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# Weinstein on Sentencing



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I shall talk about an area of the law of great significance to any society's measure of justice, criminal sentencing. I call my remarks "Weinstein on Sentencing."

Has Judge Weinstein over the course of decades fundamentally changed the contours of law and practice in this area? I think he would say "not enough." But that's not for lack of trying. In addition to many law review articles and speeches, he has written scores of sentencing opinions that exceed the standards of the most exacting academic—thorough, analytically impregnable, and heavily footnoted—attempting to get the Second Circuit, the Supreme Court, and Congress to remake sentencing law.

He has not waged these battles alone—but more than any judge I can think of, he has waged them continually and on every front, with powerful intelligence and humanity. In these ways he is one of the creators of today's new sentencing landscape, in which judges are allowed to consider not just what the Sentencing Commission proclaims, but what justice requires.

Never content to rest on his laurels, Judge Weinstein has, in the years since *United States v. Booker*<sup>1</sup> and its progeny, turned his sights primarily on the Guidelines' tough cousin, mandatory minimums. And, looking to stir up a little controversy (for a change), he's taken on sentencing in child pornography cases.

The first case to recall this evening actually involves neither the Guidelines nor mandatory minimums. In 1977, Judge Weinstein had the duty to sentence Daniel Fatico, who had pled guilty to one count of conspiracy to receive stolen goods in interstate commerce, in connection with a truck hijacking at Kennedy Airport. The Government advised the court that, at the sentencing proceeding, it wished to call an FBI agent who would provide reliable, informant information that Fatico was a "made member" of the Gambino family. Judge Weinstein held that the government could not call the witness, concluding that this was a new allegation that was material to sentencing under the then-existing "special offender" law and, therefore, that such hearsay testimony would violate Fatico's confrontation and due process rights.<sup>2</sup>

The Government sought mandamus in the Second Circuit. And, as has often been the case, it won—at least initially.<sup>3</sup>

At the sentencing hearing on remand, the Government called not one but ten witnesses. Judge Weinstein found that it had proved by "clear, unequivocal and convincing evidence," that the defendant was indeed a member of the Gambino family. On this basis, he explained, he was sentencing Fatico much more severely than he otherwise would have.

On the defendant's appeal, the Government requested the Second Circuit to reject both the burden-of-proof standard the Judge had used and "also the entire concept of a [sentencing] hearing." The Court of Appeals addressed these matters in a footnote. It did not approve or disapprove of the standard of proof. And it did not require sentencing hearings for important disputed facts. It did, however, allow that "we certainly would not hold it an abuse of discretion" for a district judge to hold such a hearing.<sup>4</sup>

And so *Fatico* hearings were *not* instituted by the Court of Appeals, which had not said they were necessary. And they were not instituted through the Criminal Rules, nor by Congress or the Supreme Court. They were developed and instituted by Judge Weinstein. They became the practice throughout the Second Circuit and many courts beyond. And it is a testament to Judge Weinstein's vision and persistence that the evidentiary hearings required by the Sentencing Reform Act of 1984 are called, at least in these parts, *Fatico* hearings.<sup>5</sup>

Now let me give but a glimpse of Judge Weinstein's sentencing jurisprudence in the years since the Sentencing Guidelines went into effect.

It is not surprising that the creator of the *Fatico* hearing was initially well disposed toward the Guidelines as a way to bring reason and a greater measure of process to sentencing.<sup>6</sup> At the same time, he warned, "To apply the rules of the new system blindly amounts to injustice. . . . No matter how efficient it would be, we may not delegate the sentencing decision entirely to the computer."<sup>7</sup>

As the radical nature of the Guidelines became clear by the early 1990s, Judge Weinstein soured on them. His discontent coalesced into four main criticisms. First, because they were so rigid, they had perverted the sensible idea of reducing disparity into "an unnecessarily cruel procrustean bed." Second, while seeking to reduce inter-judge sentencing *disparity*, what the Guidelines actually reduced was inter-judge sentencing *discussion*, at least among the judges

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in the Eastern District of New York. Third, the new regime required judges to look at the “bad” aspects of the defendant, while neither probation officers nor defense counsel had any incentive to be aggressive in seeking out the “good.”<sup>8</sup>

