

The Least Accountable Branch?

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Under what conditions should judges be held accountable to their constituents for the decisions they make? In framing our question as we have we are immediately tipping our hand on two crucial issues: (1) we assume that judges have constituents, which is, of course, technically true of more than 90% of American judges, and (2) we imply that under at least some conditions, accountability is not only appropriate but required by most theories of liberal democracy.¹ Our arguments run as follows:

- In many areas of law, including sentencing, judges are given by statute an enormous amount of discretion.
- When law authorizes discretion, law no longer indicates what specific decision should be made. Any decision that falls within the range of discretion authorized by law must be judged to be compatible with the rule-of-law.
- Judges may base their discretionary decisions on many factors, including expertise, their own ideological predilections, their own self-interest, the interests of the workgroup of which they are a member, and the preferences and interests of their constituents, to name just a few salient factors.
- The factors upon which judges base their decisions may conflict with one another. For instance, when it comes to sentencing, the interests of the courtroom workgroup may clash with the interests and preferences of the judge's constituents.
- References to constituents' preferences and interests as "whims" or in other ways irrational are practically never accompanied by evidence pertaining to the nature of those preferences and interests. It is improper to assume away a role in decision making for judges' constituents by such prejudicial and entirely non-evidence-based assertions.
- Under a number of conditions, it is appropriate for judges to base their discretionary decisions on the interests and preferences of their constituents. Doing so poses no conflict with hallowed principles such as the rule-of-law.

THE MEANING OF JUDICIAL ACCOUNTABILITY

What do we mean when we ask whether judges should be "accountable" to the public? Judicial accountability encom-

passes judicial responsibility for the conduct of judges as a whole, for their behavior on and off the bench, and for the content of their rulings.² Few would argue, for example, that judges should *not* be held accountable for mismanagement of institutional resources or for violating canons of judicial ethics. At least as institutional and behavioral notions of accountability are concerned, that judges should be held responsible for their actions seems beyond dispute.

But those are not the only types of accountability. The conversation around judicial accountability tends to focus on *decisional accountability*: the notion that it is good to hold judges responsible for specific decisions or sets of decisions that they make. As it concerns Judge Persky's situation in California, many of Persky's constituents who were unhappy with the sentence Persky gave to Turner exercised decisional judicial accountability when they voted against him at the ballot box. So too did Persky's supporters who found Turner's sentence to be appropriate.³ Critics of judicial elections oftentimes rebuke voter decision making and judicial campaigning on notions of judicial accountability. Many political scientists take a different view, arguing that such campaigns can provide valuable information to voters who are inclined to hold judges accountable for the decisions they make.⁴

Judicial accountability is often juxtaposed against judicial independence.⁵ Our notion of judicial independence is simple: judicial independence provides judges with the discretion to decide cases the way they believe a case should be decided. Judges who are not independent must decide cases in ways that they believe are incorrect for either personal or political reasons. In some countries, for example, judges risk death or replacement if they rule against the government;⁶ under these circumstances, judges lack judicial independence.

While it is sometimes fashionable to say that judges who are independent are "accountable to the law," that need not be the case.⁷ Independence simply means that judges are able to make decisions without fear of reprisal. In doing so, judges may decide on the basis of many factors, including the law, expertise, their own ideological predilections, their own self-interest (including ambitions), the interests of the workgroup of which

The material in this research is based upon work supported by the National Science Foundation under Grant Number 1456580 and the Russell Sage Foundation under award number 83-18-22. Any opinions, findings, and conclusions or recommendations expressed in this material are those of the authors and do not necessarily reflect the views of the National Science Foundation or the Russell Sage Foundation.

