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Diagramming Sentences

The Supreme Court's war on sentencing guidelines.

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Sentencing is supposed to be the straightforward moment in a criminal trial—easy arithmetic compared to the subjective assessments of jurors and attorneys. But ever since the Supreme Court got into the sentencing biz back in 2000, sentencing has been a mess. The court struck down federal mandatory sentencing guidelines in 2005, and some state guidelines have fallen as well. And in a 6-3 decision Monday, the justices killed the California sentencing guidelines.

The California case is the latest battle in a strange war that has turned natural judicial enemies into allies, set Congress against the courts, and given law professors a new life's work. Some of the justices probably have had their eye on easing the sentencing load on defendants, more and more of whom have been getting locked up for longer and longer periods. But the court can't make pro-defendant reform its explicit aim—that sort of policy decision is the legislature's job, after all, and in any case the cobbled-together majority behind the recent decisions would never hold together. So, for now, at least, the court's war on sentencing has enraged the lower courts and left the law in a shambles. These cases showcase destruction—this is what it looks like when the Supreme Court lays waste.

The 2000 case that got the court started, *Apprendi v. New Jersey*, seemed to unveil a new constitutional right. The court suggested that the Sixth Amendment's guarantee of trial by jury means that a defendant can't be sentenced above the maximum specified in a statute unless a jury finds the facts that justify the increase. What does that mean? According to this week's ruling, *Cunningham v. California*, for example, a legislature may not set the penalty for child sexual abuse at six to 12 years and then authorize a judge to send a sex abuser away for 16 years if the judge finds, for example, that the victim was particularly vulnerable or the abuser violent or dangerous. For one thing, those facts haven't been found by a jury. For another, they allow for a higher sentence based on a lower standard of proof than the one required for conviction: preponderance of the evidence, rather than guilt beyond a reasonable doubt.

Apprendi and *Cunningham* have succeeded for two key reasons. First, at a time when judges have complained that federal and state laws have forced them to hand out unfairly long sentences, these cases hand power back to judges. Second, the cases are originalist, in that they arguably match the framers' 18th-century understanding of the right to trial by jury, when mandatory sentencing schemes didn't exist. For these reasons, the *Apprendi* cases have attracted an unusual combination of supporters: conservative originalists Antonin Scalia and Clarence Thomas, and, as of *Cunningham*, Chief Justice John Roberts; and moderate liberals Ruth Bader Ginsburg, John Paul Stevens, and David Souter. The justices in opposition are Anthony Kennedy, a former Sacramento lawyer; Samuel Alito, a former prosecutor; and

Stephen Breyer, the midwife (as a staffer for Sen. Ted Kennedy) of the federal sentencing guidelines.

In *United States v. Booker*, the court's 2005 sentencing case, one five-justice majority tried to kill Breyer's baby. In a Stevens opinion, this majority struck down the federal sentencing guidelines—a complicated series of charts and calculations that specify sentencing ranges for every federal crime, and which Congress had required the courts to follow since the 1980s. The Stevens group said the guidelines were unconstitutional because they allowed judges rather than juries to hike up a sentence.

But Breyer, leading a second five-justice majority, swooped in to save the federal guidelines by saying that courts could treat them as "advisory." On the one hand, the charts were unconstitutional; on the other hand, they still mattered. Only one justice, Ginsburg, agreed both with Stevens and Breyer, and she didn't explain how to square their competing approaches. And *Booker* left hanging other stray threads.

State and federal courts left to sort through the Supreme Court's contradictory and piecemeal directives often chose to ignore them. That's what California did in leaving its guidelines in place. With *Cunningham*, the Supreme Court told the states to start paying attention. California must have known its sentencing regime would fall. (The case also showed one new justice, Roberts, lining up with the Stevens-Scalia bunch and the other, Alito, with Kennedy and Breyer.)

Is it a good idea to toss out sentencing schemes like California's and the federal guidelines? That's a hard question. Guidelines and mandatory sentencing were supposed to bring order and uniformity to discretion-run-amok punishment, a world in which judges slapped one drug dealer with five years and another with 15 based on who they did or didn't like the looks of. Yet, in the past few decades, more uniform sentences have nearly always meant longer ones. Mandatory minimum penalties—five years for a certain number of grams of cocaine—have contributed. But so have sentencing guidelines. When legislatures set penalty ranges, they often don't seem to think about extenuating circumstances, or even, pragmatically, about the high cost of prison beds.

On the margins, at least, the *Apprendi* cases have helped loosen sentencing straitjackets. In their old mandatory form, the federal guidelines allowed judges to grant "downward departures"—sentencing breaks—for a small number of reasons. In the two years before *Booker*, only 6 percent of defendants got a lower sentence at a judge's behest. Since *Booker*, the rate of judge-instigated sentencing breaks has more than doubled to 13 percent. The rate of "upward departures"—higher sentences—also increased. But those numbers are much smaller—.78 percent before *Booker* compared to 1.35 percent afterward. So, the lesson seems to be that when judges have more discretion, they'll more often use it to curb the legislature's harsh impulses.

On the other hand, as federal appeals judge Michael McConnell argued last year in a law-review article, the Supreme Court's new approach may have derailed a push for broader sentencing changes. "Prior to *Booker*, there was a significant movement for sentencing reform," McConnell writes, citing support for reducing penalties from conservative groups like the Heritage Foundation and Chuck Colson's Prison Fellowship as well as liberal ones like the American Constitution Society. In the wake of *Booker* and

now *Cunningham*, by contrast, Congress' attention "has reverted to whether federal judges have too much discretion and whether they will be soft on crime," McConnell argues. He points out that the easiest way for lawmakers to reassert themselves is to pass more of the dreaded mandatory minimum penalties.

Cunningham is only the court's first word on the subject this term. In two cases to be argued next month, the court will fill in more detail about how much discretion federal judges actually now have. Doug Berman, law professor and sentencing blogger extraordinaire, thinks that both cases look like vehicles for additional change and leniency. In one, the defendant is a military veteran whose perjury crime looks more like a misunderstanding than a deliberate lie. In the second, an appeals court supplied the facts it relied on to reverse the sentencing break given by a trial judge. Get ready for more destruction.

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Judges rather than juries can still increase sentences based on a defendant's previous convictions—a big exception to the jury-sentencing rule.

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