1978

Sentencing Guidelines: Control of Discretion in Federal Sentencing

Harold R. Tyler Jr.
SENTENCING GUIDELINES: CONTROL OF DISCRETION IN FEDERAL SENTENCING

Harold R. Tyler, Jr.*

Sentencing reform in this country is now at a critical stage. We have been talking and thinking about such reform since the early 1960’s, but, particularly within the federal system, we have been unable to agree and act. It is now twelve years since the Brown Commission began its labors; its report forms the basis of the Senate’s proposed revision of the Federal Criminal Code. California has scrapped its indeterminate sentencing scheme, much admired in theory a decade ago, but found unsatisfactory in practice. Other states, such as Minnesota and Maine, attentive

---

* A.B., 1943, Princeton University; LL.B., 1949, Columbia University. Judge Tyler served as a judge for the United States District Court for the Southern District of New York from 1962 to 1975. From 1975 to 1977, he was Deputy Attorney General of the United States. Judge Tyler’s current activities in the sentencing area include: Chairperson of the Federal Advisory Corrections Council, Chairperson of the Second Circuit Sentencing Committee, and Member of the Governor’s Advisory Commission on Sentencing (New York). Judge Tyler is currently a member of Patterson, Belknap, Webb & Tyler in New York City.

1. The National Commission on Reform of Federal Criminal Law, informally called the Brown Commission after its Chairperson, Pat Brown, former Governor of California, was authorized by Congress in 1966 to draft a comprehensive penal code for the United States. After four years of hearings and work, it published a fifteen volume report. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE (1971).

2. Id.

3. S. 1437, 95th Cong., 2d Sess. (1978). This Article deals with §§ 101 and 124 of the bill. Id. §§ 101, 124. Section 101 of the bill, if enacted, will amend Title 18 of the United States Code regarding, inter alia, sentencing guidelines. All subsequent textual and footnote references to § 101 of the bill are to the proposed section numbers in Title 18 of the United States Code, and are hereinafter cited as Proposed 18 U.S.C. Section 124 of the bill, if enacted, will amend Title 28 of the United States Code to establish a Sentencing Commission. All subsequent textual and footnote references to § 124 of the bill are to proposed section numbers in Title 28 of the United States Code, and are hereinafter cited as Proposed 28 U.S.C.


to the United States Senate hearings, have recently adopted determinate sentencing codes. In fact, during the 1970's most jurisdictions in America have grown disenchanted with the idea that penal terms can reform and rehabilitate individuals. They are also confronting the failure of most of our present sentencing codes to offer any clear purposes of punishment.

There are presently three basic approaches to sentencing: (1) The indeterminate approach which is now in disfavor, though it continues to be followed by the Federal Criminal Code; (2) the presumptive sentencing approach, currently in vogue in California and other jurisdictions; and (3) the sentencing guidelines approach which aims to structure discretion without imposing total inflexibility on sentencing courts. The third alternative is the subject of this Article.

Indeterminate sentencing strikes most knowledgeable observers as irrational. Generally, legislatures fix no specific penalty for a crime; rather, a maximum, and sometimes a minimum, limit is set. In addition to the wide latitude of possible punishment, no coherent goals are provided to structure and guide the discretion of sentencing judges and parole boards. Because of the absence of goals and purposes for sentences of imprisonment, indeterminate schemes tend to foster unfair and inconsistent sentencing decisions between, and even within, courts.

Presumptive sentencing generally consists of sentences established by the legislature for each degree of offense, with narrow ranges of permissible variation for aggravating or mitigating circumstances. This model eliminates uncertainty and disparity to a sig-
significant degree, particularly if parole boards have limited power to review and change sentence time. However, the American experience with "legislative sentencing" has been far from salutary. Legislators are often overly sensitive to immediate and irrational public whims. Moreover, the urgency of other public business precludes legislatures from giving regular, measured attention to refinements of proper sentencing policy.

