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Introduction

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SYMPOSIUM ON SENTENCING, PART I

INTRODUCTION

*Edward M. Kennedy**

Sentencing in America today is a national scandal. Every day our system of sentencing breeds massive injustice. Judges are free to roam at will, dispensing ad hoc justice in ways that defy both reason and fairness. Different judges mete out widely differing sentences to similar offenders convicted of similar crimes.¹ There are no guidelines to aid them in the exercise of their discretion, nor is there any mechanism for appellate review of sentences.

The current Federal Criminal Code² contains no list of criteria to be considered by the sentencing judge in deciding whether to impose a term of imprisonment. The result has been chaotic—one judge may sentence to rehabilitate, another to deter the offender or potential offenders from future crime, a third to incapacitate, and a fourth simply to “punish.” One judge may place a convicted defendant on probation, arguing that rehabilitation should never be a justification for imprisonment; another judge may justify a sentence of probation on the ground that “deterrence doesn’t work.” The absence in the Federal Criminal Code of articulated purposes or goals of sentencing has led to sentences based on the particular sentencing attitudes and beliefs of individual judges and, inevitably, to wide sentencing disparity.

The judges are not to blame. The great majority of our federal judges try to perform their sentencing duties in a responsible, diligent manner. But they must act without the assistance of any standards or review procedures. In fact, the law invites injustice by

* United States Senator from Massachusetts. Senator Kennedy is cosponsor of S. 1437, 95th Cong., 2d Sess. (1978).

1. Dershowitz, *Background Paper*, in TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 67, 103 (1976).

2. 18 U.S.C. (1976).

conferring unlimited discretion on judges to impose sentences within vast statutory limits. For example, a convicted bank robber can be sentenced anywhere from a term of probation to twenty-five years in prison,³ a rapist anywhere from probation to life imprisonment.⁴

INDETERMINATE SENTENCING— REHABILITATION AND JUDICIAL DISCRETION

Historically, the judiciary has been provided broad sentencing discretion in the name of benevolence. The basic argument in support of indeterminate sentencing is that the convicted offender should be "rehabilitated" before being allowed to reenter society. Since the pace of rehabilitation varies among individuals, the argument continues, the sentencing judge is not equipped to fix a definite prison term before the offender starts his treatment. Traditional correctional philosophy says that a rehabilitative "cure" can best be promoted by tailoring the sentence to fit the personal needs and characteristics of the offender.

But this approach—noble in purpose and based on the best of intentions—has backfired dramatically. In the last few years study after study has documented the nature and scope of sentencing disparity.⁵ The present process results in particularly disparate treatment of the young and the poor⁶ and nurtures a growing public cynicism about our institutions. The youth who goes for a joyride or commits a petty larceny is sentenced to a year in jail. On the other hand, the tax evader, the price fixer, the polluter, or the corrupt public official often receives a suspended sentence on the irrational ground that the stigma of conviction is punishment enough.

3. *Id.* § 2113.

4. *Id.* § 2031.

5. *E.g.*, Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y. ST. B.J. 163 (1973); A. Partridge & W. Eldridge, *Second Circuit Sentencing Study, A Report to the Judges of the Second Circuit, reprinted in Reform of the Federal Criminal Laws: Hearings on S. 1 and S. 1400 Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary, 94th Cong., 1st Sess.* 8101, 8104-14 (1974). *See also* M. FRANKEL, *CRIMINAL SENTENCES* (1973); N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); A. VON HIRSCH, *DOING JUSTICE* (1976).

6. *See* TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, *CONFRONTING YOUTH CRIME* 20 (1978); Harris & Dunbaugh, *Prelude for a Sensible Sentencing Debate: Giving Up Imprisonment*, 7 HOFSTRA L. REV. ____ (1979) (to be published in *Symposium on Sentencing, Part II*, 7 HOFSTRA L. REV. 243 (1979)); Skrivseth, *Abolishing Parole: Assuring Fairness and Certainty in Sentencing*, 7 HOFSTRA L. REV. ____ (1979) (to be published in *Symposium on Sentencing, Part II*, 7 HOFSTRA L. REV. 243 (1979)).

