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Who appointed *me* God?

Reflections of a Judge on Criminal Sentencing

BY TIMOTHY J. CORRIGAN

IN my 14 years as a federal district judge, I estimate that I have sentenced well over 2,000 individuals.¹ Sentencing is the most multifaceted, emotional, and challenging task a judge performs. After a particularly difficult sentencing, I often say, sometimes to myself and sometimes aloud, “Who appointed me God?” or “Why did I possibly think that I was the right person for this job?” or “Why did anyone possibly think I was the right person for this job?” Of course, I know that sentencing judges are not God; we are mere mortals tasked with the sometimes impossible assignment of determining a sentence that is “sufficient, but not greater than necessary.”² But sentencing judges do have very wide discretion,³ and, in all but a few cases, the decision of the sentencing judge is final. The consequences of that sentence may have far-reaching implications in the lives

of crime victims, defendants, their families, and others. A sentence can have a ripple effect that can be felt by many and for a very long time.

This essay is personal, not scholarly, though I have read a good bit of sentencing scholarship.⁴ I also did not rely on data-driven research or a reading of sentencing decisions by other judges (though I have read many over the years). Nor have I attempted to undertake a comprehensive review of all major issues that arise in sentencing; rather, these are some selected topics — bias, the role of punishment, the “cooperation conundrum,” avoiding randomness, remorse and rehabilitation, conducting the sentencing hearing — that I deem to be representative and of special interest.⁵ While the citations are to federal law, the themes discussed largely apply to any judge, state or federal, who sentences criminal defendants. I am betting that

many of my experiences are similar to yours and that many of the questions I have you also share. Given that sentencing is the most sobering and important task given to us as judges, I think it instructive for us to step back every now and then, analyze what we are doing and why we are doing it. At the very least, writing this essay has been worthwhile (and somewhat therapeutic) for me; I hope reading it will prove of some value to you.



It was my very first sentencing as a district judge. The defendant stood convicted of operating a marijuana-grow operation. Not realizing the importance of accurately cataloging the number of marijuana plants, a law enforcement agent had indiscriminately stuffed the marijuana plants into

garbage bags. The cutoff point for whether the defendant's sentence carried with it a minimum-mandatory sentence was whether there were 100 or more marijuana plants. To determine this number, a DEA expert removed the marijuana from the garbage bags and attempted to reconstruct each individual plant from the broken, mangled, tangled mess. Some of the plants were a little more than an inch high, while others were full bushes. Following this painstaking effort, the DEA expert opined at sentencing that there were 102 separately identifiable marijuana plants. However, the defendant's counsel had hired his own expert biologist who performed the same reconstruction but found that there were only 98 marijuana plants, two short of the minimum-mandatory quantity.

I determined that each expert had equally impressive credentials (both had DEA backgrounds), used equally valid methodologies, and made equally credible presentations. In my first substantive act as a sentencing judge, I found that the evidence was in equipoise (a concept I had learned in law school evidence and had never before had occasion to apply), and because the government bore the burden of proving drug quantity at sentencing, I would not impose the minimum-mandatory sentence. Afterward, I thought to myself, "Are they all going to be like this?"



Just as "there is no crying in baseball," there is also no crying allowed by the judge when sentencing a person to prison. So powerful are the emotions at many sentencings, that in a heavy sentencing week, my courtroom deputy will hand out a full box of tissues to defendants, family, victims, and occasionally court personnel. But never to me.

However, it is the children who sorely test my resolve. He was eight years old, and his father, a now twice-convicted drug dealer, was before the Court for sentencing. Here is the child's letter to me:

Dear Judge,

I need my dad he's the only thing that can keep this family alive. My mom agrees, my sister, and cousin we need him and his strength. I love him and miss him if it happened to you I think you'd know how I feel. If you don't let him go let his soul be free with the lord.

Sincerely

At the bottom of the page he had circled what looked like a wet spot and written beside it, "This isn't water, it's a tear." Possibly the saddest thing I had ever read in a sentencing letter.

This same defendant's daughter addressed me, standing just a few feet away from her father:

I feel like my life is really changing right now. I'm 23 and I need my dad. He has persuaded me to go into the Air Force. He is very adamant that he wants me to do something with my life, he wants me to be successful and my eight year old brother, he's taking it really hard. We both are. But I love my dad and I know he's sorry for what he's done. I know he's ashamed, I know he's remorseful.