Therefore, discrete sentencing guidelines, which contain precise ranges of sentences set by a broadly representative sentencing commission, offer the best hope for sensible sentencing reform. They can control sentencing discretion to achieve realistic and articulated national goals of punishment. Under the guidelines model, the legislature retains its traditional function of defining criminal conduct and imposing maximum terms of punishment. A guidelines commission, created by the legislature, would have three major functions. It would classify offenses defined by the legislature into narrow categories based on such factors as the seriousness of the offense and the presence of aggravating or mitigating circumstances. In addition, it would stipulate guideline sentences for each offense or category of offenses. Finally, the commission would monitor operation of its guidelines and alter them periodically on the basis of continuing research and information.

SENTENCING GUIDELINES

The United States is one of the few countries in Western civilization that has no system of sentencing review and that

10. At least three groups are gathering information and statistics and preparing guidelines models for use by a sentencing commission in the event Congress finally agrees upon that approach. First and perhaps best known is the group at the Graduate School of Criminal Justice, SUNY at Albany, which has already provided guidelines models for county-size jurisdictions. See Gelman & Kress, How Chaotic is Sentencing in Your Jurisdiction? 17 JUDGES' J. 35 (1978). Second, under the auspices of the Federal Government, there is the "Chicago group," led by Dean Norval Morris and Professor Frank Zimring of the University of Chicago Law School, Professor Michael Tonry of the University of Maryland Law School, and others. Third, the Department of Justice has recently contracted with INSLAW in Washington, D.C. to perform similar research. See Forst, Rhodes & Wellford, Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines, 7 HOFSTRA L. REV. ___ (1979) (to be published in Symposium on Sentencing, Part II, 7 HOFSTRA L. REV. 243 (1979)).

places no constraints upon sentencing discretion, other than max-
imum punishments set by the legislature.\textsuperscript{12} Due to sentencing
disparities inherent in the indeterminate approach,\textsuperscript{13} however,
the early 1960's evidenced a shift in the sentencing debate. Rather
than arguing the legitimacy of discretion, the issue became how to
structure discretion in a practical and politically acceptable man-
ner.\textsuperscript{14} In 1976 and 1977, a considerable body of experts testifying
before the Senate Judiciary Committee favored means to control
sentencing discretion in United States courts.\textsuperscript{15} At that time, sub-
stantial support was expressed for the device of a sentencing com-
mmission to propose national guidelines.\textsuperscript{16}

Sentencing guidelines are by no means novel or unfamiliar in
the sentencing process. In 1970, Professor D.A. Thomas of Cam-
bridge, England explained the fashioning and application of sen-
tencing guidelines by the Court of Criminal Appeal in the United
Kingdom.\textsuperscript{17} Since appellate review of sentences has not been avail-
able, our courts have been in no position to formulate guidelines
through the judicial process. However, there are several reasons
why judicially created guidelines would fail to effectively control
discretion in our federal court system. Given the size of this coun-
ty, its diversity of regions and peoples, and the number of judges

\begin{itemize}
\item \textsuperscript{12} M. Frankel, \textit{Criminal Sentences} 75-78 (1977). Frankel quotes from a re-
port adopted and endorsed by the American Bar Association in 1968, which noted
"that in no other area of our law does one man exercise such unrestricted power [as
the trial judge's unreviewable sentencing power]. No other country in the free world
permits this condition to exist." \textit{Id.} at 77 (quoting ABA \textit{Project on Minimum
Standards for Criminal Justice, Standards Relating to Appellate Review of
Sentences} 2 (Approved Draft 1968)).
\item \textsuperscript{13} Professor Dershowitz chronicles some of the evidence of unjustifiable dis-
parity. He asks:
\begin{quote}
Why had 62.5 percent of the Minnesota prisoners released that year served
more than 10 years, while none of the Vermont inmates released had served
more than 5 years? Why had 3.06 percent of the Washington prisoners re-
leased that year originally received sentences of between 1 and 5 years,
while 86.1 percent of South Dakota releasees had received a sentence
within that range?
\end{quote}
Dershowitz, \textit{Background Paper}, in \textit{Twentieth Century Fund Task Force on
\item \textsuperscript{14} \textit{See generally} Thomas, \textit{The Control of Discretion in the Administra-
tion of Criminal Justice}, in \textit{Crime, Criminology and Public Policy} 139 (R. Hood
ed. 1975).
\item \textsuperscript{15} \textit{See 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. (1977)}.
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} \textit{See D.A. Thomas, Principles of Sentencing} (1970).
\end{itemize}
in the United States compared to the United Kingdom, a process of total appeals against sentences would be unmanageable. In addition, most appellate judges have opposed any form of appeals against sentences. Furthermore, compared to the sentencing guidelines system, appellate review is an inadequate mechanism for control of sentencing discretion.

