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## Future Trends in the United States Federal Sentencing Scheme

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# FUTURE TRENDS IN THE UNITED STATES FEDERAL SENTENCING SCHEME

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HON. GERALD BARD TJOFLAT  
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MODERATOR—CHARLES NIHAN

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## PANEL INTRODUCTION

MODERATOR, CHARLES NIHAN  
PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW

We have with us today three people who know more about sentencing guidelines and sentencing generally than anyone else in the United States. Jonathan Wroblewski currently serves both as Director of Legislative Affairs and as Deputy General Counsel to the United States Sentencing Commission. In these capacities, he serves as the Commission's chief spokesperson to the Congress of the United States and advises the Congress on crime and sentencing policies. Jonathan Wroblewski is also responsible for drafting amicus briefs in federal cases in which the constitutionality of the Sentencing Commission is called into question. Prior to joining the Commission's

staff, Jonathan Wroblewski worked as a public defender in Oakland and then went on to become a trial attorney in the Civil Rights Division of the Department of Justice. He graduated with honors from Stanford Law School and received his undergraduate education at Duke University. Jonathan Wroblewski has taught at The George Washington University National Law Center and currently teaches at the George Mason University School of Law. His most recent publication was an article concerning the Immigration Reform Act of 1996.

Our second presenter is the Honorable Gerald Bard Tjoflat. We are honored to have Judge Tjoflat with us today. He now serves on the United States Court of Appeals for the Eleventh Circuit and, until recently, served as Chief Judge of that court. Prior to his appointment to the United States Court of Appeals, Judge Tjoflat served as a Florida trial judge and then as a United States district court judge. Judge Tjoflat's accomplishments are far too numerous to describe, but I want to touch on a couple of highlights to illustrate the breadth of this man. He was a Member of the Advisory Corrections Counsel of the United States and a United States Delegate to the Sixth and Seventh United Nations Congresses for the Prevention of Crime and the Treatment of Offenders. Of direct relevance to today's panel, Judge Tjoflat served as Chairman of the Committee on the Administration of the Probation System for the Judicial Conference of the United States. He also served as Chairman of the Conference's Special Committee on Sentencing Guidelines and as a member of the Federal Judicial Center Committee on Sentencing Guidelines Education. In addition to authoring hundreds of legal opinions, Judge Tjoflat has been widely published in professional journals and reviews. In the 1997 Almanac of the Federal Judiciary, lawyers who have appeared before Judge Tjoflat had this to say about him: "He's brilliant. He is the smartest judge I have ever seen." "His knowledge of how to move matters through the system is excellent." "He is an outstanding writer. His opinions are well-written and incisive." I have known Judge Tjoflat for a little over two decades, and I must say that these lawyers have understated the case.

Our third presenter is Herb Hoelter. He is Co-founder and Director of the National Center on Institutions and Alternatives, one of the most progressive and effective criminal justice organizations in the United States. As is the case with our other two panelists, Herb

Hoelter's accomplishments are far too numerous to detail. He is an author, educator, manager, and a participant in the media. He has written or edited an incredible number of books and articles. One of his books, *The Real War on Crime*, was published in 1996. His articles and editorials have appeared in, among others, the *Baltimore Sun*, the *Federal Sentencing Reporter*, the *Judge's Journal*, the *Journal of the American Bar Association*, and the *Prison Journal*. Herb Hoelter has made presentations to the United States House of Representatives, the House of Commons in Canada, the National Judicial College, and numerous state bar associations. He has conducted training sessions for federal defenders, public defender associations, the Armed Forces Criminal Defense, and the list continues. Herb Hoelter has also been interviewed concerning criminal justice issues on the *Phil Donahue Show*, *CNN*, *Nightline*, the *Geraldo Rivera Show*, several *C-SPAN* programs, *CBS News* with Dan Rather, *20/20*, *Larry King Live*, and *Crossfire* several times. On *Crossfire* he once debated Judge William Wilkens, the then chairman of the U.S. Sentencing Commission. Herb Hoelter recently founded the Coalition for Sentencing Reform.

## HISTORY AND FUTURE OF THE SENTENCING COMMISSION

PRESENTATION BY JONATHAN J. WROBLEWSKI  
DIRECTOR, LEGISLATIVE & PUBLIC AFFAIRS, UNITED STATES  
SENTENCING COMMISSION

### I. INTRODUCTION

Thank you very much Professor Nihan. It is a great pleasure to be here, and it is an honor to be on the panel with Judge Tjoflat and Herb Hoelter. When Professor Nihan first asked me to come down to Miami for this conference, he suggested that I talk about where I see the Sentencing Commission going over the next three to five years. Frankly, I am not sure I am going to be able to do that.

The reason I cannot do that is because our Commission is presently in a state of flux. For those of you who are not aware, the United States Sentencing Commission, by statute, should have seven

voting members. At this time, three of the seats on the Commission are vacant. In about five weeks, the terms of three additional members will expire. Therefore, it is very likely that over the course of the next six months to a year, there will be a vastly different Sentencing Commission than the one in place now. I really cannot speculate on the nominations of the President or the deliberations of the Senate Judiciary Committee or what the policies of the new Commission will be, but at the same time I do not think that means we cannot talk about the future of crime and sentencing policy in the federal courts.

## II. POLITICS OF CRIME AND SENTENCING POLICY

I would like to begin by discussing the politics of crime and sentencing policy. This will not only provide context and insight into how the system has developed, but it will also provide a perspective and some hints on the future of crime and sentencing policy.

