

Judicial Discretion in Federal Sentencing— Real or Imagined?



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Discussions of judicial discretion in federal sentencing in 2016 invariably lead to three claims that in my view are wildly overstated, and even wrong.

First is the claim that since the Supreme Court decision in *United States v. Booker*, 543 U.S. 220 (2005), federal judges are now exercising meaningful discretion in sentencing, restoring some balance to the division of sentencing authority between prosecutors, judges, and Congress. (I fell prey to this in an article entitled, “A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right,” 100 *J. Crim. L. & Criminology* 691 (2010).) By announcing that the Sentencing Guidelines were advisory, the Supreme Court in *Booker* surely opened the door to more judicial discretion in sentencing than had existed when the Guidelines were rigorously enforced. But “more” does not mean “much.” Judges are exercising discretion around the margins of the Federal Sentencing Guidelines, what I liked to call variations on the theme of guidelines. Some are not even trying: Go to numbers of courts around the country and you will find *Booker* is a mantra to be repeated, not a meaningful change in sentencing. “Yes, I have discretion to depart or vary from the Guidelines but no, I never or very rarely do.” Since virtually all sentences are affirmed by the appellate courts, and since a Guideline sentence is almost as likely to be affirmed as a non-Guideline sentence, one would expect to find judges considering creative sentencing alternatives, evidence-based practices, neuroscientific insights into addiction or childhood adversity. One would expect judges critically evaluating, even rejecting, the seriously flawed Guideline framework, as the early post-*Booker* cases suggested.¹

On the contrary, in jurisdictions with crowded dockets, or where that is the perception, in jurisdictions that suffered from rigorous Guideline enforcement before *Booker*, the Guidelines are the easy default. “Do the numbers,” as the NPR program on the stock market suggests. You will appear efficient and you will surely avoid criticism. Do the opposite and you have to hold hearings, even write opinions, and encourage appellate review (even if rarely successful).

The second claim is that with the return of judicial discretion has come racial bias. Apart from the obvious—that bias has to be examined comprehensively, not only by judges but also by prosecutors and police,² the Commission’s records are a poor measure of bias. Consider the

following: I have submitted my seventeen-year sentencing data for examination to determine if my sentences reflected racial bias. But my data is more than merely criminal record, offense conduct, and the perfunctory information on the Statement of Reasons form that the Commission gets. I have physical files for each defendant, a spread sheet that I kept over the years, memos, transcripts, and often written decisions. If the first review of my sentences suggests bias, I would want to delve deeper to see what other factors explain the differential: the defendant’s addiction, his family ties, his childhood adversity, etc. How can the Commission determine why a judge departed—for inappropriate or appropriate reasons—when the data on the Statement of Reasons form reflects little more than the Guideline factors?³

The third overstated claim is that the “new” judicial discretion coupled with the financial crisis and a change in the politics of crime has ushered in a new epoch of reform in federal sentencing. There is no question that reform is in the wind. Important pre-trial diversion and reentry programs are cropping up around the country. But these reform efforts are still on the periphery of the discussion in federal sentencing, not in the mainstream. To look at the United States Sentencing Commission web site, for example, is to see only proposals for new Guidelines, not proposals for new programs.

Likewise, reform efforts in Congress underscore how narrow the federal sentencing debate has become. “Less” as in “less imprisonment” is not a criminal justice policy, any more than “more” as in “more imprisonment” was. Nor is “judicial discretion” a criminal justice policy; it simply describes who ought to make the decision about sentencing, *not what the decision should be*.

In a talk at Loyola Law School, then embodied in an article, I began by saying, “I don’t want to talk about sentencing disparity.”⁴ It was “an issue far, far less important than issues of sentencing fairness, of proportionality, of what works to address crime. Disparity-speak has sucked the air out of all interesting and meaningful discussion of criminal justice reform for the past several decades.” And I continued, “you cannot build a rational sentencing regime if the only important question is this one: Am I doing the same thing in my courtroom that you are doing in yours, even if neither of us is imposing sentences that make sense, namely, that work to reduce crime? You cannot talk about

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disparity unless you understand the context—disparity in sentencing with respect to what? What purposes? What characteristics? Similarly situated with respect to what? The offense? The chances of deterrence? Amenability to treatment?”⁵

Twenty years of Guideline sentencing has transformed the federal bench. It did so not only for judges who came of age during the Guidelines era. It was also for those who had practiced criminal law, or had been on the bench pre-Sentencing Reform Act.⁶ It is more than the cognitive phenomenon of “anchoring,” the “potential robust and powerful anchoring effect” of the Sentencing Guidelines and “the effect of the bias blind spot in determining just sentences.”⁷ It is a tectonic shift in the way judges see the job of sentencing. Guidelines and mandatory minimum sentences have simply normalized sentences that would have been obscene years ago. We have come to view imprisonment as the appropriate punishment for all crimes with the only question being *how much*.

Although in the years immediately following the passage of the Sentencing Reform Act, there was an outcry among judges when the Commission issued statistics about “compliance” or “non-compliance” with the Guidelines,⁸ today—even in this more flexible post-*Booker* era—there is nary a whimper. The Commission proudly reports that Guideline compliance is at 80 percent: 80 percent of federal offenders continue to be sentenced within the applicable advisory Guideline range or pursuant to a request from the government for a sentence below the otherwise applicable advisory Guideline range.”⁹ Consider that statistic: 80 percent of the time, judges stay within the lines of a sentencing framework that has been widely criticized and soundly rejected by other states, not to mention other countries considering structured sentencing. And

when the judges step outside those lines, we tout the fact that it is only with the government’s permission. So much for an independent judiciary, carefully using its new sentencing discretion to consider alternatives to incarceration, creative sentencing options, the insights of neuroscience, or evidence-based practices.

Notes

- ¹ United States v. Gall, 552 U.S. 38 (2007).
- ² Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 2 (2013).
- ³ Judge Nancy Gertner, *Judge Identifiers, TRAC, and A Perfect World*, 25 Fed. Sent’g Rep. 46 (2012).
- ⁴ Nancy Gertner, *How to Talk About Sentencing Policy—and Not Disparity*, 46 Loy. U. Chi. L.J. 313 (Winter 2014).
- ⁵ *Id.* at 314.
- ⁶ Judge Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 Ohio St. J. Crim. L. 523 (2007); Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, Yale L.J. (The Pocket Part), July 2006.
- ⁷ Mark Bennett, *Confronting Cognitive “Anchor Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim.L. & Criminology 489, 503–13 (2014).
- ⁸ Daniel Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1721 n. 199 (1992). “Compliance” was then defined as sentencing within the Guidelines rather than departing from them, even if the departures were authorized by the Guidelines Manual. Of course, as described above, “compliance” has changed today.
- ⁹ Prepared Testimony of Judge Patti B.Saris, Chair, United States Sentencing Commission, Before the Subcommittee on Crime, Terrorism and Homeland Security, Committee on the Judiciary, October 12, 2011, http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20111012_Saris_Testimony.pdf.