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## SECOND CIRCUIT NOTE 1973 TERM

### FOREWORD: THE SENTENCING PROCESS AND JUDICIAL INSCRUTABILITY

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Several years ago I had occasion to discourse at some length, in delivering the annual Sonnett Lecture at Fordham Law School, upon the judge's dilemma in assigning relative importance to the various goals which for centuries society has agreed the sentencing process should achieve.<sup>1</sup> It is commonplace to acknowledge the conceptual inconsistency which may result from grouping together that set of aims with which the public at large, apparently expecting equal deference to be given to each, equips the judiciary for its task of enforcing the criminal law. For example, the approach of the "new" penology, whose origins lie with the utilitarian philosophers of the nineteenth century, recognizes that "with respect to any particular delinquent . . . punishment has three objects — incapacitation, reformation, and intimidation."<sup>2</sup> For Jeremy Bentham, as for the school which has followed his view, commitment was to be therapeutic for the offender, and protective of the community whose rules he had broken. Yet there persists among some today,<sup>3</sup> as there did long before Bentham's time,<sup>4</sup> the notion that incarceration and other sanctions should be retributive as well, expressive of the moral revulsion we feel at the criminal's infliction of injury upon our fellow man. And it requires little elaboration to demonstrate that a prison term which properly conveys that moral indignation might differ greatly from the sentence most properly designed to rehabilitate the inmate.

The potential for disparate treatment of similar offenders which

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<sup>1</sup> Kaufman, *Prison: The Judge's Dilemma*, 41 *FORDHAM L. REV.* 495, 499-503 (1973).

<sup>2</sup> J. BENTHAM, *THE RATIONALE OF PUNISHMENT* 21 (1830).

<sup>3</sup> See, e.g., N.Y. PENAL LAW § 1.05(4) (McKinney 1967).

<sup>4</sup> See, e.g., NEW YORK STATE COMM'N ON ATTICA, *ATTICA: THE OFFICIAL REPORT* 6 (1972).

inheres in these conflicting ideals is supplemented by another difficulty. Abstract and philosophical discussion of penal objectives must, of course, be pursued; but judges are daily called upon to apply the tentative consensus of these societal deliberations to convicted offenders of almost infinitely variegated temperaments, histories, and economic circumstances. It appears too obvious to require argument that, even if we were to agree on the relative priorities to assign to deterrence, rehabilitation, isolation from the community, and retribution, differences among individuals would still present us with the phenomenon of sentencing disparity to which so much attention has recently been devoted. Thus, the calculus whose outcome is a term of years seems to require differentiation along two wholly distinct scales: the personal as well as the theoretical.

There is, however, an important distinction which must be made between these quite independent problems. What is considered under the too general rubric of "sentencing disparity" may be acceptable when it results from what I have chosen to call "personal" reasons, although it is completely unjustifiable when it results solely from "theoretically" inconsistent views held by different judges. An example would help to illustrate this point. Recently, a panel on which I sat and for which I wrote the opinion affirmed an order granting writs of habeas corpus to several hundred young adults who had been sentenced under the reformatory sentence provisions of former New York Penal Law Article 75.<sup>5</sup> That statute, which had been prospectively repealed shortly before our decision,<sup>6</sup> provided misdemeanants between the ages of 16 and 21 with terms of unspecified duration, to terminate either upon discharge on parole, or after service of four years of confinement. The purpose of this reformatory sentence was "to provide education, moral guidance and vocational training for young offenders,"<sup>7</sup> and to achieve this goal New York provided special institutions, programs, and parole officers uniquely for young adult offenders. In 1970, however, the Correction Law was amended to abolish the distinction between reformatories and prisons.<sup>8</sup> Thereafter, youths who had been given four-year terms were confined indiscriminately with adults who had committed the same crimes, and who were incarcerated under conditions which the Penal Law recognized as punitive.<sup>9</sup> The anomaly which resulted was that adult offenders who had committed

<sup>5</sup> United States *ex rel.* Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974).

<sup>6</sup> N.Y. SESS. LAWS [1974], ch. 652, § 7 (McKinney).

<sup>7</sup> N.Y. PENAL LAW § 75.10, commentary at 156 (McKinney 1967).

<sup>8</sup> N.Y. CORRECTION LAW art. 4 (McKinney Supp. 1974).

<sup>9</sup> N.Y. PENAL LAW § 1.05(4) (McKinney 1967).

exactly the same crimes received substantially lesser sentences — to be served in the same institutions — because the law supposed that the young adult group was being rehabilitated, while the adults were being punished.<sup>10</sup>

The inconsistency is by no means peculiar to the legislative branch. Indeed, it may well appear even more frequently among a group of judges. Some will impose stiffer sentences than others because they have attached differing significance to the goals which they believe society wishes to achieve through the penal law. Whether the disparity of sentencing is created by the legislative or the judicial branch, our sense of fairness is pricked by the inequality.

