisdictions, statutory provisions available for judges provide guidance on many issues related to sentencing, such as sentencing purposes, types of sentences, minimum and maximum sentences, aggravating and mitigating circumstances, criteria of preponderance, among others. Judges can find in the relevant statutes a more or less clear sentencing methodology. At least from a theoretical point of view, sentencing regimes from civil law countries would allow less discretion (Teske & Albrecht, 1992), giving them a relative advantage compared to sentencing guidelines systems from common law jurisdictions. Such hypothesis would have to be empirically tested, but this falls outside the scope of this article.

It would be extremely difficult to examine legal methodologies found in sentencing statutory provisions in the civil law world. That would require a comparative effort incompatible with the limits of this article. However, we will highlight three essential aspects of the Penal Codes found in some civil law jurisdictions, therefore helping us to assess the levels of integrity at legislation in such countries.

First, a fundamental issue to be identified in the Penal Codes of civil law countries is whether there is, or not, a clear definition of sentencing purposes, such as pure retribution, crime prevention, rehabilitation, and incapacitation, for instance. In Portugal, for example, the Penal Code (Decree-Law n. 48/95), in Ar-

ticle 40, 1, establishes that sentencing should aim at the protection of legal interests ("*bens jurídicos*") and the rehabilitation of offenders. Article 70, 1, on the other hand, ask judges to determine sentences compatible to the offender's guilt and crime prevention concerns. Similarly, Brazilian criminal law considers retribution and crime prevention as sentencing purposes (Decree-Law n. 2.848/1940, Article 59). Legislative syncretism remains to be dealt with by sentencing judges, who will be responsible for choosing the most appropriate purpose in the case at hand. In some countries, legislators do not provide judges with minimal guidance on the purposes of punishment. This is the case in Italy (*Regio Decreto 19 ottobre* 1930, n. 1398) (Mannozzi, 2002) and Spain (*Lei Orgánica* 10/1995), two continental European countries with strong legal traditions. In Germany, the Penal Code (*Strafgesetzbuch* or StGB) indicates that sentences must be proportionate to the offender's guilt and the seriousness of the offense (Section 46 StGB), thus imposing a general requirement of retributive proportionality (Frase, 2001). There are also those who see a rehabilitative purpose of sentencing in the statutory provision according to which the effect of punishment on the future life of the offender in society must be taken into account by judges (Section 46, (1) StGB) (Streng, 2007). There seems to be a compromise between a traditional retributive position and a more favorable orientation towards the preventive purposes of sentencing (Weigend, 2001), although such conciliation is not clear.

Clear statutory sentencing purposes are key to the integrity of adjudication. Without such guidance, judges will decide at their sole discretion, often pursuing their own conceptions of justice. To be sure, there will not always be a single rationale (e.g., deterrence or rehabilitation); it is possible for legislators to choose one or two main sentencing purposes, as in Portugal and Brazil, or, more controversially, in Germany. In worst case scenarios, sometimes there is no indication in the statutes of any particular sentencing purpose; other times, legislators simply provide a list of all possible sentencing purposes, leaving huge discretion to judges (Ashworth, 2015). In such cases, it becomes virtually impossible to think of coherence and integrity in a Dworkinian sense.

Second, legislators usually define, in advance, minimum and maximum sentences. For example, according to the Spanish Penal Code, the length of custodial sentences can vary from 3 months to 20 years (article 36, 2). In the case of theft committed with violence or intimidation of the victim, the sentence might be custody from 2 to 5 years (article 242). This is the same technique adopted in the Penal Codes of Italy, Portugal, and Brazil: for each crime, there are minimum and maximum limits, and such a range is sometimes known as "penal frame". Within the statutorily determined range, a sentencing judge will find the sentence more proportionate to the seriousness of the offense. Obviously, judicial discretion is not uncontrolled, as other statutory provisions prescribe methodological steps for the "calibration" of the final sentence, that is, its correct individualization. In any case, judicial discretion at sentencing is exercised within the correspondent range (penal frame), and the amount of discretion will

depend on at least two criteria or factors: 1) the sentencing range's elasticity, so that the wider the range is, the greater the potential for discretion will be, as observed, among others, by Weigend (2001) and Nestler (2003) regarding the German Penal Code (more below), and 2) whether the sentencing methodology defined in the Penal Code provides numerical or mathematical criteria related to aggravating and mitigating factors.

On the other hand, German law adopts a significantly different technique, although, like the above mentioned Spanish Penal Code, custodial sentences vary from one month and 15 years (Section 38 (2) StGB). However, specifically for the offense of theft without aggravating circumstances, the minimum sentence is one year's imprisonment (Section 249, (1) StGB); if the offender carries a weapon, the minimum sentence is 3 years (Section 250, (1) StGB); if he/she actually makes use of a weapon during the commission of the criminal offense, the minimum sentence rises to 5 years (Section 250, (2) StGB). Specific maximum sentence limits for each crime are not usually provided for in the *Strafgesetzbuch*, only the general maximum of 15 years. In terms of discretion and integrity, it is not difficult to see how, at least potentially speaking, the lack of a maximum for each offense introduces an element of indeterminacy into sentencing. Indetermination at sentencing is a synonym for discretion. Sentencing schemes that provide too much room for decisionism usually fall short of Dworkin's idea of law as integrity.

In the absence of a statutorily defined maximum sentence for each crime, proportionality between the seriousness of the offense committed and the corresponding sentence is undermined. Relative or ordinal proportionality might be jeopardized as well. It would be possible, for example, that offenders who committed different offenses (e.g., robbery and theft) would get the same sentence. Although there is no such thing as absolute proportionality, some situations clearly reflect what has been termed "utter disproportionality" (Ashworth, 2015: p. 120).

