Legal Fiction: Reading Lolita as a Sentencing Memorandum

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LEGAL FICTION:
READING LOLITA AS A SENTENCING MEMORANDUM

Christina M. Frohock*

INTRODUCTION

“Lolita, light of my life, fire of my loins. My sin, my soul. Lo-lee-ta . . . .”1

The opening lines of Vladimir Nabokov’s classic novel *Lolita* are famous, or more accurately one should say infamous.2 They are, after all, the words of an admitted pedophile, rapist, and murderer.3 Those words begin chapter one, where the novel proper expresses the voice of the first-person narrator, Humbert Humbert.4 Nabokov begins the book a few pages earlier, with a foreword that speaks directly to the reader to introduce that narrator.5 The foreword lifts the fictional scenario to a meta level, providing critical and disturbing information about the imminent voice readers will hear narrating the story.6 We learn from a cousin of the narrator’s lawyer that “Humbert Humbert” is a pseudonym for a man who died of coronary thrombosis “in legal captivity . . . a few days before his trial was scheduled to start.”7 The upcoming “strange pages” are Humbert Humbert’s memoir penned in

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1 VLADIMIR NABOKOV, LOLITA 9 (Vintage 1997) (1955) [hereinafter LOLITA].
3 See id.
4 See LOLITA, supra note 1, at 3, 9.
5 See id. at 3.
6 See id. at 5.
7 Id. at 3.
prison, revealing the "cause and purpose" of his crimes. Humbert Humbert attempts to persuade the reader that his affection for the title character drove his actions, and indeed Lolita has been lauded as "the only convincing love story of our century." But Lolita is not a love story. It is not a romance, beautiful or tragic or otherwise. It is a confession of a pretrial detainee seeking leniency in public opinion and in the criminal justice system. It is, in the true sense of both words, a legal fiction.

The idea of a legal narrative often focuses on identifying a narrative within the law. Scholars have described the persuasive power of storytelling techniques in legal advocacy, for example, within the facts section of a trial court motion or an appellate brief. The story emerges from the law. This Article proposes inverting that focus so that we identify the law within a narrative. Using the example of Lolita, the Article explains how we can read Nabokov's novel as a prolonged sentencing memorandum. That memorandum casts the narrator as the defendant writing pro se. In Lolita, the law emerges from the story, showing that an entire legal document may be redrawn as a narrative. The legal filing and literary fiction are one, with a distinct point of view in favor of the criminal defendant. This unity between law and narrative illuminates a deep, essential goal shared by both genres: garnering sympathy. The notion of law

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8 Id. at 3–4.
9 Gregor von Rezzori, In Pursuit of Lolita, VANITY FAIR, Aug. 1986, at 78, 80, https://archive.vanityfair.com/article/1986/8/in-pursuit-of-lolita [https://perma.cc/VMS8-R7JA] (adding that “[e]very passionate love can find its image in Humbert Humbert’s boundless love for Lolita”); Johnston, supra note 2 (praising Lolita as “one of the most beautiful love stories you’ll ever read” and stating “[i]t may be one of the only love stories you’ll ever read”).
10 Both educators and attorneys would be wise to pay attention to this impressive scholarship. See, e.g., Heather M. Kolinsky, Storytelling, The Sound of Music, and Special Teams, FlA. BAR J. 38, 38 (2022) (“Lawyers can harness the power of storytelling by considering some of the elements of fiction writing—particularly character, conflict, and resolution—because those same elements are present in any legal dispute.”); Ruth Anne Robbins, Fiction 102: Create A Portal for Story Immersion, 18 LEGAL COMM. & RHETORIC 27, 29 (2021) (“A story is not information itself, but a construct, a way of structuring information that creates context and relevance and that engages the audience.”); Cathren Koehlert-Page, Come a Little Closer So I Can See You My Pretty: The Use and Limits of Fiction Techniques for Establishing an Empathetic Point of View in Appellate Briefs, 80 UMKC L. REV. 399, 436 (2011) (“Lawyers can establish this empathy by studying distance, viewpoint character chronology, and vivid play-by-play techniques such as metaphors, action verbs, active voice, and seamless dialogue and monologue tags.”); Gerald Lebovits, Fact vs. Fiction: Writing the Facts—Part I, N.Y. ST. B.J., Sept. 2008, at 64, 64 (“In a persuasive brief, the fact section tells the story that makes the fairness of your client’s position evident.”) (internal quotation omitted); Brian J. Foley & Ruth Anne Robbins, Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections, 32 RUTGERS L.J. 459, 465, 480 (2001) (stating that “[t]he most powerful tool for persuasion may be the story” and proposing that “the current system of legal education needs to be reformed to include teaching lawyers how to tell stories in facts sections”).
without sympathy thus rings hollow. Finally, this essential link between law and sympathy shines a new light on the law’s role in promoting justice. Justice must be measured at least partly as an expression of sympathy rather than solely as a cold calculation of costs and benefits.

A. For the Defendant, the Prison Memoir

Nabokov first published *Lolita* in Paris in 1955. Major publishers in the United States, including Viking Press, Simon and Schuster, and Doubleday, had all rejected the manuscript. So the “unorthodox” Olympia Press in France took it up. The French government banned the novel one year after publication, a ban later ruled illegal by the French High Court. The French government then took a different censorship tack, banning the book from bookstore displays and from sales to anyone under eighteen years old. Britain and Argentina also imposed bans. Nabokov himself recognized the risk in publishing, at one point considering anonymity for the book jacket or an assumed name such as the anagrammatic “Vivian Darkbloom.” In 1958, Nabokov finally saw his novel published in the United States, to reviews ranging from “enthusiastic” to “puzzled” to “outraged.” The topic was scandalous, to say the least: a man’s sexual obsession with his twelve-year-old stepdaughter. Yet, the writing is masterful, and Nabokov depicts the entire sordid affair without one word of profanity.
The story is an invention on two levels, from outside by author Nabokov and from inside by narrator Humbert Humbert. A brief summary from the insider’s perspective is in order. Writing his memoir while awaiting trial, Humbert Humbert first recounts a postcard-perfect childhood on the French Riviera. One summer at age thirteen, he fell “madly, clumsily, shamelessly, agonizingly in love” with “a certain initial girl-child” named Annabel. With their passion expressed only in “incomplete contacts,” Annabel soon died of typhus. Nearly twenty-five years later, a frustrated Humbert Humbert reincarnated Annabel in Lolita. He designated both girls as instances of a maiden visible only to much older men, an otherworldly type between nine and fourteen years old whose “true nature...is not human, but nymphic (that is, demoniac).” He named these demons “nymphets.”