We do not feel as outraged, and perhaps rightly so, when those who have committed the same crimes are penalized differently because of characteristics peculiar to their individual cases. Whether preeminence be assigned to the need for rehabilitating the criminal, or isolating him as a danger to the community, or punishing him because he has transgressed the most basic social norms, our judgment of the proper length of sentence cannot but be affected by such factors as prior criminal record, ignoble motive, perjury, and so forth. In so saying I am, of course, making no novel statement. Indeed, the Project for an Italian Penal Code more than 50 years ago presented a schedule of conditions evidencing greater or less "dangerousness" to be used by the sentencing judge.<sup>11</sup> Seventeen circumstances requiring greater punishment were enumerated, including "dishonesty of prior personal, family or social life; . . . [p]rior judicial and penal record; . . . [a]buse of trust in public or private matters or malicious violation of special duties . . ."<sup>12</sup> Eight mitigating circumstances were also set forth, among which were "[h]onesty of prior personal, family and social life; . . . [h]aving acted from excusable motives or motives of public interest; . . . having acted in a state of excusable passion . . . ; [h]aving acted through . . . special and transitory conditions of health or through unknown material circumstances . . ."<sup>13</sup>

We must be cautious, however, lest our recognition of the propriety of a consideration of such individual differences cause us to overlook the possibility that considering each of these factors and attaching

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<sup>10</sup> See also *Gesicki v. Oswald*, 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd*, 406 U.S. 913 (1972).

<sup>11</sup> I. FERRI, *RELAZIONE SUL PROGETTO PRELIMINARE DI CODICE PENALE ITALIANO* 7 (1921).

<sup>12</sup> *Id.* at 553-54, 342-43.

<sup>13</sup> *Id.* at 154, 344-45. These and other provisions of the Italian Project's Penal Code are discussed in Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 467-75 (1928).

various weights may lead to unfair discrimination. The welter of attitudes and circumstances which distinguish one defendant from another almost defies description. And yet if we are to hold fast to our hope for equal justice under the law, we must make a confirmed effort both to isolate the factors which may be considered by the sentencing judge, and to determine the weight which each deserves.<sup>14</sup> To be sure, this task is no less difficult than — and is in fact related to — that which we face in coming to some agreement over the policies underlying the sanctions imposed. But it would seem that, even without an explicit definition of priorities, we could achieve a considerable measure of uniformity merely by restricting our efforts at reform to the realm of the personal.

In an attempt to make some progress along these strictly pragmatic lines, I appointed in July of 1973 a Committee on Sentencing Practices, to study the nature and extent of sentence disparity in the Second Circuit, and to bring to the problem solutions which would be at once imaginative and practical. The recently released Sentencing Study, prepared by the Federal Judicial Center and conducted under the direction of the Committee headed by former Chief Judge J. Edward Lumbard,<sup>15</sup> illustrates well the method of inquiry which I suggest may be most fruitful. Eschewing any attempt to resolve the theoretical dilemma posed by the existence of several goals in the sentencing process, the study instead focused on the problem of disparity as it appeared to be related to particular case characteristics. The result was one which many had long suspected. Substantial variations appeared in length and type of sentence imposed by different judges, even where the underlying facts were the very same.<sup>16</sup> It is important to note, though, that the intra-circuit disparity which did not appear to result from the con-

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<sup>14</sup> This suggestion is, of course, by no means unique. For a somewhat similar proposal, see Frankel, *Lawlessness in Sentencing*, 41 CINN. L. REV. 1, 53 (1972) (proposing a National Commission to enact rules "about factors to be weighed in mitigation or aggravation of prison sentences").

<sup>15</sup> FEDERAL JUDICIAL CENTER, *THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT* (Aug. 1974).

<sup>16</sup> I shall cite but one striking example. Identical groups of 20 presentence reports — drawn from actual cases, but with the identifying facts altered — were sent to a number of district judges. The 20 cases selected were broadly representative of the criminal business of the Second Circuit's district courts. The first defendant in those groups was a union official convicted after trial of extortionate credit transactions and related income-tax violations. Additional information was provided concerning the official's prior record, narcotics use, sex, current employment, and so forth. Sentences imposed by the 26 judges considering the case ranged from 3 years' imprisonment to 20 years' imprisonment and a \$65,000 fine. Twelve judges would have sentenced him to 15 years' imprisonment or more; twelve judges would have sentenced him to 8 years' imprisonment and a \$20,000 fine or less. Proportionate disparities appeared throughout the other 19 test cases. *Id.* at Table I & p. A-4.

firmed predilections of various judges for more severe or more lenient punishments. If we may assume a consistent ranking of theoretical goals on the part of each, we can, I think, rightly conclude that the problem of disparity stems in large measure from an uncertainty over the relevance and importance of the myriad characteristics which combine to make each offender a special case.

