

CRIMINAL JUSTICE REFORM

KEYNOTE ADDRESS

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On June 22, 2015, Massachusetts Governor Charlie Baker announced an initiative to deal with heroin overdose.¹ It was extraordinary in many respects. For decades, the mantra for Republicans and Democrats alike had been “tough on crime.” And “tough on crime” – drug crime in particular – invariably meant heaping more and more imprisonment on convicted offenders. While it was clear that communities demanded help with the drug scourge, since the 1980s state and federal authorities had only one answer – prison – and nothing else. It was the functional equivalent of a legislative bidding war. If the sentence for a given drug offense was five years, and yet the problem of drug distribution and use persisted, the response was to increase the penalty to ten years, then fifteen, even life. It was never: Should we imprison at all? Is there any efficacy to imprisonment beyond a few years to deter crime? Is there a category of offenders for which imprisonment and more imprisonment should not be the only response?

But Governor Baker’s approach was different. The initiative recognized that, first and foremost, opioid drug addiction was a public health problem. An interdisciplinary approach was essential to address all its aspects, enlisting schools and medical communities – indeed, all communities. It required preventive education and training, limiting the distribution of prescribed medications and monitoring their use, making substances that counteract opioid overdoses more available, amending the civil commitment statute to enable the transport and assessment of someone at substantial risk because of a substance abuse disorder, and, most of all, recognizing that addiction was a chronic medical condition which required treatment. The

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1. *Governor Baker Releases Opioid Working Group Recommendations*, OFFICIAL WEBSITE GOVERNOR MASS. (June 22, 2015), <http://www.mass.gov/governor/press-office/press-releases/fy2015/governor-releases-opioid-working-group-recommendations.html>.

law enforcement model was neither sufficient nor appropriate; the focus should be on prevention, not punishment.

But this laudable initiative raises a critical question: Why just for heroin? Why not for all drugs?

In the 1980s, then-Governor Michael Dukakis offered an even more comprehensive initiative.² He created an Anti-Crime Council, consisting of all department heads across the government, representatives of the judiciary, legislators, members of the bar, and private citizens, as well as representatives from law enforcement. Crime, he recognized, was not just a problem for prosecutors and police, but implicated schools, mental health facilities, social services, and the medical community. And the Council was to deal not just with drug crime, but all crime. It was charged with coming up with proposals for reducing crime, both short term administrative reforms that the governor could initiate as well as proposals for longer term legislative initiatives.³ It met monthly, even when Governor Dukakis was running for president. I was a member, representing the civil liberties community, and for me, the experience was transformative.

Between the Dukakis and Baker initiatives, our country and my state implemented a criminal justice policy, specifically a “War on Drugs,” that was the antithesis of these approaches, inconsistent with what the communities wanted and, indeed, inconsistent with any even remotely rational criminal justice policy. I was a judge during this “war,” and while I did what I could to mitigate the harsh effects of these laws, I was constrained by mandatory minimum sentences and mandatory guidelines. In retrospect, I wish I had done more. I plan to do what I can for these offenders now that I have retired from the bench.⁴

For most of the seventeen years I was on the bench, every factor that mattered to me—and should matter to the public—was effectively irrelevant to the federal sentencing calculus or trivialized. For example, in *United States v. Lacy*, I lamented:

[W]hile the Guidelines’ emphasis on quantity and criminal history drives these high sentences, sadly, other factors which I believe bear directly on culpability, hardly count at

2. Mass. Exec. Order No. 226 (Feb. 16, 1983), available at <http://www.mass.gov/courts/docs/lawlib/eo200-299/eo226.txt>.

3. *Id.*

4. Nancy Gertner, *Undoing the Damage of Mass Incarceration*, BOSTON GLOBE (Nov. 4, 2015), <https://www.bostonglobe.com/opinion/2015/11/04/undoing-damage-mass-incarceration/9Ww80SKxQm9EbdHxmZG5sM/story.html>.

