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Judge Thomas M. Hardiman, United States Court of Appeals for the Third Circuit [foreword]

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Foreword

*Judge Thomas M. Hardiman, United States Court of Appeals for the Third Circuit**

I appreciate the opportunity to write the Foreword to this issue of the *Duquesne Law Review* devoted to criminal sentencing. Of the many solemn responsibilities of a judge, imposing sentences is perhaps the most daunting. Any preconceived notions that a judge may have about sentencing upon taking the bench are quickly dwarfed by the awesome responsibility it entails. Balancing the principles animating the criminal law—incapacitation, retribution, rehabilitation, and deterrence—is difficult in and of itself, and the inherent subjectivity of the enterprise makes the task even more challenging. At the end of the day, one person, backed by the formidable power of the State, passes judgment upon a fellow human being. This is more art than science, so judges do the best they can.

More than four years have passed since I sentenced anyone, but I remember well the histories and backgrounds of many of those who appeared before me, and I continue to hope and pray that they were sentenced justly. Even when a just sentence is imposed, however, there is nothing to celebrate because every sentence signifies failure to some degree. Most obvious is the failure of the defendant to conform his conduct to the requirements of the law. But there are other failures as well. The large majority of defendants I encountered were not raised properly, primarily because their fathers rarely, if ever, lived with them during their formative years. In these fatherless homes, mothers, grandparents, and other family members often strove mightily to raise these young

* Judge Hardiman was nominated by President George W. Bush to the United States Court of Appeals for the Third Circuit on January 9, 2007 and was confirmed by the Senate (95-0) on March 15, 2007. Prior to becoming an appellate judge, he served as a trial judge on the United States District Court for the Western District of Pennsylvania as of November 1, 2003. Before entering judicial service, Judge Hardiman handled a wide variety of litigation matters in state and federal trial and appellate courts as a partner at Reed Smith LLP (1999-2003), a partner at Titus & McConomy LLP (1996-1999), and as an associate with its predecessor firm, Cindrich & Titus (1992-1996). A graduate of the University of Notre Dame (1987) and Georgetown University Law Center (1990), Judge Hardiman began his legal career as an associate in the Washington D.C. office of Skadden, Arps, Slate, Meagher & Flom (1990-1992). His chambers are in Pittsburgh, Pennsylvania, where he resides with his wife and their three children.

men, all to no avail. In some cases—especially those involving the pervasive illicit drug trade—family and friends were complicit in the defendant's criminality because of the material wealth it generated. Some blame also can be directed at failing public schools. Numerous defendants who appeared before me were high school dropouts, and many of those who received diplomas were passed along from one grade to another irrespective of what, if anything, they had learned. Finally, we all share in some of the failure to the extent today's American culture neither teaches young people the distinction between virtue and vice nor provides them with the moral foundation to pursue the good.

In light of the 1.6 million incarcerated and the 4.2 million on probation, there is no doubt that criminal sentencing will keep judges busy for the foreseeable future. As my colleague Judge Fisher notes in his article, the Supreme Court's pathmarking decision in *Booker* and its progeny have presented challenges for federal trial and appellate courts. Questions that presently vex federal trial and appellate judges include: When is a sentence substantively unreasonable? What constitutes sufficient consideration of the sentencing factors of 18 U.S.C. § 3553(a)? Are some Guidelines entitled to more deference than others? If so, which ones and why? Reprising his article in Volume 46 of the *Duquesne Law Review*, Judge Fisher here refines further his theory of "guided discretion" in an effort to improve the fairness and predictability of federal sentencing in the post-*Booker* world. The article also contains useful statistics regarding the sentencing habits and practices of district judges since *Booker* was decided.

In some tension with Judge Fisher's notion of "guided discretion," Paul J. Hofer, Policy Analyst for the Sentencing Resource Counsel Project, and Assistant Professor at John Hopkins, exhorts federal trial judges not merely to calculate the advisory Guidelines range, but also to consider the pedigree of each guideline at issue. Mr. Hofer provides an interesting retrospective of the United States Sentencing Commission and the evolution of the Guidelines. He discusses the effect of statutorily prescribed mandatory minimum sentences on the Guidelines and encourages judges to exercise their newfound discretion as amply as necessary to impose fair and just sentences, particularly when the Guidelines may be characterized as a reflexive response to Congress, rather than as the result of the Sentencing Commission's institutional role.

In addition to the issues related to federal sentencing, this issue of the *Duquesne Law Review* also discusses sentencing in Penn-

sylvania state courts. In a thought-provoking article, members of the Pennsylvania Commission on Sentencing—Mark Bergstrom, Steven Chanenson, and Jordan Hyatt—explain some of the opportunities and challenges related to the Commission's implementation of the General Assembly's 2008 reform of Pennsylvania's indeterminate sentencing scheme. That reform required the Commission to adopt new guidelines for sentencing, resentencing, parole, and recommitment. Most significantly, in light of Pennsylvania's growing prison population and the budgetary challenges attendant thereto, the Commission's focus on public safety rather than retribution requires both the development of a risk assessment instrument to be incorporated into the new guidelines, as well as the development of a cost-benefit capacity to measure resource utilization and outcomes of existing and proposed guidelines and programs. The authors posit four important questions that must be addressed before these policies may move forward.

In a more quantitative analysis, Professor R. Barry Ruback and Dr. Valerie Clark write about economic sanctions in Pennsylvania. After describing the three primary types of economic sanctions, the article notes that more than 2.8 million sanctions in over 2,600 categories are imposed each year. The authors conclude that the inconsistent imposition of economic sanctions undermines fairness. They also suggest that more uniformity in the sentencing guidelines is advisable.

Two student papers appear in this issue as well. Curt McMillen offers a sharp critique of the decision of the United States Court of Appeals for the Seventh Circuit in *United States v. Gregory*, which sided with the Third, Ninth, and Eleventh Circuits in holding that, for purposes of the career offender provision of the United States Sentencing Guidelines (§ 4B1.1), a conviction that occurs when one is under the age of eighteen and that involves a sentence that is served in a juvenile detention facility should not count as a prior felony conviction under the career offender provision. Mr. McMillen's view is consistent with that reached by the Court of Appeals for the Fourth Circuit, so it will be interesting to see if the Supreme Court decides to resolve the circuit split in the near future. Finally, Kaitlin Jamiolkowski offers a detailed review and evaluation of *Graham v. Florida*, in which the Supreme Court held that the imposition upon a juvenile of a life sentence without the possibility of parole violates the Eighth Amendment's prohibition against cruel and unusual punishment.

We need not believe in the perfectibility of man to recognize that we can and should strive to reduce crime and improve our penal

system. This issue of the *Duquesne Law Review* offers new ideas to help make that aspiration a reality.