Fourth and foremost, the Guidelines failed to treat each defendant as “a unique human being.” In his 1992 article entitled *A Trial Judge’s Second Impression of the Federal Sentencing Guidelines*, Judge Weinstein noted that “[i]t would be historically and morally inappropriate to equate [sentencing under the guidelines with] deliberate and atrocious war crimes and genocide.”<sup>9</sup> Yet in the next sentence he quoted Hannah Arendt’s work on the Holocaust, and expressed his worry that under the Guidelines “we judges will cease to aspire to the highest traditions of humanity and personal responsibility that ought to characterize our office.”<sup>10</sup>

Judge Weinstein has never ceased to aspire to the highest traditions of his office. Acting within what he understands to be the limits of the law—which for this Judge are, essentially, appellate opinions directly on point and mandates from the Second Circuit to him!—he has sought to find ways, where warranted, to accord mercy under that law. Early on he became a judicial Houdini in freeing himself from various Guidelines mandates. Reading the Sentencing Reform Act to allow departures in areas not specifically contemplated by the Commission, he departed on the basis of physical illness,<sup>11</sup> being a single parent,<sup>12</sup> reduced mental capacity,<sup>13</sup> insufficient evidence that the drug courier defendants knew that the drug in the balloons they’d swallowed was heroin, and many more grounds not addressed in the Guidelines.<sup>14</sup> In several cases, he deferred sentencing for a year so the defendants might have an opportunity for rehabilitation.<sup>15</sup>

I get a special kick out of a case where the Second Circuit had earlier reversed his order granting bail. At sentencing, Judge Weinstein granted a departure because of, among other factors, “the defendant’s long pretrial incarceration under onerous conditions.”<sup>16</sup> (So there, Second Circuit!)

Judge Weinstein actually got away with all of the decisions I’ve mentioned—but perhaps that’s because the Government, for one reason or another, didn’t appeal them.

Where it did appeal, Judge Weinstein was less successful.

The Second Circuit rejected, for instance, his holding in 1994 that a close reading of the Sentencing Reform Act revealed that the Guidelines were not, in fact, mandatory.<sup>17</sup> In another case, where the Court of Appeals insisted that he apply a six-level increase due to relevant conduct,<sup>18</sup> the Judge asked, regarding the sentence he was required to impose, “Under the blindfold, does justice weep?”<sup>19</sup>

As these decisions suggest, Judge Weinstein is proactive. In 2003 Congress enacted the Feeney Amendment, which required the Courts of Appeals to review de novo any departure from the Sentencing Guidelines. The Judge responded by publishing a memorandum, in Federal Rules Decisions, called *In Re Sentencing*.<sup>20</sup> There he

announced that henceforth all of his sentencing hearings would be videotaped, in order to “assist the Court of Appeals judges in their new onerous task”—and, he went on, “the appellate judges can observe the actual people they are sentencing.”<sup>21</sup>

Not surprisingly, since *Booker* came down in 2005, Judge Weinstein has . . . exercised his discretion.<sup>22</sup> For instance, he has refused to apply sentencing enhancements where there is no proof of *mens rea*.<sup>23</sup> And in an opinion spanning more than one hundred pages, he decried—even as he applied—mandatory minimums for minor participants in drug crimes.<sup>24</sup>

As I noted at the outset, he has also taken on the difficult and sensitive matter of sentencing in child pornography cases. In the 2008 *Polizzi*<sup>25</sup> case, he had to sentence a pizza shop owner convicted of possessing this material, where the Guideline range was thirteen to fifteen years. In a later law review article, the Judge referred to the defendant as “a middle-aged, otherwise blameless peaceful citizen,” and family man, who viewed the child pornography in a locked room in his detached garage.<sup>26</sup> Judge Weinstein varied the sentence from the Guideline range of thirteen years down to the statutory minimum of five years. Although the *Polizzi* case, like many, bounced several times between Cadman Plaza and Pearl Street, the Second Circuit ultimately allowed the sentence to stand—while rejecting Judge Weinstein’s order granting a new trial and his argument that juries should be informed of applicable mandatory prison terms.

In another child pornography case decided last year, the judge found that applying the five-year statutory minimum would violate that defendant’s rights under the Eighth Amendment’s ban on cruel and unusual punishment.<sup>27</sup> This was no idle speculation; the Judge wrote a 400-page opinion explaining the historical, doctrinal, and factual bases for his judgment.

