Final Judgment

D. Brock Hornby

Judge Ricardo Fahre listened attentively as the defendant's lawyer made her arguments for a lower federal sentence. Suddenly his computer screen went dark, quickly replaced by a flashing message: "*Take the lunch recess early. You must meet a visitor in chambers*." Judge Fahre was startled; he was unaccustomed to a flashing, emphatic notice on his screen and to being told when to take a recess. The tone of the message was unlike that used by his longtime judicial assistant or anyone from the Clerk's office in addressing him. Nevertheless, it was close to noon, so Judge Fahre recessed the proceeding, and directed everyone to return in an hour-and-a-half. He stood up from the bench and testily went out the door behind him. The door took him directly into his chambers.

There to his surprise he saw, not his judicial assistant nor a clerk, but a seated figure of uncertain age, dressed much like he was, in a long black robe. Fahre could not decide whether it was a man or a woman, and the figure's complexion shifted continuously, so that its ethnicity and race were indeterminable.

"I'm sorry to have interrupted you, Ricardo," the figure said. "But I didn't want to wait. Besides, I have never really understood time."

"Who are you?" Fahre demanded.

"I am who I am," the figure responded. "Exactly who you think I am. I want to ask you some questions about what you do, Ricardo. I hope you

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don't mind. But I'm going to ask the questions and demand answers even if you do mind."

All Fahre's instincts warned him not to object.

"How do you decide what punishment to impose on someone in your courtroom, Ricardo? Like this poor woman whom you are about to sentence for internet fraud?"

"Well, I won't talk about someone I'm about to sentence, even to you, just as I wouldn't in the confessional. But I can tell you the factors I consider in every case. They are things that Congress and the Supreme Court have told me I must take into account."

"Really! You have a checklist?"

"Yes. First I have to consider the Sentencing Guidelines."

"What are Sentencing Guidelines?"

"Don't you know everything?"

"Humor me, Ricardo."

"Well, the Sentencing Guidelines give judges criteria for determining the range of a sentence. Researchers collected sentences federal judges previously imposed in a wide variety of cases around the country and tried to categorize the factors of the offense and offender characteristics that drove the sentences. The Guidelines they came up with are supposed to produce more consistency and uniformity among judges in sentencing. They aren't binding, but they are always the starting point."

"What a great idea. I wonder if I could use something like that."

"What are you talking about? Why do you want to know how a federal judge sentences, anyway?"

"Ricardo, have you ever heard of the Last Judgment or Yawm al-Din?"

(Fahre shuddering): "Yes."

"It's getting closer every day and I need to be prepared to do my part. Let me ask you, do the Guidelines give you much help? I mean, do they achieve consistency and uniformity over the course of time – for example, between offenders already a long time in prison and those whom you are newly sentencing? Do they take into account cultural and ethnic differences? Can they really mathematize a person's past history or his conduct?"

"Probably not. But they're better than a judge having no guidance at all."

"I suppose that's right. Of course, as I think about it, Guidelines aren't relevant to my task, because I will be the only judge imposing the punish-

ment and there's only one penalty available at the Last Judgment. But tell me this, once you figure out the Guideline sentence, what else do you take into account?"

"I consider deterrence – in other words, I try to use the length of the sentence to discourage the person I am sentencing and others from engaging in criminal conduct. I consider the seriousness, nature, and circumstances of the offense. I assess whether I need to protect the public for a length of time by warehousing the offender in a federal prison. I consider the need to promote overall respect for law. In some cases, I take into account the need for restitution to victims. And I follow the principle of imposing no greater a sentence than necessary."

"When you say you 'consider' all these, Ricardo, what does that mean?"

"It means that I think about them and I talk about them at the sentencing. But I have to confess that they don't really tell me what sentence to impose. We just don't have empirical data to assess what weight to give them or much consensus on their proper role in a particular case."

"Well, those factors won't help me much at the Last Judgment anyway. There'll be no more need for protection and deterrence, it will be too late for restitution, and there'll be only one penalty. By the way, deterrence hasn't worked much for me. You'd have thought the threat of hell would be the ultimate deterrent, but it doesn't seem to have improved human behavior. Are there any other factors you use that might help me?"

"I also consider the offender's personal characteristics and history, and what punishment is just."

"Now we're talking, Ricardo. How do you weigh those factors?"

"They may be the hardest part of sentencing. Many offenders have had very destructive childhoods and upbringings; many have serious emotional, mental, or addiction challenges. That can make them sympathetic when it comes to punishment, but it can make them dangerous in the future as well. People from privileged backgrounds may be less likely to reoffend once they are caught and they are less likely to commit violent crimes, but I have to be careful that my sentences don't favor the privileged. In the end, it's very difficult to know what punishment is just and necessary in any given case."

"So what do you do, Ricardo?"