*[My brother] — he's really been having a really hard time. At times he doesn't want to go to my mom. We don't want to put too much of a burden onto my mom. So sometimes he'll come to me . . . And he used to love baseball. But now he'll say, it's not the same because dad's not there [she begins crying]. Sorry. It's just been a really tough time because we are used to being the four of us. But like I said, I know my dad is remorseful and sorry for what he's done.*¹⁶

Feeling the need to respond to her, all I could muster was this:

I know that it's difficult for you. I know I won't say anything that's going to make a difference to you but I do want you to know a couple of things. Sometimes in life people make bad decisions, but it doesn't make them bad people. And it's obvious that your father loves you, it is obvious that you are making something out of

yourself even though you are facing this difficult circumstance and that's exactly what you should be doing and exactly what he would want you to do. And one of the tragedies of situations like this is it doesn't just affect the person who is before the Court, it affects the whole family and lots of other people and I really understand that. I really do.

There's not always something I can do to make it all go away but I understand it and I think it showed a lot for you to stand up here today and talk to me and I'm proud that you are going to be serving our country.

As I uttered this last sentence, I came perilously close to violating the "no crying" rule.

BIAS

Winston Churchill once said, "Nothing in life is so exhilarating as to be shot at without result." I am not so sure about that.

On June 23, 2013, I was shot at while I was sitting in my own home in my favorite chair with my wife just a few feet away. The bullet, I am told, narrowly missed my head, and if it had not, would surely have been fatal. Thinking about it now, even three years removed, "exhilarating" is not the word that comes to mind.

My assailant turned out to be a criminal defendant whom I had sentenced several years earlier. The first time I conducted a sentencing after this unhappy event, I was concerned whether it would change my sentencing calculus. Knowing that the FBI and other law enforcement agencies had investigated the crime against me and the U.S. Attorney's Office was prosecuting it, would I now become "pro-prosecution"? Knowing that my assailant was on supervised release when he attempted to kill me, would I now be more likely to give longer prison sentences to keep locked up those who might try to do me harm? On the other hand, would I start to pull my punches, becoming more lenient in the hope that I could curry favor with a potential future assailant?

It turned out that none of those things happened. While my return to the bench within days of the shooting carried with it some anxiety, I can honestly say that the

incident did not affect my sentencing decisions. How can I be so sure? By identifying the possible bias in advance and taking care to be conscious of it, sort of an “examination of conscience,” I was able to neutralize its possible effects.

I recognize that I have just appointed myself arbiter of my own possible bias, but truthfully, no one else is likely to accuse a judge of sentencing bias unless it is egregious or documented. We judges must monitor ourselves for impermissible biases and do everything possible to eliminate them from our thinking.

There are other potential sources of bias in sentencing. Some are obvious — i.e., racial, ethnic, gender, or religious. Though not all would agree, I think that most judges are on guard against these types of bias.⁷ Even so, judges must remain vigilant so that these biases do not creep into their sentencing decisions.

Other biases are less easily recognized. Take, for example, two bank robbers, identical in all respects in terms of their criminal conduct and backgrounds. At the sentencing of bank robber number one, the bank teller victim declines to testify or provide a victim impact statement. At the sentencing of bank robber number two, the teller comes in and shares her story of being in fear for her life, discusses how the effects of her harrowing experience cause her to continue to live in fear, and says that she suffers from post-traumatic stress disorder. She asks the judge to impose the maximum sentence. Is the sentencing judge likely to be influenced by the victim’s testimony such that he gives a harsher sentence to bank robber number two than to bank robber number one, even though their conduct was identical? If so, is that impermissible sentencing bias or simply consideration of the effect of the crime on the victim as part of a rational sentencing calculus?

One day, after sentencing a female defendant, I was eating lunch with my staff, and my court reporter and courtroom deputy expressed the view that I was often more lenient when I sentenced women. This surprised me. Did I have a soft spot for female defendants? Because we sentence relatively few female defendants in comparison to males, I could recall many of those sentencings. Female defendants, much

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more commonly than males, are the sole providers and caretakers of young children. I therefore would often take into account the needs of these children in fashioning an appropriate sentence. So what my staff saw as leniency, I saw as a legitimate consideration concerning “the history and characteristics of the defendant.”⁸ But I was glad that they had raised this issue because it allowed me to identify a potential source of bias. I recently sentenced a male defendant who was the only caregiver for a young child, and I explicitly took that into account in structuring his sentence.

Not long ago, I was confronted with a case in which the defendant questioned whether I had been biased against him because he was a Chinese national. Two defendants were accused of importing massive quantities of chemicals into the United States for use in manufacturing synthetic drugs. The first defendant, an American, was caught in 2011, immediately

cooperated, and spent the next four and a half years providing an extraordinary level of cooperation to the government, going undercover on a number of occasions, and putting himself in harm’s way. This American defendant also testified before a number of grand juries and in trials around the country and had completely rehabilitated himself, operating a successful business and volunteering in the community. The American defendant also lured his Chinese counterpart to the United States, where he was arrested. Both defendants faced sentences in the 135-168-month range under the advisory guidelines.