The system which produces this disparity appears arbitrary to society as well as to prisoners. How does one explain that a defendant who is sentenced by a judge to twelve years in prison is paroled after actually serving just four? How does one justify excessive jail terms for some offenders, while others, who commit the same crime and have a similar background and record, escape jail altogether. Certainty of punishment, the cornerstone of an effective law enforcement policy, does not exist. To all who come in contact with it, the "system" is seen for what it is: a game of chance in which offenders play the odds and gamble on avoiding punishment.

When judges do impose identical terms of imprisonment, offenders often are released from confinement arbitrarily, after serving different proportions of their imposed terms. This is because one offender, having completed all the proper prison education and counseling programs, is found to be "rehabilitated" by the parole board while another prisoner, who refuses to take such courses, is deemed a "poor risk." Correctional experts agree, however, that how a prisoner responds to such prison rehabilitation programs is not an accurate predictor of how he or she will behave in society once paroled.⁷

Thus parole acts arbitrarily to keep one prisoner jailed while releasing another. This should not be surprising. Coercive rehabilitation programs too often force the prisoner to make a Hobson's choice: Reject the programs offered, in which case this apparent lack of cooperation with the prison authorities assures the prisoner a longer indeterminate sentence, less likelihood of parole, and less opportunity for participating in early release or other diversionary programs; or "go along with the game plan" and pretend to respond to compulsory prison training programs. In the latter case, "rehabilitation" is little more than a sham to ingratiate the prisoner with the parole board.

Abolition of prison rehabilitation programs is not the answer. Indeed, such programs should be expanded, especially in the areas of vocational and educational training.⁸ What is needed is the

7. See, e.g., N. MORRIS, *supra* note 5, at 34-36.

8. Even Robert Martinson, who long held the view that rehabilitative programs have no appreciable effect on recidivism, see, e.g., Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INTEREST, Spring 1974, at 22, now asserts that this conclusion is incorrect and that some programs are, indeed, beneficial. See Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. ____ (1979) (to be published in *Symposium on Sentencing, Part II*, 7 HOFSTRA L. REV. 243 (1979)).

abolition of compulsory rehabilitation, particularly as a justification for imprisonment. Forced rehabilitation does not work and can be manipulated by the parole board as a justification for retaining custody of a prisoner until it determines that he or she is sufficiently rehabilitated to become a peaceful member of society.

The underlying reason for the lack of success in our correctional system is the absence of rational, fair sentencing practices. The issue is not whether more offenders should be sentenced to prison (they should not); nor is it whether prisons should be abolished and replaced with a wide variety of diversionary programs (we will always need prisons for certain offenders). Certainly, widespread criticism of our correctional system is justified: Our prisons are overcrowded and understaffed, and few correctional programs seem to "cure" criminals of crime.⁹ Yet, such criticism is misdirected. The real issue is determining, with some degree of fairness and uniformity, which offenders belong in prison and which do not; for those who do, we must assure similar sentences for similar offenders who commit similar crimes. We must direct our immediate attention away from the ideological argument of incarceration versus diversion and instead debate the need for improving our sentencing practices.

FEDERAL LEGISLATION: S. 1437

The critical problem of sentencing disparity is met head on for the first time in the proposed Federal Criminal Code Reform Act,¹⁰ the most important effort yet undertaken to deal with the problem of criminal sentencing. The Act is thus the focus of much of the debate contained in this Symposium.

The Act would restructure and modernize the entire Federal Criminal Code. Its most important provisions are designed to curb judicial sentencing discretion, eliminate indeterminate sentences,

9. See Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INTEREST, Spring 1974, at 22.

10. S. 1437, 95th Cong., 2d Sess. (1978). This Introduction deals with §§ 101 and 124 of the bill. *Id.* §§ 101, 124. Section 101 of the bill, if enacted, will amend Title 18 of the United States Code regarding, *inter alia*, sentencing guidelines. All subsequent textual and footnote references to § 101 of the bill are to the proposed section numbers in Title 18 of the United States Code, and are hereinafter cited as Proposed 18 U.S.C. Section 124 of the bill, if enacted, will amend Title 28 of the United States Code to establish a Sentencing Commission. All subsequent textual and footnote references to § 124 of the bill are to the proposed section numbers in Title 28 of the United States Code, and are hereinafter cited as Proposed 28 U.S.C.

