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Sentencing: Disparity, Inconsistency, and a New Federal Criminal Code

In 1966, Congress established a National Commission on Reform of Federal Criminal Laws.¹ The duties of the Commission in reforming Title 18 were set forth as follows:

The Commission shall make a full and complete review and study of the statutory and case law of the United States which constitutes the federal system of criminal justice for the purpose of formulating and recommending to the Congress legislation which would improve the federal system of criminal justice. . . .²

Although the Commission concentrated on several problem areas within Title 18,³ this article will examine only the Commission's recommendations to improve the imprisonment provisions of the federal sentencing system. Congress felt a particular need for reform of federal sentencing procedures. This can be seen through its directive that the Commission

. . . make recommendations for revision and recodification of the criminal laws of the United States, including . . . *such changes in the penalty structure* as the Commission may feel will better serve the ends of justice.⁴

The Commission has pinpointed three major shortcomings in the federal sentencing system: (1) mandatory sentences,⁵ (2) inconsistent penalty provisions,⁶ and (3) disparity in sentencing.⁷ The problem of mandatory sentences, *i.e.*, statutory provisions fixing minimum prison terms without the opportunity for probation or parole, shall not be considered here since it is only rarely found in federal statutes and generally limited to federal narcotics

1. Act of Nov. 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516, *as amended*, Act of July 8, 1969, Pub. L. No. 91-39, 83 Stat. 44.

2. *Id.* § 3.

3. For example, the proposed code will be more comprehensive, better integrated, and suggestive of a more restrained approach as to what constitutes federal criminal jurisdiction. FORWARD TO FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS at xi (1971) [hereinafter cited as PROPOSED NEW FEDERAL CRIMINAL CODE].

4. Act of Nov. 8, 1966, Pub. L. No. 89-801, 80 Stat. §§ 1516, *as amended*, Act of July 8, 1969, Pub. L. No. 91-39, 83 Stat. 44 (emphasis added).

5. WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, Vol. II, at 1251 (1970) [hereinafter cited as WORKING PAPERS].

6. *Id.* at 1246.

7. *Id.* at 1255.

laws.⁸ In addition, statutory language included in the Commission's proposed new Federal Criminal Code appears to solve the problem simply by allowing indefinite sentences, probation, and parole in all federal convictions.⁹

Inconsistency In Penalty Provisions

Inconsistency in penalty provisions has been one of the foremost problems of our sentencing system. For example, a person convicted of making a "false, fictitious, or fraudulent" claim against a government department or agency subjects himself to five years imprisonment and a \$10,000 fine,¹⁰ while a person convicted of a similar false claim in excess of \$100 against the Post Office Department is subjected only to one year imprisonment and a \$500 fine.¹¹ The existence of this disparity leads arguably to unequal treatment of some criminals. Prison discipline likewise is affected when inmates discover that their sentences are harsher than those of prisoners convicted of more serious offenses.¹²

The principal factor leading to inconsistent penalty provisions is the "piecemeal" approach to the treatment of criminal issues. Title 18, like most state penal codes, was enacted on a "piecemeal" basis by "numerous differently composed legislatures"¹³ with their own view as to what sentence best fits the crime. Professor Herbert Wechsler has bitterly criticized this "piecemeal" approach.

No branch of penal legislation is, in my view, more unprincipled or more anarchical than that which deals with prison terms that may or sometimes must be imposed on conviction of specific crimes. The legislature typically makes determinations of this order not on any systematic basis but rather by according its *ad hoc* attention to some discrete area of criminality in which there is a current hue and cry. Distinctions are thus drawn which do not have the slightest bearing on the relative harmfulness of conduct and the consequent importance of preventing it so far as possible, on the probable

8. *Id.* at 1252.

9. PROPOSED NEW FEDERAL CRIMINAL CODE. Consider, for example, the following sections:

§ 3201(2)—A sentence of imprisonment of more than six months shall be an indefinite sentence.

§ 3101(1)—[a] person who has been convicted of a federal offense may be sentenced to probation or unconditional discharge. . . .

§ 3401(1)—[e]very prisoner sentenced to an indefinite term of imprisonment shall be eligible for release on parole upon completion of the service of any minimum term, or, if there is no minimum, at any time.

10. 18 U.S.C. § 287 (1964).

11. *Id.* § 288 (1964).

