1-1-2009

Daniel Freed

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Recommended Citation
Stith, Kate, "Daniel Freed" (2009). Faculty Scholarship Series. Paper 1288.
http://digitalcommons.law.yale.edu/fss_papers/1288

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Norval Morris became a hero of mine when I read The Future of Imprisonment as a student of James Vorenberg and Alan Dershowitz at Harvard Law School in the 1970s. Dan Freed is a more recent hero—for only a quarter century. It is an honor to begin to recount his work and legacy.

There is a personal side to this task, and I ask your indulgence to begin with the day I first met Dan Freed. This was in late 1984, shortly before I joined the faculty at Yale. Introducing himself in the Law School Dining Hall, Dan asked if I had an interest in the law of criminal sentencing. I think I said (and I know I thought): “Sentencing? In law school? There’s not much law there.” On my first day of school, so to speak, I knew of Dan Freed primarily as the progenitor of bail reform. I did not know that he had been teaching a full course on sentencing since 1980.

While Dan had been developing and teaching his course on sentencing, I had been a federal prosecutor. As I told Dan in that first conversation, the truth is that federal prosecutors in those days had very little to do with sentencing. Indeed, I had never recommended a sentence to a judge, not even to the occasional judge who asked my views. The policy of the United States Attorney’s Office for the Southern District of New York was that (excepting the exceptional case, of course) our only role in sentencing was to tell the probation officer and the court what we knew about the crime and the defendant, including any cooperation he had provided. The closest to sentencing advocacy I came was to urge, on a few occasions, that the defense counsel’s plea for mercy had downplayed the seriousness of the offense. But the sentencing function itself belonged entirely to the judge.

Dan replied, “Yes, but you know all of that is about to change.” He referred to Marvin Frankel’s book,1 to the Sentencing Reform Act2 that President Reagan had just signed, and to the new agency that would be writing the Federal Sentencing Guidelines.

I knew about the book and about the new legislation, and I did not hide my skepticism. I told Dan that I had been practicing before the very bench that Judge Frankel castigated. The judges portrayed in the book were for the most part very different from those I saw. I witnessed judges who seemed to take the responsibility of sentencing quite seriously and who often explained at length their reasons for the sentence they were imposing. I was dubious about the Sentencing Reform Act, as well. I remarked that the legislation appeared to be decidedly ambiguous on the central issue: whether the Guidelines would be binding on judges or would just be recommendations, of no more inherent persuasive power than a defense attorney’s plea for mercy or the prosecutor’s rejoinder.

Dan’s eyes twinkled. It was clear he loved to talk about sentencing guidelines! He explained to me that how binding the Federal Guidelines would be was one of the fascinating issues still to be addressed by the soon-to-be-appointed U.S. Sentencing Commission. Dan parried my questions with deeper ones of his own. At one point he caught my gaze straight-on and asked, “Why should a person’s sentence depend on the luck of the draw—which judge he happens to appear before?” I thought, “How wonderfully idealistic this man is!” I replied, though, that the criminal justice system is full of contingencies—good luck and bad luck. It’s bad luck to get caught; it’s good luck to be appointed a skilled public defender. It’s bad luck to have no one to cooperate against; it’s usually good luck to have a prosecutor with a heavy docket. It’s bad luck to get a law-and-order jury; it’s good luck to get your presentence report written by a probation officer who looks into non-imprisonment options. Ultimately, you can have good luck or bad luck in the judge to whom your case is assigned. In the general scheme of things, isn’t it better for defendants to be sentenced by human beings who can exercise judgment, rather than according to a set of guidelines written for everyone else?

That, said Dan, with growing excitement in his voice, is the challenge. Can we, without denying the important role of judges and advocates and probation officers, devise a system in which we at least try to make sure the same rules are applied to everyone? We try to do that in trials, don’t we? “Doesn’t it seem strange to you, Kate, that in sentencing we’ve never even tried to apply to same rules to everyone?” Indeed, it did seem odd. I was hooked. This was the beginning of a long conversation, with Dan and with so many across the nation and around the world. I thank him for insisting that I join in.

In hooking me, Dan was doing what he had done with so many other students and colleagues, including

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2. President Reagan signed the Sentencing Reform Act of 1984 on October 1, 1984. The act created the U.S. Sentencing Commission (USSC) and established federal sentencing guidelines. The guidelines were intended to reduce sentencing disparity and improve the fairness of sentencing. The USSC was charged with developing the guidelines and making recommendations to Congress. The guidelines were initially intended to be advisory, but over time they became increasingly binding. The guidelines have been a significant factor in federal sentencing practices, influencing judges and lawyers alike.

