

Tailored To the Crime

Sentencing case shows need to defend judicial discretion.

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Last week, the Supreme Court heard oral argument in *Gall v. United States*—a case with immense consequences for the federal criminal justice system.

Although the question presented in *Gall* is seemingly narrow—whether a sentence imposed outside the range suggested by the Federal Sentencing Guidelines must be justified by “extraordinary circumstances”—the real issue is far more profound: whether mechanistic guidelines will continue to hold sway for the foreseeable future, or whether judges will be permitted to impose sentences in a way that is more nuanced, individualized, and humane.

The Court’s consideration of *Gall* flows from a revolutionary case decided in 2000. In *Apprendi v. New Jersey*, the Court held that the Sixth Amendment forbids a judge from enhancing a sentence beyond the prescribed statutory maximum based on conduct not proven to a jury beyond a reasonable doubt.

Later, in *United States v. Booker* (2005), the Court grappled with *Apprendi*’s legacy for the then-mandatory Federal Sentencing Guidelines. The question in *Booker* was whether such guidelines violate the Sixth Amendment’s right to trial by jury. By a 5-4 margin, the Court held that mandatory guidelines, combined with an enhanced sentence based on judge-found facts, violate the Constitution.

NUMBER CRUNCHING

The mandatory sentencing guidelines came into being as a result of widespread dissatisfaction with federal sentencing. Before 1984, judges had virtually unfettered discretion to impose sentences within a broad range, and a parole commission ultimately determined the length of a sentence. This system came under widespread attack, primarily for its perceived disparities and unpredictability.

In 1984, Congress sought to address these concerns. Congress created a system of determinate sentencing and

a Sentencing Commission with the power to issue “guidelines” that would dictate sentences in particular circumstances. Despite their name, these prescriptions were legally binding. Unless an individual case involved some aggravating or mitigating circumstance that the commission had not considered—which was relatively rare—the judge was required to follow the guidelines.

The primary task of a sentencing judge under this regime was to make the myriad, often-complex factual findings that the guidelines demanded. Once those facts were found, the judge became something of a glorified calculator. Adding and subtracting, the judge arrived at two numbers that, when plotted on a 43-by-6 grid, generated a narrow range of possible sentences. Under this regime, reasoned discretion was supplanted by number crunching.

Many judges publicly chafed under this system. Eventually, the Supreme Court tried to send a message in *Koon v. United States* (1996) that the guidelines had been applied too rigidly. Determined to appear tough on crime, however, Congress resisted and enacted legislation in 2003 making the guidelines even more strict by instructing appellate courts to show no deference to judges who sentenced outside the guideline range.

At the same time, the Supreme Court was making major changes in the constitutional landscape that threatened serious consequences for the guidelines scheme. First came *Apprendi*. Then, in *Blakely v. Washington* (2004), the Court made clear that the Sixth Amendment’s jury trial right means that all facts increasing a defendant’s potential sentence beyond the top of a mandatory guideline range must be found by the jury.

GUIDELINES IN TROUBLE

From the moment that *Blakely* was decided, the federal sentencing guidelines were clearly in trouble.

The guidelines allowed—indeed, required—judges to find facts to increase sentences. Few Court watchers were surprised, therefore, when the justices concluded, in *Booker*, that the mandatory guidelines violated the

Sixth Amendment. In a controversial remedial opinion by Justice Stephen Breyer (which took juries out of the picture), a different 5-4 majority held that judges were required to take the guidelines into account but not to obey them. Breyer called upon appellate courts to assess the “reasonableness” of sentences in reference to a list of factors from Congress.

The *Booker* remedy raised at least as many questions as it answered. Had Breyer, an architect of the guidelines, performed a sleight of hand to preserve their force at their moment of greatest peril? Or would the *Booker* remedy free district judges to exercise individualized, less constrained, but reasoned judgment?