Footnotes

1. CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (2009); MELINDA GANN HALL, ATTACKING JUDGES (2014); HERBERT M. KRITZER, JUSTICES ON THE BALLOT (2015).
2. Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911 (2006).
3. Maggie Astor, *California Voters Remove Judge Aaron Persky, Who*

Gave a 6-Month Sentence for Sexual Assault, NEW YORK TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html>

4. BONNEAU & HALL, *supra* n. 1.
5. G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES (2012)
6. Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 921 (2002).
7. Alyse Face, *Judges Should Be Accountable to the Law, Not Public Opinion*, BRENNAN CENTER FOR JUSTICE (Sept. 17, 2014) <https://www.brennancenter.org/blog/judges-should-be-accountable-law-not-public-opinion>.

they are a member, and the preferences and interests of their constituents, to name just a few salient factors. Judicial independence may contribute to rule-of-law outcomes, but does not necessarily do so (e.g., judges who base their decisions solely on their own ideologies).⁸

Moreover, the relationship between judicial elections and judicial independence has changed over time. While many now argue that judicial elections *reduce* judicial independence, that has not always been the case. For example, judicial elections were originally adopted in the mid-1800s as a means of increasing judicial independence, based upon fears that judges were too accountable to the state legislators and party leaders who recommended and appointed them.⁹ Likewise, Bolivians adopted judicial elections in 2009 for their national high courts based upon a promise that judicial elections would increase judicial independence and reduce corruption.¹⁰

Of course, these two concepts have been the subject of voluminous debates among legal scholars, and our description here only scratches the surface of the tension between judicial independence and judicial accountability.¹¹ The key points of this discussion for our argument are simply that judicial independence increases opportunities for judges to rely upon whatever factors they would like—be those legal or otherwise—to make decisions. And, while decisional accountability is often criticized, the basic notion of judicial accountability for other types of judicial behaviors is relatively straightforward: just because someone is a judge does not mean they should not be held responsible for their conduct.

THE AVAILABILITY OF JUDICIAL DISCRETION

Judges' decisions are sometimes said to be incompatible with the rule of law. But we contend that any decision authorized by statute or precedent or rules of equity is one that is compatible with the rule of law. Those who criticize judges' decisions as inconsistent with the rule of law are often doing nothing more than declaring that they disagree with the decision. In reality, judicial decision making is difficult to judge because judges are gifted with unbelievable amounts of discretion.¹² This is not particularly surprising; almost every judicial decision, of almost every type, involves a choice between alternative outcomes. And, anyone with even a cursory knowledge of the opinions of high courts knows that judges often disagree about which of those alternative outcomes is correct. As much as Supreme Court nominees like to hail their affinity for calling "balls and strikes," the craft of judging is discretionary and difficult, and we observe many good-faith disagreements among competent and qualified judges about how a case

should be resolved.¹³

What explains these disagreements? In some cases, law is very clear and constrains the legitimate outcomes a judge can reach. If a road has a speed limit of 25 miles per hour and a driver is clocked by a police officer (who is using a correctly calibrated tool) as operating her or his motor vehicle at 40 miles per hour, a judge has relatively little discretion in how the defendant's speeding ticket should be resolved. In the absence of facts to the contrary, the defendant has committed the crime of speeding. The law is clear in that case.

Most cases are not that easy. Typically, the law is indeterminate, providing judges with legitimate discretion that supports a range of possible outcomes. This is true with regard to choices on concepts ranging from "commonality" to "reasonableness." As Judge Cardozo put it in his famous lecture on *The Nature of the Judicial Process*:

The decision-making freedom that judges have is an involuntary freedom. It is the consequence of legalism's inability in many cases to decide the outcome... That inability... create[s] an open area in which judges have decisional discretion—a blank slate on which to inscribe their decisions—rather than being compelled to a particular decision by "the law."¹⁴

In other words, the law is not clear in many cases, leaving even the most careful judges a window of discretion. Consider, for example, constitutional provisions like "reasonable" searches and seizure, "cruel" punishment, or an "adequate" education. These clauses are ripe with vagueness; in these circumstances, judges' interpretations of the law give them discretion based on the meaning of the provision or statute they must interpret.

