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Jurist in Residence Lecture

Cruel and Usual: Sentencing in the Federal Courts

John S. Martin, Jr.*

If I were to tell you that every day federal judges are ordering that the dominant hand of drug offenders be cut off, you would no doubt all be appalled and feel a need to do something about such inhumanity. While no one's hand is being cut off, every day in the federal courts judges are imposing such harsh sentences that the defendant would probably prefer to have his or her hand cut off.

In a speech to the American Bar Association two years ago Justice Kennedy said of our sentencing system, "Our resources are misspent, our punishments too severe, our sentences too long."[1]

Let's start with the statement that our sentences are too long. I do not question that there are those who should be in jail for long periods of time and some who should never see the light of day outside prison. The problem with our current criminal sentencing system is that it does not draw distinctions between the serious offender who deserves the maximum possible sentence and others whose crimes are less serious or whose involvement is less substantial.

When I started out as an Assistant to the United States Attorney in the early sixties, there was a five-year mandatory drug sentence that was considered extremely harsh. It was rare to see a defendant, other than someone prosecuted under that mandatory statute, receive a sentence of five years in jail. Today, there are 168,000 prisoners in the federal

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1. Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

system and approximately 68% of them are serving sentences of five years or more.[2] Twenty percent of those prisoners are serving sentences in excess of fifteen years and 12% are serving sentences over twenty years.[3] What is interesting is that only 3.2% of those incarcerated in our federal penitentiaries have been convicted of murder, kidnapping or aggravated assault, which we normally think of as the crimes that would warrant such severe sentences.[4]

Let me give you a few examples of how overly severe sentences are being applied to low level violators. About a year before I retired, I was presiding at a pretrial conference in a criminal case. I asked the Assistant U.S. Attorney to outline the proof against the defendant. He said that this defendant, who was an addict, sat on a stoop on a public street and when people would come up and ask where they could get crack, he would tell them of the apartment in which the other defendants were selling crack. Because he did this, from time to time the crack dealers would give him some crack for his own use. I asked what the guideline sentence was. The answer was that, because the defendant had prior convictions for street level sales of drugs, under the guidelines the sentence was approximately sixteen years, and there also was a mandatory minimum sentence of twenty years that could apply.

Another example is found in an opinion I wrote in a case entitled *United States v. Williams*.[5] In that case, the defendant had been involved in the sale of twenty-nine grams of heroin to an undercover police officer. He did not play a major role in transaction, although he was present when the heroin was delivered and helped count the money paid by the undercover police officer. Williams, who was then in his early twenties, presented the picture of a typical defendant in the federal narcotics cases. He was raised by a single mother in the projects in the Bronx. He began using marijuana at the age of ten. At the age of nineteen he was convicted in state court of having sold two envelopes of heroin to an undercover officer. Nine months later, he was convicted for selling a ten dollar bag of crack to an undercover officer. Approximately two years later, he was arrested for selling crack on the street. Under the Federal Sentencing Guidelines, Williams faced a minimum sentence of twenty-two years.

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2. Up-to-date statistics regarding the number of federal prisoners can be found at The Federal Bureau of Prisons, http://www.bop.gov/index.jsp (last visited Jan. 6, 2006).

3. *Id.*

4. *Id.*

5. 78 F. Supp. 2d 189 (S.D.N.Y. 1999).

These two cases provide good examples of sentences which are too long that are regularly being imposed on minor drug violators. However, it is not only the very long sentences that can be too severe. Let me give you two other examples. One of the early cases I tried, involved a single mother of two children who worked at the United States Post Office in downtown Manhattan on the night shift. At approximately 11:30 p.m. one night, she had her break and went to a local bar where she joined two other women from the post office waiting to buy some cocaine for their personal use. When the cocaine dealer came in they each said that they wanted a twenty dollar bag. He asked one of them to step outside with him to exchange the money for the cocaine, and the defendant volunteered to do this. She was found guilty of distributing cocaine within a thousand feet of a school, which carried a mandatory one-year prison sentence.

In another case, a woman, who was an Hispanic immigrant, was before me in a case involving food stamp fraud. Her husband had been the leader of a group that had been involved in the purchasing food stamps from welfare recipients for cash and he was sentenced to approximately six years. According to the Government the husband would occasionally bring food stamps home and have his wife stamp them on the back with an endorsement necessary to deposit them. Occasionally he would have her take the food stamps to the bank and deposit them. Although she had three children, one of whom was severely retarded, the guideline for her sentence was 2 1/2 years in jail.

