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COMMENTARY

'Something Needs to Be Done': Review of Frederic Block's 'A Second Chance: A Federal Judge Decides Who Deserves It'

One reason for the book's excellence is the importance of the issue of compassionate release—the balance that society ought to achieve between strict sentences and mercy, an NYU Law professor emeritus writes.

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Judges

By William E. Nelson

Book Review: "A Second Chance: A Federal Judge Decides Who Deserves It"

By Frederic Block

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Political decisions supported by a majority of the people or otherwise rightly made sometimes have disastrous effects on

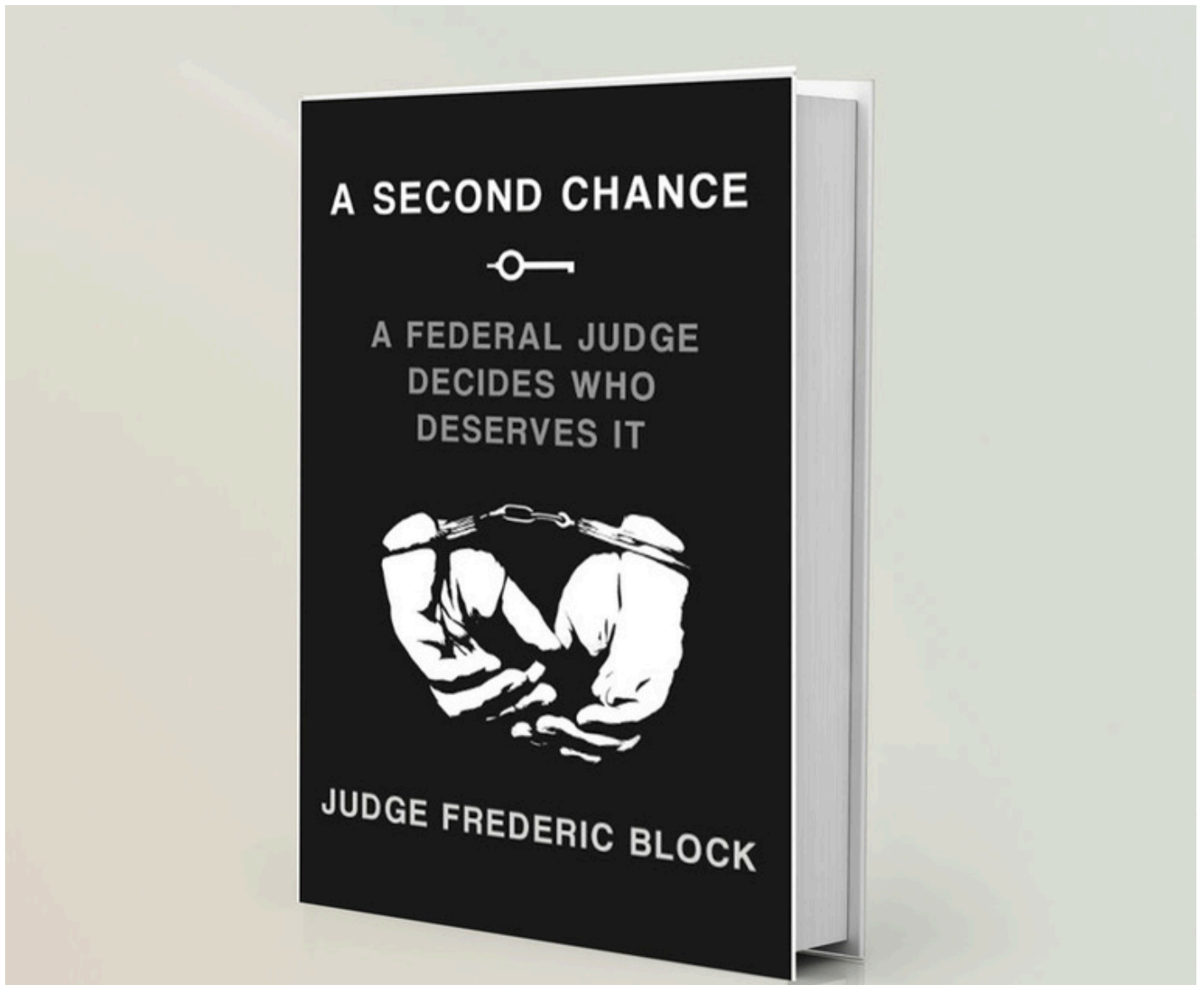
individuals. Going to war, for example, will result in the deaths of individual servicemen, but in this instance, the negative effects on individuals are unavoidable. In some situations, however, government can pursue a desired policy while limiting the negative consequences for individuals. In "A Second Chance: A Federal Judge Decides Who Deserves It," U.S. District Judge Frederic Block of the Eastern District of New York analyzes one such situation.

