

Curtailing the Sentencing Power of Trial Judges: The Unintended Consequences

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In the middle 1960s, the President's Commission on Law Enforcement and the Administration of Justice issued *The Challenge of Crime in a Free Society*.¹ One part of the report was "Task Force: Corrections," covering imprisonment, probation and parole. It supported the principle of indeterminate sentencing, which held that in setting a criminal's total sentence, his incarceration should be relatively short and his parole supervision in the community should be long, based on the notion that when the inmate was released, with help from his parole officer, he could more easily be integrated into society and become a conforming, productive citizen.

Since that time, there has been a 180-degree change in the philosophy of corrections. Legislators and politicians have tried to outdo each other in extending the ambit of capital punishment, demanding longer and mandatory sentences, and abolishing parole. The obvious result has been that inmates now serve longer sentences and the number of inmates in prison has increased. What is the price we are paying for this change?

Right now, times are good: the unemployment rate is low, and the FBI reported that, in 1997, serious crimes, including murder, and property crimes had declined for the sixth year in a row.² Despite good times, however, since 1990, the number of federal and state

prison inmates has continued to increase, along with the budgets for prisons. In 1990, of the 65,526 prison inmates who were serving time in the federal prison system, 31,300 were drug offenders. By the end of 1997, the number of inmates had jumped by 47,447 to 112,973, of whom 55,194 were drug offenders.³ At a minimum cost of \$25,000 per inmate, the yearly federal budget has risen by almost \$2 billion in this seven-year period. During the same time period, the number of state prisoners rose by 423,188, from 708,393 to 1,131,581, of whom 23 percent were drug offenders, at a cost of roughly \$10.5 billion, leading to sharp cutbacks in other state programs, particularly university funding.⁴

What is the prognosis for the future? It is generally agreed that when the percentage of 15- to 21-year-olds in the overall population increases (as it is doing right now), and if our economic situation falters, unemployment figures rise, and the number of families below the poverty line increases, the rate of crime will rise. The "drug problem" shows no sign of changing or being solved: even now, heroin use among U.S. teenagers is rising.⁵ Under such circumstances, prison commitments would increase and the federal and state corrections budgets would explode.

Let's look for a moment at the federal corrections system: why have prison commitments increased so much, even

in "good" times? For the answer, we start with a history lesson.

Twenty-seven years ago Marvin Frankel, sitting as a federal district judge in New York City, wrote a book called *Criminal Sentences*,⁶ in which he called attention to the evils of sentence disparity — offenders committing the same offense receiving wildly different sentences by different judges. The problem, for Frankel, was the unlimited discretion given to judges by sentencing laws prescribing indeterminate sentences, such as one to fifteen years, or a choice between probation or prison at the option of the judge. Under such laws, sentences could be, and were sometimes, handed down by judges with individual biases. Prison inmates found themselves serving time with fellow prisoners who had committed the same offense, but received much shorter sentences. Further, the disparity of sentences was frequently irrational in that it was not geared to the severity of the offense. Prison administrators routinely complained about the effects on morale and the injustice of sentence disparity.

Frankel's book started a movement to reform sentencing at both the federal and state levels, and while the resulting reform schemes differed in structure and detail, all were aimed at severely limiting the discretion of the sentencing judge. In the 1980s, Congress formed committees in the Senate and the House of Representatives that held hearings to

Footnotes

1. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967).
2. *Crime Drops in '97; Murders Are at 30-Year Low*, N.Y. TIMES, Nov. 23, 1998, at A16.
3. BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 1997* (Aug.

1998).

4. Randal C. Archibold, *Colleges Fall, But Prisons Rise in State Support*, N.Y. TIMES, Dec. 2, 1998, at B18.
5. *Heroin Use Is Rising Among U.S. Teenagers*, N.Y. TIMES, Dec. 8, 1998, at A22.
6. MARVIN FRANKEL, *CRIMINAL SENTENCES: CRIME WITHOUT DISORDER* (1972).

address the problem of disparity in sentencing. The witnesses, for the most part, were academics and appellate court judges; largely missing were trial court judges, probation administrators with hands-on experience in the dimensions and problems of sentencing, and prison wardens and superintendents.

In October 1984, with strong bipartisan support, Congress enacted the Comprehensive Crime Control Act, to be applied to federal offenders who committed crimes after November 1, 1987.⁷ This act abolished parole and the Federal Parole Commission and created a Sentencing Commission to draw up guidelines for federal sentencing. To assess the probable impact of the Guidelines, we developed a questionnaire designed to elicit practitioner reactions to various types of sentencing changes, and in that connection we surveyed a fairly large representative group of judges, prosecutors, parole commissioners and wardens in New York and in the federal government. The responses indicated unenthusiastic support for sentencing guidelines, dissatisfaction with mandatory and flat sentences, and support for post-release supervision. Our findings were published in September 1987, two months before the Federal Sentencing Guidelines were implemented.⁸

As mandated by the new law, the Federal Sentencing Commission developed a scheme that assigned point values to both the offense and the offender. Offenses were assigned points for the heinousness of the crime, whether violence or cruelty was involved, etc., and

offenders were given points for recidivism, substance abuse, and the like. Charts were then constructed with the score for the offense on one axis, and the score for the offender on the other, resulting in something that looked very much like a mileage chart. The judge had only to run his finger along each axis and sentence according to the number of months in the box.⁹ The point and grid scheme constituted sentencing guidelines, which, in theory, would have greatly reduced sentencing disparity. Instead, the dreaded law of unintended consequences has produced something close to a disaster. The most obvious result was a sharp rise in prison commitments. A less obvious result has been disproportionately long sentences for minor offenders and slaps on the wrist for some major criminals.

