

WORKING DRAFT

DISPARITY IN FEDERAL SENTENCING:  
THE HISTORY, CONSEQUENCES AND PROPOSED  
REMEDY FOR UNFETTERED JUDICIAL DISCRETION

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SEPTEMBER 1988

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## INTRODUCTION

Over 187 years ago, Thomas Jefferson addressed the nation with these words:

Equal and exact justice to all men, of whatever state and persuasion, religious or political. These principles form the bright constellation which has gone before us, and guided our steps, through an age of Revolution . . . and should we wander from them . . . let us hasten to retrace our steps and regain the road which alone leads to peace, liberty and safety.<sup>1</sup>

The principle of "Equal Justice under Law"<sup>2</sup> is solidly embedded in the theoretical foundations of this country. We read, in documents such as the Declaration of Independence and the Constitution that equality is a universal right to be guaranteed by fair laws and just governments.<sup>3</sup> These principles are so fundamental that they hardly bear repeating. Unfortunately, there are times in the history of this country where even the most basic of our beliefs become obscured and are not properly applied. The sentencing of criminals in federal court seems one

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<sup>1</sup>Thomas Jefferson, First Inaugural Address, March 4, 1801.

<sup>2</sup>These words can be found engraved over the entrance to the U.S. Supreme Court building.

<sup>3</sup>"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." The Declaration of Independence para. 2 (U.S. 1776). "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. IX

such instance of inequality and unequal justice. As Judge Marvin Frankel lamented: "We claim, remember, to have a government of laws, not men. That promise is broken to the hope when a sentence may range from zero up to thirty or more years in the unfettered discretion of miscellaneous judges . . . The result . . . is a wild array of sentencing judgments without any semblance of consistency demanded by the ideal of equal justice"<sup>4</sup>.

For a variety of reasons,<sup>5</sup> intolerable levels of disparity, discrimination, inequality and unfairness seem to have crept into the law of federal sentencing over the past 75 years.

✓ Attorney General Frank Cummings, writing as early as 1938, noted:

My studies on the disposition of criminal cases in the Federal courts have led me to the conclusion that there frequently occur wide disparities and great inequalities in sentences imposed in different districts, and even by different judges in the same district, for identical offenses involving similar states of facts. . . . This situation makes it difficult to maintain that equal, even-handed justice is obtained.<sup>6</sup>

Judge Frankel was a principal actor in the effort to direct national attention to the unpleasant fact of sentencing inequality. In 1972, Frankel wrote: "The evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge amounts of discretion,

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<sup>4</sup>Frankel, Criminal Sentences: Law Without Order, 6-7 (1972). Judge Frankel continued elsewhere in his book: "The sentencing powers of judges are, in short, so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all." Id. at 8.

<sup>5</sup>See Notes 19-37, and accompanying text.

<sup>6</sup>Reprinted in McGuire and Holtzoff, The Problem of Sentence in the Criminal Law, 20 B.U.L. Rev. 423, 428 (1940). The Attorney General also recommended to Congress in 1938 that the law be changed to allow for appellate review of sentences.

mete out widely divergent sentences where the divergences are explainable only by the variations among the judges, not by material differences in the defendants or their crimes."<sup>7</sup>

Echoing these same sentiments, commentators referred to federal sentencing as a "national scandal,"<sup>8</sup> and as a "game of chance" not unlike roulette.<sup>9</sup> One <sup>critic</sup> ~~commentator~~ bluntly summarized the <sup>his observations</sup> system of federal sentencing <sup>as</sup> in the following <sup>s</sup> manner: "In perhaps no other corner of the criminal justice map is it truer that the quality of justice is a function of the luck of the draw."<sup>10</sup>

This paper <sup>begins by</sup> ~~will~~ <sup>ing</sup> explore some of the alleged causes and consequences of sentencing disparity, before proceeding to a

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<sup>7</sup>Frankel, Criminal Sentences: Law Without Order, 21 (1972). These words were echoed by Senator Jepson:

As anyone who has closely examined Federal sentencing procedures knows, there is often very little consistency on the part of Federal judges. It is hard for anyone to accept the notion that a crime might be more heinous in one part of the country than another despite the fact that the circumstances surrounding the case are identical. It is not hard to find situations where individuals convicted of drug possession might receive a very light sentence in one court while another person convicted on the same offense receives a very tough sentence in another court. 130 Cong. Rec. S 755 (daily ed. January 2, 1984).

<sup>8</sup>O'Donnel, Churgin & Curtis, Toward a Just and Effective Sentencing System, pp. 1-15 (1977). See also 130 Cong. Rec. S 563 (remarks of Senator D'Amato).

<sup>9</sup>Kennedy, "Criminal Sentencing: A Game of Chance," 60 Jud. 208 (1976); See also 130 Cong. Rec. S 525 (daily ed. January 30, 1984) (statement of Senator Kennedy).

<sup>10</sup>Reform of the Federal Criminal Laws: Hearings on S. 1437 before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess., 8897 (statement of Pierce O'Donnell, June 8, 1977).

discussion of the dramatic remedy proposed by Congress--the federal sentencing guidelines. In Part I, we introduce some of the difficulties involved in defining and measuring disparity. Part II provides a brief review of the historical background explicating the rise in the disparate treatment of criminals, including a brief review of the leading empirical studies documenting the extant disparity. Part III focuses on the *major* consequences of disparity: uncertainty, inequality and discrimination. Part IV examines the specific legislative response of Congress to the sentencing crisis. Part V *provides an analysis* ~~concludes~~ ~~with an examination~~ of the Federal Sentencing Guidelines promulgated by the United States Sentencing Commission and an empirical examination of how the Guidelines should reduce sentencing disparity. Part VI concludes with a statement of the limits and barriers <sup>to</sup> of the intended reform.

#### PART ONE: PROBLEMS IN DEFINING AND MEASURING DISPARITY

Before moving to history and research, it is instructive to note the difficulties in defining the concept of sentencing disparity. Some empiricists, for example, have asserted that there are at least four distinct forms of sentencing disparity.<sup>11</sup> First, there is <sup>*that category thought to be*</sup> merely the appearance of disparity that occurs when cases appear to be alike on the surface, but in reality are fundamentally different because there are material differences

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<sup>11</sup>Research on Sentencing: The Search for Reform, 75-77, Blumstein, Cohen, Martin & Tonry, eds., (1983)

between the defendants. For example, one defendant may manifest remorse, while another remains belligerent.<sup>12</sup> A judge taking this <sup>past</sup> conviction behavior into account might justifiably mete out two distinctive sentences for offenders whose offense and prior record <sup>characteristics are</sup> similar.

Second, there is <sup>that category of</sup> disparity which may be introduced as a matter of time-bound public or social policy. This is particularly common when politicians and government officials launch a campaign against a particular type of criminal behavior, without regard for how the new penalty fits within the existing sentencing hierarchy.<sup>13</sup> <sup>to illustrate,</sup> ~~For example,~~ the sentences for insider trading may be increased dramatically as a result of heightened public concern for the offense. While the increased concern may be justified, the desire to "get tough" may prompt sentences out of line relative to more generally agreed upon offense seriousness rankings, <sup>in similar fraud and property offenses.</sup>

Third, there is interjurisdictional disparity. This is that <sup>category</sup> ~~kind~~ of disparity which occurs between separate jurisdictions;

<sup>of the country,</sup> for example, in the federal courts, between urban and rural, or <sup>region</sup> north and south. Such sentencing differences are often explained by allusions to <sup>varying</sup> community standards regarding certain offenses, or pressures due to localized prison overcrowding.<sup>14</sup>

Finally, there is disparity attributable to bench bias, or

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<sup>12</sup>Id. at 75.

<sup>13</sup>Id. at 76.

<sup>14</sup>Id. at 76.

*less benign explanations point to whom  
a thoughtless disregard for equality, and equity and  
uniformity, and patent discrimination for or against*

the individual judge before whom the offender appears. This disparity occurs when defendants with similar criminal records, found guilty of similar criminal conduct, are nonetheless given dissimilar sentences merely because they appeared before different judges.<sup>15</sup> Benign explanations point to fundamental philosophical differences over the purposes of sentencing among judges, or to differences in the experiences, training and background of each separate judge.<sup>16</sup> It is this last form of disparity that has drawn the greatest attention.<sup>17</sup>

*some groups largely on the basis of suspect classifications*

Simply stating, however, that disparity is the imposition of

<sup>15</sup>Disparity also occurs when defendants commit dissimilar crimes but are nonetheless given similar sentences. An illustration of this type of disparity is found in several sentences handed down by Judge A. Andrew Hauk, from the Central District in California: Nathalie Soubiran, a French student residing in the U.S. on a student visa, was arrested while attempting to smuggle a half kilogram of cocaine through customs. During investigation it was revealed that she had been working in the U.S. in violation of the terms of her visa. She had no criminal record. Judge Hauk sentenced her to 5 months probation. In a second case, Jose Alvarez, a Columbian native, was arrested for his involvement in a large-scale drug ring. Officers traced the transport and sale of over 30 kilos of cocaine during their investigation and seized an additional 15 kilos at the time of arrest. Alvarez was considered a partner in the operation. He had no criminal record. Judge Hauk's sentence: 5 months probation. In a third case, Carolyn Jeffery was arrested shortly after robbing a savings and loan bank. She was connected to 5 other similar robberies, amounting to a total loss of over \$6,000. Jeffery had a prior criminal record which included two burglary convictions. Her sentence: 5 months probation.