I want you first to imagine being a campaign aide to Ronald Reagan in 1980, or part of domestic policy counsel in the White House in 1982, or working for the Senate Judiciary Committee under Chairman Strom Thurman in 1982 and 1983. Imagine that you were given the issue of crime and sentencing policy as part of your portfolio and were responsible for developing a strategy for addressing these issues. To do this, you would, as one of your first tasks, analyze the politics of crime.

From a political point of view, crime was for a long while a very divisive issue, a wedge issue. It helped Richard Nixon win the White House. Ronald Reagan ran for president in large part on the issue of law and order. There was, for a long time, a division in philosophy between the Democrats and the Republicans on crime. At its barest, one side argued that poverty and social forces caused crime, while the other side contended that crime was a matter of individual responsibility. And crime would remain a powerful political issue for some time. Throughout the 1970s and 1980s, crime increased dramatically. Statistics showed that drug use and homicides were increasing. There was a general perception that all crime was on the rise.

At the same time, sentencing policy was being called into question. Over the course of decades, a philosophy of sentencing policy had existed that revolved around the notion of rehabilitation. Correc-

tional facilities were for correcting a defendant's behavior, and a penitentiary was about penitence. Those in the White House, the Senate Judiciary Committee, and the Judiciary began questioning the ability of prisons to rehabilitate and then many began moving toward the attitude: "if you do the crime, you do the time." This was a move toward a new sentencing scheme, where the primary goals were to incapacitate criminals and deter future criminals. The Republicans were not mostly concerned about a defendant's history or social background. They thought that mandatory sentences and a determinant sentencing scheme were good ideas to address the issue of rising crime rates.

Now imagine you were a staff member for the ranking Democratic member on the Senate Judiciary Committee, and you were given the job of devising a policy for sentencing. You were faced with the increase in the crime rate, the likelihood that Congress would set high mandatory minimum sentences, and the issue of disparity in sentencing. There was an emerging body of literature, beginning in the 1970s through the early 1980s, that focused on such disparities in sentencing. When two people committed the same crime, many times the studies found, each would get a very different sentence. And those receiving the longer sentences tended to be minorities. Following this train of thought, many Democrats believed that a structured sentencing system was a good thing.

Within this context, Senators Strom Thurman and Ted Kennedy sponsored a bill in 1984 that achieved a political compromise and created the United States Sentencing Commission to implement a determinant sentencing scheme. The Commission would be an agency of bipartisan experts and would create sentencing guidelines. The experts would be drawn from across the country, from the academic community, and from the federal judiciary. Three members of the Commission would be from the federal bench. The first members of the Commission were appointed in 1985 and pledged to write these guidelines by November of 1987.

### III. INFLUENCE OF DRUGS ON CRIME POLICY

The crack cocaine epidemic was reaching its peak in the mid-1980s and had a great influence on crime policy. Congress wanted—needed—to address the issue. In the summer of 1986, as the Con-

gress was considering its crime legislation, the Boston Celtics drafted Len Bias, a star basketball player from the University of Maryland. Within days of being drafted by the Celtics, he died of a cocaine overdose. Another athlete, Don Rogers, a star football player for the Cleveland Browns, also died of a cocaine overdose around the same time. In nearly every media publication, on television, and in newspapers there were regular reports about a surge of crack cocaine, mostly in inner city neighborhoods. Congress needed to act and in 1986, it passed the Anti-Drug Abuse Act of 1986. Neither Republicans nor Democrats would be outdone. The Act contained new mandatory minimum sentencing statutes. Not until the following year did the Commission come out with its guidelines.

During the Bush Administration, bipartisan efforts at crime policy development failed. The Democrats thought twice about the "get tough approach" and leaned toward prevention. The Bush Administration disagreed with the Democrats and published a paper that argued the benefits of incarceration. But the issue remained a powerful one, and in 1992, Presidential candidate Bill Clinton ran on the crime issue and clearly adopted the "get tough approach." And while the 1994 crime bill did have some money allocated for prevention, much of that money was stripped away at the last minute. However, the bill did provide for approximately sixty-five new death penalties, with new directives to the Sentencing Commission to further increase penalties on a wide variety of crimes. Shortly after this crime bill passed in September of 1994, the Republicans took control in Congress. In the wake of the Clinton Administration and the Republican Congress, we are left with a "get tough" consensus on crime and sentencing. Last year, Congress passed bills that included, with Administration support in many cases, new mandatory minimum sentences and increases in penalties.

The point of all of this is that there was a clear paradigm shift in sentencing policy in the early 1980s. We went from rehabilitation, to incapacitation and deterrence. That was the politics of 1986 and it is the politics of the day. What has happened since that paradigm shift? The new paradigm has not loosened, if anything, with the Clinton Administration and their "get tough approach," and with the Republicans now in control of Congress, the determinant sentencing schemes, I think, are more firmly in place.



#### IV. FUTURE OF THE SENTENCING SCHEME

Looking ahead for the next five years, I believe that we are going to have a determinant sentencing scheme in the federal system much like today's scheme. This means that we will have mandatory minimum sentences and sentencing guidelines. As new crimes arise, I believe that Congress will likely propose new mandatory minimum sentences and higher penalties under the sentencing guidelines. Herb Hoelter will provide some of the recent statistics in that area and statistics regarding the number of prisons and prisoners we now have in federal and state systems.

