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How to Talk About Sentencing Policy—and Not Disparity

*Judge Nancy Gertner**

I had difficulty deciding what to speak about in this keynote address. First, I want to talk about why I don't want to discuss sentencing disparity, why this is an issue far, *far* less important than issues of sentencing fairness, of proportionality, of what works to address crime. Disparity-speak has sucked the air out of all interesting and meaningful discussion of criminal justice reform for the past several decades. Second, I want to recount one case that dramatizes why the debate on sentencing disparity is beside the point, why we need to talk about real problems of real offenders.

Now, of course, sentencing disparity is important even though I don't want to talk about it. We tell the same disparity stories over and over again. The chair of the United States Sentencing Commission, a very distinguished judge, spoke to my Harvard Comparative Sentencing class this past week, recounting the usual narrative.¹ During the Vietnam War era, federal judges were obliged to sentence convicted draft

* The Honorable Nancy Gertner is a graduate of Barnard College and Yale Law School where she was an editor of *The Yale Law Journal*. She received her MA in political science at Yale University. President Clinton appointed her to the bench in 1994, and in 2008 she received the Thurgood Marshall Award from the American Bar Association Section of Individual Rights and Responsibilities. Judge Gertner is only the second woman to receive this award (Justice Ruth Bader Ginsburg was the first). More recently, Judge Gertner received the ABA's Margaret Brent Award, given by the Commission on Women. She has written and spoken widely on various legal issues and has appeared as a keynote speaker, panelist, and lecturer concerning civil rights, civil liberties, employment, criminal justice, and procedural issues throughout the U.S., Europe, and Asia. Her autobiography, *In Defense of Women: Memoirs of an Unrepentant Advocate*, was released on April 26, 2011. Her book, *The Law of Juries*, co-authored with attorney Judith Mizner, was published in 1997 and updated yearly. She has published articles and chapters on sentencing, discrimination, forensic evidence, women's rights, and the jury system. In September of 2011, Judge Gertner retired from the federal bench to join the faculty of the Harvard Law School. She has taught a number of subjects including criminal law, criminal procedure, forensic science, and sentencing, and continues to teach and write about women's issues around the world.

1. The Chair of the United States Sentencing Commission is Judge Patti B. Saris. *About the Commissioners*, U.S. SENT'G COMM'N (last updated June 2013), <http://www.uscc.gov/about/commissioners/about-commissioners>.

dodgers.² In one courtroom, the draft dodger would get probation and in the other, the draft dodger would get ten years. Yes, that was troubling (although the draft dodger example was *sui generis*; the Vietnam War divided the American public and surely its judges). In fact, there was very little accurate data on federal sentencing in the pre-Guidelines era. Significantly, much of the discussion was anecdotal, certainly not the product of careful study; there *must* be disparity in sentencing, the critics reasoned,³ since prior to the Sentencing Reform Act of 1987⁴ there was no appellate review and no guidelines.

But the truth of the charge of sentencing disparity was less important than the mythology. The mythology of rampant sentencing disparity without guidelines has driven American sentencing for decades. The problem is that you cannot build a rational sentencing regime if the only important question is this one: Am I doing the same thing in my courtroom that you are doing in yours, even if neither of us is imposing sentences that make sense, namely, that work to reduce crime? You cannot talk about disparity unless you understand the context—disparity in sentencing with respect to what? What purposes? What characteristics? Similarly situated with respect to what? The offense? The chances of deterrence? Amenability to treatment?

I don't even want to talk about disparity's twin brother, which is unjust uniformity—treating different people alike: treating the man who is dealing drugs from the car in which he is living the same as the man who is dealing drugs to buy a Porsche to sit next to his Bentley, to cite one example.⁵ To eliminate sentencing disparity, the United States Sentencing Commission and Congress chose to treat drug quantity the same across contexts, contexts that were very different. I want to talk about those contexts and the content of a just sentence. How do we deal with drug addiction? What is the punishment that makes sense? When is drug treatment appropriate in lieu of imprisonment? I want to talk

2. See VIETNAM WAR ERA: PEOPLE AND PERSPECTIVES 152 (Mitchell K. Hall ed., 2009) (recounting how Walter Collins received a twenty-five year sentence for draft evasion and David Bell received two years in a federal prison).

