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One Judge Makes the Case for Judgment

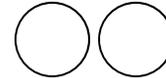
John Coughenour says federal sentencing guidelines are overly punitive, coldly algorithmic measures that strip the courtroom of nuance. Without discretion, what's the judiciary for?



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TEXT SIZE



Judge John Coughenour is a rebel. It's not because—or not only because—he rides a Harley or spends his free time in prisons. It's that the Reagan-appointed U.S. District Court judge has rebelled against federal sentencing guidelines ever since they were established in the mid-1980s.

But Coughenour had never earned national attention for his nonconformist ideas about sentencing and punishment—until, that is, al-Qaeda trainee Ahmed Ressam appeared in his courtroom in the spring of 2001. Over the course of the next 11 years, Coughenour would sit down to sentence Ressam to prison on three separate occasions, all for the same crime—two times to huge uproar and one time to clarify the sentence once and for all.

In 1999, 32-year-old Ahmed Ressam had planned to detonate a massive car bomb at Los Angeles International Airport on New Year's Eve. Had he succeeded, it would likely have been the deadliest bombing in U.S. history. Fortunately, Ressam was caught a thousand miles from his goal. He was tried and convicted in federal court. The jury returned its guilty verdict in April 2001—and that's when the fight over Ressam's fate really began.

As the judge presiding over Ressam's trial, Coughenour's job was to determine the would-be terrorist's punishment. His sentencing should have been a straightforward computation, based on the U.S. Sentencing Commission's Guidelines Manual. A jury found Ressam guilty. By law, his sentence should have been 65 years to life.

When the trial ended, however, Ressam's sentencing was postponed. Ressam had struck a deal with federal agents to cooperate in terror investigations. In fact, when the 9/11 attacks occurred a few months later, Ressam was the best-connected al-Qaeda acolyte willing to work with the U.S. government. He helped identify terrorists from security-camera footage and even assisted with the aftermath of the "shoe-bomber" in December 2001. But by 2005, Ressam had stopped working with agents. (Coughenour says Ressam became embittered by years of solitary confinement.) He even recanted some of his prior testimony.

Since Ressam was no longer cooperating, he was put back up for sentencing. In recognition of Ressam's assistance to the United States, the government asked for 35 years—30 less than the original minimum penalty. It was a good deal by any measure, especially so soon after 9/11, when terrorism prosecutions were not known for leniency.

Coughenour, though, was swayed by Ressam's years of cooperation—which, the judge maintains, put Ressam's life in danger. It's a dilemma Judge Stefan Underhill recently described in *The New York Times*: “Which man was I sentencing?” he asked, referring to a repentant gang member. “The murderer or the remorseful cooperator?” Coughenour was similarly moved by Ressam's condition. Since his arrest, Ressam had been held in solitary confinement, and it had changed him. Coughenour says that, at his trial, Ressam had “had a pleasant demeanor about him.” But in the four years since then, while cooperating with the government, Ressam had become “thinner, and drawn, and haggard.” And Coughenour knew that every year Ressam spent in prison was almost certainly another year in solitary confinement—a fairly standard measure for terrorists as well as for those cooperating with law enforcement. The judge felt for the hapless Algerian and thought it would be in the interest of justice to lay off a bit on the penalty's harshness. After all, Coughenour reasoned, Ressam never did set off the bomb. Ressam's lawyers had asked for 12 and a half years. Coughenour split the difference with the government's request for 35 and went with 22 years. That was the first time Coughenour sentenced Ressam. Coughenour says now, “I thought—wrongly it turned out—that the sentencing was pretty straightforward.”

Immediately afterward, a furor erupted in the national media and among those who question Coughenour's overall approach to punishment. Fox News' Michelle Malkin [dubbed](#) Coughenour the

“terrorists’ little helper,” arguing that he represented everything that was wrong with judge-centered sentencing. Critics slammed Coughenour, saying his sympathy for the defendant had trumped national safety. After 22 years, they reasoned, Ressayre would be middle-aged when he got out, fully capable of staging another attack.