This paradigm shift has not just occurred at the federal level; it has occurred at the state level as well. California had an indeterminate sentencing scheme for some time but then replaced it in the early 1980s with a very strong determinant sentencing scheme. Since then, California's prison population has increased.

#### V. ROLE OF THE SENTENCING COMMISSION

What is the role of the Sentencing Commission in all of this? I think the Sentencing Commission has two important roles. First, the Sentencing Commission has the responsibility of identifying the issues in the federal criminal justice system that result in injustice. An issue many of you may have heard surrounds federal cocaine sentencing policy. In the 1986 Anti-Drug Abuse Act, Congress mandated that the distribution of five grams of crack cocaine would result in a sentence of five years in prison. The Commission has stated that this is not an intelligent or fair policy and that crack offenses can be and should be treated more closely to powder cocaine offenses. The Commission has identified a whole series of issues over the last five years, and I believe that the Commission has taken some very important steps forward in moving the federal system toward a more just system. For example, the Commission has proposed changes, and there have been some modifications made, for low-level drug offenders. The Commission has modified the guidelines in a number of other areas as well. It has both mitigated and increased certain sentences. The Commission has a sentencing enhancement provision in place within the guidelines for hate crimes and police brutality crimes. Before the guidelines were written, the sentence for those who committed a police brutality offense in virtually all cases, except

perhaps when death occurred, was probation. In other areas, the Commission has suggested that penalties be decreased.

The second important role of the Commission is to collect data on the federal criminal justice system, to conduct research, and to continue to advise Congress, the executive branch, and the judiciary on sentencing policy. Research may show over time that some of the policies that we currently have in place are not the most effective. Therefore, additional changes will need to be made. Whether that means a new paradigm shift for the twenty-first century or merely specific and more limited changes in certain areas is unknown. The Commission, however, is now in the process of increasing its research capacity. Hopefully, with the new membership on the Commission in the next months, it will take a larger role in advising Congress, the executive branch, and the judiciary on sentencing policy.

This, for me, is the broad political outline of how we got to where we are now and some thoughts on where we might go next. I am happy to answer any questions you may have afterwards and to get into some of the details of the sentencing guidelines.

## THE EVOLUTION OF THE FEDERAL CRIMINAL SENTENCING SYSTEM

PRESENTATION BY THE HONORABLE GERALD BARD TJOFLAT  
CIRCUIT JUDGE, ELEVENTH CIRCUIT COURT OF APPEALS

### I. INTRODUCTION

I have a different perspective on how the present situation evolved. Let me say first that it is not a matter of Democrats or Republicans. I have been involved in the criminal justice system for thirty years. In 1972, the Chief Justice appointed me to the Committee on the Administration of the Criminal Law and the Probation System, formerly called the Committee on the Administration of the Probation System. It is one of the standing committees of the Judicial Conference of the United States. Despite the name change, it still maintains essentially the same function—the Committee was created to oversee the criminal law, and, more importantly, the issues relating to sentencing and

corrections.

The first day I attended a meeting of that Committee, I was given a copy of S.1, the first bill of the new session of Congress. It called for a complete revision of the federal criminal code: the substantive criminal law, sentencing, appellate review of sentences, and parole. The chairman said it was my job to oversee this legislation from the judiciary's point of view. I spent the next fifteen years going back and forth between Jacksonville, Florida, where I maintained court, and Washington, D.C. I dealt with members of the House and Senate judiciary committees, committee staff members, and Department of Justice representatives. My job was to articulate the view of the federal judiciary—specifically, the Judicial Conference of the United States—with respect to this legislation. The views of the judiciary were tentatively formulated in our Committee. I then presented these views to the Judicial Conference and testified before the House and Senate judiciary committees.

## II. HISTORY OF THE SENTENCING SCHEME

Prior to 1974, the federal system had what we call “medical model” sentencing. Indeterminate sentences were imposed, which meant that the judge, in fashioning a ten-year prison sentence, could make the offender immediately eligible for parole at the sole discretion of the Parole Commission. In theory, a person could walk into prison one day and be paroled the next. The judge could also give what used to be called a “straight adult sentence,” which meant that an individual would be eligible for parole after serving one-third of the sentence. Alternatively, the judge could fix the parole eligibility date at a point between zero and one-third of the sentence. There was no appellate review of sentences in those days, and, as a matter of fact, judges did not even have to explain why they imposed a particular sentence.

### *A. The Parole Commission*

It was not until the early 1970s that all of the federal judicial districts in this country provided offenders with pre-sentence investigation reports prepared by the court's probation office. Typically, defense counsel would ask the judge at sentencing to make the sentence fully indeterminate so that the defendant could present the case anew

before the Parole Commission. The Parole Commission, then called the Parole Board, would periodically send hearing examiners to each prison. The hearing examiners would have a copy of the pre-sentence investigation report, which, in practice, provided the basis of the court's sentence, and would hear from the inmate; a case manager or social worker at the prison would usually be present to represent the inmate.

The Parole Commission, therefore, played the role of doctor in the same way a mental institution uses psychiatrists to determine when John Doe is mentally able to return to society without injuring himself or others. The Parole Commission would predict whether John Doe would commit more offenses, and, using that prediction, determine whether he should be released. Many subjective factors were used to determine whether parole should be granted. This medical model system was based on the idea that prisons could rehabilitate inmates. Consequently, prisons provided rehabilitative programs, principally education and vocational training.