3. See James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 271–72 (1999) (noting that while sentencing guidelines have reduced inter-judge disparity—which was about 4.9 months at the time the Guidelines were implemented—they also eliminate the judge's ability to correct for disparity elsewhere in the system); see also MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 6 (1973) (writing that federal judges were answerable only to their varieties of consciences and could hand out varying sentences).

4. 18 U.S.C. § 3551 (1982 & Supp. IV 1986); 28 U.S.C. § 991 (1982 & Supp. IV 1986).

5. See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 902 (1991) (arguing that the movement from individualized to aggregated sentences is a backward step in the search for just criminal punishments).

about problem solving courts, reentry programs, and meaningful diversions. How can neuroscience help us craft treatment? What evidence based practices should we implement? What works?

And, above all, I want to talk about how to meaningfully undo the catastrophe of mass incarceration in this country, the catastrophe that we have created with our dual emphasis on eliminating disparity, and imprisonment as a cure all. It is a “one size fits all” approach, and that “size” has been ever more imprisonment. I want to talk about our uniformity-focused, criminal-record emphasis, incarceration-obsessed criminal justice policy.

But before I talk about substance, sentencing content, and context, I have to address why this is such a difficult conversation in our country, even today. I’ve written a great deal about the guidelines, particularly in one article, “A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right,”⁶ to borrow from “Goldilocks and the Three Bears.” “Too Little Law” was the period of indeterminate sentencing, when there was unlimited judicial discretion. “Too Much Law” was the period of mandatory guidelines, and I suggested, “Just Right” was the period after the Supreme Court’s decision in *United States v. Booker*,⁷ when the federal sentencing guidelines were ruled to be advisory. The seeds of our inability to talk about substance, context, and content lies in that history.

Let me begin with indeterminate sentencing. I don’t rhapsodize about the indeterminate sentencing pre-Guidelines era. Sentencing statutes prescribed broad statutory ranges for each offense of conviction. Judges had substantial discretion; there was no appellate review of sentencing and, as a result, no meaningful discussion of sentencing principles and policies. Without appellate review of sentencing, judges didn’t have to give reasons for the sentences they gave. You didn’t have to write an opinion; your decision would not be examined by anyone. Small wonder that people experienced the system as chaotic. Small wonder that when charges of sentencing disparity were leveled, no one could rebut them.

There were no substantive discussions of proportionality, even at the constitutional level. Constitutional challenges, with the exception of the death penalty, were about process and not substance.⁸ Did you have a

6. Judge Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691 (2010).

7. 543 U.S. 220 (2005).

8. See *Blakely v. Washington*, 542 U.S. 296, 298 (2006) (appealing a sentencing procedure that deprived defendant of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence).

hearing? Were you informed of the charges? If yes, no matter that you received twenty-five years for that third strike involving the theft of golf clubs as in *Ewing v. California*.⁹

Significantly, other common law countries in the American period of “Too Little Law,” had appellate review of sentencing, without guidelines: Canada, Israel, the United Kingdom, and Australia. While there were limitations, something akin to a common law of sentencing evolved—a statement of judicial principles about sentencing: a body of precedent, not unlike the body of precedent in torts or contracts. Without guidelines imposed from above, judges in other countries had to write opinions of some sort because they knew they would be reviewed.¹⁰ Appellate judges in those countries had to be conversant with sentencing principles and at the very minimum, had to identify improper sentences at least at the margins, the sentences that were grossly lenient or grossly punitive.

