

# Reducing Sentencing Disparity by Increasing Judicial Discretion



**ALEXANDER  
BUNIN**

Federal Public  
Defender, Northern  
District of New York

Adjunct Professor,  
Albany Law School,  
Union University

During twenty-three years of practice in the federal courts in Texas, Alabama, New York, and Vermont, I have come to two conclusions. First, a prosecutor's decision to charge a defendant in federal court, and what charges to bring, is vastly more determinative of the sentence than any other factor in the process—much more than the identity of the particular judge hearing the case. Second, the judicial discretion of individual judges helps prevent far more unwarranted disparity and unwarranted uniformity than it causes.

## I. Prosecutors' Decisions Are the Primary Source of Unwarranted Disparity

When I was an assistant federal public defender in Beaumont, Texas, a large portion of my cases involved illegal drugs transported east on Interstate 10. About twenty miles southwest of Beaumont is the line dividing Chambers and Jefferson counties. Chambers County is in the Southern District of Texas and Jefferson County is in the Eastern District. If individuals are transporting 100 kilograms of marijuana on I-10, it makes a world of difference where they are stopped and arrested. In Chambers County, there is virtually no chance that charges will be filed in federal court because such a case is considered too small. The defendant will be prosecuted in state court, and might pay a large fine and receive probation. In Jefferson County, the case will likely become a federal prosecution involving a mandatory five-year prison sentence. The two cases do not differ except in an imaginary line on the highway and in two districts' charging policies.

During my entire time in Beaumont, I never saw a federal immigration crime charged. The reason was not because no noncitizens were living in Southeastern Texas in violation of federal law; rather, no such crimes were charged because there was no active Border Patrol or Immigration and Customs Enforcement office looking to make cases. In the Northern District of New York, where I now work as a federal public defender, a large portion of the docket comprises immigration offenses. Even individuals entering the United States with legitimate political asylum claims have been prosecuted.<sup>1</sup> Clearly, decisions made by the federal government regarding where federal criminal laws will be enforced,

and where they will not, has a drastic effect on national sentencing disparity.

These systemic disparities occur because United States Attorneys have different priorities based on such factors as the coordination between state and federal law enforcement, a district's proximity to an international border, peculiarities within different prosecutors' offices, and whether the population of a given area is urban or rural. When the sentencing guidelines were mandatory, variations occurred among districts and circuits,<sup>2</sup> and these variations increased in drug trafficking cases as judges compensated for the unwarranted severity of the drug trafficking guidelines.<sup>3</sup> Some of these regional disparities are simply inherent, unavoidable, and warranted.<sup>4</sup> The kinds of offenses and their seriousness, as well as community views of just punishment, differ by district. Because "retribution imposes punishment based upon moral culpability and asks [what] penalty is needed to restore the offender to moral standing within the community,"<sup>5</sup> the "community view of the gravity of the offense" and the "public concern generated by the offense" are relevant, as Congress itself recognized.<sup>6</sup> See *United States v. Cavera*, 550 F.3d 180, 195 (2d Cir. 2008) (en banc); *United States v. Politano*, 522 F.3d 69, 72 (1st Cir. 2008). By failing to take into account local conditions and norms, a blind application of the guidelines can foster unwarranted disparity.<sup>7</sup>

Many other disparities are merely fortuitous. For instance, in a multi-defendant case, when a defendant is debriefed pursuant to a cooperation agreement, self-incriminating information may not be used to calculate his guidelines (See U.S.S.G. § 1B1.8). However, by incriminating others, that first defendant prevents the other defendants from receiving that same benefit—even if their assistance to the government was not motivated by his cooperation—because the information against them will be deemed as coming from an independent source. Equally arbitrary is that even the initial cooperating defendant will lose this benefit if the statements are not made pursuant to a negotiated agreement, which the defendant may not have pursued if he lacked the necessary understanding and also lacked a lawyer to assist him. When defendants are arrested late on a Friday, the one who hires counsel immediately can get this benefit,

*Federal Sentencing Reporter*, Vol. 22, No. 2, pp. 81–84, ISSN 1053-9867 electronic ISSN 1533-8363.  
©2010 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website, <http://www.ucpressjournals.com/reprintInfo.asp>. DOI: 10.1525/fsr.2009.22.2.81.

whereas the others must wait until the next week for the appointment of counsel.

