PROSECUTION NOTES

CENTER ON THE ADMINISTRATION OF CRIMINAL LAW

The Center on the Administration of Criminal Law is pleased to present Prosecution Notes. *This edition recounts some of the Center's activities over the last year, offers a look back at 50 years of practicing criminal law by expert and experienced practitioner Charles A. Stillman '62, and summarizes all criminal law decisions from the 2010-11 Supreme Court Term.*

In This Edition:

50 YEARS PRACTICING CRIMINAL LAW: A LOOK BACK

By Charles A. Stillman '62 with Zachary Margulis-Ohnuma '99

Charles A. Stillman is a founding partner of Stillman & Friedman, P.C.
Zachary Margulis-Ohnuma is the principal attorney of the Law Office of Zachary Margulis-Ohnuma.

In 1959, Russell Bufalino and 19 other defendants with nicknames like "Black Jim" Colletti and "The Guv" Guarnieri stood trial before Judge Irving Kaufman of the Southern District of New York. The charges stemmed from the notorious Apalachin Meeting—the huge gathering of mobsters at a quiet farm in upstate New York disrupted by eagle-eyed state troopers suspicious of the dozens of flashy cars with out-of-state licenses visiting the tiny hamlet.

I was still in law school, having transferred to the night division at New York University so that I could live with my new bride rather than accept a Pomeroy grant that would have required me to live in the dorms—then, men only. But I also had the good fortune of serving Judge Kaufman as his bailiff—a courtroom job that combined the function of manservant to a federal judge, assisting the law clerk (in those days there was only one law clerk) and, by being in Court, observing the cream of the criminal bar in action.[1]

More than 50 years later, there are no bailiffs and NYU no longer has a night division. The Mafia is not what it once was, few convictions are overturned, and there are thousands of new substantive federal crimes.[2] When I first started practicing law, *Miranda v. Arizona*,[3] *Gideon v. Wainwright*,[4] the Racketeering Influenced and Corrupt Organizations (RICO) Act,[5] the Criminal Justice Act,[6] and the present courthouses for the Eastern and Southern Districts of New York were all still to come. Most important, the U.S. Sentencing Guidelines were a quarter-century away. Federal judges had unfettered discretion in fashioning a sentence within the proscribed statutory maximum.

The government still seeks to put people in prison for committing crimes, but just about everything else about criminal law has changed. It would be impossible to summarize the changes in federal criminal law over the last 50 or so years in a short article like this. Nonetheless, with the benefit of perhaps more hindsight than many, I will try to highlight some of the essential developments that have made the practice of criminal law so different now from how it was then—and that have kept my colleagues and me so deeply engaged for all these years.

THE EXPLOSION OF PROCEDURAL RIGHTS

I left the U.S. Attorney's Office for the Southern District of New York in 1966 after trying more than 30 cases in just four years. Trials were more common then, at least in part because there were no Sentencing Guidelines and the statutory maximum sentence for most federal crimes was just five years. In the meantime—i.e., from 1962 to the early 1970s—the procedural rights of criminal defendants increased exponentially, at least on paper. The attorneys and agents I worked with as a prosecutor were, for the most part, professional, honorable, and ethical; nonetheless, it was not unheard of for a defendant in a drug case or a Hobbs Act case to complain of mistreatment at arraignment in Room 318 of the Foley Square courthouse.

[1] The 20 men on trial were convicted and sentenced to terms ranging from three to five years for conspiracy to lie about what they were doing at the obscure farm, but the convictions were later overturned. See *U.S. v. Bufalino*, 285 F.2d 408 (2d Cir. 1960). Nonetheless, the Bufalino trial is still widely considered the first major assault on organized crime.
[2] See generally, American Bar Association, Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* (1998).
[3] 384 U.S. 436 (1966) (defendants in police custody must be informed of right to counsel and right against self-incrimination).
[4] 372 U.S. 335 (1963) (courts are required under the Sixth Amendment to provide counsel in criminal cases for indigent defendants).
[5] 18 U.S.C. § 1961 *et seq*.
[6] 18 U.S.C. § 3006A *et seq*.

