
CIVIL DISOBEDIENCE — THE ROLE OF JUDGES — NINTH CIRCUIT AFFIRMS MANDATORY SENTENCE. — *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006).

Justice and freedom are not words and slogans, but ways of life. It is their essence to exist only where we toil and sweat and live and die each day to practice them. So often we cannot find America's commitment to these values: we cannot find it in our streets and in our schools or in our projects and in our prisons. It is this final locus, the homes we construct for our criminals — these enclaves of despair and social clubs for our poorest — that awaits those subjected to our draconian and irrational sentencing policies. These policies, in all of their ugly inevitability, were yet again faithfully followed by the Ninth Circuit in *United States v. Hungerford*.¹ By dutifully affirming a lengthy and inappropriate prison sentence, the *Hungerford* judges passed up a chance to engage in a powerful, symbolic act of civil disobedience — the kind of direct public repudiation of unwise and unjust laws that has been central to social change throughout our history. The court, like hundreds of others each year, missed an opportunity to play a role in ensuring America's substantive commitment to its formal values in an area likely to be ignored by popular government and unlikely to engender a spontaneous, organic, and effective social movement.

Marion Hungerford suffers from severe Borderline Personality Disorder.² She has a “very low capacity to assess reality” and a “low level of intellectual functioning.”³ The examining psychiatrist called interviewing Hungerford “one of the most arduous, painful experiences in my life” and determined that Hungerford had “one of the most severe psychological disorders.”⁴ Her deteriorating mental condition led her husband, with whom she had four children, to leave her. Alone and poor and unwanted by any employer, she moved in with Dana Canfield, upon whom she became dependent. Vulnerable, “easily victimized,”⁵ and desperate for rent money, she engaged in a string of small-scale robberies with her new companion.⁶ Marion Hungerford lived the first fifty years of her life without a criminal incident. She will spend the next 159 years in federal prison.

Between May and July 2002, Canfield carried a gun into seven Montana businesses, stealing a total of less than \$10,000.⁷ Hungerford

¹ 465 F.3d 1113 (9th Cir. 2006).

² *Id.* at 1119 (Reinhardt, J., concurring in the judgment).

³ *Id.* (citing testimony of the examining psychiatrist).

⁴ *Id.* at 1122 (internal quotation marks omitted).

⁵ *Id.* at 1119 (internal quotation mark omitted).

⁶ *Id.* at 1114–15 (majority opinion).

⁷ *Id.*; see also *id.* at 1119 (Reinhardt, J., concurring in the judgment).

was involved in the planning of the robberies and shared in the spoils, but she remained either at home, in the car, or elsewhere while Canfield carried them out. Hungerford never touched a gun. They were both prosecuted for the robberies, and Canfield pled guilty, agreeing to spend 32 years in prison.⁸ Hungerford pled not guilty, believing that she had not done anything wrong.⁹ After a jury trial, she was convicted of conspiracy, seven counts of robbery, and seven counts of using a firearm in relation to a crime of violence.¹⁰ The district court sentenced Hungerford to 4.75 years for conspiracy and robbery, 5 years for the first firearm charge, and 25 years for each of the next six firearm charges (to run consecutively, as required by statute), for a total of 159.75 years.¹¹ The district court understood itself to be bound by 18 U.S.C. § 924(c), which calls for judges to impose mandatory minimum sentences for certain firearm offenses.¹²

Hungerford could never understand why she was found guilty. After conviction, at sentencing, she still could not believe what was happening to her: "I have not done anything illegal. I did not go about with any gun. . . . I didn't take any money. . . . So please don't do whatever you're going to do to me for what you think I did, because I didn't do it."¹³ Hungerford could not understand the charges against her since she had neither touched a gun nor joined Canfield in the actual perpetration of the robberies. She insisted again: "[M]y crime isn't hurting anybody, because I don't do that My crime is being stupid. That's my crime."¹⁴ Given her significant mental disability and the turmoil surrounding her troubled life, Hungerford might be forgiven for not understanding the intricacies of § 924(c), the jewel in the crown of federal mandatory minimum sentences.