To begin with, Judge Frankel was wrong in identifying the sentencing judge as the villain of the sentencing process. The real malefactor is the prosecutor. The great majority of criminal cases are disposed of by plea bargaining. The defendant agrees to plead guilty to a lesser offense in return for a lesser charge. Plea bargaining is really sentence bargaining, because the judge has to sentence by the charge, not by the real criminal conduct. Thus, it is the prosecutor who controls the ultimate sentence, not the judge.

Further, sentencing guidelines have resulted in great injustice by forcing judges to sentence minor offenders severely, while major offenders are treated far more leniently. This is because there is a joker in the deck, i.e.,

prosecutors may recommend a substantial reduction in a sentence where the defendant "cooperates" - names names and gives valuable information on his criminal enterprise. Low-level criminals cannot "cooperate" because, being at the bottom of the organization, they haven't any information to give. The result of the lengthy incarceration of minor offenders has been an astronomical increase in the prison population, so severe in some state systems that violent offenders have been released early to make room for minor drug offenders. As a consequence of the guidelines, the length of most commitments were uniform - but only based on the formal level of the convictions (by plea or after trial). That is, all criminals convicted of the same degree of robbery, are, more or less, given similar sentences, as are all criminals convicted of the same degree of homicide, etc. However, when a prosecutor intrudes with a plea bargain, the level of crime for which the criminal is convicted is lowered, as is the resulting sentence, though the underlying conduct is still the same.

We had become aware that many federal trial court judges were profoundly unhappy with the mandatory provisions of the Sentencing Guidelines. In an effort to track this down, we interviewed a number of senior status judges.¹⁰ We chose senior judges because we felt that they were not looking for political advancement and would be more likely to give us objective, nonpolitical responses.

Federal guidelines have proved to be such a disaster that many judges of

7. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

8. Alexander B. Smith, Harriet Pollack & F. Warren Benton, *Sentencing Problems: A Pragmatic View*, 51 FEDERAL PROBATION 3 at 67-74 (Sept. 1987).

9. Sentencing Reform Act of 1984 28 U.S.C. §§ 991-998; 18 U.S.C. §§ 3551- 3673 (1984).

10. Senior status permits federal judges to remain on the bench after reaching the age of 65 if they have served fifteen years, or at age 70 if they have served ten years, or any combination of years of service and age that adds up to 80. As senior judges, they can accept as much of a workload and whatever cases they choose while continuing to receive full pay. Senior status is an alternative option to retirement, and judges may retain such status indefinitely,

although they are periodically re-certified by the chief judge of their court of appeals. A majority of those eligible for retirement elect instead to take senior status because they feel their physical stamina is adequate, the work is interesting and rewarding, and they can enjoy the prestige and deference that goes with being a federal judge. The job of senior judge is no sinecure. The judges work hard and are necessary, indeed essential, to the functioning of the court. Because of the inordinately high caseload, the federal district courts could not function without the services of these judges of senior status. When a federal judge takes senior status a vacancy results, which is filled by appointment. The senior judge slot is not charged to the table of organization, and the particular court ends up with an additional judge.

senior status, who often can choose the cases they wish to hear, have refused to handle criminal cases because they consider the guidelines so unjust. Sentencing judges who attempt to deviate from the guidelines have almost universally been reversed on appeal, and no member of Congress dare suggest reform lest they be accused of being "soft on crime." Most of the judges we interviewed were quite bitter about the operation of the sentencing guidelines. As one of them remarked: "The people who drew up these guidelines never sat in a court and had to look a defendant in the eye while imposing some of these sentences." Some of the judges have attempted to rectify the injustice of the prescribed sentence by deviating from the guidelines, only to have their decisions, accompanied by written explanations justifying their deviation, overturned. Because of their distaste for the rigidities of the sentencing guidelines, most of the senior judges have refused to take on criminal cases, especially drug cases.¹¹ In April 1993, Judges Jack Weinstein and Whitman Knapp publicly announced their refusal to take such cases and were castigated by Representative (now Senator) Charles E. Schumer for picking and choosing the laws they wished to enforce. Schumer invited the judges to "knock on Congress' door and tell us what is happening in their courtrooms,"¹² but, according to the judges, many spokesmen already had done so, and nothing was done.