Trial judges, in particular, have an extreme amount of discretion in their day-to-day work. These judges make discretionary decisions about what evidence to admit, which witnesses to believe, which jurors to seat, and which requests of the lawyers to grant. All of these decisions typically involve judgment calls based on credibility, a concept that is extraordinarily subjective. In short, even when carrying out their day-to-day jobs, judges exercise a great deal of discretion.

[J]udicial decision making is difficult to judge because judges are gifted with unbelievable amounts of discretion

8. James L. Gibson & Michael J. Nelson, *Judicial Elections: Judges and their New-Style Constituencies*, in THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 48 (Lee Epstein & Stefanie A. Lindquist, eds., 2017).
9. Jed Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010).
10. Amanda Driscoll & Michael J. Nelson, *The 2011 Judicial Elections in Bolivia*, 31 ELEC. STUD. 628, 628–29 (2012); Amanda Driscoll & Michael J. Nelson, *The Political Origins of Judicial Elections: Evidence from the United States and Bolivia*, 96 JUDICATURE 151 (2013); Amanda Driscoll & Michael J. Nelson, *Judicial Selection and the*

Democratization of Justice: Lessons from the Bolivian Judicial Elections, 3 J. L. & CTS. 115 (2015).

11. For a more complete overview of the debate, see TARR *supra* n. 5.
12. Of course, the amount of discretion granted to judges in deciding what sentence to impose pales in comparison to the unfettered statutory discretion given to prosecutors when it comes to the decision to charge or not charge for a criminal offense.
13. Brett M. Kavanaugh, *The Judge As Umpire*, SAINT POPE JOHN XXIII LECTURE SERIES (2015) https://scholarship.law.edu/johnxxiii_lectures/2.
14. Quoted in Richard Posner, HOW JUDGES THINK (2008) at 9.

[J]udicial discretion is, practically speaking, virtually unbounded

In still other cases, the law expressly provides judges with discretion. This is obviously true when judges sentence a defendant, authorizing them to give, for example, a fine and/or a period of probation or a lengthy prison sentence. And many of those statutes are accompanied by *specific grants of discretion* in terms of the sever-

ity of a sentence.¹⁵ While specific aggregating or mitigating factors might be authorized by statute, determining whether or not those factors have been satisfied is often another grant of discretion. Again, this seems uncontroversial: that judges are so rarely found to have abused their discretion speaks to the conclusion that judicial discretion is, practically speaking, virtually unbounded.

THE FACTORS THAT INFLUENCE JUDICIAL DISCRETION

If judicial discretion is, as we have argued, an inevitable part of the judicial process, then what factors should guide that discretion? To begin, there are some features that clearly should *not* influence judicial behavior because they undermine the rule of law. The easiest example is a bribe. Even if a decision may be authorized by law (e.g., the defendant is statutorily authorized to receive probation), the process leading to the decision (the bribe) may render the decision illegitimate as a violation of the rule of law. And we of course recognize that, while bribery is not much of an issue in contemporary U.S. judicial politics, it is not so unbelievable outside the geographic confines of this country. Here, campaign contributions are an issue, and some believe that basing one's decision on campaign contributions is illegitimate and a violation of the rule of law.¹⁶ This then means that how a decision is made (procedurally proper) is important beyond the specific outcome embraced by judges.

Still, that extralegal factors may legitimately influence judicial decision making is not as strange as it may first appear. Consider the use of legislative intent to interpret a statute. Many judges and legal scholars believe that judges should defer to the interpretation of a text as it was originally drafted; by that view, judges' discretion should be curtailed by neither the law (strictly speaking) nor their own personal views but rather by outsourcing interpretation of a statute or constitutional provision to its original authors (or, in some instances, to a presidential signing statement).

Or consider interpersonal dynamics among judges. Judges on collegial courts decide cases in groups, and it is only natural

that the unique personal information they bring to the bench might change how their colleagues exercise their discretion in some cases.¹⁷ Justice Ginsburg made this point well when discussing the Supreme Court's deliberations in a case involving the strip search of a 13-year-old girl by her teachers: "They have never been a 13-year-old girl.... It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood." After she explained to her colleagues "the trauma such a search would have on a developing adolescent," Ginsburg was able to persuade her colleagues to rule that the school's search was unconstitutional.¹⁸ In this way, judges' exercise of discretion might sometimes be affected by the personal views and experiences of their colleagues.