I sentenced the American first. The government filed what was a highly unusual (in our district) request for a 16-level departure under United States Sentencing Guidelines § 5K1.1 because of the defendant’s cooperation, recommending only a very short prison sentence (the case agent actually disagreed with the prosecutor and wanted probation). After a day-long sentencing hearing, I sentenced the American defendant to probation, home detention, and a substantial period of supervised release, requiring 1,500 hours of community service and a community service financial contribution of \$500,000 (the defendant had already forfeited to the government over \$5 million).

When it came time to sentence the Chinese defendant, there was no § 5K1.1 cooperation motion and very little the Chinese defendant could do to cooperate, given that the American defendant had gotten there first and spilled all of the beans. Other aggravating factors also existed. The government asked for a downward variance to 96 months. I sentenced the Chinese defendant to 50 months. In so doing, I acknowledged the disparity between the American and Chinese defendants’ sentences but found that disparity to be appropriate:

I want to be clear about this that there will be a disparity between [the Chinese defendant’s] sentence and [the American defendant’s] sentence; there will be.

And I want to make absolutely clear — I hope it need not be said, but I want to say it anyway: That has nothing to do with their nationality or where they come from ▶

or what their culture is or anything like that. It really has to do with their case.

I view [the Chinese defendant] — and this happens all the time in our criminal justice system. The person who gets there first — and in this case it was [the American defendant] — who, when confronted with his crimes, agreed to cooperate with the government, and then just jumped in with both feet for a four-and-a-half-year period, racking up numerous prosecutions and other information for the government, none of which [the Chinese defendant] had an opportunity to do — but that's not all that unusual.

[The American defendant] effectively allowed the government to prosecute [the Chinese defendant] in circumstances under which the government would have otherwise not been able to do

And so what has happened is one business partner in an illegal enterprise has turned government's evidence and helped the government prosecute another one and in part is rewarded for that

But the fact of the matter is [the Chinese defendant] was a Chinese national when he was arrested here in the United States [and] there was virtually no chance he would get released and be able to do any kind of cooperation that was proactive, even if he were in a position to do so.

And you can call that an inherent unfairness in the system or you can call it the way it is or you can call it whatever you want, but it is the truth.

So there is going to be a disparate sentence but I don't think it will [be] unwarranted. And I would think that if the shoe would have been on the other foot, that if somehow [the Chinese defendant] had been the first one to the table and he had brought in [the American defendant] and others I think he probably would have gotten the same type of consideration that [the American defendant] got. I don't necessarily always think that's the best system that we have that rewards cooperation to such an extent

So I think there's going to be disparity. And I could see why somebody might object to that disparity, but I just don't think it's unwarranted sentencing disparity. I do think that [the Chinese defendant] has presented himself as a person

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who was importing illegal substances into the United States knowingly over a long period of time and in great quantities.

A few days after I sentenced the Chinese defendant, he wrote me a long letter questioning the fairness of his sentence in comparison to the American defendant and suggesting, among other things, that his nationality played a role. While I understand why he might feel that way, I think he is wrong. And I hope that by accounting for the potential bias in my sentencing decision, I have avoided "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct."⁹

All of us who sentence have potential biases, blind spots, or predilections that, if

we do not acknowledge them, can subconsciously affect our sentencing decisions. But if we do take care to "examine our conscience," identify these potential biases, and do everything we can to neutralize them, we are doing the best we can.

THE ROLE OF PUNISHMENT

It is not uncommon for a probation officer to tell me before a sentencing, "I don't think you will ever see this person again." Indeed, by the time of sentencing, some defendants have demonstrated appropriate remorse, completely turned their lives around, and have already transitioned to becoming law-abiding, productive citizens. Thus, their "history and characteristics" are positive, specific deterrence is not an issue, and the public needs no protection "from further crimes of the defendant."¹⁰ Sometimes these defendants receive sentences of either time served or probation. But there is another feature of our sentencing regime for which we must account: A defendant's sentence is also supposed "to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense."¹¹

Thus, "just punishment" must also be meted out. This requirement sometimes results in a prison sentence even when all other sentencing factors point to a non-incarcerative disposition. I frankly struggle when deciding such cases. But the concept of accountability and punishment for past misconduct has long been rooted in our criminal justice system.