But the Ninth Circuit affirmed Hungerford's sentence. Writing for the panel, Judge Graber held that neither the Fifth Amendment's guarantee of due process nor the Eighth Amendment's prohibition of cruel and unusual punishment precluded Hungerford's lengthy sentence.¹⁵ To any student of precedent, this was an easy case. The Ninth Circuit had long ago ruled that mandatory minimum sentences do not impermissibly give discretion to prosecutors at the expense of judges.¹⁶ Moreover, the Supreme Court has retreated almost entirely

⁸ *Id.* at 1121 (Reinhardt, J., concurring in the judgment).

⁹ *Id.*

¹⁰ *Id.* at 1114 (majority opinion).

¹¹ *Id.*

¹² *Id.* at 1118 (citing 18 U.S.C.A. § 924(c) (West 2000 & Supp. 2006)).

¹³ *Id.* at 1121 (Reinhardt, J., concurring in the judgment) (internal quotation marks omitted).

¹⁴ *Id.* at 1122 (emphasis omitted).

¹⁵ *Id.* at 1118 (majority opinion).

¹⁶ See *United States v. Wilkins*, 911 F.2d 337, 339-40 (9th Cir. 1990).

from Eighth Amendment proportionality review.¹⁷ In *Harmelin v. Michigan*,¹⁸ Justice Scalia explained the inapplicability of the Eighth Amendment to a life sentence for a first cocaine offense: in a constitutional sense, “[s]evere, mandatory penalties may be cruel, but they are not unusual.”¹⁹ As a result, Judge Graber disposed of Hungerford’s Eighth Amendment challenge to her 159-year sentence with neither difficulty nor fanfare. She used just nine words.

But the case need not have been so easy. Indeed, to some, Hungerford’s case presents the very kind of excruciating moral and professional dilemma that can make for one of life’s most difficult and defining choices. In fact, it troubled Judge Reinhardt greatly. He concurred in the judgment only and wrote candidly about the absurdity of Hungerford’s sentence, noting that no one who really thinks about her sentence could believe it was justified.²⁰ He expressed disappointment that precedent precluded Hungerford’s Eighth Amendment challenge, writing with a sense of both powerlessness and irony that his court had previously urged Congress to reform these “unnecessarily harsh” sentencing laws.²¹ Judge Reinhardt believed that he “lack[ed] the authority” to reform statutory penalties or Eighth Amendment precedent.²² He called upon those with “both the power and the responsibility to do so” to take action.²³ Ironically, Judge Reinhardt did not recognize that he and his colleagues on the federal bench fit this description.

Federal judges should realize that *they all* have the power to craft a more just, humane, and cost-effective approach to criminal punishment. In fact, federal judges are uniquely well-suited to spark a movement against draconian sentencing by telling a credible, knowledge-

¹⁷ Over the past several decades, although rarely able to reach agreement on the extent of Eighth Amendment protections, the Court has upheld a number of astonishingly harsh penalties for seemingly minor conduct. See, e.g., *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (plurality opinion) (upholding a sentence of up to life in prison for the theft of three golf clubs under California’s three-strikes law); *Rummel v. Estelle*, 445 U.S. 263, 285 (1980) (holding that it was not cruel and unusual to impose a life sentence under a recidivist statute for successive convictions of credit card fraud, forging a check, and obtaining money by false pretenses totaling less than \$230).

¹⁸ 501 U.S. 957 (1991).

¹⁹ *Id.* at 994.

²⁰ See *Hungerford*, 465 F.3d at 1122 (Reinhardt, J., concurring in the judgment).

²¹ *Id.* at 1119; see also *United States v. Harris*, 154 F.3d 1082, 1085 (9th Cir. 1998) (“We urge Congress to reconsider mandatory minimum sentences.”). Congress’s response to the Ninth Circuit’s suggestion in *Harris* was to increase the penalty for successive § 924(c)(1) violations from 20-year consecutive terms to 25-year terms of the same variety. *Hungerford*, 465 F.3d at 1119 (Reinhardt, J., concurring in the judgment) (citing Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3649 (codified at 18 U.S.C.A. § 924(c) (West 2000 & Supp. 2006))).

²² *Hungerford*, 465 F.3d at 1118 (Reinhardt, J., concurring in the judgment).

²³ *Id.* If history is any guide, Judge Reinhardt’s pleas will either fall on deaf ears or remind Congress, in the heat of an election campaign, that it has been too long since it increased criminal penalties for crimes committed in large numbers by the poor.

able, and powerful story. To ignite and participate in this transformation, judges must step out from their traditionally prescribed roles.

