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Symposium: Equality Versus Discretion in Sentencing

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PANEL V

EQUALITY VERSUS DISCRETION IN SENTENCING

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INTRODUCTION BY THE HONORABLE FRANK H. EASTERBROOK*

Ever since the beginning of the republic, both state and federal judges have had wide discretion in imposing sentences. They have had discretion in the sources of information they used in imposing sentences within a range, based on their own mix of considerations of desert, deterrence, rehabilitation, and incapacitation, and in deciding how to weigh each of these factors. For example, some judges believe that violent offenses are more serious than property offenses, and others hate stealth offenses more than violent offenses. In addition to the discretion implicit in the range for each statute, judges have had the discretion to choose between consecutive and concurrent sentences.

The result is a great deal of variation: judge-to-judge, urban versus rural, and region-to-region. In a northern city such as Chicago, a crime involving a small transaction of drugs might lead to an award of probation. In a rural southern city, on the other hand, the identical crime might lead to a twenty-year sentence. A national consensus developed that this variation is inappropriate.

In 1984, without opposition, Congress passed a determinate sentencing law. Several states have passed parallel laws. The Sentencing Guidelines became effective for crimes committed after November 1, 1987. The package has several components: more elaborate fact-finding; statements of reasons; appellate review; and ranges based on the seriousness of the main offense with aggravating and mitigating circumstances. Proponents of this package hoped that it would end judge-to-judge and region-to-region disparities, promote candor in sentencing, and provide judges with relative values in sentences.

It is appropriate to ask: What are the Sentencing Guidelines and will they work? The panel today will address these questions. Some people believe that even though the system is designed to reduce discretion, it is very difficult to implement in practice. Although there was a national consensus in 1984 that reducing discretion is a great idea, this consensus has evaporated.

This evaporation reflects a traditional pattern in the regulation of conduct by the government that has carried over to the regulation of sentences. Some

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people would treat determinate sentencing as no different in principle from price control—it imposes a single price for a single activity. These people would predict the development of the standard responses to price control: black markets and queues.

The Guidelines' parallel to the black market is charging discretion. The prosecutor and the defendant may take the crime off the books by not charging the real offense, by charging some subset of the offense, or by withholding from the judge the information necessary to impose the sentence. Forms of misbehavior also exist. For example, if the Guidelines require a sentence that is too high for the judge's druthers, a much higher rate of acquittal or conviction on lesser included offenses or, to put it mildly, winking at the facts when the time comes to make the decision might occur.

The authors of the Guidelines need to control these responses to the Guidelines. The possibility of the creation of a substantial fact-finding apparatus, and, because of the various forms of evasion, no greater uniformity in real sentences, cause concern. The program for this afternoon's panel is a description of what it is that is being done and some questions about whether it will work in practice.

Here to discuss these questions are two members of the Sentencing Commission and one member of the criminal bar: Ilene Nagel, Stephen Breyer and Terence MacCarthy.

PRESENTATION BY COMMISSIONER ILENE H. NAGEL*

For ten years, the United States Congress wrestled with the tripartite problems of federal sentencing: unwarranted disparity and its sometime corollary discrimination, dishonesty, and excessive leniency.[1]

Disparity left us with cohorts of defenders who, despite conviction for the same offense and similar criminal histories, served, for example, a range of time in prison spread across fifteen years for bank robbery, or nineteen years for heroin distribution, with some serving no time at all.[2] Moreover, unfettered judicial discretion provided a shield for discrimination: some district court judges systematically treated blacks and hispanics more harshly, while others used the court to promote a system of alleged justice, where minorities were given light sentences as an accommodation to past societal wrongs, the latter pattern without regard for the dire consequences this practice holds for minority and other victims.[3]

Female codefendants routinely received lesser sanctions in accordance with paternalistic assumptions;[4] this, in spite of the increase in the absolute number of crimes committed by women, and with almost total disregard for the inequities caused by such a practice.

