Boston Bar Journal
"Viewpoints" April 23, 1993
Re: Presumptive Sentencing Guidelines
By Harvey A. Silverglate

"Two Federal Judges, in Protest, Refuse to Accept Drug Cases", blared the 2-column headline on the front page of The New York Times of April 17th of this year. The article explained that respected U. S. District Judges Jack B. Weinstein of Brooklyn's federal bench, and Whitman Knapp of Manhattan's, announced to their colleagues that henceforth they would exercise the case-selection discretion afforded by their senior status and refuse to be assigned drug cases, as a protest against federal sentencing guidelines and the particularly Draconian and counter-productive impact that those guidelines have had in drug prosecutions in particular. The Times reported another fact little-known outside of judicial circles -- it seems that "about 50 of the 680 Federal judges are refusing to take drug cases," and this "protest is confined to senior judges, a category of judges eligible for retirement who are given wide latitude in choosing their cases."

In other words, among judges who have the luxury of following their consciences in matters of case selection, a disturbingly large number have chosen not to tread where federal sentencing guidelines result in particularly unconscionable miscarriages of justice.

This cadre of some of the federal judiciary's most experienced, seasoned judges, does not include what is probably the larger number of active judges who try to utilize legalistic legerdemain in an effort to dodge the

literal mandate of the sentencing guidelines in a wide variety of cases, not just drug cases. As time goes on, some appellate panels are knocking down those efforts, while other panels are more supportive of their conscience-stricken lower court colleagues. The federal judiciary is dividing into two camps -- those judges who find the guidelines to be an insult to a judicial system that calls itself civilized and which turns thinking and feeling judges into robotic computers, and those who find comfort and ease in the robotic nature of these rules (who, in other words, welcome the relief of not having to make some of the more difficult and profound decisions that heretofore we have entrusted to our judges).

This system, alas, is being touted as another federal innovation that should be slavishly copied by the various states, including Massachusetts: Sentencing Guidelines -- more "progress" from the same folks who brought the federal court system such dubious schemes as Draconian and blunderbuss racketeering ("RICO") laws, rules of evidence that do not restrict the government to proving the crime charged, forfeiture proceedings that deprive citizens of the financial wherewithal to pay for legal counsel to represent them in the very proceedings that will determine the fate of both their liberty and property, and habeas corpus restrictions that allow the execution of a prisoner who has no procedure available for presenting late-discovered evidence of probable innocence.

Indeed, when the joint Boston Bar Association/Crime and Justice Foundation report, "The Crisis in Corrections and

Sentencing in Massachusetts (February 1991), issued, recommending the adoption in Massachusetts of sentencing guidelines, it opined that "there is much to be learned from the federal commission's experiences." That is quite obviously true, but the lesson is hardly that the federal experience should be emulated.

There are myriad policy arguments on both sides of the debate. But the bottom line is that, theoretical policy arguments aside, we actually have had experience with sentencing guidelines -- in the federal system. The results warn us against importing the experiment. The guidelines have produced a large increase in average sentences without any discernable impact on the crime rate. Our prisons are bursting, with a substantial increase in minority group representation. Corrections budgets continue to go up, being the only budgets to resist the current era of falling expectations and hard times. The sentencing practices have had a corrupting impact on federal trials. And we have deprived our federal judges of the opportunity to use their experience and discretion to make reasonable distinctions among defendants, turning the judges instead into virtual computers and robots who mechanically implement a rigid sentencing scheme laid out on a grid. And by transferring discretion from judges to prosecutors, we have not even made serious inroads in inappropriate sentencing disparities.

Take the argument that guidelines will reduce sentencing disparities. While it is probably true that the federal guidelines have caused similarly situated defendants, who

have committed similar crimes, to face similar penalties, it is also undoubtedly true that very <u>different</u> cases and defendants have likewise been treated similarly. This untoward result was inevitable, in view of the incredible variety of human experience and conduct, and the remarkable breadth of conduct covered by many criminal statutes. Many of the disparities, it seems, that the guidelines were meant to obliterate, were perfectly reasonable disparities, reflecting human judges' views as to what conduct and traits merited moderation in sentencing.

If the truth be told, the system has achieved far less uniformity than one would think. The reason for this is that much of the discretion that has been taken from our carefully-selected and screened judges, has been placed in the hands of prosecutors and other law enforcement agents. The currency of the realm insofar as avoiding the rigors of the sentencing guidelines is concerned, is "cooperation". We are witnessing daily the outrageous spectacle of heavy-duty criminals who committed heavy-duty crimes, plea-bargaining for charges that substantially undercut the penalties they would be exposed to were their guidelines to apply, in exchange for testimony against lesser actors. The guidelines are easily evaded by a careful selection of the counts to which a cooperator pleads guilty, so that the statutory maximum to which he is exposed is far less than the guideline sentence would be.

One newspaper report, discussing one of the more notorious blots on the page of federal criminal justice,

compared a case in which a defendant who sold less than a gram of LSD got a 21-year mandatory sentence, with the case of Jose Cabrera, who by government estimates raked in over $40 million importing cocaine and who should have received a life sentence plus 200 years, but who managed to bargain for only eight years because he knew Manuel Antonio Noriega and would be able to convince jurors that, because he knew Noriega, his testimony against the former Panamanian general was probably true.[1] Guidelines do indeed bind judges' hands, but they do not bind prosecutors' hands.

Worse yet, the guidelines do not produce necessarily truthful testimony. Indeed, perhaps their worst effect has been the corrupting effect that the Draconian sentences under the guidelines have had on the motivations pushing defendants and prospective defendants to "cooperate" against others. The pressure on cooperating individuals to help prosecutors get scalps, which has been substantial in just about all state and federal criminal justice systems in recent decades, has now gotten so great that it has come to virtually define the federal system, for cooperation is just about the only way that a federal defendant can reduce his or her sentence these days. When this pressure is extreme enough, it is only the most meticulous and steadfast potential cooperator who is not tempted to make up whatever story he or she feels the prosecutor wants to hear in order to avoid a lifetime in prison. To experienced federal criminal defense lawyers, the pressure on these witnesses to lie, if necessary, is

palpable. Indeed, the pressure on their own clients to cooperate, even if it means telling less (or more) than the truth, is substantial and unnerving. One hears more and more talk these days from talented and ethical criminal defense lawyers about getting out of federal criminal litigation because of the unholy mix of Draconian sentencing guidelines and offers to avoid the guidelines in exchange for "cooperation" defined, even if unintentionally, as what the prosecutor wants or needs to hear.

The discussions that apparently are held with some frequency, although fairly quietly until recently, in the judicial chambers and dining rooms in the federal courts in Brooklyn, Manhattan, and undoubtedly in Boston as well, are heard, too, when defense lawyers get together. A system that so ruthlessly challenges the consciences of its most ethical and talented judges and lawyers, and that so severely tests the truthfulness of desperate cooperating witnesses, should not be emulated. Rather, it should be avoided like the plague that it is.

Endnotes

1 "Long LSD Prison Terms -- It's all in the Packaging," Los Angeles Times, July 27, 1992, at 8-9.

- end end end -

F:\HOME\HARVEY\bbjview.art