<sup>16</sup>Id. at 77.

<sup>17</sup>This last type of disparity is specifically defined as the variety which Congress wished to avoid. 28 U.S.C. § 991(b)(1)(B) states that the purposes of the United States Sentencing Commission are, inter alia, to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . "

different sentences on similarly situated defendants masks an important conceptual problem. How does one determine when two defendants are similarly or dissimilarly situated? Two defendants convicted of the same crime may appear to be similarly situated, but there may be important <sup>material</sup> differences between them, either in the nature of the crime ~~and the manner in which~~ the manner in which it was committed, or in the background of the offender. To elaborate, although convicted of the same crime, one defendant may have been a more culpable actor in the criminal enterprise. One defendant may have a long criminal record while the other has none. One may be addicted to drugs. One may have a job and an education while the other has neither. One may have family responsibilities. Some of these differences may be relevant and appropriate to the sentencing decision, and others are not.

Because no two individuals and no two crimes are completely alike, no two defendants will ever be identically situated. The term "similarly situated" should be understood to mean <sup>identical</sup> identical or equivalent in all relevant respects. When two superficially similar defendants are, in fact, different in some relevant way, then the imposition of different sentences is either warranted disparity or it is not disparity at all.

<sup>the</sup> Relevance of the above is the mandate it carries for empirical studies and the two subjective judgments which must then be made. <sup>in studying the situation of unmarked disparity</sup> First, the researcher must decide which sentencing factors are relevant. For example, if a certain factor was used to differentiate sentences for offenders convicted of the same



offense (e.g., age), those who feel the factor is relevant will not conclude that the different sentences evidence disparity; those who perceive the same age factor as irrelevant will reach the opposite conclusion. The more factors the researcher deems to be relevant, the less unwarranted disparity he or she will find.<sup>18</sup>

Second, the researcher <sup>must</sup> make a subjective decision when deciding which sentencing factors are equivalent. For example, the use of a gun during a robbery may or may not be deemed equivalent to the use of a knife. Two past misdemeanor convictions may or may not be deemed equivalent to one past felony conviction in assessing similar criminal history. An alcoholic defendant may or may not be deemed equivalent to a defendant addicted to heroin. A defendant who embezzles \$100,000 from one victim may or may not be deemed equivalent to a defendant <sup>who</sup> ~~to~~ embezzles \$100,000 from ten victims. Judges are faced with making these and similar decisions regarding equivalency every day. If the researcher agrees with the judge's decision to equate certain factors, less disparity will be found. <sup>As the author, the above forces us to recognize that</sup> Because there are an infinite number of potentially relevant sentencing factors, sentencing disparity can never be measured with absolute precision. Two defendants may have similar or

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<sup>18</sup>By interviewing judges, researchers are sometimes able to determine which factors are generally used in the imposition of sentences. See e.g. Clancy, et al., Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity, 72 J. of Crim. L. & Criminology 524 (1981); Diamond & Zeisel, Sentencing Councils: A Study of Sentencing Disparity and its Reduction, 43 U. Chi. L. Rev. 109 (1975).

equivalent cases with respect to five significant sentencing factors, yet they are given different sentences. Before concluding that unwarranted sentencing disparity is present, it is necessary to verify that no other relevant factors are present which may distinguish one defendant from the other. If there is, what appears to be unwarranted disparity may be, in fact, a justifiable difference.

The impossibility of identifying every relevant sentencing factor suggests that there is always the potential for a small range of <sup>acceptable or tolerable</sup> sentencing disparity. This range cannot be labeled as warranted or unwarranted because it may be attributable to an unidentified relevant sentencing factor. Still, most sentencing disparity can be traced to identifiable factors which are recurring and can be sufficiently identified. In addition, the absence of relevant factors can be observed and, in these cases, any disparity observed may be labeled as unwarranted.

In accordance with the above, <sup>research effort</sup> any ~~program~~ aimed at measuring disparity must necessarily decide (1) which sentencing factors are relevant, (2) which are equivalent, and (3) what is the range of tolerable disparity. It is inevitable that researchers will reach different conclusions, even if the same facts are used, because they will resolve these three threshold issues in different ways.<sup>19</sup>

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<sup>19</sup>The Sentencing Guidelines promulgated by the United States Sentencing Commission radically alters the study of sentencing disparity by resolving these three questions in a universal fashion. The Guidelines (1) specify which sentencing factors <sup>are here</sup> relevant, (2) which factors are equivalent, and (3) what is the

been suggested as

measured

## PART TWO: HISTORICAL BACKGROUND

### A. From the Colonies Through the Seventies

Like the European systems they left behind, the early colonial systems of criminal justice were based largely on principles of retribution.<sup>20</sup> Capital and corporal punishments were the norm, with fines levied only for economic crimes. Those who could not pay were whipped, placed in stocks, or branded. The colonial legislatures attempted to set fixed or determinate sentences for each criminal offense.<sup>21</sup> Many of the criminal codes were, however, incomplete; in these instances, judges were provided little direction as to the choice of punishment. Jails were still a novel concept, used primarily to hold those awaiting trial.<sup>22</sup>

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range of tolerable sentencing disparity. It ~~will~~ <sup>should</sup> be much easier to evaluate sentencing disparity in the more honest and open sentencing system created by the Sentencing Reform Act. By definition, unwarranted sentencing disparity only occurs under the guideline system if the Commission makes an incorrect policy judgement regarding which factors are relevant and equivalent, or if a sentencing court departs from the Guidelines based on an irrelevant factor. The Commission itself may correct this first form of unwarranted disparity by means of the amendment process, while courts of appeal are available to correct the second type of disparity.

<sup>20</sup>Orland, From Vengeance to Vengeance: Sentencing reform and the Demise of Rehabilitation, 7 Hofstra L. Rev. 29, 31 (1978). See also National Institute of Justice, U.S. Dep't of Justice, Sentencing Reform in the United States: History, Content and Effect 2 (1985); Dershowitz, Criminal Sentencing in the United States: An Historical and Conceptual Overview, 423 Annals 124-125 (1976).

<sup>21</sup>Dershowitz, Criminal Sentencing in the United States, supra note 16, at 124.

<sup>22</sup>Dershowitz, Criminal Sentencing at 124-125.

After the War of Independence, the criminal codes of most states underwent major revision. An oft held belief was that because the British system of justice was so harsh, juries were refusing to convict offenders--thereby thwarting the judicial system.<sup>23</sup> During this period, state legislatures began to embrace the policies of general deterrence; concomitantly, the use of the death penalty and other forms of corporal punishment were severely reduced.<sup>24</sup> In their place, states began to turn to imprisonment--not as a form of punishment, but as a means of reforming the prisoner--a concept first developed in European monasteries.<sup>25</sup> It was believed that through a regimented system of discipline, labor and religious exhortation, the prisoner could be "cured" of his evil ways.<sup>26</sup>

Throughout this period, however, and up through 1870, legislators retained most of the discretionary power over criminal sentencing. Judges were given some sentencing discretion, but only within ranges that were very narrow,

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<sup>23</sup>Rothman, If Prison, How Much? in Justice in Sentencing 46-47 (Orland & Tyler, eds. 1974).

<sup>24</sup>Id.

<sup>25</sup>Kittrie, The Right to Be Different (1971), in Sentencing and the Correctional Process 17 (F. Miller, ed. 1976).

<sup>26</sup>See Rothman, The Discovery of Asylum (1971). An early proponent of this rehabilitative theory was Dr. Benjamin Rush, who with the Philadelphia Society for Alleviating the Miseries of Public Prisons, helped to establish the Walnut Street Jail. This jail was a early proving ground for the new theory of individualized reformatory incarceration. Id.

especially compared to later developments.<sup>27</sup> Moreover, sentences were fairly rigid, not generally subject to reductions once incarceration began. It was this rigidity which caused many prisoners to "lose hope", prompting the prison riots of the early 1900's.

In 1870, the rehabilitative theory of prisons and punishment was brought to the forefront of attention by the National Congress of Prisons. The Congress voted for a Declaration of Principles wherein they stated that crime was:

a moral disease, of which punishment is the remedy. The efficiency of the remedy is a question of social therapeutics, a question of the fitness and the measure of the dose . . . . punishment is directed not to the crime but to the criminal . . . . The supreme aim of prison discipline is the reformation of criminals and not the infliction of vindictive suffering.<sup>28</sup>

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<sup>27</sup>Dershowitz, Criminal Sentencing, at 126. See, U.S. v. Grayson, 438 U.S. 41, 45-48 (1978).