While many judges gave excessively light sentences for economic crimes, thereby compromising deterrence, and precluding the potential for sentences to promote crime control, others treated white collar offenders as deserving of extremely harsh sentences, not only for the crimes they had committed, but for the alleged sin of having led or been born to a more privileged life. Race, sex, and social class of the offender,[5] rather than being neutral and irrelevant

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* United States Sentencing Commission. The following remarks were prepared by the author.

1. The National Commission on Reform of Federal Criminal Laws (Brown Commission) was created in 1966 upon the recommendation of President Johnson. The twelve member commission published its Final Report in 1971. Hearings on this Final Report began during the 92nd Congress. The first specific legislative proposals on federal sentencing were introduced in 1973. In 1976 during the 94th Congress, Senator Kennedy introduced the first bill calling for sentencing guidelines. Similar bills were introduced and debated during the 95th, 96th and 97th Congresses. During the 98th Congress as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, the Sentencing Reform Act was passed. Sentencing Reform Act, Pub. L. No. 98-473, tit. II, ch. II, secs. 211-239, 98 Stat. 1837, 1987-2040 (1984) (codified as amended at 18 U.S.C. §§ 3551-3559, 3571-3574 (1982 & Supp. V 1987), and at 28 U.S.C. §§ 991-998 (Supp. V 1987). For the legislative history of the Sentencing Act, see 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3220.

2. *Sentencing Guidelines: Hearings on the Sentencing Reform Act of 1984 Before the Subcomm. of Criminal Justice of the House Judiciary Committee*, 100th Cong., 1st Sess. 661, 685 (1987) (statement of Ilene H. Nagel, Commissioner of United States Sentencing Commission).

3. *Id.*

4. I. NAGEL & J. HAGAN, GENDER AND CRIME: OFFENSE PATTERNS AND CRIMINAL COURT SANCTIONS IN CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 91-144 (Tonry & Morris, eds. 1983).

5. *See, e.g.*, Bullock, *Significance of the Racial Factor in the Length of Prison Sentences*, 52 J. CRIM. L. & CRIMINOLOGY 411 (1961); Parisi, *Are Females Treated Differently?*, in JUDGE, LAWYER, VICTIM, THIEF 205 (Rafter & Sanko, eds. 1982).

to sentence determinations, exacerbated or mitigated the levels of punishment, in no consistent way, and for no justifiable reasons.

In addition to unwarranted disparity, sentence pronouncements were misleading; a twelve year term of imprisonment meant four years in most instances, but only the victim, his family, and the public were duped. Because of this systemic sham, each player in the criminal justice system second-guessed the next, with no one recommending a sentence thought to be appropriate to the offense.[6]

Finally, despite conviction for serious felonies, under past federal sentencing practices, over 40 percent of the federal offender population was sentenced to serve zero time. For tax violations, where the government and the taxpaying public are the victims, fifty-seven percent of those convicted were sentenced to zero time, and for property offenses, the percentage reaches sixty percent.[7] Is it no wonder that the absolute rate of crimes committed continues to soar? Under past sentencing practice, for many offenses, there is little doubt that crime pays.

The question of equality versus discretion lies at the heart of each of these problems, and at the heart of the controversial proposed remedies.[8]

Disparity for persons convicted of like crimes with similar criminal histories can easily be remedied by prescribing the same sentence for each. Attempts to define what are like crimes and what are similar criminal histories, however, immediately reveals the hidden complexity of this seemingly simple solution.[9] According to whose values do we define "likeness of crime?" By what criteria does one equate a robbery with an embezzlement? What is the measure of "similar" criminal history? Are five arrests with one conviction similar to one conviction? Are three sentences of two years probation for past crimes similar to one sentence of two years imprisonment? Even assuming consensus could be reached as to what are like offenses, and what are similar criminal histories, is the same sentence for those similarly classified a step towards equality? Could not one argue, as is often heard in court, that conviction for some is tantamount to prison for others?

On the strength of these arguments and derivatives therefrom, many judges and most defense attorneys argue for individualized sentences with a maximum of judicial discretion.

