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COMMENTARY

JUDICIAL DISCRETION IN SENTENCING

William W Schwarzer*

The views expressed in this paper are those of the author. In matters of policy, the Federal Judicial Center speaks only through its Board.

The role of judicial discretion in the sentencing process is a fundamental and inescapable issue. It tends to become obscured by other issues, such as determinancy and penal policies. When it does come to the public's attention, it is usually in a context of controversy over what a judge has done. The public perception of judicial discretion is almost invariably skewed.

For all those reasons, it is important to focus on that issue. A comprehensive discussion of judicial discretion would take more time than is available. I therefore want to narrow the focus to consider what has happened to judicial discretion in the existing sentencing system and what the consequences have been.

I have in mind that the sentencing guideline system is still evolving. But it has been almost seven years since the Sentencing Reform Act was passed and four years since the guidelines went into effect. Sufficient time has passed to warrant a look at the perceived problems at which the guidelines are aimed, how well they are dealing with those problems, and what impact they are having.

THE PERCEIVED PROBLEMS UNDERLYING THE GUIDELINES

The Sentencing Reform Act of 1984 was adopted in response to a widespread feeling that unwarranted disparities in sentencing were undermining public faith in the criminal justice system. That feeling was by no means universal. There were many, including Congressmen, who did not share it. But in the end, those who objected to unduly harsh sentences and those who thought criminals were being coddled came together to form a majority to pass the act.

To what extent did unwarranted disparities exist in sentencing prior to the 1984 act? Clearly there was a perception that they existed. Clearly there were philosophical differences among sentencing judges. And the legislative history of the 1984 act collected some statistics that indicated the existence of disparities.

These data need to be viewed in context, however. One factor is that the length of the sentence imposed exaggerated the apparent disparity because

the length of time served was generally much shorter under the parole system.

Another factor is that the data were selective and did not attempt to analyze the extent to which unwarranted disparities in fact existed across the system as a whole.

What Congress was concerned with was the appearance of disparity. Presumably it reasoned that to promote public faith in the criminal justice system, the public needed to believe that similar offenders who committed the same crime under similar circumstances did not receive substantially different punishment.

Public perceptions are not based on comprehensive analyses of presentence reports in representative samples of cases to determine the extent of unwarranted disparities. They are derived mostly from press reports of selected cases.

It is necessary therefore to distinguish between the problem of perceptions and the problem of unwarranted disparities. Congress certainly addressed the former. We do not know the extent to which the latter problem in fact existed.

One reason for the public perception of disparity was the frequent failure of judges to explain the reasons for a sentence. Perhaps had they done that, public perceptions might have been different. The Sentencing Reform Act now requires judges to do that, and this is a desirable reform.

The fact remains, however, that the legislative decision to adopt guidelines rested more on perceptions than on objective data establishing widespread unwarranted sentencing disparities.

HOW WELL DOES THE GUIDELINE SYSTEM ADDRESS THE PERCEIVED PROBLEM OF DISPARITY?

The Sentencing Reform Act attacked these public perceptions in effect by casting a vote of no confidence in judicial discretion. It opened the door to an approach to sentencing that would reduce the process to a mechanical formula.

The guideline system largely eliminates discretion from sentencing. Its purpose is to produce consistency and predictability. It does so by creating the appearance that there is a "right" answer to the guideline calculation in each case.

But the search for the right answer proves illusory. That is because the factors involved do not lend themselves to being reduced to precise and objective formulae. In practice, therefore, the calculations produce widely differing answers from case to case.

For example, the adjustments for the defendant's acceptance of responsibility and for his role in the offense can be and are applied in different ways. What constitutes acceptance of responsibility is heavily influenced by a judge's perception of the facts of the case and the offender and what can reasonably be expected.

How uncharged acts and conduct are factored into the calculation—how far afield a judge will go in

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taking into account conduct as being relevant to the sentence—is an imponderable and unpredictable.

There are wide disparities in the interpretation of the rules governing upward and downward departures—not only among trial judges but also among the courts of appeals. Some consider only whether a particular factor has been fully taken into account by the guidelines. Others look at the entirety of the circumstances of the case.