In the 1980s, the period of “Too Much Law,” as I have described it, there were sentencing guidelines, mandatory minimum statutes, and suddenly, for American courts, appellate review. The district court judge, who did not have to say much before Guidelines, still did not have to say very much. For the most part, and there were surely exceptions, the only opinion he or she had to write or say was—fill in the boxes of the Guideline grid—for example, offense level, thirty, criminal history, two. The only judgment he or she had to make was where in the very limited range of the box (no more than twenty-four months) the defendant would be sentenced. And the new appellate review was the judicial equivalent of a second grade drawing exercise. Have you stayed within the (Guideline) lines? If you have not, you’re reversed.

Judicial decisions on the district court level and appellate decisions did not look anything like appellate reviews of sentencing opinions in other jurisdictions. Appellate judges who had never known any other kind of sentencing review authored mechanistic Guideline analysis. Let me say that again. Appellate judges who were reviewing sentencing for the first time post-Guidelines had no framework within which to

9. 538 U.S. 11 (2003).

10. See Arie Freiberg, *Australia: Exercising Discretion in Sentencing Policy and Practice*, 22 FED. SENT. R. 204, 205 (2010) (describing how the Australian approach to sentencing starts with the premise that there is no single, objective starting point from which a judge can determine a sentence and also takes into account all relevant consideration); Gertner, *supra* note 6, at 695 (noting that unlike other common-law countries, American courts have limited appellate review of sentencing). See generally SENTENCING AND SANCTIONS IN WESTERN COUNTRIES (Michael Tonry ed., 2001) (tracing the evolution of sentencing laws and practices in Western countries).

understand sentencing, other than the Guideline framework. And so they enforced the Guidelines with a rigor that no one had anticipated.

A student of mine, using interesting neuroscience research, suggested that sentencing prior to the Guidelines had been an intuitive process, correlated with activity, she said, in the socio-affective region of the brain, not regions typically associated with cognition.¹¹ It was all about hunch and intuition, rather than cold deduction from legal principles. She suggested that under a Guideline regime, we might find a different part of the brain involved, namely the cognitive regions, rather than those associated with emotive or affective responses. After all, in a sentencing guidelines regime, *someone else* does the weighing, the evaluating. *Someone else* comes to grips with the emotional costs and the moral dilemmas of sentencing. The decision that results from Guideline computations feels eminently rational, eminently antiseptic because *someone else* did the thinking. I [the judge] did not have to do much. All I had to do was fill in the boxes.

In fact, I would go further: Guideline discussion—what I call “Guideline speak”—silenced all substantive discussions of meaningful criminal justice reform. Every sentencing conference that I attended was about sentencing disparity or Guideline enforcement. Few talked about drug addiction, evidence-based practices, what actually made sense. Few conferences addressed the very real questions I had to deal with in my courtroom: What punishment works for this offender?

It would be one thing if the Guidelines represented rational sentencing policy. Indeed, I wouldn’t mind if the Sentencing Commission did the thinking for me as a judge, if the thinking that they did was based on data, principles of proportionality, and had an understandable rationale. Too often, it was not.

The United States Sentencing Commission was not a real expert commission in the sense that it was composed of neutral actors, including sociologists, criminologists, working above the fray, considering the appropriate sentences unmoored from the pathological politics of crime. This Commission was political from the outset, what Justice Scalia called “a junior-varsity Congress.”¹² Rather than being independent of Congress, they were in some measure, its megaphone. The Commission balanced Democratic and Republican representation; its members had to be confirmed by the Senate; a representative of the Department of Justice was an ex officio member—a status that the

11. Rebecca Krauss, *Neuroscience and Institutional Choice in Federal Sentencing Law*, 120 YALE L.J. 367, 369 (2010).

12. *Mistretta v. United States*, 488 U.S. 361, 427 (1989).

