

Law's Emperor

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The best legal opinions speak to issues of great importance with exceptional clarity and persuasiveness. Opinions that meet this test have the potential to shape or change the course of the law. Many such opinions have an immediate impact, but others—particularly concurrences and dissents—may not make their effects felt until years or even decades have passed. Judged by this standard, my favorite opinion is Judge Harry Edwards's concurrence in *United States v. Harrington*.¹

At first glance, *Harrington* may seem an unlikely candidate for this symposium. It is just one of the many thousands of crack cases that pass through the courts every year.² Neither judges nor scholars seem to like drug cases very much, and *Harrington* is likely to be the only one that appears in this symposium,³ despite the undeniable importance of drug-related crime. The second strike against *Harrington* is that the issue on appeal—whether post-offense drug rehabilitation is a proper basis for a downward departure under the Sentencing Guidelines—is a technical one that turns on the proper construction of several Guidelines provisions. Judge Edwards does not disagree with the majority's conclusion that pretrial drug rehabilitation may justify a downward departure, but ordinarily no more than a two-level departure under Guideline 3E1.1 for acceptance of responsibility. The majority "attempt[s] to find a middle ground between the wholehearted acceptance of drug rehabilitation as a ground for departure and its complete rejection."⁴ Edwards concludes that this is "as good as any other result, and better than most, under our existing system."⁵ Then why does Judge Edwards write separately, and

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1. 947 F.2d 956 (D.C. Cir. 1991) (Edwards, J., concurring).

2. *Harrington* was charged with selling crack to an undercover agent and with possessing powder cocaine and crack with intent to distribute. He disputed both charges at trial, claiming that he had been misidentified at the undercover sale and had been present only as a customer, not a dealer, at the drug raid that led to the possession charge. *Id.* at 962 n.9.

3. The editors tell me that there is another drug case in the symposium. It is worthy of note, however, that the author never mentions that *Mistretta v. United States*, 488 U.S. 361 (1989), was a drug prosecution. See Maxwell Stearns, *Mistretta Versus Marbury: The Foundations of Judicial Review*, 74 TEX. L. REV. 1281 (1996).

4. *Harrington*, 947 F.2d at 968 (Edwards, J., concurring) (citation omitted).

5. *Id.* (Edwards, J., concurring). On the other hand, as Edwards notes, this interpretation of the Guidelines "will benefit addicts who accomplish the laudable and difficult task of rehabilitation no more than they would have benefitted had they demonstrated sincere contrition to the Probation Officer;

what is so special about his concurring opinion? Why should anyone care about a drug case that turns on the fine print of several Guidelines, particularly when, as here, an amendment to the Guidelines Commentary now endorses the majority's resolution of this issue?⁶

Judge Edwards begins by retelling the tale of the emperor's new clothes, which concludes with a child saying aloud that the emperor "doesn't have anything on."⁷ The emperor was indeed stark naked, but everyone conformed to the fiction of his elegant new clothes until the child's statement broke the spell.⁸

Judge Edwards argues that the federal Sentencing Guidelines are like the emperor's new clothes:

We continue to enforce the Guidelines as if, by magic, they have produced uniformity and fairness, when in fact we know it is not so. . . . [T]he Guidelines merely substitute one problem for another, and the present problem may be worse than its predecessor. Nonetheless we, the district courts, the U.S. Attorney's Office and the defense bar are forced to press on—through contorted computations, lengthy sentencing hearings and endless appeals—in the service of a sovereign who can be neither clothed nor dethroned.⁹

The Sentencing Guidelines have literally revolutionized federal criminal practice in the last ten years, and they have an awesome impact on the lives of thousands of men and women sentenced for federal crimes each year. The Sentencing Reform Act of 1984¹⁰ was intended to bring an end to arbitrariness and discrimination in federal sentencing through a new regime of Guidelines sentencing.¹¹ The Sentencing Commission has now spent more than a decade and millions of dollars to reform federal

indeed, for those rehabilitated addicts who would otherwise qualify for credit under the 'acceptance of responsibility' Guideline, our decision today holds no benefit at all." *Id.* (Edwards, J., concurring) (citation omitted).

6. Amendment 459, effective Nov. 1, 1992, amended the Application Notes to provide that "post-offense rehabilitative efforts (e.g., counseling or drug treatment)" is an appropriate consideration in determining acceptance of responsibility.

7. *Harrington*, 947 F.2d at 963-64 (Edwards, J., concurring) (quoting HANS CHRISTIAN ANDERSEN, *THE EMPEROR'S NEW CLOTHES* (Pictureback ed., Random House 1978)).

8. Although the spell was broken "for the people," and the king "knew the little child was right," he decided that "the procession must go on" and hurried along with his nobles continuing to carry his imaginary train. *Id.* Although neither Edwards nor Andersen tells us what happened next, I like to think that the king hurried back to his castle never to wear that suit of "clothes" again.

9. *Id.* at 967 (Edwards, J., concurring) (footnote omitted).

10. Pub. L. No. 98-473, §§ 211-239, 98 Stat. 837, 1987-2040 (codified as amended in scattered sections of 18 & 28 U.S.C.).

