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I would like to address one of the questions of sentencing equity raised by Professor Zimring, a question he suggests "[goes] to the heart of the matter—who should go to prison and why."[1] It is important to recognize that sentencing is a two-step process. The imprisonment question, that is, who goes "in" and who stays "out," is a very different one from the subsequent determination of sentence length. It is my view that something can be done to improve that first step in the sentencing process.

Of the four commonly identified, and generally acknowledged, "purposes" of punishment,[2] two, at least, must be viewed from a substantially different perspective when the "in-out" decision is being made than when length of incarceration is our concern. As Professor Zimring points out, the expectation of achieving rehabilitation in today's mega-prison is probably absurd.[3] Thus, once the decision to imprison is made, consideration of rehabilitation becomes essentially irrelevant in determining the appropriate sentence length. Rehabilitation is not irrelevant to the initial imprisonment decision, however. Assuming that one accepts individualization as a necessary part of a proper criminal sentencing system,[4] the availability and effectiveness of rehabilitative resources, and the likelihood that the use of those resources will result in a rehabilitative success with a particular offender, are considerations which must be addressed when the incarceration decision is made.

Similarly, the goal of incapacitation relates essentially to the "in-out" decision, rather than to the length of sentence determina-

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1. Zimring, *Sentencing Reform in the States: Some Sobering Lessons from the 1970's*, 2 N. ILL. U.L. REV. 1, 16 (1981). *See also* TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 7 (1976) [hereinafter cited as TWENTIETH CENTURY FUND].

2. *See, e.g.*, Bullington v. Missouri, 451 U.S. 430 (1981); 1 INTRODUCTION TO THEORIES OF PUNISHMENT 5 (S. Grupp ed. 1971).

3. *See* Zimring, *supra* note 1, at 6-7.

4. *See* text accompanying note 9 *infra*.

tion. Once it is determined that society is in need of protection from an offender, any attempt to predict how long that need will continue is almost certainly tilting at windmills. It is plausible to suggest, however, that we are capable of making reasonably accurate assessments of whether society requires the incapacitation of a particular offender at all.

To perhaps a lesser, but nonetheless significant extent, the other two goals of punishment, deterrence and retribution, must be viewed from a different perspective when the two steps in the punishment decision are considered. It can be safely assumed that the deterrent effect of probation, or some form of "conditional release," on the general populace is, as a rule, going to be less than that of a prison sentence. On the other hand, any suggestion that a ten-year prison sentence has a greater general deterrent effect than does a five-year sentence is mere speculation. So, too, with the question of individual deterrence. The sentencing judge can be provided with information sufficient to enable him to make a reasonably accurate determination of whether probation will deter this individual from committing future crimes, or whether imprisonment is necessary. But that is an "in-out" decision. Whether a certain length of incarceration will provide more or less of a deterrent effect on an offender requires us to set a sentence based on mere predictions of what the actual effect on the offender will be at the end of his term of imprisonment. We are incapable of providing the sentencing judge with that kind of information.

Without belaboring the point, similar considerations exist with regard to the fourth acknowledged goal of punishment— vindication of society's need to condemn, that is, retribution for the crime. A determination of whether that need will be satisfied by probation, or whether society will be satisfied only with the sound of a cell door closing, is a much different and more manageable task than is an accurate judgment of how long that cell door must remain closed.

To reiterate, sentencing may be properly described as a two-step process. It is my contention that our ability to predict whether the goals of punishment will be achieved, and what considerations are relevant in making those predictions, are very different when we are making the "in-out" decision than when we are making the length of sentence decision. As a rule, efforts at sentencing reform have failed to recognize these differences, and have tended to approach the process as a conceptual whole. Consequently, difficulties inherent in the second decision have affected

consideration of the first, and have blinded us to the fact that the first is, as we shall see, a much more solvable problem. Furthermore, I would suggest that a solution to the "in-out" problem will alleviate at least some of the difficulties inherent in the length of sentence problem. For example, better "in-out" decision-making may well lower the prison population, as well as improve prisoner attitudes concerning the justice of the sentencing process. In addition, to the extent that the two steps have features in common, the development of an effective approach to the "in-out" decision will provide information which is usable in working out the problem of making length of sentence decisions. I therefore will limit myself to proposing a solution for the problems inherent in making the imprisonment decision in the first place. While recognizing that this proposal will not solve the length of sentence problem, it may at least assist in its resolution.

