

Foreword

The government has no power greater than to take away a person's freedom or even life. We trust our judges to balance justice and mercy to arrive at an appropriate sentence when a person has been convicted of a crime. Yet to a large extent, how a judge goes about this process is invisible to the lawyers in a case, the public, and even to the criminal defendant being sentenced. To be sure, judges often give reasons for their sentences, such as explaining when their sentence is dictated by a statute requiring a mandatory minimum sentence or how the punishment fits under the sentencing guidelines. But the human dimension of this—how a judge actually balances justice and mercy, what a judge feels in putting a person in prison for a long time or condemning a person to death—is rarely publicly explored.

Judge Frederic Block, a long-time federal district court judge, has written a magnificent book which describes the experience of a human being punishing other human beings. Judge Block does this by telling the stories of some of the cases that he has handled since coming on the bench in 1994. Each of the cases is compelling and Judge Block is a great storyteller. Each evokes important issues concerning our criminal justice system. Judge Block is candid in sharing his thinking and his feelings as he approached imposing punishments in these instances. He is remarkably self-reflective, often describing his concerns that his religion or the unfounded accusations against him or his recent reading might be unduly influencing the sentences he is imposing. Along the way, he tells us a lot about the workings of the federal courts and also about his life.

What comes across most clearly is how Judge Block is trying mightily to follow the law, even when it leads to results he feels are unjust, but also to use his discretion to do what he feels is right: imposing significant penalties when that seems appropriate, but also acting with

compassion when that seems warranted. This is a book that can be enjoyed simply for its stories and its humanity. It is about the crimes people commit and what a judge considers in punishing them. It therefore is a book that deserves a wide audience. It is beautifully written and accessible to lawyers and non-lawyers alike.

But there also is an underlying dimension to the book that should be part of a larger conversation about the problems with our current sentencing system. I can identify several important issues that emerge from reading Judge Block's book.

First, there is the problem of draconian punishments and the point at which they become cruel and unusual in violation of the Eighth Amendment. In fact, Judge Block expressly poses the question of when sentences are so disproportionate to the crime as to violate the Eighth Amendment. The first case I ever argued in the Supreme Court was *Lockyer v. Andrade*, where my client received a sentence of fifty years to life, with no possibility of parole for fifty years, for stealing \$153 worth of videotapes from K-Mart stores in San Bernardino, California. He received this sentence even though he had never committed a violent crime and even though no one in the history of the United States had received a life sentence for shoplifting until California's "three strikes law."

The United States Court of Appeals for the Ninth Circuit ruled that the sentence was unconstitutional cruel and unusual punishment, but the Supreme Court reversed in a 5–4 decision. In *Lockyer v. Andrade* and a companion case, *Ewing v. California*, the Court made clear that the government has enormous discretion in imposing punishments, even very lengthy sentences for minor crimes.

In the story of "John Doe," Judge Block tells of imposing a mandatory minimum sentence of fifteen years in a case where that seems clearly excessive. As a conscientious judge following the law, Judge Block imposed this punishment even though he thought it was excessive under the circumstances. It made me think about being a judge when the law requires an unjust, though constitutional result. Laws like "mandatory minimums" and "three strikes" often require this of our judges. The "tough on crime" mentality of the last half century has led to legislatures, and sometimes voters, sometimes creating pun-

ishments that are far too harsh for the crimes involved. No politician wants to seem soft on crime. Judge Block tells what it is like to be a judge having to apply these laws.

Second, laws like these—such as mandatory minimums and three strikes—have meant a significant shift of power in sentencing from judges to prosecutors. In the John Doe case, it was the prosecutor's choice to charge and try the case under a statute that required a mandatory minimum penalty that tied Judge Block's hands. In *Lockyer v. Andrade*, the prosecutor could have charged Leandro Andrade with one misdemeanor count of petty theft, with a maximum sentence of six months in jail; or two counts of petty theft, with a maximum sentence of one year in jail; or one count of the felony of "petty theft with a prior," with a maximum sentence of three years in prison; or two counts of petty theft with a prior, with a maximum sentence of three years, eight months in prison; or one count under the three strikes law, with a maximum sentence of twenty-five years to life in prison; or two counts under the three strikes law, with a maximum sentence of fifty years in prison. The charging decision was left entirely to the prosecutor and he choose the maximum possible. The judge was helpless to prevent this and the jury that convicted had no idea as to the consequences of their verdicts.