But Coughenour sees part of his role as protecting the accused from a sometimes-bloodthirsty media, especially when it comes to sentencing.

Coughenour was appointed during President Ronald Reagan’s first year in office, a few years before the federal sentencing guidelines were created. The new system was meant to counteract the wild inconsistencies in the sentences handed down in different courts. Instead of going simply by intuition, federal judges would now refer to a handbook that established a sentencing range. And any discretion on the part of judges was intended to be restricted to the limits of that range. But what some saw as a reasonable step toward greater justice, Coughenour saw as inhumane and robotic. What’s the point of a judge if he is discouraged from offering his judgment?

Once on the fringe, Coughenour’s argument against sentencing guidelines is now gaining traction. At the heart of the debate is an undecided question: Which is scarier—a world where a person’s actions are treated as part of a mathematical equation blind to context, or a world where political appointees decide people’s fates based on gut feelings?

Coughenour’s position is clear. He believes that the standardization of sentences has resulted in less justice, not more, and that the way the nation sentences criminals today has created greater inequality, not less. Underhill [agrees](#). “The tragedy of mass incarceration,” he writes, “has recently focused much attention on the need to reform ... the federal-

sentencing guidelines, which often direct judges to impose excessive sentences.” Underhill also thinks prisoners deserve a “second-look review”—“a mechanism for judges to re-evaluate the sentences they’ve imposed.” For his part, Coughenour would dismantle standardized criminal sentencing entirely. “But,” he adds meaningfully, “you’ve got to trust the person making the decision.”

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Ressam’s 22-year sentence in 2005 was overturned on procedural grounds. And when the case came up again in 2008, the government sought a life sentence. But Coughenour saw no reason for his decision to change; he again imposed a 22-year sentence. Coughenour cited Ressam’s favorable psychiatric report and noted with sympathy that Ressam “spent many years in solitary confinement in a country far from his family and loved ones.” The judge also pointed out that other terrorists, including John Walker Lindh, an American, had been sentenced to 20 years or less. “In the time since Mr. Ressam’s first sentencing,” Coughenour concluded, “I have come to feel even more confident that the sentence I originally imposed was the correct one.” That was the second time Coughenour sentenced Ressam.

The Ninth Circuit disagreed. In a scathing 72-page opinion, a panel of judges concluded that Coughenour had “abused his discretion” by flouting the guidelines. And so, on October 24, 2012, almost 11 years since Ressam first appeared before Coughenour (and nearly 13 years since his arrest), the judge was ready to give Ressam his third and final sentence. He looked at all the lawyers and journalists packed into his

Seattle courtroom. Would he go along with the government's request for a life sentence? Or would he again thumb his nose at the system?

Coughenour (he pronounces it “coon-our”) looks uncannily like Statler, the taller and grumpier of the critics from *The Muppet Show*—they even cross their hands the same way—and he shares the Muppet's penchant for avuncular wisecracks. He was 39 when Reagan tapped him for the bench, making him part of a wave of young, conservative judges that Reagan ushered into the federal judiciary. Since then, Coughenour has become one of the most senior and respected judges in the United States. His work ethic is legendary—even when he took senior status, a sort of judicial semi-retirement, he insisted on maintaining a full caseload. Mark Bennett, a federal judge in Iowa, says that Coughenour even volunteers to help other districts cover their caseloads. “Anybody who knows Jack knows a couple of things about him,” says Bennett. “He's very smart. He's incredibly hardworking. He's incredibly dedicated and takes his job seriously. And he does what he thinks is right.”

One of Coughenour's early projects was lobbying successfully for a federal prison in the Northwest. Before Federal Correction Institution, Sheridan, was built with Coughenour's support, prisoners' families in Washington and Oregon often had to travel a thousand miles or more to make visits. In May 1989, Coughenour rode his Harley-Davidson motorcycle down the Pacific coast to Sheridan to attend the prison's opening. While touring the facility with the warden, Coughenour heard someone say, “Hey, judge!” and turned to see a man dressed in prison garb.