Federal Public Defender did not have. The Sentencing Guidelines were supposed to have been based on real data, the actual sentencing practices extant at the time of their promulgation. But they were not. Because there were few written judgments across the country, the Commission had to reconstruct sentencing practices from a less than accurate set of records. They essentially identified the factors that they thought were salient, which were not necessarily the factors the judges relied upon. They discounted probation—which they counted as zero time—and in many instances, just increased the sentences without explanation. There was no room for consideration of rehabilitation or deterrence, or even proportionality. The traditional culpability factors—in particular, *mens rea*—were rejected because their evaluation required *judgment*, and could lead to disparate results, even though those factors were essential to the just sentence. Instead, the Commission emphasized so called objective factors like quantity or criminal record,¹³ factors that created a false uniformity of treatment across contexts and circumstances.

Worse yet, Guideline-speak changed the American bench. It was not simply the fact that most of the bench was selected post Guidelines, and came to define fairness in sentencing by the contrived grid. Some judges came to believe that their expertise was supplanted. They did not have to do their own thinking, and worse yet, after Guidelines, some believed they shouldn't.

In 2005, the Federal Sentencing Guidelines became advisory, under *United States v. Booker*, ushering in the period that I refer to—tongue in cheek—as “Just Right.” This period could have been enormously creative, a discussion of meaningful substantive reform. The Guidelines were the starting point of analysis, but they bound no judge. They could be critiqued, evaluated, and rejected if appropriate. Other sentencing approaches could be discussed, evaluated, and considered.

To some degree, there has been a more open, more substantial discussion of sentencing alternatives. The Commission has made some changes to the Guidelines post-*Booker*, but the overall picture has not dramatically changed. Eighty percent of the federal bench follows the Guidelines—advisory or not.¹⁴ Most judges have not changed their

13. See Alschuler, *supra* note 5, at 918–24 (discussing the Commission's treatment of drug offenses that emphasized its reliance on the weight of the drugs to determine sentencing). See generally Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on Discretion of Sentencers*, 101 YALE L.J. 1681, 1685–91 (1992) (examining the evolution of the current system of Commission-guided sentencing).

14. *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After U.S. v. Booker, Before the Subcomm. on Crime, Terrorism, and Homeland*

sentencing approaches post-*Booker*; most, at best, pay lip service to the decision. In effect, the overall message is something like, “yes, the guidelines are advisory, but they are the best we can do! Why should we do anything else?” With some very notable exceptions, few judges write opinions articulating a common law of sentencing, providing a framework alternative to Guideline-speak, much less struggle with the question of what works.

To be sure, appellate review of sentences has changed post-*Booker*, but not in any coherent way. *Booker* suggested that sentences could be reviewed for “reasonableness” which has translated across the country into a procedural review, largely without substantive content.¹⁵ Again, the appeals courts ask, “Have you followed the Guidelines?”—a question not unlike the pre-*Booker* questions. And, “Have you made any procedural errors?”—also, not unlike the prior regime. If there are no procedural errors, if the Guideline analysis is correct, few appeals courts will consider whether the sentence is substantively unreasonable, whether the sentence is wildly disproportionate to any rational sentencing scheme—for example, a ten-year sentence for a first offender, non-violent drug offender, or even life for a marijuana distributor.

Appellate courts that never engaged in substantive review of sentences before Guidelines, who only knew Guideline-speak after the Sentencing Reform Act, can do little more now. If a judge stays within the Guidelines today, he or she is virtually assured of being affirmed. And even if the judge strays outside the Guidelines, affirmance is still likely without any substantive analysis. In short, anything goes—except procedural error. Since nearly every sentence is affirmed, there is still little or no discussion of the content of the decisions, what makes sense, what sentences are proportionate, what works. The only question again is, “Did you calculate the guidelines right? Did you make any mistakes?” Not, “Did you appropriately deal with an addict? Did you look at evidence-based practices? Did you consider alternatives to incarceration?”

