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Sentences and Judges

A few days ago, President Ford was in New Haven giving a speech on law-breaking in which he called for "more courtroom determination of guilt and innocence." The same day, back in Washington, a U.S. District Court judge was providing an example of *less* courtroom determination of guilt and innocence. Judge George L. Hart told the convicted Rep. George Hansen (R-Idaho) that a prison stretch of two months wasn't in order after all, even though the week before the judge had decreed in strong words: "If the people who make the laws can't obey them, who can be expected to obey them?" In this change of the judicial mind, the judge said: "I assumed when I sentenced him to jail he was evil. Now, I am not so sure. Stupid, surely."

The Hansen case is important for the attention it draws not only to the campaign finance laws broken by this particular politician-criminal but also to the whole issue of judges and sentences. Sentencing is an area of the judicial process filled with disparity, confusion and prejudice, all of it a complexity that has long been despaired about but only recently faced by some of those with power to change it.

In the Hansen case, the public saw in action a style of disparity common in the American courtroom. The judge who issued the original sentence on Hansen—a harsh one compared to similar cases—was the same judge who last year set free Richard Kleindienst, the perjurer, with the thought that the former Attorney General's only crime was having "a heart that is too loyal and considerate of the feelings of others." Judge Hart also had tender concern about other convicted criminals—such as former White House aides Harry Dent and Jack A. Gleason—who came before him after pleading guilty to breaking a campaign law. Both were given sentences of one month of unsupervised probation. In another recent campaign case, though, involving former Montana Gov. Tim Babcock, Judge Hart was in a different mood: "When you broke the law," he lectured Babcock, "you knew you were breaking it, and thereafter you tried to cover it up . . ." Babcock received four months. The case is now on appeal.

What is illustrated here—the same judge being easy on three of the guilty (Kleindienst, Dent, Gleason), harsh on two (Hansen, Babcock) and both harsh and easy on one (Hansen)—is how disparate and discretionary judicial power can be. Judge Hart is not unique. Any number of examples can be found. A board chairman who steals hundreds of thousands of dollars through price fixing gets a suspended sentence while a high school dropout knocking off a gas station for $20 gets 10 years. Studies have shown that one judge gives many more suspended sentences than another judge, and that violators of a law in one state get an average of five months while the same offense in another state draws 20 months. The disparity was summarized by Marvin E. Frankel in his book "Criminal Sentences": "A defendant who comes up before sentencing has no way of knowing or reliably predicting whether he will walk out of the courtroom on probation, or be locked up for a term of years that may consume the rest of his life, or something in between."

The breadth of opinions, feelings and practices among judges—on such issues as deterrence, rehabilitation, duties to victims, protecting the community from criminals—has long been a problem so large that its reform is far down the list of priorities. But the issue is not being ignored. Evidence exists that questions are being asked of judges, that demands are being made that decisions from the bench be held accountable. It is true that this accountability is usually to nothing more forceful than public opinion, but in the context in which many judges work—remoteness, secrecy, long-term or lifetime appointments—an advance is being made.

A recent interview by the Bureau of National Affairs with Judge Charles B. Renfrew of the U.S. District Court in Northern California—an interview the bureau said was "a rare public glimpse of the problems judges face in sentencing white collar criminals"—a question on deterrence was asked. Judge Renfrew answered: "I think you try and make (the sentence) fit the crime and the criminal. Of course, one of the things that's very difficult about sentencing is that none of us really knows whether we did the right thing, whether the sentence had a deterrent effect. It's a difficult thing. You just have to give a great deal of thought and effort to the sentencing."

But who knows how much thought and effort a judge gives in a particular case? What if he gives little? He can persist in his mental laziness for years, all the while having unaccountable power over peoples' lives. In "Partial Justice: A Study of Bias in Sentencing," Willard Gaylin, M.D., notes that "when a judge assigns a sentence now, he is under obligation to explain why he imprisoned a man for the maximum sentence, imprisoned him for a minimum sentence, let him go on probation, or whatever." As a reform, Gaylin argues that if a judge is made to present reasons for assigning sentence, "he will have to document the facts which influenced him rather than the prejudices. Either in the presentation of his argument or in anticipation of it, a judge will have to examine the real considerations."

"Who knows how much thought and effort a judge gives a particular case? And when sentencing, is he looking at the crime or the criminal?"

Among those considerations is whether the judge is looking at the crime or the criminal. It is clear that when Judge Hart had Richard Kleindienst, a confessed liar, before him, he put the emphasis on who Kleindienst was, not what he did. It was the opposite when Rep. Hansen first appeared or in the Babcock case; the judge considered the foul deed of breaking the law more than the respectability of the lawbreaker. His sentencing comments to Hansen and Babcock stress the supremacy of the law, not the state of their hearts. As a judge in "Partial Justice" says: "Very often you wind up with one possible rationalization for your sentence [of a prominent person]. If these men don't get punished, the system has no credibility whatsoever."

The judge didn't explain why the punishment of prison is linked with the system's credibility. A case can be made that the opposite is true: the system has lost credibility because prison is not only inhuman but is ineffective as a deterrent and expensive to pay for. The issue is not whether criminals should be punished or not punished but what form of punishment is proper for each person. Judge Renfrew said that "we don't use as many of the rich alternatives that are available to a federal judge in sentencing . . . You can do a large number of things, but you

have to use your imagination."

Although the jails and prisons continue to receive criminals every day, the presence of such jurists as Charles Renfrew, Marvin Frankel and some of those interviewed in "Partial Justice" holds promise that not all the thinking from the bench is stagnant. Some of it is creative and useful, and occasionally signs appear that it is spreading.