Other factors play a part in producing disparate results:

Offender characteristics: though the guidelines generally preclude their consideration, many judges find it difficult not to be influenced by differences such as, for example, between a mother who embezzled to pay for her child's medical care and a defendant who embezzled to support an extravagant lifestyle; between a defendant who ordered pornographic material through the mail and a defendant who produced it.

The guidelines often mandate incarceration at the low end of the scale when a judge is convinced that it would be counter-productive, generative pressure to find a way to ameliorate the harshness of the rule.

In these and other ways, the guideline system tends to create the illusion of certainty and predictability more than the reality. In the process it tends to prove also, not only that hard cases make bad law, but that bad law makes hard cases.

The wrenching results the guidelines can produce are illustrated by some recent court of appeals decision in which downward departures were reversed. In one case, the court held that a female defendant, who on entering prison would have to leave her three small children with her ill mother a thousand miles away presented nothing unusual because "imposition of prison sentences normally disrupts family relationships." In another, the court reversed a downward departure for a pregnant defendant on the ground that "since time immemorial the sins of parents have been visited on children and to allow such a departure would set a dangerous precedent since it would send an obvious message to all female defendants that pregnancy is a way out."

While the object of the guideline system is largely to displace judicial discretion, its irony is that it is itself the product of discretion exercised by the Sentencing Commission. The adjustments under the guideline calculations are determined by the Sentencing Commission.

It is true that they come from a data bank reflecting a record of some 40,000 sentences and 10,000 presentence reports. But they reflect national averages. As a result they do not and could not take into account the particular factors that judges took into account in imposing sentences in particular cases, mainly the offender characteristics.

Judges who imposed those 40,000 sentences looked at the offense as well as the offender and decided what sentence was appropriate, i.e. what purpose the sentence should serve in the particular case. Bank robbers received different sentences, for

example, depending among other things on an assessment of the offender's characteristics and the resulting needs for specific and general deterrence, incapacitation, or retribution. Those considerations have been washed out in the homogenized national averages the data bank produces. Those averages may well create a heartland but the heartland is simply the middle of a bell shaped curve and a judge now is largely barred from the up and down sides of the curve even though they contributed to defining that heartland.

By taking discretion from the judge to consider factors that are critical to fashioning a sentence reasonable and appropriate for the case, the guidelines open the door to arbitrary results. It is useful to remember that it is an offender, not an offense, who is being punished.

Finally one must look at the guidelines as part of the federal sentencing system as a whole. If the purpose was to reduce unwarranted disparities, that purpose surely cannot be achieved so long as mandatory minimum sentences remain on the books. Mandatory minimum sentencing laws compel the imposition of sentences, mostly on drug offenders, solely on the basis of the kind and quantity of the drug involved, without regard to the degree of culpability. None of the sentencing factors that even the guidelines accept may be considered. The records are replete with cases in which first time offenders who were brought into a drug deal, often unwittingly, as a lookout or a mule were sentenced to five, ten or fifteen years as though they were the dealer or organizer, simply on the basis of the type and quantity of drugs involved and whether a gun was found.

It is true that the dealer can be given a longer sentence but the minimum is so severe that this will rarely be appropriate. In fact, the dealer is often able to negotiate with the prosecutor for a sentence below the minimum in return for cooperation which the small fry is unable to offer. Since about one third or more of the federal sentences are imposed under mandatory minimum laws, unwarranted disparities remain a significant part of the federal sentencing system.

WHAT HAS HAPPENED TO DISCRETION IN SENTENCING?

There is of course a relatively narrow band between the top and the bottom of a guideline within which the judge may still exercise discretion. There are also the adjustments I have described. But they generally are not held out by the guidelines as opportunities for the exercise of discretion—rather than being invited to exercise their discretion, judges are directed to apply them correctly, as the guidelines instruct.

Discretion has been shifted from judge to prosecutor. Prosecutors have it largely in their power to determine the sentence within a narrow range by their charging decisions and their plea bargains.