Civil disobedience by federal judges is both justified and required when two conditions are met: first, when an essential contradiction exists between stated ideals and ostensible justifications on the one hand and how people are actually living and actually being treated on the other; and second, when such a contradiction is not likely to be exposed and remedied as effectively by social movements or other means absent judicial intervention. The ways in which America treats its criminal defendants and its prisoners satisfy both of these conditions, and the Ninth Circuit should have refused to apply the statute. It should have reversed Marion Hungerford's sentence.

Little need be said here about the foolishness of sentencing laws like § 924(c). The mass incarceration to which they contribute has staggering negative consequences that ripple throughout society and culture. A small sample includes tremendous financial costs²⁴ and devastating effects on family and community stability.²⁵ There are also strikingly disproportionate effects within poor and minority communities,²⁶ which perpetuate cycles of oppression and domination.

In addition, there is something deeply problematic with the very notion of prison, even were we to mitigate the social injustice that prisons exacerbate. Taking away liberty — locking a human in a cage — requires us to identify the moral justifications for this practice, especially given the deplorable conditions in many prisons. We must study how and why we give authority to government officials to make this decision about a life. We must always be sure that we are engaging in this activity for the right reasons and in the right proportion.

But our collective policy judgments are often clouded by various cognitive biases,²⁷ incomplete information, the exigencies of everyday

²⁴ In fiscal year 2003, U.S. corrections expenditures totaled more than \$60 billion. See BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, at tbl.I.4.2003 (Ann L. Pastore & Kathleen Maguire eds., 2007), <http://www.albany.edu/sourcebook/pdf/t142003.pdf>.

²⁵ See, e.g., Bruce Western with Leonard Lopoo, *Incarceration, Marriage, and Family Life*, in BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 131 (2006).

²⁶ See, e.g., Bruce Western with Becky Pettit, *Mass Imprisonment*, in WESTERN, *supra* note 25, at 11; *id.* at 16 ("Black men are eight times more likely to be incarcerated than whites . . ."). The United States incarcerates blacks at about six times the rate of South Africa at the height of apartheid. See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* 263 (2002).

²⁷ The many biases include framing effects, stereotypes, dissonance removal, and attribution errors. See generally, e.g., Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 37-71 (2004). Moreover, even though many believe that punishment reflects blameworthiness, evidence shows that sentencing decisions are often actually based on many other factors not currently recognized in formal law or the public conscience. See, e.g., Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006) (finding that stereotypical blackness of a face determines the likelihood of death sentence).

life and politics,²⁸ and appealing myths that we tell ourselves to justify the status quo.²⁹ These are major market failures in the *marketplace of intuitions* — that process by which we translate our values into our policies and outcomes. This term is used because various intuitions — our beliefs about the world based on our internal cognitions and external experiences — compete for influence as we try to create a world that we see as empirically conforming to formally articulated values. These failures lead to tremendous gaps between ideals and reality.³⁰

The role of a judge, however, is to articulate value judgments, require reasons for government action, and test to see if the overt justifications offered in support of how law is *written* and *imagined* actually cohere with how law is *experienced*. Judges may be particularly good in this role because of their training in argument, their experience uncovering underlying purposes and values, the openness of their decisionmaking processes, their relative insulation from the political process, their high visibility, and their perceived status as educated and impartial. But how should judges best use these skills and their positions in a clear case of contradiction like mass incarceration?

Judges should engage in disobedience — they should refuse to enforce unjust laws. Just as, in a structural constitutional sense, judges are the immune system that ensures society gives reasons for the things that it does and to guard against political process failures, so too can they, in a cultural sense, help to protect against prevalent failures in the marketplace of intuitions.³¹ The task must be to understand and confront the cognitive, informational, and social forces and processes that lead to these market failures. To compete and succeed in this marketplace — to spark a tremor or bring momentum to a movement — judges must skillfully articulate shared values, explain their rea-

²⁸ In addition to directly corrupting the development of ideas and policies, political process failures also influence our deeper intuitions. They settle basic assumptions about customs and institutions, determine how discussions are framed and what information is available, and give certain conceptions of who we are a place in public discourse while powerfully signaling and affirming the intuitions of our peers.

