

REIMAGINE JUSTICE

**EXECUTIVE SESSION
ON THE FUTURE OF
JUSTICE POLICY**

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REIMAGINING JUDGING

The Square One Project aims to incubate new thinking on our response to crime, promote more effective strategies, and contribute to a new narrative of justice in America.

Learn more about the Square One Project at squareonejustice.org

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MEMBERS OF THE
EXECUTIVE SESSION
ON THE FUTURE
OF JUSTICE POLICY

I have been a participant—a very enthusiastic participant—in Columbia University’s recent three-year Executive Session on the Future of Justice Policy, part of the Justice Lab’s Square One Project. Square One’s goal is to bring together a diverse and engaged group of thinkers and advocates to literally reimagine the criminal legal system *from square one.*

I thought about how this rich dialogue fit within the role I had for seventeen years, that of a federal trial judge. I was struck by the distance between the Square One discussions and those in which I had participated when I was on the bench. In the Executive Session, we talked about reckoning and accountability—a reckoning in which participants come to grips with the historical role the criminal legal system played in racial injustice, a reckoning with its role in the more recent past, the decades of mass incarceration and community disruption, a reckoning with over-policing, over-prosecuting, and over-punishing. Judges rarely address issues like this; and if they do, their likely reaction would be: “What does this have to do with me?” The answer is, on reflection, a great deal.

I left the bench in 2011 to teach and to write. One book project in particular made the Square One conversations resonate. I am writing a judicial memoir (entitled “Incomplete Sentences”), but not the usual kind. Many—not all—judicial memoirs are about how the judge got to be on the bench, their career path and their obstacles, rather than the job of judging itself. And when judges do talk about what they do, it is often in general terms—abstract notions of balancing justice and fairness—not the concrete—how to treat the human being before you.

I am telling my story through the stories of the men that I had sentenced. I write about who they were when I sentenced them, who they are now (I met many of them after I retired), how I made painful decisions about their punishment, and how they should have been treated in a humane system. It was my small effort to be accountable, to take responsibility—in effect, to reckon—for my role in mass incarceration. But that effort is backward-looking, assessing what I had done in my 17-year judicial career. This essay is the beginning of a conversation about looking forward: What do the Square One discussions have to do with the work of judging going forward? Put otherwise: How can we reimagine judging?

The conversations in Square One that focused my attention about the role of judges were often those in which Executive Session members addressed violent crime. In his book *Homeward*, Bruce Western described the problem as follows:

Where violence is contextual and offenders are also likely to be victims and witnesses, justice is not achieved through the punishment of the offender but through the abatement of violent contexts (Western 2018:81–82).

Fellow Executive Session member Chief Judge Elizabeth Trosch and I talked about how a sentencing judge might consider the “violent contexts” about which Western writes. A judge is supposed to individualize, focus on the person before her—what he was convicted of doing, his background, the circumstances of the crime—as well as on considerations of public safety. The very

ubiquity of the social and economic issues which Western describes makes these factors difficult to titrate in an individual case. How could I compare the experiences of the men I sentenced for drug crimes who attended a neighborhood school with no water fountains or guidance counselors; or those who started using alcohol and drugs at age 8, or 10, or 12; or those whose bodies bore the scars of violence, like the man with a bullet still lodged in his skull from being shot in the head; or the experiences of the man who dealt drugs to support his family because the government disability benefits for which he qualified had been delayed? Are there degrees of trauma or adversity or impoverishment that individual dispositions should reflect? Or are we looking at it the wrong way by using the criminal legal system to punish criminogenic environments of poverty and deprivation? The questions could not be more critical today, given the paroxysms of the past year—the growing public awareness of mass incarceration and its human costs, the Black Lives Matter movement and the systemic injustice it

catalogues, the resurgence of hate crimes and white nationalism, and then, a pandemic.

To individualize surely does not mean to ignore the broader issues, to function as if the only world is the one in the four corners of the courtroom, the only audience an appeals court or other judges. Clearly there is a wider world, a broader audience. Written judicial opinions can try to change the retributive narrative about who the defendants are and how they got to court. They can reflect the dignity of all the participants, rather than treating them as “cases” or “numbers.” (One of the men I sentenced told me that he carried my opinion with him in prison; it was not a particularly flattering account of him—it talked about his offense and his chaotic family background—but it showed more of his humanity than his rap sheet or presentence report.) Judicial opinions offer the prospect of describing both the trajectory of the person who offended and the pain of the people affected, reflecting the community’s interest in



A JUDGE CAN MAKE ACCESS TO JUSTICE EASIER OR IMPEDE IT, EQUALIZE THE RESOURCES BETWEEN THE GOVERNMENT AND THE DEFENSE, ENACT RULES THAT LEVEL THE PLAYING FIELD BETWEEN PROSECUTOR AND DEFENDER, AND MORE

both. But written opinions are not the only way a judge can consider broader issues. A judge can effect change through her role in the governance of her own session and the functioning of the court at large. She can make access to justice easier or impede it, equalize the resources between the government and the defense, enact rules that level the playing field between prosecutor and defender, and more. A judge is the gatekeeper to resources for the defense, determining what experts the state should pay for to support a criminal defense lawyer, what witnesses to allow, how much time to give the defense to put its case together; the government's resources—the time it spends, the experts it uses—are not monitored. There are big decisions and small: I recall asking an interpreter to give the electronic headsets through which he communicated with the Spanish-speaking defendant to all of the defendant's family members who were sitting in the back of the courtroom, perplexed. While the proceeding was frightening, at least they then understood what was going on and why. And surely in

a judge's speeches and writings outside the courtroom—such as in my forthcoming book, *Incomplete Sentences*—she can give witness to the disarray of the criminal legal system and how it should change.

Political change does not happen quickly; when it does finally happen, when laws are passed or regulations promulgated, they do not enforce themselves. Even in a reimagined U.S. criminal legal system, there will be judges.¹ Even in a system in which the roles of all the usual players have been fundamentally reconceptualized, there will be judges taking up the slack when communities are unable to do the job of judging their members. No matter how the system is reframed to be about reckoning and accountability, however much legal principles are refashioned to reflect parsimony and proportionality rather than our current system—punishment without end—judges will be called upon to enforce them.