12. WORKING PAPERS at 1246.

13. Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1138 (1960).

dangerousness of the individual whose conduct is involved, or even on a public demand for heavy sanctions which is so inexorable that it cannot safely be denied. What dictates legislation is the simple point of politics that reelection demands voting against sin, whenever ballots on the question must be cast.¹⁴

Congressman Celler has voiced a similar but more reserved criticism:

The penalties imposed at other times and places have reflected the cultural preferences and exigencies of the era rather than any real attempt to weigh the value of the methods in use.¹⁵

It appears that a primary cause of sentence inconsistency is the enactment of criminal statutes with little consideration of what sentences are currently authorized for equally grave crimes.¹⁶ Thus, a congressional committee considering what maximum sentence to fix for robbery of a post office, for example, should consider initially the present penalty for robbery of other federal buildings.

As a result of this "piecemeal" approach, there are a large and irrational number of federal sentencing categories.¹⁷ Title 18 contains some 55 distinct punishment categories. Among these categories are 18 separate and distinct maximum prison terms ranging from 30 days to life imprisonment and death,¹⁸ 14 different fine levels ranging from \$50 to \$25,000,¹⁹ and various combinations of other prison terms and fines. Such numerous sentencing distinctions are clearly "in excess of those which could rationally be drawn on the basis of relative harmfulness of conduct or the probable dangerousness of the offenders."²⁰ Consequently, the Commission has recommended that Congress place criminal sentences within a few broad categories relating to the seriousness of the crime.

The Proposed Code

The Commission has recommended establishing six categories of federal offenses.²¹ Arguably, such categorization would

14. Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 472-73 (1961).

15. Pilot Institute on Sentencing, 26 F.R.D. 231, 243 (1960) (remarks of Rep. Celler).

16. See note 13 *supra* at 1139.

17. *Id.* at 1250.

18. 30 days, 90 days, 3 months, 6 months, 1 year, 2 years, 3 years, 4 years, 5 years, 6 years, 7 years, 10 years, 15 years, 20 years, 25 years, 30 years, life, and death. WORKING PAPERS at 1250.

19. \$50, \$100, \$150, \$200, \$250, \$300, \$500, \$1,000, \$2,000, \$3,000, \$5,000, \$10,000, \$20,000, and \$25,000. *Id.*

20. THE PRESIDENT'S COMMISSION OF LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 15 (1967), [hereinafter cited as TASK FORCE REPORT: THE COURTS].

21. PROPOSED NEW FEDERAL CRIMINAL CODE § 3002.

achieve a sense of order, and yet, at the same time, permit legislative grading of offenses of different levels of severity within controlled limitations.²²

Specifically, Section 3002 of the proposed code establishes the following categories: Class A, B and C felonies, Class A and B misdemeanors, and infractions. As might be expected, the Class A felony includes the most serious offenses such as intentional murder and forcible rape while the infraction category includes minor offenses such as speeding violations. Authorized prison terms for each category are as follows:

Class A felony	—	no more than 30 years
Class B felony	—	no more than 15 years
Class C felony	—	no more than 7 years
Class A misdemeanor	—	no more than 1 year
Class B misdemeanor	—	no more than 30 days
Infractions	—	no prison term ²³

Under the proposed code, the maximum penalties imposed would depend upon the category of the offense. Accordingly, proponents argued that such categorization would foster consistency of treatment for existing offenses, and help in determining the most appropriate sentencing level for new offenses.²⁴

Even if the Commission's recommendations are followed, the problem of sentence inconsistency, although reduced, will still exist. Different generations frequently hold divergent views as to the seriousness of specific offenses. Thus, when enacting a new criminal law to deal with current problems, the enacting Congress might believe the crime to be a Class B felony, whereas a subsequent Congress would think that a Class A misdemeanor designation was more appropriate.²⁵ Unfortunately, as these laws become antiquated, there is little likelihood of repeal or amendment.

Based on the above reasoning, many of the problems prevalent in the present criminal code will carry over to the new code. As Professor Wechsler has stated, "the law that governs sentence and correction needs sustained and critical attention."²⁶ Therefore, although the Commission's recommendations go far toward curing present deficiencies, more is needed. Congress should consider establishing the National Commission on Reform of Federal Criminal Laws as a permanent body, whose sole function would be the periodic review of the Code.

22. WORKING PAPERS at 1303.

23. PROPOSED NEW FEDERAL CRIMINAL CODE § 3201.

24. WORKING PAPERS at 1259.

25. A good example is the federal narcotics law.

26. See Wechsler, note 14 *supra* at 493.

Disparity In Sentencing

Although the twentieth century has witnessed a remarkable trend toward greater judicial discretion in sentencing, this has not always been so:

[T]he federal sentencing system started with the assumption that the Congress should control sentencing and that no discretion should be delegated either to the sentencing judge or a parole board.²⁷

The trend toward greater judicial discretion did not continue unchallenged. Critics charged that greater discretion would mean greater disparity and, in turn, greater injustice. Their fears were best summarized by Professor Glueck who noted that "the entrusting of undisciplined discretion [could] lead, at worst, to tyrannical abuse of power and, at best, to erratic decisions."²⁸