DISCRETION AND THE ROLE OF PUBLIC OPINION

Naïve understandings of judicial independence sometimes suggest that judicial independence is nothing more than deciding cases independent of public opinion. As we have argued above, this is not true. Indeed, sometimes the statutes *directly ask justices to consider public opinion*. Consider *Roper v. Simmons* (2005): "To implement this framework we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."¹⁹ Or, to take another example, the *Miller* test for obscenity asks judges to consider: (1) whether "the average person, applying contemporary community standards" would find that the work, "taken as a whole," appeals to "prurient interests," (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) whether the work, "taken as a whole," lacks serious literary, artistic, political, or scientific value.²⁰ These are all cases in which judges are specifically asked to consider what their constituents might believe about a case.

Even when public opinion is not expressly implicated in the law, there are many scenarios in which judges might quite reasonably take into account the preferences of their constituents in making their decisions. For instance:

- When the public turned against the war in Vietnam, sentences for draft evasion could quite reasonably be changed from prison time to probation under the theory that dwindling support for the war no longer justified incarcerating those who opposed the war.
- To combat the gun epidemic in Chicago, judges could quite reasonably announce that they intend to double the average sentence for gun-related crimes, based on the belief

15. James L. Gibson, *Environmental Constraints on the Behavior of Judges: A Representational Model of Judicial Decision-Making*, 14 LAW & SOC'Y REV. 343 (1980); Michael J. Nelson, *Responsive Justice? Retention Elections, Prosecutors, and Public Opinion*, 2 J. LAW & CTS. 117 (2014).

16. James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 70 (2008); James L. Gibson, *ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGIT-*

IMACY 136 (2012).

17. Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effect of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010).

18. Robert Barnes, *Supreme Court Rules Strip Search Violated 13-Year-Old Girl's Rights*, WASH. POST (June 26, 2009), Available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/25/AR2009062501690.html>.

19. 543 U.S. 551, 560-1 (2005).

20. 413 U.S. 15, 24 (1973).

that responding to the fear of gun violence is reasonable and that increasing penalties are likely to deter gun-toting behavior.

- As a means of “sending a message,” a judge could quite reasonably sentence Martha Stewart to prison time for insider trading on the stock market, this time under the theory that majoritarian institutions decided to ban certain trading behavior, and without meaningful enforcement and serious penalties, the purposes of the law would be defeated.
- When citizens vote to legalize some forms of marijuana, judges could quite reasonably change their sentencing behavior to give less serious sentences to those convicted of marijuana crimes because, as a *mala prohibita* crime, the definition of what constitutes a crime is to some degree arbitrary, with whatever people think is criminal being treated as criminal.
- Judges who ride a circuit—especially one made up of both rural and urban counties—could quite reasonably adjust their sentences to take into account the degree to which a crime constitutes a moral affront to the instant community.
- Judges pressed to address the widespread culture of sexual assault could quite reasonably issue sentences that assuage the legitimate concerns among their constituents that potential perpetrators need strong deterrents to get them to change their behavior.

LIMITS ON THE ROLE OF PUBLIC OPINION

We do not necessarily argue that sentences in instant cases should consider the preferences of the judge’s constituents. But sentences in the aggregate constitute public policy. For judges to say that they are changing the “going rate” for particular crimes because their constituents are worried about the crime does not strike us as being in the least inappropriate. Or certainly it is no more inappropriate than listening to the voices of those who say that current penalties are unfair and too severe.

Sentencing is a different type of judicial decision, one associated with an enormous degree of authorized discretion. We do not argue that judges should ignore mandatory sentences if their constituents oppose them.²¹ But we see no valid arguments supporting the view that judges who listen to the general sentencing preferences of their constituents are acting improperly. Certainly, no one could rightly judge sentences informed by the value priorities of the judge’s constituents a violation of the rule of law.