As an adult, Humbert Humbert had entered a brief, unhappy marriage to a woman based on “the imitation she gave of a little girl.” A stint in a psychiatric ward is mentioned in passing, with self-compliments for “trifling with psychiatrists,” before the memoir introduces its title character and the story takes flight. Discharged from the sanatorium, Humbert Humbert moves to a small town in New England with aspirations to write a book. There he becomes a tenant in the home of a widow, Charlotte Haze, a lodging decision made immediately upon spotting Charlotte’s twelve-year-old daughter, Dolores, sunbathing in the backyard garden.

Perhaps reflecting her uncertain identity, which remains as hazy as her surname, Dolores answers to various nicknames: “Lo” to her mother, “Lola” and “Dolly” when wearing trousers and attending school, and “Lolita” to Humbert Humbert alone. His obsession is so complete that he creates “this Lolita, my Lolita” in an instant, contemplating how “my judges” will regard his performance in this

21 See LOLITA, supra note 1, at 9–11.
22 Id. at 9, 11–13.
23 See id. at 12–13.
24 See id. at 15, 39 (tracking the passing of twenty-four or twenty-five years).
25 Id. at 16; see id. at 17–18.
26 Id. at 16–17 (describing “the little deadly demon” with “fantastic power”), 139 (“the body of some immortal daemon disguised as a female child”).
27 Id. at 25–26.
28 Id. at 34; see id. at 58–59 (describing the narrator, in his early interactions with Lolita, as having “the cunning of the insane” and “a maniac’s inner eye”).
29 See id. at 35.
30 See id. at 35, 39–40, 70.
31 Id. at 9, 40, 65.
“curious tale.” Humbert Humbert settles into life in the Haze home, longing for the child and detesting the mother, until he is shocked to hear that Lolita will leave early for summer camp. In the child’s absence, he decides to marry the mother. After all, proximity offers opportunity. One day he “might blackmail—no, that is too strong a word—mauve-mail big Haze into letting me consort with little Haze.” Humbert Humbert even contemplates drowning Charlotte one afternoon while they swim together in a lake, but “I just couldn’t!” An admitted “sex offender,” our narrator is no “sex fiend.” No, he is a poet at heart, and “[p]oets never kill.”

Fate does the deed for him; Charlotte Haze dies by accident. After discovering her husband’s diary, an enraged Charlotte runs from their house and is fatally hit by a car. Her newly minted widower “neither wept nor raved,” but “impersonate[d] the calm of ultimate despair.” As expected of a gentleman, Humbert Humbert focused on urgent family matters, specifically the task to fetch his stepdaughter from camp and “give her a good time in totally different surroundings.” Off they drive, checking in at a swanky hotel where Humbert Humbert drugs Lolita with a sedative and leaves her to fall unconscious on the bed. The pills prove too weak, however, and our narrator is forced to wait for another time and a stronger drug to achieve “nympholepsy.” Humbert Humbert succeeds, sexually assaulting Lolita the next morning. In the storyteller’s words, they became “technically lovers,” the stepfather and twelve-year-old girl, and he stresses that she made the first move.

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32 Id. at 39–40, 75; see id. at 62 (“What I madly possessed was not she, but my own creation, fanciful Lolita . . . .”).
33 See id. at 63.
34 See id. at 67–72.
35 Id. at 71.
36 Id. at 87.
37 Id. at 87–88; see id. at 131.
38 Id. at 88; see id. at 131 (“The gentle and dreamy regions through which I crept were the patrimonies of poets—not crime’s prowling ground.”).
39 See id. at 103.
40 See id. at 95–97.
41 Id. at 98, 101.
42 Id. at 101.
43 See id. at 117–18, 122–23.
44 Id. at 129.
45 Id. at 132; see id. at 140 (“Whether or not the realization of a lifelong dream had surpassed all expectation, it had, in a sense, overshot its mark—and plunged into a nightmare. I had been careless, stupid, and ignoble. And let me be quite frank: somewhere at the bottom of that dark
Lolita calls it rape. But the adult is in charge, of both the story and the journey. So onward they drive, traveling for a year as an illicit pair across "the crazy quilt" of the United States. The rapes continue, with zigzagging "sidetrips and tourists traps" designed "to keep my companion in passable humor from kiss to kiss." Reader, he tried with "everything in my power to give my Lolita a really good time." Soon monetary bribes precede the sexual assaults, which Humbert Humbert frames as generosity: "attending to all the wants of my little auburn brunette's body!"