My focus in this short essay is only on sentencing. A judge's role is different at sentencing than her role at other points in a criminal trial, or in other contexts. The stakes are the highest; it is when state power confronts a person's liberty. And I write for the most part about what I know best, which is *federal* sentencing. Federal sentencing has changed over the past forty years and with it the judge's role. It has seesawed from a period when the purpose of sentencing was rehabilitation, and a judge had virtually unlimited discretion to sentence (Gertner 2010). It then moved to a more recent period when a judge's power was more strictly cabined by mandatory minimum sentences, and mandatory Federal Sentencing Guidelines. Finally, it has shifted to the present which is—at least on the surface—some combination of both. Today, there is space for more judicial discretion. On the surface, that change—increasing judicial discretion—looks promising. More judicial discretion might well be an antidote to treating people as Guideline categories

or cogs in a three-strikes machine. Reformers sometimes assume that when judges focus on an individual, they will necessarily consider their humanity and the social context of the crime, all factors that have largely been ignored during the past thirty years. But there are reasons to be skeptical.

“More discretion” standing alone is not at all a criminal legal policy. It announces where the decision-making authority lies but says nothing about how that authority should be exercised. Countless papers have been written about the perils of unstructured discretion—discrimination and bias chief among them (Frankel 1973). But I want to raise another issue: The unique problem of giving judges discretion in sentencing at this moment in time, after a decades long love affair with prison. How can judges who have been schooled in the extraordinarily punitive system that produced mass incarceration

for the past thirty years suddenly operate in a system that—one hopes—will reflect wholly different premises? How can a judicial system based on one set of assumptions suddenly enact or apply a wholly different approach? These are precisely the same questions we have asked of police, correctional officers, and prosecutors in a changed criminal legal system. Is change possible in juvenile correctional facilities that reflected hard-nosed punishment, too often accompanied by physical and sexual abuse scandals? Is change possible with police schooled to be warriors, not guardians? Although surprising at first blush, assuming that law-following judges will enforce such institutional changes—much like with these other actors—is not enough.

In this paper, I touch first on judicial resistance to recent modest criminal law reforms, one example of what I have described elsewhere as the phenomenon of “the habits of mass incarceration” (Gertner 2020). Then I sketch out—very

briefly—the factors that make judges resistant to change: constraints that apparently limit a judge’s horizons, cognitive influences that they ignore, and political pressures that are unexamined. Finally, I propose a way to effect change—a very preliminary suggestion.

Several caveats: I am generalizing from my experiences from 17 years in the federal system. This is not an empirical paper. Not all judges fit these descriptions. Nor is this paper about *what* needs to be changed in the broader criminal legal system; others are dealing with those profound and overarching questions. Finally, the message here is not that judicial change is impossible, only that it is difficult. Any “reimagining project” must take judicial impediments to change into account; this paper considers how to revamp the criminal legal system through the lens of those who must apply that system’s rules. □

JUDICIAL RESISTANCE TO REFORM

For over a decade, some—not all—judges have resisted even modest criminal law reforms.

At the federal level, these reforms have included the Second Chance Act, passed in 2007 and renewed in 2015, which sought to address the problems of prisoner reentry; the 2010 Fair Sentencing Act, which reduced but failed to eliminate the racially discriminatory disparity in sentencing between those convicted of crack and powder cocaine distribution; and the 2019 First Step Act, which broadened a judge's authority to release prisoners under compassionate release provisions, gave judges more discretion to go below a mandatory sentence, and also reduced some mandatory drug sentences.

We have seen the resistance of some federal judges to use their new sentencing discretion under these statutes, as well as under the now advisory Federal Sentencing Guideline regime (Gertner 2016; Roth 2017). And that resistance is especially surprising given the overwhelming judicial opposition to mandatory guidelines and mandatory minimum sentencing decades ago. Numbers of federal judges testified against mandatory sentencing legislation in the 1980s and 1990s. Many more criticized mandatory sentencing guidelines in articles and opinions (Stith and

Cabranes 1998). Right after the passage of the Federal Sentencing Reform Act (which created the Federal Sentencing Guidelines), 200 judges declared them unconstitutional (Stith and Cabranes 1998). But once the Supreme Court rejected those constitutional challenges, and signaled to the lower courts that mandatory guidelines meant *mandatory*, sentencing changed. More than just legal change—the formal rulings of the Supreme Court and the courts of appeals—the socialization of judges changed: how they were reviewed (by higher courts) and what they were criticized for (i.e., for not following guidelines), how they were taught when they first went on the bench and in successive trainings, and how they were valued (for not getting reversed by appellate courts, for not getting lambasted in the press and even by Congress for being too soft, for being efficient in the way that rigid Guideline-following enabled).

The result was that most federal judges—especially those who became judges after the Guidelines regime began—began to enforce the sentencing rules with a rigor that none of the legislators who enacted the law, or even the scholars who recommended it had anticipated. Scholars noted that the judges had become “passive,” allowing themselves to be “marginalized,” in the sentencing process, ceding all authority to the Sentencing Commission (Berman 1999). The job of sentencing became mechanical—mastering the 800-page Guideline book and virtually nothing more. But the new sentencing ideology and socialization went deeper. More and more federal judges came to *believe* in the Sentencing Commission and the rationality of the Guidelines it promulgated (U.S. Sentencing Commission 2002; U.S. Sentencing Commission 2015). This was especially true if they had never been criminal defense lawyers; most had not. They had no framework with which to criticize them. And criticism was critical. The Guidelines were not a rational, carefully conceived set of rules. They were unmoored from evidence, framed in a political process, “just back of envelope calculations and collective intuitive judgments.”² Federal judges were not alone. Skyrocketing imprisonment rates were also reflected in state sentencing, even without mandatory minimum statutes, rising to levels unheard of in the 1980s.

