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## SOME THOUGHTS ON THE SENTENCING REFORM ACT OF 1984

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WHEN the Articles Editor invited me to write an article on sentencing, he informed me that the format would be informal and that footnotes were not required. I wasn't sure whether this was a carrot on the stick approach or simply a tacit recognition of the fact that the involvement of federal court of appeals judges in the sentencing process has been minimal and, therefore, perhaps not too enlightening. For many years, my colleagues and I have followed the Supreme Court's admonition that our sole role on an appeal from a sentence was to determine whether the sentence was imposed in a proper manner and fell within the statutory guidelines.<sup>1</sup> With the advent of the Sentencing Reform Act of 1984,<sup>2</sup> this is about to change.

It seems like only yesterday that Justice Black, writing for the Supreme Court, stated that the "modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime," and that "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."<sup>3</sup> "Retribution," Justice Black continued, "is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."<sup>4</sup>

Although only thirty-seven years have passed since those words were written, we are now instructed that the beliefs they

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1. See, e.g., *United States v. Keuylian*, 602 F.2d 1033, 1043 (2d Cir. 1979).

2. PUB. L. No. 98-473, 98 Stat. 1987 (1984). The Act amends the sentencing provisions of Title 18 of the United States Code.

3. *Williams v. New York*, 337 U.S. 241, 247 (1949).

4. *Id.* at 248.

espoused are, to use a well-worn legal phrase, clearly erroneous. The principal aims of sentencing now are said to be retribution, deterrence, incapacitation and uniformity.<sup>5</sup> Realization of these aims is the specific goal of the Sentencing Reform Act. Imprisonment for purposes of rehabilitation is considered inappropriate.<sup>6</sup>

Briefly summarized, the Act, which is not yet fully effective, provides for the creation of a Sentencing Commission, which is to promulgate guidelines for the courts to use in sentencing, together with policy statements regarding the application of the guidelines and related matters.<sup>7</sup> The guidelines are intended to cover the various categories of offenses as they involve various categories of offenders.<sup>8</sup> Trial judges are instructed to impose sentences of the kind and within the range established by the Sentencing Commission for each applicable category, unless aggravating or mitigating circumstances exist which call for a departure from the pertinent guideline.<sup>9</sup> The Commission, in turn, is instructed to formulate its guidelines for imprisonment so that the maximum term does not exceed the minimum by more than twenty-five percent of the minimum or six months, whichever is greater, except that, if the guideline calls for a maximum sentence of life imprisonment, the minimum must be at least thirty years.<sup>10</sup> Parole is effectively abolished.<sup>11</sup>

In September 1986, the Sentencing Commission issued a preliminary draft of its proposed sentencing guidelines for the purposes of securing public analysis and comment. Putting it mildly, the response to date has been less than enthusiastic. Undaunted by the truism that "[n]ature never rhymes her children, nor makes two men alike,"<sup>12</sup> the Commission stated that its goal was "to provide a structure and framework for the sentencing decision so that similar offenders who commit similar offenses are sentenced in a similar fashion." Reacting perhaps to the modern generation's fascination with numbers, the Commission seeks to attain this goal by means of mathematical computations. An anal-

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5. H.R. REP. NO. 1030 and S. REP. NO. 634, 98th Cong., 2d Sess. 75-76, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 3182, 3258-59.

6. See 28 U.S.C. § 994(k) (Supp. III 1985).

7. See 28 U.S.C. §§ 991-998 (Supp. III 1985).

8. 28 U.S.C. § 994(b) (Supp. III 1985).

9. 18 U.S.C. § 3553(b) (Supp. II 1984).

10. 28 U.S.C. § 994(b)(2).

11. PUB. L. NO. 98-473, § 218(a)(5), 98 Stat. 2027 (1984).

12. R.W. EMERSON, *Essay on Character*, ESSAYS, FIRST AND SECOND SERIES 324-44 (1951).

ysis of the proposed guidelines is beyond the scope of this brief article. Moreover, since changes are inevitable, a detailed discussion at this time would be premature. However, since the thrust of the Commission's proposals probably will not vary a great deal, some generalizations presently can be made.

In assigning to the Commission the task of creating guidelines, Congress insisted that the guidelines be "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders,"<sup>13</sup> and that they "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."<sup>14</sup> These instructions have led the Commission to concentrate more on the nature and extent of the injury or harm resulting from the defendant's acts than on the nature of the offense and the defendant's character and mental processes. The guidelines group offenses into a number of broad categories, for example, "Offenses Involving the Person", "Offenses Involving Property", etc., and assign to each a basic offense point value. The sentencing judge is instructed to modify the basic offense value by looking not only to the offense for which a conviction was obtained but also to the conduct or harms committed in furtherance of that offense, i.e., to look at the complete picture of the defendant's wrongdoing. This is to be accomplished by referring to so-called "Special Offense Characteristics" and "Cross References" listed for each offense and adding whatever points are called for in these subchapters.