They finally settle in a New England college town called Beardsley, and Humbert Humbert enrolls Lolita in a private school for girls. In exchange for a sexual favor, he permits her to perform in the school play. She never does so. After "a strident and hateful scene" of an argument one week before the performance, they leave Beardsley for another road trip. Humbert Humbert grows jealous and convinced that a man in a red convertible is following them, an elusive man who appears often in their travels. During a stop in a cabin, Lolita spikes a fever. She checks into the local hospital, where Humbert Humbert visits with increasing panic that Lolita will "babble" to the staff. He soon learns that Lolita's "uncle" checked her out of the hospital and paid her bill in cash. Although Humbert Humbert's so-called "very special memoir" is "about Lolita," he spends the next "three empty years" without her. One day, he receives a letter signed "Dolly (Mrs. Richard F. Schiller)," explaining that she is married and pregnant and in desperate need of money. Bringing a gun to confront Mr. Richard F. Schiller, Humbert Humbert finds a seventeen-year-old Lolita in her

\begin{footnotes}
\item[46] Id. at 140–41, 202; see id. at 150, 202.
\item[47] Id. at 152–53; see id. at 145–48, 151–58 (describing their travels).
\item[48] Id. at 154, 161, 163.
\item[49] Id. at 163.
\item[50] Id. at 148, 165, 183–85.
\item[51] See id. at 154, 173, 176.
\item[52] See id. at 198.
\item[53] Id. at 205, 208–09.
\item[54] See id. at 127, 217–18, 227–29, 237–38, 248–49.
\item[55] Id. at 239–40.
\item[56] Id. at 240–42.
\item[57] Id. at 246.
\item[58] Id. at 99, 253.
\item[59] See id. at 266.
\end{footnotes}
"clapboard shack" of a home.\textsuperscript{60} There she reveals that the mystery man who checked her out of the hospital was Clare Quilty, the playwright of the play Lolita was rehearsing to perform in school and "practically an old friend" of her late mother.\textsuperscript{61} When Lolita refuses to flee with Humbert Humbert, he hands her a wedding tousseau of four thousand dollars.\textsuperscript{62} He then leaves, finds Quilty "in a fog" at home in his mansion, and fatally shoots him.\textsuperscript{63}

In a final scene, Humbert Humbert drives away from the mansion and, after disregarding traffic laws as he "disregarded all laws of humanity," steers his car off the road and brakes, waiting to be arrested.\textsuperscript{64} He hears in the distance "the melody of children at play."\textsuperscript{65} In that moment, the tragedy of his crimes hits home: "then I knew that the hopelessly poignant thing was not Lolita's absence from my side, but the absence of her voice from that concord."\textsuperscript{66}

Humbert Humbert is arrested and faces trial on multiple charges of murder and rape.\textsuperscript{67} He spends fifty-six days writing in "this tombal jail" of pretrial detention, settling on the pseudonym "Humbert Humbert" over other repetitive options because it "expresses the nastiness best."\textsuperscript{68} Completing his manuscript but never reaching a courtroom, he dies in custody a few days before trial.\textsuperscript{69} One month later, Lolita dies in childbirth.\textsuperscript{70} By prisoner's request, the manuscript is published "only when Lolita is no longer alive."\textsuperscript{71}

The main thread of Lolita is so well known—an adult man lusting after a young girl—that the title character has entered the dictionary and popular culture.\textsuperscript{72} But it is a mistake to treat the story as simply

\textsuperscript{60} Id. at 267–69, 277.
\textsuperscript{61} Id. at 208–09, 221, 271–77.
\textsuperscript{62} Id. at 278.
\textsuperscript{63} Id. at 293–305.
\textsuperscript{64} Id. at 306–07.
\textsuperscript{65} Id. at 308.
\textsuperscript{66} Id.
\textsuperscript{67} See id.
\textsuperscript{68} Id. at 3, 109, 308.
\textsuperscript{69} See id. at 3.
\textsuperscript{70} See id. at 4.
\textsuperscript{71} Id. at 309.
a pop culture meme. The narrator warns us straight away not to take his words lightly. In the opening paragraphs of his memoir, Humbert Humbert makes his intention clear: to plead his case to the “[l]adies and gentlemen of the jury.” 73 Dramatic themes are deemed exhibits, and readers serve as judges and jurors. 74 The subtitle is a “Confession.” 75 A “sentencing judge” awaits. 76 Writing from behind bars, the defendant facing trial will present “this tangle of thorns” and “miserable story” for the court’s consideration, tracing his crimes back to his obsession with Lolita. 77 And he will marshal the persuasive power of language to win favor: “You can always count on a murderer for a fancy prose style.” 78

The novel’s foreword underscores this frank admission. Lolita is Humbert Humbert’s prison manifesto, a document so significant as to earn mention in the narrator’s will. 79 Upon Humbert Humbert’s death, the will empowered his lawyer to oversee publication. 80 The lawyer assigns the task to his cousin, a modestly successful writer himself. 81 Striking a note of awareness, the cousin describes Humbert Humbert as “horrible,” “abject,” and “abnormal,” a “maniac” who committed “sins of diabolical cunning.” 82 (Nabokov rendered no such judgment upon the novel as a whole, stating that “Lolita has no moral in tow.”) 83 Nonetheless, the memoir goes to print, offering value as a psychiatric “case history,” a literary “work of art,” and “a general lesson.” 84

The defendant wrote his history, confessing and detailing crimes against Lolita and Quilty, always from the offender’s point of view. Neither Lolita nor Quilty lived to tell their side of the story, so their rapist and murderer, respectively, controls the narrative. The characters’ names are fictions upon fictions, with pseudonyms shielding the “real” people in the “true’ story” behind Humbert

73 LOlITA, supra note 1, at 9; see id. at 61, 69, 87, 103, 125, 135 (addressing the jury).
74 See id. at 9 (“exhibit number one”), 40 (“Exhibit number two”), 123 (“Jurors!”), 163 (“my judges”), 185 (“your Honor”).
75 Id. at 3.
76 Id. at 308.
77 Id. at 9, 193; see id. at 109 (“Lolita, Lolita, Lolita, Lolita, Lolita, Lolita, Lolita, Lolita, Lolita. Repeat till the page is full, printer.”).
78 Id. at 9.
79 See id. at 3, 109.
80 Id. at 3.
81 See id.
82 Id. at 5.
83 Id. at 315.
84 Id. at 5.
Humbert’s self-serving account.\textsuperscript{85} This defendant always intended his prison notes to be printed and read and his actions to be weighed in the balance.