Appellate courts, after looking at the column of figures that is Guideline analysis, refuse to say, “you know, that really makes no sense.” Appellate judges who had never done that kind of analysis pre-

Security of the H. Comm. on the Judiciary, 112th Cong. 10 (2011) (testimony of Judge Patti B. Saris, United States Sentencing Commission); Michael Tonry, *The U.S. Sentencing Commission’s Best Response to Booker is to Do Nothing*, 24 FED. SENT’G REP. 387, 393 (2012).

15. See *Gall v. United States*, 552 U.S. 38, 49–51 (2007) (explaining how district court judges and appellate courts should determine the reasonableness of sentences).

Guidelines (“Too Little Law”), and never did it in the mandatory Guideline regime (“Too Much Law”) are incapable of doing it today.

So let’s talk about content. It is more than a discussion of “less jail,” however important that discussion may be. “Less jail” is no more a coherent discussion of penal policy than was “more jail.” We need to have a discussion about the relationship between all the social control mechanisms in the society, and imprisonment. We need to have a discussion about what to do with offenders in lieu of jail, during jail and after. We need to have a discussion about what it is going to take to undo what we have done—the failed experiment in mass incarceration. In short, we need to have is a discussion of real change.

So let me give you an example about a person, a person that I had in front of me, who ripped my soul out. Damien Perry was one of twenty-one men charged in a drug conspiracy. He was accused of distributing crack in small quantities on a street corner. Over a year, undercover officers rode bicycles to buy crack from various people on this block, in this conspiracy. It was truly a retail operation, disruptive to the community to be sure, but still small scale. The indictment claimed that the twenty-one men were part of a gang. Gang—the word was intended to, and did, engender fear in the reader, even a dispassionate judicial reader. You read into it a group of marauding African-American teenagers.

But the reality was far from clear. Gang, in this situation, meant a group of young men who lived on the same block all of their lives. There was no initiation ritual; there were no colors; there was no hierarchy; there was no chain of command. The leadership depended just on the happenstance of your age, criminal record, and what kind of access you had to the drugs. They had no one supplier or dealer; in fact they competed with one another for customers and dealers. They just hung out, shared similar life circumstances. And what were those life circumstances? Shredded families, high school dropouts, no supervision, parents who were either in jail or working day and night, too overwhelmed with their own problem to address their kids’ issues. What I came to see was that this was not much of a gang at all. It was a peer group, sadly, with guns.

Of course, they had violated the law, but the question was what was to be done about it. Some of the twenty-one were violent; I had no problem imposing severe punishments. Some cooperated with the government for a lesser sentence, even though they too had been violent, and hardly transformed by their apprehension. Cooperation was just another business decision for them. The third category was cannon fodder: young men, caught up in this sting, pressured to cooperate, to

enable the government to—as they said—”go up the ladder.”

Damien Perry was cannon fodder. He couldn't cooperate with the government. He didn't know enough; he was on the ladder's first rung.

When he appeared before me, I sensed something different. It was not just his physical appearance. He was only twenty-one years old, a stocky man with a left eye swollen shut. The presentence report told a sadly not-unfamiliar story. His mother, who was seventeen when he was born, turned to drug abuse and prostitution. He had no contact with her from age three to age eight, when there was a brief visit after which she went to jail. He never spoke to her again. His father was fifteen when he was born, far too young to care for him. Damien had no contact with his father until he was nearly ten years old. He was raised by a maternal grandmother, who reported that he had a wonderful memory and described him as bright and articulate, but she was having difficulty controlling him.

At sixteen he and a friend were playing with a gun—also not an unfamiliar scene. It accidentally fired. Damien was shot in the head, losing his left eye. Doctors could not remove the pieces of the bullet because they were too close to a major artery. The fragments remained in his brain causing him headaches so severe he could not speak. He had hearing loss, blood clots, and occasional seizures. He became clinically depressed. He contemplated suicide. His life changed dramatically. He was now a teenager with needs far more complex than even the usual ones, and far too complex for his grandmother to deal with. He got in trouble in school, skipped classes, had skirmishes with the juvenile justice system, but no meaningful adult record. He was suspended from school as a result of his absenteeism and then withdrew.