Third, within the minimum and maximum sentences for each offense, legislators rarely indicate a starting point, that is, an amount of sanction that reflects some measure of the offender's culpability, and from which judges will "fine tune" the sentence (Ashworth & Roberts, 2013: p. 7) after considering all possible aggravating and mitigating factors. The Penal Code in Brazil adopts a similar methodology, describing a first step where judges will find an initial sentence (called "*pena-base*"). All subsequent steps will necessarily take into consideration that sentence. The strategy adopted by Brazilian legislators, however, is far from being satisfactory. Articles 59 and 68 of the Penal Code determine that the "*pena-base*" must somehow meet the following criteria: culpability, criminal record, social conduct, and personality of the offender; motives, circumstances, and consequences of the offense; and the victim's behavior. Therefore, although relevant factors related to the offender, the offense and the victim are described by law, we lack any numerical criteria. If, for example, a theft offense might be sentenced with one to four years in prison, what will be the "*pena-base*" or

starting point? This is an open question in Brazil, one which seriously damages the legislation's integrity.

3.2. "Fine Tuning" the Sentence: Aggravation and Mitigation

"Fine tuning" the sentence to better reflect the seriousness of the offense and the culpability of the offender also varies from one jurisdiction to another. Statutory provisions usually describe a certain number of aggravating and mitigating factors. The relationship between this and individualization should be now clear: the more aggravating and mitigating circumstances can be used by judges, the greater the possibility of a genuine individualization at sentencing. Conversely, if the law provides only a few aggravating or mitigating factors, the final sentence will be less individualized, which means less appropriate to the circumstances of each offense and the offender. To put it simply, if the sentencing judge cannot consider mitigating factors (no criminal record, mental illness, remorse, victim's behavior, e.g.), the sentence may not correctly reflect the seriousness of the offense and the level of culpability of the offender.

Generally speaking, civil law jurisdictions' statutes more often than not provide a list of sentencing factors, which will normally be used to "adjust sentences to the requirements of the case at hand" (Rodrigues, 2014: p. 139). Such factors, which can be aggravating or mitigating, have a modifying role in the final level of severity of the sentence, therefore helping judges to find the most appropriate sentence within the minimum and maximum defined by statutes.

Fine tuning the sentence has close relation to the issue of judicial discretion and, therefore, to integrity. In this regard, a serious shortcoming found in many civil law countries' legislations is the frequent absence of numerical criteria related to aggravating and mitigating circumstances.

Articles 21 and 22 of the Spanish Penal Code describe mitigating factors (influence of alcohol or substances; guilty plea; financial reparation to the crime victim, e.g.) and aggravating factors (recidivism; offense motivated by racism or other kinds of discrimination, for instance related to ideology, religion, ethnicity, race, gender, age, and sexual orientation). For the purposes of numerical guidance to judges, Spanish law uses expressions such as "upper half", "lower half" or "higher or lower sentence in degree". A final sentence is therefore calculated as follows: in the event of a single mitigating factor, the sentencing judge will find a fit sentence in the lower half of that established by law; if there are two or more mitigating circumstances, without any aggravating factors, the final sentence will be one or two degrees lower than that provided for by law; if there is only one aggravating factor, without any mitigating circumstances, the sentence will fall within the upper half of that established by law; finally, if two or more causes of aggravation are present at the same time, and there is no mitigating factor, the sentence will be one degree higher than that provided for by law, in its lower half (article 66).

The "lower or upper half" is calculated by dividing the range of minimum and

maximum sentences by two, adding the result of the minimum sentence to get to a new maximum, or subtracting such result from the maximum sentence to come to a new minimum. For example, if an offense carries a sentence of 2 - 8 years, the lower half will be 2 - 5 years and the upper half will be 5 - 8 years.

"Higher" or "lower" sentence in degrees consists of the following mathematical operation: the higher sentence in one degree will start from the maximum sentence established by law for an offense, increased by one half, in such a way that the resulting sum is the new upper limit. The minimum sentence higher by one degree will be the maximum sentence provided for in the Penal Code, plus one day (for custodial sentences only). For example, if an offense carries a sentence of 2 - 4 years, the highest sentence in one degree would be 4 years and one day up to 6 years. The same idea goes to a lower sentence in one degree, but the other way around.

Therefore, civil law legislations often provide some level of numerical guidance related to aggravating and mitigating factors. However—and this is the point we wish to emphasize—the Spanish legal regime, as in other jurisdictions, is insufficient to circumscribe judges' discretion within narrower maximums and minimums. In other words, not even the existence of numerical criteria to help fine-tuning the sentence, up or down, can ensure greater integrity to sentencing.

In the Penal Code of Brazil, the problem is even more pressing. Under Brazilian law, there are two basic types of aggravating and mitigating factors: *general* aggravating and mitigating circumstances, applicable to all offenses, and *special* aggravating and mitigating circumstances, offense-specific. As to the former, the Penal Code simply does not provide any numerical criteria that would help judges to adjust the sentence to any aggravating or mitigating factors. Room for discretion is amplified, seriously risking the equal treatment of similar cases and, consequently, the integrity of sentencing.

Portugal's experience with aggravating and mitigating factors is interesting. Indeed, according to the Portuguese Penal Code, a mitigating circumstance will modify the sentencing range as follows: 1) the maximum sentence will be reduced by one third; and 2) the minimum sentence will be reduced to one fifth if it is equal to or greater than 3 years, or to the general minimum sentence (one month) if it is less than 3 years (article 73).

To sum up, in civil law jurisdictions, it is up to the statutes to define a methodology and the sort of guidance to be given to sentencing judges. The obvious advantage of the legalistic tradition is that sentencing will never be entirely arbitrary; having a methodological structure determined by law, judges cannot simply ignore it. The legal sentencing regime is mandatory; there is, for sentencing judges, a duty to comply which allows no departure sentences, as in some common law jurisdictions. Mandatory sentencing methodologies are important to prevent judicial arbitrariness, therefore setting the conditions for greater integrity at sentencing, at least theoretically speaking.

However, statutory sentencing provisions in civil law countries like Brazil, Portugal and Spain are so flawed that we cannot conclude that sentences are co-

herently determined by judges, expressing an ideal principle of justice collectively shared. Civil law jurisdictions still struggle to achieve greater consistency at sentencing, far from Ronald Dworkin's idea of integrity. The absence of true integrity at legislation means that sentencing practices will not follow any rational justifications (retribution, crime prevention, rehabilitation), reflecting pure judicial pragmatism (Nestler, 2003).