Accordingly, the writing is filled with excuses and explanations, shifting blame from Humbert Humbert to circumstances beyond his control. For example, his discovery of Lolita was “a fatal consequence of . . . my tortured past.”\textsuperscript{86} The devil was using him as a “plaything,” tempting him with the child’s presence and then directing the mother to interrupt, “leaving me with a dull pain in the very root of my being.”\textsuperscript{87} An “agent of fate” sent Charlotte running across the street to her death.\textsuperscript{88} Most glaringly, Lolita and all nymphets are “evil” demons with deadly power who entrap older men under their spell.\textsuperscript{89} Let’s be honest, even twelve-year-old Lolita was far from pure.\textsuperscript{90} But Humbert Humbert . . . our narrator was poisoned by his first love.\textsuperscript{91} He is “not, and never was, and never could have been, a brutal scoundrel.”\textsuperscript{92} He simply “followed nature” as its “faithful hound.”\textsuperscript{93} Sadly, pedophilia was his “accursed nature,” but the lure was magic rather than sex.\textsuperscript{94} Then “something very strange” happened: “it was she who seduced me.”\textsuperscript{95} Really, if one thinks about it, Humbert Humbert was another victim.

As victim, our narrator seeks his readers’ understanding and compassion. Humbert Humbert asks that “the jury” view shocking, violent, predatory scenes “with what my lawyer has called, in a private talk we have had, ‘impartial sympathy.’”\textsuperscript{96} Squinting from the desired sympathetic angle, we might see Humbert Humbert’s arousal under the lap of an unsuspecting Lolita as “careful,” “chaste,” and “wine-sweet,” even a source of pride.\textsuperscript{97} Or, we could admire the man’s resolution, at least at first, “to pursue my policy of sparing her

\textsuperscript{85} Id. at 3–4.
\textsuperscript{86} Id. at 40.
\textsuperscript{87} Id. at 55–56.
\textsuperscript{88} Id. at 103.
\textsuperscript{89} Id. at 16–17, 125.
\textsuperscript{90} See id. at 124 (explaining that he “had taken for granted, when I first met her, that she was . . . unravished”), 135–37 (relating to the “gentlewomen of the jury” that he “was not even her first lover”).
\textsuperscript{91} See id. at 18.
\textsuperscript{92} Id. at 131.
\textsuperscript{93} Id. at 135.
\textsuperscript{94} Id. at 134, 257.
\textsuperscript{95} Id. at 132.
\textsuperscript{96} Id. at 57, 61.
\textsuperscript{97} Id. at 57; see id. at 58–62 (declaring after arousal, “Blessed be the Lord, she had noticed nothing!”).
purity by operating only in the stealth of night, only upon a completely anesthetized little nude."98 Given that our imaginations may not be sufficiently vivid or forgiving to ascribe the sentiment of love to Humbert Humbert, he "may as well give those imaginations a kick in the pants."99 In his mind, "[i]t was love at first sight, at last sight, at ever and ever sight."100

Reading Lolita cover to cover, then, reveals this narrative framework: Humbert Humbert sits in prison awaiting trial on murder and rape charges, where he writes a first-person account of his crimes that is both admission and plea for sympathy. Although Humbert Humbert initially intended the complete writing to save his soul rather than his head, he resigns himself to using only "parts of this memoir in hermetic sessions" at trial.101 Even with excerpts, the goal remains the same: to temper the raw facts with the defendant's point of view. That goal fits squarely in a criminal defendant's sentencing memorandum.

B. For the Defendant, the Sentencing Memorandum

An ideal in the criminal justice system is that a sentencing judge will "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."102 With a defendant's life and liberty on the line, the stakes can rise no higher.103 The Federal Sentencing Guidelines, promulgated by the U.S. Sentencing Commission and first effective in 1987, were designed to impart "uniformity, predictability, and a degree of detachment."104 In 2005, the Supreme Court in United States v.

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98 Id. at 124.
99 Id. at 65.
100 Id. at 270; see id. at 277.
101 Id. at 308.
103 See 3 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 521 (4th ed.), Westlaw (database updated Apr. 2022) ("Trial judges have few more important, or difficult, functions than imposing sentence. The jury is not involved at this stage; it is for the judge alone to discharge this weighty responsibility.").
104 Koon, 518 U.S. at 113; see 18 U.S.C. § 3553; United States v. Booker, 543 U.S. 220, 227 (2005) (ruling that "two provisions of Sentencing Reform Act of 1984 (SRA) that have the effect of making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent"); Sentencing Guidelines Manual § 1A1.3, p.s. (U.S. Sent’g Comm’n 2021) [hereinafter Sentencing Guidelines] ("Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."); An Overview of the United States Sentencing Commission, U.S. Sent’g Comm’n,
Booker clarified that such guidance is advisory rather than binding, lest a criminal sentence rest on facts not proven beyond a reasonable doubt and run afoul of the Sixth Amendment.105

A federal judge begins the sentencing process by consulting the Guidelines and calculating the prescribed penalty range.106 The judge then has discretion to deviate from that range, even reject it outright.107 A variance or departure may be appropriate based on statutory factors listed in 18 U.S.C. § 3553, including “the nature and circumstances of the offense and the history and characteristics of the defendant,”108 or based on “exceptional” circumstances and policy considerations, as contemplated by the Sentencing Commission.109 Given the individualized nature of sentencing, a trial court may not presume a sentence within the Guidelines range to be reasonable.110

105 See Booker, 543 U.S. at 245 (holding “that, in the circumstances mentioned, the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing.”); see also Blakely v. Washington, 542 U.S. 296, 303 (2004) (finding enhanced penalty unconstitutional where “[t]he facts supporting that finding were neither admitted by petitioner nor found by a jury”); United States v. Antonakopoulos, 399 F.3d 68, 75 (1st Cir. 2005) (“A mandatory minimum sentence imposed as required by a statute based on facts found by a jury or admitted by a defendant is not a candidate for Booker error.”).