“I'm sorry,” Coughenour said. “I don't recognize you.”

“Well, you ought to,” he remembers the prisoner replying. “You’re the one that sentenced me!” They spoke for a few minutes and parted.

Shortly after he returned to Seattle, Coughenour got a call from Sheridan’s warden, who told him the encounter had “caused quite a stir.” Prisoners were pleased that a judge had taken the time to come to a prison in the first place, but they were even more amazed that he’d taken the time to have a conversation with someone he had sentenced.

“You know,” Coughenour said to the warden, “there have to be a lot of people down there that I have sentenced. How would you feel about me coming down and meeting with them?”

“The meaning of time really hits you hard when you see these same guys there, year after year after year, and they’re still there.”

So, twice a year for almost 20 years, Coughenour rode his Harley from Seattle to Sheridan to meet one on one with each of the men he had sentenced. And then, he started visiting prisons all over the country with the same purpose. To ensure candor, he insisted that the prisoners be unshackled and that the meetings be private. A corrections officer stood outside just in case, but in two decades, Coughenour only had to call the officer in once.

During these meetings, the judge always asked the same questions: “How much time do you have left? What are you doing to prepare yourself for getting out? Are you dealing with anything you can’t handle? Do you feel safe?” Sometimes, he’d compare notes about motorcycles—word traveled fast that the judge rode a Harley—and

sometimes he'd just commiserate about prison food. The next prisoner would be escorted in 15 minutes later, and the judge would start over again. Coughenour resists the implication that his visits—and the hundreds of hours he has spent asking hundreds of prisoners about their lives—have influenced his judicial philosophy. But at the same time, Coughenour insists that the prisoners' stories all carry a clear moral lesson: Too many people are in prison for too long.

One of Coughenour's favorite anecdotes from these visits is about a man from Everett, Washington, whose wife had multiple sclerosis. In the mid-1980s, the man was laid off from his job and, in desperate need of money, robbed five banks. Coughenour, who was then a young judge, now says, "I gave him a heavy hit." A few years after he sentenced the man, Coughenour saw the bank robber again, this time in the meeting room at Sheridan. He sat across from him again six months later. And again the next year. "Every time I went back to Sheridan," he says, "I saw this guy, and I started realizing how long it was that he was doing. And the meaning of time really hits you hard when you see these same guys there, year after year after year, and they're still there. It's easy to sit in an office room somewhere and say, 'Well, you know, you rob a bank, you should get 10 years.'" But watching those decisions play out among real men in real time was something else entirely.

This sort of thinking is divisive. Judge Richard Sullivan of New York, the former head of narcotics at the U.S. Attorney's Office in Manhattan, says, "Judges are generally very good at recognizing the humanity of the person in front of them." He argues that it's the humanity of *victims* that judges too often ignore. "Candidly," he says, as a counterpoint to Coughenour's prison visits, "I'm not sure how many judges have walked around Hunt's Point or some other neighborhood that's been overrun by

drugs and drug violence to get a feel for the impact of these crimes on communities and families.”

“Judges,” Sullivan says, “should also have some humility and recognize that we aren’t, and probably shouldn’t be, the only players in this drama.”

For most of history, sentencing was not a judge’s burden. Crimes carried a predetermined punishment, usually a fine, corporal punishment, or, for a staggering number of offenses, death. In England and the United States, the jury effectively determined the punishment as soon as it decided the defendant’s guilt or innocence. All the judge did was referee the proceedings and formally announce the sentence. By the end of the 18th century, however, many colonial Americans protested what they saw as an overuse of torture and death as punishments. And so, in the first decades of the 19th century, Philadelphia’s Quaker-led government developed a novel, more humane way of dealing with convicts: incarceration. Previously, jails had been used to house people awaiting trial or execution, but imprisonment had not generally been used as a punishment in its own right. The only problem was that now someone had to determine the appropriate amount of time each convict should spend in prison.