But after *Miranda*, *Mapp v. Ohio*,[7] and *U.S. v. Wade*,[8] pretrial hearings became routine. A crafty agent might still extract a confession from a suspect in custody, but he could not escape the scrutiny of a good defense lawyer and a fair-minded judge. Still, it is a constant of criminal defense practice, then and now, that defendants ignore their attorneys' advice not to make statements to law enforcement, ignore the *Miranda* warnings, and hang themselves on their own words, even with *Miranda* firmly in place.

Perhaps the most important new procedural protection was the advent of *Gideon*, which guaranteed a lawyer to any defendant who could not afford one. The Criminal Justice Act of 1964 implemented *Gideon* in the federal courts. When I started out in practice in New York City, indigent defense was a haphazard process. There was one public defender, assigned to the Southern District: Bernard Moldow, of the Legal Aid Society. He was an extremely able lawyer (later appointed a New York State Criminal Court judge)—but he was only one person. If more than one indigent defendant was charged, the arraignment judge would buttonhole the nearest attorney in the court that day and "ask" him to take on the case pro bono. Such requests were seldom turned down, and most defendants in the Southern District got competent representation even when it was unpaid. We lawyers did very well as a rule and considered it a duty to give back by accepting occasional unpaid assignments; even today, many firms do not submit claims for reimbursement under the Criminal Justice Act because they see indigent defense as a public duty.

Of course, standards varied from court to court around the country and criminal cases frequently proceeded without attorneys or with attorneys who were so incompetent they could not prevent almost routine miscarriages of justice. *Gideon* went halfway to changing that: It guaranteed an attorney with a law license, but that was it. It was not until 1984 that the United States Supreme Court established the constitutional right not just to a lawyer but also to an *effective* lawyer, in *Strickland v. Washington*.[9]

The Criminal Justice Act became effective in 1964 and I was asked to sit on the committee drafting the CJA guidelines for the Southern District of New York. Now, the district enjoys a proud tradition of first-rate attorneys on the CJA Panel who provide effective defenses to all defendants. And the lonely efforts of Bernard Moldow have been replaced by an outstanding group of lawyers in the Office of the Federal Defender.

[7] 367 U.S. 643 (1961) (evidence obtained in violation of the Fourth Amendment may not be used in state or federal courts).
[8] 388 U.S. 218 (1967) (criminal defendant has a Sixth Amendment right to counsel during identification proceedings).
[9] 466 U.S. 668 (1984).

WHAT IS ILLEGAL, ANYWAY?

The substance of federal criminal law has changed as much as or more than the procedure, but in a different direction. Counting the number of distinct crimes on the books is notoriously difficult. By one estimate, 40% of all federal crimes enacted since the Civil War have been created since 1970.[10] There was always (or at least since the 1930s) a broad securities fraud law, but now we defend a mind-boggling array of other financial and business crimes like illegal money transmitting, structuring financial transactions, violating other countries' environmental laws, and, in the more egregious cases, RICO as applied to organizations that have little in common with the fellows that met in Apalachin in 1957. The breadth of these statutes and others more than compensate prosecutors for the procedural gains achieved by defendants over the years. All the procedures in the world provide superficial protection if the criminal law is ever expanding.

THE RISE AND FALL OF THE MANDATORY SENTENCING GUIDELINES

For the convicted, the most important aspect of a criminal prosecution is sentencing. Nowhere have we seen more change over the years. Starting in the late 1960s—as expanded procedural protections were coming into effect and the number of federal crimes was multiplying—statutory maximum sentences became longer and longer. Judges did their best to be fair and evenhanded, but they enjoyed no guidance as to where on a scale of zero to 20 or more years a sentence should fall. Judge shopping was essential: In those days, if a defendant in the SDNY pleaded guilty at arraignment on the indictment, the arraignment judge sitting during that two-week rotation would impose sentence. Otherwise, the case would be randomly assigned ("wheeled out," as it was aptly described) to another judge. If you could control the timing of the arraignment—and you often could ("I have a very important brief to write next week; let's just do it the following week")—you could pick your judge. So long as your client understood what was going on, you could urge him to plead guilty at arraignment, thereby assuring a potentially better result at sentencing.

