

## Sentencing Reform: A Loud Silence

By Kurt Stand

### I.

Silence, a loud unmistakable silence, has been the dominant response to the Supreme Court's decision on mandatory minimum sentencing in the *Booker/FanFan* case this January, a silence followed by other silences on the path toward making the U.S. a world leader in keeping people under lock and key. There are to be sure, exceptions: prisoners and their families have responded as best they can, so too have prisoner rights groups and concerned criminal defense attorneys. Beyond that, a few members of the Congressional Black Caucus have raised their voices, as has an occasional liberal columnist or progressive activist, but not much else, nothing that has echoed. The fate of those locked up was absent during last year's election debates; the issue remains as absent from this year's political discussions.

For Republicans the reason is clear, authoritarian laws are the necessary complement to limitations on social welfare – the freer the market, the greater the need for social control. Too many Democrats have traveled the same road with this outlook, others out of fear of demagogic charges labeling them soft on crime. This is to be expected. What has amplified the problem should be unexpected, the lack of public protest over the political use to which criminal justice practices have been put. Too many on the left have themselves been too silent, reflecting an acceptance of those behind bars as invisible.

A basic understanding of the rulings might shed some light on this picture. The Supreme Court's decisions were in response to the latest in a series of challenges to federal (and similar state) sentencing laws. Passed in the late 1980s, these laws increased the length of sentence imposed for many federal crimes (especially those related to drugs); increased from 67 percent to 85 percent the minimum amount of time that must be served; and eliminated federal parole. The law also created a system whereby factors other than the charges on which a defendant is indicted could be used to significantly add on to a sentence, while the mandatory nature of sentence guidelines meant that it was virtually impossible for a judge to give less time than a prosecutor demanded. At the heart of *Booker/FanFan*: whether add-ons based on charges not proved beyond a reasonable doubt violate sixth amendment rights; and whether limits on judicial discretion in pronouncing sentence unconstitutionally breach the court's independence from the other branches of government.

These are clear cut issues that did not receive a clear cut resolution; the Court's ambiguous ruling struck down part of the law without declaring the law itself unconstitutional. To the extent that facts beyond those admitted by a defendant or found beyond a reasonable doubt by a jury are in question, sentencing guidelines will henceforth be voluntary rather than binding on judges. In other words, a judge is not required to adhere to the guidelines though he or she may do so. The Court thereby

partially addressed the dispute over separation of powers while sidestepping the matter of the rights of the accused.

Unfortunately this left unaddressed any reference to what the ruling might mean for those currently imprisoned, those who are serving much longer sentences than might have been the case had judges used discretion. This is fundamentally a political failure stemming from a fear of a large number of inmates being suddenly freed, stemming too from a refusal to accept that those deemed felons do still have rights. A view of people in prison as somehow worse, less, than those outside is part of the blindness that renders those inside invisible. It is what permits the lack of a public outcry that would force judges and legislators to listen to what they don't want to hear, to open their willfully closed eyes.

Were our criminal justice system seen for what it is, then what is common knowledge within would have to be publicly acknowledged outside – beginning with the fact that current sentencing laws have created a culture of informing, via thinly-veiled bribery. If someone is offered \$100,000 to testify against someone else, no one could pretend that the testimony would be trustworthy. Yet it has somehow become acceptable for the government to offer 10-20 year sentence reductions in exchange for pointing a finger at another person. So acceptable as to be standard practice.

What makes bribery effective, however, is its necessary complement, blackmail – in essence an equal part of what takes place daily in courtrooms across our country. Prosecutors can, and generally do, add a significant number of years to the sentences of defendants deemed uncooperative (that is, unwilling to play informer), frequently by the expedient of those unproven enhancements. In addition, prosecutors can, and generally do, charge a defendant differently if he or she takes a plea rather than insist on a trial -- a decision that can translate into the difference between a 7-year and a 17-year prison term (or an even greater discrepancy). Not incidentally, this has eroded the right to a trial, for a right begins to lose meaning when the exercise of it results in such a high price. It is a price likely to be paid, given that jury conviction rates in federal courts run around 95 percent, a figure which ought to arouse as much skepticism as election results of similar margins.

## II.

The injustice done here, it is important to note, is not just toward those wrongly accused. It is as much an injustice to those who have broken the law. The principle of vengeance with which the state acts reflects the very devaluation of human life that defenders of “law and order” claim to uphold. Long sentences don't end illegal activity nor make life safer for most people; the kind of social dislocation out of which crime grows cannot be solved if treated solely as a police problem. All that current policy does is to warehouse people for years as a prelude to a lifetime disability – for, in practice, a convicted felon is never truly restored to full civic equality. The law freezes anyone caught in its net at the moment of arrest forever; once someone is deemed to have crossed the line that divides “good” and “bad,” he or she is unlikely ever to be allowed back. The inequality implied

by this is what makes the huge increase in the number of people imprisoned the last two decades so dangerous to the functioning of democratic society.