106 See Gall v. United States, 552 U.S. 38, 49 (2007) (noting that “the Guidelines should be the starting point and the initial benchmark.”); see also Booker, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”); United States v. Siegelman, 786 F.3d 1322, 1332 (11th Cir. 2015) (“Although the Guidelines are not mandatory, district courts are required to begin the sentencing process by correctly calculating the sentencing range prescribed by the Guidelines.”); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 522 (4th ed.), Westlaw (database updated Apr. 2022) (explaining that the probation officer typically files a presentence investigative report, including a calculation of the Guidelines range).

107 See Kimbrough v. United States, 552 U.S. 85, 90 (2007) (“In accord with 18 U.S.C. § 3553(a), the Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence.”); id. at 113 (Scalia, J., concurring); Irizarry v. United States, 553 U.S. 708, 714–15 (2008); United States v. Rangel, 697 F.3d 795, 801 (9th Cir. 2012).


109 SENTENCING GUIDELINES, supra note 104, at § 5K2.0, p.s.; Kimbrough, 552 U.S. at 101; Gall, 552 U.S. at 47, 49–50 (recognizing § 3553(a) directive that sentence be “sufficient, but not greater than necessary” to meet statutory objectives and stating that court need not find “extraordinary” circumstances to justify a sentence outside the Guidelines range.”). See generally United States v. Hall, 965 F.3d 1281, 1295–96 (11th Cir. 2020) (discussing distinction between variance and departure).

110 Nelson v. United States, 555 U.S. 350, 352 (2009) (“The Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable.”); see Booker, 543 U.S. at 245–46 (“tailor the sentence”); see also Gall, 552 U.S. at 50 (“individualized assessment”); United States v. Morais, 670 F.3d 889, 893 (8th Cir. 2012) (stating that the

https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf

In addition, the government and the defendant can each file a sentencing memorandum, raising objections to the Guidelines calculation for the court to consider. Specifically, a defendant has an opportunity to highlight exceptional characteristics that justify leniency. The memorandum should stress "factors that neutralize reasons to impose a harsh sentence," explain "mitigating factors and why they justify a reduced sentence," and "provide a counter-schema to mainstream viewpoints of the person." That way, the sentencing judge can see features of the case that "take it outside the Guidelines' 'heartland' and make of it a special, or unusual, case." The aim is to present the defendant "as a whole person." A human being "with flaws, virtues, and a need for empathy." An individual rather than a statistic.

appellate court "review[s] the substantive reasonableness of a sentence under a deferential abuse-of-discretion standard" and "presume[s] that a sentence imposed within the advisory guideline range is substantively reasonable" (first citing Gall, 523 U.S. at 41; then citing United States v. Ruelas-Mendez, 556 F.3d 655, 657 (8th Cir. 2009)).


See SENTENCING GUIDELINES, supra note 104, at §§ 5H, 5K2.0(c) (discussing "relevance of certain specific offender characteristics in sentencing").


United States v. Palma, 376 F. Supp. 2d 1203, 1210 (D.N.M. 2005) (quoting Koon v. United States, 518 U.S. 81 85 (1996)); see United States v. Freeman, 992 F.3d 268, 279, 281 (4th Cir. 2021) (finding sentence "substantively unreasonable" where district court failed to "fully consider the history and circumstances of the defendant in relation to the extreme length of her sentence"); reh'g en banc, 24 F.4th 320, 332 (4th Cir. 2022) (vacating sentence based on ineffective assistance of counsel); United States v. Rybicki, 96 F.3d 754, 757 (4th Cir. 1996) ("Each guideline attempts to anticipate a broad range of typical cases—a 'heartland'—that is representative of the circumstances and consequences of ordinary crimes of the type to which the guideline applies." (quoting Koon, 518 U.S. at 93)).


Id. (discussing remarks of the late Judge Richard S. Arnold of U.S. Court of Appeals for the Eighth Circuit).

See United States v. Jumaev, No. 12-CR-00033-JLK, 2018 WL 3490886, at *12 (D. Colo. July 18, 2018), aff'd, 20 F.4th 518 (10th Cir. 2021) ("We must recognize that a human being is the focal point of the sentencing process..."); see United States v. Diaz-Rivera, 957 F.3d 20, 23–29 (1st Cir. 2020) (acknowledging sentencing memorandum describing living with heroin and cocaine addictions); United States v. Eustice, 952 F.3d 686, 690 (5th Cir. 2020) (stating district court varied sentence downward based on sentencing memorandum describing childhood and addiction); United States v. Ramos, 772 F. App'x 47, 51 (5th Cir. 2019)
In *United States v. Wright*, for example, the defendant pleaded guilty to conspiring to distribute oxycodone. His court-appointed counsel filed a sentencing memorandum “that gave a detailed, sympathetic look into the unfortunate circumstances of Defendant’s life,” including his exhausting work “as the sole breadwinner at home” and his “financial and emotional struggles caring for his mother, who was herself struggling with Alzheimer’s disease.” The memorandum both accepted responsibility on the defendant’s behalf and insisted that the burdens that led to his “criminal behavior called for a sentence variance below the minimum recommended by the Sentencing Guidelines.” Counsel also included character letters from family members and associates.

The U.S. District Court for the Eastern District of Kentucky sentenced the defendant to 160 months in prison and seven years of supervised release. The defendant then moved to vacate, set aside, or correct the sentence on the basis of ineffective assistance of counsel. The district court denied the motion, finding that defense counsel “in fact did a more than adequate job.” In particular, the judge praised counsel’s sentencing memorandum as providing “a detailed background into Defendant’s life that gave the Court vivid insight into the difficulties that would tend to suggest a lighter sentence was warranted.” Indeed, the memorandum was partly successful, as “the Court sentenced Defendant to 20 months less than what the United States sought, citing the ‘positive history and characteristics of the defendant’ identified by defense counsel as a factor in that decision.”

(acknowledging sentencing memorandum describing lack of mental capacity to lead others in conspiracy).