It is pure fantasy to suggest that, out of a range of 0 to 30 years, there is a “correct” decision, and that the judge is uniquely in a position to know what that “correct” decision is.

Instead, we know from decades of research on criminal courts that the interests of the “courtroom workgroup” play an outsized role in the decisions of that workgroup. Is it appropriate to sentence on the basis of a workgroup’s “going rates” for individual crimes? What about taking into consideration the degree of overcrowding in the prisons? Or perhaps enhancing a sentence because the defendant pled innocent and therefore required the time, effort, and expense of a jury trial? Or to issue lesser sentences to the clients of an attorney who makes campaign contributions to the judge to get assignments to represent indigent defendant? Much discussion of sentencing seems to suggest that there is a “correct” sentencing decision—or at least one that is best justified by the need of the convicted for “rehabilitation.” But American prisons generally fail in their rehabilitative function, and sentencing decisions are often more likely to represent the needs of the workgroup than the needs of the convicted.

Research on the sentencing decisions of Kansas judges offers a useful case study of the conflict between the needs of the criminal court workgroup and the preferences of the judges’ constituents.

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THE SENTENCING BEHAVIOR OF KANSAS JUDGES

Much has been made of the findings that judges change their behavior over the course of the electoral cycle—scholars are particularly concerned about the research findings of Huber and Gordon, Gordon and Huber, and Berdejó and Yuchtman.²² The assumption is that decisions made in proximity to an election are improper (the word “pander” is often used) and that decisions made outside the electoral period (however defined) are proper. To be clear, “proper” and “improper” are normative judgments, not empirical findings. All the data themselves show is that the behavior differs at different points-in-time. For instance, “when election is imminent, judges in competitive districts are 7.1% . . . more likely to sentence a convict to time in prison and, conditional on incarceration, assign sentences 6.3 months longer than their counterparts in retention districts.”²³ In general, some scholars are much concerned about serious bias against criminal defendants in states that elect their judges. We, however, are less concerned.

For simplicity, let us assume two periods of decision making—a period under external scrutiny (the election period) and a period not under external scrutiny (the non-election

21. Consider, for example, U.S. District Court judge Jack B. Weinstein, who tossed aside a conviction for child pornography because the defendant posed “no risk to society.” A.G. Sulzberger, *Defiant Judge Takes on Child Pornography Law*, N. Y. TIMES A1 (May 21, 2010).

22. Gregory A. Huber and Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office*, 48 AM J. POL. SCI. 247 (2004); Sanford C. Gordon and Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q. J. POL. SCI.

107 (2007); Carlos Berdejó and Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV OF ECON. AND STATISTICS 741 (2013).

23. Gordon and Huber, *supra* n. 22 at 129-131. It is important to note that Gordon and Huber exclude so-called victimless crimes such as drug possession from their analysis. It is at possible that constituents want more *lenient* sentences for this sort of criminal conviction and that their preferences are satisfied by the courts.

Crimes typically are associated with a “going rate” [of sentence level].

period). What we mean by “external” is that in the period not under scrutiny, the courtroom workgroup (the prosecutor, the defense attorney, and the judge) is able to implement its preferences without constraint. Assume for a moment that prosecutors are

motivated by producing as high a “conviction rate” as possible, defense attorneys (and defendants) primarily want no jail time, and judges shoot for a record of not ever being overturned on appeal. All of these motivations fuel the plea-bargaining process.

Now, few have ever argued that the sentences handed out under plea bargaining are rationally designed. Crimes typically are associated with a “going rate,” around which increments and decrements are sought. An important goal of the process is conflict minimization and maintenance of the relationships among the repeat players—the courtroom workgroup. Under these circumstances, the average sentence for a second conviction on burglary might be on the order of four years, a very far cry indeed from the maximum sentence for the crime provided by the state legislature (a parameter that so many decry as an unreasonable, even if largely irrelevant, decision by a majoritarian institution).