all: Profound drug addiction, sometimes dating from extremely young ages, the fact that the offender was subject to serious child abuse, or abandoned by one parent or the other, little or no education. Nor may I consider the fact that the disarray so clear in the lives of many of these defendants appears to be repeating itself in the next generation: Many have had children at a young age, and repeat the volatile relationships with their girlfriends that their parents may have had. And I surely cannot evaluate the extent to which lengthy incarceration will exacerbate the problem, separating the defendant from whatever family relationships he may have, or the impact on communities when these young men return.⁵

Drug addiction was not “ordinarily” a basis for a downward departure from the United States Sentencing Guidelines (“Sentencing Guidelines”).⁶ The fact that a defendant’s “mental capacity” was “significantly reduced” was irrelevant if it resulted from “the voluntary use of drugs.”⁷ Even after the Sentencing Guidelines became advisory in 2005,⁸ they continued to “anchor” judicial decisions,⁹ framing the way judges viewed addicted offenders. Some judges were prepared to depart downward for an addict;¹⁰ most would not. Significantly, a reviewing court would uphold either decision, based on a very forgiving “abuse of discretion” standard.¹¹ Few pretrial diversion programs for addicts existed. The programs for sentenced prisoners at the Bureau of Prisons were manifestly inadequate to meet the need. Just within the group of defendants that I sentenced, the overwhelming number of them had severe substance abuse problems. According to the Bureau of Justice Statistics, nearly seven

5. 99 F. Supp. 2d 108, 112 (D. Mass. 2000).

6. U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 (U.S. SENTENCING COMM’N 2011) (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)) (“Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure. Substance abuse is highly correlated to increased propensity to commit crime.”).

7. *Id.* § 5K2.13 (Diminished Capacity (Policy Statement)) (“[T]he court may not depart below the applicable guideline range if . . . the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants . . .”).

8. *United States v. Booker*, 543 U.S. 220, 246 (2005).

9. Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137, 138 (2006); see generally Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489 (2014).

10. See *United States v. Hendrickson*, 25 F. Supp. 3d 1166, 1179 (N.D. Iowa 2014).

11. See *United States v. Reid*, 456 F. App’x 93, 95–96 (3d Cir. 2011). For the “abuse of discretion standard” generally, see *United States v. Hasan*, 586 F.3d 161, 167–68 (2d Cir. 2009) (“[A] district court necessarily ‘abuses its discretion’ if it makes an error of law.”).

out of ten prisoners meet the criteria for substance abuse or dependence.¹²

But we know that drug addiction is critical to crime, recidivism, and rehabilitation. Until recently, the popular view was that drugs created a physical dependence. Neuroscience, however, has shown the extent to which drug addiction affects more than just the defendant's desire to take drugs.¹³ Chronic drug use leads to changes in the physical structure of the brain that persist and undermine the brain's mechanism for voluntary control.¹⁴ It literally reconfigures—scientists describe it as “hijacking”—the circuitry of the reward and decision-making systems.¹⁵ In short, addiction—all addictions and not just opioid addiction—creates neurological problems that call for medical solutions. And apart from the instrumental purposes of punishment, rehabilitation, and deterrence, treating the addicted offender the same as the non-addicted offender made no sense, even as a matter of retribution.

The Sentencing Guidelines absolutely barred consideration of adversity in childhood. “Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing” is the way the Guidelines described—and trivialized—this factor.¹⁶ But studies in developmental neurobiology have shown how changes in the brain are shaped by family, schools, and neighborhoods. Scientists are evaluating the impact of stress on specific neural structures at particular times in a child's life, as well as the role that neglect plays in cognitive delays and increasing the risk of psychological disorders.¹⁷ To be sure, so many of the people I sentenced came from profoundly disadvantaged, even abusive, backgrounds, that it was difficult to make distinctions among them and to determine who should be singled out for special leniency and who should not. Even if a judge could do so, during the time of mandatory guidelines, the major tool at her disposal was the least effective: imprisonment or no impris-

12. JENNIFER C. KARBERG & DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL INMATES 2002 1, 5 tbl 5 (2005), available at <http://www.bjs.gov/content/pub/pdf/sdatji02.pdf> (reporting that in 2002, 28.8% of convicted inmates were under the influence of drugs at the time of their offenses).