119 Id.

120 Id.

121 Id.

122 Id. at *2.

123 Id.

124 Id. at *3, *7.

125 Id. at *3.

Shining a positive light? A loving, generous man? Sounds familiar. Or, consider a recent example with chilling echoes of the plot of Lolita. In 2008, Jeffrey Epstein “pleaded guilty to soliciting a minor for prostitution.” Under a secret, sweetheart deal with the U.S. Attorney’s Office for the Southern District of Florida, Epstein avoided federal prosecution and pleaded only to lesser state charges. Serving thirteen months in jail, he participated in a work-release program that allowed him to work in his office six days each week. When the plea deal came to light years later, the public was outraged. In 2019, the U.S. Attorney’s Office for the Southern District of New York announced new felony charges against Epstein for “sex trafficking of minors and conspiring to commit sex trafficking of minors” in New York City, Palm Beach, Florida, and elsewhere. Yet, the long-awaited prosecution never came to pass; his victims never received the vindication and closure of a conviction. While in pretrial detention, Epstein hanged himself in his cell.

(10th Cir. 2021) (reviewing terrorism defendant’s sentencing statement and considering “the causes of his behavior,” including his words and sentiments that others “viewed with grave suspicion and little sympathy”).


128 See Curt Anderson, 1 Justice Department, 2 Views on Sex Charges Against Epstein, AP (July 9, 2019), https://apnews.com/article/jeffrey-epstein-miami-donald-trump-us-news-ap-top-news-9054a8384520479aa3c36464b00c8df06 [https://perma.cc/A2GM-LPPM].


Following in the unfortunate footsteps of Humbert Humbert, Epstein faced charges of sexually abusing underage girls, but died in custody before trial. Unlike Humbert Humbert, Epstein did not write a memoir during his detention. Nor did he reach the sentencing phase post-conviction. There is no prison manuscript or sentencing memorandum in United States v. Epstein to compare to the pedophile’s plea for sympathy that is Lolita. But there is a sentencing memorandum in the federal prosecution of Epstein’s co-conspirator: United States v. Maxwell.\(^1\)\(^3\)

In December 2021, Ghislaine Maxwell was convicted after a one-month trial in the U.S. District Court for the Southern District of New York on charges of “conspiracy to entice minors to travel to engage in illegal sex acts, conspiracy to transport minors to participate in illegal sex acts, transporting a minor to participate in illegal sex acts, sex trafficking conspiracy, and sex trafficking of a minor.”\(^1\)\(^3\)\(^4\) For years, she had lured and groomed the girls for Epstein.\(^1\)\(^3\)\(^5\) In June 2022, Maxwell was sentenced to twenty years in prison, along with five years of supervised release and a fine of $750,000.\(^1\)\(^3\)\(^6\)

Defense counsel had filed a sentencing memorandum seeking a significant downward variance from the Sentencing Guidelines.\(^1\)\(^3\)\(^7\) As defendant Humbert Humbert began his story in childhood, so too does defendant Maxwell. Born in France, the youngest of nine siblings, Maxwell suffered family tragedies during her formative years.\(^1\)\(^3\)\(^8\) Her brother fell into a coma after a car accident; her mother traveled around the globe, leaving the children to a nanny; and

update, clarifying that while the government dismissed charges against Epstein following his death, the investigation into his crimes continues).


\(^1\)\(^3\)\(^5\) See Maxwell Sentenced, supra note 134.

\(^1\)\(^3\)\(^6\) Id.

\(^1\)\(^3\)\(^7\) See Sentencing Mem., supra note 133.

\(^1\)\(^3\)\(^8\) See id. at 9–10.
Maxwell developed anorexia. Her politician father was a domineering presence, brutally “dressing down” his children in front of distinguished guests and banging on Maxwell’s hand with a hammer. As Humbert Humbert suffered daily headaches in his tomb of a jail, so too Maxwell suffered “abnormally rigorous conditions” in detention. The poet Humbert Humbert could not escape the influences of fate and nymphets. The warm-hearted Maxwell could not escape the influences of, first, her father and, later, Epstein.

As letters from family and friends attest, she is not, and never was, and never could have been “a villain, rich heiress, and vapid socialite.”

With *Lolita* in mind, the themes of Maxwell’s sentencing memorandum ring loudly. From impressionable child to vulnerable adult, the defendant respectfully requests Your Honor’s sympathy.

## C. Sympathy in Literature and Law

Sympathy plays a key role in any defendant’s decision to write and file a document expressly seeking leniency. As both *Lolita* and court opinions make clear, the aim is for a kind eye to recognize the special and unusual case at bar. Humbert Humbert asks his readers—recall, judges and jurors—for “impartial sympathy.” A kind and unbiased eye. Criminal defendants hope the judge will take “a more sympathetic view” and “a detailed, sympathetic look.” A kind and precise eye. Perhaps a convicted offender could reach even further, evoking the more remote feeling of empathy in his audience. Any

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139 *Id.* at 9.

140 *Id.* at 9–10.

141 *Id.* at 7; *LOLITA*, supra note 1, at 109.

142 See Sentencing Mem., supra note 133, at 11–15; see also *id.* at 1 (“Epstein was always the central figure; Epstein was the mastermind . . . .”), 35 (stating that Maxwell’s “difficult, traumatic childhood with an overbearing, narcissistic, and demanding father . . . . made her vulnerable to Epstein, whom she met right after her father’s death”), 12 n.11 (stating that Maxwell would not comment on events concerning Epstein that were the subject of her trial).

143 See *id.* at 13–16; cf. *LOLITA*, supra note 1, at 131.

144 *LOLITA*, supra note 1, at 57; *see id.* at 308 (“For reasons that may appear more obvious than they really are, I am opposed to capital punishment; this attitude will be, I trust, shared by the sentencing judge.”).


146 See *Sympathy vs. Empathy*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/empathy#note-1 [https://perma.cc/ZY4F-47GJ] (“In the contexts where the two words do overlap, sympathy implies sharing (or having the capacity to share) the
degree of emotional accord between writer and reader would benefit a defendant, including the narrator of *Lolita*.