Answers came quickly. The federal appellate courts proved partial to the status quo and began erecting new devices to ensure that the guidelines would continue to be obeyed.

Last term, in *Rita v. United States* (2007), the Supreme Court addressed one such device—a presumption that a sentence within the guidelines is reasonable. Again writing for the Court, Breyer upheld this presumption, but only by draining it of any real force. His opinion emphasized that the presumption is “not binding” and has no “independent legal effect,” but instead simply reflects that a sentence is likely reasonable where a judge’s discretionary decision accords with the Sentencing Commission’s recommendation.

Rita left for another day a more pressing question: What happens when a judge concludes that the sentence suggested by the guidelines is inappropriate?

TOO LENIENT?

Enter Brian Gall. His case is a perfect example of how *Booker*’s promise has been eroded by the federal appellate courts.

As a college student, Gall sold drugs for about nine months. He stopped, graduated from college, and started his own business. When authorities contacted him two years later, Gall turned himself in and pleaded guilty.

The guidelines called for a prison term of 30-37 months. The district court, taking into account Gall’s youth, his exemplary post-offense behavior, and the employees who depended on him, sentenced Gall to probation.

The U.S. Court of Appeals for the 8th Circuit rejected the sentence as unreasonably lenient. An “extraordinary variance” from the guidelines, the court held, must be supported by “extraordinary circumstances.”

The Supreme Court is now squarely faced with deciding what the federal sentencing guidelines actually mean in practice. There is little question that the 8th Circuit’s standard violates *Blakely*, *Booker*, and *Rita*. There’s a big difference between saying, as *Rita* did, that a guideline sentence may be presumed reasonable on appeal and saying, as the 8th Circuit did in *Gall*, that such a sentence is *the* presumptively reasonable sentence. Such an approach puts undue pressure on district courts to hew to the guidelines, making them advisory in name only.

Unless the Court is to short-circuit the revolution it started in *Apprendi*, it should reinstate the reasoned deci-

sion of the only judge who looked Brian Gall in the eye: the district judge.

But *Gall* is not just about one circuit’s wayward standard. The Court has an opportunity to cement a sentencing regime that steers a middle course between the virtually unchecked discretion of the pre-guidelines world and the almost robotic constraints of the guideline system. Based on the oral argument in *Gall* last week, there is reason to believe that a majority of the justices may be trying to do so. “What are the words that should be written,” Breyer asked, “that will lead to considerable discretion on [the] part of the district judge but . . . not to the point where the uniformity goal is easily destroyed?”

A MIDDLE WAY

If a middle way for federal sentencing is to be charted, it must have several important components.

First, there should be no thumb on the scale in favor of a guideline sentence. Although the judge must consider the advisory guideline range, that range is not to be treated as a tether. Congress has set out a variety of factors to guide courts in sentencing. Judges must assess those factors and articulate how any particular sentence would advance the legislative goals.

Second, the sentence ultimately imposed, whether inside or outside of the guideline range, should be entitled to substantial deference on appeal as long as the district court follows correct procedures and articulates substantial reasons for the sentence. Such deference recognizes a trial judge’s superior ability to assess the facts and circumstances of each case. But deference is not abdication, and appellate review would allow true outlier sentences to be corrected.

Third, judges must respect the statutory command to impose a sentence “sufficient, but not greater than necessary” to achieve specified purposes of punishment. This “parsimony principle,” which traces back to Montesquieu, has been a central maxim in American criminology since the framing of the Constitution.

There is some irony in having a line of cases aimed at rejuvenating the jury’s power culminate in a revival of the role of judges. Nevertheless, the regime we have outlined would strike a better balance between discretion and constraint than those that have come before.

We need a system that will allow judges to respect the law as written, ensure that sentences are based on the exercise of reasoned judgment, and protect the public against violent offenders, predators, and recidivists. That may not do much to empower juries, but it would be cause to celebrate the vitality of our judicial process.

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