The United States Congress, in crafting the enabling legislation for the United States Sentencing Commission, opted not to choose between: A) a sys-

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6. *See, e.g.*, Kennedy, *Criminal Sentencing: A Game of Chance*, 60 JUD. 208 (1976); S. REP. No. 225, 98th Cong., 1st Sess. at 46-49 (1983).

7. *See* United States Sentencing Commission, Research Data Compiled During Examination of over 10,000 Federal Sentences (unpublished) (available at United States Sentencing Commission) (discussing actual violations for tax violations).

8. *See* Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975 (1978) (discussing remedies).

9. *See* Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988); Nagel, *The Structure of Judicial Discretion Under the Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY ____ (1990).

tem calling for the continuation of unfettered discretion; and B) one with excessive rigidity, giving only the appearance of equality; but, rather, to compromise. The vehicle was to be mandatory sentencing guidelines, binding on the court, but from which the court could depart for unusual, atypical, extraordinary cases.[10]

In 1985, President Reagan appointed, with the advice and consent of the Senate, three federal judges, three former law professors, and one former prison warden to serve two, four, or six-year terms on a bipartisan, full-time commission, whose primary task it was to promulgate sentencing guidelines for all federal offenses.

The enabling legislation specified four purposes: just punishment for the offense; deterrence; incapacitation; and effective correctional treatment. All four statutory objectives were to be maximized by the Guidelines. No single purpose was to predominate.[11]

After a year's experimentation in drafting and testing of three different approaches to sentencing guidelines, each incorporating varying formats, structures, degrees of judicial discretion, principles, and theoretical bases, six Commissioners forged a coalition and agreed to the following principles of drafting.

First: Similar offense categories defined by varying statutes would be grouped together under a single generic heading. For example, all of the fraud statutes were grouped together under the generic heading of "fraud."[12]

Second: The base sentence for each offense category would be determined as a result of the Commission's discussion, a process that would be anchored, but not bound by, an examination of the average time served in past years for offenders convicted of that same offense and the percentage given a non-incarceration sentence.

Third: For articulated policy reasons, the Commission would adjust base sentences for some offense categories up or down, relative to past practice. For example, for the sake of deterrence, sentences for tax evasion might be raised. For the sake of public protection, sentences for violent offenders would be lengthened.

Fourth: Base sentences for each offense category would be modified by a set of what we called "specific offense characteristics." The standard for the Commission's decision for inclusion as a specific offense characteristic would be either: A) that empirical analyses of past sentencing practice showed that

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10. *See* S. REP. No. 225, 98th Cong., 1st Sess. at 50-60 (1983). "The sentencing guidelines system will not remove all the judges' sentencing discretion. Instead, it will guide the judge in making his decision . . . ." *Id.* at 51.

11. 18 U.S.C. § 3553(a)(2) (Supp. V 1987); S. REP. No. 225, 98th Cong., 1st Sess. at 76-79 (1983).

12. *See, e.g.*, United States Sentencing Commission Guidelines Manual 2.67. The heading "fraud" groups together the following crimes: 7 U.S.C. §§ 6, 6(b), 6(c), 6(h), 6(o), 13, 23 (1982 & Supp. V 1987); 15 U.S.C. §§ 50, 77(e), 77(q), 77(x), 78(d), 78(j), 78(ff), 80(b)(6), 1644; 18 U.S.C. §§ 285-91, 65(g), 1001-08, 1010-14, 1016-22, 1025-26, 1028-29, 1341-44 (1982 & Supp. V 1987).

judges routinely distinguished one offender convicted of the base offense from another, on the basis of such a characteristic; for example, the amount of or type of drugs in drug offenses, the amount of monetary loss, or degree of planning in a fraud, the degree of physical injury in a robbery, the possession of a firearm in a burglary; or B) the relevant statute makes such a distinction, such as the use of a weapon in a bank robbery, trafficking in controlled substances involving an individual fourteen years of age or less, or distributing specific controlled substances within one thousand feet of a schoolyard; or C) some special compelling reason was articulated to justify including the specific offense characteristic, for example, the degree of planning had been included for fraud; thus, it was included for theft, since frauds and thefts involve similar conduct.