The Supreme Court has long recognized the power of sympathy. Especially in death penalty cases, the emotion can exert such a strong pull on jurors that it threatens the objectives of fairness and accuracy.\(^{147}\) Accordingly, the Supreme Court in *Saffle v. Parks* stamped its imprimatur on antisympathy instructions to capital juries, stating that it is “constitutionally permissible, if not constitutionally required, for the State to insist that ‘the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence.’”\(^{148}\) Sympathy must not eclipse the rule of law.\(^{149}\)

While the law must prevail, to be sure, emotion can serve as an interpretive tool for the bench.\(^{150}\) To borrow a phrase from Justice William J. Brennan, Jr., “untethered sympathy” may overreach,\(^{151}\) dredging up age-old concerns about bias and disparate treatment in sentencing.\(^{152}\) Judges should not impose punishment based purely

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\(^{148}\) Id. at 492–93 (quoting California v. Brown 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (internal citation omitted); see *Mayfield v. Woodford*, 270 F.3d 915, 923 (9th Cir. 2001) (“[F]ederal courts have consistently held that jury instructions admonishing the jury to base its penalty determination on mitigating or aggravating evidence, not on sympathy for the defendant, pass constitutional muster.”) (collecting cases).

\(^{149}\) See *Brown*, 479 U.S. at 542–43 (majority opinion); *Saffle*, 494 U.S. at 490, 493 (stating that sympathy relates “not to what mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to how it must consider the mitigating evidence,” and that while the “State must not cut off full and fair consideration of mitigating evidence . . . it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice”). Compare *Brown*, 479 U.S. at 539, 543 (finding no constitutional violation for instruction that jurors “must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling” during capital penalty phase), with *Ochoa v. Davis*, 16 F.4th 1314, 1339–42 (9th Cir. 2021) (finding no constitutional violation for instruction that jurors “may take sympathy for the defendant into consideration in determining whether or not to extend mercy to the defendant,” where capital defendant also sought sympathy for his family).

\(^{150}\) See United States v. Creech, 408 F.3d 264, 272 (5th Cir. 2005) (implying that emotion may have no effect at all, as “mere sympathy toward either the defendant or the defendant’s family is not indicative of a judge’s desire to sentence differently under a non-mandatory Guidelines regime”).

\(^{151}\) *Brown*, 479 U.S. at 548–50 (Brennan, J., dissenting).

\(^{152}\) See United States v. Edwards, 622 F.3d 1215, 1216–17 (9th Cir. 2010) (Gould, J., dissenting) (lamenting Ninth Circuit’s “pattern of approving unreasonably lenient sentences for serious white-collar offenses” and observing that “[b]ecause of the nature of their crimes, white-collar offenders are uniquely positioned to elicit empathy from a sentencing court” (first citing United States v. Whitehead, 532 F.3d 991, 993 (9th Cir. 2008); then citing United States v. Ruff, 535
on passion or temperament. Nor should they transform into automatons. Rather, in discharging the “formidable responsibility” of sentencing, judges should exercise “informed discretion.” With all due respect to Aristotle, sympathy tethered to reason and facts is a powerful lens.

Given the common end of fostering sympathy, and especially with its striking foreword setting the stage for Humbert Humbert’s prison notes, *Lolita* may be read as a prolonged sentencing memorandum. The procedural fit is imperfect, as our narrator died before trial and, thus, before the sentencing phase. But his notes are a fine first draft penned pro se. Both the memoir and the memorandum are written by or on behalf of a criminal defendant, from the offender’s distinct point of view, and for an intended audience. And both memoir and memorandum share the critical goal of eliciting feelings of support, affinity, and loyalty in the reader.

Of course, appearance and preparation differ. The memoir is informal rather than formal, lacking the trappings of a cover page with filing stamp and a final page with signature block. The memoir

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F.3d 999, 1007 (9th Cir. 2008) (Gould, J., dissenting)); United States v. Gupta, 904 F. Supp. 2d 349, 350 (S.D.N.Y. 2012), aff’d, 747 F.3d 111 (2d Cir. 2014); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 521 (4th ed.), Westlaw (database updated Apr. 2022) (quoting Chief Justice Earl Warren that “[s]ubstantial differences in sentencing for which no adequate reason can be given not only create problems of institutional morale but they detract from the objective of equal treatment, which is an important goal of criminal justice administration”); SENTENCING GUIDELINES, supra note 104, at § 1A1.3, p.s.; KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 104–05 (1998) [hereinafter FEAR OF JUDGING].

See FEAR OF JUDGING, supra note 152, at 31; MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER, at x, 19 (1973) (district judge of U.S. District Court for the Southern District of New York raising the alarm in 1973, pre-Sentencing Guidelines, that sentencing judges can be “arbitrary, cruel, and lawless” and there is a “frightening chanciness of judicial tempers and reactions”).

See FEAR OF JUDGING, supra note 152, at 169.

United States v. Gupta, 904 F. Supp. 2d 349, 350 (S.D.N.Y. 2012) (“The notion that this complicated analysis, and moral responsibility, can be reduced to the mechanical adding-up of a small set of numbers artificially assigned to a few arbitrarily-selected variables wars with common sense.”).

FEAR OF JUDGING, supra note 152, at 169; Jack B. Weinstein, *A Trial Judge’s Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 366 (1992) (district judge of U.S. District Court for the Eastern District of New York expressing concern that “use of the guidelines does tend to deaden the sense that a judge must treat each defendant as a unique human being” and that judges may “cease to aspire to the highest traditions of humanity and personal responsibility that ought to characterize our office”).


See FEAR OF JUDGING, supra note 152, at 176–77; see also United States v. Reed, 522 F.3d 354, 362–63 (D.C. Cir. 2008) (finding sentence reasonable where district court acknowledged and expressed sympathy for mitigating factors).
is fantasy rather than reality, lacking the high stakes of a prosecution. And the entire novel is written by a literary master, lacking the banality of a law license. Yet, for all these differences, both memoir and memorandum are aligned as works of persuasion. The offender’s fate lies in the reader’s hands. In the nonfictional realm, the judge imposes a sentence on the convicted defendant, within or beyond the Sentencing Guidelines range. In the fictional realm, a court would have tried and likely convicted Humbert Humbert, with defense counsel filing memoir excerpts for in camera review. Certainly, he would prefer a sentencing judge over a capital jury with instructions not to sympathize. He got us instead. Now readers all sit in judgment of Humbert Humbert for posterity, posthumously elevating him to protagonist in a love story or condemning him to antihero in a crime spree.