That responsibility fell to judges, which appealed to Americans’ predilection for checks and balances: The jury would determine guilt or innocence, the judge would determine punishment if necessary, and neither would interfere with the finding of the other. Also it was efficient: The judge was already in the courtroom. It wasn’t long before it became legal dogma that the members of the jury are the “finders of fact” and the judge is the “finder of law,” including handing down sentences. For a century and a half, judges wielded this power with

essentially unfettered discretion, but the system had drawbacks. Judges had no governing body, and they approached sentencing differently: Some saw incarceration as rehabilitative, while others saw it as retribution, or as a deterrent, or as a way to segregate dangerous people from society. And judges were not immune to the vicissitudes of public opinion. The potential for abuse of power was patent. Sentencing decisions were not even subject to a higher court's review.

By the middle of the 20th century, skeptics began asking why judges should be trusted to make such complex decisions unilaterally. Were judges supposed to have an inherent sense of how long a miscreant should spend in prison? After all, sentencing was not taught in law schools, and judges received no training in how to sentence fairly—many were not even lawyers. Nancy Gertner, a Harvard Law professor and former federal judge, [wrote](#) in 2010 that judges were “surgeons without *Gray's Anatomy*.” And that is the crux of the opposition to Coughenour's argument: For too long Americans exclusively trusted the wisdom of judges who, of course, were just as fallible as anyone else. Besides, it was judges themselves who became the first proponents of reform.

In a January 1960 [essay in *The Atlantic*](#), Judge Irving Kaufman bemoaned the fact that “neither the judge nor the legislature has any real scientific guide” to sentencing. “If the hundreds of American judges who sit on criminal cases were polled as to what was the most trying facet of their jobs,” Kaufman wrote, “the vast majority would almost certainly answer ‘Sentencing.’” With all the advances in behavioral science, he wondered, couldn't there be some sort of guide? Kaufman noted that, in 1959, “the average prison sentence meted out in the federal courts ranged from nine months in Vermont to 58 months in southern Iowa.”

In fact, sentences handed down by different judges for the same crimes varied so widely that the disparities could not simply be explained by the contexts of the cases. Biases of all sorts prevailed: Race, class, education, and mental illness all influenced judges. In 1972, Judge Marvin Frankel of New York critiqued these tendencies in his influential *Criminal Sentences: Law Without Order*. “The almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law,” he wrote. Frankel’s solution was to create what he called a “Commission on Sentencing.” At first, his ideas were mostly relegated to law-review debates. If his book hadn’t caught the eye of an influential U.S. senator, Frankel’s influence might have stopped there.

Instead, Ted Kennedy read Frankel’s book and was stirred by the judge’s lament of lenient sentences for white-collar criminals, many of whom had gone to the same colleges and prep schools as their judges. In 1975, Kennedy worked with Stephen Breyer—then the senator’s protégé, now a Supreme Court justice—to create a bill to standardize and reform federal sentencing procedures. Pitching the legislation to Democrats as a way to make sure malfeasant bankers got their due, Kennedy tried and failed for a decade to get some version of it passed in Congress. What he needed was a conservative backer.

A change in the political environment handed Kennedy two of them. Shortly after Coughenour’s appointment in 1981, Reagan announced that he was “taking down the surrender flag that has flown over so many drug efforts” and beginning the modern War on Drugs. Soon thereafter, sentencing reform became bipartisan. That’s when Kennedy was approached by Strom Thurmond and Orrin Hatch, archconservatives whose politics rarely aligned with the liberal Bostonian’s. Of course, their reasons for wanting to overhaul federal