In a recent *New York Times* article, Judge Stefan R. Underhill, a federal district judge for the District of Connecticut, writes of sentencing a man to 18 years in prison after he "had sold heroin, assaulted rival dealers, and murdered a potential witness."¹² Because the defendant was cooperative, the government had filed a substantial assistance motion (apparently advocating for even less than the 18 years Judge Underhill imposed), which allowed Judge Underhill to ignore the mandatory life sentence that the defendant would have otherwise faced. Judge Underhill then recounts a meeting he had with the defendant in prison and his belief that the

man had been completely rehabilitated and needed no further incarceration. (He had served about 11 years at that point.) Judge Underhill advocates for a “second-look review” to allow judges in certain circumstances one opportunity mid-sentence to adjust a sentence downward based on a defendant’s extraordinarily good conduct and rehabilitation in prison.

While I am open to considering Judge Underhill’s idea for a “second-look” at some sentencing (indeed, all judges have imposed sentences on which they would like a “do-over”), I question whether the defendant in Judge Underhill’s case would be deserving of such consideration. Even if you accept Judge Underhill’s belief that the defendant has been completely rehabilitated and poses no future threat to society, he still committed a cold-blooded premeditated murder, among other serious crimes. Under our current sentencing norms, it may well be that the 18 years of imprisonment he received was the minimum necessary “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.”

THE COOPERATION CONUNDRUM

The vagaries of how courts apply substantial assistance protocol lead too often to inconsistent and questionable results. While I understand the value of a criminal defendant cooperating with the government in the pursuit of solving further crime, I have long questioned the outsized role that cooperation plays in the federal sentencing regime. Here are just a few of the recurring problems I have noticed when dealing with substantial assistance motions.

The paradigm case, which fortunately does not happen frequently, occurs when the more culpable party, or even the ring leader, cooperates against his underling. In the worst-case scenario, the cooperator, with the benefit of a substantial assistance motion, can break through a minimum-mandatory sentence, while the underling, because of his lesser role and concomitant lesser knowledge, has nothing to offer the government. Fortunately, these cases are relatively few, as the government seemingly recognizes that this situation

creates unfairness and finds a way to either accord cooperation status to the underling or otherwise account for the problem in its charging decisions.

Another problematic issue arises when a defendant provides valuable information to the government, but, for reasons outside of the defendant’s control, the government cannot or chooses not to use that information in aid of a new prosecution. Because § 5K1.1 and § 3553(e) speak of “substantial assistance in the investigation or prosecution of another person who has committed an offense,” the government will decline to file a substantial assistance motion unless the cooperation leads to the making of or assistance in a new case (or prosecution of codefendants). All too often, this leaves an otherwise worthy and cooperative defendant standing at the altar.

The issue of third-party cooperation has proven troublesome. Until the government in our district tightened its standards as to when it will allow third-party cooperation (partially in reaction to complaints from the bench), I had a number of instances where the use of third-party cooperation was flawed. The most notorious example was a case in which a third party provided cooperation for which two of his cousins, both facing sentencing, attempted to claim credit. When I asked the government how it would decide who should get the benefit of the third cousin’s cooperation, the government attorney told me that he would leave it up to the cooperating cousin to decide which cousin he thought more deserving. Really? And this doesn’t even address the issue of whether the court ought to be encouraging third parties to potentially put themselves in harm’s way to benefit a defendant who takes none of the risk.

There are no national DOJ guidelines or other uniform standards as to how the government recommends or the court decides how much sentencing credit to give a defendant who is the beneficiary of a substantial assistance motion.¹⁵ In my own district, there is a written U.S. Attorney policy that if the substantial assistance leads to a new prosecution, the government will recommend a four-level reduction from the otherwise applicable advisory guidelines. If the substantial assistance leads to the prosecution of a codefendant,

the government will seek a two-level reduction. Greater departures require supervisory approval.¹⁴ In other districts, the government recommends sentencing credit based on a percentage reduction of the advisory guidelines range (the percentage varies widely, even up to 50 percent); in still others, the government makes no recommendation at all to the sentencing judge. Given the court’s ability under *Booker*¹⁵ to vary downward in any event, the amount of credit given for substantial assistance perhaps is not as significant as it once was; however, it is still important and there appears to be little consistency in its application around the country and sometimes within the same district.¹⁶

I have always been struck by the disparity that can arise in using guidelines levels as the basis for substantial assistance credit. For example, a defendant being sentenced either as a career offender or for an extremely serious offense and who has a lengthy criminal history might have an advisory guideline range of 35/6, which recommends a sentence between 292 and 365 months. If this defendant receives the benefit of a four-level reduction for his cooperation, his guidelines become 188 to 235 months, well over a 100-month reduction. A less blameworthy defendant with a shorter criminal record who receives the same four-level reduction reaps much less benefit. A defendant with an advisory guideline range of 16/2 (24 to 30 months), who receives a four-level substantial assistance reduction, has an adjusted guidelines range of 12 to 18 months, or 12-month difference. Thus, the more serious the offense that you commit and the worse your criminal record, the more you will benefit by your cooperation. The same holds true, by the way, if you apply a consistent percentage reduction to these two defendants’ guidelines. While there may well be cases where this type of disparity is appropriate, there are undoubtedly others where it is not. The sentencing judge, of course, is not bound by these recommendations, but surely they are influential, whether the judge explicitly uses them or subconsciously utilizes them as an “anchor.”¹⁷