The sentencing judge is instructed to then modify the total offense value score by looking to certain so-called "Offender Characteristics," which assign numerical multiples for such things as the defendant's role in the offense, his criminal history, his post-offense conduct, etc. The length of the defendant's sentence is determined by reference to a table which provides a maximum and minimum period of incarceration for the final point total.

The consensus of most knowledgeable critics is that the Commission's sentencing by the numbers approach is too depersonalized, too complicated, too punitive, and too burdensome of application. In a public statement, in which most of the Second Circuit judges joined, the above-described use of rigid mathematical values was said to have reduced the discretion of the sentencing judge "almost to the point where the sentencing process

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13. 28 U.S.C. § 994(d) (Supp. III 1985).

14. 28 U.S.C. § 994(e) (Supp. III 1985).

could be performed by a computer or an accountant." A report by a subcommittee member of the Association of the Bar of the City of New York stated that the "quest for scientific precision is illusory and dangerous."

Assuming that the fairness or unfairness of such a mechanical process is, in the first instance at least, a matter for Congress rather than the courts, the effect of the process upon the courts is a matter of direct judicial concern. Although it is too early to make a factually supportable appraisal of the guidelines' almost complete overthrow of existing sentencing law, it can be safely predicted that the guidelines, as presently contemplated, will impose a massive additional burden on the courts, particularly at the appellate level.

Congress clearly intended that the courts of appeals should take an active role in overseeing sentencing. Congress felt that appellate review is essential "to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines."<sup>15</sup> Appellate pronouncements also are expected to assist the Sentencing Commission in determining whether its guidelines are being implemented effectively and whether they should be revised if they have failed to achieve their intended purposes.<sup>16</sup>

In providing for review, Congress has attempted to distinguish between sentences resulting from incorrect application of the guidelines and sentences that are outside the range of applicable guidelines. The Act provides that either the government or the defendant may appeal a sentence imposed in violation of law or as the result of an incorrect application of the sentencing guidelines.<sup>17</sup> A defendant may appeal a sentence that is greater than that prescribed in the guidelines and specified in a plea agreement, if any; the government may appeal when the sentence is less than that provided in the guidelines and in a plea bargaining agreement, if any.<sup>18</sup> The facts needed to quantify the Special Offense Characteristics, Cross References, and Offender Characteristics which are used to modify the basic offense value must be established by a preponderance of the evidence. Sentencing

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15. 1984 U.S. CODE CONG. & AD. NEWS 3182, 3334.

16. *Id.* at 3361.

17. 18 U.S.C. § 3742. Appeals by a defendant are governed by subsection (a) of § 3742, while government appeals are governed by subsection (b). The grounds for review are the same for both. *Compare* § 3742(a)(1)-(4) *with* § 3742(b)(1)-(4).

18. *Id.*

hearings in this area will proliferate and appeals inevitably will follow. Because the trial court always must state the reasons for the sentence it has imposed,<sup>19</sup> reasons that will be reviewable by an appellate court, a completely new body of sentencing law is almost certain to result.

The expressed intent of Congress is to create a sentencing guidelines system that will eliminate sentencing disparities.<sup>20</sup> In discussing the so-called "shameful disparity" that presently exists,<sup>21</sup> Congress returns time and again to the subject of white collar crimes.<sup>22</sup> Unfortunately, some federal crimes, particularly white collar crimes, do not lend themselves readily to uniform classification.

One need review only a few of the cases decided under the mail fraud statute<sup>23</sup> to appreciate the varieties of culpability possible under that law. The liberal construction policy followed by the courts has changed this statute from one of limited objectives to a general prohibition of conduct "which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'"<sup>24</sup> Numerical classification of violations which will eliminate sentencing disparity under this statute is an almost impossible task. The nine Specific Offense Characteristics and one Cross Reference applicable to the "Offenses Involving Fraud and Deception" category of the guidelines, which is made applicable to mail fraud, are neither sufficiently flexible nor adequate for this purpose.

The conspiracy statute<sup>25</sup> presents a similar problem. This statute makes it unlawful to conspire to violate another criminal statute or to defraud the United States, even though a specific criminal statute has not been violated. Indeed, the statute makes it unlawful to conspire to commit any offense which Congress has

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19. See 18 U.S.C. § 3553(c) (Supp. II 1984).

20. 1984 U.S. CODE CONG. & AD. NEWS 3182, 3234.

21. *Id.* at 3248.

22. See, e.g., *id.* at 3259, 3260. Referring to the deterrent purpose of sentencing, the legislative history states: "Major white collar criminals often are sentenced to small fines and little or no imprisonment. Unfortunately, this creates the impression that certain offenses are punishable only by a small fine that can be written off as a cost of doing business." *Id.* at 3259.

23. 18 U.S.C. § 1341 (1982).

24. *United States v. Keane*, 522 F.2d 534, 545 (7th Cir.) (quoting *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967)), *cert. denied*, 424 U.S. 976 (1976); see *United States v. Siegel*, 717 F.2d 9, 23 (2d Cir. 1983) (Winter, J., dissenting).