While each of the cases I have described involves someone who clearly did something the law prohibits, in none of the cases was the sentence prescribed appropriate. I should tell you that in each of the cases, we were able to work out a more favorable disposition. However, these cases are examples of why there must be discretion in sentencing. Unfortunately, I do not think all judges would have believed that they had the power to depart from the guideline sentences in those cases.

The perception that our sentences are too severe is not simply that of some group of liberal judges. In response to an article published in *The New York Times*, I received a letter from a judge in the South who described himself as a conservative and said:

> when I was appointed by President Reagan in the Fall of 1985, I thought my biggest concern in sentencing would be to make sure that hard core criminals were not routinely given lenient sentences. I soon found out, however, that the guidelines, particularly in drug case, are so favorable to the prosecution that I must devote much of my attention to trying not to

give harsh sentences where none is required.

One of the things that I have found interesting is the extent to which court personnel, not directly involved as parties to the litigation, have expressed their concern about the severity of the sentences being imposed in our courts. People like our interpreters and our court reporters have on numerous occasions told me about incidents where they just were shocked by the sentence that was being imposed on a particular defendant. I recall a court reporter telling me that she had just taken a proceeding in which a young man in his twenties had been sentenced to life without parole for a narcotics violation even though there had been no violence associated with his activity. He was in fact a dealer in substantial quantities of narcotics, and deserved a substantial sentence, but putting him away for the rest of life seemed to her and to me an unduly harsh punishment. Several years ago, I visited a women's prison in Texas where I met a well-spoken woman in her twenties who was serving life plus thirty-five years because of her involvement in her boyfriend's crack distribution operation.

You might ask why, if our sentences are so harsh, has there not been more of a public outcry. To a large extent, the answer is found in the population upon whom we are imposing these harsh and cruel sentences. Of the 168,000 prisoners in our federal prisons today, 40% are Black, 32% are Hispanic, another 3% are Asian or Native American.[6] While there may be some overlap in the Black and Hispanic populations, I think it is fair to estimate that between 65 and 70% of the federal prison population are minorities. I do not believe that we have a consciously racist criminal justice system. I do believe, however, that because these sentences are imposed on minorities, they do not cause the majority community the concern they would feel, if the defendants were people with whom we identified in a meaningful way. Several years ago in a speech to the Federal Bar Council in New York, my former colleague, Bob Carter said that if as large a percentage of the White community was being imprisoned as is happening in the Black community, our society simply would not tolerate it and would look more closely at the root causes and do something. I am firmly convinced he is correct. It is not that we are consciously trying to imprison minorities, we simply do not care enough about the problems that minorities face.

Let me turn now to Justice Kennedy's statement that our resources

6. For statistics regarding prison populations by race see the U.S. Department of Justice, http://www.ojp.usdoj.gov/bjs/welcome.html (last visited Jan. 5, 2006).

are misspent. Two years ago I visited a federal women's prison in Arizona in which 270 women were incarcerated. There were no prison walls, no barbed wire, nothing that would prevent any of them from leaving the camp. At night between 10:00 p.m. and 6:00 a.m. there was one Bureau of Prisons employee on duty at that institution. It was a warehouse for women, many of whom were mothers with young children. I asked myself what conceivable good is it doing for society to have most of these women warehoused here while their children are raised in foster homes or by distant relatives. We are just making sure that we repeat the cycle that will lead their children to spend a good part of their lives in our prison system.

There are other ways in which our resources are being misspent on lengthy prison terms for minor violators. Several years ago, the Rand Corporation did a cost benefit analysis of various approaches to our narcotics problem.[7] The study concluded that every million dollars spent on incarcerating drug offenders for longer periods of time would result in the decrease of thirteen kilograms of cocaine distributed. However, if you took that same million dollars and, rather than spending it for prison guards and other correctional costs, used it to put more police and drug agents on the street, you would reduce narcotics distribution by twenty-seven kilograms. Even more revealing, the study found that, if you took that million dollars and spent it treating heavy users in narcotic addiction programs, you would reduce cocaine consumption by over one hundred kilograms. Unfortunately, it is easier to run for Congress by saying you voted for harsher mandatory sentences for drug dealers than by saying you voted to allocate more money for drug addiction programs.