To be sure, appellate courts try to overcome the relative lack of integrity in civil law statutes by developing some numerical sentencing criteria. Excessive reliance on such criteria, however, departs from the very tradition of legality, as it places the role of promoting integrity at sentencing in the hands of judges. That is not the best way to go. Legislative reform should aim at making sentencing legal methodologies clearer, more rational and, above all, non-discretionary.

4. Integrity at Adjudication: Towards Greater Rationality at Sentencing

4.1. From Indeterminate Sentencing to Sentencing Guidelines

In the common law world, sentencing has always been essentially discretionary. In the United States, during most of the twentieth century, a system of indeterminate sentencing allowed judges wide discretion. Federal and State-level legislation used to define maximum sentences; statutory minimum sentences, on the other hand, were not as abundant. It was up to sentencing judges to decide whether to use custodial sentences and the sentence length. However, parole boards also exercised discretion, granting early release from prison at times (Tonry, 1996). From a theoretical and philosophical point of view, until the 1970s punishment of offenders was justified on utilitarian grounds, basically the idea of rehabilitation. Since then, correctionalism has been questioned for its lack of effectiveness, resulting in the "decline of the ideal of rehabilitation" (Garland, 2001: p. 8).

Pragmatically speaking, the uncontrolled discretion typical of the indeterminate sentencing regime lasted until the mid-1950s. In most countries, appeal courts exercised control over sentence disparities through judicial self-regulation, setting out general sentencing principles. In England and Wales, since the 1960s the Court of Appeal began a guideline judgments movement, laying down criteria and principles as guidance for sentencing judges. Such a model was expected to promote more consistency at sentencing as it would be a system "constructed by judges for judges" (Ashworth, 2009: p. 244), supposedly more capable of attaining compliance by judges. However, one of the problems of judicial self-regulation is that appeal judgments, in spite of constituting binding precedents for other judges, sometimes fail to show coherence in their reasoning. In the United States, indeterminate sentencing prevailed from around 1930 to 1975, when a profound reform movement began, characterized by the adoption of sentencing guidelines.

Sentencing guidelines, therefore, can be considered a major development at

sentencing in common law jurisdictions over the last fifty years or so. To be sure, however, the common law world is not homogeneous: in some countries, such as Canada, acceptance of sentencing guidelines is low, which means judges find guidance basically in the Canadian Penal Code, following the example of civil law jurisdictions. Article 718 of Canadian law, for example, lists several sentencing purposes and principles, such as denunciation, dissuasion, incapacitation, rehabilitation, and financial reparation to the victim, as in a "shopping list" (Campbell, 2002: p. 141) judges can choose from. On a positive note, proportionality between the sentence and the seriousness of the offense and the degree of responsibility of the offender is statutorily defined as a fundamental sentencing principle (Article 718.1). The Canadian Penal Code sets rules concerning many aspects of sentencing (types of sentences, aggravating and mitigating factors, among others). On the other hand, for a long time sentencing in Australia was left to wide judicial discretion. In the 1990s, though, reforms in federal and state-level legislation established statutory provisions regarding the purposes of sentences, their types, and the relevant sentencing factors, as in Victoria's Sentencing Act (1991). Despite the importance of legislative reform, the sentencing ethos in Australia is still strongly discretionary (Freiberg, 2001). To date, there are no sentencing commissions or sentencing guidelines in Canada and Australia. Scotland's trajectory has been somehow a different one: historically, sentencing used to be widely discretionary; there were no sentencing guidelines, not even as binding precedents from the Court of Appeal (Tata, 2010). Things began to change in 2015, with the creation of the Scottish Sentencing Council and the publication of the first three sentencing guidelines, one of which related to sentencing purposes and principles, approved in 2018.

Although significant advances have been achieved with the guidelines, a more in-depth assessment of the U.S. and English sentencing schemes may reveal that there are still risks to integrity at sentencing. Dworkin's integrity at adjudication may provide some grounds for further reform of the sentencing guidelines, aiming at promoting greater control over judicial discretion, without compromising the ability of judges to find fair sentences.

There would be many more issues to discuss about the guidelines, such as, for example, the correlation between the use of the guidelines and imprisonment rates (Reitz, 2013; Tonry, 2016), the impact of criminal records on the final level of sentence severity (Frase, 2014; Roberts & Pina-Sánchez, 2014; Tonry, 1996), or the effectiveness of guidelines in the reduction of sentence disparities, including those related to the race, ethnicity and gender (Frase, 2005; Reitz, 2013; Tonry, 2016). However, in terms of integrity, that is, control of judicial discretion, three elements of sentencing guidelines models should be highlighted: its mandatory/advisory nature, the question involving the so-called "departure sentences", and the latitude of sentence ranges.

4.2. Mandatory/Advisory Guidelines and "Departure Sentences"

First, the success of any attempt to guide judges at sentencing by providing them

with insights into the purposes and principles of sentencing and their relevant factors depends; it seems, on whether the guidelines are mandatory or advisory. For instance, in the state of Minnesota, the guidelines set by a local sentencing commission in the early 1980s have always been mandatory. Something different took place in the U.S. federal system. According to the Sentencing Reform Act (1984), the guidelines established by the newly created U.S. Sentencing Commission were mandatory. U.S. federal magistrates did not have the option of refusing to find a sentence in the manner and within the limits established by the guidelines. The duty to comply, however, was reversed by the Supreme Court in the case United States v. Booker (543 U.S. 220), in 2005. The court decided that the statutory provisions according to which judges should take into consideration only sentencing factors clearly mentioned in the guidelines, coupled with the federal guidelines' strictness, violated the constitutional right to a Jury trial, provided for in the Sixth Amendment to the United States Constitution, and the idea of individualization at sentencing. After Booker, the U.S. federal system guidelines became merely advisory.

In England and Wales, at first pursuant to Section 125(1) of the Coroners and Justice Act (2009), now in accordance with the Sentencing Act (2020), there is a general duty of court to follow any sentencing guidelines which are relevant to the case at hand, unless it is the opinion of the court that it would be contrary to the interests of justice to do so (Section 59(1)).

Second, we must consider not only the statutory compliance requirement, but also the degree of constraint imposed by the guidelines upon courts, that is, how stringent or relaxed is the approach to sentencing outside their ranges. To be sure, "departure sentences" are always possible, but if they are too easy for judges to justify, then the biding nature of any guidelines become too easy to circumvent.

