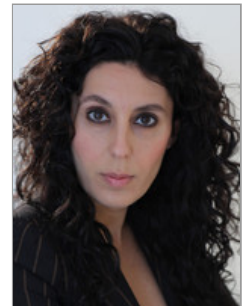


Sessions' Sentencing Policy Will Move The Country Backward

By **Lara Yeretsian**

Law360, New York (May 31, 2017, 3:01 PM EDT) -- Directing federal prosecutors to crack down on drug offenders, Attorney General Jeff Sessions recently issued a directive that shifts the country away from a more nuanced and individualized approach of dealing with these crimes and instead returning it to a harsher era when sentencing guidelines and mandatory minimum sentences frustrated not only the accused, but the judges charged with sentencing them.



Lara Yeretsian

The two-page memo, released publicly on May 12, essentially reverses the Obama administration's more moderate stance on prosecuting drug and other nonviolent offenses, in a policy shift that will do far more harm than good.

In a highly retrogressive move, the memo directs prosecutors to "charge and pursue the most serious, readily provable offense," noting that U.S. attorneys, assistant attorneys general or designated supervisors must sign off on any deviations from the policy.

Sessions called the change "moral and just," but his tough-on-crime rhetoric falls flat in the face of the evidence: In a society where it is harder and harder to find or keep a good job, harder to get health care and harder to afford the basics of daily living, this directive will only create more criminals, more hardened criminals and more prisons, all overcrowded and at taxpayers' expense. In other words, it will only serve to perpetuate the cycle of crime.

It also may backfire.

Instead of the tough penalties Sessions envisions, we may see more and more prosecutors feeling uneasy charging defendants with crimes carrying the harshest possible mandatory minimums.

Prosecutors have often been criticized for overcharging for the sake of pushing for a favorable plea deal, but now we may see something at the opposite end of the spectrum: prosecutors intentionally holding back in order to get around a potentially unjust sentence.

Prosecutors want to sleep at night, too, which is hard to do if you know you are throwing away the life of someone who does not deserve it: say, a man or woman on their third offense, none of which are violent.

As a criminal defense attorney with more than 19 years of experience, I practice in both federal and state court, and I have seen cases where these mandatory minimums, had they been imposed, would have resulted in lengthy prison sentences for clients charged with low level drug crimes or other nonviolent offenses that should merit short or no prison terms.

Moving forward, when people commit crimes, even nonviolent crimes, instead of giving them opportunities to turn their lives around, we are going to lock them up and throw away the key. According to a 2013 paper by the Congressional Research Service on federal mandatory minimum sentencing statutes, the most common imposed federal mandatory minimum sentences arise under the provisions punishing the presence of a firearm in connection with a crime of violence or drug trafficking offense, the Armed Career Criminal Act, various sex crimes including child pornography and aggravated identity theft.

The paper notes that the Eighth Amendment's cruel and unusual punishments clause "does bar mandatory capital punishment, and apparently bans any term of imprisonment that is grossly disproportionate to the seriousness of the crime for which it is imposed."

Low-level, nonviolent, noncartel-related drug offenders certainly should not be sent to prison for the rest of their lives. In fact, some should not be sent to prison at all. Many are addicts who need help rehabilitating and sending them off to prison would only turn them into hardened criminals.

"The most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences," Sessions said in the memo.

Former federal prosecutor Chiraag Bains and former U.S. District Judge Nancy Gertner note in their commentary in The Washington Post that former Attorney General John Ashcroft's similar efforts in 2003 swelled the federal prison population from 172,000 to nearly 220,000 over 10 years. The country's incarcerated population then followed suit. Ten years later, Attorney General Eric Holder told attorneys to reserve the most severe sentences for the most grave offenses; in other words, not low-level drug offenders.

Gertner said in the article she believes that "roughly 80 percent of the sentences she was obliged to impose were unjust, unfair and disproportionate. Mandatory penalties meant that she could not individualize punishment for the first-time drug offender, or the addict, or the woman whose boyfriend coerced her into the drug trade."

Holder's position was the right one, and it also was a success, succeeding where Ashcroft's failed: The federal prison population fell for the first time in 40 years.

Now, Sessions wants to swing the pendulum back the other way, to an approach that not only did not work but is patently unjust. Unfortunately, the Sessions directive is not only an attempt to fix something that is not broken, but rather an attempt to break something that is actually intact.

The directive steps all over the toes of the players in the center of the ring: the prosecutors.

While the memo acknowledges there will be "circumstances in which good judgment would lead a prosecutor to conclude that a strict application of the above charging policy is not warranted," it also notes that any decision that strays away from the policy must be approved by someone in a supervisory position and the reasoning behind any deviation must be documented in the file.

"Charging and sentencing recommendations are bedrock responsibilities of any prosecutor and I trust our prosecutors in the field to make good judgment," Sessions said at a subsequent news conference, as reported on CNN.com. "They deserve to be un-handcuffed and not micromanaged from Washington."

But this is merely lip service, since the reality is that the new directive ties prosecutors' hands and significantly narrows the scope of their discretion.

The scare tactics are familiar: Paint all drug offenders equally so that we can treat them all equally harshly. This is unfair both to those who mete out these sentences and those who receive them.

Sessions asserts that his directive takes a moral high ground and is in the interest of protecting public safety, but sadly, it does neither: His draconian approach will tear apart families, overcrowd prisons and produce unnecessarily grave consequences for the futures of generations to follow.

Lara Yeretsian is the principal of Yeretsian Law, a criminal defense firm in Glendale, California.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.