<sup>28</sup>Transactions of the National Congress of Prisons and Reformatory Discipline, (American Correctional Association ed. 1970). This theory of reform later took on the title of "positivist criminology." It was popular to speak of crime in medical terms--crime was no more or less than a treatable disease, as the 1931 Wickersham Commission explained:

Physicians, upon discovering disease, cannot name the day upon which the patient will be healed. No more can judges intelligently set the day of release from prison at the time of trial. Boards of parole (on the other hand) can study the prisoner during his confinement . . . . Within their discretion they can grant a comparatively early release to youths, to first offenders, to particularly worthy cases who give high promise of leading a new life . . . and keep vicious criminals in confinement as long as the law allows.

National Commission of Law Observance and Enforcement (Wickersham Commission), Report on Penal Institutions, Probation and Parole, 142-43 (1931).

Coinciding with the theory of prison as a rehabilitative institution, and justice as aimed at individual restoration, was the development of the then innovative indeterminate sentence. So long as reformation was the principal goal of imprisonment, it was reasoned that the prisoner should be sentenced until he or she had reformed--which was by definition, an indeterminate time.<sup>29</sup> It was not long before these novel ideas reached the ears of state legislators. Attracted by both the putative practical and humanitarian potential, states seized upon this new construct as the progressive response to the growing problem of crime. Between 1880 and 1899, seven states passed indeterminate sentencing laws. From 1900 to 1911, another twenty-one states formally joined the ranks.<sup>30</sup> By the 1960's, every state in the nation had an indeterminate sentencing system of one form or another.<sup>31</sup>

This "enlightened" reform movement brought with it an important change in the relationship between the legislature and the judiciary. Legislatures across the country made a conscious choice to delegate much of the responsibility for sentencing to

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<sup>29</sup>Thus the Prison Congress wrote: "Preemptory sentences ought to be replaced by those of indeterminate duration--sentences limited only by the satisfactory proof of reformation should be substituted for those measured by the mere lapse of time." Transactions of the National Prison Congress, supra note 19.

<sup>30</sup>Zalman, The Rise and Fall of the Indeterminate Sentence, 24 Wayne L. Rev. 45 (1977).

<sup>31</sup>National Institute of Justice, U.S. Dep't of Justice, Sentencing Reform in the United States at 6.

the judiciary and the corrections departments. According to the evidence, they delegated with a vengeance.<sup>32</sup> Under a system which sought to rehabilitate prisoners through indeterminate imprisonment, it was assumed that the effectiveness of the process depended on the existence of maximum discretion--both for judges and parole authorities.<sup>33</sup>

Not only were judges free to choose the length of the sentence, but there was, as well, a complete freedom to choose sentencing goals and policy statements to guide the judge in selecting a rationale for his or her decision. Although experts had agreed for some time that the four purposes of sentencing were deterrence, retribution, incapacitation and rehabilitation, neither Congress nor the state legislatures had ever stated which goals it believed to be most important, or how priorities among the competing goals should be ordered. In sum, there was simply no guidance as to which purpose(s) should be afforded primacy over the others. Federal law merely required that when a sentence was imposed the court should consider "the ends of justice and the best interests of the public."<sup>34</sup>

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<sup>32</sup>For example, the California Adult Authority was empowered to commit a criminal for a period of one year to life for many offenses. The judge's sole duty was to decide if this "sentence" was to be imposed in lieu of a probation or a fine. The Parole Board then became the actual department which determined the sentence to be served.

<sup>33</sup>Dawson, Sentencing: The Decision as to Type, Length and Conditions of Sentence, 378 (1969).

<sup>34</sup>18 U.S.C. § 4205(b) (1976).

Appearing before the Senate Subcommittee on Criminal Laws and Procedures, then-acting Deputy Assistant Attorney General Ronald Gainer stated:

The current federal statutes provide no specific guidance as to the purposes sought to be achieved by the sentencing process . . . no sentencing philosophy is outlined, and no direction is afforded as to the imposition the appropriate penalty. No instruction is set forth to govern the selection of the type of penalty to be imposed or of the severity of the penalty selected. Because there exist no legislative standards . . . judicially imposed sentences vary considerably. <sup>35</sup>

Each individual judge has therefore been free to impose any allowable sentence they thought proper, for whatever reasons they desired. The values of the individual judge on the bench became the values of the court and the particular jurisdiction.

~~Numerous~~ critics have identified this lack of clearly articulated sentencing goals as a primary flaw in the sentencing process.<sup>36</sup> As Norval Morris observed: "Sentencing in America has not been guided by any apparent principles, and certainly not by any legislatively enunciated principles. It has been left to the caprices of judges with various characters and training, working under the pressures of crowded court dockets, and the

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<sup>35</sup>Reform of the Federal Criminal Laws: Hearings on S. 1437, supra note 9, at 8998 (prepared statement of Ronald Gainer, former Deputy Assistant Attorney General for Improvements in the Administration of Justice, Dep't of Justice, June 8, 1977).

<sup>36</sup>See, e.g., Kennedy, Criminal Sentencing: A Game of Chance, 60 Jud. 208, 210 (1976); O'Donnel, Churgin & Curtis, Toward a Just and Effective Sentencing System (1977); Forst & Wellford, Punishment and Sentencing: Developing Sentencing Guidelines Empirically From Principles of Punishment, 33 Rutgers L. Rev. 799 (1981); Hoffman & Stover, Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function, 7 Hofstra L. Rev. 89, 96 (1978).



vagaries of changing judicial and public attitudes towards crime and punishment."<sup>37</sup> The only existing restrictions were various statutory minima and maxima--which as Judge Frankel noted, are equivalent to no restrictions at all.<sup>38</sup>

#### B. Prescription for Disparity

The indeterminate sentencing structures readily embraced by the states and federal government during the first part of this century were truly a prescription for disparity. In retrospect, it is easy to see how "[t]he predictable product of normless and unsupervised decision-making by judges with weak communication links is extreme variation along the continuum of choice."<sup>39</sup> Back in the 18th century, Cesare di Beccaria had warned against an unstructured sentencing system where judges are not bound by any rules of law.<sup>40</sup> In the early nineteenth century, a similar

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<sup>37</sup>Morris, Towards Principled Sentencing, 37 Md. L. Rev. 267, 274 (1977).

<sup>38</sup>Frankel, Criminal Sentences at 8.

<sup>39</sup>Cook, Sentencing Behavior of Federal Judges: Draft Cases-1972, 42 Cinn. L.R. 597, 598 (1973).

<sup>40</sup>Beccaria stated:

Nothing is more dangerous than the common axiom that one must consult the spirit of the law. This is a dike that is readily breached by the torrent of opinion . . . . Everyone has his own point of view, and everyone has a different one at different times. The spirit of the law, then, would be dependant on the good and bad logic of a judge, on a sound or unhealthy digestion, on the violence of his passions, on the infirmities he suffers, on his relations with the victim, and on all the slight forces that change the appearance of every object in the fickle human mind.

warning against the grant of unfettered sentencing discretion to judges was echoed by Sir Samuel Romilly. Romilly noted in 1810:

[T]he very same circumstance which is considered by one judge as a matter of extenuation, is deemed by another a high aggravation of the crime . . . . [I]f every judge be left to follow the light of his own understanding and to act upon the principles and the system which he has derived partly from his own observations, and his reading, and partly from his natural temper and his early impression, the law invariable only in theory, must in practice be continually shifting with the temper, and habits, and opinions of those by whom it is administered.<sup>41</sup>

Accounts of grievous cases of sentencing disparity and unfettered judicial discretion are numerous. In one case, for example, a judge had previously decided, based on the presentence investigation report, to mete out a sentence of 4 years. At sentencing however, after the accused exercised his right to speak to the court, and in so doing criticized the criminal procedure and participants, the judge arbitrarily raised the sentence to 5 years.<sup>42</sup>

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Thus we see the fate of a citizen change several times in going from one court to another, and we see the lives of poor wretches are at the false reasonings or the momentary churning of a judges humors. The judge deems all this confused series of notions which affect his mind to be a legitimate interpretation. Thus we see the same court punish the same crime in different was at different times because it consulted the erroneous instability of interpretations rather than the firm and constant voice of the law . . . .

Beccaria, On Crimes and Punishments, 11 (D. Young trans. 1986).

<sup>41</sup>Romilly, Observations on the Criminal Law of England, (1810).