However, the binding nature of a guideline might be not enough to ensure that courts will follow the methodology provided by the sentencing commission. If this were true, the compliance rate of judges to a guidelines' presumptive sentences would always be 100%, which is not the case in any of the common law jurisdictions where sentencing guidelines are in place. It has already been suggested that courts and judges are likely to circumvent the guidelines if they consider that they are excessively stringent, excluding any possibility of finding a more appropriate sentence to an offender's case, regardless of whether the guideline is mandatory or advisory from a formal point of view (Scott, 2010; Tonry, 2016; Ulmer et al., 2011).

The Minnesota guidelines have always been flexible, allowing courts to depart from a presumptive sentence when there are "compelling and substantial" circumstances (Minnesota Statutes, Section 244.10, subdivision 2). Reasons in favor of a pronounced sentence other than the recommended in the guidelines must be strong enough to rebut the presumption in favor of the sentence found in the appropriate cell on the applicable guidelines grid. Factors related to race, gender, professional status, and education level, for instance, are not legitimate reasons

to depart from the guidelines. On the other hand, aggravating and mitigating factors, provided for in the Minnesota guidelines, are not part of its sentencing methodology, allowing courts to find fairer and more proportionate sentences. Although mandatory and supposedly stringent, the guidelines of Minnesota allow considerable room for judicial discretion (Ashworth, 2015).

In turn, in the U.S. federal system, courts may also depart from the presumptive sentences established by the guidelines, if the case presents atypical characteristics; in other words, when they find aggravating and mitigating circumstances not appropriately considered by the State sentencing commission (18 USC Section 3553(b)). As in Minnesota, sentencing judges must give specific reasons to pronounce a departure sentence, and the appellate courts might review the reasonableness of the reasons provided (18 USC Section 3742). The difference is that the U.S. sentencing guidelines prevent some factors—age, education, physical condition, alcohol and drug addiction, employment status, family ties and responsibilities, community relationships, among others—from having an impact on the final sentence, therefore leaving little room for judicial discretion.

In England and Wales, the methodology prescribed by the guidelines is also not hermetically sealed. For every offense, the applicable guideline establishes some categories (levels) of seriousness of the offense, and it is up to the courts to decide which category best fits two criteria: harm and offender's culpability. For each category there is a specific sentence range. To be true, there is no statutory duty for courts to find a sentence within the limits established by the guideline for each offense category. A sentence may fall under or above the defined sentencing ranges, under certain conditions (for example, due to personal mitigation), provided that the court respects statutory minimums and maximums, which are evidently much wider (S. 125(3) Coroners and Justice Act 2009). Following the English guidelines' logic, only a sentence falling outside the wide statutory limits will be regarded as a departure sentence, leaving a significant margin for discretion. This is one of the main reasons for criticism of Sentencing Council's guidelines (Ashworth, 2010).

4.3. Sentence Ranges and "Starting Points"

To assess the scope of discretion left by sentencing guidelines to judges, whether in the U.S., England and Wales or any other jurisdictions, one needs to consider how wide or narrow sentencing or guideline ranges are. Indeed, it will be within the minimum and maximum limits of such ranges that courts will have to find the most appropriate sentence. Therefore, we need to understand the structure and general functioning of the sentencing guidelines system.

In Minnesota, the sentencing guidelines consist of a numerical table or grid with two axes, which works as follows (**Table 1**): on the vertical axis (severity level), offenses are arranged into eleven levels of severity (1 to 11); on the horizontal axis (criminal history score), the offender's criminal record scores from 0

Table 1. Minnesota sentencing grid.

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)		CRIMINAL HISTORY SCORE						
		0	1	2	3	4	5	6 or more
Murder, 2nd *Degree* (*Intentional*; *Drive-by-Shootings*)	11	306 261 - 367	316 278 - 391	346 295 - 415	366 312 - 439	386 329 - 463	406 346 - 480	426 363 - 480
Murder, 2nd *Degree* (*Unintentional*) *Murder*, 3rd *Degree* (*Depraved Mind*)	10	150 128 - 180	165 141 - 198	180 153 - 216	195 166 - 234	210 179 - 252	225 192 - 270	240 204 - 288
Murder, 3rd *Degree* *Assault*, 1st *Degree* (*Great Bodily Harm*)	9	86 74 - 103	98 84 - 117	110 94 - 132	122 104 - 146	134 114 - 160	146 125 - 175	158 135 - 189
Agg. Robbery, 1st *Degree Burglary*, 1st *Degree* (*w*; *Weapon or Assault*)	8	48 41 - 57	58 50 - 69	68 58 - 81	78 67 - 93	88 75 - 105	98 84 - 117	108 92 - 129
Felony DWI *Financial Exploitation of a Vulnerable Adult*	7	36	42	48	54 46 - 64	60 51 - 72	66 57 - 79	72 62 - 84
Assault, 2nd *Degree* *Burglary*, 1st *Degree* (*Occupied Dwelling*)	6	21	27	33	39 34 - 46	45 39 - 54	51 44 - 61	57 49 - 68
Residential Burglary *Simple Robbery*	5	18	23	28	33 29 - 39	38 33 - 45	43 37 - 51	48 41 - 57
Nonresidential Burglary	4	12	15	18	21	24 21 - 28	27 23 - 32	30 26 - 36
Theft Crimes (*Over $5000*)	3	12	13	15	17	19 17 - 22	21 18 - 25	23 20 - 27
Theft Crimes (*$5000 or less*) *Check Forgery* (*$251 - $2500*)	2	12	12	13	15	17	19	21 18 - 25
Assault, 4th *Degree* *Fleeing a Peace Officer*	1	12	12	12	13	15	17	19 17 - 22

Source: Minnesota Sentencing Guidelines Commission (2022).

to 6 or more, where 0 represents someone with no prior convictions, while 6 represents an offender with a high number of criminal convictions. The presumptively fit sentence, normally expressed in months, would be found at the intersection of the two axes. After following this procedure, courts would ultimately identify the "correct" sentence for each combination of offense severity level and criminal history.

For instance, an offender with no criminal record who has committed theft (severity level 1) will receive a custodial sentence of 12 months (and one day); with one previous conviction, he will be sentenced to 13 months in prison, and so on; finally, with 6 or more priors, the sentence will reach 32 months in custody.