phase out parole release, and make criminal sentencing fairer and more certain.¹¹ In the great majority of cases the indeterminate sentence would be replaced by a requirement that the judge sentence a convicted offender to a fixed period of imprisonment.¹² The sentencing judge, not the parole board, would determine the precise sentence that an offender should serve; however, the judge would sentence within a narrow range of sentencing guidelines,¹³ fashioned by a permanent Sentencing Commission.¹⁴

This guidelines approach is designed to reduce the problem of sentencing disparity by narrowing the range of permissible judicial discretion. In determining sentencing guidelines, the Commission would consider: The general criteria spelled out in the statute;¹⁵ available sentencing statistics;¹⁶ and, especially, the various aggravating and mitigating circumstances which affect culpability.¹⁷ These might include leadership in the criminal enterprise, particularly cruel treatment of the victim, previous record of the offender, and the degree of coercion imposed on the offender.¹⁸

If the judge, in a rare case, decides to impose a sentence outside of the guidelines, the reasons for doing so must be explained on the record, and appellate review to a higher court would follow.¹⁹ This practice is now followed in only a few states.²⁰

Given such a system of judicially-fixed sentences, parole release would be gradually abolished, since whether or not prisoners had been rehabilitated or had completed certain prison courses would have no bearing on their prison release date. Subject to slight variations based on prison behavior,²¹ offenders would know *at the time of initial sentencing by the court* what their prison release date would be.

11. See Proposed 18 U.S.C., *supra* note 10, §§ 2001-2306; Proposed 28 U.S.C., *supra* note 10, §§ 991-998; text accompanying notes 12-21 *infra*.

12. Proposed 18 U.S.C., *supra* note 10, § 2301(a)-(b).

13. *Id.* § 2003(a)(2).

14. Proposed 28 U.S.C., *supra* note 10, § 994.

15. *Id.* § 994(b)-(d), (f)-(m).

16. *Id.* § 994(l).

17. *Id.* § 994(c)-(d).

18. See *id.*

19. Proposed 18 U.S.C., *supra* note 10, § 3725.

20. See, e.g., N.Y. CRIM. PROC. LAW §§ 450.30, 470.13 (McKinney 1971). For a list of states in which appellate review of sentences is permitted, see Labbe, *Appellate Review of Sentences: Penology on the Judicial Doorstep*, J. CRIM. L. & CRIMINOLOGY 122, 124-25 (1977).

21. Proposed 18 U.S.C., *supra* note 10, § 3824(b).

THE SYMPOSIUM—DISTILLATION OF THE DEBATE

Sentencing reform—whether it takes the form advocated in the federal legislation or in some other proposal—will have a pronounced and lasting impact on our criminal justice system. It is, therefore, important to debate and discuss the benefits and costs of such reform. Yet sentencing reform is an extraordinarily complex subject; here lies the importance of these issues of the *Hofstra Law Review*. This Symposium is a gathering of the leading authorities on sentencing, an invaluable resource tool which affords experts and lay people alike the opportunity to become acquainted with all aspects of the sentencing controversy.

This is not to say that all participants in the Symposium agree with each other. Judge Richey, for example, calls for appellate review of sentences, but only on appeal by the defendant.²² While unlimited prosecutorial appeal may have serious implications,²³ limited government appeal serves an important function. A chief cause of sentencing disparity can be traced to the unreasonably low sentences often imposed on white-collar offenders. For example, in its recent report on white-collar crime, the Subcommittee on Crime of the House Judiciary Committee points to a 1971 bank failure, involving sixty million dollars, for which the official directly responsible received a sentence of three years probation and a five thousand dollar fine.²⁴ Moreover, such lenity is not confined to white-collar crime, but is found equally in the sentences imposed on those convicted of government misconduct: Recently in *United States v. Denson*,²⁵ three Texas policemen, who conspired in and were held responsible for a man's death, were sentenced to one year imprisonment and five years probation. The federal legislation defends

22. Richey, *Appellate Review of Sentences: Recommendation for a Hybrid Approach*, 7 HOFSTRA L. REV. 71 (1978).

23. For discussion of constitutional issues implicated by prosecutorial appeal, see Richey, *supra* note 22, at 78-80, 86.

