

Introduction

He had one leg and a crutch for the missing one. Darryl Fulton had just been convicted for a string of bank robberies, and as he wobbled toward me, I started to hyperventilate. I was about to sentence someone to jail for the first time as a newly minted federal district judge.

That was twenty-four years ago. Since then I have probably put more than a thousand people in jail. It is the toughest part of the job.

For this book, I have picked out a cross-section of several different crimes for which I had to sentence a convicted criminal. I first write about their crimes. For example, I tell the stories of the trials of Peter Gotti (who succeeded his brother John as head of the Gambino crime family) and Pedro Espada Jr. (the former leader of the New York Senate). I then take the reader through the sentencing proceedings. I recount what the defendants said, what the lawyers said, what the victims said, and what I said. And I share with you my private thoughts and doubts as to whether I imposed the right sentence: Should I have sentenced Gotti to more than nine years? Was five years the right number for Espada? And each chapter represents a different sentencing category. For example, it will undoubtedly come as a surprise that a federal judge can consider *uncharged* and even *acquitted* conduct in rendering the sentence.

There is no uniformity in the sentences judges hand out. Regardless of all sorts of sentencing guidelines and multiple efforts throughout the years to try to avoid sentencing disparities among similarly situated criminals, every criminal defense lawyer will tell you that who the judge is still makes all the difference in the world.

Justice Sotomayor's book *My Beloved World* provides a better understanding of how her compelling beginnings shape her thinking as she wades through the challenging issues she must decide as the first Hispanic Supreme Court justice. And learning of Chief Justice Rob-

erts's far different upbringing allows us to appreciate how his thoughts might be different from his colleague's. It is not a matter of right or wrong. They are both skilled, dedicated jurists who care passionately about doing the right thing. And we would not want it to be any different. We do not want all the justices to be of one mind-set. Diversity of attitudes, opinions, and thoughts make for a more robust court.

When it comes to sentencing, however, we may not want such diversity. Conceptually, criminals doing the same crime should be doing the same time. But that is not how it works in the real world, any more than in the Supreme Court. As we will see, our sentencing laws give judges an enormous amount of discretion, and judges coming from different parts of the country, with different sociocultural backgrounds, will rarely see eye-to-eye. Our life stories are all different, and they shape our thought processes. No one makes a decision in a vacuum. We are the products of our environments, our families, our life experiences.

And the age of the judge and the number of years on the bench usually make a huge difference. There is a tendency for the new judge to be more cautious and less likely to stray from the straight and narrow. The sentences imposed during the staging-in phase of the judge's career will probably be greater than the sentences imposed under similar circumstances when the judge has a few years under his or her belt.

Conversely, since federal judges are appointed by the president for life, be wary of the very old judge whose perspective may be entirely different. I recall when I first got on the bench meeting the venerable Judge Bartels, who at the tender age of ninety-six was still sitting after four decades. He never remembered my name and would call me Sonny. We all loved him. He died just short of his hundredth birthday. But when he was in his nineties, he was still putting people in jail. The story goes that on one occasion, shortly after the judge had turned ninety, a lawyer was pleading that if he gave his client a twenty-year sentence, it would be tantamount to life since he was very old. The good judge asked how old he was. The lawyer said "seventy." Judge Bartels snapped back: "Seems like a pretty young man to me." He gave him the twenty years.

Thus, the sentences that I write about in this book will not necessarily have been the same sentences that my judicial colleagues may

have imposed, nor the same sentences that you would have imposed. Nonetheless, I think there is value in confessing to what goes on in at least one judge's mind to provide a window into the real world of sentencing.

It will be easy to do this for things I am consciously aware of. For example, I know that I am troubled and upset whenever I must sentence a Hasidic Jew. I am Jewish and feel ashamed that a fellow Jew—let alone an extremely observant one—has committed a crime. I have disciplined myself, however, by engaging in an internal dialogue to make sure that my angst will not become an unwarranted sentencing factor and that I will not impose a higher sentence than one that a non-Jewish colleague might render. If I had any doubts in a particular situation, I would recuse myself—although that has yet to happen.

But I have no control over the subconscious thoughts that may unwittingly be at play. I can only trust that my upbringing and life experiences have given me a decent judicial compass. What enters my mind when I decide whether someone should be put in jail—and for how long—is therefore the product of both the subconscious and the conscious.

In this book, I share thoughts that entered my mind during the course of the trials. I also recount parts of my life experiences that could have had some impact on my subconscious and may have affected the sentences that I handed out. This is detailed in the wide array of fascinating chapters that follow.

I wrote a good chunk of this book a few years ago but put it on the shelf until I was asked by Law360 to review *Tough Cases* (New Press 2018), a terrific compilation of the inner thoughts that many of our country's fine judges share with the public about the times when they were faced with making difficult decisions. I was struck by their candor in disclosing their "insights into the private thoughts that contribute to a judge's decision." After all, as I also wrote: "What goes on in a judge's mind is the fuel that ignites her or his judgment. It is the human side of our awesome calling, yet we invariably choose not to disclose our judgments' mental underpinnings."

Tough Cases gave me the courage to finish this book, since I think that the public is entitled to know what sentencing is all about and

what a judge's inner thoughts are when discharging this awesome aspect of his or her judicial responsibilities.

Crimes and Punishments is also intended to stimulate debate. Should a sentencing judge be allowed to consider uncharged, let alone acquitted conduct? How much weight should victim impact testimony have? How much consideration should be given to the status of a defendant as a public official? Are the RICO laws fair? Should Congress have unfettered discretion to take sentencing away from the judge by establishing mandatory minimum sentences whenever it wishes to do so? Has Congress effectively rendered the sentencing judge a mere functionary in those areas where it has chosen to act? Has Congress gone overboard in setting high mandatory minimums in child pornography cases? How does the prosecutor's charging decision impact sentencing? Is it time for needed reform in respect to the thousands of state and federal statutes establishing significant collateral consequences that ex-felons face? To what extent should these collateral consequences be sentencing factors?

The book raises these issues in what is intended to be reader-friendly dramatic chapters. I hope you will enjoy them.