Then, there is the defendant who “refuses” to cooperate. There can be reasons for this other than obstinacy or lack of

remorse. Sometimes, family members are involved and a cooperating defendant would have to name his own family to get sentencing credit. In other cases, defendants fear their cooperation will become known and either they or their family will be at risk.¹⁸ Still others just can't bring themselves to implicate somebody else. I recently had a defendant who did cooperate tell me in open court that he felt like "a piece of sh_t" for doing so.

Finally, the government's decision whether to seek pretrial detention and the court's decision whether to detain a defendant can dictate whether a defendant is able to provide meaningful cooperation. A detained defendant may only provide historical cooperation, while one at liberty can be proactive and possibly earn a larger reward.

These are just some concerns (not original to me) with the premium that we place on cooperation in our federal criminal justice system. We are overdue for a system-wide reevaluation of this process. I am not suggesting the elimination of cooperation as a feature of sentencing, but the current regime is in need of study and reform.

LOOKING FOR CONSISTENCY (OR AT LEAST TRYING TO AVOID RANDOMNESS)

A judge who has sentenced for any length of time lives in fear of catching herself coming and going. When people ask me what goals I am trying to achieve when I sentence someone, I always say that one thing I am trying to do is avoid randomness. Putting aside minimum-mandatory cases, why did I sentence the drug defendant last week to 151 months when I'm getting ready to sentence this drug defendant to 48 months? Why am I sentencing the bank robbery defendant who claimed to have a firearm but never displayed one to more time than the bank employee who embezzled far more money from the bank? Why, under the sentencing guidelines, does the defendant who went on a crime spree and robbed multiple banks not face significantly increased exposure than if he had robbed just one? Why am I sentencing a large-scale drug importer to 50 months when a couple of years ago I gave 54

No judge worth her salt can fail to be concerned with trying to achieve consistency, proportionality, and the avoidance of "unwarranted" disparity or apparent randomness in the sentencing process.

months to a single mother of an eight year old, who had committed serial identity theft and continued to do so even after she knew she was under investigation? Why do the sentencing guidelines eventually forgive a defendant for her long-ago past crimes, while the Armed Career Criminal Act has no such statute of limitations? Why under the advisory sentencing guidelines do repeat offenders of certain crimes pay a much higher penalty than repeat offenders of other types of crimes? Why is a repeat offender sometimes facing less time under the guidelines the second time than he was the first?

I could go on. I am not trying to be critical of the United States Sentencing Commission (which has the impossible task of setting guidelines for every federal crime and accounting for every conceivable sentencing scenario) or deny the difficulty in creating a fair and consistent sentencing regime.¹⁹ Indeed, there may well be good answers to some or all of my rhetorical questions, but to the extent that we seek to have "the punishment fit the crime" and to "avoid unwarranted sentencing disparity," sentences given in unrelated cases or at different times may sometimes be difficult

to reconcile or explain when viewed on a broader spectrum.

One answer is that every judge tries to sentence each defendant based on the individual facts and circumstances of the case without regard to the sentence that same judge (or another) may have given a different defendant convicted of another crime at a different time. This can be true even in the same case. I knew, for example, that when I sentenced the American drug importer to probation, I was likely to face a difficult decision as to how to sentence the Chinese exporter. Yet, I did not think it appropriate for me to "penalize" the American in order to reach some artificial "consistency" vis-a-vis the Chinese defendant.

The answer certainly is not to return to a mandatory guidelines scheme. Giving the sentencing judge discretion (as has occurred post-*Booker*) properly places the sentencing responsibility in the hands of the judge, allowing the judge to try to achieve a just sentence in the individual case. Indeed, I actually think the system we have now with advisory guidelines and sentencing discretion works relatively well. (It would work better if we eliminated or drastically reduced the number of minimum-mandatory sentences.) Even if we returned to a system requiring more deference to the guidelines, many of the problems of potential inconsistency I am describing would still be present.

Every time we sentence someone, we are expressing a societal value judgment as to the appropriate sentence for that particular crime and that particular defendant. No judge worth her salt can fail to be concerned with trying to achieve consistency, proportionality, and the avoidance of "unwarranted" disparity or apparent randomness in the sentencing process.

HOW DO WE KNOW WHETHER TO BELIEVE A DEFENDANT'S REMORSE?