And judges’ commitment—both federal and state—to punitive sentencing is nowhere clearer than in judicial resistance to the policies of elected progressive prosecutors. For decades, judges have deferred to the decisions of prosecutors—no matter how problematic those decisions have been. Constitutional separation of powers demanded that deference; judges are in the judicial branch; prosecutors, the executive. But with respect to elected progressive prosecutors, there has been pushback. Judges have second-guessed the decisions of prosecutors who have declined to prosecute minor crimes that are more a product of aggressive policing in communities of color than threats to public safety, as well as prosecutors that have rejected the death penalty (DeCosta-Klipa 2016; Smith 2019; Ricono and Fahrlander 2020).

Judges are not alone in resisting reform—some prosecutors, police, politicians, and even the media share responsibility. But in many ways judicial resistance to change is more difficult to address, clothed as it is in citations to precedent, as well as real concerns about neutrality and judicial independence.

To be sure, there are obvious exceptions to judicial resistance to change. Judges have led the movement toward problem-solving courts, restorative justice, pretrial diversion, and reentry programs (Denis 2019). These programs are important, but they exist in the interstices of an otherwise punitive system. They have not led to a fundamental reexamination of ordinary sentencing—the day-to-day treatment of the majority of people not lucky enough to be included in these specialized programs. It is as if we found out that the COVID-19 vaccine worked well on one group but then did not bother to try it out on anyone else.

The issue was especially clear to me when I was invited to attend the graduation from a reentry program of a man I had sentenced to a substantial mandatory minimum term. Although I made sure that I publicly announced my objection to mandatory sentencing, I had no choice in the matter. At the program, the man talked about how

far he had come since his release from prison, and how much his life had improved as a result of the court's reentry program. There were many questions I wanted to ask—what happened to his family after he left for a far-off federal prison, what it felt like to pick up the pieces after so long—but I settled on one: Did he think he needed a fifteen-year sentence to get to the point where the reentry program would help? He paused. I wondered whether he hesitated because he feared the consequences of the “wrong” answer, a lesson he had learned after years in “the system.” He finally said, “Of course not.”

He was describing the disconnect between the sentence he received for his drug offense—wildly punitive, disproportionate—and his treatment when he was out of prison on supervised release, at least in that reentry program. He was describing two different worlds, different rules, different purposes. The lessons all the players in the criminal legal system might have learned from diversion or reentry programs do not appear to have bled over into the rest of the system at least on any scale. Significantly, the success of some drug courts has not thus far led to a fundamental reexamining of all the drug laws. Federal sentencing law continues to treat drug addiction as “not ordinarily relevant” to reducing a defendant's



JUDICIAL RESISTANCE TO CHANGE IS MORE DIFFICULT TO ADDRESS, CLOTHED AS IT IS IN CITATIONS TO PRECEDENT, AS WELL AS REAL CONCERNS ABOUT NEUTRALITY AND JUDICIAL INDEPENDENCE

culpability (United States Sentencing Guidelines 2012). This was so when in my court, and others around the country, a large proportion of the men and women sentenced for drug offenses have substance abuse issues; dealers one day, users the next. Reentry programs have worked to make certain that some defendants have jobs and homes upon their release, jobs and homes that could have enabled them to avoid imprisonment in the first instance. Both surely would have made a difference to the unhoused 14-year-old who started dealing crack to provide him and his siblings with school supplies; by the time he was before me, he had a lengthy record, qualifying him for a mandatory minimum sentence. While judges in the diversion courts may work mightily to keep the defendant from returning to prison, they may well be less attentive to the harm that imprisonment had affected in the first instance. And as I mentioned before, neither process—sentencing in the first instance or reentry decisions—is remotely nuanced. The initial crime was the sole “fault” of the individual defendant, as is a drug relapse. Neither stage considers the family and community that must support the individual; the carceral state cannot and more importantly, should not, serve as a stand-in for families and communities.

These patterns are especially clear with respect to people accused of violent crimes, as our Square One discussions have reflected. Pre- and post-trial diversion programs cherry-pick defendants, excluding those convicted of violent crimes, a category that is often too broadly defined (Patterson 2020). This leaves the so-called “nonviolent drug offenders,” a label that resonates with paternalistic—even racist—efforts to separate the “deserving” from the “undeserving” poor that dates from Tudor England (Tihelkova 2015). The vast majority of the men I sentenced were victims, witnesses, or perpetrators of violence, as Bruce Western’s quote suggests. Their pre-sentence reports and bodily scars reflected the violence they experienced. Reducing imprisonment for “nonviolent offenders,” or eliminating it entirely, is good—but not good enough.

The judicial habits that enabled mass incarceration—that ignored the impact of mass incarceration or that passively accepted new definitions of what was a fair sentence—are nowhere clearer than in the pool of defendants affected by the Supreme Court’s decision in *Miller v. Alabama* (2012), in which the Court held that the imposition of a mandatory life without parole sentence on a juvenile violated the Constitution’s prohibition against cruel and unusual punishment. But rather than effecting a sea change in the treatment of juveniles,

the decision led to the resentencing of juveniles around the country—this time to “virtual” life sentences, like thirty or forty years (*Miller v. Alabama* 2012). Given the chance to reconsider the culpability of defendants who were under 18 at the time of the crimes, the courts hardly budged. Some had become immune to sentencing men to longer and longer periods of imprisonment; a multiple decade sentence did not shock in the early 21st century in the way it had shocked in the early 20th. And just nine years later, in *Jones v. Mississippi* (2021), the Supreme Court added fuel to the fire, gutting *Miller’s* (2012) presumption against life without parole for juveniles and its core conclusion that the vast majority of adolescents do not deserve life even if their crime reflects “unfortunate yet transient immaturity.” As long as the judge knew they had discretion to reject a life sentence, Justice Kavanaugh found, that was all that mattered. Justice Kavanaugh’s idea of discretion, in short, is all about form and not remotely about substance.

Finally, while the COVID-19 pandemic has accelerated the pace of decarceration, it is striking how many judges remain resistant to releasing defendants at risk for the disease (Blakinger and Neff 2020; Finkle 2021). Some have even punished defendants who did not physically appear in court because the defendant feared infection (Brelis 2020). Some of the judicial resistance is grounded in real issues about the absence of community supports to ensure successful reentry in a time of crisis, but much of it is not (Decarcerating Correctional Facilities 2020). Some resistance is grounded in judicial risk aversion embedded in thirty years of mass incarceration, of not wanting to be that judge whose release decision, however well-grounded, leads to a violent crime and press attacks (Hulse 2016). This is so even for judges with life tenure. Perhaps as a way to cover that fear—that the releasees will reoffend—judges will say that the men and women before them, as well as the community are somehow “better off” with them in prison. But “better off” never means much. It rarely figures in the likely impact of imprisonment and its collateral consequences on a defendant and his community.