We need not deal with crime in this way. The U.S. is singular in the harshness of sentences routinely imposed, as it is in the annual number of arrests. There are many reasons for this, despite our very real heritage of civil liberties and democratic rights, not least of which is the tendency to divide people into categories of good/bad. This outlook makes it possible to rationalize the suppression of some people's rights on the assumption that one's own rights will remain protected.

That is the logic of racism and so it is that the racism endemic to our history is in many ways responsible for the severity of our criminal laws. Visible structural inequality contributes to the implicit acceptance of "others" as being somehow a little less human and thus more deserving of their fate; too many who see a black face caught at the other end of a nightstick or receiving a guilty verdict are unable to picture themselves in those shoes. Racism in this form also helps mask the class bias of our courts. Those without resources have far fewer chances for justice than those who are wealthy – a reality everywhere evident yet rarely acknowledged or addressed.

Similarly, too many are too quick to accept draconian criminal laws when radical political is criminalized. There is a red thread that connects the criminal syndicalism laws aimed at the IWW, through McCarthyism, and into contemporary police tactics aimed at global justice and anti-war protesters. This same thread is embodied in the mis-named Patriot Act. The more militarized our society becomes, the more easily national security can be used to define people outside society so as to strip them of their rights.

Finally, both images – dark skinned, politically suspect – are also used to rationalize the targeting of immigrants who are prosecuted and sentenced today with a cruel impunity. The partial dehumanization in all of the above was briefly seen in all its implications at Abu Ghraib – not only that torture is practiced, but that it is easily excused by so many.

Taken together, the implication of this is that "good" people should have no fear of giving up rights in the name of security, while "bad" people, for who no penalty is too harsh, don't deserve rights. The understanding that these rights have a value for all at all times and are not just for people who have gotten into trouble has declined in recent years, making the defense of civil liberties all the more difficult. This trend (which is a reflection of how democratic governance has been undermined) has practical consequences: Every arrest that turns someone into an "other" is followed by a realization of how many constitutional protections have been lost. Every day in prison one can see people shaking their heads over this discovery, a discovery made when it is too late to object.

Understanding this brings us back to current sentencing laws and the Supreme Court's Booker/FanFan decision. Inadequate though this was, it did open the door to change ever so slightly. A strong push through legal, legislative, political action, and inclusion in the broader progressive agenda, could bring more reform of sentencing laws on behalf of

those now in prison as well as people facing arrest in the future, perhaps as prelude to more basic reform of the criminal justice system itself.

This ought to be done as a matter of social conscience; it ought to be seen equally as a matter of social justice and democracy. This was well understood by Walt Whitman when he compared George Washington to a common criminal, emphasizing thereby that each of us share in the common attributes of humanity, each with virtues, failings, and potential. Whitman's refusal to allow the designation "convict" to subsume the human being is of a piece with his assertion of the mutual dependence of democracy and equality, in contrast to today where the pretense is maintained that these are distinct. As he understood, once we stop seeing the human in human beings, we begin to accept a hierarchy of power and rights.

### III.

Eugene Debs shared and took this sentiment one step further when he declared, "If there is a criminal class I am of it, so long as there is a soul in prison I am not free." This reflected a conviction widespread in the early socialist movement that there is a contradiction between expressing anger at a poor man who robs, while accepting without question the legitimacy of business wealth that grows each day by quite legal forms of robbery and dispossession. We would do well to see in closed factory gates the price corporate power makes working people pay for having dared to struggle with some success to improve their lives; the poverty and deprivation widespread in the countries to which production is often moved are the price those same corporations demand be continuously paid if there are to be jobs for those desperate to work.

Debs' statement was by no means made to exculpate those among us who hurt or attack others, in which women more than men, immigrants more than citizens, blacks more than whites, poor and working people more than the well-to-do, always and everywhere the most vulnerable, are victimized. Denouncing the violence of a system that fattens itself on the hunger of many does not excuse the violence people too often inflict on each other. Rather, Debs' words speak to a rejection of the good/bad dichotomy that implies that change is impossible, just as his socialist convictions were rooted in a rejection of the idea that a system of buying and selling, of war and exploitation, could never be overcome. Solidarity in the struggle for peace and justice is rooted in the belief that change, individual and social, is possible – and it is this which most strongly argues against the sentencing laws and prison policies now in place.

Most of the demands from those within prison are to go back to prior laws which would reintroduce parole and reduce the minimum amount of time needed to be served once a sentence is pronounced. The hope had been that the Supreme Court's decision would have been a step in that direction; it is a hope that should be turned into a demand echoed loudly. Sentence reform along with a more fundamental look at what constitutes crime and how to structure criminal justice practices should be a part of every progressive agenda. Far from being a distraction from more pressing needs, or a source of disunity

that the Right will exploit, taking up the issue of prisoners' rights is a way to challenge the illusion that the rights of some can be bought at the expense of others.