

# REIMAGINING JUDGING

## EXECUTIVE SUMMARY

Nancy Gertner



REIMAGINE JUSTICE

What is the role of federal judges in reimagining justice? When new federal laws or regulations are created and passed, it comes down to judges to enforce them—particularly through the adjudication and sentencing decisions made in individual cases. As we consider ways to create a system with more equitable laws and policing, how can we prepare the institution of the federal judiciary, and individual judges in individual cases, to support and facilitate real change?

In the past 40 years, federal judges' roles have changed drastically, from discretionary and reformatory to sentencing focused on mandatory minimums. In recent years, it has become a combination of both. Discretionary sentencing alone is not reform; judges must be willing to make different decisions in order for real change to occur.

Judges have traditionally been resistant to most types of reform: even when changed laws broadened the scope of judges' sentencing discretion, many judges have been hesitant to utilize this development. This happens for many reasons, including the separation of judges from the involved parties and lawyers based on an ideology of judging called "legal formalism" that asserts this is necessary to prevent bias; a process of federal judicial selection through which the backgrounds of federal judges rarely match up with the demographics or experiences of the communities that they serve; and incentives for judges not to write sentencing opinions—even when they have thoughtful and pertinent views—in order to streamline case management and prevent overturn on review.

We must find ways to change this, and the courts and judges themselves have a role to play. The courts must be actively involved in the revolutionizing of the justice system. Judges must engage with broader questions

on how the current system disproportionately impacts communities of color and poor communities to effectively serve these communities. In holding judges and the judicial system accountable, the criminal legal system will be able to reckon with past harms and better transform its future.

## RECOMMENDATIONS FOR REIMAGINING JUDGING

### Judicial Selection

Judicial selection should reflect not just diversity in race, gender, and sexuality but also diversity in socio-cultural experience.

### Judicial Training

Judges should be trained in the impact of trauma, exposure to violence, poverty, and lack of access to schools, healthcare, employment, etc.

### Sentinel Event Audits

Judges should conduct retrospective reviews, similar to doctors' independent "sentinel audits" conducted following a death or serious injury when there is a wrongful conviction, recidivism, or an unexpected tragic event in a case.

### Statistical Reviews

Judges' sentencing records should be subject to regular statistical analysis to identify racial bias.

### Community Engagement

Judges should meaningfully engage with the communities in which they serve.

### Narrative Change

Judges should attempt to change the narrative through opinion writing, shining a light on the humanity of individual people and the inhumanity of the criminal legal system. □