Even if one accepts the false concept that *disparity* is defined only as sentences below the guideline range, the government is more of the cause than are judges. The nationwide rate of below-guideline sentences sought by the government is much higher than that at which judges impose below-guideline sentences without the government's approval (government-recommended sentences, 25.3%; judges' sentences, 15.9%). And even these rates overstate the extent to which judges are acting over the objections of prosecutors.<sup>8</sup> Concern with disparity should be focused on judicial departures and variances only if one accepts the premise that any nonguideline sentence sought by the prosecution is warranted—a premise at odds with the United States Sentencing Commission's own research and Congress's concern with unwarranted disparity caused by plea bargaining.<sup>9</sup>

Judges are required to impose sentences that are sufficient but not greater than necessary to achieve the purposes of sentencing. Those sentences, which are announced in public and are subject to appellate review, are based on all of the relevant facts of the offense and the offender. On the other hand, Department of Justice policies require federal prosecutors to seek the harshest sentence possible. Although this directive is supposed to be national, some offices follow it and others do not. All of these decisions by prosecutors are made in secret and are not subject to appellate review.

Most often, the policy to seek the harshest penalties that are potentially applicable to a case is used either as a threat to induce guilty pleas and cooperation, or as a punishment for going to trial. The disparities in whether and how this policy is implemented depend on different philosophies among U.S. Attorneys, of supervisors within their districts, and of individual line prosecutors. Each U.S. Attorney's Office has its own standards for rewarding cooperation, and these can vary even among divisions in the same district. Despite having a substantial number of immigration cases (about 21%), as well as a lengthy international border, my district has no fast track program. It is difficult to see any relevant difference between some of the districts that lack fast track programs and those that have them.

## II. Judges Prevent Far More Disparity than They Cause

I have appeared as defense counsel in federal sentencing hearings before at least 18 different United States District Judges in a half-dozen districts. Some judges spent their entire time on the bench implementing the sentencing guidelines. A few preceded that model. In Beaumont, I appeared before the late Hon. Joe Fisher, who had been appointed by President Eisenhower and spent 35 years as the sole federal district judge for Eastern Texas. For 38 years, he sentenced defendants without any guidelines.

Among the various judges before whom I have appeared, virtually all expressed dissatisfaction with mandatory

minimum punishments, particularly in drug crimes.

Some did not like mandatory guidelines. However, none of those judges indicated that they wanted to go back to a system having no guidance of any kind except at the top and the bottom of the statutory range. All appreciated the assistance of the guidelines and only felt unnecessarily constrained when some requirement—whether a mandatory minimum, a prohibition on departure, or a restrictive appellate interpretation—kept them from fairly and individually addressing the defendant appearing before them.

The current advisory guideline system is better than what preceded it. Unwarranted disparity can result from the *exercise* of discretion, as when prosecutors apply charging or plea bargaining criteria that are unrelated to, do not advance, or thwart sentencing purposes.<sup>10</sup> But unwarranted disparity can also result from the *restriction* of discretion, as when judges were precluded by the mandatory nature of the guidelines from considering relevant offense and offender characteristics,<sup>11</sup> and were required to impose a guideline sentence when the guideline itself was unsound.<sup>12</sup> Judges can now act as a check on the unwarranted disparity created by prosecutorial charging and plea practices.

Judges must now impose a sentence that is sufficient, but not greater than necessary, to achieve just punishment, respect for law, deterrence, protection of the public, and rehabilitation (18 U.S.C. § 3553(a)). In doing so, judges must consider the applicable guideline range, all of the circumstances of the offense, and the history and characteristics of the defendant. Because judges are comfortable with the process of calculating and applying guidelines, and because the guideline range is still the initial benchmark, the change from mandatory to advisory guidelines has had no dramatic effect. The national rate of below-guideline sentences—both those requested by prosecutors and those imposed by judges without the government's agreement—has increased only moderately since before *Booker*. The average sentence length is about the same as it was in 2003.<sup>13</sup> Currently, however, defendants are no longer told that the judge has no choice but to impose an excessive sentence. Judges can explain the sentence in terms of the defendant's situation and what purpose the sentence is meant to accomplish. Today's sentences are more just, honest, and respectful. Except when a mandatory minimum statute applies, judges are no longer required to impose sentences that they believe are too severe.