I can't tell you the numbers of people that I sentenced like Damien, who had been either kicked out of school, or left school in tenth or eleventh grade. Judge Reena Raggi of the Second Circuit, who had been an Assistant United States Attorney in New York, when asked by a newly elected Mayor what law-enforcement initiatives she would recommend with respect to drugs, replied: The best way to address the city's drug problem, would be with a first class school system.¹⁶ The staffer told her that that wasn't politically feasible.¹⁷ Imprisonment, however, was.

So, back to Damien. Like many others, he was out of school by the

16. The Honorable Reena Raggi, Remarks at the Harvard Law School Federalist Society Lunch Talk (Apr. 2, 2014).

17. *Id.*

tenth or eleventh grade. There was no meaningful support network once he left school. He had a brief turn on an assembly line, but he ultimately left that too. He sold drugs to support himself. The only network that was available to him was that group of kids on the street, the peers in the “gang.”

At the sentencing, after he pled guilty, Damien was articulate and respectful. He and I began to have a conversation in open court. His lawyer was largely silent during the exchange. I held a five-day hearing just to find out what had happened to Damien during his childhood that led to these charges. What was the impact of his physical impairment? I wanted to make sense of what I was about to do. The legal framework was completely onerous. Happily, there was no mandatory minimum statutory sentence in this case, but the Guidelines were apparently mandatory. The sentence would be determined 100% by the quantity of drugs he had distributed on several occasions to the officers riding up on their bicycles.

Nothing about what I had painstakingly learned about Damien’s background and his disability entered into the calculus under the Guideline regime. There was no place in the Guideline grid to talk about his abandonment. There was no place in the grid to consider the fact that the disarray in his life was very likely to repeat itself in the next generation. I wasn’t supposed to try to understand the extent to which lengthy incarceration would, in fact, exacerbate his problems. All I was supposed to do was add up the amount he sold, figure out his criminal record, look on the grid, and sentence within the range.

It didn’t even matter that, in Guideline-speak, the drug suppliers to this group got lower sentences than the defendants who dealt on the street. The suppliers had not directly interacted with the bike cops; the quantity of drugs that they dealt could only be estimated and resulted in a lower calculation than the calculations for the other defendants.

With the video taken by the police and the testimony of cooperating witnesses, Damien had no choice but to plead guilty. The government’s recommendation was 135–168 months. It was, in short, ridiculous. If I credited the government’s analysis, I would have classified Damien’s offense level at thirty-two, a higher level than for offenses like transmitting national defense information, assault with intent to murder, criminal sexual abuse, kidnapping, abduction, and unlawful restraint.¹⁸

18. See U.S. SENT’G COMM’N, U.S. SENTENCING GUIDELINES MANUAL § 2A2.1 (2013) (stating that the base offense level for assault with intent to commit murder not in the first degree is 27(a)); *id.* § 2A3.1(a) (2013) (stating that the base offense level for criminal sexual abuse not committed under 18 U.S.C. § 2241(c) is 30); *id.* § 2A4.1(a) (2013) (stating that the base offense

The principle question under the Guidelines was quantity, and in terms of that quantity, Damien's background, and family, his real culpability relative to the others, was simply irrelevant.