²⁹ These include stories of personal responsibility and the denial of the influence of situation. The discriminatory effects of mass incarceration likely cannot be challenged under equal protection because courts use stories of personal choice to justify laws emphasizing *intent*. But these stories are seriously flawed. Dramatic recent evidence gathered by implicit bias studies shows that 88% of whites hold pro-white or anti-black biases. See Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005 (Magazine), at 12; see also Project Implicit, <https://implicit.harvard.edu/implicit/> (last visited Apr. 7, 2007) (offering implicit bias tests).

³⁰ See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001) (“American criminal law’s historical development has borne no relation to any plausible normative theory — unless ‘more’ counts as a normative theory.”).

³¹ This role schema for judges is in the tradition of Professor Robert Cover’s famous discussion of the morality of antebellum judges. See ROBERT COVER, *JUSTICE ACCUSED* 197–238 (1983). The analysis here, however, seeks to situate the role of judges among other social actors and movements to help create a better social decisionmaking process.

sons, give empirical information, and expose contradictions and inconsistencies. Only then will the ideas that best conform to our values win out in this most important of domains. Importantly, a properly functioning marketplace of intuitions will sort out for itself *which* acts of disobedience resonate.³²

A theory of judicial disobedience must be sensitive to the relationship between judges and social movements. This task is a complicated one; the etiology of social movements is an extremely inexact science. Legal scholars are only beginning to craft analytical frameworks within which to understand the roles of legal actors in social change.³³ Nonetheless, three important factors about severe prison sentences suggest that this is a context in which judges can and should play a meaningful role in bringing about social change through disobedience. First, whatever we are currently doing is not working. The structures and incentives of the political process simply let criminal defendants down.³⁴ While sentences are growing more severe and rates of incarceration are increasing,³⁵ the occasional futile plea³⁶ from the federal bench goes largely unnoticed — buried in a concurring opinion on LexisNexis — and the voices of academics and evidence from social scientists are largely ignored.³⁷ This highlights the importance of actual disobedience, because such acts draw unique attention, tell a powerful story, and create significant interest in a judge's reasons. District court judges especially can have a powerful effect on the growth of movements in local communities hit hardest by mass incarceration — where the residents have family connections to the incarcerated, pub-

³² Disobedient judges who make mistakes in identifying shared values or fail to persuade regarding market failures will simply be overruled quietly without having a powerful effect on a social movement. Although some fear that chaotic effects would result from limited judicial disobedience, only acts of disobedience that strike a chord by exposing market failures will threaten the “rule of law” and cause legal uncertainty. These would be, by definition, instances in which the “rule of law” as previously understood was deeply problematic.

³³ See, e.g., Lani Guinier & Gerald Torres, Notes Toward a Demosprudence of Social Movements, Frederick Douglass Lecture Series (Jan. 17, 2007) (unpublished manuscript, on file with the Harvard Law School Library).

³⁴ See, e.g., Stuntz, *supra* note 30, at 510 (noting that structural political incentives lead prosecutors and legislatures to seek the constant expansion of criminal law).

³⁵ The U.S. incarceration rate has skyrocketed in the last thirty years and is now roughly five times the historic average. See Western with Pettit, *supra* note 26, at 13 & fig.1.1. Europe incarcerates almost seven times fewer people per capita than the United States. *Id.* at 14–15 & fig.1.2.

³⁶ Our dockets and our reporters are teeming with appalling cases of absurd sentences, some of which draw expressions of frustration and disbelief from otherwise obedient judges. See, e.g., *United States v. Angelos*, 345 F. Supp. 2d 1227, 1261–63 (D. Utah 2004), *aff'd*, 433 F.3d 738, 753 (10th Cir. 2006) (upholding 55-year mandatory sentence for a first marijuana offense in which the defendant carried a gun in his boot while dealing, and *faulting* the district judge for expressing dismay at the severity of the sentence).

³⁷ See, e.g., Stuntz, *supra* note 30, at 508 (noting that scholars, almost unanimously critical of the current sentencing regime, may be talking to each other and to a few judges, “*but they do not appear to be talking to anyone else*” (emphasis added)).

licity of the decision is most concentrated and salient, and citizens have the most at stake in ending the flooding of their streets with guns, material need, and alienation.