Sadly, the usual calculus did not change much for some judges even in a pandemic. The lessons that might have been learned from releases under COVID-19, drug programs, and reentry courts—that it was not remotely necessary for public safety to imprison at the rates we have—are not getting through. The old narratives persist—not just with the press, the police, the prosecutors, but also crucially with judges—that the recent increase in violent crime is attributable to COVID releases and bail reform, rather than to the deterioration of whatever social supports existed in the communities hardest hit by the pandemic (after school programs, drug programs, jobs); and that the only answer to the uptick is to flood the streets with police, as we have been doing for decades, and attempt to imprison our way out—again.³

I want to understand why the bench has resisted even the modest reforms that have been enacted and whether those patterns will persist with new judges. As one scholar put it most starkly: “Will newly appointed judges and justices fully understand what, in human terms, is at stake? Or will they decide incredibly important cases purely in light of their favorite hundred-year-old precedent?” (Delgado and Stefancic 2019:25). □



WHILE THE COVID-19 PANDEMIC HAS ACCELERATED THE PACE OF DECARCERATION, IT IS STRIKING HOW MANY JUDGES REMAIN RESISTANT TO RELEASING DEFENDANTS AT RISK FOR THE DISEASE

IMPEDIMENTS TO REIMAGINING JUDGING

Many have written about what influences judicial decision making, and in particular, why judges seem so counter to change particularly in the criminal legal system (Liptak 2015).

To understand how to change judicial attitudes requires understanding why they are imbedded as they are, what inheres in the institution, what does not. I only touch on those factors here, mainly as I experienced them.

In *Just Mercy*, Bryan Stevenson repeats his grandmother's admonition long before he embarked on his storied civil rights career. "You can't understand most of the important things from a distance. You have to get close" (Stevenson 2014:14). "Getting proximate," is how he describes it, proximate to the condemned and those unfairly judged.

Judges are socialized not to be proximate in the way that Stevenson describes. They are supposed to be removed from the parties and the lawyers, on a pedestal, in a costume—the robe. Their information sources are limited—primarily the arguments of the lawyers, legal research. They are supposed to be an "other." Reverend, advocate, and scholar Vivian Nixon has

spoken of the rage she has felt about the criminal legal system, and the importance of not describing it in antiseptic terms. But those are the very terms that judges are taught to use—words that distance, that are emotionless. One scholar referred to this as "the cultural script of judicial dispassion," the idea that judging must be as "insulated from human life and emotion as possible" (Maroney 2011:631). The disciplinary rules and judicial training even encourage judges to avoid social situations in which their neutrality can be compromised, or that raise even that appearance.

State court judges (and obviously elected judges) are different; they work in the communities they serve. That is where their courthouses are, where they must park their cars, eat their meals.



JUDGES ARE SUPPOSED TO BE REMOVED FROM THE PARTIES AND THE LAWYERS, ON A PEDESTAL, IN A COSTUME—THE ROBE

Federal judges in large urban communities are often at some distance from the communities whose members regularly appear before them. And that distance, literal and figurative, made a substantial difference when legislation passed in the 1980s federalized street crime; federal courts began to prosecute low-level drug offenses, their jurisdiction overlapping that of the state courts and their separation from the communities they served even more significant.

I felt that distance the moment I became a federal judge. When I had been a civil rights and criminal defense lawyer, I had represented people accused of crimes from all of Boston's communities; I had visited homes, spoken at churches and schools, bailed out defendants in police stations across the City often in the middle of the night. But now a federal judge, I drove to the courthouse from a Boston suburb, on the Massachusetts turnpike that went under the city, and landed in the federal court garage. If I had not purposely reached out, I would have missed all the communities the turnpike steered me underneath.

This distance and "otherness" derive in part from an ideology of judging, legal formalism, an ideology largely rejected by the legal academy and most judges, but still alive and well in the media and the judicial selection process. It was reflected in Justice John G. Roberts' testimony before the Judiciary Committee in 2005. "It's my job to call balls and strikes," said Roberts at his successful confirmation hearing to be chief justice of the United States (2005). It was the theme of Justice Clarence Thomas' remarks that he would be "stripped down like a runner," and would "shed the baggage of ideology" (Greenhouse 1991).

Judicial selection—at least up until recently—mirrored this view (Southworth 2018). It is not too much of an exaggeration to say that federal judges were selected in direct proportion to how little they had said publicly about controversial issues (Gertner 2016). They assured the Senate that they were ready to be those "umpires" or "stripped down" runners. In addition, their backgrounds were homogenous; most were white, male, from large law firms, or with prosecutorial experience (Shepherd 2021).⁴ And if you were not stripped down like a runner, or the proverbial umpire, you were an "activist." (I was one of the exceptions; I had been an outspoken civil rights and criminal defense lawyer for 24 years before I became a judge.)

I recall after I issued an opinion refusing to consider traffic offenses to enhance the sentence of a Black man when those charges appeared to reflect “driving while Black” (driving an unregistered car, unaccompanied by any other offense, in the white suburbs of Boston), a colleague asked whether I was afraid I would be labeled an “activist” (*United States v. Leviner* 1998). I was not. The decision was a fair interpretation of the law, a fair application of the law to the facts at hand. It applied the formal rules to a real life context; it looked at the rules not as abstractions but as having real consequences, reflecting real biases. More recently, a scholar commented on a story I related about one of the men I sentenced, a young man with a bullet in his brain, whose trauma was largely ignored by the prosecutors. I did what I could to mitigate the harsh effects of the law, giving him a sentence as low as I could lawfully go. Wrong, this scholar suggested. I was being “results-oriented” (Kolber 2020).