Nevertheless, these critics represented the minority view. Proponents of more flexibility within the sentencing system readily conceded the possibility of greater disparity, but insisted that each individual case had its own peculiar circumstances, and that different circumstances required different sentences. Thus, the theory advanced was that

although . . . a burglary [was] always a burglary, not all burglars [were] alike in the motivations of their crime, in their mental and emotional makeup, social background, probability of recidivism and such circumstances which [were] certainly every bit as relevant to the aim of protecting society as [was] the crime itself, if not more so. Such factors [made] each crime a unique event and each criminal a unique individual.²⁹

Today, there is a widespread belief that some degree of disparity is justifiable.³⁰ For example, the President's Commission on Law Enforcement and Administration of Justice lists three justifications for such a belief:

- (1) the need for variations based on relevant differences in offenders;
- (2) the fact that statutory definitions of crimes encompass a fairly broad range of conduct having varying degrees of seriousness; and
- (3) the effect of various geographical factors (*e.g.*, differences in public apprehension regarding crime, and the need to offer more lenient sentences for defendants assisting public prosecutors).³¹

27. Pilot Institute on Sentencing, 26 F.R.D. 231, 257 (1960) (remarks of Judge Campbell).

28. Glueck, *The Sentencing Problem*, 20 FED. PROB. 15 (1956).

29. *Id.* at 16.

30. TASK FORCE REPORT: THE COURTS at 23.

31. *Id.*

While penologists have been placing such emphasis on the individual, and judges on the tailoring of their sentences to fit each particular case,³² the problem remains that two judges will rarely impose the same sentence even though the circumstances are nearly identical.³³ Unfortunately, reducing disparity significantly is a formidable, if not impossible task. As Congressman Celler noted, "[W]ith 248 federal district judges and 248 different personalities, it is understandable that disparities should develop."³⁴ That the Congressman's remark was an understatement can be seen from the following survey of average sentences imposed by a few selected federal courts:

- 1) Narcotics Violations (1965)
 - 83 months (10th Circuit)
 - 44 months (3d Circuit)
- 2) Forgery (1962)
 - 68 months (Northern District of Mississippi)
 - 7 months (Southern District of Mississippi)
- 3) Auto Theft
 - 47 months (Southern District of Iowa)
 - 14 months (Northern District of New York)³⁵

It should be noted that disparity is not limited solely to prison terms. Probation has been used by some judges in less than 10 percent of their cases, while others have utilized it up to 80 percent of the time.³⁶

Finally, although judicial discretion is the greatest single cause of disparity, the absence of any flexibility in sentencing would lead to similar results. No single statutory definition can encompass the "infinite variations in the gravity of crimes."³⁷ Nor can a statutory definition ever provide adequately for the diverse character of individual offenders.³⁸

Legislatively fixed sentences are as undesirable as unbridled judicial discretion. Presumably, any reasonable solution lies between these two extremes. The success of the National Commission depends basically on whether the Commission has located and defined this point.

32. See Glueck, note 28 *supra* at 15-16.

33. See, e.g., Gaudet, Harris and St. John, *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. CRIM. L.C. & P.S. 811 (1933). See also Everson, *The Human Element in Justice*, 10 J. CRIM. L.C. & P.S. 90 (1919); Lane, *Illogical Variations in Sentences of Felons Committed to Massachusetts State Prison*, 32 J. CRIM. L.C. & P.S. 171 (1941).

34. See note 15 *supra* at 242.

35. TASK FORCE REPORT: THE COURT at 23.

36. Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 56 (1966).

37. See Wechsler, *supra* note 14 at 478.

38. *Id.*

Under The Proposed Code

At first glance, certain sections of the proposed code appear to enhance rather than reduce disparity. For example, minimum sentences are clearly discouraged under Section 3201(3) and allowed only for Class A and Class B felonies, and then only in exceptional cases.³⁹ While it has been argued that fixing lower minimums (or doing away with them completely) is sound policy from the standpoint of flexibility within the courts, it cannot but increase disparity since "variations formerly confined to maxima, will now extend to minima as well."⁴⁰

Should Congress accept the proposed new code, prison terms would become generally less severe than those existing today. One factor contributing to this result would be the code's innovative provision for parole within every prison sentence. Section 3201(2) states in part that:

[t]he maximum term of every indefinite sentence imposed by the court shall include a prison component and a parole component. The parole component of such maximum term shall be (i) one-third for terms of nine years or less; (ii) three years for terms between nine and fifteen years, and (iii) five years for terms more than fifteen years; and the prison component shall be the remainder of such maximum term.⁴¹

The above provision represents a significant departure from current practice since parole becomes an integral part of the sentence. Contrast this with the present system under which a dangerous offender, *serving all his term in prison*, would not be subject to parole whereas a rehabilitated or non-dangerous offender, *released from prison early*, would be subject to a lengthy parole extending over the remaining period of his sentence.