Before presenting the proposal, however, it is necessary to speak briefly to the legislative versus judicial imprisonment decision debate. Under the legislative approach, it is declared by statute which crimes require imprisonment and which do not. This creates a number of difficulties. As to those crimes for which prison is mandated, it prohibits an evaluation of the possibility of rehabilitation or the actual need for incarceration, as well as any other consideration for the individual characteristics of the offender or the particular circumstances of the offense committed. Furthermore, legislatively mandated imprisonment decisions build into the process the most problematic part of the length of sentence decision—the need to be able to predict, in advance of any particular offense, whether imprisonment is necessary. As Professor Zimring indicates, legislators must always have in mind the worst possible case when establishing mandatory imprisonment. Finally, mandatory imprisonment exacerbates, rather than alleviates, both the prisoner's and society's sense that the criminal sentencing process is not based on individualized justice.

On the other hand, judicial imprisonment decision-making, at least as currently practiced, fares no better. The sentencing judge's discretion in making the imprisonment decision is greater than in any other area of the law.[5] The information upon which the deci-

5. Attorneys normally engaged in civil litigation and familiar with the broad discretion available to trial judges in evidentiary rulings, would probably be surprised at how much greater is the discretion afforded in criminal sentencing. Marvin Frankel has provided us with what should be a shocking, and is undoubtedly an accurate, picture of the sentencing process:

sion is based is untested and often not even disclosed to the defendant or his attorney. There is frequently no requirement that the sentencing judge explain the reasons for his decision and, unless the sentencing judge voluntarily explains, there is no record upon which an appellate court can review the decision to determine whether even the exceedingly broad discretion which is available has been abused. Finally, in partial defense of sentencing judges, there are few guidelines available to assist the judge in making a determination as to what factors should be considered and how they should be weighted.[6] It is little wonder that enormous disparity exists in what appear to be similar cases, and that no disparity exists in what appear to be significantly dissimilar cases.[7] Professor Zimring surely is correct when he points out that neither determinate nor indeterminate sentencing has proven to be satisfactory.

Recognizing these problems, one would like to believe that there is some third alternative. Unfortunately, it appears that there is not. Either the imprisonment decision is left in the hands of the sentencing judge for an individualized determination, or it is

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> [Sentencing] is . . . among the less meaningful things judges report about their work . . . . [They] don't talk much, to each other or to anyone, about the issues and difficulties in sentencing. They don't read or write about such things. Because . . . appeals are normally not allowed to attack the sentence, the reading pile rarely contains anything pertinent. The judge is likely to read thick briefs, hear oral arguments, and then take weeks to decide who breached a contract for delivery of onions. The same judge will read a presentence report, perhaps talk to a probation officer, hear a few minutes of pleas for mercy—invest, in sum, less than an hour in all—before imposing a sentence [of imprisonment].

M. FRANKEL, CRIMINAL SENTENCES 15 (1972).

6. A partial listing of the factors a sentencing judge might consider would include: did defendant plead guilty or demand a jury trial; has the defendant made restitution, voluntarily or under pressure; did defendant perjure himself at trial; has he a prior record of convictions; is it probable that he committed prior crimes for which he was not apprehended or convicted; what are his family conditions; has he assisted the prosecution in convicting others; who are his friends and associates; what is his employment record; how did he behave at his trial; does he attend church; is he involved in a nonmarital living arrangement; what are his religious and moral qualities and beliefs; what is his age; and, finally, what role should gender play? Clearly, some of these factors are of questionable legitimacy.