The advisory guideline system can result in the evolution of more humane and rational guidelines. Judges can openly disagree with a flawed guideline, even in an ordinary case.<sup>14</sup> As the Supreme Court has said, when judges sentence outside the guideline range based on the purposes and factors set forth in § 3553(a), those judges are providing "relevant information" to the United States Sentencing Commission so that the guidelines can "constructively evolve over time, as both Congress and the Commission foresaw" (*Rita*, 551 S. Ct. at 358). The "Commission

remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly” (*Booker*, 543 U.S. at 264).

The fact is, many of the new below-guideline sentences judges are imposing actually prevent rather than increase unwarranted disparity. The guideline sentence in many cases is too severe given the nature of the crime, because the guidelines fail to take into account many relevant mitigating factors, such as the culpability of the defendant. The factors comprising the guidelines often bear little or no relationship to the seriousness of the offense. Take, for example, a minor player in a drug conspiracy who has no control over the quantities distributed. Similarly, with the advancement of computers and the Internet, a defendant can easily download thousands of pornographic images with the single click of a mouse. When the severity of the offense depends on events that are merely fortuitous, a sentence within the guideline range creates, rather than prevents, true disparity.

Under the mandatory guidelines, judges, prosecutors, and defense lawyers, alone or together, often circumvented the guidelines to reach a sentence that is more just,<sup>15</sup> but this “institutionalized subterfuge” is no longer necessary or acceptable. See *Spears v. United States*, 129 S. Ct. 840, 844 (2009). As judges impose sentences based on sentencing purposes, they are openly issuing more below-guideline sentences, because the guidelines recommend sentences that often are more severe than necessary to achieve sentencing goals. Judges are also using their discretion specifically to avoid unwarranted disparity and excessive uniformity. If the Commission reacts by reducing the severity of the guidelines, more sentences will fall within the guideline range.

Judges can now avoid both unwarranted disparity and unwarranted uniformity because they must consider all of the “nature and circumstances of the offense and characteristics of the offender” that are relevant to sentencing purposes. See 18 U.S.C. § 3553(a)(1); *Gall v. United States*, 128 S. Ct. 586 (2007).<sup>16</sup> As the Attorney General has said, “[N]ot every disparity is an unwelcome one.” Put another way, sentences that differ one from another or that differ from the guideline range are often warranted. When Congress enacted the Sentencing Reform Act (SRA), it recognized that disparities based on factors relevant to the purposes of sentencing were not only inevitable but also desirable (S. Rep. No. 98-225 at 52–53, 150, 161 (1983)). It therefore directed the Commission to *reduce* (not eliminate) *unwarranted* sentencing disparities (28 U.S.C. § 994(f)), and to *maintain sufficient flexibility to permit individualized sentencing* (28 U.S.C. § 991(b)(1)(B)). However, again quoting the Attorney General, “[t]he desire to have an almost mechanical system of sentencing has led us away from individualized, fact-based determinations that . . . within reason, should be our goal.”<sup>17</sup>

Rather than uniformity in sentencing, the SRA called for avoidance of unwarranted sentencing disparities.

When judges decline to follow guidelines that create unwarranted disparity or excessive uniformity, they are preventing these problems. As the Supreme Court has suggested, “[A]dvisory guidelines . . . and ongoing revision of the Guidelines in response to sentencing practices will help to ‘avoid excessive sentencing disparities’” (128 S. Ct. at 573–74, quoting *Booker*, 543 U.S. at 264). As “the Commission revis[es] the advisory Guidelines to reflect actual sentencing practices consistent with the statutory goals, . . . district courts will have less reason to depart from the Commission’s recommendations” (*Rita*, 127 S. Ct. at 2482–83; Scalia, J., concurring). Reasoned judicial discretion is needed to reduce the unwarranted disparity and unwarranted uniformity that is embedded within the federal sentencing guidelines.