11. For a discussion of the history and purposes of the Guidelines, see generally *Mistretta v. United States*, 488 U.S. 361, 363-66 (1989), and Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 *HOFSTRA L. REV.* 1 (1988).

sentencing. That is an expensive set of new clothes we have purchased for the federal system, and Judge Edwards's charge that we have not gotten what we paid for is of the utmost seriousness.

Judge Edwards argues that "rigid" Guidelines "often produce harsh results that are patently unfair," and "do not, by any stretch of the imagination, ensure uniformity in sentencing."¹² His opinion describes the various strategies federal prosecutors can use to evade the Guidelines through their charging and bargaining discretion.¹³ The Guidelines are so easily evaded that they do not end sentencing discretion. Instead, they merely transfer discretion from the sentencing judges, "who, whatever their perceived failings, are at least impartial arbiters who make their decisions on the record and subject to public scrutiny and appellate review—to less neutral parties who rarely are called to account for the discretion they wield."¹⁴ Edwards questions the wisdom of transferring this discretion from experienced judges to assistant United States attorneys "who may be barely out of law school with scant life experience and whose common sense may be an unproven asset."¹⁵ Indeed, given the adversarial nature of the criminal justice system, Edwards comments that the Guidelines leave "the fox guarding the chicken coop of sentencing uniformity."¹⁶

As Judge Edwards explains, Kelvin Harrington might not have needed a departure in order to avoid the mandatory minimum sentence of imprisonment for five years. He needed only a "cunning" defense counsel and a more "amenable" prosecutor to bend the rules a little and omit the words "five grams or more" from the indictment.¹⁷ Assistant United States attorneys "have been heard to say, with open candor, that there are many 'games to be played,' both in charging defendants and in plea bargaining, to circumvent the Guidelines."¹⁸ Commentators confirm this, finding, for example, that "fact bargaining" has risen under the Guidelines, with prosecutors and defense lawyers negotiating over the facts upon which sentencing will be based, such as the amount and type of drugs sold or the dollar loss from a fraud.¹⁹

These charges are not new.²⁰ Judge Edwards's opinion bristles with

12. *Harrington*, 947 F.2d at 964 (Edwards, J., concurring).

13. *See id.* at 964-65 (Edwards, J., concurring).

14. *Id.* at 966-67 (Edwards, J., concurring).

15. *Id.* at 967 n.10 (Edwards, J., concurring) (quoting *United States v. Boshell*, 728 F. Supp. 632, 637 (E.D. Wash. 1990)).

16. *Id.* at 965 n.5 (Edwards, J., concurring).

17. *Id.* at 967 (Edwards, J., concurring).

18. *Id.* at 964 (Edwards, J., concurring).

19. *Id.* at 965 (Edwards, J., concurring) (quoting Marcia Chambers, *The Old Days: When a Plea Was a Plea* . . . , NAT'L L.J., Nov. 6, 1989, at 13).

20. For additional criticism of the Guidelines, see, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*,

citations to cases, articles, and reports that criticize the Guidelines, and he concludes with an appendix listing additional commentary and eighteen opinions.²¹ But Edwards presents these charges with a passion, and with a powerful new metaphor for the situation in which judges and other participants in the criminal justice system now find themselves. Edwards's opinion is a call for an honest reappraisal of the Guidelines, reopening the question of the best way to regulate sentencing discretion in an open and accountable fashion, in order to reduce arbitrariness while retaining needed flexibility.

Judge Edwards's eloquent critique of the Guidelines stands in sharp contrast to the majority opinion authored by Judge (now Justice) Ruth Bader Ginsburg.²² The comparison raises intriguing questions about the judicial role and about how each of these two distinguished jurists sees that role. Judge Ginsburg canvasses the relevant portions of the Guidelines and commentary, as well as appellate and district court decisions from six other circuits.²³ Her opinion recognizes the Guidelines as the governing authority and sets forth a persuasive basis for the construction she advocates. Her opinion contains no response to Judge Edwards's critique of the Guidelines, and gives no indication whether Judge Ginsburg agrees with that critique. (Of course, strictly speaking there was no need for Judge Ginsburg to respond, because Judge Edwards concurred in her opinion for the majority.)

Ultimately, of course, the question of one's favorite opinion is also the question of one's favorite judge, or at least the characteristics of one's favorite judges. Judge Ginsburg's opinion is meticulously researched and carefully and judiciously written. It is itself an example of fine judicial craftsmanship. Sometimes that is not enough. Judge Edwards's opinion goes beyond the technical question involved in the individual case to present an indictment of the current sentencing system. Upon occasion our best judges, in their best opinions, challenge the status quo and force a reexamination of existing law. Judge Edwards's opinion in *Harrington* is an urgent call to reexamine the federal sentencing regime.

I hope someone is listening.²⁴

101 YALE L.J. 1681 (1992); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991); Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587 (1992); Kevin R. Reitz, *The Federal Role in Sentencing Law and Policy*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 120 (1996); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833 (1992).

21. *Harrington*, 947 F.2d at 968-70 (Edwards, J., concurring).

22. *Id.* at 957-63.

23. *Id.* at 958-63.

24. In 1995, the Sentencing Commission announced that it would undertake a comprehensive study to measure the success of the Guidelines in meeting the goals of the Sentencing Reform Act and to consider their simplification and improvement. Notice of Priority Areas for Commission Study and Research, 60 Fed. Reg. 49,136 (1995).