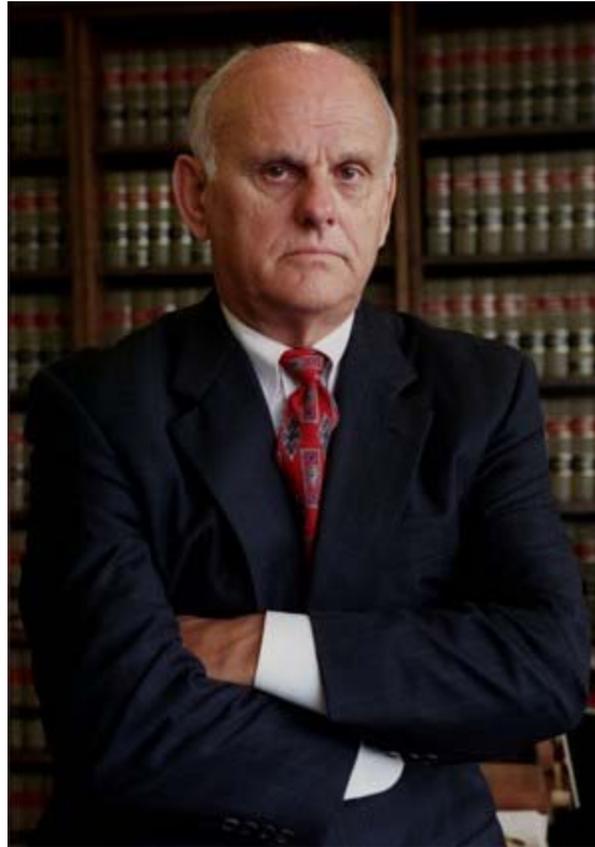
sentencing policies were not the same. Where Kennedy was keen to ensure white-collar criminals were punished fairly, Thurmond and Hatch were eager to see drug offenders receive harsh and consistent sentences nationwide. The trio crafted a bill based in part on Frankel's suggestions from a decade before. The Sentencing Reform Act was signed into law in October 1984. Among other things, it created the U.S. Sentencing Commission, which unveiled its new guidelines in 1987.

The sentencing guidelines are essentially an algorithm. For each charge, the judge inputs the crime's "base offense level" and makes adjustments based on factors like the defendant's role in the crime, his acceptance of responsibility, and whether he had a gun. The resulting value, from one to 43, is the defendant's "offense level." The judge then uses a table to cross-reference the offense level with another number based on the defendant's prior convictions. At the intersection of the offense level and the criminal-history category, the judge finds the "guideline range," an upper and lower sentencing limit. Some judges call this process "grid and bear it."

Coughenour watched the standardization of sentences with dismay. He was one of about 200 judges who wrote opinions finding the guidelines unconstitutional. The Supreme Court overruled all 200 objections in 1989. "It was terribly frustrating," Coughenour says. "I started screaming at the top of my lungs. I have been screaming ever since ... I was imposing sentences that made no sense at all."

Coughenour recalls the story of a young man he'd sentenced in the early 1980s: "He came from a good family. He was going to college. He was doing well in everything, but he was selling pot. And he was devastated by the indictment and was overwhelmed with his remorse. And I said, 'You know, I'm going to take a chance on you. I'm going to give you

straight probation. I'm not going to send you to prison.” Twenty years later, Coughenour received a letter from that man, who thanked the judge for the chance and said that his life had turned out very well. “I couldn't do that after the guidelines,” says Coughenour. “It would have gone up on review, and it would have been reversed.”



John Coughenour (AP)

Of course, this is just the sort of story that raises the hackles of sentencing reformers from both parties. Conservatives see injustice when a criminal gets off easy because a judge takes a shine to him. Liberals see injustice when a white college student gets out on parole while prisons are crammed with people who less closely resemble the mostly white, educated judiciary. But Coughenour brushes these concerns aside. He insists that handing down unique sentences is the point: “The thing that really hit me hard with the Sentencing Reform Act was that this art form—I considered sentencing to be an art and not a

science—Congress tried to convert it into a science. And it’s not a science. It’s a human being dealing with other human beings. And it shouldn’t be done by computers.”