So to conclude is to take a long but, it must be emphasized, only a preliminary, step toward the resolution of this very serious problem. The Sentencing Study also made an attempt, perhaps necessarily less successful, to isolate and determine the weight given by various judges to those factors which it thought most likely to influence judgment concerning the proper length of sentence.<sup>17</sup> In saying "perhaps necessarily less successful," I have chosen my words carefully, for the accuracy with which the empirical sciences can reproduce the heart-wrenching reality of the actual sentencing process is limited. Indeed, the Study itself gave explicit recognition to this problem in emphasizing the tentative nature of its conclusions.<sup>18</sup> Despite these difficulties, I expect that the Committee's further deliberations — which continue even now — will result, like the Study already published, in the most significant contributions to eradication of the ancient and widespread phenomenon of sentencing disparity.

What I wish to emphasize is that work must be done along lines supplemental to those pursued by the Sentencing Committee. If much remains to be done before we have completed the Herculean task of cataloguing and determining the importance of those personal characteristics which should influence the sentencing decision, I suggest that we have ready at hand the surest and most efficient method for achieving it. For sentences are daily imposed in all the trial courts of the

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<sup>17</sup> Thus the Study considered, for example, the effect of the probation office recommendation on the length of sentence imposed. It also attempted to determine the importance which various judges assigned to the fact of heroin addiction, and the existence of a prior criminal record. Further consideration was given to the significance of conviction after plea, as opposed to trial. Finally, two of the test cases sought to weigh the effect which socio-economic considerations had on sentence disparity. Although the Study did not attempt to substantiate the criticism that white collar criminals are treated more leniently than blue collar offenders, these latter cases sought evidence of more exaggerated disparity within each of those two classes. *Id.* at 41-54.

<sup>18</sup> Among the more obvious difficulties, to which the Study gave explicit recognition, was the fact that the sentences were rendered under experimental conditions which did not give the judges an opportunity to form any personal impressions of the defendant on the basis of face-to-face contact. A somewhat related variable was that those imposing the penalties knew that their decisions would have no consequences for actual offenders, their families, or victims. Some understatement of the extent of disparity was also thought to stem from the use of identical presentence reports in all the controlled cases. *Id.* at 11-20.

federal system. It is strange indeed, and lamentable, that in the great majority of these cases we have not the slightest idea upon what those determinations are based. We can, of course, rely with some assurance upon the assumption that the judge will thoroughly consider and honestly weigh all available and relevant evidence. But it does not strain the imagination to suppose that some things of importance will be overlooked and that matters considered will be assigned varying degrees of significance by judges of differing dispositions and backgrounds. Appellate courts, although they have noted the salutary purposes which could be served by demystifying the presently murky practice, have in the ordinary case declared their impotence to remedy the situation through their supervisory powers.<sup>19</sup> Though it would take me far afield to discuss the merits of review by one tribunal over another, the absence of any form of review makes impossible some clarification at a second level.<sup>20</sup> And even in special cases, such as the Federal Youth Corrections Act,<sup>21</sup> where a statutory mandate might have been read to impose a requirement of some reasoned elaboration, the time-honored practice of judicial inscrutability has carried the day.<sup>22</sup>

In addition to serving as a desirable prelude to some thoroughgoing and perhaps legislatively enacted reform, lifting this veil of secrecy would perform a second much-needed service. For the shroud which now envelops the convicted defendant as he moves away from the constitutionally enforced publicity of trial cannot but have its harmful effect on his perception of the criminal justice system. Judge Marvin Frankel pointed out,

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<sup>19</sup> Elaboration by the sentencing judge upon the reasons for his decision has been required under only the most limited conditions. Among these are cases where a penalty was imposed on misinformation of a constitutional magnitude, *see, e.g.*, *United States v. Tucker*, 404 U.S. 443, 447-48 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948); cases where a simultaneous sentence and conviction upon a more serious count were later overturned, *see, e.g.*, *McGee v. United States*, 462 F.2d 243 (2d Cir. 1972); and situations where the court failed to consider substantial mitigating circumstances, *see, e.g.*, *United States v. Malcolm*, 432 F.2d 809, 818 (2d Cir. 1970).