Notwithstanding the overwhelming vote in the Senate for S. 1437, which establishes a comprehensive sentencing guidelines system, there exists substantial opposition to any method, even sentence appeals, of fettering sentencing discretion. Many object to the creation of any new bureaucracy—including a national sentencing commission. However, it is doubtful that this objection will effectively bar sentencing reform. More significant opposition comes from groups within or closely allied to the federal criminal justice system. As indicated, current members of the federal courts of appeal are not enthusiastic about obtaining jurisdiction to hear and determine appeals against sentences, fearing, no doubt, that such appeals will add to their already burgeoning case loads. Many defense lawyers active in federal courts, particularly those in large metropolitan centers, have also expressed strong opposition. They are plainly not anxious to give up perceived benefits derived from “judge shopping” under the present system; every defense attorney knows, without benefit of studies and statistics, that certain judges are more lenient than others. Similarly, prosecutors seek to avoid judges whom they perceive to be too gentle in their sentencing. Thus, while several lawyers in the Department of Justice created the first draft of the sentencing guidelines and commission model now found in S. 1437, it is certain that most federal prosecutors in the field will not press for significant change in the present federal sentencing provisions. In short, lawyers do

19. See text accompanying notes 57-59 infra.
22. See Justice in Sentencing, supra note 18, at 76.
23. See, e.g., Bamberger, supra note 21, at 1, col. 2.
24. In 1975, Ronald Gainer and others within the Department of Justice initially drafted what is now Part III of S. 1437, entitled “Sentences.”
not like changes in systems which they have mastered, particularly changes as disruptive of the status quo as sentencing reform. Therefore, lawyers and judges cannot be expected to be in the vanguard.

The most troublesome criticism of sentencing guidelines is contained in the “Special Report on the Provisions of S. 1437” by the Special Committee on the Proposed New Federal Criminal Code of The Association of the Bar of the City of New York. The Committee believes that “the approach of increased incarceration is embodied in, if not established by, the concept of guidelines.” But, Judge Morris Lasker and Gary P. Naftalis, the two dissenting members of this Special Committee, correctly observe that this conclusion is based on totally unsupported assumptions that the Sentencing Commission will set harsh guidelines and that judges will not use their power to disagree with and bypass the guidelines in cases where special circumstances or the interests of justice so require.

An even more fundamental flaw of the Committee majority’s thesis inheres in its premise that: “We believe such a system [guidelines] will be inevitably destructive of an appropriate individualization of sentences.” This statement is freighted with irony; the Senate’s intention, after all, is clearly to minimize individualization. The Senate was concerned that the present system gives no guidance to federal judges who are left to apply their own disparate philosophies of punishment. This concern was prompted by the views of a number of authorities, particularly those of Judge Marvin Frankel set forth in his well-known book, Criminal Sentences. Essential to Frankel’s advocacy of the sentencing guidelines approach is his observation that the “central evil” in the present system is the power of single judges to sentence with largely unreviewable discretion. Therefore, he argues for a permanent commission to study, formulate, and promulgate guidelines, “subject to traditional checks by Congress and the

26. Id. at 6 (emphasis added).
27. Id. at 10.
28. Id. at 7.
31. Id. at 69.
Courts.” In short, Frankel’s view is that judicial discretion must be structured.