Nabokov wrote Lolita as a novel—a creative endeavor for “no other purpose than to get rid of that book”—and the law exists within and emerges from his narrative. Classic literature as docket entry. This unity between law and narrative illuminates the deep essence shared by both genres, legal filing and literary fiction: a striving for sympathy. Thus, the notion of law, particularly criminal law, without sympathy rings hollow. And recognizing this essence shines a new light on the law’s role to promote justice.

Specifically, a richer measurement of justice becomes clear. In the context of criminal sentencing, justice must be measured at least partly as an expression of sympathy rather than solely as a cold calculation of costs and benefits. Courts measure justice in a variety of ways, as occasion demands. When evaluating a motion to stay based on an independent action, for example, a court weighs competing interests. Injury may arise from either postponing or proceeding with the current action. The court also considers “the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law that could be expected from a stay.” There, justice reflects simplicity or complication. Or, in an action sounding in tort or contract, actual or compensatory damages make the injured party whole to the extent possible in monetary terms.

159 Lolita, supra note 1, at 311.
162 See, e.g., MCI WorldCom Network Servs., Inc. v. Mastec, Inc., 995 So. 2d 221, 223 (Fla. 2008) (citing Winn & Lovett Grocery Co. v. Archer, 171 So. 214, 221 (Fla. 1936); Broxmeyer v.
or recklessness, a court may award punitive or exemplary damages to punish and deter.\textsuperscript{163} There, justice reflects a calculation of the correct monetary redistribution.

Criminal sentencing is unique. As "[a] just sentence is an act for which a judge is morally responsible," sentencing carries a streak of humanity.\textsuperscript{164} A feeling of sympathy from judge to offender expresses that humanity, with all the more urgency in light of the Supreme Court's approval of antisympathy instructions to capital juries.\textsuperscript{165} A purely quantitative, mechanical measure of justice fails to "capture our intuitions about what justice requires."\textsuperscript{166} Accordingly, it makes sense that the Sentencing Guidelines are not a rigid formula; they advise a judge's "informed discretion"\textsuperscript{167} in assessing, among other factors, a defendant's exceptional characteristics.\textsuperscript{168} The Guidelines offer "a degree of detachment," not total alienation.\textsuperscript{169} Cool, not cold. After calculating the advisory range, the judge should "craft a sentence... based on rational thought, humanity, and compassion."\textsuperscript{170}

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\bibitem{note1} See, e.g., Goodrich v. Malowney, 157 So. 2d 829, 834 (Fla. Dist. Ct. App. 1963) (citing Dr. P. Phillips & Sons, Inc. v. Kilgore, 12 So. 2d 465, 467 (Fla. 1943); Ross v. Gore, 48 So. 2d 412, 414 (Fla. 1950); Glickstein v. Setzer, 78 So. 2d 374, 375 (Fla. 1955)); RESTATEMENT (SECOND) OF TORTS § 908, Westlaw (database updated May 2022).
\bibitem{note2} See United States v. Jumaev, No. 12-CR-00033-JLK, 2018 WL 3490886, at *12 (D. Colo. July 18, 2018), aff'd, 20 F.4th 518 (10th Cir. 2021); see also United States v. Gupta, 904 F. Supp. 2d 349, 350 (S.D.N.Y. 2012), aff'd, 747 F.3d 111 (2d Cir. 2014) ("Whereas apples and oranges may have but a few salient qualities, human beings in their interactions with society are too complicated to be treated like commodities, and the attempt to do so can only lead to bizarre results."); FEAR OF JUDGING, supra note 152, at 170 (recognizing "the irreducible need for individualized judgment and for humanity as well as rationality in sentencing"); Guido Calabresi, What Makes A Judge Great: To A. Leon Higginbotham, Jr., 142 U. PA. L. REV. 513, 513 (1993) (stating that a great judge needs "generosity of spirit" and "compassion which causes one to know what it is like to be in trouble and in pain").
\bibitem{note3} See supra note 148 and accompanying text.
\bibitem{note4} FEAR OF JUDGING, supra note 152, at 168–69.
\bibitem{note5} Id. at 169.
\bibitem{note6} See 18 U.S.C. § 3553(a); see also Aguilar v. United States, 363 F.2d 379, 381 (9th Cir. 1966) (prior to Booker, agreeing with sentiment that trial "judge expressed great sympathy for the defendant and lamented the mandatory statutory requirement of a long sentence").
\bibitem{note7} Koon v. United States, 518 U.S. 81, 113 (1996).

Elie, 647 So. 2d 893, 895 (Fla. Dist. Ct. App. 1994)) ("Generally, a person or entity injured by either a breach of contract or by a wrongful or negligent act or omission of another is entitled to recover a fair and just compensation that is commensurate with the resulting injury or damage.").
In other words, the judge should read a sentencing memorandum as "a human being dealing with other human beings." We should read Lolita in the same vein: not as a love story, but as a human story.

CONCLUSION

Therefore, treating Lolita as a sentencing memorandum highlights both the "legal" and the "fiction" aspects of the novel as legal fiction. The book is legal in that it exemplifies a criminal defendant's written explanation of his characteristics and crimes: Lolita is his sin and soul. The book is fiction in that it tells a story conjured in Nabokov's imagination: the narrator is his creation, and we are the ultimate judges. Finding the commonality between Humbert Humbert's memoir and a defendant's sentencing memorandum allows us to appreciate more deeply the humanity in our criminal justice system. On a sympathetic reading, both the memoirist and the defendant come alive.