I am troubled by the great shift in the power to determine sentences from judges to prosecutors. This change in the law has not received nearly enough attention. Prosecutors are partisans in our criminal justice system. No matter how much it is said that a prosecutor's role is to secure justice, they see sentencing from their own perspective. It is far better to have sentencing decisions in the hands of judges, but that is very much lessened when the prosecutor's charging decisions make all the difference in terms of the punishment imposed.

Third, Judge Block describes the enormously disturbing reality that defendants can be sentenced for crimes for which they are not convicted and even for crimes for which they were acquitted. This is reflected in the first two chapters of Judge Block's book, one involving a case that he heard while sitting by designation in the United States Court of Appeals for the Ninth Circuit and the other he handled as a district court judge.

The law is clear that a judge in sentencing may impose punishments for crimes for which the defendant was acquitted. In *United States v. Watts* (1997), the Supreme Court held that a jury's verdict of acquittal does not prevent a sentencing court from considering a defendant's conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence. The rationale is that a conclusion of guilt requires proof beyond a reasonable doubt, but a sentencing factor need be proven only by preponderance of the evidence.

I always have felt that it unjust for a person to be punished for a crime for which he or she has been acquitted. Imagine a defendant is charged with twelve counts, eleven for very serious offenses and one for something minor. If the defendant is acquitted on the eleven serious counts, he or she can still be punished for them if convicted of the minor crime.

This is exactly what happened in the cases that Judge Block describes. The law allows it, but I hope the Supreme Court will reverse its earlier opinion and find that it is unconstitutional to punish someone for a crime for which he or she has been acquitted.

Fourth, throughout the book, Judge Block refers to the sentencing guidelines. These were adopted over thirty years ago to create more uniformity in sentencing. As Judge Block explains, they create a system that requires that a judge consider a number of prescribed factors and it yields a range for the permissible sentence. The U.S. Supreme Court in *United States v. Booker* (2005) held the guidelines are advisory, not mandatory. Judges, though, must still justify departures from what the guidelines prescribe.

As I read Judge Block referring repeatedly to the "guidelines range," I was interested in knowing more about his thinking about the sentencing guidelines. Many, including judges I have spoken to, believe that they are too harsh. Some think they went too far in substituting uniformity for individualized sentencing. But others think that *Booker's* making the guidelines advisory has helped to cure this problem. After more than thirty years' experience with the guidelines, and more than a decade since *Booker*, it is time for a careful examination of how they function and whether they are desirable.

Finally, Judge Block's book forces us to continue to think carefully about the role of race in the criminal justice system. This especially comes

up in the last chapter about Chevelle Nesbeth, a young woman who was convicted of attempting to smuggle cocaine in the United States.

Judge Block describes focusing on the collateral consequences of her conviction, all of the ways in which Nesbeth would be harmed by a criminal conviction. A felony conviction often is a lifetime disqualification from occupational licenses; in some places, it prevents people from being able to vote. In telling the story of Nesbeth's sentencing, Judge Block examined whether these consequences should be taken into account in deciding her punishment. In one of the more powerful passages, Judge Block describes having just read Michelle Alexander's book, *The New Jim Crow*. Professor Alexander powerfully details the collateral consequences of criminal convictions, especially in terms of their effects on defendants of color.

This caused Judge Block to write a forty-two-page opinion and to impose a sentence substantially lower than the sentence guidelines range. It also caused Judge Block to instruct the probation department to include a collateral consequences section in all future presentence reports. Hopefully, other judges will copy this practice. It should be part of a larger consideration of race in the criminal justice system.

These, of course, are just some of the issues and some of the stories in this wonderful book. Most of all, in reading the book I came away with the sense that regardless of whether I was a prosecutor or a defense lawyer, I would want Judge Block to be hearing my cases. I hope it never happens, but if I or someone I love committed a crime, I would want Judge Block to decide the sentence. I came away from the book with a strong sense that Judge Block does all that a human being possibly can to be conscientious, thoughtful, and fair in imposing punishment. And that is all, as lawyers and as citizens, we can expect of our judges. I am so glad that he wrote this book and gave us the chance to understand his thinking in making the profoundly important decisions about how to punish people for their crimes.

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