A lot has been written by legal scholars and practitioners about the serious problems inherent in the sentencing guidelines. This has not moved Congress. No politician wants to be considered as soft on crime. In the last campaign for the U.S. Senate in New York State, there were lively debates between (then) Congressman Schumer and the incumbent, Alphonse D'Amato. Both men tried to outshout each other about how tough they were on crime, how they

had supported legislation to extend capital punishment and increase prison terms, and how they had fought to curtail parole. These debates were typical of what went on throughout the country. There seems to be no representative in Congress, at present, who has any interest in or stomach for modifying, in any way, the sentencing guidelines. With a federal budget surplus, Congress feels no pressure to do anything about the problem of rising prison costs. Three years ago, the Sentencing Commission proposed the modest step of reducing sentences for offenses involving crack cocaine, to eliminate the disparity in penalties for crack and powdered cocaine. The Clinton Administration opposed the amendment, and Congress voted it down.

The U.S. Supreme Court has started to pay attention to the serious problems the guidelines have caused. In 1993, Chief Justice Rehnquist said in a speech that mandatory minimums "frustrate the careful calibration of sentences" that the sentencing guidelines were intended to accomplish. Nothing was done at the time, but in a 1996 decision, the Court finally offered hope that the rigidity of the guidelines might, at least, be modified. That case, *Koon v. United States*,¹³ involved the police officers who beat Rodney King and were subsequently convicted in the federal district court of violating King's civil rights. The guidelines required 70 to 87 months imprisonment. Judge John G. Davies sentenced the defendants to 30 months each, for a variety of reasons, one of which was that King was partially responsible for the beating because he resisted arrest. On appeal, the Ninth Circuit Court of Appeals reversed Judge Davies and imposed the more severe, guideline sentences. The U.S. Supreme Court unanimously reversed the appellate court and said that a trial judge's decision was "due substantial deference" and should be set aside only for "abuse of discretion." Even Justice Stephen G. Breyer, who had

been a member of the Federal Sentencing Commission that drew up the Federal Sentencing Guidelines, concurred with all but one section of the Court's unanimous opinion.¹⁴

Recently, at a conference on sentencing at the University of Nebraska College of Law, Justice Breyer said that although he remained "cautiously optimistic" about the guidelines, the system had become too complex and too intertwined with the dozens of mandatory minimum sentences that Congress has attached to the criminal code. Justice Breyer's views are important because of his close involvement with the guidelines. He was chief counsel of the Senate Judiciary Committee, which helped steer the bill that became the Sentencing Reform Act of 1984. From 1985 to 1989, as a court of appeals judge, he was one of the original members of the Sentencing Commission. In his speech, Justice Breyer recommended that greater judicial discretion be exercised by the trial judges, even though a degree of fairness would be sacrificed. In addition, he said that the system was suffering from administrative neglect and that all seven seats on the Sentencing Commission were vacant and should be filled. Justice Breyer went on to say that the Justice Department should "make the guidelines a high institutional priority. . . . The guidelines cannot succeed without strong leadership from the department, acting not in its role as federal prosecutor, but as a national 'ministry of justice'" that can undertake and encourage research on how the system is working.¹⁵ He did not address the imbalance in the criminal justice system which is the result of the enhanced power of the prosecutor in the sentencing phase of the judicial process; nor did he comment on the rise in prison commitments.

After eleven years, it should be obvious that the system has failed and that it cannot be fixed — even by the Supreme Court — because the criminal justice system has been distorted: the enhanced

11. Alexander B. Smith et al., *Looking Back: Senior Judges of the Second Circuit Reflect on the Criminal Justice System*, in 3 CRIMINAL LAW BULLETIN 252-261 (May-June, 1994).

12. Charles E. Schumer, Letters to the Editor, *The Judges Transgress*, N.Y. TIMES, May 3, 1993, at A14.

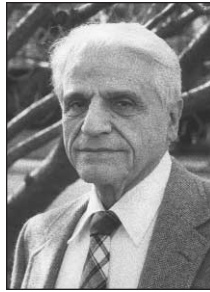
13. 518 U.S. 81 (1996).

14. 518 U.S. at 118.

15. Linda Greenhouse, *Guidelines on Sentencing Are Flawed*, N.Y. TIMES, Nov. 21, 1998, at A14.

power of the prosecutor in sentencing has diminished the traditional role of the judge. The result has been even less fairness, and a huge rise in the prison population. If it is the judge who has to look the defendant in the eye when imposing sentence, and has to answer to the community for the severity or leniency of the sentence, his role should not be diminished or demeaned. As a group, prosecutors are looking to enhance their "batting average," so that they can aspire to higher office. They should not be in a position of prosecuting a defendant and determining his sentence.

Ultimately, Congress will have to face up to the necessity of revising the Guidelines and reconsidering the advisability of reinstating parole. When it does, it should realize that it cannot excessively depend for advice on appellate judges who have not had trial experience or on legal scholars whose knowledge of the criminal justice is, at best, second hand, to give them sufficient insight in improving the system. Congress must call on seasoned trial judges, probation supervisors and administrators, in addition to prison wardens and superintendents, for insight and guidance.



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