<sup>42</sup>The judge is reported to have stated: "I listened without interrupting. Finally, when he said he was through, I simply gave the son of a bitch five years instead of four." Frankel,

In another case, two men were convicted of cashing checks without sufficient funds. The first offender was out of work at the time of the offense. His wife was ill and he needed money for rent, food and medical expenses. He had no prior record when he cashed the check for \$58.40. The sentence imposed was 15 years in prison. The second offender was also out of work. But his wife had left him for another man. He also had a record which consisted of a drunk charge and nonsupport. He cashed a check for \$32.50 and was sentenced before a different judge to 30 days in jail.<sup>43</sup>

A 50 year-old white male was convicted of accepting a \$3,000 bribe in connection with his official duties. After cooperating with the authorities, he received a sentence of one day unsupervised probation. Another 40 year-old black man was charged with and plead guilty to transporting \$13,000 in stolen U.S. Treasury checks. A family man with 14 years service in the Armed Forces, he received two years in prison.<sup>44</sup>

Similar stories abound, with each as incomprehensible and perplexing as the next. And the anecdotes do not stand alone. They are supported by a vast array of empirical studies which after examining statistically based analyses of disparity reach similar conclusions. To assert that sentencing disparity is a

Criminal Sentences at 18.

<sup>43</sup>S. Doc. No. 88-70 at 331 (1964).

<sup>44</sup>Seymour, 1972 Sentencing Study for the Southern District of New York, 45 N.Y. St. Bar J. 163, 167-168 (1975).

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"mere shibboleth," unsupported by "meaningful empirical data," is to deny decades of methodologically sound research, conducted in a variety of contexts.<sup>45</sup>

### C. Empirical Studies

One of the earliest study on sentencing disparity was conducted in 1919; known as the Everson Study, the research examined the sentencing patterns of 42 magistrates in New York City.<sup>46</sup> Everson found that the use of suspended sentences in public intoxication convictions ranged from less than 1% to over 82% among the judges. In addition, the frequency of suspended sentences appeared to be related to the judge's ethnic background.

In 1933, F. Gaudet, G. Harris and C. St. John published a study on the sentences imposed by six state court judges in New Jersey over a nine year period.<sup>47</sup> The authors introduced their research by stating that they had been "told by several lawyers that some recidivists know the sentencing tendencies of judges so well that the accused will frequently attempt to choose which

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<sup>45</sup>Judge Robert W. Sweet, a distinguished trial judge from the Southern District of New York recently wrote: "With little meaningful empirical data, the shibboleth of disparity swept the Congress, creating the Sentencing Commission, and has resulted in the guidelines. U.S. v. Reich, No. 86-0863, slip op. at 3 (S.D.N.Y. May 20, 1987).

<sup>46</sup>Everson Study, The Human Element in Justice, J. Crim. L. & Criminology 90 (1919).

<sup>47</sup>Gaudet, Harris & St. John, Individual Differences in the Sentencing Tendencies of Judges, 23 J. Crim. L. & Criminology 811 (1933).

judge is to sentence them. . ."<sup>48</sup> Their results showed that disparity occurred not only between judges, but that the same judge varied over time.<sup>49</sup>

M. McGuire and A. Holtzoff reviewed all federal sentences for violations of liquor and drug laws for the period of 1934-1935 and 1937-1939.<sup>50</sup> In year one of the study, sentences for liquor offenses ranged from 40 days to 851 days; drug sentences ranged from 31 to 3,468 days. In the third year studied, sentences ranged from 100 to 1,825 days for liquor offenses and 137 to 1,840 days for drug crimes. In addition, in year three, the authors found that the frequency of probation granted by each judge ranged from 4% to 62.4%.<sup>51</sup>

In 1946, Gaudet published a follow-up study to the 1933

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<sup>48</sup>Id. at 812.

<sup>49</sup>The ranges between the highest and lowest judge in several sentencing categories were as follows: imprisonment, 33.6% to 57.7%; probation, 19.5% to 32.4%; and suspended sentences, 15.7% to 33.8%. In addition, over a three-year period, one judge began by sentencing approximately 30% of all offenders to jail and ended up sentencing 45% to prison. Id. at 813-815.

<sup>50</sup>McGuire & Holtzoff, The Problem of Sentence in the Criminal Law, 20 B.U.L. Rev 423 (1940).

<sup>51</sup>Id. at 424. The authors concluded: The conclusion seems inescapable that the differences are due principally to diverse attitudes on the part of the individual judges toward various crimes, and that the severity or lightness of punishment depends on each instance very largely on the personality of the trial judge. The old maxim that "Equity is as long as the Chancellor's foot" seems equally applicable to sentences imposed by the federal courts in criminal cases. Id. at 428.

results.<sup>52</sup> In a study of 7,500 sentences imposed by 6 state judges in New Jersey, the author found that the frequency of probation ranged from 20 to 31%. Gaudet concluded that the judges "differed considerably in the frequency, length and types of probationary sentences they assigned."<sup>53</sup>

J. Esposito conducted a review of the 1966 Department of Justice Statistics and published his results in 1969.<sup>54</sup> He found that in North Carolina, drug offenders were sentenced to an average of 77.6 months, while in South Carolina, drug offenders were sentenced to an average of 56.3 months. For the crime of forgery, the author found the following sentence averages: Western District of Texas--43.0 months; Southern District of Texas--27.2 months; Northern District of Indiana--36.0 months; and Southern District of Indiana--19.6 months.<sup>55</sup> The author summarized: "These examples illustrate. . . a disparity that can

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<sup>52</sup>Gaudet, The Differences Between Judges in the Granting of Sentences of Probation, 19 Temple L.Q. 471 (1946).

<sup>53</sup>Id. at 483.

<sup>54</sup>Esposito, Sentencing Disparity: Causes and Cures, 60 J. Crim. L. & Criminology 182 (1969).

<sup>55</sup>Esposito also includes in his article a summary of the results obtained during a sentencing workshop conducted for federal judges. Where judges were presented with identical pre-sentence investigation reports for hypothetical cases, sentences ranged as follows: auto theft--79 days to 5 years; income tax fraud--\$5,000 fine to \$10,000 fine plus 5 years; embezzlement--1 year probation to 5 years in jail. Id. at 183.

only be attributed to the abuse of judicial discretion."<sup>56</sup>

In 1972 Whitney Seymour, while serving as a U.S. Attorney, analyzed the sentences given to 645 defendants in the Southern District of New York.<sup>57</sup> He found that irrational disparities occurred in the sentences given to white collar offenders as opposed to the convicted of "common crimes."<sup>58</sup> Defendants convicted on white-collar crimes faced a 36% chance of going to prison, non-violent common crime offenders stood a 53% chance of imprisonment, and violent common crime offenders were sentenced to prison 80% of the time.<sup>59</sup> In addition to the likelihood of a prison sentence, the length of the actual sentence imposed varied greatly depending on the type of crime, the sentencing judge and the particular jurisdiction.<sup>60</sup>

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<sup>56</sup>Id. at 185. Esposito continued: "Proper individualization of punishment can only take place through the use of judicial discretion, but judicial sentencing power must be given proper goals and boundaries within which to operate. Both the legislature and the courts have failed to accomplish this." Id.

<sup>57</sup>Seymour, 1972 Sentencing Study for the Southern District of New York, 45 N.Y. St. Bar J. 163 (1975).

<sup>58</sup>"Common Crimes" include such offenses as robbery, theft, narcotics and gambling.

<sup>59</sup>Id. at 164.

<sup>60</sup>For example, forgers in the federal district of Connecticut received an average of 18.8 months in jail, while robbers were sentenced to an average of 142.3 months. Id. at 168. In the Southern District of New York, Judge "W" sentenced selective service violators to jail 100% of the time (10 cases), while Judge "C" did not sentence similar offenders to any jail time in the six cases he/she decided. Id. at 166. Finally, in the 1st Circuit, robbers received an average sentence of 106.3 months while the same offenders received 330.0 months in the D.C. Circuit. Id. at 168.

In 1974, Partridge and Eldridge published the results of a study wherein they had given 20 identical sentencing scenarios to 50 judges from the 2d Circuit.<sup>61</sup> The results of the study showed that variety and disparity were the norm. For example, recommended sentences for an extortion and tax evasion hypothetical, where every judge responded to the identical hypothetical fact pattern, ranged from 20 years in prison plus a \$65,000 fine to 3 years in prison. For a hypothetical heroin sale conviction, the range was 10 years in prison plus 5 years probation to 1 year in prison with 5 years probation. For the remaining 18 cases used in the study, the disparity of sentencing responses was equally disconcerting.

In a 1981 simulation study conducted for the Department of Justice, similar results were obtained.<sup>62</sup> 208 active federal judges were asked to report what sentences they would impose in 16 hypothetical cases--8 frauds and 8 bank robberies. In one fraud case, the recommended sentence ranged from a mean of 8.5 years to a high of life in prison. In another bank robbery case, the mean was 7.3 years; the severest was 25 years in prison.<sup>63</sup>

A number of other studies, using different methodological procedures, *of differing methodological strength,* have nonetheless all come to similar conclusions--

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<sup>61</sup>Partridge & Eldridge, The Second Circuit Sentencing Study--A Report to the Judges, (1974).