That 400-page opinion, and the others like it, are, I think, crucial to understanding this judge. Critics and fans alike have sometimes made the mistake of thinking that Judge Weinstein wears rose-colored glasses, or that he is “soft” on crime, or that he’s just got this big heart that’s spilling over with no reason or analysis. It is true that Jack Weinstein is humane and empathetic, and that he has great social insight and compassion. He brings these qualities to bear in his judging. But he also brings to bear piercing intelligence that untangles complexity, and integrity that rebukes deception. He comprehends the whole of the law, and never fails to explain his reasoning under the law.

I would say of Jack Weinstein what he has recalled about great judges of the past. In a new article entitled *The Roles of A Federal District Court Judge*,<sup>28</sup> he writes: “A candid statement of the reasoning supporting the trial court’s decision is always required. Mendacity in twisting the facts, evidence, history or legal background to arrive at a conclusion is not acceptable.” He then quotes Learned Hand’s description of another New York judge: “[Cardozo] never disguised the difficulties, as lazy judges

do [,] who win the game by sweeping all the chessmen off the table. . . .”<sup>29</sup>

Judge Weinstein has always acknowledged all the chessmen—all the laws that bind him and the litigants who come before him.

But Judge Weinstein does play chess very well.

## Notes

\* The author thanks Alex Ramey '13 for his excellent research assistance. These remarks were given at a panel on Judge Weinstein's jurisprudence held on September 13, 2011 at the City Bar Association of New York. The event marked Judge Weinstein's 90th birthday and also the publication of Jeffrey Morris's biography, *Leadership on the Federal Bench: The Craft and Activism of Jack Weinstein* (Oxford 2011).

<sup>1</sup> United States v. Booker, 543 U.S. 220 (2005).

<sup>2</sup> United States v. Fatico, 441 F. Supp. 1285, 1287 (E.D.N.Y. 1977). Taking the long view, Judge Weinstein argued that these constitutional procedural protections had evolved considerably in recent decades, as evidenced both by several Supreme Court cases applying a few constitutional rights at sentencing and by changes in the Rules of Criminal Procedure. Before 1966, Rule 32 prohibited even revelation of the presentence report to the defendant and his counsel, but by 1975 it required such disclosure and provided that, in the discretion of the court, the defendant could introduce testimony relating to any factual inaccuracy. FED. R. CRIM. P. 32 advisory committee's notes (1975). It was a short step to recognize that the defendant had the right to cross-examine the government's witnesses.

<sup>3</sup> The Second Circuit ordered Judge Weinstein to allow the witness to be called. United States v. Fatico, 579 F.2d 707 (2d Cir. 1978). This first Court of Appeals opinion in *Fatico* did move the law of the Circuit a little, however, in implying that hearsay is admissible at a sentencing hearing only if it is "reliable." The Court of Appeals also noted that "the weight given to the informer's declarations and the assessment of credibility are matters for the sentencing court." *Id.* at 713 n.14.

<sup>4</sup> United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979).

<sup>5</sup> It took a couple of decades, but under the Guidelines regime the Second Circuit also adopted Judge Weinstein's view that sometimes a burden of proof higher than the preponderance standard is needed for the finding of aggravating facts. See United States v. Shonubi, 203 F.3d 1085, 1089 (2d Cir. 1997) ("a more rigorous standard should be used in determining disputed aspects of relevant conduct, where such conduct, if proven, will significantly enhance a sentence").

Judge Weinstein has explained that the significance of *Fatico* hearings is their deterrent effect: knowing that disputed facts will lead to a hearing, counsel exercise greater diligence in contributing to and reviewing sentencing information; in particular defense counsel exercise greater diligence in ensuring that their clients understand and agree with the representations in the presentence report. See Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 358-59 (1992).

<sup>6</sup> Jack B. Weinstein, *A Trial Judge's First Impression of the Sentencing Guidelines*, 52 ALB. L. REV. 1 (1987-88).

<sup>7</sup> *Id.* at 11.

<sup>8</sup> See Weinstein, *supra* note 5, at 363-66.

<sup>9</sup> *Id.* at 366.

<sup>10</sup> *Id.* at 366.

<sup>11</sup> United States v. Velasquez, 762 F. Supp. 1262 (E.D.N.Y. 1991).

<sup>12</sup> United States v. Concepcion, 795 F. Supp. 1262 (E.D.N.Y. 1992).