Again, I emphasize that the maintenance of this system was not a matter of partisan politics; rather, it was a reflection of the will of the American people. In September 1984, the Comprehensive Crime Control Act was passed, which created the guidelines sentencing system. The academic community—including those who studied crime and punishment—and those involved in corrections thought that the medical model's use of unknown parole dates yielded cruel and unusual punishment. Inmates would sign up for correctional programs so that they could have a record of their attempt to do better when it came time to present their case to the hearing examiners. The idea that an inmate would get involved in a correctional program, not to rehabilitate himself or herself, but simply to make a record for the Parole Commission, seemed cruel, and a bit farcical, to a lot of people. Aside from that, the Parole Commission was incapable of determining whether someone on release was going to commit more crime. The Commission's ability to assess recidivism was nil.

### *B. Creation of the Brown Commission*

The criticism of the medical model sentencing system began in the 1960s and early 1970s. Sentencing judges were upset because the Parole Commission was, as a practical matter, doing the actual sen-

tencing. Under a fully indeterminate sentence, the judge only set the maximum term of incarceration; the Parole Commission determined how much time the inmate would serve. A commission was established in the late 1960s to study federal criminal code revision. Its product was the S.1 bill that I was given the responsibility of overseeing for the Committee in 1972. It was called the Brown Commission because it was chaired by Pat Brown, the former Governor of California. The Brown Commission issued a comprehensive report that called for the reform of the substantive criminal law, the "front part" of the report, and sentencing, the "back part."

Partisan politics really had little to do with the end product. The Brown Commission found an intolerable amount of sentence disparity. There was also no appellate review to correct the disparity, unless a judge had exceeded his statutory authority, which was rare. Some appellate courts reversed convictions in order to set aside sentences they felt were unjust, which was illegal. They did not have the power to review sentences, but they reviewed them nevertheless.

### *C. Methods of Eliminating Sentencing Disparity*

In the meantime, the General Accounting Office, which is, in effect, an investigative arm of the Congress, kept saying to the judiciary that we had unwarranted disparity in sentences and that the judiciary had to take corrective action. The judiciary, however, did not have statutory authority to do anything corrective. Corrective action would have to come through education and peer pressure. Much education was already ongoing. For example, we held sentencing institutes, where judges could discuss sentencing and corrections trends and sentencing philosophy. These institutes were held in every circuit, in three-year intervals.

The death knell of the medical model was the enactment of the Parole Commission and Reorganization Act of 1976. Congressman Kastenmeier chaired the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice; his Subcommittee took the lead in fashioning the Act, which installed a "determinant" sentencing system for cases within the Parole Commission's jurisdiction. The Parole Commission was instructed to draw guidelines similar to the guidelines the Sentencing Commission has drawn. As a matter of fact, the Sentencing Commission got the guidelines idea

from the Parole Commission.

Through this legislation, the Parole Commission stopped acting as a doctor trying to predict when somebody was going to be a law-abiding citizen and could be released from prison without committing further crime. Rather, its sole objective was to eliminate unwarranted sentencing disparity. For example, suppose three defendants committed the same crime. At sentencing, all received fully indeterminate prison sentences—one for five years, one for ten years, and one for fifteen years—meaning that the Parole Commission could release them at its sole discretion. To fix the parole release date, the Commission would determine the severity of the offense by looking to the “severity scale.” Then it would look to the “salient factor” score for each defendant. The salient factors predicted criminality, the potential for recidivism. If those factors indicated that the defendant would probably not lead a law abiding life on parole, the Commission would “warehouse” him for a longer period of time than the sentence that would be sufficient to reflect the severity of the crime. The fact that the court sentenced the defendants to different sentences would not affect the Commission’s decision unless the length of the sentence was too short—say, the five-year sentence—under the Commission’s guidelines. If so, the defendant would probably “max out,” by serving the entire five-year sentence.

The judiciary agreed with the Brown Commission that there should be appellate review of sentencing. In 1976, the chairs of the House and Senate Judiciary Committees took the position that the courts could not, through rule making, provide the government appellate review of sentencing. Rather, the courts could only provide appellate review to defendants. But, if unwarranted sentencing disparity was to be reduced, both the defendant and the government had to be afforded appellate review. To accomplish this, Senator Kennedy, joined by a handful of Senators, introduced the first Sentencing Commission bill in 1975. After the 1976 election, it was reintroduced. The bill ultimately had over eighty sponsors. The first time the bill came to a vote was in February of 1978; the vote was eighty-seven to twelve. It was brought twice to the Senate floor prior to 1984; on each occasion the “yeas” were overwhelming.

*D. Influence of the American Public*

Here is where I bring in the American public. 1984 was an election year. The Senate had passed the Comprehensive Crime Control Act, which implemented bail and sentencing reform and included a revised version of the Kennedy sentencing commission bill. The judicial branch had its own bill. The Senate's Comprehensive Crime Control Act came to the House and, because it was an election year, the House would adjourn the first week of October. The House's own crime control bill had been bottled up in subcommittee. In August, the House Judiciary Committee finally reported out a bill with sentencing reform provisions. When the House returned after Labor Day, the House's bill was on the floor, but without a rule; without a rule, it could not be debated. This was at the end of September, and if Congress did not pass a "continuing resolution" by September 30, the government would be out of money and everything would close.