It was an extraordinary comment. Sentencing, after all, *is* about results—what outcomes make sense, what alternatives are possible that do the least harm (18 U.S.C. §3553(a)). Even in a mandatory regime, hedged about by rules, judging is an interpretive process, informed by considerations of justice and equity, empathy and compassion, a view far more complex than Roberts or Thomas would suggest. Judge Denny Chin (2020:1561, 1563–1564) of the U.S. Court of Appeals for the Second Circuit made it clear that although empathy “should play no role in a judge’s determination of *what* the law is,” empathy is “essential ... in the real-world, day-to-day administration of justice.”

Judges’ experiences necessarily figure into the equation. At least until recently, we selected judges almost exclusively in their late 40s and older, after a life lived in the legal profession and the world, with their attitudes and their experiences, expressed and unexpressed. The question is *how* to deal with their experiences, not *whether*. For many judges, the failure to acknowledge those experiences and how they figure into judging too often means not reflecting on their biases and the way their experiences skew their viewpoints.

Experiences and the assumptions about the world they engender affect all decisions, big and small—the time you give to the case, whether you see it as a complex issue or open and shut. One judge told me that if he did what I did at sentencing, it would require him to spend the same amount of time for a criminal sentencing as he spends on complex patent cases; he did not think sentencing required that. He privileged efficiency over all—except in his commercial cases. But learning more and more about a defendant may get a judge as proximate as they can be. *When* you decide affects *what* you decide, whether in a deliberative pretrial setting, after a hearing, or in the midst of a trial with a jury impatiently waiting. Judicial shortcuts affect not just the speed of justice, but the quality. Efficiency is not neutral—you choose it over access to justice and a more complete understanding of the case.

Experience (and thus bench diversity) obviously matters. If you have never seen a police officer lie on the stand, you may well believe—as a judicial colleague once told me—that the officer witness is not likely to do so. That colleague’s threshold for evaluating a police officer’s credibility was different—higher—than the threshold of someone who had had that experience of seeing a police officer lie. If you have never been in communities of color when a policeman stops a Black teenager, you may well believe that he must be guilty of the crime when he runs, rather than that he feared arbitrary violence at the hands of the police. If you have never selected jurors when a Black defendant is on trial, you would not have rejected the elderly white woman from one of Boston’s suburbs, who when asked if there is any reason why she should not serve, told me that she was “afraid” to come into Boston. While I excused her, it may have been just as likely that a judge in another courtroom would believe that her comments were not problematic, or worse, true. While we screen jurors for their biases, we assume judges’ neutrality once they are confirmed and on the bench.



**EFFICIENCY IS NOT NEUTRAL—
YOU CHOOSE IT OVER ACCESS TO
JUSTICE AND A MORE COMPLETE
UNDERSTANDING OF THE CASE**



WRITING OPINIONS IS IMPORTANT NOT SIMPLY FOR ITS IMPACT ON THE PUBLIC AND THE MEDIA NARRATIVE BUT ALSO BECAUSE IT CHANGES THE DECISION-MAKING PROCESS, THE WAY A JUDGE SEES THE CASE

Sociocultural factors determine the issues judges identify as problematic. Judges did not have to learn much about the groups to which *they* belong; given the makeup of the bench, they know all about the middle-class or upper-class white male defendants. As to that group, judges were not really “others.” This was not so with respect to the Black or Latinx defendants who made up the bulk of most urban dockets. When 30 Black defendants were brought into my courtroom and described as members of a violent street gang, I wanted to scrutinize this label “gang.” For someone who knew the communities in which the defendants lived, the “Castlegate gang” was simply a group of men who lived on one street, grew up together, or, as one mother in a different case described, were in Pampers together. What the government described as their “aliases” were names they gave each other as children. They may have been dealing drugs, but to caricature them as if they were MS-13—or worse, the “superpredators” of the Clinton era—was absurd to me (Moriearty 2010).⁵

And apart from the experiences judges bring to the bench, there are additional influences that derive simply from their judicial service. The longer one is on the bench, the more likely embedded assumptions about the criminal legal system remain unexamined: the judge believes that they have “no choice” but to follow them. Robert Cover, speaking of the antislavery judges who enforced the Fugitive Slave Act more rigorously than they had to, described this as the “judicial can’t” (as distinguished from “judicial cant”) (Minow 1990:8). The habits of mass incarceration have framed sentencing for over thirty years. As one scholar described it:

Tough on crime policies have dominated the country for decades, and judges have been at the frontline of enforcing these policies. As public sentiment changes and legislatures pursue reforms, judges are likely to lag behind. For a judge, being less punitive means reversing course on a career of judicial decision-making. Ideologically motivated or not, many judges have grown comfortable in their practices, trust the wisdom and experience they have gathered from years on the bench, and will not be eager to change how they collect fines and fees or impose bail (Brett, Doyle, and Nagrecha 2020:10).

Caseload pressures, real and imagined, have their own dynamic. I was encouraged not to write opinions unless I had to. Opinion writing, the trainers cautioned, slowed down case management. It meant I could not get to as many cases as other judges who chose not to write as much. Sentencing memoranda, explaining why I sentenced someone as I did, were especially unnecessary to the trainers. An open court recitation was adequate, indeed the norm. That meant that only the parties in the room were likely to hear the explanation of the sentence, not the media (unless they happened to be there at the time), or the judge in the courtroom next door, or the one across the country. That meant that no other judge would be able to use my sentence or my analysis as precedent for theirs unless I was appealed to the higher court. And if I were appealed, then the court of appeals' analysis in their written opinions—antiseptic, out of context, too often reversing a more lenient sentence I imposed—would supplant mine. So, the precedent was shaped—rarely reexamining the tropes that underpinned mass incarceration, and even those that facilitated racial caricatures.

