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LAW

The Media's Reporting On Justice Is Criminal

Victims' family member, Steve Davis speaks to media outside federal court in Boston Tuesday, June 12, 2012, after Catherine Greig, who spent 16 years on the run with former Boston mobster James "Whitey" Bulger, was sentenced to eight years in prison for helping to hide one of the FBI's Ten Most Wanted Fugitives. (AP Photo)

There is a canned, formulaic newspaper story about any criminal case. It can be repeated in every prosecution, no matter what the crime, no matter who the defendant.

Here's how it goes: Judge X sentenced defendant Y to five years (or whatever the number). The prosecutor argued for 10 (or higher than the number the judge gave). The victim's family is appalled. When interviewed, they stridently proclaim their outrage at the judge. The press then echoes that sentiment.

All concerned assume that the right sentence is the one the prosecutor wanted or the victim demanded. So when the judge sentences the defendant to less, they cry foul. Another lenient judge! Another liberal! Another blow against the "tough on crime" mentality!

Never do you see the opposite: a columnist decrying a sentence that was too high or a reporter noting that these sentencing lengths are just arbitrary numbers – five, 10, 15, 20 – without any relationship to what works to deter crime, what is cost effective, etc. And they are "just" numbers that will inevitably increase over time, precisely because they are contentless.

They do not reflect expert opinion about proportionality — for example, measuring relative sentences across crime categories or comparing nonviolent drug sentences to sentences for violent crime. They don't consider alternative approaches. They don't evaluate recidivism, whether drug treatment programs in certain instances will work better than incarceration.

These numbers only reflect the public's and the district attorney's spleen – and so whatever the number was before the sentencing of this defendant, they "must" be higher in the next case, with the next defendant. There is, in short, no end.

We lead the world in imprisonment not just by a little — but by several orders of magnitude. Our nearest competitors are

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Rwanda and China, hardly good company. And the

policy. racial figures are even worse: At the end of 2010, black men had an incarceration rate of 3,059 sentenced prisoners per 100,000 U.S. black male residents. This rate was almost seven times higher than the incarceration rate for white men (456 per 100,000).

Three decades ago, we considered rehabilitation and specific deterrence to be more important than retribution. And while there were unquestionably problems with that approach, at the very least it enabled a discussion about what punishments made sense to ensure public safety, to minimize recidivism and to balance all of the purposes of sentencing. In addition, it permitted criminal justice experts in various fields – including judges – to participate in a meaningful discussion about crime.

But in the 1980s rehabilitation was discredited. On the eve of sentencing reform in the federal courts, one scholar wrote: “What works? Nothing!” – although he subsequently amended his views. The sentencing focus shifted for the most part to a single purpose: retribution. And for that purpose there were new “experts”: the public. If the most important question had become, “What punishment fits this crime?” Everyone could weigh in.

And not just the public. By the late 1980s, crime issues were part and parcel of the political debate — think of the role of the Willie Horton ads in the 1988 presidential election. A decade later came the shock jocks and 24/7 pundits. What the public thinks about the crime, and thus what the criminal “deserves,” came to be shaped — indeed inflamed — by the press.

Meanwhile, criminal justice experts were sidelined. As Duke University law professor Sara Sun Beale argued in the aptly titled 1997 article “What’s Law Got to Do With It?” — criminal justice policy is largely driven by the media. The good news of falling crime rates over the past two decades was rarely reported; the nightly news famously reflected the principle, “if it bleeds, it leads.” The result? Popular punitiveness trumped everything, whether or not it bore any relationship to good public policy.

Some of the blame surely goes to the media. Take the case of Kenneth Belew of Somerville, Mass. On the evening of April 21, 2011, after drinking too much, Belew got behind the wheel and lost control of the car. Of the five passengers – two tragically died. The judge sentenced Belew to five years; the prosecutor had wanted eight to 10.

A Boston Globe columnist excoriated the judge in all too familiar terms: He was insensitive and unduly lenient for not imposing the sentence the prosecutor wanted. But what the prosecutor wanted was hardly the measure of fairness. The presumptive range of sentences under the Massachusetts Sentencing Guidelines was about three and a half to five and a half years.