Second, the issue of harsh sentencing is important, widespread, and a fairly slam-dunk case from a policy perspective. Judicial disobedience must not be wasted on technical legal matters of little interest to the general public. It must focus on salient issues in which there are fairly clear superior policy positions given prevailing underlying values, such as was the case with laws allowing overt racial discrimination. This selectivity will ensure that disobedience is saved for rare, especially unjust circumstances and will maximize its likely effect on the public conscience while minimizing its detrimental effect on respect for the rule of law. Equally important is that, given full information, the public is unlikely to lend mass incarceration strong political support. Mass incarceration is a complex problem in which the market failures are difficult to recognize. Judges, as experts in clear, persuasive argument, must be able to explain this sometimes esoteric issue in order to clarify to ostensibly entrenched interests what is actually (or what is not) at stake. Interest convergence will likely be crucial to the success of a movement to reform American sentencing.³⁸ We have created powerful affirming myths in our culture that prevent us from recognizing injustices by legitimating status quo distributions and norms.³⁹ Judges can use their position in public discourse and their skills as lawyers to help expose the inconsistencies and inaccuracies in these myths in ways that were perhaps not needed when the disconnect between our ideals and practices was more starkly manifested by white police officers unleashing water cannons and vicious dogs on innocent black children.

Third, disobedience here is unlikely to hinder successful social movement organizing.⁴⁰ Rather, powerful stories told by individual

³⁸ Cf. Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1056 (2005) (highlighting the paramount importance of interest convergence in social change to achieve racial justice).

³⁹ See generally, e.g., Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413 (2006) (discussing social science evidence on the human tendency to legitimate and applying it to racial injustice throughout American history).

⁴⁰ Much of the literature criticizes a reliance on courts and litigation as the sole means to pursue social justice. See, e.g., Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 797 (2006). The worries might range from failure to build real power to cooptation by legal elites to reliance on legal actors for services and a corresponding inability to mobilize for change in the future. But the goal here is not to rely on courts to hand us social change on a silver platter, but rather to ensure the active role of courts in protecting the social decisionmaking process and to situate judges within broader movement storytelling. The anti-mass incarceration movement must still play an integral part in building solutions. Rather than outside actors defining harms in legal terms and thus constraining a social move-

judges can spark and supplement a movement that builds real power to change unjust laws. The class of those adversely affected by sentencing policy is dispersed geographically, isolated physically from society, frequently detached from family and friend networks, often mentally ill, transient, unsympathetic (at least intuitively) to other members of society, and nonvoting. Moreover, the group is constantly changing and growing, and it is not the kind of community — with shared interests and shared futures — generally served by developing relationships and organizing. These citizens may not, therefore, easily become organized and powerful enough to fight repeated battles.

All of these factors highlight the importance of the judiciary in protecting the legal and moral rights of criminal defendants and prisoners against legislative forces. However, because the type of change needed is so comprehensive, only a broader public reexamination of attitudes and policy can result in fundamental reforms. This type of reorganization of penal philosophy simply cannot be implemented by the judiciary alone. The movement must be one that seeks out other citizens and communities, telling them a compelling narrative. Judges can supplement and fuel emerging grassroots organizations, such as Families Against Mandatory Minimums, that are already undertaking the difficult task of starting and maintaining a social movement. Slow improvements begun by judicial activism can eventually disseminate the truth of the social science evidence and demonstrate the fallacies in our ways. In turn, there will be a subterranean shifting of the tectonic plates of our attitudes and culture.

Judges can tell a powerful story by bringing attention to real failures in the marketplace of our intuitions and educating us on ways to correct them. They can highlight the shared interests of both dominant classes and underprivileged communities in pursuing meaningful solutions and help us see criminals as fellow creatures of situation — situations that we create. As Martin Luther King, Jr., wrote from jail, disobedience “seeks so to dramatize the issue that it can no longer be ignored.”⁴¹ Judges can thus impact policy while doing justice and showing mercy in individual cases for defendants like Hungerford.

When Marion Hungerford leaves prison at age 210, perhaps she will see a different America. Perhaps she will see an America that has finally solved its great contradiction — finally closed the gap between the values that figure in its constitutional scrolls and on its marble monuments and in the kinds of lives it promotes among its citizens, including and especially those it brands as criminals.

ment, judicial disobedience, if anything, is the acknowledgement that we do not currently have existing legal/doctrinal categories into which to fit these claims neatly.

⁴¹ MARTIN LUTHER KING, JR., Letter from Birmingham Jail, *in* WHY WE CAN'T WAIT 77, 81 (1963).