Writing opinions—as I describe—is important not simply for its impact on the public and the media narrative but also because it changes the decision-making process, the way a judge sees the case. The legal literature suggested that “writing opinions could induce deliberation that otherwise would not occur” (Guthrie, Rachlinski, and Wistrich 2007). In contrast, using “scripts, checklists, and multifactor tests” decreases judges' reliance on their own experiences and memories (Guthrie, Rachlinski, and Wistrich 2007). There is no more pernicious checklist than the Federal Sentencing Guidelines, which, though advisory, exerted a gravitational pull on what judges do, a gravitational pull that necessarily led to higher sentences. Judges felt anchored to the Guideline ranges, even when they had discretion to reject them, imposing harsher sentences than they would otherwise have given (Guthrie, Rachlinski, and Wistrich 2001; Bennet 2014). The power of precedent normalized Guideline sentences, and even mandatory minimum sentences, that would have been obscene years before. Judges—indeed all of the participants in the criminal legal system—had come to view imprisonment as the appropriate punishment for all crimes with the only question being, “*how much imprisonment?*” (Gertner 2016).

Legal doctrine, or precedent, whatever its initial rationale, has a life of its own. For example, standards have evolved that excuse police misconduct or justify otherwise illegal searches—qualified immunity in the former case, good faith defenses in the latter. These doctrines may have made sense at the outset, but their meaning is lost in the repetition, in their application to contexts far afield of the original one. Worse, those doctrines have cognitive consequences. Just one example: the habit of excusing police

errors in case after case leads to a bench unable to ever see police or prosecutor errors even when they are clear, even when they should be recognized in the law. Judges lose the ability to envision what error even looks like (Gertner 2012). And if they never had any personal experience in the criminal legal system—especially as a defense lawyer—they may well never have had that ability in the first place. □



THE POWER OF PRECEDENT NORMALIZED GUIDELINE SENTENCES, AND EVEN MANDATORY MINIMUM SENTENCES, THAT WOULD HAVE BEEN OBSCENE YEARS BEFORE

REIMAGINING JUDGING

What does it take to turn this system, with these pressures and influences, around? Given judicial resistance to changing the habits of mass incarceration, how can we provide institutional support for meaningful change? A few suggestions follow.

INSTITUTIONAL CHANGES

JUDICIAL SELECTION

An important first step is to change whom we select for the bench. It is not simply a question of racial, ethnic, or even gender diversity. A bench can be racially diverse, diverse in terms of gender and sexual preference, and still come from the same socio-cultural background as most judges have for decades. The issue is diversity of experience, not just demographic diversity. The vast majority of judges are former prosecutors and government civil attorneys, rather than defense or civil rights attorneys (Woods 2020). And if they are not prosecutors, they are corporate

lawyers. Eighty-five percent of former President Obama's appointees were in either category (The New York Times 2014). And recent selections have also done little to change the gender or racial makeup of the bench. They may well be extraordinary legal thinkers, they may well have the appropriate temperament, but they represent a narrow swath of attitudes and experiences—and that matters to the thousand decisions, big and small, that they must make on the bench.

JUDICIAL TRAINING

Judicial training, at least in the federal courts, is largely about rules, as if the only measure of a fair sentence is whether it is lawful, within statutory limits. While the Federal Sentencing Guidelines are now supposed to be advisory, judges are primarily trained in their application. The slide deck used by the United States Sentencing Commission is almost completely about the Guidelines, their application, and their interpretation, save for the last slide which announces that the Guidelines are advisory. There is no analysis of how to deal with that new discretion, or what programs and considerations might be relevant. It is no small wonder federal judges continue to default to the guideline analysis; there is no framework for anything else.

We need a “Square One” program for all judges if changes in a reimagined criminal legal system are to be reflected in court. Training about the impact of trauma, exposure to violence, poverty, and lack of access to schools, healthcare, employment, etc., should be required. They should hear from scientists about the neuroscience of trauma, addiction, and adolescent neurodevelopment; from sociologists about the social and cultural contexts of men and women they are sentencing; from health professionals about the social determinants of health. As I have described, this information—not

likely a part of the world view of the majority of judges—informs how a judge sees a case, how carefully they will question the parties, how deeply they will delve into the issues, and how much time they will give to it, as well as what he or she may do in the final decision.

That discussion needs to be paired with a sophisticated understanding of the risk of pathologizing defendants from Black and Latinx communities, the danger that the problems appear so complex that they are beyond a judge’s consideration at all. One of the many factors that ushered in mandatory sentencing in the 1980s was an article by sociologist Robert Martinson which seemed to suggest that nothing worked to rehabilitate people who have committed harm.⁶ We know that “nothing works” is wrong in many contexts related to crime, violence, and harm. The papers generated by Square One make that clear (Hawks, Lopoo, Puglisi, and Wang 2021; Alexander and Sered 2021; Jones-Tapia 2021; Austin, Schiraldi, Western, and Dwivedi 2019).

We need training programs that include information about other countries' criminal legal systems in order to enable judges to envision approaches other than the usual ones, and other than the assumptions of thirty years of judging. Judges often believe that what they are doing is the only way criminal legal work can be done, as if U.S. penal practices reflect the natural order of things. They do not.

SENTINEL EVENT AUDITS

In medicine, doctors hold "sentinel event" reviews whenever there is a death or serious physical or psychological injury to a patient or patients.⁷ Too often, the only outcome that matters to judges is a reversal by a higher court or press criticism. For the police, we have discussed changing incentives from arrests and convictions to more substantial measures of a community's health and safety (Pearl 2019). Likewise, we need to change the incentives for judges, and in so doing change their deliberative processes. Judges (and other players in the system) could hold a retrospective review when there is a wrongful conviction, when there is recidivism, or when there is an unexpected tragic event. What happened? What could be changed? What did we miss? What program worked or did not work? Should recidivism even be the measure of success or some other criterion—family, job, reintegration into a supportive community?

What about accountability for wrongful or disproportionate sentences? What if judges were obliged to review case studies of what has happened to the defendants sentenced to lengthy retributive sentences, reexamining them, critiquing them, and considering alternatives?⁸ Did a thirty-year sentence, or twenty years, or ten, make sense in this case, in a humane, or even rational, sentencing system? How much did it disrupt the defendant's life course? Was it justified? What else could have— or should have—been done?