"As I said, I don't have data or any other way to predict what people

will do in the future or what sentence will produce more law-abiding behavior. Sentencing goals sometimes conflict. Victims may cry out for a stiff penalty, but the offender's personal circumstances may call for leniency. So I often have to rely on instinct, while recognizing that I probably harbor unconscious biases and may use heuristic techniques that are not optimal. I ask myself if I would impose a different sentence if I were not a white male, or if I belonged to a different religious or political group, or if the offender were of a different race, gender, or ethnicity. I try not to impose sentences that treat similar offenders differently. Those are some of the reasons why the guidelines can be helpful. In considering what sentence is just, I also have to think about community values. I try to keep my judgment independent of popular backlash for a particular crime, but I can't help thinking about community reaction. Some things are just beyond my control. For example, sometimes Congress has imposed a sentencing floor that I cannot go below, or has mandated that a particular sentence be consecutive to other sentences. There is nothing I can do to shorten those sentences."

"Wow, I see that sentencing is challenging work, Ricardo. In considering what punishment is just, do your sentences presume free will on the part of an offender, or are you a Calvinist believing in predestination or, in more modern terms, that an offender is an unwitting product of his genes and environment?"

"A little of both. As a sentencing judge, I do tell the community that I hold criminals accountable for their conduct, and the damage they've caused to a victim or society. The general public has to proceed on that premise, despite what neuroscientists are learning about how our brains operate. But I also take into account the role of the offender's background and upbringing in producing the criminal conduct. And I try to assess what effect my sentence will have in the future for this offender and others."

"Ricardo, there's something that has always bothered me about your profession – you judges don't get any systematic feedback about the effect of your sentences. Let's take a look at some of your past sentences to see how things actually turned out."

The figure pulled out from its robe's folds what appeared to be a new-generation iPad, announcing, "I have access to my own cloud, Ricardo, and some pretty fancy apps and software. Let's see what we can find."

Something akin to Google Maps brought up a tough part of town on the

screen, then focused onto an impoverished apartment within it. Once the figure double-clicked on the apartment, there appeared a real-time video and audio of the people living there. Fahre watched a mother read a disciplinary note from school that her young daughter handed her as the mother listened sadly to the little girl describe the jeers of her fellow students about the clothes she wore; heard the mother talk despondently about an older child in a juvenile detention facility; saw that there was little food in the apartment and that the furnishings were shabby and sparse; and heard gunshots from a passing car outside.

Fahre asked the figure, "Why are you showing me these unfortunate people on your iPad?"

"Well, Charles Dickens might have used dreams and ghosts, Ricardo, but now we have better technology. Do you remember the name Leroy Howard?"

"Why, yes, I sentenced him some years ago for armed bank robbery. He didn't actually use the gun, but . . . I gave him 10 years in federal prison. The tellers – the victims – were very compelling in their description of the resulting fear they faced every time the bank door opened after the robbery, and I wasn't satisfied that he wouldn't do it again. At sentencing, I really lashed into him for what he did, and he was pretty angry about how I treated him."

As Fahre spoke, the video and audio switched to Howard's sentencing proceeding, showing Fahre berating Howard, calling him "scum" and a "coward."

"How did you come up with the sentence?"

"His Guideline range, given the amount stolen and some previous convictions, was around 5 years. And he was charged and convicted of possessing a gun during the robbery, although he didn't use or brandish it. That resulted in a mandatory consecutive sentence of 5 more years for a total of 10. But why do you ask?"

"Look more closely at the name on the dunning envelopes on the apartment table, Ricardo."

Fahre squinted at the video and after pausing, asked, "Are these people Leroy Howard's family?"

"Yes. He died in prison from an assault after serving 6 years. This is what happened to his family as a result of your sentence, Ricardo. Do you

think you sentenced him fairly?"

Fahre's face reddened, and he spoke indignantly: "There are always collateral consequences flowing from a sentence, consequences that are beyond a judge's control. I can't let those consequences affect my sentence, because the defendant deserves to be punished, the community wants to see him punished, and he shouldn't be able to use his family circumstances as a 'get out of jail free' card to avoid prison when he breaks the law. And I can't determine what happens to him in prison. I do remember having second thoughts over my excoriating remarks in front of his family but, as I recall, the public reaction to my sentence was very positive. In this case, too, the prosecutor tied my hands by charging the gun possession separately. If it hadn't been a separate count, it would have caused the Guideline range to go up somewhat, but it wouldn't have generated the mandatory 5-year consecutive sentence. That's the sentencing system Congress has given us."

"Okay, Ricardo, let's look at a different one."

The screen flickered, then showed a dilapidated doublewide, modest but clean. They could hear and see a woman in the kitchen preparing lunch for her children while describing positively to a friend her recent morning session at Narcotics Anonymous.

"I recognize *her*, that's Marlene Batson," said Fahre. "I sentenced her for drug-dealing, something she did to feed her cocaine habit. Knowing she had young children and no other family members to care for them, and given that she cooperated against her supplier, I gave her a modest sentence – actually probation – taking a gamble. I didn't know if the gamble would pay off. I was also worried about how she would be treated in prison as a snitch." Somewhat mollified at seeing this different sentencing outcome, Fahre added, "I can't really take credit for any success. The sentence was risky and easily could have come out badly – she might have failed her children or exposed them to drugs and drug habits. Many drug dealers do recidivate when they get out of prison, and I see defendants all the time whose parents exposed them to the evil effects of drugs and alcohol when they were children, a toxic mix that the children were unable to escape as they grew up. I'm glad to see Batson's staying clean for now."

