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CHARLES D. WEISSELBERG

COURAGE, COURAGE

Charles D. Weisselberg*

On the assumption that we will continue to have guidelines for years to come, I offer two modest suggestions — exhortations, really — to the Sentencing Commission. The first is to lead, even when your actions may displease some in the Congress, the Administration or the Judiciary. The second is to rethink some early assumptions about the purposes of sentencing and the factors that are necessary to a just sentence.

I. The Courage to Lead

It is worth recalling why we have a Sentencing Commission at all. In the late 1970s and early 1980s, many concluded that federal sentencing practices lacked consistency and did not always meet the purposes of punishment. Yet if reducing disparity were the sole reason for the 1984 reforms, we would not have needed an independent commission. If Congress sought merely to equalize sentences for like offenses, it could have promulgated determinate penalties for each offense. But it did not do so. It wanted an independent and expert body to ensure that sentencing practices would "reflect, to the extent practicable, advancement in knowledge of human behavior."¹

We did not get what Congress ordered. The Sentencing Commission closely studied the implementation of the guidelines. It also supported a myriad of research projects concerning mandatory minimum penalties, intermediate sanctions and individual offenses. However, these projects and advances in knowledge have not always translated into sentencing reforms. The Commission has, at least until recently, forsaken its role as an expert, independent body in the area where it counts the most, drug sentencing.

Drug offenses now dominate and drive the federal criminal justice system.² Drug offenders now consume 75% of the resources of the federal prison system.³ In determining the appropriate penalties for drug offenses, the Commission did not act as an independent, expert body. In 1987, it merely pegged its offense levels to the mandatory minimum penalties set by Congress.⁴ The Commission just toed the line.

There is reason for hope that the Commission will finally take the lead. In 1993, it adopted a different calculus for LSD and some other drug guidelines.⁵ More significantly, this spring the

Commission, after an exhaustive study,⁶ concluded that crack and powder cocaine offenses should be treated alike. And rather than merely submit its report to Congress to see whether the legislature would respond, the Commission took the lead. It proposed a guideline amendment and harmonizing legislation to equalize sentences for crack and powder cocaine.⁷ The Administration opposed the guideline amendment and the amendment was rejected by Congress, which sent the crack/powder issue back to the Commission for further study.⁸ Though the amendment was rejected, at last the Commission has functioned as an independent body. It has taken a thorny and highly-charged problem, examined it in depth, and summoned the strength to stand behind its conclusions. Now that the crack/powder issue has been returned to the Commission, the Commission will face a difficult challenge. The question is whether the Commission will knuckle under to political pressure or whether the Commission will again act as the nation's independent expert sentencing authority.

My first message to the Sentencing Commission is this: have the courage to lead. If you wish your work to be respected and followed, you must study sentencing issues in depth, document your conclusions, and act on them. You will not be able to make a decision that will completely satisfy everybody. Yet you will lose credibility as an expert body if you politicize your role by proposing only measures that you expect will be popular with members of Congress. You must put forward reforms based on your research and expertise, even if some amendments do not survive the approval process. Remember, you are an independent commission, not a congressional subcommittee.

II. The Courage to Rethink Basic Assumptions

In the Sentencing Reform Act, Congress provided that courts should consider the traditional purposes of punishment—deterrence, incapacitation, retribution and rehabilitation—as well as the history and characteristics of defendants, and avoid "unwarranted disparities" among defendants with similar crimes and similar records.⁹ Congress directed the Commission to weigh the relevance of a host of factors including age, education, physical, mental and emotional condition, vocational skills, employment, and family and community ties. At the same time, it communicated its view of the "general inappropriateness" of certain factors in setting terms of imprisonment.¹⁰ Of course, Congress's directives were in conflict, since all these factors correlate with risk to the community. Without considering these factors, no sentencing authority can devise a sanction that protects (but does not overprotect) the public.