STATISTICAL REVIEWS

One way to address racial bias in policing is an after the fact, thorough statistical analysis of arrests to examine the extent to which they correlate with the race of the defendant. To be sure, this requires a commitment to accurate data collection and periodic reviews. Judicial decisions are rarely subject to that kind of analysis, except by scholars; even then, the analysis happens on a group, not an individual level. Fearful of public criticism, judges are reluctant to allow scrutiny of their sentencing decisions (Gertner 2012).⁹ The fear is well-founded in a world in which press coverage of criminal matters is more parody than fact. Still, there is no other way to address unexamined bias.

I am working to submit my seventeen-year record to a statistical analysis to identify my racial bias. When I proposed such a program while I was still on the bench, there was considerable resistance; judges feared that the analyses would become public, that they would be criticized in the media, that Congress would swoop in with additional mandatory minimums. But without a statistical examination of sentencing, even if only for the internal review of the courts and individual judges, there is a risk that a judge will see racial bias as an abstraction; it applies to other judge's decisions, not their own.¹⁰ And for the public, such reports could well enhance the court's legitimacy, suggesting "we have nothing to hide," even "we are trying."

COMMUNITY ENGAGEMENT

Federal judges are too often removed from the communities they serve. The community's voice is filtered through the prosecutor and occasionally the victims, who pass on only the information that is most advantageous to seeking harsh sentences. The Black community had broadly supported police-driven efforts to deal with crime in their communities, but their attitudes began to change as more and more young men were sentenced to extraordinarily long sentences and as police practices in stopping and frisking young Black men were exposed. That support dissipated, and they sharply

criticized the government, when the U.S. Attorney decided to seek the death penalty in a case before me involving the murder of a man, allegedly by a local gang.

Concerns about judicial neutrality should not impede meaningful, unfiltered engagement with the community, an understanding of its needs and resources, what it takes to make a community flourish, and the role that courts play in doing so. That engagement should count as important—indeed more important—than the usual engagement with bar associations or law schools.

Judges are rarely held accountable in a meaningful way for their criminal legal decisions. They may be appealed, but that is not real accountability. That is only about conformance with rules and procedures, not necessarily justice. Judges may be criticized in the press, but that is rarely a dispassionate review and is often discounted. In fact, judges are likely to be criticized for sentencing too little, never too much; held responsible when someone they sentenced commits another crime, no matter what the cause, and not when someone they sentenced succeeds in reconstructing (or constructing) a good life. It results in a one-way ratchet, rewarded for over-punishing, for adopting whatever sentence the prosecutor requests, but rarely for their humanity and compassion.

NARRATIVE CHANGE

The Square One discussions, channeling the movement for Black lives and the pushback against mass incarceration, addressed not only criminal law reform, but also the importance of creating a new narrative about crime, justice, and equity. The questions I grapple with are, how can that narrative be reflected in the work of judging, and perhaps more critically, how do we incentivize judges to do so?

Opinion writing is the way for judges to reflect new narratives, to shine a light on the humanity of the defendants, and the inhumanity of the criminal legal system. In *Do Judges Cry? An Essay on Empathy and Fellow-Feeling*, the authors cite to the dissent of Justice John Harlan in *Plessy v. Ferguson* (1896), which they describe as “lamenting the sterile formalism by which the majority found nothing wrong with a railroad ordinance that required separate seating for white and black passengers,” the opinion of Judge David Bazelon of the D.C. Circuit in *United States v. Alexander* (1973), who discussed the ways in which a “rotten social background,” including child abuse, violence, and maltreatment, should figure into the court’s understanding of a defendant, and my opinion in *United States v. Leviner* (1998) (which rejected the consideration of prior convictions that were for “driving while

Black”) (Delgado and Stefancic 2019:51, 50.). Other examples might include my opinion in *United States v. Haynes* (2008:19) (courts should consider the ways in which the failed experiment in mass incarceration has disrupted families and communities) or Judge Jack Weinstein’s decision in *United States v. Bannister* (2011:63) (warning that mandatory minimum sentencing “impose[s] grave costs not only on the punished but on the moral credibility upon which our system of criminal justice depends”).¹¹ Or perhaps the most compelling narrative was in *United States v. Burudi Faison* (2020:P2), which begins a sentencing memorandum with a quote from Shon Hopwood in *Law Man: My Story of Robbing Banks, Winning Supreme Court Cases, and Finding Redemption* (2012:12–13): “As we neared the prison, I saw its razor-wire fences, towers, and lights...Our bus pulled up to the gate. Again, we faced a reception line of guards with shotguns and automatic assault rifles.”

Even in situations in which a judge must impose a mandatory sentence, when the opinion is nothing but a *cri de coeur*, a judge should write if only to decry the unfairness of the result. In *United States v. Vasquez* (2010), Judge John Gleeson began:

When people think about miscarriages of justice, they generally think big, especially in this era of DNA exonerations, in which wholly innocent people have been released from jail in significant numbers after long periods in prison. As disturbing as those cases are, the truth is that most of the time miscarriages of justice occur in small doses, in cases involving guilty defendants. This makes them easier to overlook. But when they are multiplied by the thousands of cases in which they occur, they have a greater impact on our criminal justice system than the cases you read about in the newspapers or hear about on 60 Minutes.

The goal is explicit: to speak not simply to the litigants and possibly the appellate courts, but to the public. Chief Justice Warren was clear that the majority decision in *Brown v. Board of Education*, reversing *Plessy* should have the public in mind: “[The opinion outlawing separate but equal education] should be short, readable by the lay public, non-rhetorical, unemotional, and above all, non-accusatory” (Guinier 2008). During my time on the bench, I tried to make the first three or four pages of any opinion the functional equivalent of a press release (Gertner 2016).¹²

Judges speak through their opinions—to the lawyers, to other judges, to the media, to the people before them. They can speak in the antiseptic language of the law, the language of guidelines and rules. They can pretend that what they are doing is fair when it is not. Or they can change the narrative. □



OPINION WRITING IS THE WAY FOR JUDGES TO REFLECT NEW NARRATIVES, TO SHINE A LIGHT ON THE HUMANITY OF THE DEFENDANTS, AND THE INHUMANITY OF THE CRIMINAL LEGAL SYSTEM

CONCLUSION

The habits of mass incarceration die hard, helped by the insularity of the courts, by its composition, and by factors I have only begun to address. But these habits are not impenetrable. The goal is to engage the courts in the wider discussion about the unfairness of the system, its impact on poor communities and especially communities of color. The goal is to invite judges to reimagine what community safety really looks like, not with police, prosecutors, and exorbitant mandatory minimums—and the role that judges can play in facilitating it. James Forman put it best. He describes the criminal justice system as so disaggregated and uncoordinated, no single actor can take responsibility for the growth of our carceral system.