Table 1 represents the current format of the Minnesota grid (2022):

Thus, sentencing in Minnesota becomes a relatively simple task: courts only need to assess the level of seriousness of the offense and compute the offender's criminal history score; the "correct" presumptive sentence will be found in the appropriate cell on the grid located at the intersection of the criminal history score (horizontal axis) and the severity level (vertical axis).

In Table 1, the shaded area represents the offenses that carry non-custodial sentences. All sentences falling above the solid dark line (disposition line) mean prison sentences. The use of custody at sentencing, therefore, depends on the position, in the table, of the disposition line, at the discretion of the sentencing commission.

More importantly, Minnesota's sentencing ranges are flexible. Taking first-degree assault (severity level 9) as an example, sentence duration in months can vary from 74 - 103 (offender with no prior record); 84 - 117 (one prior conviction); 94 - 132 (two priors); 104 - 146 (three priors); 114 - 160 (four priors); 125 - 175 (five priors); and finally, 135 - 189 (six or more priors). Within each range, maximum sentence is always about 40% higher than the minimum, which is certainly a wide, flexible margin. Such elasticity, in practice, means flexibility and greater discretion for judges to determine an appropriate amount of prison time.

In the U.S. federal system, the sentencing guidelines first published in 1987 have an identical structure. Guidance for federal courts and judges consists in a numerical table with two axes: a vertical one, relative to the level of offense seriousness; and another one, horizontal, related to the offender's criminal history. There are 43 possible levels of offense severity, 6 categories of criminal history, and 258 sentencing ranges, displayed in months of imprisonment. Depending on those two factors (offense seriousness and criminal record), sentences can range from 0 - 1 month up to life imprisonment (Table 2).

Offense severity level (1 - 43) forms the vertical axis of the table. Criminal history category (I - VI) forms the horizontal axis. An appropriate guideline range can be found in the intersection of the two axes. For example: to an offender who has committed an offense level of 15 and with a criminal history category of III, the guideline range will be 24 to 30 months in prison.

The most recent version of the U.S. sentencing guidelines can be found in Table 2.

In the methodology of the Guidelines Manual (2021), the first step to be taken by courts at sentencing is the identification of the appropriate offense level. Offenses are grouped by their similarities. Thus, for example, the base offense level for property crimes (theft, embezzlement, fraud, forgery, counterfeiting, and simple property damage or destruction), is 7.

Next, the court must assess specific offense characteristics, which may result in an increased offense level. For example: in the case of a theft offense, if the loss exceeds $6500, the offense level will be increased by 2, making a total of 9; if it is more than $15,000, the offense level will be added 4; more than $40,000, 6 is added; and so on, until, if the loss of property is more than $550,000,000, the offense level will be increased by as much as 30.

The offense severity level can still be adjusted, upwards or downwards, to reflect 1) any special condition related to the crime victim (hate crime motivation or vulnerability, for instance), 2) the role occupied by a perpetrator at the time of

Table 2. U.S. sentencing grid.

		SENTENCING TABLE (in months of imprisonment)					
		Criminal History Category (Criminal History Points)					
	Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	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
Zone B	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
Zone C	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
Zone D	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	78 - 97
	22	41 - 51	46 - 57	51 - 63	63 - 78	78 - 97	87 - 108
	23	46 - 57	51 - 63	57 - 71	70 - 87	87 - 108	97 - 121
	24	51 - 63	57 - 71	63 - 78	78 - 97	97 - 121	108 - 135
	25	57 - 71	63 - 78	70 - 87	87 - 108	108 - 135	121 - 151
	26	63 - 78	70 - 87	78 - 97	97 - 121	121 - 151	136 - 168
	27	70 - 87	78 - 97	87 - 108	108 - 135	136 - 168	151 - 188
	28	78 - 97	87 - 108	97 - 121	121 - 151	151 - 188	168 - 210
	29	87 - 108	97 - 121	108 - 135	136 - 168	168 - 210	188 - 235
	30	97 - 121	108 - 135	121 - 151	151 - 188	188 - 235	210 - 262
	31	108 - 135	121 - 151	136 - 168	168 - 210	210 - 262	235 - 293
	32	121 - 151	136 - 168	151 - 188	188 - 235	235 - 293	262 - 327
	33	136 - 168	151 - 188	168 - 210	210 - 262	262 - 327	292 - 365
	34	151 - 188	168 - 210	188 - 235	235 - 293	292 - 365	324 - 405

Continued

35	168 - 210	188 - 235	210 - 262	262 - 327	324 - 405	360 - life
36	188 - 235	210 - 262	235 - 293	292 - 365	360 - life	360 - life
37	210 - 262	235 - 293	262 - 327	324 - 405	360 - life	360 - life
38	235 - 293	262 - 327	292 - 365	360 - life	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

Source: United States Sentencing Commission (2021).

the commission of the criminal offense (e.g., leadership or "participant"), 3) obstruction of justice or possible commission of an offense while on parole, probation or any form of early release from prison, 4) two or more offenses arising out of the same incident or fact (multiple counts), and 5) a guilty plea or any other behavior that shows an offender's willingness to take full responsibility for his/her actions.

Once these stages are overcome, courts will find the most appropriate final level of offense seriousness ("total offense level", in the guideline's language) to the case at hand. It will be possible for them to identify the corresponding cell on the vertical axis of the grid.

The next stage is to determine the criminal history category on the horizontal axis of the table. Each prior sentence will increase a defendant's score. For example, the guideline determines that, for each prior sentence of imprisonment exceeding one year and one month, 3 points must be added; for each prior sentence of imprisonment of at least sixty days but not exceeding one year, the increase will be of 2 points; 1 point will be added for each prior sentence not exceeding sixty days, up to a maximum of 4 points. The guideline also stipulates a two-point increase if the defendant committed the offense while under any criminal sentence, including probation, parole, supervised release, work release, and imprisonment.

For instance, a defendant who has two previous criminal convictions, respectively of 4 years (increase of 3 points) and 6 months (increase of 2 points), will score 5 points. His/her category on the horizontal axis, therefore, will be III. If a crime was committed while on any kind of early release from prison, the defendant receives 7 points, and the appropriate criminal history category will be IV.