<sup>20</sup> *See, e.g.*, *United States v. Velasquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973).

<sup>21</sup> 18 U.S.C. § 5010(d) (1970) requires, before a youth offender is sentenced under an applicable penalty provision other than the Federal Youth Corrections Act, that the court "shall find that the youth offender will not derive benefit from treatment under" the Act.

<sup>22</sup> Despite the holdings of several appellate courts that § 5010 required an explicit finding of "no benefit" coupled with supporting reasons for resort to the alternate penalty, *see, e.g.*, *United States v. Kaylor*, 491 F.2d 1133 (2d Cir. 1974) (en banc); *United States v. Toy*, 482 F.2d 741 (D.C. Cir. 1973), the Supreme Court declined to interpret the section as demanding anything more than a statement by the district judge that the offender would not benefit from the provisions of the Youth Corrections Act. *Dorszynski v. United States*, 94 S. Ct. 3042 (1974).

When the sentence is imposed, the darkness deepens for the defendant; there usually is . . . little or nothing to show that a reasoned judgment is being rendered. This is not to imagine that the average defendant, doomed to a term of confinement, is likely to find pleasure or solace in a coherent rationale for the affliction. It is to say that the failure to explain, especially in the light of the ample time for later brooding, lends a quality of baleful mystery rather than open justice. At the least, the absence of an explanation does nothing to quell the disposition to suspect unfairness, fired later by encounters with prisoners who have much lighter sentences based upon circumstances that seem, or are perceived to be (or, simply, are) essentially identical.<sup>23</sup>

I have said that a requirement of elaboration upon the reasons for each sentencing decision would assist both to identify factors considered — some of which we may not in fact have suspected — and to pinpoint the significance assigned to each factor, thus hopefully providing a target toward which legislative reform can most effectively be directed. It would also offer some reassurance to the criminal, whose life is most acutely affected, that his liberty is not being revoked in a wholly arbitrary fashion. I believe still a third end might be accomplished by this actually quite modest expedient. It has been commonly supposed that the very singularity of each crime and criminal makes any attempt at development of uniform standards not only doomed to failure, but even undesirable.<sup>24</sup> Viewed from a different perspective, this is in fact to suggest that the very problem which we are considering is its own justification. As the ostrich-like quality of this supposition becomes increasingly evident, however, I believe that it will begin to appear with equal clarity that the singular virtue of the common law may be exercised to good effect. For the silence which has heretofore characterized the post-conviction process has not only bred suspicion among the guilty; it has also imposed an undesirable insularity upon the judges themselves, forcing them to act unassisted by the accumulated wealth of prior and contemporary opinion upon which they can draw in so many other fields. The necessary result has been that individual judges act only within the limits of their own wisdom, which, even at the end of their tenure, does not exceed that of the rest of fallible men.

If, instead, each sentence which was imposed were to be accom-

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<sup>23</sup> Frankel, *Lawlessness in Sentencing*, 41 CINN. L. REV. 1, 13-14 (1972).

<sup>24</sup> See, e.g., DIX, *Judicial Review of Sentences: Implications for Individual Disposition*, 1969 LAW AND THE SOCIAL ORDER 369.

panied by a declaration of those characteristics of the criminal's background, demeanor, motives, and attitude, and those peculiarities of the crime, which the sentencing judge took into account, and a statement of the importance which he found each should be assigned, the situation might be considerably ameliorated. A judge concerned to discover the precise mitigating effect which other judges allotted to the fact of narcotics addiction, or to the fact that a particular defendant had two concerned parents, or had been employed for several years at the same job, would have empirical evidence upon which to rely. It is true that even this sort of enumeration and weighing would still fall short of capturing the uniqueness of the convicted individual whom the judge confronted. But I cannot help but think that achieving a consensus regarding these recurring symptoms, and forcing the judiciary to think about its own decision-making process, would exert a beneficial influence to rationalize the procedure which now is too easily characterized as capricious.<sup>25</sup>

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<sup>25</sup> A further significant purpose which could be served by requiring a statement of reasons is a reduction of the risk that the sentencing judge might rely on misinformation contained in the presentence report. *See* *United States v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973). For once the court's misapprehension had been disclosed, the convicted defendant would be offered a much more meaningful opportunity to apply for reduction of sentence even within existing procedures. *FED. R. CRIM. P.* 35.

It has also been suggested that the court's statement of reasons "could prove to be of considerable assistance to prison and parole authorities in later determining the type of institution in which the defendant should be incarcerated and the time and conditions of parole." *United States v. Brown*, 479 F.2d 1170, 1173 (2d Cir. 1973).