**Federal Sentencing Reporter, Vol. 21, No. 4, pp. 244–247. ISSN 1053-9867 electronic ISSN 1533-8163 ©2009 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press’s Rights and Permissions website, http://www.ucpressjournals.com/reprintInfo.asp. DOI: 10.1525/fsr.2009.21.4.247.**
Kennedy the same year.5

In later years, he invited judges from other jurisdictions—Delaware, Pennsylvania, Connecticut. But each of Dan's state sentencing workshops stuck to one state so that all the judges were operating under the same formal law. Every judge had to provide Dan in advance with redacted copies of real presentence reports and had to agree to travel to New Haven for four separate two-day workshops. In the first year of the seminar, only the judges were assigned to give a sentence in each of the cases; the students were observers and interlocutors and critics. Later, at the suggestion of one of the participating judges, the students also sentenced every case.

Indeed, the only person who never submitted a sentence was Dan himself. When I later asked him why, he explained that it was for pedagogical reasons. Dan would ultimately be “sentencing” each of the students when he gave them a grade for the course and wanted to remain to their eyes an unbiased evaluator of their sentences and explanations; nor did he want to suggest that there was a single “right” sentence in any case.

The range of workshop sentences in nearly every case was broad. Moreover, the reasons given by the sentencers also varied greatly—both reasons sounding in the particular
The judges were marvelous. We saw such sincere, thoughtful, hardworking judges, who had an astounding array of different practices and approaches. What we witnessed in those workshops in the mid-1980s made clear that any move to sentencing rules would be difficult.

It was also critical to the success of Dan’s workshops that they reached beyond the classroom. During the intensive days in New Haven, there were opportunities for the students and judges to share meals and walk around Yale. Best of all, there was a long, delicious, and intellectually exciting dinner at Dan’s and Judy’s home, usually on the night before the workshop began. Some years, students were also assigned to do a profile of the judges; some even traveled to the judge’s home court to watch her conduct real sentencings. The Alabama judges invited their Yale student friends down to a state judicial conference, where the students were warmly received.

As I’ve said, the sentences were disparate, sometimes quite so. Hence here is “Freed Sentencing Workshop Finding #1”: There Is Disparity in Sentencing.

But one of the most important observations made by Dan and his students was that virtually every sentence of every judge in every workshop was reasoned. These were thoughtful and experienced judges, and they could and did explain their sentences, and they could and did reason and explain further in response to inquiries. Hence there is “Freed Sentencing Workshop Finding #2”: Criminal Sentences Are (or Can Be) the Product of Reasoning.

Perhaps the notion that judges are simply arbitrarily imposing sentences, and the related notion that the sentence depends on what the judge ate for breakfast, gained credence because too many judges were not putting on the proverbial record the reasons for their sentences.

Putting these two findings together, I infer that disparity does not necessarily reflect arbitrariness or unreasonableness by the particular sentencing authority. I also infer that simply requiring a clear statement of reasons will not necessarily eliminate, or even reduce, disparity.

These observations bring us to the heart of the issue that everyone who cares about sentencing has stayed up pondering late into the night: Is it possible to reduce interjudge disparity while still ensuring that the sentence in a particular case is the product of reason?

I do not know whether, when he began his workshops, Dan consciously set out to answer this question. But I think his workshops do suggest an answer. While the judges did not ever reach full consensus on sentences, almost all of them were moved after listening to others. Dan and his students observed and documented the evolution of their thinking about the purposes of sentencing and how to achieve these purposes—evolution that, as a general rule, drew them closer together. Often, though not always, this meant regression toward the mean. (I would be interested whether empirical studies of the brief experiment with “sentencing panels” in the federal courts in the early 1970s reveal a similar pattern.)

On the basis of Dan’s workshops, I thus have a hypothesis: a jurisdiction can develop a set of sentencing guidelines that will be regarded by sentencing judges as legitimate, workable, and reasonable. But this will be achieved not by a top-down process, starting with a grand theory of punishment (or a grand mishmash of theories) and implementing these principles down to the last iota. Rather, workable and respected guidelines will be developed by gathering together people who have good faith, common sense, and sentencing experience. Once the people are gathered, there must be some pedagogy (in Dan’s workshops, it was by sentencing real cases on the basis of presentence reports) whereby each participant explains and gives reasons for her approach, and, equally importantly, listens to what everyone else has to say.

Most importantly, the ground rules have to make clear that each person is free to change his mind about matters small and large, and no one is there to represent vested interests. Dan’s workshops showed—showed me, anyway—that in such a setting, through hard work over many months, it is just conceivable that a broad consensus on the content of sentencing guidelines may be achieved.

I have only begun to scratch the surface of what I know and think about Dan Freed. Let me end by saying that I was only partly right when I early on judged Dan to be an idealist. In fact, this man is that remarkable combination that seems to defy the laws of both logic and politics: he is both an idealist and a realist. He has never stopped pursuing a better world—not just a better theory, but a better world on the ground. And he has enlisted so many others to join with him.

Thank you, Dan.
Notes

1 Criminal Sentences: Law without Order (1973).