"As am I, Ricardo. I know enough about her – much more than you do – to consider her current behavior exemplary."

The screen flashed to a third location, showing sheriff's deputies evicting an elderly couple, crying, from their home. Fahre could make out their names on the sheriff's papers.

"I've never sentenced anyone by that name. You can't hang their misfortune on me."

"Do you remember Kirk Madsen?"

"Yes, he was somebody I sentenced for internet fraud."

"What did you give him, Ricardo?"

"Well, it was a light sentence of just a few months, because it was a first offense, he paid restitution, he showed remorse, he came from a good family that supported him, and I thought he would turn his life around. Why do you ask?"

"Within three months after he came out of prison, Ricardo, he defrauded these folks, and many others, of their life savings through an investment scam. The community – maybe you've heard – is outraged, and local politicians are making headlines over judges being soft on crime."

"That hurts. I do get it wrong sometimes. Critics come out of the woodwork when I show mercy, although I never get criticized for imposing too harsh a sentence. Sometimes mercy works, as apparently it did for Marlene Batson, and sometimes it doesn't, as apparently for Kirk Madsen. If only I could know for sure at the time! I wonder whether unconscious preconceptions led me to look more favorably on Madsen than I should have. Now I wish I'd thrown the book at him."

The screen flashed to ramshackle buildings on the edge of arid farmland, showing a couple of thin goats and some scraggly corn. Children in tattered clothes mingled with the animals. The audible language was Spanish.

"This is Guatemala, Ricardo. This is where Miguel Santoya and his family live. You sentenced him for illegally and repeatedly entering the United States to work as a migrant laborer harvesting crops. He served his prison time and was deported. Now he is trying to eke out a living on the land back home where he was raised. His family often goes hungry, his children sometimes are unable to attend school, and they fear violence from local drug gangs. But Santoya loves his family, and he and his wife do the best they can."

Fahre grimaced. "I find sentencing immigrants very difficult. Many of

our American forebears came to the United States as immigrants, some legally, others illegally. Generally the immigrant offenders I see are hard-working, and except for coming here illegally, they are honest and trustworthy with high moral and family values. They sometimes deprive themselves so as to send back home to their family as much money as they can. I know that the economic conditions in their country of origin are often so severe that sentences do not deter their illegal return. But the law is clear and I have to enforce it; I have to maintain respect for the rule of law. Plus, the actual prison time I gave Santoya was relatively short. I don't impose the deportation, which is what really matters; that's up to federal immigration authorities."

Glancing up from the mesmerizing images, the figure saw that Fahre was looking down at his hands despondently, and quickly snapped the iPad shut.

"Why the long face, Ricardo? I can tell you want to say something. Go ahead."

"This isn't working for me like Scrooge's transformation in *A Christmas Carol*. I can't say, 'Aha, I've been misbehaving and now I see how I ought to behave in the future.' I know I haven't been a perfect judge. But I've tried to do my best. Congress wrote a great list of goals for sentencing, but they often conflict; victims pull one way; the defendant's family pulls the other way; prison terms aren't successful ways to deal with substance abuse or mental and emotional challenges. I don't have good data to tell me who will misbehave in the future and who won't. The community at large can't decide what it wants, strict punishment or rehabilitation. All in all, sentencing is a very tough enterprise, and in a particular case, I don't get to say 'I want to pass on this one.' I often lie awake at night before I sentence, wondering what to do. When it's my turn, how will you judge me? What would you have done in these cases if you were the judge in my place?"

"Frankly, Ricardo, I don't know. I don't trust abstract statements about punishment or Monday-morning quarterbacking by the media, academics, politicians, or even appellate judges. Over many more years than you can count, I've learned there is no single correct answer for the appropriate punishment for an individual. There are so many audiences – the offender, victims, law enforcement, the offender's family, media, interest groups, the broader community – with often different demands. That's why I leave

the sentencing job to humans. I want you human judges to agonize over the decisions, and I prefer that you endure the criticism that ensues. People are supposed to love me, and they don't love those who do the judging! It's also why I've delayed the Final Judgment so many times. You just can't add up the bad and the good of a human being and make a final irreversible declaration. And being who I am, I know everything there is to know about an individual, and that makes it even harder.

I'll be honest with you. In the beginning, I had no idea punishment would be this difficult. Whose idea was this Last Judgment thing anyway? I don't recall saying anything about it to Noah after the Flood. How can I make decisions about whom to punish that will seem fair to people from all walks of life, all ethnic groups, all religions, all over the world, all millennia?

But that's my problem, not yours, and today's not your day for a final accounting, Ricardo. Get back to work and do your best; your courtroom is waiting for you. They're depending on you. *I'm* depending on you. Treat your offenders with dignity. Be merciful when you can – you can take the heat (excuse the pun). And as you humans say when you part, 'I'll see you.' When I say it, you can count on it!"