As an example of why prison terms would be shorter under the proposed code, consider the following illustration. Although a 30 year maximum sentence would be authorized for commission of a Class A felony, the maximum time a criminal could be imprisoned would be 25 years, since maximum terms under the proposed code include both a prison and a parole component and the parole component for a Class A felony would probably be five

39. PROPOSED NEW FEDERAL CRIMINAL CODE § 3201(3) states the following:
An indefinite sentence for a Class A or B felony shall have no minimum term unless by the affirmative action of the court a term is set at no more than one-third of the prison component actually imposed. No other indefinite sentence shall have a minimum term. The court shall not impose a minimum term unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required because of the exceptional features of the case. . . .

40. See Wechsler, *supra* note 14 at 479.

41. PROPOSED NEW FEDERAL CRIMINAL CODE § 3201(2).

years.⁴² Similarly, the only time a court could see a maximum term of greater than 20 years for a Class A felony, 10 years for a Class B felony, or 5 years for a Class C felony, would be in the case of a "dangerous special offender." Generally, the "dangerous special offender" category would include persistent felony offenders; professional criminals or leaders of organized crime; dangerous, mentally abnormal offenders; and offenders who used firearms or other destructive device in the commission.⁴³ Thus, most Class A felons who appear to be liable for a maximum term of 30 years would at most, barring some facts making him a danger to the community, subject himself to a 20 year maximum term (15 years imprisonment and five years parole). Note that all of the above mentioned terms are maximum terms and in no way indicative of how much time the felon will actually spend in prison. This is particularly significant since there are enormous differences between sentences the system authorizes and sentences imposed by judges. Furthermore, few felons actually serve their full sentences as originally imposed.⁴⁴

Under section 3201(2), all prison sentences over six months would be indefinite. Since judges and parole authorities would thereby retain significant discretion in setting the length of sentences or the time of parole, the problem of disparity in sentencing will remain a troublesome one even in the event that Commission recommendations are accepted by Congress and enacted into law. The new code, however, would ease the problem somewhat by setting forth various criteria which, "while not controlling the discretion of the court, shall be accorded weight in making determinations."⁴⁵ Examples of factors to be considered in determining what sentences should be accorded, or at what time to grant parole, are found in Sections 3101, 3202, and 3402. They include such factors as danger of further criminal activity, amount of provocation, the desire for restitution to victims, past records, cooperation with officials, and effect on institutional discipline.

Conclusion

The present federal criminal code is grossly inadequate. It is not structured rationally, and is little more than a poorly organized compilation of existing criminal statutes. The most promising aspect of the Commission's proposed code is the attempt to integrate the various code sections into a rational

42. *Id.*

43. For a precise definition of "dangerous special offender" see PROPOSED NEW FEDERAL CRIMINAL CODE § 3202(2).

44. WORKING PAPERS at 1256.

45. PROPOSED NEW FEDERAL CRIMINAL CODE § 3101(3).

scheme.⁴⁶ This is particularly important from the standpoint of sentencing because a criminal offense considered serious enough by Congress to rate a Class A or B felony designation, would automatically authorize the imposition of a Class A or B felony sentence. To this extent, sentences under the proposed code would be more consistent than sentences under current methods. But as noted earlier, mores change and if the new code is to maximize consistency in sentencing, the National Commission on Reform of Federal Criminal Laws should become a permanent body whose function would be to review the code periodically and make recommendations to Congress for its modernization. Without such a body, or other provision for modernization, the new code would once again become stagnant and inconsistent.

Under the Commission's proposed code, there would probably be some lessening of disparity in sentencing. In part, this would be accomplished by directing the attention of a judge to "those factors which the legislature had determined to be relevant to the sentencing decision."⁴⁷

It appears that the only other successful method within the proposed code for promoting parity in sentencing is the curtailment of long sentences which necessarily leads to a greater limitation of the trial judge's discretion. This is of limited value, however, due to the Commission's recommendation for curtailment of minimum sentences.

Regardless of its shortcomings, the Commission's Report represents an initial step that, if enacted by Congress, will result in sound reforms long overdue.

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46. The Commission has borrowed substantially from other modern penal codes. *See, e.g.*, ADVISORY COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT (1963); AMERICAN LAW INSTITUTE, MODEL PENAL CODE (P.O.D. 1962); AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (Approved Draft, 1968).

47. TASK FORCE REPORT: THE COURTS at 17.