A number of states and the federal government have adopted severe sentencing systems, usually for specific serious crimes, that authorize long prison sentences and/or require mandatory minimum sentences. A few years ago Congress enacted a bipartisan sentencing reform known as the First Step Act. This act allows federal judges to release federal prisoners from sentences even when no constitutional or other error occurred in their original convictions and sentencings. Judge Block's book urges federal judges to administer this law for compassionate release generously and urges all states to adopt similar legislation.

"A Second Chance" is an outstanding book. There are three reasons for its excellence. The first is that Block wrote the book in a clever, easy-to-read way. The first part of the book impartiality presents six cases assigned to him in which convicted defendants who claimed that their jail sentences were excessive sought compassionate release. Block invites his readers to reach their own judgments about whether any or all of the convicts should receive that release. Later in the book he presents his judgments

and identifies his reasons for reaching them. Readers thus can make their own judgments and later compare them to the judge's because none of the cases presents technical legal issues; the issue in all six is about how to balance the public's interest in strict sentences against providing compassion and mercy to individual convicts who deserve it.

The second reason for the book's excellence is the importance of the issue of compassionate release—the balance that society ought to achieve between strict sentences and mercy. Third, Judge Block offers a powerful argument for compassion and mercy on the state as well as the federal level.



A Second Chance: A Federal Judge Decides Who Deserves It

The importance of the issue of compassionate release and the power of Block's argument for compassionate release even by the states emerges from examination of the case of Stephen May, to whom Block dedicates "A Second Chance" and about whose case the judge wrote extensively. May, who was 35 years old at the time of his sentencing, is currently serving a 75-year term in an Arizona state prison without any possibility of early release on parole or for good behavior—effectively a life sentence. He was initially charged with sexually molesting young children, specifically with six counts of touching the genitals of children 8

years old and younger indirectly through bathing suits they were wearing at the apartment pool where he lived, and one count of touching the genitals of a 6-year old boy through his pants at a school where he worked. He was convicted of five counts, in respect to which he did not touch the genitals of any child directly, but only through clothing.

The evidence against May was weak. The children, whose testimony was prepared unscrupulously by the police, were the only witnesses with actual personal knowledge of whatever had occurred. May has continually protested his innocence, and he might, in fact, not be guilty. Pursuant to an Arizona statute that has since been repealed because of its inconstancy with federal constitutional law, the trial judge instructed the jury that the prosecution did not have the burden of proving that May was sexually motivated in touching the children; May had the burden of proof that he was not sexually motivated.

In light of this erroneous instruction and the weak evidence, the jury could not reach a verdict. The trial judge accordingly directed a mistrial, but the jury then requested an opportunity to continue deliberations. With the consent of both counsel, the judge granted its request.

Upon the jury's return to the jury room, the foreman told his colleagues that if they compromised and found May guilty of some but not all counts, he would receive a sentence of two or three years. We do not know whether the foreman believed that what he told the jury was true. Or did he know that each count

carried a mandatory minimum sentence of 15 years, with sentences on each count to run consecutively, not concurrently? On the basis of the foreman's statement, the jury compromised and found May guilty of five of the seven counts.