This question, lurking in the background of many cases, was present in spades in a recent sentencing of a 19 year old who pled guilty to conspiracy to provide material support to terrorists. The defendant had trained himself to participate in jihad and traveled to the Middle East hoping to join

Al-Qaeda in Yemen, only to be rebuffed and returned home to the United States, where he continued to espouse the desire to commit terrorist acts. At sentencing, the defendant expressed remorse and regret, renouncing all of his radical leanings, telling me he considered himself to be an American who wanted to get his MBA and perhaps study how to combat terrorism. Where he had previously been bearded, long-haired, and robed, he was now clean-cut. My struggle over the sincerity of the defendant's remorse and rehabilitation was apparent:

If the Court was convinced that Bell's repentance was sincere and permanent, he would still need to be punished, but a lesser term of imprisonment would suffice. If the Court was convinced that Bell's radicalization was permanent and his remorse feigned, the full 30-year maximum term might well be appropriate because he would present an ongoing terrorist threat. What, though, if the Court cannot be sure?

Bell has admitted that he was a terrorist, that he had accepted and fully subscribed to the extremist views of Anwar al-Awlaki, and that he had become radicalized to the point of turning these views into action both in the United States and abroad. There may be lingering doubt whether he would have indeed fought and killed had he joined Ansar al-Shari'a or another terrorist group. But there is reason to think that he would have . . .

Bell understood that he would be considered a terrorist for his actions. Yet, he persisted in his radical agenda even after returning to the United States and knowing he was under surveillance by federal law enforcement.

Bell's past lies and full embrace of the terrorist ideology color his current expressions of remorse and make it difficult for the Court to know whether to believe his seemingly sincere renunciation of terrorism and re-acceptance of the label of "American." Bell is undoubtedly bright and capable of feigning remorse to obtain a more favorable sentence. But on the other hand, though it contains discrepancies, his letter's expressions of regret and hope of rejoining society and becoming a law-abiding citizen cannot be ignored.

At the sentencing hearing, the Court was interested to hear from Bell himself. As committed to the cause as he was in the many videos, the Court thought it might be difficult, if not impossible, for him to personally and publicly reject his past statements and actions. But he did. Had he done otherwise, the Court's decision here would have been easier. As it is, though, the Court cannot gainsay the possibility that, having now been in custody for nearly two years, Bell has permanently turned away from terrorism.

If he has, Bell would still have to pay for his crimes, but the Court's sentence could reflect that a troubled young life had begun the journey of rejoining civilized society. However, unlike other crimes, where, in a close case, the Court might give the benefit of the doubt to a seemingly remorseful defendant, terrorism-related crimes are different. Terrorism endangers the lives and property of the public at large, seeks to weaken or destroy societal institutions, and tries to spread as much fear and panic as possible. While the Court hopes that Bell's disavowal of this path is real, the need to protect the public from further crimes of this defendant remains an important consideration.²⁰

THE SENTENCING HEARING

Those of you veteran sentencers need no help from me as to how to conduct a sentencing hearing or arrive at your sentence. However, there may be some newer judges who might benefit from brief discussion of some things I have learned along the way:

1. *Read everything beforehand.* Even the letters. While numerous letters from a defendant's family or friends can be repetitious, they often contain useful nuggets (both positive and negative) and give you better insight into the person's character. (Then you can also truthfully tell the letter writers at sentencing that you have read them.) By the way, I am constantly amazed by how many criminal defendants lead double lives. At the same time they are committing serious crimes, their families and friends (who are either ignorant of their acts or willfully blind) consider them the salt of the earth.
2. *If at all possible, sentence related defendants or related cases together.* If you do not, you may find yourself having sentenced a defendant and later realize that a related defendant's sentence is not going to make sense, or you learn information in the related defendant's case that you would have liked to have known at the time you sentenced the first defendant. You are also more likely to be internally consistent within a case or a set of related cases if you sentence all of the defendants at the same time or nearly so. Indeed, I sometimes wait to impose sentence until I have heard all the related cases and then pronounce with everyone together.
3. *Be solicitous of victims who appear in person and of the defendant's family and friends.* It is a stressful time for all of them, and they very often do not understand what is going on. Take the time to thank them for being there and explain to them what is happening. If they are going to speak, consider letting them go first in case they have to leave and otherwise try to put them at ease.
4. *Don't underestimate how much what you say and how you say it during a sentencing hearing matters.* Offer victims, whose lives may have been devastated, sympathy and hope. Be empathetic to defendants' families who oftentimes are living a nightmare. There is nothing inconsistent with imposing a just sentence and trying to encourage a defendant to do better. I can only think of a few defendants (one remorseless father convicted of molesting his own child; another an unrepentant and defiant Ponzi schemer) for whom I could not find something positive to say. If appropriate, I will even compliment the lawyers and case agent for a job well done.
5. *Use the sentencing hearing to work out your own thinking.* More than any other type of hearing, you will learn more at a sentencing hearing that could influence

your ultimate decision. Often times, when I am questioning lawyers or witnesses at a sentencing hearing, I am listening to what they have to say but also verbalizing my own thoughts so I can in effect test my reasoning.