A Republican Congressman moved to amend the rule under which the House was debating the continuing resolution in order to attach a non-germane amendment to the resolution: to wit, the Senate's Comprehensive Crime Control Act. The motion went down on a party vote. The debate and vote were televised, and the public responded instantaneously. The public was concerned about crime and drugs, and it appeared as if the Democrats were on the wrong side of the issue. The phones rang off the hook. A short time after the "no" vote, the Democratic and Republican leadership solved the problem. They would send the House bill back to the Judiciary Committee with instructions to report out the Senate bill instantaneously. This was accomplished immediately. The House then amended the rule under which it was debating the continuing resolution and attached the Senate's Comprehensive Crime Control Act as a non-germane amendment. The resolution and the amendment passed, and that is how we arrived at where we are today.

## FEDERAL SENTENCING GUIDELINES—TEN YEARS OF DISAPPOINTMENT

PRESENTATION BY HERBERT J. HOELTER

DIRECTOR, NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES

### I. INTRODUCTION

Who is happy with this ten-year experiment in public sentencing guidelines? The title of my talk is *Federal Sentencing Guidelines—Ten Years of Disappointment*. My focus today is on the *results* of the guidelines. I hope that my comments and my talk today will provide some thought for discussion, because I think that is what needs to happen in this country.

### II. THE FAILURES OF THE CURRENT SYSTEM

Over the past ten years, federal legislation on sentencing guidelines and mandatory minimums, what we call “truth-in-sentencing,” and the abolition of parole, have taken the criminal justice system of the United States, once a model for the world, and made it a national and international disgrace. I had the opportunity earlier this year to go to Russia, to the new republics in the Ukraine, Georgia, and Moscow, and I talked to them about what kind of a criminal justice system the new republics ought to put into place. My advice was very simple: do not follow the model of the United States of America.

We now live in a country that has the highest incarceration rate in the world. On this statistic, we battle neck and neck with Russia, depending upon the year. We have 1.5 million people in our prisons and jails. Three-quarters of the admissions to the prisons and jails in this country are minorities. We spend money to build prisons when we cannot build schools. As one example, in the past decade, the state of California built ten prisons and one community college. We are living in a time that is very difficult, indeed.

Criminal justice reform needs to be responsibly discussed, not only ideologically, but also financially, because the federal government spends a lot of money for states to influence criminal justice policies. I am not a lawyer, and this issue is much better discussed by the lawyers, but let me discuss some of the highlights and lowlights of what



the sentencing guidelines have done to our legal system.

We now have a system where a defendant may be acquitted of one crime and convicted of another in the same trial. Yet the acquitted conduct may be used to determine the sentence. We have a system where the Supreme Court of the United States, our most revered body, has to decide cases such as whether the blotter paper of the LSD tab should be used to calculate the sentence. We have a system of cooperation called "substantial assistance" within the guidelines, which is daily, weekly, and monthly, a manipulated ploy of prosecutors and law enforcement agencies. We have a system where we now train the Federal Bureau of Investigation, the Drug Enforcement Agency, and immigration agents in this country on the federal guidelines and how to charge the case in order to achieve the maximum sentence on a person.

My organization, the National Center on Institutions and Alternatives, for twenty years has been trying to bring some responsible public policy and programs to the criminal justice system across our great land. In the federal system, in particular since 1987, we have presented over 2,000 sentencing reports, which help the courts apply the sentencing guidelines in literally thousands of cases. Our most recent public policy effort is called the Coalition for Federal Sentencing.

### III. THE ORIGINAL GOALS OF THE SENTENCING GUIDELINES

November 1, 1997, will mark the ten-year anniversary of the guidelines. We think now is the time to look at the guidelines. In preparing for this discussion, I went back to our video library, and dug out the taped debate that I had with Judge William Wilkens in 1984. Judge Wilkens was the first Chairman of the Sentencing Commission. We were on a show called *Crossfire* where policy issues are debated. Also on the show were: Patrick Buchanan, who ran for President, and who is a very strong minded conservative; Pat Braeden, who was the liberal; and Judge Wilkens, this distinguished federal judge and then Chairman of the Sentencing Commission. I was put in the position of criticizing reform, which is what my organization tries to achieve. After watching the video, I realized that our arguments against the guidelines have not changed over the past decade. While the concept of sentencing guidelines is a tremendous

and valuable *concept* with viable goals, the application of the guidelines in the United States has been abysmal.

On *Crossfire*, Judge Wilkens said there were three original goals of the federal sentencing guidelines. First, we wanted a system that would be more *honest*. At the end of the day, everyone would know the reason behind the sentence: the public, the defendant, and the court. Second, we wanted a system that would be more *effective*. We believed that a clear and certain criminal justice system would make our entire criminal justice system work better. Third, we wanted a system that would be *fair* so that regardless of race, social, or economic status, all defendants would have fair and equal treatment in our federal courts. These goals have not been achieved.

#### A. *Honesty*

Honesty was the first goal. We wanted an honest system and believed that truth in sentencing would let us be honest. Let me give you an idea of what has happened. We now have "charge bargaining" in the federal courts. For example, we may have a defendant who caused a bank fraud, took money from this bank, and put it in another bank. It is a true bank fraud in any court. However, the defendant in this case would now get indicted for money laundering. Why? Because money laundering carries a level 24 under the guidelines and fraud might only carry a level 18. Money laundering carries a much more severe penalty. They will indict the defendant for money laundering, but if the defendant is cooperative, he or she may be allowed to plead only for fraud, which is what it was in the first place. That is just one example, and there are dozens of others. In the District of Columbia right now when there is a charge in a federal court or a charge in the state court, they allow the defendant to pick a charge or court where he or she wants to be sentenced.

