Alternatives to the Carceral State: The Judge's Role

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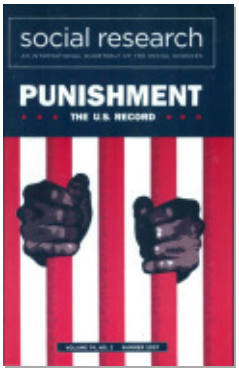

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THERE IS A DISCONNECT BETWEEN THE ACADEMY AND THE PUBLIC, THE Congress and the courts that the papers in this volume dramatize. The academy, or especially, the sponsor of the conference from which this volume derives, the New School-has highlighted the extraordinarily troubling implications of the mass imprisonment of the past two decades, the racial disparities, the social dislocation to poor communities and communities of color, the impact on this democracy of felon disenfranchisement, the extent to which retribution has surpassed all other purposes of punishment, displacing any effort to determine "what works" to reduce crime. But the public is barely a participant in these discussions. If it reads the tabloids, watches television, or surfs the Internet, it hears an entirely different story, a story about dangerous crime rates and impending doom, a story about fear and retribution. And so long as it hears *that* story, it will support ever more punitive laws, and rail against judges who are widely perceived to be lenient.

The story is in fact more complex, the proverbial "good news" and "bad news." The good news is that the public may not be as punitive as the media and politicians suggest *if they are given the facts,* They understand sentencing and individualized treatment. They can tell the difference between the kingpin and the mule, between the postal worker who steals a check and the Enron executive who rapes a company. The

bad news is that courts, which know the individual facts, nevertheless face extraordinary pressures to be tough, no matter what the offense. Many judges have been affected by 20 years of onerous sentencing policy and 24/7 media coverage that parodies the bench rather than covers it. The conclusion is ironic: those who *have* the information about offenders—judges—face extraordinary pressures from those who do not—the public. While sentencing policy was once considered a matter of judicial expertise and received little scrutiny (Barkow, 2005: 745), today it is the contested territory of politicians, on the one hand, and late night talk show hosts on the other.

The United States Sentencing Commission conducted a poll about public attitudes to crimes (Rossi and Berk, 1995: 82-86). The public did not support harsh treatment of nonviolent drug offenses, differential sentencing between offenders convicted of distributing crack rather than powder cocaine, increases in the punishment for environmental crimes, violations of civil rights and certain bribery and extortion claims. As to individual sentences—as opposed to aggregate data—there was only a "modest amount" of agreement between sentences given by the respondents and the sentences required by the Guidelines (Rossi and Berk, 1995: 208). If the public knew what judges know about the individual defendant, it would make a difference to their attitudes. In any event, what the commission did not test was the public's consideration of the kinds of trade-offs necessary to support high levels of incarceration, such as the cost of incarceration and the social disruption to communities of incarcerating large numbers of minorities.

The public hears only the sound bites. By the late 1980s, when crime became the fodder of political campaigns, so-called lenient judges were parodied by the media. By the time of the presidential contest in 1990, the politicization of criminal justice had become a national phenomenon. In the mid-90s, the debate veered in a distinctly anti-judge direction. One cannot minimize the adverse, even threatening, climate in which sentencing decisions are now being made. Under the circumstances, it was far easier for judges to say "The United States

Guidelines made me do it"—even when they did not—rather than to take responsibility and criticism for sentencing judgments (Gertner, 2005).

The philosophy of sentencing changed, with a growing emphasis on retribution rather than rehabilitation. The public, as well as certain members of the academy, effectively gave up on rehabilitation as a central purpose of sentencing. Retribution and incapacitation were more certain, more enforceable, and significantly more accessible to the public. The proper sentence could be the subject of debate with the late night talk-show host, or of rhetorical flourishes in Congress. As sentencing purposes changed, it followed that different kinds of expertise would be valued, expertise which, over time, many judges came to believe they lacked (Gertner, 2007b).

After 20 years of this, there has been a profound change in the courts, and not just the obvious one: the numbers of judges appointed by one administration rather than an another. While large numbers of judges had opposed the Guidelines (many holding the Sentencing Reform Act unconstitutional), they soon began to enforce the Guidelines with a rigor not at all necessary. And many federal judges came to believe that they do not know how to sentence at all without explicit directives from an "expert" agency (Gertner, 2007a). Judges on the Sentencing Commission and in the United States Judicial Conference ceased acting like judges. Time and again they agreed to guideline provisions that would narrow their own discretion to sentence and would limit their ability to vary from the script. Rather than being critics of Guidelines (and there is much to criticize), judges accepted the commission's "diktats" without scrutiny. Guideline thinking supplanted any and all of the sentencing thinking that had predated it, to the extent that there had been any. Departures from the Guidelines required an independent sentencing perspective, a theory of why and when the Guidelines were inapplicable. Few judges had such a perspective. Indeed, by the mid 1990s, more and more judges appointed after the implementation of the Guidelines regime defined the Guidelines themselves as fair. They had never experienced anything else (Gertner, 2007a).

Then there was the problem of the 600-pound (page) gorilla: the Guidelines manual. The Guidelines that the first commission drafted created a new ideology of sentencing, a new approach, more like the approach of a judge in a civil code jurisdiction than a common law judge. Numerical Guidelines had an impact even beyond what one might have expected, reinforcing the phenomenon of what cognitive psychologists call "anchoring" (Gertner, 2007a).

Tethered to the Sentencing Guidelines—even when they did not have to be—not to mention mandatory minimums, sentences necessarily increased. Since the commission lacked independent expertise in criminal justice matters—it was not composed of criminologists, penologists, sociologists but mainly judges and lawyers, most with a prosecution background—it had no legitimacy to resist congressional importuning to increase sentencing. It could offer no reason why its view of "just deserts" should trump that of Congress or the public. It could not pretend to independence from the political forces swirling around it. Indeed the commission's acts in increasing sentences over and over again "seem to reflect an agency finely attuned to the political preferences of its overseers"—the Congress (Barkow, 2005: 767).

Even after the Supreme Court's recent decision in *United States v. Booker* announced that henceforth the Guidelines would be "advisory," judicial behavior has—with some notable exceptions—not changed. At a time when some sentencing discretion was apparently restored, court after court insisted that the advisory Guidelines were entitled to considerable, even presumptive, weight, effectively trumping any standards that common law judges might create in their stead. In effect, given an independent judicial voice in sentencing, many judges did not take it.

The public debate has to change, the insights of the papers in this volume have to be widely communicated. Only then will it be clear that the problem is not the judge who cannot wait to release a heinous criminal and find himself or herself lambasted on the local cable network. The problem is the judge who wants to keep his or her head down.

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