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## Sentencing Guidelines: Where We Are and How We Got Here

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THE HONORABLE GERALD W. HEANEY\*

The first sentencing institute that I went to was in 1967. And if I remember correctly it was at the site of one of the prisons, I think, in Colorado. At that time, the cry was that judges did not know what they were doing and that judges should give indeterminate sentences, and should leave to the prison authorities and the Parole Commission the decision as to how long an individual would serve under the indeterminate sentence. That was my first experience in the sentencing area.

We have come a long way since that time. Now, I think that I agree with what Michael Goldsmith said: that the principle objective of the Sentencing Guidelines was to eliminate what was categorized as unwarranted inter-judge disparity. Mr. Goldsmith observed that the sentence depended on what the judge had for breakfast.

I do not think that was the case, but even if it were, it is better to depend on what the judge had for breakfast than what the prosecutor had for breakfast. The prosecutor is a political appointee and the judge is a lifetime appointee who, it seems to me, has a greater concern for overall public interests than a prosecutor.

Now, what I want to talk about a little bit this morning is that I do not think that there is any impartial study that supports the view that sentencing disparity in the wider sense has either been eliminated or lessened. Supporters of the Sentencing Guidelines point to those studies that support the view that inter-judge disparity had been eliminated and there may be some merit to that.

My concern, however, is with the fact that these studies measure only one visible measure of sentencing disparity. They ignore the unwarranted disparities that either continue or have grown beyond the reviewable decisions of law enforcement officers, probation officers, and prosecutors.

I think we all know that the first stage of the criminal justice process occurs when the law enforcement officer on the street makes a decision as to who he is going to arrest and what he is going to arrest for. Then, in many instances, the officer also determines whether to refer this case to the state

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prosecutor or to refer it to the federal prosecutor. Often times that decision is based on what he thinks the ultimate outcome will be in the terms of length of sentence.

Now, if the matter is referred to a federal prosecutor, the prosecutor determines what to charge, when to charge, whether to enter into plea negotiations, and if so, the terms of the plea. We have reviewed literally hundreds of decisions since the Guidelines have been in effect and at least, from my view, having reviewed those decisions, I find that there is a good deal of disparity among the prosecutors as to what they charge, when to charge, and particularly who to charge. This is especially true when you have large conspiracy cases where the ring-leader, the person who is most responsible for the conspiracy, gets a lesser sentence than those who are well down the line. The ring-leader gets a lesser sentence because he was the first to realize that if he went to the prosecutor and gave the prosecutor all the information that he or she had, then providing information would result in a lesser sentence. Those well down the line get a longer sentence, however.

I think that one of the first things that we need to do if are going to revise the Sentencing Guidelines is to undertake a comprehensive study to determine the impact of the Guidelines at every stage. This is difficult and will be expensive and time-consuming. I did it with respect to four districts in our circuit and you can read what the results of that were in my article entitled *The Reality of Guidelines Sentencing: No End to Disparity*.<sup>1</sup> I found on the basis of that study that the disparities were at least as great after the Guidelines as they were before; they only appeared at a different level.<sup>2</sup>

In order to undertake this kind of a study, what you have to do is take a relatively representative group of cases from selected districts in the United States and go back to the original arrest and follow that all the way through to determine whether, in fact, we have really eliminated disparity or whether disparity continues at the levels that it had been before.

I have debated this issue on a few occasions before and the answer to my argument has been that the prosecutors have always had the authority to determine who to charge, when to charge, and what to charge. The prosecutors always did have this authority, but the authority was different early on. At that time, their decisions did not necessarily determine the end result because you had a judge who had to review these decisions – a judge who was insulated from the pressures of public criticism by a lifetime appointment.

Rather than eliminate disparity, I think that the principle effects of the Sentencing Guidelines have been two-fold. First, as I have mentioned, the Guidelines enhance the discretion of law enforcement officers, prosecutors, and probation officers in the sentencing process and diminish the discretion of

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1. 28 AM. CRIM. L. REV. 161 (1991).

2. *Id.* at 187-90.

the district judge. Perhaps most importantly, they confine many more offenders to prison for longer periods of time.

You can debate whether this is bad or not, but the facts are that our federal prison population has increased from about 43,000 in 1987, when the Guidelines were approved, to about 106,000 in 1998, and since that time have grown significantly.<sup>3</sup> During this same period, the average sentence has increased by more than two-and-a-half years. These increases, as those who are practitioners know, have been driven by three factors: (1) the dramatic increase in sentencing for drug offenders, particularly crack-cocaine, (2) the mandatory minimum sentences for violent offenders and persistent drug offenders and importantly, (3) the elimination of probation as an option for non-violent, first-time drug offenders.

Now this is one thing that I have never been able to understand. Every study that has been conducted – whether it is a study that Judge Thomas Eisele conducted over a period of ten years in Arkansas where he followed up every person that he had placed on probation, or the studies of the parole commission itself – have concluded that first-time drug offenders who have been imprisoned are five times more likely to recidivate than comparable offenders placed on probation. These first-time drug offenders represent a huge percentage of the young, black males who are now serving time in our federal prisons.

As the raw numbers of federal prisoners has increased, so too has the percentage of black male inmates. They now represent approximately 40% of the Nation's federal prison population, even though they only represent 12% of our population.<sup>4</sup> I think that statistic cries out for a careful study to determine why that is so. My view is it has been largely driven by the number of young, black males who have been convicted of possession with intent to distribute crack-cocaine. Drug offenders, as you now know, represent 60% of all inmates in federal prisons and black males constitute more than 45% of those confined for those offenses.<sup>5</sup>

It is only a matter of a few years until the Congress of the United States is going to take a look at one aspect of this problem: the huge number of aging inmates. Now, it may not come during my lifetime, but you can be sure that within a very few years you are either going to have Congressional legislation or other action which will say that when inmates reach a certain age, if there is a finding by the prison authorities that they are not a danger to the community, those prisoners will be released. It is not going to have anything to do with

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3. FEDERAL BUREAU OF PRISONS, QUICK FACTS (2000).

4. *Id.* See also U.S. Census Bureau, *Resident Population Estimates of the United States by Sex, Race, and Hispanic Origin* (released Dec. 23, 1999) <<http://www.census.gov/population/estimates/nation/intfile3-1.txt>>.

5. See FEDERAL BUREAU OF PRISONS, QUICK FACTS (2000).

whether this is wise; but it is rather a cost matter. And so we send those men and women, mostly men, back to the state where they become wards of the state and move on to our welfare system or become homeless.

In closing, I certainly do not share the view that discretion should be eliminated from the sentencing process. As long as you have human beings dealing with other human beings, there is going to have to be some discretion in the system and the question is: to what extent should the various players in the system exercise discretion.

Realistically, it will always be shared. In my view, however, the judge, the true neutral in the sentencing process, must be given more discretion than he or she has under the Guidelines as currently written.