Our point is simple. Assume Huber and Gordon are correct about temporal variability in sentencing. Could it not be that the sentences issued under periods without scrutiny are sentences that primarily serve the benefits of the courtroom workgroup, and that those sentences are “too low” (whatever that means)? When under scrutiny, the actors in the workgroup are compelled to consider societal interests more strongly, and therefore cannot “give away the store” just to secure a guilty plea from a defendant. To treat sentences in the non-electoral period as somehow more rational (e.g., tailored to fit the rehabilitation needs of the defendant) does not at all fit with the reality of plea bargaining in American criminal courts. If the workgroup is simply negotiating self-serving sentences in the non-election period, then the scrutiny that comes during the electoral period may actually be desirable from the point-of-view of the public good.

Let us assume that the constituents generally want a sentence of +6 months, or, more precisely, +6.3 months. We take this figure from the finding of Gordon and Huber that judges in competitive districts in Kansas “assign sentences 6.3 months longer than their counterparts in retention districts.”²⁴ Clearly, many observers view this additional 6.3 months as undesirable. But the only criterion they apparently use to make this judgment is that of defendant preferences. We completely

agree that it is reasonable to assume that convicted criminals would prefer to spend X months in jail rather than X + 6.3 months in jail.

So, convicted criminal defendants want less jail time and constituents want more.²⁵ Without some ancillary theoretical apparatus, it is not at all clear to us why the preferences of the defendants should be treated as superior to the preferences of the constituents.

We should readily admit that we do not necessarily agree with the view that guilty criminal defendants are somehow entitled to lenient sentences. We would not, for example, necessarily object to a convicted burglar getting 5.6 years of incarceration rather than 5.0 years. We would not agree with a sentence outside the range of available penalties proscribed by statute (of course). More generally, we would most likely agree with sentencing decisions that are transparent and subject to scrutiny. But simply to say that +6.3 months is somehow wrong, and because it is wrong, the method of selecting judges is wrong, strikes us as entirely too simplistic.

What if the people of Kansas realized how expensive it is to incarcerate convicts and therefore shifted to a preference of -6.3 months for the average sentence? Would it be appropriate for the sentencing judges to respond to these changed preferences? If so, then the culprit critics identify is not necessarily judges responding to the preferences of their constituents (because they are elected, not appointed), but rather that the constituents currently hold “bad” preferences. If that is true, then perhaps the palliative is to change the constituents, not the methods of selecting judges.

“PANDERING?”

Scholars who write about the role of public opinion in court decisions often use the word “pander” when referring to incorporating constituent preferences into the factors guiding the exercise of judicial discretion. According to the *Oxford English Dictionary*, the verb “pander” refers “to act as a pander; to minister to the immoral urges or distasteful desires of another;” or, “in weakened use: to indulge the tastes, whims, or weaknesses of another.”²⁶ Critics use this term, we suspect, under the assumption that the preferences of the constituents are ill-informed, or just simply irrational. We strongly suspect that many who read the Huber and Gordon findings are disgusted that the American people unreasonably seem to prefer more punitive rather than less punitive sentences. This is just one more charge in what is often a comprehensive indictment of the American people for being know-nothing dolts when it comes to law and politics.

Many have argued that judges ought not to “pander” to the “whims” of their constituents. Of course, framing the question

24. Gordon & Huber, *supra* n. 22 at 131.

25. To assume that the American people always want more punitive criminal sentences may not be correct. In the last decade or so, a rather dramatic change in American public opinion toward the death penalty has occurred, with support for the penalty declining by about 20 percentage points (see, for state-by-state documentation of this trend, Brandice Canes-Wrone, Tom S. Clark & Jason P. Kelly, *Judicial Selection and Death Penalty Decisions* 108 AM. POL.

SCI. REV. 23 (2014)). With the rising costs of incarceration—coupled with the rising public awareness of that cost—it is not difficult to imagine that public opinion could soon shift from preferring longer to shorter sentences.

