

DA Conley: 'skunk at the garden party'

By: Nancy Gertner March 19, 2015



Suffolk County District Attorney Daniel F. Conley referred to himself as the "skunk at the garden party" at the Second Annual Massachusetts Criminal Justice Reform Coalition Summit, when he called for the continuation of mandatory minimum drug sentences.

The summit was designed to bring together experts from all quarters, to look critically at incarceration, using advances in scientific research to address issues that have too often been shouted in legislative sound bites or strident political debates. In

this very thoughtful setting — with all voices decrying mandatory minimum drug sentences — Conley's "skunk" reference doesn't begin to describe his remarks.

Outdated, inaccurate, overstated, even disrespectful would be better.

Before Conley, Supreme Judicial Court Chief Justice Ralph D. Gants called for an end to mandatory minimum sentences. His comments mirrored those of U.S. Attorney General Eric Holder, the U.S. Sentencing Commission, scholars, practitioners, an extraordinary right-left coalition of current and former members of the U.S. Congress, and state legislatures which have voted to end mandatory minimum sentences. Such sentences are unfair; worse yet, they don't deter drug crime.

As Gants said, mandatory sentences treat the drug courier the same as the kingpin, the one "motivated by addiction the same as the one motivated by greed," the homeless man dealing out of his car the same as the one dealing to buy a car. After 17 years as a U.S. District Court judge, I could not agree more.

Nor do mandatory drug sentences cause lower crime rates. Crime rates have been falling across the country — indeed across the industrial world — regardless of the sentencing regime, mandatory sentences or not, lenient or harsh.

Drug dealers are particularly fungible. When one is arrested, others take his place, often younger and more violent, as one street worker told me when I toured a community ravaged by drugs. U.S. Sentencing Commission research has suggested that mandatory drug sentences do not affect deterrence. Why consider the mandatory minimum before you deal when you can bargain it away in a plea bargain?

Worse yet, as Bruce Western, professor of Criminal Justice Policy at Harvard has explained, incarceration decimates communities, especially those of color, undermines the offender's long-term economic prospects, creates family instability, and predicts crime in future generations. "Right on Crime," a conservative think tank, emphasizes how wasteful these sentences are. Imprisonment costs the taxpayers \$50,000 per year, money better spent on evidence based programs and community reinvestment.

What did Conley have to say about this research? Massachusetts exceptionalism. Here mandatory minimums work just fine. Jail is reserved for the truly violent; there is no over incarceration. Prosecutors use their authority to charge judiciously, only going after those who deserve it. And as far as the crime rate is concerned, the communities "feel safer" no matter that their feelings are unrelated to, even undermined by, the policies he espouses.

The facts are otherwise. Massachusetts prisons are 130 percent of capacity; addicts or mentally ill prisoners get little meaningful treatment. Recidivism rates soar. We imprison at a much higher rate now than 20 years ago, with little

or no effect on drug crime. The only way Conley can say with confidence that the jails are filled exclusively with the violent offenders as he did is by redefining what a violent offender is.

What Conley is really saying is to consider the alternative to prosecutorial charging discretion, what he calls the failed policies of the 80s, when judges had sentencing discretion.

It is an outdated caricature and more importantly, wrong today.

It is prosecutorial discretion in charging that has contributed to racial disparity in mandatory minimum sentences. In 2013, racial and ethnic minorities were 32 percent of those sentenced to mandatory minimums, but 75 percent of drug mandatory sentences.

While a judge may be biased, his decision is public, can be studied and attacked. (Conley knows that well. He attacked a Boston Municipal Court judge whose sentences he did not like.).

While judicial discretion was criticized in the 1980s, the context has changed. Then the rehabilitation of offenders was more about faith than evidence. Today, research shows what works to deter crime at least for some offenders. Problem solving courts identify who can be diverted from jails, with monitoring and support. A judge can ground his sentence on evidence, and the "best practices" Justice Gants is innovating.

Nor has judicial discretion been problematic for crimes with no mandatory minimums — attempted murder, armed robbery, rape of a child by force, etc. Other states have eliminated mandatory drug sentencing without the dire consequences Conley predicts. And while we know more about what works, we surely know what doesn't: jail.

What is really behind Conley's position? Power. Armed with a mandatory sentence, prosecutors can pressure a defendant to cooperate or, at the least, plead guilty, penalizing the exercise of a constitutional right. And with mandatory minimums, prosecutors sentence, not judges.

We can deal with our drug problem with evidence and research, as the Criminal Justice Reform Coalition urges, not sound bites. Mandatory jail is not a reasoned criminal justice policy. Every garden party skunk knows that.

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