When Congress and the public talk of disparity and unpredictability, they see only the tip of the

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iceberg. Out of their view are the many options that are exercised in the long course of the criminal process, the many fortuities that occur on the way from the crime to the imposition of sentence.

We, of course, want the public to have confidence in the way the last event in this process—sentencing—is managed. But why, when it comes to the exercise of discretion, are prosecutors more to be trusted than judges? Is it only because their decisions are largely out of the public's view, while the judge's are out in the open?

Requiring judges to take into account relevant uncharged conduct is not an answer to the problem. It has problems of its own by creating the need for collateral proceedings to determine guilt outside the regular criminal trial. It introduces a wild card into the system. And it does not greatly diminish prosecutorial discretion.

The real question, therefore, seems to be, not whether one can largely eliminate discretion from the criminal justice system, but where it will be exercised. There is much to be said for restoring it to judges who were appointed for that purpose and who exercise it in the public view.

WHAT HAS BEEN THE IMPACT OF THE PRESENT SENTENCING SYSTEM?

What has the present sentencing system accomplished? Certainly it has succeeded in making it difficult—and often impossible—for a judge to impose a relatively light rather than a heavy sentence, to find an alternative to incarceration where that seems unproductive, to avoid sentences that impose unreasonable social costs. And operating in conjunction with mandatory minimum sentences, the guidelines have contributed to a system of draconian severity, illustrated by the following statistics.

In the last 7 years the federal prison population has doubled. It is now nearly 80,000 inmates and that number is expected to double again in about three years. One fourth of the inmates are serving sentences of over 15 years, one half over seven years. No other industrialized country imposes sentences of comparable severity. In the Soviet Union, for example, only 10 percent of the sentences are for more than 10 years, most are less than five years, and prisoners generally serve only one third of the time in prison, the rest on parole.

The federal system is the bellwether for the states. Looking at the state and federal systems combined, there are now nearly a million persons incarcerated in the United States, twice the number of prisoners ten years ago. There are 426 prisoners for every

100,000 residents. No other country comes close: South Africa has 333 prisoners per 100,000 residents, the Soviet Union 268, Britain 97, and France 81.

We are paying a high price for the present sentencing system, and not only in dollars. It is a high price in terms of the integrity of the criminal justice process, in terms of human life and the moral capital of the system. The elimination of unwarranted disparities is a worthy objective but it has not been achieved. Instead a system conducive to producing arbitrary results has been created.

All of this is the result of a policy of distrust of the judiciary. Judges may not be perfect, but they take their sentencing duties very seriously. Most regard it as the most serious responsibility they have. They do not approach it with identical philosophies and value systems. But the diversity of the bench reflects the diversity of a democratic society. It does not take away from the conscientiousness with which judges perform this duty. It is worth remembering that the system entrusts them with a wide range of discretion. Judges find it hard to understand how they can be trusted with such wide discretion over the trial process which determines guilt or innocence, but not with discretion to determine the appropriate sentence.

That is not to say that guidelines—as guidelines—could not be useful in giving judges a yardstick against which to measure the exercise of their discretion. Consistency is desirable, so long as all relevant factors are open to consideration. But guidelines that compel judges to impose sometimes unreasonable sentences will in the long run do irreparable injury to the justice system. Justice Frankfurter once said that “judges are not merely the habitations of bloodless categories of the law which pursue their predestined ends.” And Judge Glasser of the Eastern District of New York recently insisted that the defendant before him for sentencing was “a person, rather than an objective manifestation of discrete criteria to which are assigned numbers which, when added together, yield a sentencing result.” Judges do not like to think of themselves as clerks at a grocery check-out counter, adding up the items in the basket to come up with the price to be paid. Many judges are finding this system demoralizing and demeaning, and it is taking its toll of the federal bench; some judges are resigning and some senior judges will no longer sit on criminal cases.

A justice system that denies judges discretion cannot be depended on to produce fair and reasonable results. And a justice system that denigrates and distrusts its judges will not long be worthy of the name.