Second, we have sentencing entrapment. This is where a federal law enforcement agency uses the guidelines to direct the suspect toward the criminal conduct of the highest possible sentencing guideline range. If a defendant wants to engage in a drug transaction for five grams of cocaine, you will most likely have an agent that knows if the client does five grams, the client can be induced to sell ten grams. Therefore, he gets sentenced at a level 20 and not at a level 12. The agent brings ten grams and says, "Listen, I had to get ten to-

day; I could not get five." The defendant takes the ten and faces the steeper sentence. Agents do this all the time.

Third, in terms of honesty, we also have a distorted process, one we call substantial assistance. Within the guidelines, if you want to have what we call a departure from the guideline, you want the judge to agree the guidelines should not apply, and the sentence should be lower or higher. The most significant departure is what is called "substantial assistance." However, if your client is willing to talk and assist in catching someone else, a client may earn a departure, but this process is one hundred percent controlled by the prosecutor. The judge has been stripped of the ability to evaluate that defendant's cooperation and decide that he or she should have a downward departure. It is all in the hands of the prosecutor. If the prosecutor does not want to file a "cooperation" motion, he does not have to file a motion. The result is that those people at the top of the criminal pyramid who had the most to bargain away get a break. Those defendants at the bottom of the criminal pyramid, who did the day-to-day deal and did not know their supplier, have nothing to give and receive nothing in return. As a result, the peons receive ten-year sentences and the upper-leaguers receive substantial assistance, departure motions, and only two to three year sentences.

In terms of honesty, this issue also carries with it a number of twists, one of them being the bargaining away of the defendant's right to appeal. In many of our jurisdictions, if you want to sign the plea agreement, you have to waive your client's right to appeal, regardless of what the sentence may be. Let me discuss for a minute just one of the issues regarding appeals in the United States. In 1987, when the guidelines met little resistance, there were about 5,000 appeals of which 600 of those were appeals of criminal sentences. In 1995, the Court of Appeals had 10,000 appeals, and ninety percent of them had to do with sentencing issues. This is what our Court of Appeals is now doing, instead of thinking about the broader rules of law.

### *B. Effectiveness*

The second major goal of the guidelines was effectiveness. The hope exists that the system will work better in the areas of public safety, deterrence, retribution, and rehabilitation. There is no ques-

tion that the current system has gotten bigger, but that is not necessarily a reason to believe that it has gotten more effective. In 1981, there were 24,000 inmates in the federal prison system. In 1987, when the guidelines went into effect, there were about 35,000 inmates. There are now 110,000 prisoners in the federal prison system; it has more than doubled its size over the last ten years. Between 1900 and 1980 there were forty-one federal facilities built. In the last seventeen years, there have been thirty-eight federal facilities built in this country.

Judge Lasker, who was appointed by Lyndon Johnson, said in a recent hearing in Washington regarding the guidelines:

Because I believe that the then existing system of sentencing, which gave judges literally unlimited discretion on the proposal of sentencing is opening unwarranted disparity for the personal use of the sentencing judge, and because I hoped the proposed guideline system would result in sentences that are effective and just, I supported that. Today I conclude with sorrow and disappointment that the system is resulting in the evolution of many sentences which are neither just nor effective.

In 1985 in federal courts, we spent 804 million dollars prosecuting defendants; we now spend 1.5 billion dollars; this figure has doubled in twelve years. In 1985, we spent 780 million dollars on corrections and 1.5 billion dollars on prisons. At the same time, the money spent for public defenders increased only 100 million dollars.

### *C. Fairness*

The next issue for consideration is who is going into our federal prisons? The percentage of drug offenders in federal prisons in 1986 was seven percent, and it was sixty-one percent in 1995. How many of us think the United States is winning the war on drugs? In January 1981, there were 24,000 inmates. One-third of them, 8,000, were black and hispanic. With the use of the guidelines in December 1995 there were 106,000 inmates, sixty-two percent black and hispanic. In raw numbers, that is an increase of 70,000 inmates. We went from 8,000 to 70,000 black and hispanic inmates in the federal prison system. The notion of being fair and racially blind does not exist in the application of the sentencing guidelines and the mandatory minimum sentencing.

In the days before the guidelines, we used to be able to talk about the human elements of sentencing. Ronald Reagan appointed Judge Stanley Sporkin to the Federal Court in the District of Columbia. Here is his opinion of the guidelines:

We are cramming our jails with a lot of secondary violators of the drug laws. Recently, I was told that under the sentencing guidelines, I would be required to sentence a drug addict to a ten-year period of incarceration. If this person were from a different socio-economic background, he would have gone to the Betty Ford Clinic for sixty to ninety days. As I contemplated the sentence I would have to impose, all that came to mind was a modern day version of *Les Miserables*.

#### IV. CONCLUSION

These are some of the reasons why I think the federal criminal justice system and the federal sentencing system need dramatic reform, and we need it now. We are urging attorneys and judges, who want discretion back, to be involved in reform. A recent judicial survey found that seventy-two percent of judges want the system changed. We are going to build upon that so that we can push our political leaders to create a different type of system as we move forward in this country. Thank you very much.