Another way to see how our resources are misspent in our sentencing system is to look at the escalation of the cost of imprisonment in the federal system. In 1978, there were 20,000 people in the federal system at a cost of $308 million. Today, there are 168,000 people in federal prison at a cost of over $5 billion. The question that has to be asked: is this vast increase in the amount we are spending incarcerating our fellow citizens having a substantial impact on crime? I suggest that the answer is no. Forty percent of the people in federal prison are there because of narcotics related offenses. However, statistics will show that there has been no diminution in the amount of narcotics addicts or narcotics being distributed in this country.

Our current sentencing scheme also leads to inefficiency in the war

7. *See* http://www.rand.org.

against drugs. We have gotten to the draconian sentences which exist today, because ever since I was an Assistant United States Attorney in the early 1960s, drug enforcement officials would tell Congress that we can win the war on drugs if we increase drug sentences. Time after time, Congress would respond to that argument by increasing the penalties. However, these harsh penalties are applied without any thought about the level of involvement of the particular defendant in the narcotics distribution scheme. When you fail to distinguish between major and minor violators, you give the law enforcement community the ability to brag about their success in prosecuting narcotics violators. They can testify before Congress and say look, there are 40,000 people who are in federal prison for sentences of over ten years because of their narcotics violations. What is not said is that the incarceration of 95% of those individuals will have no meaningful impact on the amount of drugs distributed because those individuals are low level members of narcotics distribution organizations who can be immediately replaced upon their arrest.

It is very easy for drug enforcement officers to go out on the street and arrest addicts selling drugs as in the *Williams* case. But you end up with somebody doing more than twenty years in jail who was immediately replaced by another addict willing to sell drugs to get some for himself. Drug agents can create impressive statistics by arresting low level drug dealers. It takes a much greater law enforcement effort to prosecute major violators who do not operate openly on the streets. If we simply limited the harsh penalties to major violators, we would be providing the Drug Enforcement Agency with an incentive to concentrate their efforts on major violators, and we would have a way of measuring the success of law enforcement in the war on drugs.

I am not opposed to the concept of sentencing guidelines. The Sentencing Reform Act, which established the guideline system, had as its central theme the concept that judges should have guidelines to follow in imposing sentence so that there would be uniformity in sentences. To accomplish this end, the statute set up a panel of experts; a sentencing commission that was charged with the task of setting up guidelines for the sentencing for each violation of federal law. A guideline tells the judge what the sentence should be in a typical case. Thus, judges in California and New York can look at the guidelines to determine the appropriate sentence for the typical drug dealer who sells a kilogram of heroin.

However, there are three factors that have combined to make our

sentencing regime unconscionably severe. First, Congress has adopted numerous excessively harsh mandatory minimum sentences, which give the judge no discretion in imposing a sentence.

Second, at the time the Sentencing Commission was formed, it was charged with developing a philosophy of sentencing and developing a sentencing system that would fix appropriate sentences for various types of criminal conduct. However, when the Commission attempted to do this they found that they could not reach a consensus on these major issues. Rather than attempt to use their expertise to set appropriate sentences the Commission simply took an average of the sentences for each type of crime that had been imposed in the past and used that average sentence to establish the guideline for that offense. Thus, the Sentencing Commission, which was established to replace a flawed system, took the average result from that flawed system and adopted that as the guideline for future sentences.

Third, the Sentencing Commission felt compelled to fix the guideline sentences to make them consistent with the lengthy mandatory minimum sentences that Congress had mandated for various offenses, particularly narcotics offenses. Since the mandatory minimums are too high the guidelines are also too high. While these problems primarily relate to drug sentences, once drug sentences were set at a high range, there has been a tendency to increase the sentences in white collar cases to avoid the perception of a double standard. Thus, we can now proudly say that we treat white collar defendants almost as unfairly as we treat narcotics defendants.

Justice Kennedy, in his address to the ABA, stated that the guideline sentences are too high and should be revised downward. I enthusiastically agree. Since the guidelines became effective in 1989, the number of people in federal prisons has grown from 47,000 to 168,000.

During the last three years I was on the court, I served on the Criminal Law Committee of the Judicial Conference and we worked closely with the Sentencing Commission. I am confident if the Commission had the freedom to set the guidelines without Congressional interference they would do much to alleviate the harshness of our sentencing system. However, Congress refused to let the Commission do the job it was created to do and continuously attempted to micromanage the work of the Commission.

For example, the Commission did an extensive study of the disparity in sentencing for crack and powder cocaine and found no

justification for it. When the Commission considered amending the guidelines to reduce the crack penalties to the level of powder cocaine, it was told by leaders in Congress that if the changes were adopted Congress would overrule them.