6. *Do not pronounce sentence until you are ready.* Early on, I felt the eyes of the courtroom on me and would start to pronounce a sentence before I was really sure what I was going to say. I have gotten over that. I always take at least a few minutes after presentations have closed to gather my thoughts and sometimes longer. If I need to take a recess, I do. In the rare case, I will continue the sentencing until another day so that I can give the matter more thought or perhaps research an issue as to which I am uncertain. Once you pronounce a sentence, that is it for all time. Don't rush.
7. While precedent under § 3553(a) does not require you to articulate each and every sentencing factor, I generally try to do so anyway, even if briefly, to *explain to all parties present my thinking and why I am going to give the particular sentence.* This approach has the added benefit of giving the appellate court a more complete understanding of your reasoning and allows you to listen to yourself as you speak to make sure that you are satisfied with your rationale and the result that you reach. I often find, too, that the family and friends of a defendant (and sometimes the defendant himself) don't appreciate the severity of the crime or the defendant's prior record. Taking the time to explain that may at least help them to better understand the sentence. I also articulate the sentencing guidelines, any applicable minimum-mandatory, and the statutory maximum, and I try to explain what they mean.
8. Although the law does not require it, I *give prior notice to a defendant if I am considering varying upward from the guidelines.* While upward variances are less common than downward variances, they do happen, and I do not want a

defendant to be blindsided when it does. If it is not apparent until sentencing that I might upwardly vary, I offer the defendant a continuance to prepare to argue against that course of action. Likewise, if the government is surprised by a downward variance and thinks it can provide me with additional information to convince me otherwise, I will give it an opportunity to do so.

9. *Don't be afraid to be creative if circumstances allow.* You have broad discretion in imposing a sentence, and there are times when you should use it.

A couple of examples come to mind from my own experience. There was a 60-year-old defendant, president of a small construction company, who at the behest of his neighbor took a "treasure map" and tried to dig up a crate stuffed with kilograms of cocaine which had been buried on a Caribbean island years before. (I likened the case to "Breaking Bad" meets "Walter Mitty.") Although the cocaine turned out to be unusable, and the defendant could not retrieve it without the aid of undercover government agents, he was nevertheless guilty of attempted possession of a substantial quantity of cocaine. Fortunately, the defendant qualified for the safety valve, leaving the minimum mandatory off the table. He had zero criminal history and was unlikely to ever get so much as a future traffic ticket. Without objection by the government, I sentenced the defendant to 60 days in prison, a period of home detention, and supervised release. One of the conditions of supervised release was that the defendant use his construction knowledge to work 20 hours a week for Habitat for Humanity. At the defendant's suggestion, I also required him to build a "Splash Park" in his hometown at his own expense.

Another defendant was a twice-convicted drug dealer facing a significant period of imprisonment. After the defendant was apprehended, his estranged wife suffered an injury that rendered her a quadriplegic. At the sentencing, the wife's sister essentially argued to me, "Don't you dare put him in jail and let him sit comfortably there

while his wife, who needs 24 hours a day assistance, goes without. The defendant will suffer much more having to attend to her than he ever will in a prison cell." Again with the concurrence of the government, I gave the defendant an extended period of supervised release and required that he provide full-time care for his wife during the entire term of his supervision. He continues to do so to this day.

All of us have had cases where a nontraditional sentence makes sense. If you can do so, try to get the government and the defendant on board, but even if you can't, it still might be the right thing to do.

10. Both at sentencing and in your written criminal judgment, *be specific in your recommendations to the Bureau of Prisons and to Probation and tailor those recommendations to the individual needs of the defendant.*

CONCLUSION

I am sometimes asked what's the most important attribute of a good judge. I used to answer that question differently, but now I say "humility." This is especially true in sentencing. No matter how long we have done it, we can never forget what an awesome responsibility it is to decide whether and for how long to deprive someone of their liberty. We also must remember our duty to those affected by the sentencing, to the general public, and



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to the cause of justice, to do everything we can to get it right. One aspect of that responsibility is to continually reexamine the various components of sentencing and recognize that sentencing, more than any other judicial function, is dynamic and needs constant attention. If we work hard at it, avoid complacency, and strive for a just sentence in every case, even if we are never fully satisfied that we are achieving it, we are doing all that can be asked of us.

¹ Though this number is enough for me to speak with some experience on the subject of sentencing, it is a fraction of the number sentenced by my veteran state court counterparts.