[10] American Bar Association, Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* (1998) at 7. See also John S. Baker Jr., *Revisiting the Explosive Growth of Federal Crimes*, LEGAL MEMORANDUM (June 16, 2008); John S. Baker Jr. and Dale E. Bennett, *Measuring the Explosive Growth of Federal Crime Legislation*, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES (2004).

SAVE THE DATES

FEBRUARY 7, 2012

Conversation on Urban Crime

CYRUS VANCE JR.
New York County District Attorney

APRIL 17, 2012

FOURTH ANNUAL CONFERENCE

New Frontiers in Race and Criminal Justice

KEYNOTE SPEAKER:
MICHELLE ALEXANDER, author
The New Jim Crow: Mass Incarceration in the Age of Colorblindness

Greenberg Lounge, Vanderbilt Hall
40 Washington Square South

Invitations to follow

The change in the assignment system after the Federal Magistrates Act of 1968, along with the Sentencing Guidelines, dramatically altered the picture. A magistrate judge—using the same wooden wheel used back then—chooses a district judge at random. But it does not matter what day your client is arraigned or who is sitting; the sentencing judge will always be chosen by "chance." And, until just a few years ago, that judge would have been bound by the mandatory U.S. Sentencing Guidelines.

The Sentencing Reform Act of 1986 that created the Guidelines was intended to add uniformity and consistency to sentencing. But it also had the effect of increasing sentences, as judges were forced to focus on the defendant's criminal conduct and record, with little or no regard for personal history and characteristics. The result was stifling: Single mothers with small children involved in fraud were sentenced to the same terms of imprisonment as men without families. And, with President Reagan's War on Drugs in full swing and a deadly new form of cocaine called crack inspiring previously unheard-of levels of street violence, sentences became harsher and harsher. By 1992, the average time in prison had more than doubled, from 26 months in 1986 to 59 months.[11]

The sentencing tide started to turn, albeit very slowly, with *Koon v. U.S.*,[12] in which the U.S. Supreme Court upheld a more liberal view of downward departures under the Guidelines to justify a lower sentence for the policeman who led the videotaped beating of Rodney King. Another series of cases, starting with *Apprendi v. New Jersey*[13] and climaxing with *U.S. v. Booker*,[14] first questioned, then "excised" on Sixth Amendment right-to-jury trial grounds, the mandatory sentencing scheme. We are not back where we were in 1986: Courts still calculate the Guidelines, the Guidelines are still harsh, and sentencing judges can be overturned for getting it wrong. But *Booker* now at least permits judges to fulfill their statutory duty under 18 U.S.C. § 3553(a) to consider the defendant as a complete person. Average sentences are down to 44.3 months.

White-collar cases, though, are an exception to these trends. When first enacted, the Guidelines left room in appropriate cases for the existing practice of granting probation or home confinement to most low-level fraud defendants. That changed with the drumbeat of huge corporate scandals like Enron, Adelphia, and WorldCom, which inspired the Sentencing Commission to add more and more upward adjustments. Average sentences for fraud, though, actually dropped after the Guidelines were enacted, and then were remarkably steady from about 1989 until *Booker*, at around 15 months.[15] One reason for this trend was that the Guidelines, to promote deterrence, sought to make prison more likely for economic crimes, but initially reduced sentence length.[16] Fraud sentences, however, began rising briskly starting in 2006 (to 18.6 months, up from 14.9 months the year before), the year after *Booker*, climbing to an average of 23.2 months last year according to Commission statistics.[17] And of course today's headline cases, like Madoff and others convicted of serious fraud crimes, although meted out in months result in decades of incarceration.

CONCLUSION

There is no question we have come a long way from the days of the Bufalino trial. A harder question is whether lawyers and their clients are better off now than they were before. Some injustice has been added to the system, but much has also been removed by judges, lawyers, and, frankly, politicians working in good faith to impose rules that achieve just results. The practice of criminal law is every bit as interesting, frustrating, and ultimately rewarding as it was in 1959. And there is no expectation that creating new crimes is at an end. The truth is that there will always be crime and as long as there is crime there will be plenty of disagreement on how to punish it. That will keep future generations of prosecutors and defense lawyers as busy and engaged as the last.