25. 18 U.S.C. § 371 (1982).

prohibited in the interest of public policy, even though the offense itself is not a criminal act. As Justice Holmes said in *Drew v. Thaw*,<sup>26</sup> “[i]t is perfectly possible and even may be rational to enact that a conspiracy to accomplish what an individual is free to do shall be a crime.”<sup>27</sup> We may anticipate increased litigation in these areas, both at the trial and appellate levels.

Constitutional issues likewise will not be lacking when the guidelines become effective. For example, the Act provides that the controlling guidelines are those in effect on the date the defendant is sentenced rather than on the date of the crime.<sup>28</sup> Undoubtedly, someone will contend that this provision violates the constitutional prohibition against ex post facto laws. It may be that Congress is placing unjustified reliance upon cases upholding the applicability of changes in parole guidelines to defendants already sentenced.<sup>29</sup> The Parole Commission’s decision whether or not to grant parole is not part of the sentencing process.<sup>30</sup> The sentencing guidelines, as their name implies, appear to be an intrinsic part of that process. If the guidelines at the time of sentencing are more onerous than those in effect when the crime was committed, there may be merit in the argument that they violate the constitutional prohibition against ex post facto laws.<sup>31</sup>

When the Supreme Court held in *Solem v. Helm*<sup>32</sup> that claims of disproportionate excessiveness justified appellate review of sentences, Chief Justice Burger, quoting Judge Friendly, wrote in dissent that “[t]o require appellate review of all sentences of imprisonment—as the Court’s opinion necessarily does—will ‘administer the *coup de grace* to the courts of appeals as we know them.’”<sup>33</sup> Although I think it unlikely that the sentencing guide-

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26. 235 U.S. 432 (1914).

27. *Id.* at 438; *see also* *United States v. Hutto*, 256 U.S. 524, 528-29 (1921) (combination of two or more persons to accomplish criminal or otherwise unlawful purpose comes within accepted definitions of conspiracy); *United States v. Wiesner*, 216 F.2d 739, 742 (2d Cir. 1954) (conspiracy statute does not preclude indictment of person for conspiracy to commit non-criminal offense).

28. *See* 18 U.S.C. § 3553(a)(4) (Supp. II 1984).

29. *See* 1984 U.S. CODE CONG. & AD. NEWS 3182, 3260-61.

30. *Dioguardi v. United States*, 587 F.2d 572, 574 (2d Cir. 1978); *see also* *Portley v. Grossman*, 444 U.S. 1311 (1980) (Rehnquist, J.) (in chambers denial of application for stay).

31. *See* *Weaver v. Graham*, 450 U.S. 24, 28-31 (1980) (ex post facto prohibition forbids any law imposing punishment for act not punishable at time committed or imposing additional punishment to that then prescribed); *see also* H.R. REP. NO. 614, 99th Cong., 2d Sess. 3 n.3, *reprinted in* 1986 U.S. CODE CONG. & AD. NEWS 1762, 1763.

32. 463 U.S. 277 (1983).

33. *Id.* at 315.

lines will have such a disastrous effect, I agree with my Second Circuit colleagues that the proposed new procedure will impose a "massive additional burden" on the courts and that there will be a substantial increase in the number of appeals. Moreover, at least during the shakedown period of the guidelines, many of these appeals will have to be decided by citable, interpretative opinions. This obviously will place a heavy burden on already overburdened courts of appeals. Should the Sentencing Reform Act's goal of uniformity and certainty even be reached, there may well be a substantial decrease in the number of cases disposed of by pleas. An indicted defendant then should be able to anticipate what guidelines will control his sentence if he goes to trial, and it appears to be the congressional intent that judges examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine those applicable guidelines.<sup>34</sup> If the congressional intent prevails, we may anticipate a reduction in the number of guilty and nolo contendere pleas by defendants, who know that they have nothing to lose by going to trial, and a corresponding increase in the number of trials and appeals.

There is reason to doubt, however, that the Sentencing Reform Act's aim of consistent, non-disparate punishment ever will be realized completely. Americans are more inclined to be merciful than vindictive, and this is as true of most judges as it is of most laymen. Departures from the guidelines by such judges will not be overturned unless the departures are unreasonable,<sup>35</sup> and appellate courts probably will continue to show substantial deference to the decisions of the sentencing judge. Those who favor the new punitive and depersonalized concept of sentencing should of course be concerned with whether the courts will be able to handle the heavier burden it imposes upon them and whether already overcrowded federal prisons can accommodate the inevitable increase in inmate population. However, additional judges can be appointed, and new courthouses and prisons can be built. The more basic concern, as I see it, is whether judges, who deal with human beings, not numbers, are prepared to operate on the theory that disparity is "shameful" and to apply the sentencing guidelines in the literal fashion that the Commission apparently intends.

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34. 1984 U.S. CODE CONG. & AD. NEWS 3182, 3246.

35. 18 U.S.C. § 3742(d)(3).