While some in the defense bar rejoiced at the Supreme Court's decision in *United States v. Booker*[8] as signaling the end of the rigidity of the sentencing guidelines, I think the joy is unwarranted. Although the Supreme Court said that the guidelines were not mandatory, it said that the sentencing judge must still consider the guideline. This was reiterated by the Second Circuit in *United States v. Crosby*.[9] I think that the experience since *Booker* indicates that there has not been a substantial increase in the extent of departures from the guidelines and I do not think that there will be.

If I was given the choice, I would abandon our guideline system entirely and do away with all mandatory sentences. Those who favor sentencing guidelines observe that such guidelines provide a rational basis for ensuring that defendants who commit similar crimes in similar circumstances will receive similar sentences. Since ending unwarranted disparity in sentencing was a principal reason for establishing the guideline system, the first question to be asked is whether experience has shown that this goal has been accomplished. A look at the most recent statistics from the Commission's 2003 Annual Report suggests that the answer to that question is a resounding "no."

In fiscal year 2003, only 69% of all sentences imposed were within the prescribed guideline range. In 16% of the cases, downward departures from the guideline range were made as a result of a motion by the prosecutor under Section 5K1.1 because of the defendant's substantial assistance in the investigation or prosecution of another person. In another 6.3% of the cases, sentences were imposed below the guideline range as a result of a Justice Department initiative such as a fast track program where plea offers below the guideline range were made in order to reduce the backlog of immigration and narcotics cases in some of the border districts. In 7.5% of the cases, judges departed below the guideline range under Section 5K2.0, finding that "there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

8. 543 U.S. 220 (2005).
9. 397 F.3d 103 (2d Cir. 2005).

Departures from the Sentencing Guidelines in 31% of the cases does not, in itself, suggest that these departures give rise to disparity. Indeed, in many of these instances, prosecutors and judges are correctly identifying cases where departure is appropriate under the standards established by Congress and the Commission. However, even if we assume that the Sentencing Guidelines were consistently applied in those cases in which the courts departed under Sections 5K1.1 and 5K2.0, the same risk of disparity that existed under the pre-guideline regime exists today in those case because those two provisions give judges as much discretion in imposing sentences as they had before the Sentencing Guidelines.

More importantly, however, the available data suggests that there is a wide disparity in the exercise of the departure power under Sections 5K1.1 and 5K2.0 by prosecutors and judges.

Looking at the extremes in substantial assistance departures: in the Eastern District of Pennsylvania, 38.8% of the defendants received substantial assistance departures, while in the Southern District of West Virginia, only 2.6% of the defendants received such a departure. Making the same comparison by circuit reveals that in the Third Circuit, 28.8% of all defendants received substantial assistance departures, while in the Tenth Circuit, only 9.4% of the defendants received such departures. There is no reason to believe that the nature of the crimes prosecuted in various parts of the country is so different that the need for cooperating defendants would vary so substantially. Thus, these statistics suggest that there is great disparity in the criteria used by individual United States Attorneys in moving for Section 5K1.1 departures.

Similarly, there is disparity in the way individual judges grant downward departures in cases where there is no motion by the prosecutor for a substantial assistance departure. For example, in the Eastern District of Oklahoma, only 1.2% of all defendants received downward departures for reasons other than substantial assistance, whereas in the District of Connecticut 31.3% of the defendants received such departures. A similar comparison by circuit shows that in the Second Circuit, 16% of all defendants received such departures, while in the Fourth Circuit, the departure rate was 3.8%.

Disparity in the application of the departure power by prosecutors and judges is relatively easy to detect. What is not as easy to detect, however, is the extent of the disparity that no doubt exists even in the 69% of the cases in which the defendants were sentenced within the guideline range. Before examining the factors that may lead to disparity

among sentences imposed within the guideline range, it is important to note that disparity in sentences can occur in one of two ways. First, individuals who commit similar crimes in similar circumstances may receive different sentences. Second, individuals who commit different crimes in different circumstances may receive the same sentence even though the conduct of one is more culpable than that of the other. In enacting the Sentencing Reform Act, Congress intended to end such disparities. Unfortunately, experience suggests that the emphasis on ending the first type of disparity has resulted in an increase in the second type of disparity.