Once the sentencing judge finds the appropriate cell located at the intersection of the axes, such cell will display the minimum and maximum prison sentence applicable, that is, the duration of the sentence (guideline range). Finally, the zones indicated in the table by letters A to E allow courts and sentencing judges to pronounce an alternative sentence rather than imprisonment. Sentencing op-

tions are community confinement, home detention, community service, order or notice to victims, occupation restrictions, among others. If the applicable guideline range is in Zone A (for example, if the lowest sentence recommended by the guideline is 0 months), any available legal alternatives is authorized, unless the guidelines require, for the offense committed, a term of imprisonment. On the other hand, if the guideline range is in Zone D (for example, the recommended minimum sentence is 15 months or more), a term of imprisonment is always required.

Unlike Minnesota, the sentencing ranges established in the U.S. sentencing guidelines are narrower. Pursuant to statutory laws, if a sentence specified by the guidelines includes a term of imprisonment, the maximum of the appropriate range shall not exceed the minimum of that range plus 25% or six months (28 USC Section 994(b)(2)). Discretion in determining the sentence duration can only be exercised within such narrow margin. To put it differently, 25% or six months is the highest level of discretion granted by the guidelines to U.S. federal judges within each specified sentence range. Federal sentencing is therefore more stringent than in Minnesota.

In England and Wales, the guidelines issued by the Sentencing Council are not numerical, as in a table or grid, such as in the United States. This model was specifically rejected (Ashworth, 2015; Reitz, 2013) and a more narrative style of guidance was preferred. In short, the English guidelines' methodology works as follows: the court should determine the offense category of seriousness, assessing culpability and harm. Each category provided by an applicable guideline reflects a different level of seriousness or harmfulness of the offense committed. Within the minimum and maximum sentences statutorily defined, the guidelines provide sentence ranges for each offense category. Having determined the most appropriate category, the court should use the corresponding starting point to find a sentence within each category range. Next, aggravating or mitigating factors should be considered upon, resulting in upward or downward adjustments from the sentence reached so far.

For instance, for the crime of aggravated burglary, with a statutory offense range from one to thirteen years of imprisonment (Section 10 of the Theft Act 1968), the applicable guideline establishes three categories of severity (1 - 3) and determines a sentence range and a starting point for each category, as shown in **Table 3**.

Sentence ranges and starting points are crucial to the English guidelines system. They serve at least two purposes. First, they exert more strict control over judicial discretion by preventing a final sentence from being pronounced at any point within the wide minimum and maximum limits established in the statutes (offense ranges), which is an advantage, for example, in comparison to civil law jurisdictions' sentencing schemes. Narrower sentencing ranges impose more restrictions upon courts and judges' discretion. Second, sentencing ranges and starting points allow for greater predictability of sentencing outcomes, promoting consistency in the sentencing regime (Hutton, 2013).

Table 3. English guideline for aggravated burglary (Theft Act, 1968, Section 10). Categories, sentence ranges, and starting points; Offense range: 1 - 13 years' prison sentence.

Category 1	Greater harm and higher culpability	
Category 2	Greater harm **and** lower culpability **or** lesser harm **and** higher culpability	
Category 3	Lesser harm **and** lower culpability	
Offence category	**Starting point** (*Applicable to all offenders*)	**Category range** (*Applicable to all offenders*)
Category 1	10 years' custody	9 - 13 years' custody
Category 2	6 years' custody	4 - 9 years' custody
Category 3	2 years' custody	1 - 4 years' custody

Source: Sentencing Council (2011).

The three aforementioned guidelines systems—Minnesota, United States federal system and the English model—have advantages and disadvantages in terms of how they seek to solve the problem of having a methodology and clear-cut criteria to guide courts and judges at sentencing. Our intention in this short study was not to perform any in-depth assessment of such sentencing models. From the outset, our aim was to understand how Dworkin's idea of integrity in law is present in sentencing regimes around the world. Clearly, there is room for future reforms in sentencing guidelines systems, which a view to increase judge compliance to any prescribed methodologies, therefore increasing control over judicial discretion, allowing for greater consistency and predictability at sentencing and, more importantly, providing greater rationality to sentencing.

Finally, one last and interesting feature of sentencing guidelines also reflects the idea of Ronald Dworkin's law as: its dynamic nature. To be true, the production of a new guideline by a sentencing commission is the result of an assessment of current sentencing practices, which explains the reason why the guideline will inevitably reflect the levels of sentence severity imposed by courts upon defendants. On the other hand, sentencing guidelines also tend to influence courts and judges, sometimes changing current trends. Clearly, sentencing guidelines always have an eye on the past, at the same time looking into the future. In other words, the guidelines are both influenced by, and have an influence on, actual sentencing practices.

Ronald Dworkin approaches a similar dynamic in his integrity's thesis. Law as integrity it is both the product of the interpretation of legal practices and its source of inspiration (Dworkin, 1986: p. 226). Adjudication is essentially interpretive; public legal norms are the result of the interpretation of current trends, but Law requires that judges continue to interpret it (Raz, 1986). The sentencing guidelines embody the relationship between integrity and interpretation as described by Dworkin. In this regard, the somehow recent experience of guidelines in most common law jurisdictions is entirely distinct from the civil law tradition of legality. Statutory laws as the main source of guidance for courts and judges at sentencing is a more static than dynamic element, distancing themselves from actual sentencing practices.

5. Conclusion

Ronald Dworkin's potential contribution to the field of penology can be very promising. Some elements of Dworkin's legal theory, such as law as integrity, the one-correct answer thesis, and the chain novel, for instance, have always influenced the study and practice of Law, including the adjudication process. Dworkin's criticism of judicial discretion, intrinsically linked to his interpretative conception of Law, has undeniable parallel in the study of sentencing.

Around the world, different sentencing models, both in civil law and common law jurisdictions, seek, each in its own way, to somehow regulate judicial discretion. It has never been and will never be a simple matter; courts and judges tend to consider themselves capable of finding the most appropriate and fair sentences for every case at hand. Individualization of sentences is important, to such an extent that in some countries like Brazil it holds constitutional status. A pressing question is how to balance the need to provide sentencing judges with practical conditions to pronounce individualized sentences with greater consistency. After all, individualization is not the only relevant value at sentencing. Predictability and coherence are other values umbilically linked to the idea of justice itself.