The Commission dealt with Congress's conflicting commands by finding that these individual characteristics are "not ordinarily relevant" in determining whether a sentence should be outside the

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guideline range. In making its findings, the Commission elevated the goal of reducing sentence disparity over the aims of accurately assessing each individual's need for incapacitation and rehabilitation. In essence, the Commission reduced disparity by overusing imprisonment.

From the outset, the guidelines have proved unpopular among most district court judges. The dissatisfaction stems at least in part from many judges' belief that the guidelines require courts to overlook factors that are relevant to a just sentence. A judge who is forced to give a 70-year-old offender the same lengthy sentence as a 25-year-old cannot be faulted for wondering whether justice is being done. Everything we know tells us that these two offenders will not ordinarily require the same sanction to assure the safety of the community and to accomplish the goal of rehabilitation.

My second message to the Commission is this: have the courage to rethink basic assumptions. Over the last seven years, you have observed judges engage in countless creative efforts to depart from and circumvent the guidelines. Instead of viewing these efforts as illegitimate, look to see whether judges are, instead, expressing their own expert views that certain factors cannot be disregarded in fashioning an appropriate sentence. Rather than rejecting such attempts to introduce more discretion into the system, contemplate ways to incorporate these factors and to channel judicial discretion. For example, you might consider a specific reduction in offense level if a defendant's age or physical or mental condition makes it highly unlikely that he or she will commit another offense. Some may argue that this would lead to more disparity. But when there are meaningful differences between defendants, different sentences are not disparate. And even if some regard different sentences as disparate, it would be difficult to conclude that all such disparity is "unwarranted."

Guidelines will be with us for years to come. If the legal community is to accept the findings and recommendations of the Commission, the Commission must have the courage to lead. It must have the strength to revisit its earliest decisions, where re-examination may lead to more fair and just sentences.

FOOTNOTES

¹ 28 U.S.C. § 991(b)(1)(C).

² Of the 64,699 defendants prosecuted in federal court

in the year that ended September 30, 1993, 23,114 (50.4 %) were charged with drug offenses. *Report of the Director, Administrative Office of the United States Courts Table D-2* (1993).

³ Eric Simon recently studied the effect of drug sentences on the Prison Bureau's resources (computed on the basis of "bed-years"), and found that drug offenders used 75% of available bed-space. Eric Simon, *The Impact of Drug-Law Sentencing on the Federal Prison Population*, 6 Fed. Sent. R. 29, 30 (1993).

⁴ See, e.g., § 2D1.1, Application Note 10 ("The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences"); § 2D1.1, background ("The base offense levels in § 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking").

⁵ See Amendment 488 (effective November 1, 1993). The Commission also made clear that, for guideline purposes, the drug "mixture or substance" does not include substances that must be separated from the drug prior to use. Amendment 484 (effective November 1, 1993).

⁶ See generally United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995).

⁷ United States Sentencing Commission, *Amendments to the Federal Sentencing Guidelines, Policy Statements, and Official Commentary, Amendment 5*, reprinted at 57 Crim. L. Rep. 2095, 2096-2098 (BNA May 10, 1995) (amendments); United States Sentencing Commission, *Materials Concerning Sentencing for Crack Cocaine Offenses*, reprinted at 57 Crim. L. Rep. 2127 (BNA May 31, 1995) (harmonizing legislation).

⁸ The House and Senate recently passed S. 1254, which rejected Proposed Amendment 5. Section 2 of the bill instructs the Commission to reconsider its conclusion that crack and powder offenses should be treated alike, and to submit new proposed amendments and harmonizing legislation. See 141 Cong. Rec. H 10255 (Oct. 18, 1995) (containing debate on amendments and the full text of S. 1254). President Clinton signed S. 1254 into law on October 30, 1995.

⁹ 18 U.S.C. § 3553(a).

¹⁰ 28 U.S.C. § 994(d) (Commission shall consider specific factors); § 994(e) (guidelines shall reflect the "general inappropriateness" of many of these factors in connection with recommending a term of imprisonment); § 994(f) (Commission should pay particular attention to goals of providing certainty and fairness in sentencing and reducing unwarranted disparity).