After May had spent more than a decade in jail, a federal district judge released him on habeas corpus. Initially the U.S. Court of Appeals for the Ninth Circuit affirmed, but four years after May's release, on rehearing, it reversed itself and remanded him to custody. May spent his four years of freedom learning to be a paralegal and then working as one.

The foundation of Block's argument is a concern that many sentences in the United States, both federal and state, are excessively long. Too many convicts are languishing in prison for too long a time. It is impossible not to agree. Thousands of people who like May might be innocent are spending all or most of their lives in jail. But Block does not take a position that legislatures should be prohibited from adopting severe sentences or providing mandatory minimum terms. He implicitly recognizes that judges should not interfere in the political process, which sometimes will find severe sentences appropriate. Instead he urges the adoption of a safety valve.

May's case illustrates the need for this safety valve. Deterrence, rehabilitation, and retribution are reasons for keeping people in jail, but, even assuming that May was guilty, those goals have been achieved in his case. I am convinced that 10 years in jail have taught May not to touch the clothing of children in the

vicinity of their genitals. I am also convinced that the prospect of ten years would convince any sane person of the same as well keeping sexual perverts out of society for those years.

Deterrence has been served. So has rehabilitation. When May came out of prison, he immediately trained himself to work as a paralegal rather than as a caretaker for children. Retribution may raise more serious issues. I assume, however, that retribution should not exceed the biblical principle of an eye for an eye and a tooth for a tooth. Under that principle, lengthy sentences are appropriate for crimes such as murder; where the victim has been deprived of life, so too the murderer should be deprived of the benefits of life for his entire life. But I doubt that the children touched by May received lifetime injuries; some of them may not even have known at the time that they were being injured. And I wonder whether the children who are now adults are sufficiently certain today of what May did to them to testify against him now. Or are they feeling guilty, as I would feel, for sending him to prison for life?

Thus, even assuming May's guilt, I believe that whatever legitimate purposes may have been served by putting him in jail, his ten years in jail have served those purposes. Three problems remain. One, May might, as he claims, be innocent and should be free to pursue his life. Two, as Block has argued, imprisoning May costs the taxpayers money, perhaps over \$1 million, if May lives to age 80. Three, May is suffering daily trauma, and we should care

that a fellow American is being traumatized by deprivation of his right to liberty and the pursuit of happiness.

Once time served in prison has achieved whatever it is capable of achieving in the way of deterrence and rehabilitation, little reason remains for keeping a convict in jail. The convict benefits and taxpayers benefit through the compassion and mercy of early release. As long as a prison sentence has been sufficiently long to provide victims of crime of retribution by the biblical principle of an eye for an eye and a tooth for a tooth, the only losers from early release are victims of crime who are seeking retribution beyond the biblical measure. So viewed the mercy and compassion of early release is well justified.

Indeed, shorter criminal sentences are justified. The difficulty here is the frequent impossibility at the time of initial sentencing of determining how long a prison term needs to be to accomplish legitimate goals of deterrence, rehabilitation, and retribution. For this reason legislatures have enacted and judges at times have imposed lengthy and sometimes mandatory minimum sentences. When the passage of time makes the determination of necessary time easier, mercy, compassion, and early release are justified.

Thousands of convicts like May, many of them innocent, are languishing needlessly in prison. When May's case is multiplied by thousands, the scope and importance of the problem of excessive sentences becomes obvious. Something new needs to be done; the old, common-law practice of royal and later presidential and gubernatorial pardons has become so politicized

that it can no longer provide an adequate safety valve. Here Judge Block comes to the rescue with his proposal that every state adopt legislation similar to Congress' First Step Act and also establish impartial, apolitical bodies to pass upon petitions for early relief. Block's proposal would preserve long sentences where needed but also provide early release for innocent or otherwise worthy prisoners.

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