There are a variety of factors that result in disparities in sentences imposed within the Sentencing Guideline range. First, the Sentencing Guidelines do not impose any meaningful limits on the prosecutors' discretion in selecting the crimes with which the defendants will be charged. Anyone who has been active in the criminal justice system since the inception of the Sentencing Guidelines knows that there are instances when the prosecutor will file a less serious charge to induce a defendant to plead guilty and thereby avoid being sentenced under a more severe guideline.

Second, in negotiating a plea, prosecutors may agree to forego a sentencing enhancement that they would seek after a trial, such as an increase for the defendant's role in the offense, or agree to limit the scope of the defendant's criminal conduct, which is used to calculate his guideline range, to less than that which might be proved at trial. These decisions to seek less in a plea than might be obtained after trial may be totally appropriate given the risks inherent in litigation, but there is no reason to believe that all prosecutors are applying uniform standards in making these choices.

Third, even where judges and prosecutors are attempting to apply the Sentencing Guidelines in total good faith, some of the factors that may enhance or decrease an offense level lack sufficient precision to ensure completely uniform application. For example, the Sentencing Guidelines provide for decreases in the offense level if the defendant was a "minimal" or "minor" participant in the crime. Similarly, both the bribery and fraud guidelines provide for a sentence enhancement if the criminal conduct "substantially jeopardized the safety and soundness of a financial institution."

The most significant factor that can give rise to disparity in applying the Sentencing Guidelines is the differences in the available proof of criminal activity. Does the prosecutor have merely a snapshot of the

defendant's criminal activity or is her proof more like a videotape of a year in the defendant's criminal life? The answer to that question will result in substantially different sentences.

For example, let us assume that two brothers with identical backgrounds and criminal histories are selling crack on two different street corners and that they have been doing so for three months. Both are arrested after making sales of one gram of crack each to an undercover agent. After his arrest, one brother tells the agent that he has been making about thirty such sales at that location six days a week for the last three months. His brother, however, exercises his constitutional right to remain silent, and he answers no questions. If both plead guilty and do not cooperate with the prosecution, the first brother will face a guideline range of 168-210 months because the criminal conduct that he admitted when he was arrested will be considered in calculating his guideline range. However, his equally culpable brother will face only 18-24 months. The same disparity in sentencing would result if the police have been surveilling the first brother's corner for three months as part of an investigation of those higher up in the distribution chain, but there had been no similar surveillance of the second brother.

While the preceding example is extreme, the problem is common. Every day, judges read pre-sentence reports of people involved in criminal activity who have prior criminal records and no legitimate means of supporting themselves. The defendant may have been charged with a single offense resulting from a single transaction, but there is no reason to doubt that the defendant has been engaged in that same criminal conduct on a regular basis. For example, no judge or prosecutor sentencing the second brother would doubt that he had made numerous sales of similar quantities prior to his arrest. Yet because he, unlike the first brother, did not confess to such prior drug sales, his sentence would be fixed only by the amount sold to the undercover agent.

If the above analysis is correct and the guidelines have not ended sentencing disparity there is little justification for limiting judicial discretion by forcing judges to impose sentences according to a flawed guideline system. While granting district judges broad discretion in imposing sentences creates a risk of greater disparity, ending such disparity—a worthy purpose—should not be the principal goal of any sentencing regime. Instead, the principal goal of any sentencing scheme should be to do justice to each individual who comes before the bar of justice. The only way that we can come close to reaching that goal is by giving district judges the reasonable sentencing discretion they require to

make the punishment fit the crime. Having been an active participant in the criminal justice system for over forty years I firmly believe that there were a far greater percentage of just sentences imposed in the pre-guideline era than there are today

The strictures that have been put on judicial discretion by the sentencing guidelines and mandatory minimum provisions have brought us to a point where we are dealing not simply with a question of sentencing policy but an issue of morality. Can we in good conscience continue to imprison for unfairly long periods of time people who our society has failed for years: failed in not providing them with a reasonable education, failed in not providing them with treatment for narcotics addition, and failed in not providing them with the skills that would enable them to earn an honest living?

Let me close with another quote from Justice Kennedy's speech to ABA on sentencing.

> The subject is the concern and responsibility of every member of our profession and of every citizen. The Gospels' promise of mitigation at judgment if one of your fellow citizens can say, 'I was in prison, and ye came unto me,' does not contain an exemption for civil practitioners, or transactional lawyers, or for any other citizen. And . . .the energies and diverse talents of the entire Bar are needed to address this matter.[10]

10. Kennedy, *supra* note 1.