7. In one Ohio county studied, for example, one judge granted probation to 51 percent of the offenders brought before him, while another granted probation to only 26 percent. One judge imprisoned 62 percent of convicted grand larceny offenders but only 17 percent of convicted robbery defendants. One judge imprisoned 56 percent of black defendants while releasing 65 percent of white defendants. TWENTIETH CENTURY FUND, *supra* note 1, at 5.

replaced by a standardized judgment made by some other body.[8] Faced with this limitation, I would suggest that, for two reasons, judge-made, individualized imprisonment decisions are preferable.

The first of these reasons relates to a philosophy which lies at the core of our Anglo-American social, political and legal heritage—that of individualized fairness and justice. Legislatively declared mandatory prison sentences, while satisfying the mood of the moment regarding a particular crime, cannot be successful in the long run. Primarily, they deny an individualized evaluation of the offender, and a determination of the most appropriate disposition of that offender. Individualization will not be surrendered by a society historically and emotionally tied to a philosophy establishing the individual as its most fundamental unit. Treatment of each person as an individual by our government occupies too important a place in our basic concept of justice to be discarded entirely.[9] Although we recognize that our capacity to individualize is limited, we cannot accept a total rejection of the underlying premise that justice requires individual punishment as well as individual trial and judgment. I suggest, moreover, that although our present approach to the imprisonment decision does not go to the limits of our capacity to individualize, we can improve the system rather than reject individualization.

My second reason for rejecting statutorily mandated sentencing is that there are certain inherent difficulties with standardized, made-in-advance decisions. The information available to the legislature is usually nothing more than a description of the particular crime. The possibility of rehabilitation, or need for incarceration, of a particular offender is legislatively made irrelevant. The recognition that mandated imprisonment does not work necessarily means that it cannot be made to work.

Judicial imprisonment decision-making, however, can be im-

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8. We could, of course, combine features of both determinate and indeterminate sentencing as Illinois has done with its numbered and lettered felonies. Such an approach, however, merely applies one set of difficulties to some crimes, and the other set to the remainder.

9. Indeed, it is likely that criminal juries, knowing that conviction will lead to automatic imprisonment, will take cases they deem appropriate for leniency out of the hands of the legislature and the judge, and will acquit rather than send the offender to prison. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 259 *passim* (1966). This exercise of "jury nullification" deprives us of the values inherent in a conviction followed by conditional release, and will result in even more unreviewable discretion than exists under the indeterminate sentencing approach.

proved to a degree that allows the basic goals of punishment to be achieved. In examining the system, and participating in it, one cannot help but be struck by the almost total disregard of the procedures our legal system has developed over the past thousand years to insure just and equitable decision-making.[10] When we are deciding who should pay for a damaged automobile, we demand full, advance disclosure of information, testing of all evidence in open court (under oath and subject to cross-examination), disclosure of the rules of law being applied, a proper application of those rules by the fact-finder, and the opportunity for appellate review. Yet when we are deciding something of such transcendent importance to both the individual and society as who will go to prison, these procedures are nowhere to be found. The fact-finder takes whatever evidence he deems pertinent, from whatever source it may come, evaluates that evidence without the assistance of counsel or any process of verification, applies whatever rules he personally considers appropriate, and announces his decision, frequently with no explanation whatsoever. To be sure, if he should happen to disclose that he used an inappropriate consideration such as race, reversal on appeal is possible. But if he should give no reasons, or if the reasons he gives are less clearly inappropriate, or if they are unsupported by the evidence, no appeal will lie.

The problems with such a procedure (or lack thereof) are several. The disparity of which we have already spoken is inevitable. The effect on the individual is significant. Those who are imprisoned for crimes which they deem to be less serious than the crimes of others who have not been imprisoned are bound to resent the fact that their futures were placed in the hands of one individual with the capacity, and perhaps the inclination, to act arbitrarily. For those who are not imprisoned, perhaps as arbitrarily, they may well lose the educational benefit[11] of knowing what it was about

10. When first exposed to the criminal sentencing process, I was reminded of Justice Felix Frankfurter's oft-quoted statement about the importance of procedure in the success of the Anglo-American legal system. "The safeguards of 'due process of law' and 'the equal protection of the laws' summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people. The history of American freedom is, in no small measure, the history of procedure." Malinski v. New York, 324 U.S. 401, 413-14 (1945).