This study set out to examine the problem of how the legal traditions of civil law and common law structure sentencing by courts and judges. From the outset, our premise was that judicial discretion should be limited, which is compatible with Dworkin's demands for integrity in both legislation and adjudication. Thus, we tried to identify some strengths and weaknesses of both civil law sentencing regimes, statutory-based, and the guidelines system from some common law jurisdictions (U.S. and England and Wales). Since these are significantly distinct legal traditions, where sentencing models have always followed different trajectories, we decided to carry out a methodologically bifurcated analysis, clarifying the distinctive features of each system. It is time to outline some possible convergence points between such models and the sentencing practices observed in the investigated jurisdictions, aiming at promoting greater integrity at sentencing.

In civil law jurisdictions, the tradition of legality implies that any attempt to change sentencing practices must be addressed primarily to legislators. Integrity as a legislative principle aimed at sentencing is not consistent with the existence of vague or obscure statutory provisions concerning crucial elements such as sentencing purposes, "starting points" ("*pena-base*" under Brazilian law), or aggravating and mitigating factors, among others. To be true, the fact that civil law jurisdictions usually have a sentencing methodology statutorily described is certainly an advantage. However, it seems that the overly narrative style of sentencing statutes prevents greater predictability and consistency of criminal sentences. Therefore, such jurisdictions would benefit from providing numerical (quantitative) guidance to courts and sentencing judges. Starting points, numerical criteria for aggravation and mitigation adjustments, and relative weights

should be clearly provided by legislators.

In turn, in common law jurisdictions, there is no lack of numerical criteria for courts and sentencing judges. Particularly in jurisdictions such as Minnesota and the U.S. federal system, sentencing guidelines take the form of a table or grid. In Minnesota, the sentencing grid is quite simple, whereas the federal guideline tables are more complex. Nevertheless, finding the presumptively more appropriate sentence in a numerical grid can be significantly straight-forward. Still, excessive discretion results from some factors discussed throughout our study, such as the relationship between the mandatory/advisory nature of the guidelines and their flexibility, and the issue of how wide the sentence ranges for each category of offense seriousness are. Possible reform in the guidelines could reduce the problem of wide discretion, but arguably such jurisdictions would benefit from more guidance from legislators. For example, a statutory provision setting out one or two main sentencing purposes would be welcome, making it clear to courts and judges what are the goals to pursue at sentencing. A compliance requirement should be incorporated in statutory law in a stricter language, therefore reducing the scope for departure sentences.

Evidently, Ronald Dworkin never wrote about the issues related to sentencing. Perhaps if Dworkin had done so, he would have decidedly convinced us to accept the idea that such a crucial thing as sentencing could never be essentially discretionary. Discretion must be limited, controlled and only marginal. In Dworkinian language, one-correct answer, in criminal cases, should mean one-right sentence.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

References

Ashworth, A. (2009). Techniques for Reducing Sentence Disparity. In A. Von Hirsch, A. Ashworth, & J. Roberts (Eds.), *Principled Sentencing: Readings on Theory and Policy* (pp. 241-257). Hart Publishing.

Ashworth, A. (2010). Coroners and Justice Act 2009: Sentencing Guidelines and the Sentencing Council. *Criminal Law Review, 5,* 389-401.

Ashworth, A. (2015). *Sentencing and Criminal Justice* (6th ed.). Cambridge University Press. https://doi.org/10.1017/CBO9781107415270

Ashworth, A., & Roberts, J. (2012). Sentencing: Theory, Principle, and Practice. In M. Maguire, R. Morgan, & R. Reiner (Eds.), *The Oxford Handbook of Criminology* (5th ed., pp. 866-894). Oxford University Press.

Ashworth, A., & Roberts, J. (2013). The Origins and Nature of the Sentencing Guidelines in England and Wales. In A. Ashworth, & J. V. Roberts (Eds.), *Sentencing Guidelines: Exploring the English Model* (pp. 1-14). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199684571.001.0001

Campbell, M. E. (2002). Sentencing Reform in Canada: Who Cares about Corrections? In C. Tata, & N. Hutton (Eds.), *Sentencing and Society* (pp. 139-154). Ashgate.

Chiesa, L. E. (2007). Taking Victims Seriously: A Dworkinian Theory of Punishment. *Revista Juridica Universidad de Puerto Rico, 76,* 117-128.

Culver, K. (2001). Leaving the Hart-Dworkin Debate. *The University of Toronto Law Journal, 51,* 367-398. https://doi.org/10.2307/825911

Dworkin, R. (1977). *Taking Rights Seriously.* Duckworth.

Dworkin, R. (1986). *Law's Empire.* Harvard University Press.

Fellows, J., & Chong, M. D. (2016). Extra-Curial Punishment in Criminal Law Sentencing: A Principles-Based Approach. *Southern Cross University Law Review, 18,* 1-22.

Frankel, M. E. (1972). Lawlessness in Sentencing. *University of Cincinnati Law Review, 41,* 1-54.

Frase, R. (2001). *Sentencing in Germany and the United States: Comparing Äpfel with Apples.* Max Planck Institute for Foreign and International Criminal Law.

Frase, R. (2005). Sentencing Guidelines in Minnesota, 1978-2003. *Crime & Justice, 32,* 131-219. https://doi.org/10.1086/655354

Frase, R. (2014). Prior-Conviction Sentencing Enhancements: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals. In J. V. Roberts, & A. Von Hirsch (Eds.), *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (pp. 117-136). Hart Publishing.

Freiberg, A. (2001). Three Strikes and You're Out—It's Not Cricket: Colonization and Resistance in Australian Sentencing. In M. Tonry, & R. Frase (Eds.), *Sentencing and Sanctions in Western Countries* (pp. 29-61). Oxford University Press.

Garland, D. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society.* Oxford University Press. https://doi.org/10.7208/chicago/9780226190174.001.0001

Huigens, K. (2007). The Jurisprudence of Punishment. *William & Mary Law Review, 48,* 1793-1829.