In the final analysis, regardless of all that has changed, three fundamental principles remain inviolate: the duty of the prosecution to pursue allegations of crime vigorously and fairly; the defense to effectively represent the accused as the last bulwark in a free society against an oppressive and overreaching prosecution; and finally, the Court to make sure that both sides follow the rules so that in the end, true justice is realized.

---

11 United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* (2004) ("*15 Year Report*") at 46.
12 518 U.S. 81 (1996).
13 530 U.S. 466 (2000) (Sixth Amendment prohibits judges from enhancing criminal sentences beyond statutory maximums based on facts not admitted or decided by a jury beyond a reasonable doubt).
14 543 U.S. 220 (2005) (holding the U.S. Sentencing Guidelines are not mandatory).
15 See *15 Year Report* at 59–60.
16 *Id.* at 59 ("For example, average time served for embezzlement has decreased from preguidelines levels, but nearly twice the proportion of embezzlers are going to prison. As more embezzlers were given short periods of imprisonment, the average length of imprisonment among all embezzlers declined as the new offenders were included in the average.").
17 United States Sentencing Commission.

FELLOWS

Much of the Center's work is done by New York University School of Law students who are chosen as fellows after a competitive application process. The Center's current fellows are Yotam Barkai '13, Christina Dahlman '12, Chad W. Harple '12, Philip T. Kovoor '12, Alexander Li '12, Evelyn Malavé '13, Julie K. Mecca '13, David B. Mesrobian '12, Karl D. Mulloney-Radke '12, Zachary B. Savage '13, Cameron Tepfer '13, Michael Levi Thomas '12, Julia Torti '13, and Elizabeth Daniel Vasquez '13.

ALUMNI

The Center's former fellows are Joshua J. Libling '09, Kathiana Aurelien '10, Beth George '10, Julia Sheketoff '10, Laura J. Arandes '11, Mahalia Annah-Marie Cole '11, Kelly Geoghegan '11, Alexander F. Mindlin '11, Meagan Elizabeth Powers '11, Jason A. Richman '11, Elizabeth-Ann S. Tierney '11, and Alicia J. Yass '11. Former Center summer fellows are Tom Ferriss (Harvard '11), Mark Savignac (Harvard '11), Jake Tracer '12, and Rebecca Welsh '12.

Center fellows have gone on to post-graduation employment including clerkships on the United States Court of Appeals for the District of Columbia Circuit, the United States Court of Appeals for the Third Circuit, the United States Court of Appeals for the Sixth Circuit, and the United States District Court for the Southern District of New York; the Department of Justice Office of Legal Counsel; the Department of Justice Attorney General's Honors Program; the Office of the Bronx District Attorney; the Defender Association of Philadelphia; and various prominent international and national law firms.

Center fellows have also held criminal justice–related summer employment positions at various organizations including the Manhattan District Attorney's Office, the Department of Justice, the United States Attorney's Offices for the Eastern District of New York and for the Northern District of Texas, the American Civil Liberties Union, the Philadelphia District Attorney's Office, Women Empowered Against Violence Inc., the Juvenile Justice Project of Louisiana, the United States Senate Judiciary Committee, and the Defender Association of Philadelphia.

JANELLE PITTERSON, ADMINISTRATIVE ASSISTANT

Janelle Pitterson is the administrative assistant at the Center.

Editor, Sarah M. Nissel '08

Center on the Administration of Criminal Law
New York University School of Law
139 MacDougal Street
New York, NY 10012
prosecutioncenter@nyu.edu
www.prosecutioncenter.org

This newsletter is made possible, as is all the Center's work, by generous support from the Ford Foundation.

We invite you to contact the Center if you wish to join it, contribute to its mission, inquire about one of its events or projects, or bring to its attention a case or public policy issue.

The Center welcomes tax-deductible donations to further its mission of promoting and defending good government practices in criminal matters. To contribute, please visit www.prosecutioncenter.org and click on the "Contact/Join/Contribute" link on the left side of the screen, or cut and paste this address into your browser window: www.law.nyu.edu/centers/adminofcriminallaw/contactjoincontribute. You can also contact us directly at prosecutioncenter@nyu.edu.

To join the Center, please send us an e-mail at prosecutioncenter@nyu.edu. You will be entered into the Center's database to receive invitations to Center events and updates on recent activities and publications.