11. The educational effect of criminal conviction and punishment has been suggested as a fifth "purpose" of the criminal law. W. LAFAVE & A. SCOTT, CRIMINAL LAW, 23-24 (1972).

them which warranted a second chance, as well as lose their respect for the law and the criminal justice system. Finally, and most significantly, this system makes it almost impossible to identify the real problem with a judge-made sentencing system. Sentencing disparity, prisoner disaffection and over-crowded prisons are not, in themselves, the problem: they are the symptoms. The problem is that we do not know what sentencing judges are doing. We do not know what information they are using. We do not know whether it is true or false. We do not know what criteria they are applying and if they relate to a legitimate purpose of punishment. Without this information it is impossible for anyone—be it legislature or appellate court—to determine which, if either, of two judges who reached inconsistent and disparate conclusions was wrong. And the sentencing judges, presuming their honesty, integrity and desire to do justice, have no way of knowing whether they have erred.

Viewed in this light, a rational lawyer who believes in the rationality of our legal system cannot help but seek out the reasons for the virtually unbridled discretion given to sentencing judges. When we have done so well at developing a system for making decisions at trial, why have we abandoned that system at sentencing in favor of one which would be rejected in any other area as too fraught with potential for arbitrary action?[12] One possible explanation is that we have made a social policy decision. We will afford an accused, who is presumed to be innocent, a vast panoply of procedural safeguards, but a verdict of guilty rendered by his peers carries with it a forfeiture of the right to be free of arbitrary governmental action. I suggest, however, that we have not made and cannot make such a policy decision. To be sure, a criminal conviction does carry with it a forfeiture of certain rights. The right not to be imprisoned is one. The right, once imprisoned, to unlimited communication with persons on the outside is another.[13] The right, if not imprisoned, to travel from state to state without official approval is undoubtedly a third. But all of these forfeitures, and certainly any others conceivable, are directly related to our need to accomplish the special goals we have in dealing with a convicted offender. The rights surrendered must be limited to those required

12. One might note, at this point, that we have retained procedural safeguards for such "in-out" prison decisions as parole and probation revocations. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). Their disregard at the sentencing hearing, therefore, seems even more anomalous.

13. Procunier v. Martinez, 416 U.S. 396 (1974).

to serve that social interest.[14] There must, therefore, be some interest of the criminal justice system which is perceived as legitimizing the forfeiture of practically all due process rights in the sentence hearing.

The search for some justification for this system is illuminated by a series of four related decisions issued by federal courts in New York between 1977 and 1979. In *United States v. Fatico,*[15] District Court Judge Weinstein of the Eastern District of New York was required to pass sentence upon an offender convicted of highjacking an airplane from New York's Kennedy Airport. Included in the information which the prosecution sought to have considered was uncorroborated, out-of-court testimony that the defendant was affiliated with an organized criminal syndicate. In refusing to accept this evidence, Judge Weinstein concluded that the due process and confrontation clauses of the fifth and sixth amendments[16] applied to sentencing hearings, and that no evidence could be considered which was not presented in open court, under oath and tested for veracity through cross-examination.

Not surprisingly, on appeal Judge Weinstein was reversed.[17] The opinion of the Court of Appeals for the Second Circuit, while recognizing that "[the] Due Process clause is plainly implicated at sentencing," went on to state: "It does not necessarily follow, however, that all of the procedural safeguards and strict evidentiary limitations of a criminal trial proper are required."[18] Judge Weinstein, while on the right track, had apparently gone too far. In support of its conclusion, the Second Circuit identified two factors which made it necessary to deny full due process rights at the sentencing hearing. The first was the risk that "[s]uch a procedure could endlessly delay criminal administration in a retrial of collateral issues."[19] Second was the danger that persons with relevant information would fear coming forward if their identity and information were to be disclosed in open court.

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14. *Cf.* Procunier v. Martinez, 416 U.S. 396 (1974) (restrictions on prisoners' rights to communicate with the outside world must be limited to those necessary to serve identifiable and valid prison goals).