Those guidelines were established by a Sentencing Commission consisting of prosecutors, defense counsel, public safety and correctional

officials, and victim-witness advocates. And the judge accompanied the sentence with an elaborate recitation of the reasons for the sentence — on the record and in public.

The prosecutor cannot be so monitored. He picks a number and does not have to explain it, beyond justifying it in the particular case. There are no public, transparent guidelines for prosecutors, no Sentencing Commission, no standards. He cannot be easily reviewed to see if he is biased, choosing mandatory minimums for defendants of color more than for those who are white, or simply going with his gut.

Recently, a Suffolk County prosecutor criticized the Supreme Judicial Court for not requiring a judge whom the prosecutor believed to be too lenient to disclose his personal notes, records and diaries to justify his sentences. When was the last time a prosecutor was required to disclose why he chose to prosecute a defendant, or picked a given charge, or recommended a given sentence? The answer is never.

And, to a shocking degree, the prosecutor is picking numbers out of the air. Twenty years ago, we considered five years a very long sentence. In most European countries that is still the case. But now, in the United States, we increase sentences by fives. It's like a betting game. Five does not send a message if it is what the defense lawyer wants. OK, I'll raise you five more. Why five? Why not 10?

When sentences had to bear some relationship to outcomes — what worked to prevent recidivism, for example — there were limits. With retribution, there are few.

To be sure, pundits are beginning to write about the unfairness of mandatory minimum sentences. They are beginning to notice the disproportionate sentences for African Americans and Hispanics. And in this depressed economy, the media is beginning to acknowledge that lengthy sentences, particularly for nonviolent drug offenders, are not remotely cost effective.

But those general observations are rarely reflected in media coverage of individual cases. And individual cases, particularly the celebrated ones, are what drive the legislative debate (think Megan's or Melissa's laws) — not a general analysis of the needs of the criminal justice system or the lack of a relationship between the declining crime rate and our ever increasing imprisonment rate.

That is the only explanation of why, just when punitive states like Texas and Mississippi are repealing "three strikes" laws, Massachusetts just passed one, after two highly publicized and tragic crimes: the murders of Melissa Gosule and Officer Jack Maguire. Three strikes is nothing more than a baseball metaphor — not social policy.

Too often the themes the press echoed and the legislators repeated were simply without basis:

Myth 1: Massachusetts judges are coddling criminals. In fact, since the

Willie Horton incident, imprisonment rates have increased, with consequent prison overcrowding. Even independent judges feel the public's pressure to imprison more and more.

Myth 2: Parole boards coddle criminals. But parole was declining steadily after the Horton incident and, after Officer Maguire's killing at the hands of a paroled offender, was effectively shut down further.

Myth 3: Prosecutors can be trusted to decide who should be charged and who should not be. It is a fallacy to believe that all prosecutor's decisions are without flaws, any more than all judge's decisions are wrong. Indeed, prosecutors' decisions are less likely to be publicly reviewed, or to be independent of political influence, than those of judges.

Myth 4: We need higher sentences to stop violent crime. Not so. Violent crime has been declining, especially in Massachusetts.

Myth 5: We need higher sentences to deal with recidivism. Indeed, the recidivism rate is high – by some accounts as high as 40 percent – but given the imprisonment rate, it suggests the failure of prisons more than anything else.

Myth 6: It is costless to imprison more and more. Hardly. Since rehabilitation was generally discredited in the 1980s, reformers have focused on evidence-based practices proven to be efficacious in preventing crime. In this recession, every dollar spent on prison walls is a dollar less for treatment that works.

So it matters how the media covers the individual case, whether it follows the usual formula, "whatever the prosecutor wanted was right" or is more nuanced. The press can't decry mass incarceration while regularly beating the drum to criticize judges who are trying to make reasonable distinctions between offenders.

The views and opinions expressed in this piece are solely those of the writer and do not in any way reflect the views of WBUR management or its employees.