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# Two Cheers for the New Paradigm

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# Two Cheers for the New Paradigm



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Following decades in which the U.S. Department of Justice has consistently advocated for a rigid and harsh legalism in criminal justice policy—in which the DOJ, in the name of abstract principles of national uniformity, has willfully disregarded the devastating impact of its charging, plea-bargaining, and sentencing practices on real-life human beings—Attorney General Holder's address to the American Bar Association seems a breath of fresh air.<sup>1</sup> He calls for a more flexible federal criminal justice system, in which prosecutorial charging priorities are more specifically tailored to meet local needs, in which sentencing is more individualized to the offender and prosecutors sometimes forego mandatory minimum sentences, and in which individual U.S. Attorney Offices experiment with new diversion programs as an alternative to conventional case processing. Holder believes—correctly, I think—that a more flexible and pragmatic system can achieve better public safety results at a lesser cost than a system in which preserving the integrity of the federal sentencing guidelines is the overriding value.

Through Holder's address, DOJ offers its most prominent and unequivocal endorsement yet of an emerging new criminal justice paradigm. The new paradigm, which seems increasingly well-established within many state criminal justice systems, is rooted in our nation's two decades of experience with drug treatment courts (DTCs). DTCs first appeared in the early 1990s and spread rapidly, reflecting a widespread feeling among practitioners that legalistic approaches to the War on Drugs—such as the use of mandatory minimums—were far more effective at filling prison cells than at depressing the drug trade. In Holder's address, I hear echoes of many characteristic features of DTC rhetoric and practice: an atheoretical pragmatism and openness to grassroots experimentation; an overriding concern with recidivism risk and its reduction; a recognition that the routine functioning of the criminal justice system may end up enhancing, rather than diminishing, the risks posed by many offenders; sharp distinctions between nonviolent and violent offenders, with alternatives to incarceration and rehabilitative programming particularly targeting the former; and an appreciation that prison and jail cells are a scarce resource that should be reserved for the most dangerous offenders. These ideas and values have already informed a large and diverse second wave of state and local criminal justice reforms following on the heels of the DTCs, including all manner of other specialized “problem-solving” courts, prosecutorial diversion

programs, prisoner reentry initiatives, and new opportunities for prisoners to secure early release from confinement. The “let a hundred flowers bloom” mentality evident in state and local systems across the country has stood in marked contrast to the federal system's obsessive concern with national uniformity in punishment.

If Holder's ABA speech truly points to the future, then the federal system will come to look increasingly like what one sees at other levels of government. Because such a transformation holds real promise for a system that better protects public safety at far less cost, I hesitate to voice any reservations about the Attorney General's remarks. Yet, I think it important to highlight two significant gaps in Holder's vision—gaps that also seem more generally evident in the emerging new paradigm.

The first gap relates to individual liberty. It is not hard to discern a set of core values that undergird Holder's address. Certain buzzwords are repeated again and again: “safety,” “efficiency,” “tough,” “smart,” and “justice.” But “liberty,” “freedom,” and “individual rights” seem conspicuously absent.

I find the gap worrisome. The new paradigm's basic thrust seems to be toward risk management and cost-benefit balancing. It is as if we were regulating crime in the same way that we regulate toxic pollutants. Our environmental protection agencies carefully measure risk and prescribe different regulations for different substances. Some are deemed so dangerous that they are simply banned. Others must be handled in certain prescribed ways based on established best practices for cost-effective risk reduction. Similarly, the new criminal justice paradigm emphasizes prison (the analog of a straight ban) for the most dangerous offenders and evidence-based risk-reduction strategies for everyone else.

The difference, of course, is that criminals, unlike toxic pollutants, are human beings whose autonomy has an intrinsic moral value.

The problem with cost-benefit analysis, in any realm, is that it tends to downplay or ignore the “soft” variables—the values that are not readily quantified. And individual autonomy is about as soft a variable as you will find.

As we move from a legalistic orientation in criminal justice to a cost-benefit orientation, it is very important for policymakers and practitioners to attend constantly to the basic value of liberty. Holder's speech, however, provides little indication that the Attorney General is doing so. (The Obama Administration's national security policies also

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seemingly point to a disregard of liberty in favor of aggressive risk-reduction.)

At a broad, conceptual level, greater attention to liberty would have at least two important implications for the new criminal justice paradigm. First, a genuine concern for liberty should cause us to be very slow to conclude that any class of offenders is too dangerous for rehabilitative alternatives to simple incapacitation. Excessive caution in this line-drawing exercise has, for instance, been a significant issue with DTCs, many of which have categorically excluded individuals with any history of violence, even though the violence may have been aberrational or linked to a treatable substance abuse problem.

Second, a genuine concern for liberty should cause us to be very selective about what problems are handled in *any* fashion by the criminal justice system. The system's most basic tools are those of coercion, and as the old saying goes, "If the only tool you have is a hammer, then every problem looks like a nail." No matter how well-intentioned, rehabilitative programming overseen by the criminal justice system is apt to exhibit powerfully coercive tendencies. DTCs again provide a case in point. Although framed as an alternative to incarceration, DTCs employ incarceration, sometimes quite liberally, as a stick to ensure compliance with the treatment regimen. It is not unknown for DTC participants to spend more time in jail than they would have if they had gone through conventional case processing. A due regard for liberty might cause us to question whether substance abuse really is the sort of social problem that should be handled through any criminal justice agency, whether or not the agency has a rehabilitative mission.

The second gap in Holder's speech relates to the overuse of very long sentences for serious crimes. His agenda focuses on "nonviolent" offenders who commit "low-level" crimes. It is not hard to feel some sympathy for these offenders, especially when they have been subjected to some draconian mandatory minimum. However, the

federal reform agenda should also focus on offenders who have committed serious crimes that undeniably warrant significant periods of incarceration. "Significant" does not have to mean, and should not normally mean, "most or all of the remainder of the offender's life." In much of the world, decade-plus sentences are considered quite harsh, but these have become a routine occurrence in our federal system, and even sentences of life without the possibility of parole (LWOP) are not uncommon.

Such super-sized sentences raise many concerns. For one thing, a system that increasingly tries to reserve expensive prison beds for the most dangerous offenders should be very hesitant to impose multidecade sentences when we know that most offenders eventually age out of their criminality. For another, long sentences on the high end of the offense severity scale normalize harshness in the system and may tend to exert a gravitational pull on sentences in lower-level cases, too. But, perhaps most importantly, there is the seeming cruelty of a sentence that leaves the offender little realistic possibility of release before death or decrepitude. As the Supreme Court has observed, LWOP raises many of the same concerns as the death penalty; it "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."<sup>2</sup> These same considerations that led the Court to declare juvenile LWOP unconstitutionally cruel should also inform how policymakers and practitioners—from the Attorney General down—view the range of sentences that are formally less severe, but practically little different, from LWOP.

#### Notes

- <sup>1</sup> Eric Holder, U.S. Attorney General, Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), *transcript available at* <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.
- <sup>2</sup> *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010).