After a brief judicial revolt in the late 1980s, most judges quietly fell into compliance with the guidelines. Coughenour, too, sentenced mostly within the prescribed range, though he railed against the guidelines in his opinions and tried to bend the rules when he thought he could get away with it. During this time, Coughenour and others maintain, the power to decide federal sentences actually shifted from judges to prosecutors. Mark Osler, a law professor who worked as a prosecutor in Detroit in the 1990s, says: “I had all the power. It was about whether I filed a notice of enhancement or gave points for acceptance of responsibility. It’s not reviewable. It’s within the discretion of the prosecutor.”

And prosecutors have even more power, Coughenour and others say, when it comes to mandatory minimums. In 1986, a year before the guidelines were rolled out, the Anti-Drug Abuse Act created minimum penalties for certain crimes. These were not technically part of the 1987 guideline scheme, which prescribed a sentence range based on particular inputs from the case. Mandatory minimums, however, established firm sentences for specific crimes regardless of the facts of the case. At the time, crack was tearing through America’s cities, and demand for severe penalties was high. The Anti-Drug Abuse Act established the notorious 100-to-one ratio, treating one gram of crack as equivalent to 100 grams of cocaine. (That ratio has since been reduced to a still-problematic 18-to-one.) Though both guidelines and minimums are often spoken of in the same breath, especially by their detractors (including Coughenour), some mandatory minimums may be on the way out. A bipartisan coalition of lawmakers, including GOP

leadership in both chambers, [has seemed poised](#) to reduce minimums for nonviolent offenders. But a group of more conservative Republicans is [fighting to scuttle this reform](#).

Over time, mandatory minimum penalties have been expanded beyond drug crimes. A glance through an index of America's mandatory minimum crimes is a good guide to society's evolving fears: firearm crimes, child pornography, terrorism, and, increasingly, some sex offenses. The controversy over these sentences has even spilled out of the legal community. The [recent militia standoff](#) in Oregon, for example, began over a protest of mandatory minimums for committing arson on federal land, which is covered under expansive terrorism laws. The judge in the case imposed a sentence that was less than the five-year mandatory minimum—but the U.S. attorney appealed the sentence. Now the convicted men will have to serve more time than they were originally led to believe. That's because mandatory minimums always supersede the 1987 sentencing guidelines: A judge cannot issue a lighter sentence even if the guidelines suggest otherwise.

“So much of sentencing discretion is vested now in the U.S. Attorney's Office,” Coughenour says. “By their charging decisions, they can tie the hands of the sentencing judge, particularly on mandatory minimums. And [prosecutors'] discretion, by the way, is exercised in darkness.” In other words, prosecutors can charge defendants under any statute they choose, and there is no way to review that decision. If that statute carries a hefty minimum sentence, the judge cannot lighten the punishment. “What *we* do,” he says, referring to judges, “we do out in the sunlight, and we have to be subject to appellate review. We have to explain ourselves. We have to endure press reaction to what we do.” On the other hand, nobody reviews the U.S. attorney's decisions. “In fact,” says Coughenour, “we are precluded from reviewing those charging

decisions. And here you have people who are put on the bench by the president of the United States and confirmed by the United States Senate—presumably for their judgment. I mean, that’s why they call it ‘judging.’”

“Does it trouble you at all that sentencing decisions like this are made at a committee table back in Washington, D.C.?”

At a sentencing hearing this summer in Seattle, I saw Coughenour’s disdain for mandatory minimums in action. The defendant had been found guilty of a particularly loathsome crime: sexually assaulting his 6-year-old niece. Sputtering and twitchy, the man had a long history of mental illness and addiction. He had fled an abusive father and spent his life on the streets of the Lummi Indian Reservation. Now, he was facing the standard sentence for his crime: 30 years to life.

But Coughenour pushed back in court. “Is there a sentence below the mandatory minimum that would be adequate?” he asked the prosecutor.