26. OXFORD ENGLISH DICTIONARY, *Pander*, <http://www.oed.com/view/Entry/136753?rkey=9Nhiue&result=2&isAdvanced=false#eid> (Last visited Dec. 7, 2018).

in this fashion prejudices the conclusion. It assumes that constituents do not have meaningful policy preferences and that to respond to these meaningless preferences is to gratify or indulge an immoral or distasteful desire, need, or habit or a person with such a desire. We do not in this essay speak in favor of pandering.

Constituents differ—and differ legitimately—on what they view the function of sentencing to be (just as scholars and policy makers differ). Some may favor general deterrence, while others seek special deterrence. Some may favor retributive justice; others seek restorative justice. Some may view the role and preferences of the victim to be determinative; others may think that victims ought to be excluded from the sentencing process.

Constituents also have many legal policy preferences that are a far cry from being whims. Attitudes toward abortion, for instance, are often grounded in considered moral ideologies, and are also often informed by science and medicine.²⁷ The belief that harsher sentences will deter crime may or may not be entirely supported by scientific evidence, but because it is not does not mean that it is a whim that can be ignored (just as, out of faith, many scientists believe that life as we know it must exist somewhere in the universe). Relatedly, the position that the only way to stop sexual assaults in this country is by stepped-up prosecutions and lengthy and harsh penalties may be derived after considerable thought and deliberation. Similarly, the judgment that employment-at-will is an antiquated and unfair legal doctrine can be a considered view that is well grounded in other beliefs. Even the political preference that Americans should withdraw all troops from Afghanistan should hardly be treated, on its face, as a whim to which presidents and legislators ought not to pander. Ordinary people hold views on legal issues that may not be embedded in a well-articulated and logical ideological frameworks, but that does not mean that their preferences on issues such as issuing sentences of life imprisonment without parole or seizing private property for private development are whimsical, ill-informed, or unreasonable.

Finally, those who make the “whim” and “pandering” arguments typically (if not always) produce not a scintilla of proof in support of their views. How does one determine whether public opinion is a “whim” that ought to be ignored or a considered judgment? Critics typically use phrases like “pandering” to refer to representatives who represent views the critics disliked; for views with which they agree, phrases like “representative democracy” or even “the wisdom of the crowd” are more likely to be used.

CONCLUDING THOUGHTS

No one, of course, argues that judges ought to do nothing but look to the preferences of their constituents when making

27. Indeed, by some accounts, the science that undergirded *Roe v. Wade* (e.g., regarding viability) is no longer accepted, so the factual basis of *Roe* may well have been very seriously undermined. See Chelsea Conaboy, *The Abortion Debate Doesn't Change, But the*

sentencing or other policy decisions, just as (we hope) no one argues for complete judicial independence—or that the life terms of the highly unaccountable U.S. Supreme Court justices should be expanded to other judicial officers. No one argues that the majority ought to get its way in all policy decisions, judicial or otherwise; and we are not sanguine about the difficulty of specifying when the majority has the right to get its way and when minority rights must trump majority preferences. Clearly, there must be constraints on the degree of accountability and constraints on the degree of independence.

But we do argue that a large number of policy decisions made by judges ought not to ignore the preferences of the judges' constituents. The enforceability of mandatory arbitration terms in contracts that nearly all do not read and do not understand is not an issue, for example, on which the preferences of the American people ought to be ignored. And, we contend, there is absolutely nothing wrong in a democracy that decides its judges should be elected and in which the constituents of the judges vote on the basis of whether they agree with the policy decisions of the judicial candidates. For judges to hide behind judicial independence, unsupported claims to the superiority of judicial judgments over the preferences of the constituents, and distain for the rationality of public opinion is unwarranted.



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Science of Abortion Does, BOSTON GLOBE (Aug. 31, 2018) <https://www.bostonglobe.com/ideas/2018/08/31/the-abortion-debate-doesn-change-but-science-abortion-does/smHRPvw5XDk-TXzMUrADawK/story.html>.