<sup>62</sup>Yankelovich, Skelly & White, Federal Sentencing: Toward a More Explicit Policy of Criminal Sanctions, 1981, reprinted in part in S. Rep. No. 98-225 at 44-45.

<sup>63</sup>Id. at 44.



sentencing disparity among federal judges is widespread and pervasive.<sup>64</sup> The sad truth is that "in the great majority of federal cases . . . a defendant who comes up for sentencing has now way of knowing or reliably predicting whether he will walk out of the courtroom on probation, or be locked up for a term of years that may consume the rest of his life, or something in between."<sup>65</sup>

### PART THREE: CONSEQUENCES OF DISPARITY

#### A. Uncertainty

While there are multiple consequences of sentencing disparity, we focus here on the three most problematic outcomes: uncertainty, inequality and discrimination.

Uncertainty is the natural result of a sentencing system which leaves complete and unfettered discretion in the hands of individual and independent trial court judges. As the disparity studies have shown,<sup>66</sup> a criminal offender has no way of

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<sup>64</sup>See, e.g., Tiffany, Avichai & Peters, A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial, 1967-1968, 4 J. Legal Studies 369 (1975); Clancy, Bartolomeo, Richardson & Wellford, Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity, J. Crim. L. & Criminology 524 (1981); Diamond & Zeisel, Sentencing Councils: A Study of Sentence Disparity and its Reduction, 43 U. Chi. L. Rev. 109 (1975); Broach, Jackson & Ascolillo, State Political Culture and Sentence Severity in Federal District Courts, 16 Criminology 373 (1978); Zumwalt, The Anarchy of Sentencing in the Federal Courts, 57 Jud. 96 (1973); National Academy of Sciences, Panel on Sentencing Research, Research on Sentencing: The Search for Reform, vols. I & II, (Blumstein, Cohen, Martin & Tonry, eds. 1983); Testimony of Commissioner Ilene H. Nagel before the Subcommittee of Criminal Justice of the House Judiciary Committee, July 23, 1987.

<sup>65</sup>Frankel, Criminal Sentences at 6.

<sup>66</sup>See Notes 38-45 and accompanying text.

predicting the type or severity of a forthcoming sentence. Depending on the judge before whom he or she appears, and how that judge responds to the offense/offender pattern of characteristics, the offender may receive a sentence ranging from probation to the maximum statutory sentence consistent with the offense for which the offender was convicted. The resulting uncertainty creates a system in which defendants are encouraged to "'play the odds' and through luck, manipulation and circumstance, 'beat the system.'"<sup>67</sup> In the ensuing game of sentencing roulette, the offender stays ahead as long as the benefits of the crime outweigh the probabilities of whatever punishment might be imposed.<sup>68</sup> So long as the probability of detection and conviction are less than 100 percent, as well they are, *Crime will continue to be a good risk to take.* ~~(you did not complete your sentence here. BB)~~

Certainty of punishment is critical for another reason; it is <sup>one of two</sup> the most effective tool<sup>s</sup> for deterring potential future criminals and the general public from "playing the odds."

Studies have consistently shown that the deterrence of crime is

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<sup>67</sup>Kennedy, Criminal sentencing: a game of chance, 60 Jud. 208, 215 (1976).

<sup>68</sup>Thomas Szasz was an early proponent of this theory that criminal conduct is merely a rational choice between the benefits of crime and the chances of getting caught. See Ingraham, Evans & Anderson, "Discretion and Rehabilitation: Fads or Fixtures," in Discretion and Control 93 (Evans, ed. 1978). Charles Tittle and Alan Rowe conducted a study on the level of crime as affected by the arrest rate. They found that certainty of arrest had an effect on reducing crime, but only when the certainty level exceeded 30%. Tittle & Rowe, Certainty of Arrest and Crime Rates: A Further Test of the Deterrence Hypothesis, 52 Social Forces 455 (1974).

dependant upon two factors: certainty and severity.<sup>69</sup> In an oft-cited study by George Antunnes and A. Lee Hunt, for example, it was found that of the two factors, certainty was the more important. Their research concluded that certainty had a significant effect on all types of crime, whereas severity was a significant factor only in cases of homicide.<sup>70</sup>

Although not all studies agree <sup>with</sup> ~~in~~ the conclusion that certainty is more important than severity, there <sup>is</sup> ~~are~~ unanimous agreement that the two factors together combine to stimulate a deterrent effect.<sup>71</sup> It is also clear that the degree of deterrence is affected by both the type of crime committed, and the background characteristics of the particular offender. Ehrlich found, for example, that burglars and thieves are the greatest "risk avoiders."<sup>72</sup>

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<sup>69</sup>See, e.g., Antunnes and Hunt, The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis, (1972); Zimring & Hawkins, Deterrence: The Legal Threat in Crime Control (1973).

<sup>70</sup>Id. It is interesting to note that this same principle was suggested by Cesare Beccaria: "It is the certainty of punishment, rather than the harshness thereof, which is a greater control on criminals." Beccaria, On Crimes and Punishments 58. See also Reform of the Federal Criminal Laws: Hearings on S. 1437, supra note 9, at 9051 (statement by Alan Dershowitz, "[C]ertainty is far more important than severity in reducing crime.").

<sup>71</sup>See, e.g., Ehrlich, Participation in Illegitimate Activities: A Theoretical Investigation, Journal of Political Economy 521 (May/June 1973); Gibbs, Crime, Punishment and Deterrence, 40 Soc. Sci. Q. 389 (1969); Panel on Research on Deterrent and Incapacitative Effects, Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates, Blumstein, Cohen & Nagin, eds. (1978).

<sup>72</sup>Ehrlich, Participation in Illegitimate Activities, n.58.

While deterrence research continues, there is little doubt that some offenders and some offenses can be deterred. The National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects, despite its critical and cautious approach, concluded nonetheless that, "the evidence certainly favors a proposition supporting deterrence more than it favors one asserting that deterrence is absent."<sup>73</sup> Perhaps it was this vast research literature that prompted Senator Kennedy to declare, "certainty of punishment [is] the cornerstone of an effective law enforcement policy. . . ."<sup>74</sup> Few can successfully argue against the proposition that the elimination of widespread sentencing disparity will go a long way in the general deterrence of criminal activity in this country.

## B. Inequality

A second negative consequence of sentencing disparity is the compromising effect it has on perceptions of equality, justice and fairness. The importance of "equal justice under law" was explained by Martin Golding in the following way:

The prevailing tradition of philosophy relates the core sense of 'justice' to the idea of equality. This goes back to Aristotle, who tells us that justice consists in treating equals equally and unequals unequally. Equality is the formal element of justice . . . . It requires that like cases be treated alike. But more than this, it requires that action, especially that of public officials

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<sup>73</sup>Panel on Research on Deterrent and Incapacitative Effects, *supra* note 62, at 7.

<sup>74</sup>Kennedy, Introduction, Symposium on Sentencing, 7 Hofstra L. Rev. 1,3 (1978).

and others who exercise authority, should not be capricious or arbitrary, but based on principle.<sup>75</sup>

The capricious judge who irresponsibly raises a sentence from 4 years to 5 solely because the defendant criticized the criminal justice system,<sup>76</sup> the similarly situated defendants who receive disparate sentences for the same offense,<sup>77</sup> the white-collar criminal who receives a relatively light sanction in comparison to a poorer "common" criminal<sup>78</sup>--all these cases, and thousands more, combine to give the impression that American justice is neither fair nor equal, nor just.<sup>79</sup> We are left with a vision of the symbol of justice which is neither blind nor even-handed.

The consequences of this perception are two-fold. First, the public loses confidence in the criminal justice system. As

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<sup>75</sup>Golding, Philosophy of Law 120 (1975).

<sup>76</sup>See Note 34 and accompanying text.

<sup>77</sup>See Notes 35-36 and accompanying text.

<sup>78</sup>See Notes 39-40 and accompanying text. See also U.S. v. Paterno, 375 F.Supp 647 (S.D.N.Y. 1974) (some judges feel that trial and conviction is "punishment enough" for white-collar criminal who occupy positions of prominence in their communities); U.S. v. Braun, 382 F.Supp 214 (S.D.N.Y. 1974) (improper to imprison "excessively ambitious" tax evader in light of President Nixon's pardon).