#### PANEL DISCUSSION

CHARLES NIHAN: Let me give each of the panelists two minutes to respond to each other's presentations.

JONATHAN WROBLEWSKI: Let me first respond to Judge Tjoflat. First of all, you should know, I have no disagreement with any of the numbers or the history that were discussed either by Herb Hoelter or by Judge Tjoflat. When I talked about the politics of crime, I was discussing the political context within which some of the things that Judge Tjoflat was talking about occurred. Obviously, right now there is more than just politics going on when it comes to crime and sentencing. There are members of the Judicial Congress that are working on crime and sentencing issues. There are members of the intellectual community, including Herb Hoelter's organization and other organizations, that are also working on the issues. But all of that happens within a political context. It is very important because it allows us to

evaluate what is viable in terms of reform.

Second, let me address a couple of things that Herb Hoelter mentioned specifically because the Sentencing Commission itself has identified many of the problems that he has identified in the sentencing guidelines. The Commission itself has proposed solutions to many of these problems. For example, in the area of money laundering, he is correct in saying that the sentences are not tied to the underlying conduct. The Sentencing Commission recently sent a recommendation to Congress to change that. The Administration and Congress rejected the proposal. Similarly, the Commission has proposed changes to the rule relating to acquitted conduct. There are also issues like plea bargaining, substantial assistance, and others. I believe the Commission will be releasing a report in October on substantial assistance and some of the problems that Herb Hoelter identified. The Sentencing Commission does not believe the system is perfect; it wants to identify problems and solve those problems.

JUDGE TJOFLAT: About seventy percent of the district judges wish that we had a version of the old system. They did not approve of the Parole Commission re-sentencing defendants under Commission guidelines, and they were all in favor of abolishing it. Some judges, however, want that old parole-guidelines system restored. Somebody once said, "things are more like they used to be than they ever were before." Most of the judges who want to turn back the clock were not around then. I was there, and that was the way it was.

Here is what the major problem is, as I see it. Until there is a revision of the federal substantive law regarding what constitutes a crime, such as money laundering, unwarranted sentencing disparity will not be alleviated. Every administration, Democratic or Republican, every Congress, Democratic or Republican, all have resisted any efforts to revise the federal criminal code. So there is no momentum to doing that.

The second problem facing us is that the drug problem is driving the whole criminal justice system. In debates, the American public is exposed to two extreme views about the drug problem. The public gets the far right and the far left extremes. The public does not hear from anyone in the middle who explains what the cost of incarceration is. The public does not give a second thought to the problems created by taking a twenty-one year old person and warehousing him

until he is about forty-five years old. What will be the cost to society when he is released, and he is unable to earn a legitimate wage? Who will bear the cost of supporting him? The American public learns nothing about such problems from current debate. As a result, we get this kind of reaction from the public: "lock him up and throw away the key." That is my view of where we are now.

HERBERT HOELTER: I would like to address the economic issues. The average cost to incarcerate one prisoner for one year in the United States is twenty-two thousand dollars. We have thirty-seven prisons, thirty-seven states with a system under federal or judicial oversight. I talked about some of the problems; I would like to discuss some of the solutions.

First, you must have leadership. We need strong, responsible leadership. We have a real opportunity this year because there are six Sentencing Commission seats available. One of our challenges is to try to get good, thoughtful, and responsible candidates on the Sentencing Commission. We accept the fact that there is going to be a Commission, we just want to get different people.

Second, we have to call for a debate in this country, an honest rather than a political debate, about criminal justice. We have all talked about it. Criminal justice policy in the past decade has not been based on research or studies or on what works or does not work; it has been based on sound bites and anecdotes. One important example is the Willie Horton issue in the 1988 presidential debate. Furloughs are the most successful criminal justice programs for inmates in prison. Ninety-nine percent of the inmates who go on furlough return. Yet furloughs were halted because of one man and a president who made an issue of it.

Third, we think the guidelines should continue in use. Many state systems are operating relatively effectively under their guidelines, but we think those guidelines ought to be advisory. The judge should be able to suggest options to the defendant. This would avoid manipulation by a prosecutor who wants to make a name for himself at the Court of Appeals.

Finally, we must have a restoration of balance in the system. At least under the old system, with all of its faults, there was a sense of balance between the defense and the prosecution, and the judge became the arbitrator. We now have a system where the prosecution de-

finer the crime to be charged, defines the sentence to be imposed, and hands it to the judge and says, "Put it in your calculator and you had better come up with the same result." We think there has to be a return to balance in the federal criminal justice system.

## AUDIENCE QUESTIONS

CHARLES NIHAN: Ladies and gentlemen, I invite you to ask questions.

### I. PRIVATIZATION OF PRISONS

AUDIENCE PARTICIPANT: What I find very interesting is the privatization of prisons. Could you please comment on that?

HERBERT HOELTER: The most recent example of privatization is a private prison that was just built in Columbus, Ohio. It is an eight hundred bed private prison, built for any jurisdiction who wants to send inmates; it is currently full of Washington, D.C. inmates. It shows that if you open a prison, they will come.

AUDIENCE PARTICIPANT: Is it not a solution for the states to get money for prisons through taxes or private sources, such as Texas has done?