Hutton, N. (2013). The Definitive Guideline on Assault Offences: The Performance of Justice. In A. Ashworth, & J. V. Roberts (Eds.), *Sentencing Guidelines: Exploring the English Model* (pp. 86-103). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199684571.003.0006

Krasnostein, S., & Freiberg, A. (2013). Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There? *Law and Contemporary Problems, 76,* 265-288.

Leiter, B. (2003). Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence. *American Journal of Jurisprudence, 48,* 17-51. https://doi.org/10.1093/ajj/48.1.17

Mannozzi, G. (2002). Are Guided Sentencing and Sentence Bargaining Incompatible? Perspectives of Reform in the Italian Legal System. In C. Tata, & N. Hutton (Eds.), *Sentencing and Society* (pp. 110-132). Ashgate.

Minnesota Sentencing Guidelines Commission (2022). *Minnesota Sentencing Guidelines and Commentary.* https://mn.gov/sentencing-guidelines/assets/1August2022MinnSentencingGuidelinesCommentary_tcm30-536102.pdf

Nestler, C. (2003). Sentencing in Germany. *Buffalo Criminal Law Review, 7,* 109-138. https://doi.org/10.1525/nclr.2003.7.1.109

Padfield, N. (2013). Exploring the Success of Sentencing Guidelines. In A. Ashworth, & J. V. Roberts (Eds.), *Sentencing Guidelines: Exploring the English Model* (pp. 31-51). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199684571.003.0003

Patterson, D. (2019). Dworkin's Criticisms of Hart's Positivism. In P. Mindus, & T. Spaak (Eds.), *The Cambridge Companion to Legal Positivism (Cambridge Companions to Law)* (pp. 675-694). Cambridge University Press. https://doi.org/10.2139/ssrn.3345159

Pina-Sánchez, J., & Linacre, R. (2016). Refining the Measurement of Consistency in Sentencing: A Methodological Review. *International Journal of Law, Crime and Justice, 44,* 68-87. https://doi.org/10.1016/j.ijlcj.2015.06.001

Raz, J. (1986). Dworkin: A New Link in the Chain. *California Law Review, 74,* 1103-1119. https://doi.org/10.2307/3480404

Reitz, K. (2013). Comparing Sentencing Guidelines: Do US Systems Have Anything Worthwhile to Offer England and Wales? In A. Ashworth, & J. V. Roberts (Eds.). *Sentencing Guidelines: Exploring the English Model* (pp. 182-201). Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199684571.003.0012

Roberts, J., & Pina-Sánchez, J. (2014). Previous Convictions at Sentencing: Exploring Empirical Trend in the Crown Court. *Criminal Law Review, 8,* 575-588.

Rodrigues, A. M. (2014). *A determinação da medida da pena privativa de liberdade: Os critérios da culpa e da prevenção.* Coimbra Editora.

Scott, R. W. (2010). Inter-Judge Sentencing Disparity after Booker: A First Look. *Stanford Law Review, 63,* 1-66. https://doi.org/10.2139/ssrn.1446744

Sentencing Council (2011). *Burglary Offences: Definitive Guideline*. https://www.sentencingcouncil.org.uk/wp-content/uploads/Burglary-definitive-guideline-Web.pdf

Shapiro, S. (2007). *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed* (pp. 1-54). Public Law and Legal Theory Working Paper Series No. 77.

Simons, K. W. (2010). Dworkin's Two Principles of Dignity: An Unsatisfactory Nonconsequentialist Account of Interpersonal Moral Duties. *Boston University Law Review, 90,* 101-121.

Streck, L. L. (2013). Porque a discricionariedade é um grande problema para Dworkin e não o é para Alexy. *Revista Direito e Práxis, 4,* 343-367. https://doi.org/10.12957/dep.2013.8350

Streng, F. (2007). Sentencing in Germany: Basic Questions and New Developments. *German Law Journal, 8,* 153-171. https://doi.org/10.1017/S2071832200005484

Tata, C. (2010). Sentencing and Penal Decision-Making: Is Scotland Losing Its Distinctive Character? In H. Croall, G. Mooney, & M. Munro (Eds.), *Criminal Justice in Scotland* (pp. 195-215). Willan Publishing.

Tata, C., & Hutton, N. (1998). What "Rules" in Sentencing? Consistency and Disparity in the Absence of "Rules". *International Journal of the Sociology of Law, 26,* 339-364. https://doi.org/10.1006/ijsl.1998.0070

Teske, R., & Albrecht, H. (1992). Prosecution and Sentencing Patterns in the Federal Republic of Germany. *International Criminal Justice Review, 2,* 76-104. https://doi.org/10.1177/105756779200200105

Tonry, M. (1996). *Sentencing Matters.* Oxford University Press.

Tonry, M. (2016). *Sentencing Fragments: Penal Reform in America, 1975-2025.* Oxford University Press.

Ulmer, J., Light, M., & Kramer, J. (2011). The "Liberation" of Federal Judges' Discretion in the Wake of the Booker/Fanfan Decision: Is There Increased Disparity and Divergence between Courts? *Justice Quarterly, 28,* 799-837. https://doi.org/10.1080/07418825.2011.553726

United States Sentencing Commission (2021). *Guidelines Manual.*

https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf

Valles Santillán, G. (2022). Ronald Dworkin's Legal Non-Positivism: Main Characteristics and Its Confrontation with Legal Positivism of the Twentieth Century (H.L.A. Hart). *Mexican Law Review, 14,* 107-117.

Wacks, R. (2014). *Philosophy of Law: A Very Short Introduction* (2nd ed.). Oxford University Press. https://doi.org/10.1093/actrade/9780198725947.001.0001

Waldron, J. (2019). *The Rise and Decline of Integrity* (pp. 1-17). NYU School of Law, Public Law & Legal Theory Research Paper Series, Working Paper n. 19-49. https://doi.org/10.2139/ssrn.3463479

Wasik, M. (2008). Sentencing Guidelines in England and Wales—State of the Art? *Criminal Law Review, 4,* 253-263.

Weigend, T. (2001). Sentencing and Punishment in Germany. In M. Tonry, & R. Frase (Eds.), *Sentencing and Sanctions in Western Countries* (pp. 188-221). Oxford University Press.