[N]obody has to take responsibility for the outcome, because nobody is responsible—at least not fully. This lack of responsibility is crucial to understanding why even reluctant or conflicted crime warriors ... become part of the machinery of mass incarceration and why the system continues to churn even to this day, when its human toll has become increasingly apparent (Forman 2017:14).

The way to change is to hold all of the players in the criminal legal system accountable—including judges, to effect a true reckoning. □



THE GOAL IS TO INVITE JUDGES TO REIMAGINE WHAT COMMUNITY SAFETY REALLY LOOKS LIKE, NOT WITH POLICE, PROSECUTORS, AND EXORBITANT MANDATORY MINIMUMS—AND THE ROLE THAT JUDGES CAN PLAY IN FACILITATING IT

ENDNOTES

1 Though it is outside of the scope of this paper, this author would also like to recognize the rich history of indigenous customary judicial practices, which often rely on the assistance of elders and community members to adjudicate disputes rather than formerly trained judges. See, e.g., Fletcher 2007.

2 Tonry, Michael. 2010. "The Questionable Relevance of Previous Convictions to Punishments for Later Crimes." Pp. 91-116 in *Previous Convictions at Sentencing; Theoretical and Applied Perspectives*. Robert Cover writes that "(n)o set of legal institutions...exists apart from the narratives that locate it and give it meaning," (The Supreme Court 1982). The "narrative" of the Commission was that it was an "expert" agency, its Guidelines were comprehensive, and that the Guidelines not only reflected congressionally

mandated purposes of sentencing, they achieved them. Relative to those formidable sentencing experts on the Commission, so the mythology goes courts were poorly suited to decided sentencing. None of the Guidelines ideology was true (Gertner 2006). Ohio received a score of one on a scale of most voluntary to most mandatory state sentencing systems. Judges didn't need written reasons to depart from sentencing guidelines, and sentencing departures weren't subject to appeal (Kauder 2008). Incarceration in Ohio state prisons has risen 184% since 1983; most of the increase occurred from 1983-2000 (Vera Institute of Justice 2019).

3 Number of homicides increased by 16% during the first half of 2021 compared to the same time frame as 2020, and by 42% compared to the same time frame in 2019. The aggravated assault rate was 9% higher in the first half of 2021 than during the same period in 2020, and the gun assault rate was 5% higher in the first half of 2021 than the year before. Motor vehicle theft rates were 21% higher in the first half of 2021 than the year before. Other major crimes declined. Robbery (-6%), residential burglary (-9%), nonresidential burglary (-9%), larceny (-6%), and drug offense (-12%) rates dropped from the same period in 2020. (German 2020); (Farivar 2020) suggesting that bail reform is not responsible; (Leslie and Wilson 2021) domestic violence calls are up; CCJ describes trends from 2020 through July 2021 (Rosenfield and Lopez 2021); (FBI 2021).

4 Eighty percent of federal judges are white, and 73 percent are men (Faleschini, Oyenubi, and Root 2019).

5 This seemed to be the residue of the “moral panic” of the 1990s, when the media, politicians and even judges, reflected the view there was a new breed of adolescents, “godless,” even “deviant.”

6 Martinson, Robert. 1974. “What Works? Questions and Answers about Prison Reform.” *The Public Interest*. He subsequently recanted some of his conclusions in “New Findings, New Views: A Note of Caution Regarding Sentencing Reform,” (Martinson 1979).

7 This is also done for child fatalities in most states. Intensive death reviews are conducted of children who die within one year of the family having contact with child welfare. The purpose is not to lay blame, but to uncover systemic improvements that can prevent future similar deaths. This is a structured confidential process that results in formal recommendations to various community stakeholders—not just child welfare. These death reviews are responsible for seat belt and bike helmet policy changes as well as investments in safe sleep campaigns. Just an example of how this interagency process can focus on the system rather than individual decision-makers or actors.

8 In effect, that is what the book I am writing, *Incomplete Sentences*, is about.

9 In a perfect world “[j]udges would look carefully at the statistics. They would be eager to go over the data with a fine-tooth comb, discuss why their sentences were alike or different, engage with their colleagues and perhaps persuade them of the rightness of their approach or the opposite, change their minds. They would analyze what worked and what did not work. Their sentences would be more consistent because they had the data to enable them to situate the case before them in the context of larger sentencing patterns in the district or in the country. *They would behave, in short, like some physicians who study medical outcome in a systematic way, or who, at the very least, compare therapies with their colleagues in peer review procedures,*” (Gertner 2012). (Italics supplied.)

10 In another context, a well-regarded employment lawyer in Atlanta studied how judges in the Northern District of Georgia dealt with employment discrimination cases. Of the 181 cases in which the plaintiff had counsel, the district courts dismissed 95 percent of them in part and 81 percent in full. Racial hostile work environment claims were dismissed 100 percent of the time. Data broken down per judge revealed that some judges had dismissed all—literally all—discrimination cases in the two-year period studies. Data also suggested that white plaintiffs

alleging reverse discrimination had a better success rate than Black plaintiffs alleging discrimination (Farahany and McAdams 2013).

11 See generally, Roth, Jessica A. 2017. “The “New” District Court Activism in Criminal Justice Reform.” *NYU Annual Survey of American Law* 72(2):277–363, addressing the case for reform made in the pages of their judicial opinions, in articles and speeches.

12 I had a way of referring to this to my clerks. If the law required that I do *x*, I would do *x*, even though I disagreed, but I would surely drop a footnote—“Oy, is this unfair!” Some decisions, I would tell them, are all “oy.”

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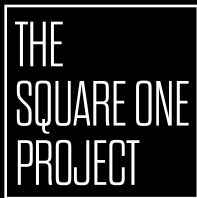
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