Although the Guidelines were mandatory, I worked mightily to interpret them in as humane a way as I could. There was a little used category for "extraordinary physical condition" under the Guidelines that enabled a departure. To protect against reversal, I wrote a lengthy opinion about the category "extraordinary physical condition," and how it applied to Damien.¹⁹ Where my contemporaries, judges in other common law countries, were writing about sentencing policy and deterrence, about the relationships between the goals of sentencing and these individual offenders, Guideline-speak obliged me to write about "bullets in the brain," Damien's "extraordinary physical circumstances." I wrote "Damien Perry has a bullet in his brain. The question is whether that is an extraordinary physical circumstance sufficient to warrant a downward departure. To ask the question, is to answer it."²⁰

The Guideline result was plainly excessive; there was a basis to depart, but then what was I to do? What should I take into account? What sentencing principles ought I apply? What programs ought I consider? I sentenced Damien to forty-seven months with substantial post-supervision detention, drug treatment, etc. Probation was not an option, although it is what I would have given at the time. I knew that if I had departed from the Guidelines to that degree, the First Circuit would have reversed me in a nanosecond. And I could craft conditions on supervised release, hoping that they would address his real problems. I could not meaningfully control what would happen to him during his imprisonment, but I could try to exercise some control afterwards.

I made it a habit of keeping track of the defendants I sentenced. I even visited the prisons when I could. I never wanted to forget what it was like when I was a young criminal defense lawyer visiting a prisoner in a maximum-security prison in Massachusetts. I went into the antechamber; the door behind me locked, and the door in front jammed. I was stuck in the antechamber for perhaps fifteen to twenty minutes. Even when I became a judge years later, I wanted to remember what that experience had been like.

I saw Damien on one prison visit. He literally came running up to

level for kidnapping, abduction, and unlawful restraint is 32); *id.* § 2M3.3(a) (2013) (stating that the base offense level for transmitting national defense information is 29 if it is top secret information and 24 for all other information).

19. *United States v. Lacy*, 99 F. Supp. 2d 108, 115–17 (D. Mass. 2000).

20. *Id.* at 118.

me, much to the chagrin of the officials, with newspaper clippings about a case of mine. When he was released, he was supposed to report to probation, but he reported to me. I got a close look at how dramatic the changes from prison to freedom are. Behavior that is completely adaptive in prison is completely maladaptive outside. In prison, everything is done for you. Suddenly, you come into a world with a thousand small decisions—a phone bill, rent, how to get from one place to the other, how to deal with people you haven't seen in years, how to deal with technological change. We understand the dislocation a prisoner of war feels on his return—and they may well be returning to intact families, even supportive communities. The defendants I had sentenced often return to shredded families, relationships that had long ended.

Damien walked into my courtroom one day. I recognized him immediately. At the recess, I invited him back to my lobby. We spoke about his hopes and dreams for life outside of prison. I saw him struggle reuniting with a father who then barely knew him. My sons were about Damien's age. I tried to help. At the time there was no reentry program. He'd come out with all the same issues with which he had entered: limited education, limited support, no place to live, disabled, and, worse, with a criminal record. He was disqualified from federal programs, and he could not live in public housing. Adaptation would have been difficult if he was not impaired, and he was impaired.

Then one Saturday morning, at about eleven o'clock, I got a call from the Assistant U.S. Attorney: "Judge, I'm sorry to interrupt your Saturday." "That's okay, what's going on?" "Damien Perry was executed on the streets of Boston yesterday at noon. Gunned down on a street corner. Judge, I don't know whether he went back to the gang." Maybe he did "return" to the gang, whatever the gang was. Perhaps he went back, we offered no meaningful alternative or, if he did not, maybe he could never escape that identification.

Again, I did something un-judgely. I called the *Boston Globe*. I did not want another article that would say, "Gang Member Executed on the Streets of Boston." I wanted them to write about him, and the promise he had. To the reporter, there was no "Damien Perry" story worth writing about. She would not write about Damien Perry unless she wrote about me as well. The headline was "Shooting Death Shatters a Rare Bond."²¹ The article was about our relationship: Judge Gertner

21. Maria Cramer, *Shooting Death Shatters a Rare Bond: Judge Mourns Ex-Gang Member*, BOSTON GLOBE, Aug. 10, 2007, at A1.

and Damien Perry.²²

The family invited me to Damien's funeral and, in fact, Damien's father wanted me to read that article to the assembled group. And I did. As I was leaving the church, feeling that I hadn't done much at all, the father reported to me that Damien had often said to him, "Judge Gertner would be happy about this," or more likely, "Oh my gosh, is she going to be mad at me?"