² 18 U.S.C. § 3553(a).

³ See *United States v. Booker*, 543 U.S. 220, 233 (2005) (“We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”); *United States v. Rosales-Bruno*, 789 F.3d 1249, 1273 (11th Cir. 2015) (finding that “the sentence did not exceed the outer bounds of the wide range of discretion that district courts are afforded”); *Ledford v. Peoples*, 605 F.3d 871, 922 (11th Cir. 2010) (explaining that when reviewing for an abuse of sentencing discretion “the relevant question is not whether we would have come to the same decision if deciding the [sentencing] issue in the first instance,” but instead, “whether the district court’s decision was tenable, or, we might say, ‘in the ball park’ of permissible outcomes”).

⁴ See, e.g., Jeffrey J. Rachlinski et al., *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L.J. 695 (2015); Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1 (2015); Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges’ Views on Allocation in Sentencing*, 65 ALA. L. REV. 735 (2014); Nancy Gertner, *How to Talk About Sentencing Policy—And Not Disparity*, 46 LOY. U. CHI. L.J. 313 (2014); Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523 (2007); Lynn S. Adelman et al., *Federal Sentencing Under “Advisory” Guidelines: Observations by District Judges*, 75 FORDHAM L. REV. 1 (2006); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003); Alan Ellis, *Views From the Bench on Sentencing Representation: Part 1*, LAW360 (Mar. 1, 2016), <http://alanellis.com/wp-content/uploads/2016/03/prison-sentencing-representation-law360-1.pdf>; Matthew Van Meter, *One Judge Makes the Case for Judgment*, THE ATLANTIC (Feb. 25, 2016), <http://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/>.

⁵ As this essay went to press, I attended a seminar put on by the United States Sentencing Commission which reminded me that there are so many other aspects of sentencing to discuss: reentry and drug courts, the role of the Bureau of Prisons, and

proposed guidelines reforms, to name a few. Maybe next time.

⁶ All transcript quotes are substantially accurate but have been lightly edited for ease of reading.

⁷ The current public debate about whether the enforcement of drug laws has had a disproportionate effect on African American and other minority communities has less to do with sentencing bias by judges and more to do with how the drug laws are enforced, the role of minimum-mandatory sentences, and lengthy drug sentences which were imposed under the preexisting mandatory sentencing guideline regime.

⁸ 18 U.S.C. § 3553(a)(1).

⁹ *Id.* § 3553(a)(6) (emphasis added).

¹⁰ *Id.* § 3553(a)(1), (2)(B), and (c).

¹¹ *Id.* § 3553(a)(2)(A).

¹² Stefan R. Underhill, Opinion, *A Judge’s Regret and a Killer’s Remorse*, N.Y. TIMES, Jan. 24, 2016, at SR4.

¹³ I have confirmed this both by research and an unscientific poll of some of my colleagues around the country.

¹⁴ I am told that this long-standing policy is currently under review.

¹⁵ *United States v. Booker*, 543 U.S. 220 (2005).

¹⁶ For a recent discussion of variances in Federal Criminal Procedure Rule 35(b) sentencing reductions around the country, see UNITED STATES SENTENCING COMMISSION, THE USE OF FEDERAL RULE OF CRIMINAL PROCEDURE 35(B) (2016).

¹⁷ Rachlinski, *supra* note 4, at 700 (discussing the “anchoring” effect of numeric reference points, even when such numbers are arbitrary).

¹⁸ The Judicial Conference Committee on Court Administration and Case Management, with the aid of the Federal Judicial Center, is studying the risks faced by cooperators and is in the process of providing guidance to sentencing courts. In connection with this effort, the FJC has just published *Survey of Harm to Cooperators: Final Report*. See MARGARET S. WILLIAMS ET AL., FEDERAL JUDICIAL CENTER, SURVEY OF HARM TO COOPERATORS: FINAL REPORT (2016).

¹⁹ A member of the Sentencing Commission, Circuit Judge William Pryor of the Eleventh Circuit Court of Appeals, has recently suggested significant reforms to the post-*Booker* sentencing regime. Judge Pryor proposes, among other things, a guidelines structure in which Congress and the Sentencing Commission would create a system of presumptive guidelines, a radically simpler system with wider sentencing ranges and fewer enhancements. Those remaining enhancements would be found by juries, not judges, unless a defendant admitted to the enhancements in pleading guilty. At the time this article went to press, Judge Pryor’s article, *Returning to Marvin Frankel’s First Principles in Federal Sentencing*, had not yet been published but should now be available to the reader.

²⁰ *United States v. Bell*, 81 F. Supp. 3d 1301, 1324–25 (M.D. Fla. 2015).

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