<sup>13</sup> United States v. Liu, 267 F. Supp. 2d 371 (E.D.N.Y. 2003).

<sup>14</sup> United States v. Cordoba-Hincapie, 825 F. Supp. 485 (1993); see also United States v. Ekwunoh, 813 F. Supp. 168 (E.D.N.Y.), *rev'd*, 12 F.3d 368 (1993).

<sup>15</sup> See, e.g., United States v. K., 160 F. Supp. 2d 42 (E.D.N.Y. 2001).

<sup>16</sup> United States v. Speed Joyeros, 204 F. Supp. 2d 412 (E.D.N.Y. 2002).

<sup>17</sup> United States v. Abbadessa, 848 F. Supp. 369 (1994). Judge Weinstein concluded that the Guidelines were just one factor the judge should look at under the Sentencing Reform Act's Section 3553(a) (this is not a nutty theory; it was shared by, among others, my late, great colleague Dan Freed). The Second Circuit, like all the other Courts of Appeals, rejected this reading, applying instead a *Chevron*-like deference to the Commission's reading of its enabling statute. See United States v. DiRiggi, 45 F.3d 713 (2d Cir. 1995). In an earlier case, Judge Weinstein held that the sentencing enhancement for perjury was not mandatory (and in the course of his opinion discussed not only the issue of double-counting in that particular case, but also the general nature of "human frailty"). United States v. Shonubi, 802 F. Supp. 859 (E.D.N.Y. 1992). He was reversed, United States v. Shonubi, 998 F.2d 83 (2d Cir. 1996).

<sup>18</sup> United States v. Molina, 106 F.3d 1118 (2d Cir. 1995).

<sup>19</sup> United States v. Molina, 963 F. Supp. 213, 216 (E.D.N.Y. 1997). The sentence quoted at text is the title of Jeffrey Morris's chapter on Judge Weinstein's sentencing decisions. On remand in *Molina*, Judge Weinstein also wrote as follows:

Molina made two mistakes. The first was entering into a conspiracy to rob an armored truck and acting to carry out that plan. His second mistake was in seeking trial rather than in quickly working out a plea deal with the government. The result is that Molina, although . . . more apt to be rehabilitated . . . will languish under a sentence much longer than all but one of his confederates. His two year-old son will spend more than a decade of his childhood without his father. This is what the Guidelines as interpreted by the courts require.

*Id.* at 215.

<sup>20</sup> *In re Sentencing*, 219 F.R.D. 262 (E.D.N.Y. 2004).

<sup>21</sup> *Id.* at 262 n.20.

<sup>22</sup> When the Supreme Court issued its landmark decision in *Blakely v. Washington*, 542 U.S. 296 (2004), Judge Weinstein immediately saw that the *Blakely* reasoning applied equally to the federal Guidelines, and sought to adapt sentencing procedures to avoid the *Blakely* problem. In one case, Judge Weinstein ordered the empanelling of a jury to hear disputed sentencing facts. United States v. Landgarten, 325 F. Supp. 2d 235 (E.D.N.Y. 2004), *vacated as moot*; see also United States v. Khan, 325 F. Supp. 2d 218 (E.D.N.Y. 2004).

In another case, he stayed a federal revocation proceeding so that the defendant could be tried on his new crime in state court and be eligible for drug treatment. United States v. Brennan (E.D.N.Y. Jan. 2, 2007).

<sup>23</sup> United States v. Handy, 570 F. Supp. 437 (E.D.N.Y. 2008).

<sup>24</sup> United States v. Bannister, (E.D.N.Y. Mar. 24, 2011), *superseded*, 2011 WL 1361539 (E.D.N.Y. Apr. 8, 2011). In the end Judge Weinstein did apply the mandatory minimums and acknowledged that he viewed these as appropriate for some of the defendants. See *id.* at 49.

<sup>25</sup> United States v. Polizzi, 549 F. Supp. 308 (E.D.N.Y. 2008).

<sup>26</sup> Jack B. Weinstein, *Finding Facts and Making Judgments*, 38 SETON HALL L. REV. 867, 869-70 (2008).

<sup>27</sup> United States v. C.R., No. 09-CR-155 (E.D.N.Y. 2011).

<sup>28</sup> Jack B. Weinstein, *The Roles of a Federal District Court Judge*, 76 BROOK. L. REV. 439, 453 (2011).

<sup>29</sup> *Id.* at 454.