What happened to Damien made me want to look at the other twenty-one I sentenced. I want to ask what worked, even post hoc. Not one of the twenty-one succeeded. Only one escaped jail or the criminal justice system, and that may well be because we lost track of him. He left the state.

Today we debate whether drug courts or reentry courts are effective. One thing is clear: jail is not. If there were any other social policy with the abysmal record of imprisonment we would have abandoned it long ago. Was Damien's neighborhood cleaned up? The crack dealers in Damien's case were taken off the street, but there is a 100% replacement rate, often by younger, more violent offenders.²³ And what about deterrence? Damien reported that everyone in his neighborhood expected to be in jail at some time or other. How did jail deter them?

I want to talk about content for Damien's sake. I want to talk about the substance of sentencing policy. I want to talk about what to do with the Damien's of the world. I want to talk about what works.

We're at a unique moment. No one could have envisioned this time in the United States. No one could have envisioned that this would be a moment when Rand Paul, Newt Gingrich, and Patrick Leahy, along with the Sentencing Commission, are working to reduce drug sentences and enable judicial discretion. They are finally decrying what has been described as America's failed experiment in mass incarceration.²⁴ But

22. *Id.*

23. See Jonathan P. Caulkins & Philip B. Heymann, *How Should Low Level Drug Dealers Be Punished?*, in *DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE* 206, 208 (Philip P. Heymann & William N. Brownsberger eds., 2001) (noting that due to the "replacement effect," new street level drug dealers replace those who have been imprisoned).

24. See Nancy Gertner, *After Horton Case, Massachusetts Fell Behind on Criminal Justice*, *BOSTON GLOBE*, May 18, 2014, <http://www.bostonglobe.com/opinion/2014/05/17/after-horton-case-massachusetts-fell-behind-criminal-justice/TfnkbFiKt6ptnc8clqtq3K/story.html> (stating how Massachusetts' prison system fell "in like with America's failed experiment in mass incarceration"). By 2010, the United States boasted the world's largest prison population, beating out countries we regularly criticize on human rights abuses including Russia, China, and Iran. See Press Release, The National Academies, U.S. Should Significantly Reduce Rate of Incarceration; Unprecedented Rise in Prison Population 'Not Serving the Country Well,' Says News Report (Apr. 30, 2014), available at http://www8.nationalacademies.org/onpinews/new_sitem.aspx?RecordID=18613 (citing facts related to the staggering prison populations in

lowering sentences is not enough; discretion will only work if the judges are willing to exercise it in a way that they have not done in the years post-*Booker*.

We have to talk about meaningful reform, the way in which we've used the criminal justice system in lieu of dealing with social problems. We have to have a substantive discussion about mental health, welfare, and collateral consequences of conviction. We have to have to talk about resources for education, counseling, and not just sentencing disparity. We have to strategize about how to undo what we have so sadly done for decades. Exceptional times call for exceptional steps. Conferences such as this are an important beginning.

But back to Damien. If the school had kept him from dropping out, if there were some way to intervene, if I could have exercised more discretion to fashion a just and proportional sentence, if I could have sentenced him to community corrections or a well-established drug and reentry program, would it have made a difference? I don't know. All I know is that what I did, did not.

Judge Morris Lasker, of the United States District Court for the Southern District of N.Y, then the District of Massachusetts, gave an interview in 1997 in which he said, "it is time to begin the end of America's love affair with imprisonment."²⁵ To which, I can only say "amen." For Damien, let's talk about real reform.

America).

25. Hon. Morris E. Lasker, Remarks Before Symposium on Sentencing Guidelines (Sept. 9, 1997), available at http://web.archive.org/web/20070401232722/http://www.vcl.org/Judges/Lasker_J.htm.