#### Notes

- <sup>1</sup> See *U.S. v. Malenge*, 294 Fed. App. 642, 2008 WL 4420023 (2d Cir. 2008).
- <sup>2</sup> Fifteen Year Review at 99–102, 140; Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1134 (2001).
- <sup>3</sup> *Id.* at 140; Hofer, Blackwell, & Ruback, *supra* note 46, at 303–04; Frank O. Bowman III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1134 (2001).
- <sup>4</sup> See e.g., Michael O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 821–22 (2004) (discussing the distortion of drug policy by federalization and the understandable regional differences); John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 HOFSTRA L. REV. 639, 656 n.66 (2008) (“These differences matter, not just to the residents of our nation’s communities, but to the jurors, lawyers, and judges in them. They are acted upon in numerous ways, including in plea bargaining decisions, to produce results that prosecutors and judges believe are just.”).
- <sup>5</sup> *United States v. Cole*, 622 F. Supp. 2d 632, 637 (N. D. Ohio 2008).
- <sup>6</sup> See 28 U.S.C. § 994(c)(4), (5); see also S. Rep. No. 98-225 at 170 (1983) (“[C]ommunity norms concerning particular criminal behavior might be justification for increasing or decreasing the recommended penalties for the offense.”).
- <sup>7</sup> See Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 741–43 (2002) (explaining why federal-state disparities should be considered at sentencing); Vincent L. Broderick, *Local Factors in Sentencing*, 5 FED. SENTENCING REP. 314 (1993) (“Local variations are important because of the wide spectrum of conditions, attitudes and expectations spanning the nation. Overcentralization can produce a rigidity engendering hostility and causing diminution of respect for the national government.”).
- <sup>8</sup> See Paul J. Hofer, *How Well Do Sentencing Commission Statistics Help in Understanding the Post-Booker System?*, 22.2 FED. SENT. REP. 89–95 (2010).
- <sup>9</sup> USSC, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 20–21 (1998); Fifteen Year Review at 10, 81–92.
- <sup>10</sup> See Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, Part I, Sept. 22, 2003.

- <sup>11</sup> For example, policy statements in the Guidelines Manual deem a host of factors to be never or not ordinarily relevant, including but not limited to first offender status, age, employment record and need for training, education and need for education, family ties and responsibilities, addiction and need for treatment, and aberrant conduct in drug cases; see Chapter 5, Part H & Part 5K2, which are highly relevant to the risk of recidivism and the likelihood and need for rehabilitation. See USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004); USSC, *Recidivism and the First Offender* (May 2004); USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005).
- <sup>12</sup> Examples include crack; see USSC, *Cocaine and Federal Sentencing Policy* (May 2007), career offender, see USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* at 133–35 (2004) (“Fifteen Year Review”), the absence of fast track departures in most districts, see USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 66–67 (October 2003), and criminal history rules that incorporate unwarranted disparity in arrest and conviction in the states. See Fifteen Year Review at 134; Testimony of Christopher Stone, United States Sentencing Commission Public Hearing, New York City, July 9–10, 2009; MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).
- <sup>13</sup> USSC, 2003 Sourcebook of Federal Sentencing Statistics, Table 13 (47.9 months); USSC, *Preliminary Quarterly Data Report*, 4th Quarter Release 2009, Table 19 (47.2 months).
- <sup>14</sup> See *United States v. Booker*, 543 U.S. 220 (2005); *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Cunningham v. California*, 549 U.S. 270, 279–81 (2007); *Spears v. United States*, 129 S. Ct. 840 (2009); *Nelson v. United States*, 129 S. Ct. 890 (2009).
- <sup>15</sup> Fifteen Year Review at 32, 82, 87, 141–42.
- <sup>16</sup> Attorney General Holder’s Remarks for the Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium, “Rethinking Federal Sentencing Policy: 25th Anniversary of the Sentencing Reform Act,” Washington, D.C., Wednesday, June 24, 2009.
- <sup>17</sup> See note 5, *supra*.