Fifth: Convictions for conspiracies and attempts would generally be treated the same as the object offense, with only a modest downward adjustment.

Sixth: All base offense sentences would be subject to enhancement by the court, if the offense involved a vulnerable victim, an official victim, or restraint of a victim.

Seventh: All base offense sentences would be subject to an upward or downward adjustment by the court, depending upon the offender's role in the offense.

Eighth: The total offense sentence level would be eligible for a downward adjustment, if the court deemed the offender to have demonstrated acceptance of responsibility for the offense. Defendants who plead guilty would not, per se, be entitled to this adjustment, nor would defendants adjudicated by trial be precluded from receiving it. The adjustment would rest solely within the court's discretion.

Ninth: An offender's criminal history score would dramatically affect an offender's ultimate sentence. The more severe the past sentencing record, the more the past criminal record would exacerbate the sentence for the instant offense.

Tenth: For nonviolent or otherwise non-serious offenses, the court would have the discretion to opt for a non-incarceration sentence, or, in the more serious of these cases, for a sentence that substitutes community or intermittent confinement for some or all of the prescribed incarceration time.

Agreement to these ten premises, coupled with a commitment to write guidelines in an iterative process over a period of years, aimed at reducing disparity, increasing certainty, honesty and uniformity, and extending the use of short shock incarceration for economic and other crimes, formed the core of the rationale that governed the United States Sentencing Commission's drafting policy.

It was further agreed that, consistent with the legislative history of patently rejecting amendments proposed to format sentencing guidelines as a tool to manage prison capacity, the Commission would consider the impact of its guidelines on prison capacity, but it would not determine what would be an

appropriate sentence on this basis.[13] Moreover, it would neither subscribe nor agree to an *a priori* assumption, as advocated by many just deserts proponents, that less, rather than more, punishment is appropriate.[14] Finally, it was agreed that the overriding goal would be to issue sentencing guidelines that would provide justice for the victim, for society, and for the defendant, guidelines which, hopefully, would contribute to a more effective and fair system of criminal justice for all.

Contrary to the characterization by some, often repeated in the press, that the new federal Sentencing Guidelines eliminate judicial discretion, substituting in its place a mechanistic computer program where judges have no role, the Guidelines, in fact, strike a balance between the prior system of unfettered discretion, on the one hand, and rigid presumptive sentences tied to the offense of conviction without regard to variation in the offense or the offender's criminal history, on the other. To be sure, judicial discretion in federal sentencing has been curtailed greatly, but we believe that it has been done so on the basis of logic and rationality, pursuant to the statutory purposes as specified, clearly by Congress.

Unbounded judicial discretion, however theoretically laudable a goal, however great its potential for justice, did not, in fact, produce a system of sentences of which this nation could be proud, in which our citizenry could take comfort, or to which our public could look for protection from criminal predation. It was not only equality among and between defendants that Congress was seeking, but equity within the society. The former focusing on the rights of defendants, the latter on the rights of victims, society, and defendants taken together.

Thank you very much.

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13. In its discussion of the provisions that would be codified at 28 U.S.C § 994(a), the Senate Report states that "[t]he purpose of [requiring the Commission to take into account the nature and capacity of the penal, correctional, and other facilities and services available] is to assure the most appropriate use of the facilities and services to carry out the purposes of sentencing, and to assure that the available capacity of the facilities and services is kept in mind when the guidelines are promulgated. *It is not intended, however, to limit the Sentencing Commission in recommending guidelines that it believes will best serve the purposes of sentencing.*" S. REP. No. 225, 98th Cong., 1st Sess. at 175 (1983) (emphasis added). *See also id.* at 424 (discussing consideration and rejection, by vote of 15-1, of Mathias amendment to direct the Commission to insure that the guidelines would not be likely to result in an increase in aggregate terms of imprisonment, or in the federal prison population).

14. *See, e.g.*, VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS: REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION 136 (1976).