“Your Honor,” replied the prosecutor, “I am hamstrung here, in that my personal views are probably irrelevant.”

“Not to me, they aren’t,” countered Coughenour. He pressed the prosecutor in this vein for 10 minutes, before he got to the point.

“Does it trouble you at all,” he asked, raising his voice, “that sentencing decisions like this are made at a committee table back in Washington, D.C., without the benefit of a full trial and a pre-sentence report and individualized consideration of the facts in a given case? Does that bother you at all?” In the end, Coughenour declared the 30-year

minimum sentence unconstitutional in this case, saying it violated the Eighth Amendment’s protection against “cruel and unusual punishment.”

The federal sentencing scheme changed again 11 years ago, though not enough for Coughenour. In 2005, the Supreme Court decided in *United States v. Booker* that, so long as guidelines were considered mandatory, they were unconstitutional. But, wrote Steven Breyer in the opinion that saved the system he helped create, the guidelines would stand if they were ruled as purely advisory, a baseline from which judges could depart at will. This means judges must still calculate the guidelines during sentencing, but they are allowed to sentence outside of them—provided they give a good reason for the departure.

“There’s this presumptive objectivity about something that says, ‘121 months.’ It’s so specific, it has this veneer of science. In reality, it’s pretty much just made up.”

“*Booker* did a lot in terms of making judges feel that they were authorized to depart more frequently from the guidelines,” Coughenour allows. But he argues that the original policy irreversibly changed the way judges sentence: “Back before I came on the bench, the incarceration rate in the U.S. was around 120 per 100,000, and it skyrocketed after the War on Drugs, to point where it’s in excess of 700 per 100,000,” says Coughenour, shaking his head. “That’s the highest incarceration rate anywhere in the world, including South Africa under apartheid or the Soviet Union back when it was the Soviet Union. Nobody has ever had an incarceration rate as high as ours is now.”

Though mandatory minimums are still controversial, overall most judges seem happy with the current system. Gertner, the Harvard professor who compared judges to surgeons, says that judges who started their careers after the late 1980s “have become inured to the guidelines ... they have come to think that the guidelines defined fairness.” Osler, the former Detroit prosecutor, agrees: “The whole structure is still guidelines-focused ... That baseline seems so objective. It’s a number, and there’s this presumptive objectivity when you’re looking at something that says, ‘121 months.’ Because it’s so specific, it has this veneer of science around it. Where, in reality, it’s pretty much just made up.” Coughenour thinks some judges are over-reliant on guidelines and apply them without thinking about the consequences. “[Guidelines] make sentencing easy,” he says. Too easy.

And yet, the data seem to show that judges *are* exercising discretion. As of last summer, according to the U.S. Sentencing Commission, fewer than half (47 percent) of all sentences fell within the guidelines range. About 51 percent of sentences fell below the guidelines. Just about 2 percent were above. And even these national averages conceal huge disparities among regions. The Second Circuit (New York, Connecticut, and Vermont) follows the guidelines only 28 percent of the time. In the Fifth Circuit (Louisiana, Texas, and Mississippi), however, 64 percent of sentences fall within the guidelines. What’s more, these numbers conceal more disparities among districts. Within the Second Circuit, for instance, guideline compliance ranges from 54 percent in the Northern District of New York to less than 17 percent in the adjacent District of Vermont. Coughenour’s own Western District of Washington follows the guidelines 34 percent of the time, which is higher than the Ninth Circuit’s 28 percent average. And even those variations conceal

discrepancies among judges. Coughenour, for instance, says his sentences are only about 20 percent compliant.