HERBERT HOELTER: It is not only Texas, but it is throughout the United States. The private corrections industry is one of the most powerful organizations to come along in awhile. It is a very difficult argument because the private prisons are coming in and saying they can run a prison better, which is not hard to do considering the state of many of our prison systems. The Corrections Corporation of America is the largest private prison company in the country. It went from zero business in 1985 to 151 million dollars in contracts this year. This year, the company set up a real estate investment trust for all its properties. It now has a powerful Washington law firm to lobby for more prisons because more prisons mean more business.

### II. EFFECT OF FEDERAL SENTENCING GUIDELINES ON DRUG TRAFFICKING

AUDIENCE PARTICIPANT: I would like to address my question to Judge Tjoflat regarding his views on the overall effects of the federal



sentencing guidelines on both drug trafficking and drug consumption.

JUDGE TJOFLAT: I think drug trafficking is an economic crime. People involved in the drug world, the people who drive drugs on Interstate 95 from Miami to New York, do not have any idea what the criminal penalties are. The sentencing guidelines are having little effect on the drug war—on stopping the “user” from using drugs. The mandatory minimum sentencing approach to the drug problem is a failure. The problem that Herb Hoelter brings up about back-room charges is as much a responsibility of the judge as it is of the prosecutor or defense lawyer. Judges should have an enormous amount of control over plea-bargaining. It is true that the Department of Justice can decide to bring a charge without a plea agreement. There is not much a judge can do about that except to remind the prosecutor that he must apply the law equally to all persons. Now, when a plea agreement is struck, a judge can disapprove the plea agreement. You have some judges who do not exert that pressure. But this authority to charge, which is a problem with the guidelines sentencing system, drives more sentencing into the prosecutor’s office where the defense lawyer and the prosecutor can get together. Before guidelines sentencing, they might not have had any idea what sentence the judge might impose. All they knew was the statutory maximum.

### III. FULL DISCRETION VERSUS MANDATORY MINIMUM SENTENCES

AUDIENCE PARTICIPANT: I am from Israel and I was wondering if any mandatory punishment is done solely at the discretion of the judge. In Israel, there is an initiative to enact minimum sentencing laws. I would like to ask the Honorable Judge which system do you think is better or more just: one that gives you full discretion or a system under which the legislature mandates a minimum sentence?

JUDGE TJOFLAT: Ours is not the greatest, is it? Which is in part what my colleagues have advocated. The British, for example, do not have a guidelines system; they have appellate review. The judge must articulate a rationale for the sentence imposed. It is extremely important that a rationale, an intelligent one, be articulated in open court from the bench as a reason for the sentence. Then, tie that into appellate review, so that an appellate court can develop a common

law of sentencing. In my judgment, that kind of accountability would cure many of the problems that we have. I think mandatory minimum punishment does a lot of things. It permits deal making. At one time, New York had a mandatory life sentence without parole for trafficking heroin; juries would not convict knowing the severity of the penalty. Therefore, when you have mandatory minimum sentencing, you are driving the sentencing decision into the prosecutor's office—unless you have strong judicial control, with life tenure judges. Life tenure is absolutely indispensable in my judgment.

HERBERT HOELTER: One of the problems with the legislative system is that we always have an issue. Last year we had a five-year mandatory sentence, and we still have a drug problem. This year we have a ten-year mandatory, next year a fifteen-year mandatory, and the sentence is never enough because all politicians want to get their sound bite on TV: "I am tough on crime." Now every two-bit politician without issues bangs on a podium and says he is the toughest in the room today.

JONATHAN WROBLEWSKI: Let me just suggest that there is more to this than the dichotomy between mandatory minimums and complete judicial discretion. Even what Herb Hoelter was suggesting about advisory guidelines is somewhere in between. I think that the experiment that was put together in 1984—having an expert agency outside the political process put guidelines together without mandatory minimum statutes set by the legislature—was a good approach. That experiment, I do not think, has yet been tried at the federal level. Again, I would not limit the focus to mandatory minimums or to complete discretion, because I believe there are other alternatives.

#### IV. MINORITIES AND DRUG USE

AUDIENCE PARTICIPANT: It seems, from your statistics, that it is only the minorities who are using drugs.

HERBERT HOELTER: That would the logical presumption would it not? It appears that Blacks and Latinos do all the drugs. But, in fact, when you look at drug use in this country, white people consume eighty-five percent of the drugs. It is a matter of enforcement. I can take you today to a section of Miami where you can see an open-air drug ring, where you can buy drugs, and you will see a bunch of people who are on drugs. Do we want to arrest all those people? I could

also take you to Coconut Grove in the condominiums where there are more drug dealings than you will ever see in an open-air drug market. It has to do with enforcement and whether you want to arrest a particular suspect. We are not going to arrest everybody who has a drug problem. We all know that.

#### V. PROGRESS TOWARD REDUCING THE CRIME RATE

AUDIENCE PARTICIPANT: Can you comment on the work regarding the main goal of reducing the overall rate of crime?

JUDGE TJOFLAT: The incapacitation model now in place—which calls for warehousing some offenders—is extremely expensive. Herb Hoelter said twenty-two thousand dollars a year, but, in fact, the national average to house somebody for a year in the federal system is higher than that because of the kinds of inmates we have, especially in a maximum security institution. In 1980 dollars, the capital for constructing a cell for one prisoner is fifty thousand dollars. It ranges from a hundred and some thousand dollars for specialized incarceration down to about twenty-five thousand.

CHARLES NIHAN: Thank you very much.