24. SUBCOMM. ON CRIME OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE 47 (Comm. Print 1978).

25. No. 77-107 (S.D. Tex., Mar. 28, 1977), *appeal dismissed, writ of mandamus denied*, 588 F.2d 1112 (5th Cir. 1979). Defendants were convicted pursuant to 18 U.S.C. §§ 241-242 (1976). The maximum term provided by each of these provisions is life imprisonment. Upon the district court's resolution of the case, the Government petitioned the Fifth Circuit on two bases: (1) It appealed the sentence of probation, challenging its legality; and (2) it sought a writ of mandamus ordering the trial judge to correct the allegedly illegal sentence. *United States v. Denson*, 588 F.2d 1112, 1114 (5th Cir. 1979). Although finding the sentence of probation illegal, the court maintained that Government has no right to direct appeal of sentence. *Id.* at 1126-27. The writ of mandamus was also rejected. *Id.* at 1133.

against such results by providing for government appeal, but only of sentences imposed below the Commission guidelines.²⁶

Professor Tonry examines the composition of a Federal Sentencing Commission and its role in creating sentencing guidelines.²⁷ Arguably, the legislature rather than a commission could set presumptive sentence ranges. In fact, a number of states have adopted this approach.²⁸ However, as Professor Tonry ably demonstrates, this task is best performed by an independent body of professionals rather than a politically responsive legislature.²⁹

Professor Orland criticizes the determinate sentencing movement.³⁰ He perceptively explores the major weaknesses in several state sentencing reform packages and notes that S. 1437 avoids most of these problems. For example, he observes that the goal of S. 1437 is to prevent incarceration of an offender for the sole purpose of rehabilitation.³¹ However, it is important to note that the bill does not eliminate rehabilitation as a consideration in sentencing.³² This is a significant and often overlooked distinction which Judges Lasker³³ and Tyler³⁴ also recognize in their cogent and important articles. Moreover, Professor Orland recognizes that S. 1437 contains a statutory requirement that good time must "vest,"³⁵ thus alleviating much of the arbitrariness which he finds present in a number of new state sentencing codes.³⁶

Professor Orland does argue that the maximum terms of imprisonment under S. 1437³⁷ are excessive.³⁸ However, the proposed federal code mandates that the Sentencing Commission develop guidelines based on the average sentences currently imposed and

26. Proposed 18 U.S.C., *supra* note 10, § 3725(b).

27. Tonry, *The Sentencing Commission in Sentencing Reform*, 7 HOFSTRA L. REV. ____ (1979) (to be published in *Symposium on Sentencing, Part II*, 7 HOFSTRA L. REV. 243 (1979)).

28. See, e.g., CAL. PENAL CODE §§ 1170-6 (West Cum. Supp. 1978).

29. See Tonry, *supra* note 27.

30. See Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29 (1978).

31. *Id.* at 47. See Proposed 28 U.S.C., *supra* note 10, § 994(j).

32. Proposed 18 U.S.C., *supra* note 10, § 101(b)(4).

33. Lasker, *Presumption Against Incarceration*, 7 HOFSTRA L. REV. ____ (1979) (to be published in *Symposium on Sentencing, Part II*, 7 HOFSTRA L. REV. 243 (1979)).

34. Tyler, *Sentencing Guidelines: Control of Discretion in Federal Sentencing*, 7 HOFSTRA L. REV. 11, 18 (1978).

35. Orland, *supra* note 30, at 45. See Proposed 18 U.S.C., *supra* note 10, § 3824(b).

36. Orland, *supra* note 30, at 44-46.

37. Proposed 18 U.S.C., *supra* note 10, § 2301(b)(1)-(4).

38. Orland, *supra* note 30, at 40.

by the length of prison terms *actually* being served.³⁹ Sentences under the Commission's guidelines thus should be substantially less than the maxima set by the bill. In addition, it is significant that S. 1437 contains a statutory presumption against incarceration for certain offenders.⁴⁰

Both Judge Bazelon and Professor Orland express concern that the proposed legislation shifts discretion from the court to the prosecutor.⁴¹ In response, I can only second a point made by Judge Tyler, former federal judge and Deputy Attorney General of the United States, who understands the political realities attending the drafting of a new Federal Criminal Code: "[W]e must start somewhere to shape discretion in the criminal justice system—and the most accessible, effective, and significant place to begin is with the sentencing function of the courts."⁴²

It is hard to disagree with many of the conclusions reached in the articles by coauthors Kay Harris and Frank Dunbaugh⁴³ and by Judge Bazelon.⁴⁴ Certainly, long range steps must be taken to eliminate crime from our society; and our prison system is a disaster. But to argue "no sentencing reform until society is reformed" is to direct attention away from the significant steps government can take *now* to make the criminal justice system fairer and more equitable.