<sup>79</sup>In a 1985 poll conducted by the New York Times/CBS News respondents were asked whether white-collar criminals were caught or whether they got away with their crimes. 85% responded that most white-collar criminals "get away with it" and only 11% felt that most were caught. U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics-1985, 161. Another poll conducted by the Washington Post/CBS News asked people about their attitudes concerning the fairness of the justice system. 57% felt that the system favored the rich, as opposed to 39% who felt that the system treated all persons equally. Id. at 163.

the Senate Judiciary Committee noted: "Sentencing disparities that are not justified by differences among offenses are unfair to both the offenders and to the public. . . . Sentences that are disproportionate to the seriousness of the offense create a disrespect for the law."<sup>80</sup> One mother whose daughter was kidnapped, raped, tortured and murdered commented on the sentences received by those responsible for the crimes: "The judicial system . . . and the Constitution . . . [has] failed all of us. It seems that the judicial system has lost track of the simple fact that it is supposed to be fair; that it is supposed to protect those who obey the law and punish those who disobey the law. And the criminal justice system that fails in these tasks lacks justice."<sup>81</sup> Unwarranted disparities generate cynicism among the public and undermine confidence in the reliability and integrity of the legal system.<sup>82</sup> The public is increasingly convinced that the principle of 'equal justice under law' is merely a myth.<sup>83</sup>

The second consequence is that inmates in prison are

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<sup>80</sup>S. Rep. No. 98-225 at 46.

<sup>81</sup>S. Hrg. 98-503 at 974-75 (statement of Roberta Roper, May 23, 1983). During the same hearing, a daughter whose father had been murdered in his own home commented on the sentence imposed on the confessed killer: "When you can receive 12 years for stealing a piece of silver but you can only get a year for murdering a man, I think that definitely the system must be changed. Id. at 982 (statement of Jennifer Short).

<sup>82</sup>Schulhofer, Due Process of Sentencing, 128 U. Pa. L. Rev. 733, 765 (1980).

<sup>83</sup>See Kramer, Different Judges, Different Justice, Wash. Post. Nov. 4, 1975, §A at 19, col. 3.

disturbed and embittered over their unequal treatment. This can create "unnecessary tensions among inmates and add to disciplinary problems in the prisons."<sup>84</sup> When the Attica Commission investigated the tragic uprising of September 1971, it found, to its surprise, that one of the most serious complaints was unrelated to prison conditions. Instead, the complaint referred to the persistent grievances from inmates in adjacent cells who believed that their sentences were unjust because of unexplained diversity.<sup>85</sup> As James Bennett, former Director of the United States Bureau of Prisons stated:

The prisoner who must serve his excessively long sentence with other prisoners who receive relatively mild sentences under the same circumstances cannot be expected to accept this situation with equanimity. . . . The existence of such disparities is among the major causes of prison riots, and is one of the reasons why prison so often fails to bring about an improvement in the social attitudes of its charges.<sup>86</sup>

### C. Discrimination

Although it would be inaccurate to proclaim disparity as the cause of discrimination, it is appropriate to concede that

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<sup>84</sup>S. Rep. No. 98-225 at 46. See also Reform of the Federal Criminal Laws: Hearings on S. 1437, supra note 10, at 8880 (statement of Norman Carlson, Director, Bureau of Prisons, "It causes unrest and uneasiness on the part of offenders who have been convicted of violating the Federal law.")

<sup>85</sup>McKay, Its Time to Rehabilitate the Sentencing Process, 60 Jud. 223, 226 (1976).

<sup>86</sup>Reform of the Federal Criminal Laws: Hearings on S. 1437 before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 95th Cong., 1st sess., 8908 (printed statement of Pierce O'Donnell).

unfettered judicial discretion serves as a procedural device to mask racism, sexism, and social class bias in the sentencing of convicted criminals. A recent report by the National Minority Advisory Council on Criminal Justice concluded:

[G]laring disparities in the sentencing of poor and minority defendants compared to those convicted of crimes who are affluent and White, lack a principled basis, which undermines the integrity of the entire criminal justice process, implicate the court in racial and economic discrimination, and are a major cause of prison unrest and community disrespect for the legal process.<sup>87</sup>

*cite Hyson review*

Studies of racial discrimination in sentencing abound. What is critical to recognize is that the discrimination goes both ways; blacks are systematically given lighter sentences by some courts because of their race, and heavier sentences by others, curiously, for the same racial reasons. In a study completed in 1961 of defendants sentenced in Texas state courts, H. Bullock concluded that Blacks were under-penalized for some offenses and over-penalized for others.<sup>88</sup> Bullock suggested that "racial discrimination appears to be motivated more by the desire to protect the order of the white community than to effect the reformation of the offender. . . . Those who enforce the law conform to the norms of their local society concerning racial prejudice, thus denying equality before the law."<sup>89</sup>

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<sup>87</sup>National Minority Advisory Council on Criminal Justice, The Inequality of Justice: A Report on Crime and the Administration of Justice in the Minority Community 224 (1980).

<sup>88</sup>Bullock, Significance of the Racial Factor in the Length of Prison Sentences, 52 J. of Crim. L. & Criminology 411 (1961).

<sup>89</sup>Id. at 417.



H. Clark and G. Koch, in a study of defendants sentenced in Alaskan state courts, found that Blacks serve an average of 11.9 months longer than Whites for drug-related felonies, and 6.5 months longer for theft offenses.<sup>90</sup> J. Gibson studied the decisions of 11 judges in Georgia who sentenced 1,219 offenders; he reports data consistent with a conclusion that at least three of the judges were clearly discriminatory and prejudiced against Blacks.<sup>91</sup> H. Kelly studied offenders convicted of burglary and homicide in Oklahoma. He found that black offenders received longer sentences than whites for burglary, but not for homicide. Mexican-American and Indian offenders received shorter sentences for homicide than both Blacks and Whites.<sup>92</sup> G. LaFree, in a study of sex offenders in 4 southern states concluded that, compared to other defendants, Black men who assaulted White women received (1) more serious charges and (2) longer sentences; and they were more likely to (3) have their cases filed as felonies and (4) receive a sentence of incarceration.<sup>93</sup> An older study by Judge Howard revealed that of the 55 death penalties imposed in

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<sup>90</sup>Clark & Koch, Alaska Felony Sentencing Patterns: A Multivariate Statistical Analysis (Alaska Judicial Council, 1977).

<sup>91</sup>Gibson, Race as a Determinate of Criminal Sentences: A Methodological Critique and a Case Study, 12 Law & Society Rev. 455 (1978).

<sup>92</sup>Kelly, Comparison of defense strategy and race as influences in differential sentencing, 14 Criminology 241 (1976); Bernstein, Kelly & Doyle, Societal Reaction to Deviants: The Case of Criminal Defendants, Amer. Soc. Rev. (Oct. 1977).

<sup>93</sup>LaFree, The effect of sexual stratification by race on the official reactions to rape, 45 Am. Soc. Rev. 842 (1980).

Maryland for rape, all the victims were White women and 50 of the 55 offenders were Black men. Even though Black women were raped twice as often as White women, the death penalty had never been imposed for the rape of a Black victim.<sup>94</sup> Another study by E. Hall and A. Simkus concluded that Native American offenders in a western state were more likely to receive sentences of incarceration than their White counterparts.<sup>95</sup>

Discrimination in sentencing does not always result in harsher sentences to minorities convicted of crimes. While some judges systematically treat Blacks and Hispanics more harshly than their white counterparts, others use the courts to promote a system of alleged justice where minorities are given light sentences as an accommodation to past societal wrongs, without regard for impact this practice has on minority victims. *cite Bernstein Kelly, Dryll*

While studies focusing on the sex of the defendant are not

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<sup>94</sup>Howard, Racial Discrimination in Sentencing, 59 Jud. 121, 123 (1975). Howard also found that when the death penalty was not imposed, the average sentence was 4.2 years when Blacks raped Blacks, 16.4 years when Blacks raped Whites, 5.7 years when Whites raped Blacks and 4.7 years when Whites raped Whites. Id. See also Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27 (1984) (a study of 8 states revealed discrimination in the imposition of the death penalty which was a "remarkably stable and consistent phenomenon."); Baldus, Pulaski, Woodworth & Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 Stan. L. Rev. 1 (1980).

<sup>95</sup>Hall & Simkus, Inequality in the Types of Sentences Received by Native Americans and Whites, 13 Criminology 199 (1975). For a thorough review of many of the studies concerning racism in sentencing, see Hagan & Bumiller, Making Sense of Sentencing: A Review and Critique of Sentencing Research in Research on Sentencing: The Search for Reform 1-54 (Blumstein et al., eds. 1983).

as abundant, still the few that do exist generally agree that elements of paternalism, chivalry and preconceived notions concerning sexual roles combine to favor women in the criminal justice system.<sup>96</sup> An early study by S. Nagel and L. Weitzman concluded that women are less likely than men to be incarcerated before trial and after conviction, and are more likely to be acquitted than their male counterparts.<sup>97</sup> I. Nagel and J. Hagan reviewed all of the existing empirical studies of gender and crime up through 1982. They concluded that women are more likely to be released on their own recognizance rather than be asked to post bail to secure their release; at sentencing, women are more likely to receive favorable outcomes than men.<sup>98</sup> After reviewing several of the leading studies in this area, Parisi similarly concluded, "it is fair to conclude that the direction of differential dispositions is most often advantageous [to women, although] it occasionally appears that negative (punitive) treatment is accorded females for 'manly' crimes."<sup>99</sup>

Social class bias is a third form of discrimination which is

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<sup>96</sup>Parisi, Are Females Treated Differently?, in Judge, Lawyer, Victim, Thief 205-220 (Rafter & Sanko, eds. 1982).