13. See David M. Eagleman et al., *Why Neuroscience Matters for Rational Drug Policy*, 11 MINN. J.L. SCI. & TECH. 7, 8 (2010).

14. *Id.*

15. *Id.* at 9.

16. U.S. SENTENCING GUIDELINES MANUAL § 5H1.12 (U.S. SENTENCING COMM'N 2011) (Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)) (noting that these factors are not relevant “in determining whether a departure is warranted”).

17. See generally Charles A. Nelson et al., *The Deprived Human Brain*, AM. SCIENTIST (May-June 2009), <http://www.americanscientist.org/issues/pub/the-deprived-human-brain/1>.

onment. Unfortunately, for the Sentencing Commission, these issues were not even part of the sentencing discussion.¹⁸

Additionally, educational background and family circumstances were not “ordinarily relevant.”¹⁹ I recently met a man whom I sentenced. Now in a reentry program after a decade in prison, he wanted to meet me for lunch and let me know how he was doing. When we met, he told me proudly that at forty he was learning to read. I rushed back to my office to review my files. (I kept files on everyone I sentenced.) I wanted to see if I had known that he was illiterate when I sentenced him years before. I had. But it was a fact of no consequence in the sentencing regime I was obliged to impose.

Until recently, we paid little or no attention to the reentry of the offenders we sent away for substantial periods. This was so even though several scholars have described the deleterious impact of long term imprisonment: “By the time of release, many offenders have developed a dependency on institutional structure, severe trust issues, social withdrawal, a limited sense of self-worth, and symptoms of post-traumatic stress disorder.”²⁰ In fact, when parole was eliminated in the federal system with the Sentencing Reform Act of 1984,²¹ the new sentencing regime required a judge to determine at sentencing the rules that a defendant was obliged to follow upon release from prison several years—even decades—later. Few judges paid any attention to the content of those conditions. And even if they had, it was difficult to predict or account for who the defendant would become at the end of his imprisonment—the impact of jail, of maturation, of years spent away from family and friends, etc.²²

18. I nevertheless tried to describe a defendant’s background, to show the inadequacies of the Guidelines framework, and to put my efforts to mitigate its harshness in context. For example, in *United States v. Ribot*, 97 F. Supp. 2d 74, 76 (D. Mass. 1999), I wrote:

One of eight children, Ribot was raised in poverty, with an extremely abusive and violent father. A few examples should put this abuse in sharp focus: Ribot, then age eight, and one of his brothers were playing in the bathtub in their apartment Angered by the noise the boys were making, their drunken father slammed Ribot’s head into the side of the tub and kept it under water, while the young boy struggled to breathe. Ribot nearly drowned; he spent three to four days [in the hospital] where his stomach was pumped in order to save his life. On another occasion, Ribot was sitting on the third floor windowsill of the kitchen of the family apartment Again drunk, Ribot’s father pushed him out of the window. Ribot fell three stories, landing—luckily—in a hedge. Not content with his efforts to kill his child, his father came downstairs and proceeded to pummel Ribot.

19. U.S. SENTENCING GUIDELINES MANUAL § 5H1.2 (Education and Vocational Skills (Policy Statement)); § 5H1.6 (Family Ties and Responsibilities (Policy Statement)).

20. Mark R. Fondacaro et al., *The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles*, 41 OHIO N.U. L. REV. 697, 708 (2015).

21. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

22. See generally Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal*

How did this sentencing system happen? Can it happen again even in the face of today's movement toward sentencing reform? Prior to the 1980s, before mandatory guidelines and before mandatory minimum sentencing statutes were in vogue, judges sentenced under what has been described as an indeterminate sentencing regime. As I have described it, during this period,

[s]entencing statutes prescribed broad statutory ranges for each offense of conviction. Judges had substantial discretion; there was no appellate review of sentencing and, as a result, no meaningful discussion of sentencing principles and policies. Without appellate review of sentencing, judges didn't have to give reasons for the sentences they gave. You didn't have to write an opinion; your decision would not be examined by anyone.²³

This approach was required by the dominant penal philosophy – rehabilitation. The judge's role was therapeutic, the functional equivalent of a physician: to “cure” the crime as a physician would cure a disease.

However, few judges were trained in exercising this discretion. There were few sentencing courses in law school. Most schools focused on trials, largely ignoring what happened following a jury's conviction. Judicial training was similarly inadequate. While doctors participate in clinical rounds and engage in peer review, for the most part, sentencing judges had little, if any, guidance. With no training, and with no need to spell out sentencing reasons because there was no appellate review, it was no surprise that there was disparity in sentencing similar offenders who were charged with similar crimes and from similar backgrounds.²⁴ Worse, by 1980, the public, and certain members of the academy, gave up on rehabilitation as a central purpose of sentencing. “What works?” one scholar was widely quoted as asking, “Nothing.”²⁵

Structured sentencing laws, including many guideline-sentencing systems and severe mandatory minimum sentences, particularly on the federal side, replaced the indeterminate regime. And these sys-

Supervised Release, 18 BERKELEY J. CRIM. L. 180 (2013).

23. Nancy Gertner, *How to Talk About Sentencing Policy – And Not Disparity*, 46 LOY. U. CHI. L.J. 313, 315 (2014).

24. See generally, Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691 (2010).

25. See Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUBLIC INTEREST 22 (1974). But see Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 252 (1979) (withdrawing his 1974 work and noting that “new evidence” led him to reject his prior conclusion).

tems were designed primarily to deter, incapacitate, and punish—not rehabilitate. Ramping up its “War on Drugs,” the government effectively federalized drug enforcement, and with that the local community’s role was diminished. Within a few years, the American imprisonment rate skyrocketed; the era of mass incarceration had begun, with particularly devastating effects on the poorest minority communities.²⁶

We are privileged to live at an extraordinary moment, one which offers the real possibility of reversing these trends and introducing some humanity into an inhumane system. The 2008 recession led politicians across the political spectrum to reevaluate the cost of mass incarceration and to work to dismantle the War on Drugs. Proposals are now pending in Congress to reduce mandatory sentences and increase judicial discretion—important first steps.

But as this conference makes clear, “less,” as in “less imprisonment,” is no more of a criminal justice policy than was “more,” as in “more imprisonment.” Likewise, “discretion,” as in “judicial discretion,” is not meaningful reform. We should be focusing not just on who should be making the sentencing decision, but on what that decision should be. We should be focusing not just on reducing onerous mandatory sentences, but on alternatives to imprisonment. We have spent the past twenty years normalizing extraordinary prison sentences. Restoring judicial discretion to judges who may have become inured to imposing such sentences is not enough. Crime is not only an individual problem, it is a community problem for which there should be community solutions—just like Governor Baker’s first step, the opioid initiative.

I have taken my own steps. I am identifying the individuals among the hundreds I have sentenced who would qualify for presidential clemency, and I am working to prepare those petitions. I am writing about the human beings I sentenced to terms that were unjust, disproportionate, and unfair, and I am re-imagining what a humane system would have yielded. I am using my sentencing record to evaluate my own bias in sentencing, and I am trying to track whether imprisonment worked at all, for anyone, or made reentry even more difficult. I want to take advantage of my unique position as a judge on the front lines of mass incarceration and ask: What can we do to undo what we have done? How can we deal with these

26. Bruce Western, Becky Pettit & Josh Guetzkow, *Black Economic Progress in the Era of Mass Imprisonment*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 165, 165 (Marc Mauer & Meda Chesney-Lind eds., 2002).

problems in the future? It is my own personal crusade, and I invite you to join me.