Don't these inconsistencies represent just what Coughenour wants? All of these differences would seem to imply that judges have broken free from the robotic guidelines regime. On the contrary, Coughenour and every judge I spoke to—including those who disagree with Coughenour—largely chalk those discrepancies up to prosecutors, not judges. Each U.S. Attorney's Office has an endemic culture. A district with low compliance could be one in which prosecutors routinely overcharge, asking for heftier-than-necessary punishments. Conversely, a district with high compliance could be one in which prosecutors generally ask for more lenient sentences or for sentences that already fall within the guidelines. But it's hard to know, since prosecutors' decision-making processes are off the record and unreviewable.

And that is Coughenour's point. For all the capriciousness of pre-reform sentencing, a judge's decisions were made in open court, and the judge owned them. Whether the punishment was just or not, the words of each decision were forever available to the public. It was imperfect, but at least it was out in the open.

The public wants an ideal arbiter: just, wise, and knowing. But while questing for that mythical, paternal figure who will make all the right decisions, it's easy to become disillusioned with the inconsistency and fallibility of human beings. The sentencing guidelines were an idealistic gesture, an expression of the belief that there is some objective measure of justice.

Coughenour had sentenced Ahmed Ressay to 22-year sentences twice—in 2005 and in 2008. Both sentences had been overturned and had ignited a public and legal uproar. In

C fact, after the second sentencing, the Ninth Circuit not only overturned Coughenour's decision again but it recommended that the case be sent to a different judge altogether, because "the district judge's previously expressed views appear too entrenched to allow for the appearance of fairness." That stipulation was removed from the case on further review, but Coughenour had his orders: Find a harsher sentence. He was pointedly reminded that the minimum guideline was 65 years.

Still, Coughenour wanted to be sure that Ressay's third sentence did not come from fear. When he speaks about it now, he tells of a chance encounter he had with Ressay's lawyer in Washington, D.C. The lawyer told him that Ressay had expressed surprise that he had received a fair trial in America and that his subsequent cooperation with the government had stemmed from that feeling. Others, however, are quick to point out that Ressay's assistance looks opportunistic—only after he was facing life in prison did he agree to help. But Coughenour holds the story close: It confirms all of his ideas about the U.S. justice system and the redemptive power of a trial held in open court.

Nearly 11 years since Coughenour first met Ressay, the judge was ready to hand down his third and final sentence. On October 24, 2012, he addressed his Seattle courtroom: "Many, including the federal government, believe that Mr. Ressay is a continuing threat and he should never see freedom again. But fear is not, nor has it ever been, the guide for a federal sentencing judge. It is a foul ingredient for the sentencing calculus." Coughenour then documented the extent of Ressay's cooperation and the ever-increasing demands of the prosecutors. In the dense legalese of the decision's core, Coughenour pushed back against the government's arguments for life in prison, announcing that 37 years was sufficient to punish Ressay and to fulfill

the needs of justice. It wasn't what the government was hoping for, but it was stiff. This time, the sentence would stand.

Coughenour concluded the proceedings by addressing Ressay personally: "There is a school of thought that believes our essence is defined by our actions alone ... If a man has a history of violence, he must be, to his core, a violent man. These judgments overlook one thing: We can choose daily to remake that essence." The Algerian looked beaten down; he had spent a third of his life in solitary confinement.

With credit for time served, Ressay will be almost 70 when he is released. "I'll be surprised if he survives," Coughenour says. And if he does survive prison, it may not last, as he'll be branded a snitch. "People who are engaged in that kind of terrorism don't forget that their friends were convicted because of someone who was cooperating."

Whatever Ressay's future holds, Coughenour will probably never see him again. Ressay is at the federal supermax facility in Colorado, and he is not permitted contact with outsiders. He will likely spend his entire time there in a 7-by-12-foot cell. But even if Ressay were allowed visitors, a meeting wouldn't happen. In 2008, after a Washington State Supreme Court justice ignited a scandal by accidentally visiting an inmate with a case pending before him, Coughenour stopped going to Sheridan.

He hasn't visited a person he sentenced since.

ABOUT THE AUTHOR

MATTHEW VAN METER is a writer based in New York. He is the author of a forthcoming book about Jim Crow.