<sup>97</sup>S. Nagel & Weitzman, Women as Litigants, Hastings L. Rev. 171 (1971).

<sup>98</sup>I. Nagel & J. Hagan, Gender and Crime: Offense Patterns and Criminal Court Sanctions in Crime and Justice--An Annual Review of Research 91-144 (Tonry & Morris, eds. 1983)

<sup>99</sup>Parisi, Are Females Treated Differently?, *supra* note 73, at 215. Parisi adds her own opinion that when the defendant is a mother with dependant children, sentencing should be more lenient because females typically have the responsibility for such children. Id.

masked by widespread sentencing disparity. In this area of sentencing, however, there are even more substantial philosophical issues regarding what is "equal" punishment between those offenders who are well-educated, and those who are not.<sup>100</sup> Judges are faced with a fundamental tension between equality of sentencing and "just deserts" theories, on the one hand, and the use of incarceration as a deterrent to crime on the other. Given that many educated offenders have no prior criminal record, and many come from stable family atmospheres, some judges feel that the use of prison to deter is excessive.<sup>101</sup> For judges

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<sup>100</sup>The problem was summed up well by Pelaez in the following manner:

Much is made of the fact that punishments must be equal-- that it is somehow unfair to sentence one person who commits a crime to a term of imprisonment and another to a non-imprisonment sanction. However, punishment can never be equal. To some, a year in jail is no big deal. To others, it is a horrendous punishment that may drive the recipient to or over the suicidal brink. To say that sentencing each of those very different felons to one year in prison is to punish them equally ignores reality. Equal sentences have nothing to do with providing only the outward appearance of equal punishment. Punishment is a subjective thing, and the extent of the punishment differs with regard to the sensitivity to a particular punishment of the person we seek to punish.

Pelaez, Of Crime and Punishment: Sentencing the White-Collar Criminal, 18 Doq. L. Rev. 823, 842 (1980). See also, J. Hagan & I. Nagel, White-Collar Crime, White-Collar Time: The Sentencing of White-Collar Offenders in the Southern District of New York, 20 Am. Crim. L. Rev. 259 (1982) ("Equality before the law" is perhaps nowhere more amorphous than in its application to the sentencing of white-collar offenders. Id. at 264.)

<sup>101</sup>See Mann, Wheeler & Sarat, Sentencing the White-Collar Offender, 17 Am. Crim. L. Rev. 479, 486-491 (1980) (One judge was quoted as saying: "Well, you have a person who has surrounded himself with a certain aura, and you strip that aura away and let him stand naked and in front of his peers, that itself is pretty serious punishment." Id. at 485). Another judge has stated: "In

subscribing to this thesis, there is a tendency to choose alternative methods of punishment--such as community service, week-end confinement, suspended sentences and fines. For other judges, the white-collar background of the offender seems to provide a rationale for a tougher than usual sentence on the assumption that privilege carries a greater awareness of responsibility and thus the fall from grace should be higher.

While there is a good deal of research on social class bias in sentencing,<sup>102</sup> and the sentencing of those who commit white-collar crimes in particular, the results are far from harmonious. The methodological problems inherent in this kind of research help to explain the seemingly inconsistent findings. At the outset, defining what exactly is white-collar crime and who are white-collar criminals has proved to be problematic.<sup>103</sup> Nagel

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white-collar cases. . . [t]he sentence may be less critical than the processing--the prosecution. The publicity of the prosecution may achieve the desired impact. You don't need quite the Greek tragedy of a whole viking funeral." Nagel & Hagan, The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity, 80 Mich. L. Rev. 1427, 1455 n. 89, (1982). See also U.S. v. Paterno, 375 F. Supp. 647 (S.D.N.Y. 1973), aff'd 798 F.2d 1396 (2d Cir. 1974), cert denied, 419 U.S. 1106 (1975) (defendants urged that they had been punished enough already and a sentence of incarceration would only serve the ends of vengeance).

<sup>102</sup>See e.g., Hindelang, Equality Under the Law, 60 J. Crim. L. & Criminology 306 (1969) (Offenders who are able to hire private counsel are less likely to receive prison terms than poorer defendants represented by public defenders.);

<sup>103</sup>See I. Nagel & J. Hagan, The Sentencing of White Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity, 80 Mich. L. Rev. 1427, 1438-1440 (1982) ("There remains uncertainty and lack of agreement about what the rubric of white-collar crime properly includes." Id. at 1439)

and Hagan, for example, note that most so-called white-collar offenses are committed by non-white-collar persons.<sup>104</sup> Also there is the problem of isolating the disparity that occurs within crime categories from that which occurs between them.<sup>105</sup>

In an early study completed by Chiricos and Waldo, the authors suggest that their data demonstrated conclusively that the socio-economic status of the offender is unrelated to the severity of the punishment imposed.<sup>106</sup> The methodology of the Chiricos and Waldo study, was, however attacked by Hopkins who argued that they had failed to separate accurately upper, middle and lower-class offenders.<sup>107</sup> Hopkins pointed to the fact that Chiricos and Waldo had rather tested for disparity within classes than between classes, which, not surprisingly, they found to be insignificant.<sup>108</sup>

In a 1982 study by J. Hagan and I. Nagel, 18,289 cases from the Southern District of New York were examined.<sup>109</sup> Their research led to a conclusion that for those offenders who

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<sup>104</sup>Id. at 1457.

<sup>105</sup>See Hagan & Nagel, White-Collar Crime, White-Collar Time, supra note 102, at 263-64 (1982).

<sup>106</sup>Chiricos & Waldo, Socio-Economic Status and Criminal Sentencing: An Empirical Assessment of a Conflict Proposition, 40 Am. Soc. Rev. 753 (1975).

<sup>107</sup>Hopkins, Is There Class Bias in Criminal Sentencing?, 42 Am. Soc. Rev. 176 (1977).

<sup>108</sup>Id.

<sup>109</sup>Hagan & Nagel, White-Collar Crime, White-Collar Time, supra note 78.

actually received prison sentences, college-educated persons convicted of white-collar crimes received sentences that averaged a year less than those received by non-college-educated persons convicted of common crimes. When all offenders were considered--regardless of whether prison time was actually imposed--the difference between the two groups was only five months, with white-collar offenders receiving the more preferential treatment.

K. Mann, S. Wheeler and A. Sarat conducted a field study and a series of interviews of 51 federal district judges in seven federal districts.<sup>110</sup> They found a common theme of judicial empathy and even sympathy as judges sentenced those who had positions in society similar to their own. The study concluded that, "it is clear that factors intimately related to the defendant's social status do receive weight in the judges thinking."<sup>111</sup> The consideration of these factors most often served to benefit the white-collar offender.

In a major study of sentencing disparity, I. Nagel and J. Hagan reported on data collected from 6,518 cases drawn from 10 federal districts.<sup>112</sup> Based on that research, the authors concluded that only one of the jurisdictions studied evidenced clear support for the long-standing assumption that white-collar

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<sup>110</sup>Mann, Wheeler & Sarat, Sentencing the White-Collar Offender, supra note 74.

<sup>111</sup>Id. at 500.

<sup>112</sup>I. Nagel & J. Hagan, The Sentencing of White-Collar Criminals in Federal Courts, supra note 80.

crime is given preferential treatment in the courts. This led the authors to conclude , at least at that time, for those jurisdictions studied that while "the problem of sentencing disparity for white-collar crime is [not] trivial or imaginary, we are not prepared to affirm the proposition that persons convicted of white-collar offenses uniformly receive preferential treatment in sentencing."<sup>113</sup>

Equality, and the Constitution, require that race, sex, social class, and other suspect classifications should have no role in sentencing. The use of these factors to sentence offenders contravenes the fundamental idea of blind justice, where all defendants are equal on the scales of justice. While the evidence is not conclusive as to whether women, blacks, hispanics, and the upper-middle class receive comparatively better or worse sentences in the courts, evidence is clear that race, sex, and social class are having a non-trivial impact when there should be no effect at all.

#### CONGRESSIONAL RESPONSE TO DISPARITY

In 1983, after almost twenty years of hearings and debate in this area,<sup>114</sup> Congress passed the Comprehensive Crime Control

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<sup>113</sup>Id. at 1456 (emphasis added).