Much of what is said by Andrew von Hirsch⁴⁵ and by coauthors Peter Hoffman and Michael Stover,⁴⁶ concerning the need for sentencing reform to reduce disparity, must be seconded by all. However, I disagree with Hoffman and Stover in one important respect: the future of the parole release function. The limitations inherent in any attempt to reduce disparity through the vehi-

39. Proposed 28 U.S.C., *supra* note 10, § 994(l). However, the Commission need not follow this procedure if it "determines that such a length of term of imprisonment does not adequately reflect a basis for a sentencing range that is consistent with the purposes of sentencing described [elsewhere in S. 1437]." *Id.*

40. Proposed 18 U.S.C., *supra* note 10, § 994(i).

41. Bazelon, *Missed Opportunities in Sentencing Reform*, 7 HOFSTRA L. REV. 57, 68 (1978); Orland, *supra* note 30, at 43-44.

42. Tyler, *supra* note 34, at 20 n.45.

43. See Harris & Dunbaugh, *Premise for a Sensible Sentencing Debate: Giving Up Imprisonment*, 7 HOFSTRA L. REV. ____ (1979) (to be published in *Symposium on Sentencing, Part II*, 7 HOFSTRA L. REV. 243 (1979)).

44. See Bazelon, *supra* note 41, at 58-59.

45. See Von Hirsch, *Book Review*, 7 HOFSTRA L. REV. ____ (1979) (to be published in *Symposium on Sentencing, Part II*, 7 HOFSTRA L. REV. 243 (1979)).

46. See Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 HOFSTRA L. REV. 89 (1978).

cle of the parole board are well pointed out by Karen Skrivseth.⁴⁷ Sentencing reform, at least of the type envisaged in the federal legislation, simply cannot succeed if the parole release function is retained. Whatever the limited benefits in allowing a parole board the power to release offenders, disparity is promoted by the likelihood of judges ignoring sentencing guidelines in an effort to second-guess the parole board's release date determination. The result is likely to be the opposite of that intended by those who advocate retention of parole release—an actual *increase* in sentence length. Furthermore, I have already questioned whether a parole board's function should include authority to alter sentences based on a finding of rehabilitation. Certainly, power to release some prisoners due to factors such as prison overcrowding creates even more egregious problems of disparity.

But the goal of this Symposium is not to secure agreement; rather it is to enlighten the current national debate and to set forth various proposed reforms. These articles—and the others by Kenneth Flaxman;⁴⁸ coauthors Brian Forst, William Rhodes, and Charles Wellford;⁴⁹ Robert Martinson;⁵⁰ Robert Pugsley,⁵¹ and Ernest van den Haag⁵²—impressively meet this challenge. There is, moreover, one point on which all contributors agree: Certain steps toward concrete sentencing reform must be taken now; too long have we lived with the system as it stands.

47. Skrivseth, *Abolishing Parole: Assuring Fairness and Certainty in Sentencing*, 7 HOFSTRA L. REV. ____ (1979) (to be published in *Symposium on Sentencing, Part II*, 7 HOFSTRA L. REV. 243 (1979)).

48. Flaxman, *The Hidden Dangers of Sentencing Guidelines*, 7 HOFSTRA L. REV. ____ (1979) (to be published in *Symposium on Sentencing, Part II*, 7 HOFSTRA L. REV. 243 (1979)).

49. Forst, Rhodes & Wellford, *Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines*, 7 HOFSTRA L. REV. ____ (1979) (to be published in *Symposium on Sentencing, Part II*, 7 HOFSTRA L. REV. 243 (1979)).

50. Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. ____ (1979) (to be published in *Symposium on Sentencing, Part II*, 7 HOFSTRA L. REV. 243 (1979)). See note 8 *supra*.

51. Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. ____ (1979) (to be published in *Symposium on Sentencing, Part II*, 7 HOFSTRA L. REV. 243 (1979)).

52. Van den Haag, *Punitive Sentences*, 7 HOFSTRA L. REV. 123 (1978).

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