15. 441 F. Supp. 1285 (E.D.N.Y. 1977), *rev'd,* 579 F.2d 707 (2d Cir. 1978), *modified on remand,* 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd,* 603 F.2d 1053 (2d Cir. 1979).

16. *Id.* at 1297.

17. United States v. Fatico, 579 F.2d 707 (2d Cir. 1978).

18. *Id.* at 711.

19. *Id.* at 712.

One cannot deny the validity of such concerns, but one must question their applicability to *all* sentencing hearings. By declaring procedural due process essentially off-limits in the sentencing hearing because it does not work in some cases, are we not applying an undesirable rule in cases in which it is unnecessary? I submit that in the overwhelming majority of sentencing decisions, especially when step one, the "in-out" decision, is seriously at issue, there is very little reason for concern about endless delay or fearful informants. In most cases the information submitted to the court is limited in quantity and relatively uncontroversial in nature.[20] In such cases, there is no justifiable reason for denying that information to the defendant, for depriving him of an indication of the reasons for his incarceration or release, or for refusing to allow him an opportunity to test the validity of those reasons in an appellate court.

I am not suggesting that we must always grant the convicted party at sentencing the full panoply of due process rights afforded at the guilt-innocence stage of the trial. Some modification of that procedure, such as a relaxation of the rules of evidence, would seem appropriate and acceptable. Still further adaptations would undoubtedly be necessary in the unusual case where excessive delay or danger to witnesses would interfere with the process.[21] What I am suggesting is that the current system reinforces for judges the notion that the sentencing decision is one in which they are free to act in accordance with their own personal concepts of justice. Requiring the application of procedural safeguards appropriate to the case, however, will reinforce the opposite notion and will direct

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20. It must also be recognized that witness reluctance is not always motivated by fear. The false witness may also be unwilling to have his assertion tested in open court.

> Assurances of secrecy are conducive to the transmission of confidences which may bear no closer relation to fact than the average rumor or item of gossip, and may imply a pledge not to attempt independent verification of the information received. The risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest.

Gardner v. Florida, 430 U.S. 349, 358 (1977).

21. In the third and fourth *Fatico* decisions (*see* text accompanying note 15 *supra*), where these problems existed, *in camera* disclosure of the evidence was permitted, but the burden of proof imposed upon the prosecution was elevated to that of "clear, unequivocal and convincing evidence." United States v. Fatico, 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979). An additional requirement of corroboration by at least one other witness might also be applied.

sentencing judges into a role with which they should already be comfortable, that of an impartial arbiter making judgments in accordance with established rules and guidelines.

All of these procedural rights certainly would be advantageous to the criminal defendant. He would be, at the very least, reasonably assured that the information being used is accurate, and he would be afforded the opportunity to challenge through the appellate process the standards being applied. The final problem, the one which concerns us most here, is that of establishing a relatively uniform set of standards, rules and guidelines for making "in-out" sentencing decisions. That too can be resolved in the way we have been resolving such questions throughout legal history. The decision-making and rule-making functions of the judicial process are but two sides of the same coin. The writing of a judicial opinion not only provides a justification for the decision reached, but also provides a basis for appellate review. This review is our primary technique for educating trial judges. All sentencing judges, in addition to the one whose decision is being reviewed, will learn which factors are appropriately considered and which are not, what weight should be given to those factors in particular cases and what facts are relevant in reaching the judgments.

Initially, because the rules do not now exist, such review would be relatively frequent. Cases which raise unanswered questions will abound, but with so many cases, the rules will develop quickly. The sentencing judges will apply the rules as they do other rules, and the number of disparities and errors will be reduced to normal and manageable levels.

This is not to suggest that judicial discretion be abolished. The fact-finding judgment on the evidence will be entitled to the deference it properly receives in other cases. Once the rules are established and understood, the weight attached to the relevant factors, within established standards, would also be accorded substantial deference. But that discretion which will be lost is better gone—the discretion to consider as true assertions which have not been verified, the discretion to consider matters not relevant to the decision, the discretion to apply unbridled personal biases and the discretion to be arbitrary.