<sup>114</sup>In 1966, based on a recommendation by President Lyndon Johnson, The National Commission on Reform of Federal Criminal Laws (Brown Commission) was formed. The 92nd Congress began hearings on the findings of the Brown Commission's Final Report in 1971. Beginning in 1973, bills were introduced for the reform of the criminal justice system. In 1976, Senator Kennedy



Act of 1983.<sup>115</sup> Chapter II of the Act, entitled "Sentencing Reform," contains the Congressional response to unwarranted sentencing disparity.<sup>116</sup> In its report on S. 1762, the Senate Judiciary committee noted that the current Federal sentencing system was based largely on outmoded and unworkable principles of rehabilitation.<sup>117</sup> Though judges were aware that rehabilitation of offenders in a prison setting was a failure, the laws had not been rewritten to reflect this fact; as such, each judge was free to apply his or her own philosophy of sentencing.<sup>118</sup>

As a result, every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. . . . These disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the

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introduced a comprehensive bill to establish sentencing guidelines during the 94th Congress. Similar and related bills were introduced during the 95th, 96th and 97th Congresses. Finally, in 1983, a bi-partisan coalition of twenty-three senators introduced S. 668--The Sentencing Reform Act of 1983. The Administration also introduced a similar bill (S. 829) which was later combined with S. 668 to form S. 1762.

<sup>115</sup>Pub. L. No. 98-473, 98 Stat. 1987 (1984).

<sup>116</sup>The Senate Report accompanying the Act is replete with references to unwarranted disparity. The following examples are typical: S. Rep. 98-25 at 41 (discussion of regional and inter-circuit disparity); 45 (disparity unfair to both offenders and the public); 52 ("A primary goal of sentencing reform in the elimination of unwarranted sentencing disparity."); 65 (government appeals are necessary to combat disparity); 178 (a permanent Sentencing Commission is necessary to combat disparity).

<sup>117</sup>S. Rep. No. 98-225 at 38.

<sup>118</sup>Id.

sentence. This sweeping discretion flows from the lack of any statutory guidance or review procedures to which courts and parole boards might look. These problems are compounded by the fact that the sentencing judges and parole officials are constantly second-guessing each other, and, as a result, prisoners and the public are seldom certain about the real sentence a defendant will serve.<sup>119</sup>

In order to address these issues, the Senate Committee set several goals for sentencing legislation. First, the law should contain a comprehensive and consistent statement on the purposes of federal sentencing. Second, the law should ensure that sentences are fair to both the offender and to society. Third, there should be certainty regarding the sentence imposed and the reasons for it. Fourth, there should be available a full range of sentencing options. Fifth, each stage of the sentencing and corrections process should be directed at pursuing the same goals.<sup>120</sup>

The resulting Sentencing Reform Act proposed to attack the problem of disparity in several ways. First, the Act codifies for the first time the purposes of criminal punishment, and specifies those purposes with considerable precision: the four purposes are just punishment for the offense, general deterrence, protection of the public and effective correctional treatment.<sup>121</sup>

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<sup>119</sup>Id. The Committee Report also includes the results of several leading disparity studies: Seymour, 1972 Study for the Southern District of New York, supra note 37; Yankelovich, Skelly & White, Federal Sentencing: Toward a More Explicit Policy of Criminal Sanctions, supra note 45; Bartolomeo, Clancy, Richardson & Berger, The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity, supra note 47.

<sup>120</sup>Id. at 39.

<sup>121</sup>18 U.S.C. § 3553(a)(2).

By standardizing the rationale for criminal sanctions, and by declaring that rehabilitation is no longer an acceptable purpose for imprisonment,<sup>122</sup> Congress took a substantial step in the elimination of unwarranted sentencing disparity.<sup>123</sup> The "medical model" of prisons<sup>124</sup> and the accompanying use of the indeterminate sentence were replaced with goals of certainty, punishment and deterrence.<sup>125</sup> The idea of using prisons primarily to punish "came out of the closet." Moreover, the Act requires, for the first time, that judges state their reasons for imposing a particular sentence.<sup>126</sup>

Second, the Act created a full-time, bipartisan, independent commission, in the judicial branch-- the United States Sentencing Commission--empowering it to promulgate mandatory sentencing guidelines for the federal courts.<sup>127</sup> Congress granted the Commission discretion to work out the specific details of sentencing guidelines, but the Act contains definite instructions on the elimination of unwarranted disparity.<sup>128</sup>

The Sentencing Guidelines to be developed were to assist the

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<sup>122</sup>28 U.S.C. § 994(k).

<sup>123</sup>The lack of appropriate standards for sentencing has been a primary factor in the problem of unwarranted disparity. See supra notes 31-35 and accompanying text.

<sup>124</sup>See supra note 28 and accompanying text.

<sup>125</sup>S. Rep. No. 98-225 at 39-40, 59-60.

<sup>126</sup>18 U.S.C. § 3553(c).

<sup>127</sup>28 U.S.C. § 991 et. seq.

<sup>128</sup>28 U.S.C. § 994.

court in determining the appropriate type and length of sentence.<sup>129</sup> The guideline system must set forth categories of offenses and offenders. The Act lists specific factors the Commission had to consider in establishing these categories.<sup>130</sup> These factors were to be considered only when relevant, a decision to be reflected in the sentencing guidelines.

The Act contains a series of directives to the Commission about specific factors to be taken into account (or ignored) in determining the appropriate sentence.<sup>131</sup> The guidelines are to "reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant,"<sup>132</sup>; and, should also "reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or

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<sup>129</sup>Id.

<sup>130</sup>28 U.S.C. § 994(c), (d). These factors, to be considered only if relevant, for establishing offense categories are: (1) the grade of the offense, (2) circumstances of aggravation or mitigation surrounding the offense, (3) the nature and degree of harm caused by the offense, (4) the community view on the gravity of the offense, (5) the public concern generated by the offense, (6) the deterrent effect of a particular sentence, and (7) the current incidence of the offense in the community and the nation as a whole. The factors for establishing offender categories, again to be considered only where relevant are: (1) age, (2) education, (3) vocational skills, (4) mental and emotional condition, (5) physical condition, (6) previous employment, (7) family ties and responsibilities, (8) community ties, (9) role in the offense, (10) criminal history and (11) degree of dependence upon criminal activity for a livelihood.

<sup>131</sup>28 U.S.C. § 994.

<sup>132</sup>28 U.S.C. § 994(c).

vocational training, medical care, or other correctional treatment."<sup>133</sup> Each of these directives was meant to shape the guidelines so as to ensure like treatment of similarly situated defendants.

The most significant legislative prescription against disparity is the requirement that the maximum term of imprisonment may not exceed the minimum term by more than 6 months or 25%, whichever is greater, for any sentence of imprisonment.<sup>134</sup> In this provision, Congress defined the tolerable range of sentencing disparity. *Footnote ABA*

The enabling legislation seeks to attack unwarranted disparity by establishing limited ranges of sentences for categories of offenders and offenses, but also by its highly circumscribed policy of departures. In recognition of the fact that there may be occasional unusual circumstances in criminal offenses as they are committed which cannot be foreseen or practically incorporated into the guidelines, the legislation permits departures. In this conception of the departure for a factor the Commission did not adequately consider, and whose consideration justice justifies a sentence other than that prescribed, Congress created a mechanism to encourage and promote equity to temper the potential rigidity of the established rule, thereby ensuring that unlike offenders could and would be treated differently. Second, departures can serve in the first iteration

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<sup>133</sup>28 U.S.C. § 994(k).

<sup>134</sup>28 U.S.C. § 994(b).

of guidelines implementation to encourage the development of a common law of sentencing. District courts imposing a sentence outside the guidelines will be required to state specific reasons for doing so. Appellate courts will then judge if the departure is warranted. The Commission can then use these collected decisions to consider the wisdom of amending the guidelines when necessary, in an ongoing process of improvement.

Prior to the enactment of the Sentencing Reform Act, individual judges sentenced according to their own lights, implementing their own, personally devised policies of sentencing. The Sentencing Reform Act sets in motion a process by which policy development will be centralized. Over time, sentencing policies will be debated, refined, and codified in the guidelines.

Finally, the Sentencing Reform Act will reduce unwarranted sentencing disparity by eliminating parole. Although the Parole Commission adopted its own guidelines in the late 1970's to reduce disparity, Congress felt that "the laws concerning the imposition of a term of imprisonment and the determination of a date for parole eligibility are not only incompatible, but also work to promote disparity and a lack of certainty in the criminal justice system."<sup>135</sup> Thus the elimination of parole creates a

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<sup>135</sup>S. Rep. No. 98-225 at 112. Findings concluded that some judges sentenced without regard for possible parole, while others tried to second-guess the parole board and imposed sentences which would ensure a minimum term of prison which might have been the actual sentence in the absence of parole. Such a system contributed to a great deal of sentence confusion.

more honest sentencing system which should in turn ensure a more equitable application of laws and sanctions. Since parole never dealt with the disparity between those whose sentence is to a term of imprisonment and those for whom no prison term will be served, it was by definition an inadequate remedy. Furthermore, despite good intentions, parole created an incentive for all of the relevant parties to recommend or impose a sentence discounted by their parole predictions.<sup>136</sup> So long as these predictions were imprecise, and they were, rather than levelling disparity, parole came to superimpose yet another layer of discretion, the result being more disparity.

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<sup>136</sup>See