Moreover, Frankel emphasizes that jail sentence maxima should be less than has been the consistent practice in this country. This is an important point, and one with which I wholeheartedly agree, yet it seems to have been lost on the majority of the Special Committee of the Association of the Bar. That group offers no basis for its apparent assumption that a commission will recommend harsh guidelines. It may be that the Committee majority feels that the legislative maxima set forth in the Senate bill are too high. However, that the maxima presently contained in S. 1437 are too high does not in any way undermine the validity of the entire sentencing commission and guidelines “concept.”

Judge Frankel’s voice has not been alone in arguing for sentencing reform. Indeed, others outside the legal profession have been more outspoken, perhaps because they are more objective than lawyers and politicians about what the criminal justice system can, and cannot, accomplish. In the words of Professor James Q. Wilson, “[W]e can most definitely stop pretending that judges know, any better than the rest of us, how to provide ‘individualized justice.’” As a former professional sentencer, it is painful to concede the corollary observation by Wilson and others that present sentencing patterns and practices in the United States frequently have less to do

32. Id. at 119.
33. Frankel underscores his “firm conviction that we in this country send far too many people to prison for terms that are far too long. . . . The United States probably has the longest sentences by a wide margin of any industrialized nation.” Id. at 58 (footnote omitted). Frankel then cites comparative statistics from a report by the ABA Project on Minimum Standards for Criminal Justice, which noted that: “In England, for example, sentences in the range of twenty to thirty years ‘are now entirely exceptional . . . and are generally disapproved’ . . . Sentences in excess of five years are rare in most European countries.” ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 57 (Approved Draft 1968) (quoting Comment, 4 BRIT. J. CRIM. 608 (1964)), quoted in FRANKEL, supra note 12, at 58 n.4.
34. The Senate Judiciary Committee defends the maximum terms set by S. 1437 in several ways. First, it asserts that the terms are somewhat less than those authorized under current law. Second, it emphasizes that the maxima represent the greatest term of imprisonment allowed to be imposed by a judge in the most egregious circumstances. Third, the Committee points out that the Commission, in creating offense categories, will be saving the upper range of the maximum sentence for offenders who either repeatedly commit offenses or commit particularly horrendous crimes. Therefore, ordinary sentences will not reach maxima. S. REP. NO. 605, 95th Cong., 1st Sess. 922 (1977). See also note 57 infra and accompanying text.
with justice than with court management problems and the beliefs and idiosyncrasies of individual judges.\(^3\)

Among other critics distressed by errant and “lawless” sentencing patterns, Professor Andrew von Hirsch has pointedly noted that unfettered discretion in sentencing has been nourished “by the traditional assumptions about rehabilitation and predictive restraint.”\(^3\) There is remarkable consensus that coerced rehabilitation, particularly in an institutional setting, does not occur. A few offenders, it is true, are rehabilitated in prison—but for reasons unrelated to the length of their terms and to their specific institutional “treatment.”\(^3\) Experience leads me to conclude that those comparatively few offenders in prison who are “reformed” become so for spiritual and prudential reasons which are largely personal. This is not to say that we should cease offering educational and other rehabilitative programs to incarcerated offenders. Many have been deprived of education, job training, and financial and psychological support. Rehabilitative programs aimed at such deprivation may place certain offenders in a better position to achieve “personal” rehabilitation. However, given our present state of knowledge, we must cease pretending that rehabilitation is a primary goal of punishment, particularly imprisonment. Our primary goals of punishment should be general and special deterrence, protection of the public, and “just deserts.”\(^4\)

37. Id. at 186. Frankel supports this observation: The evidence is conclusive that judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, 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. . . . In any event, if proof were needed that sentences vary simply because judges vary, there is plenty of it.

M. FRANKEL, supra note 12, at 21.

38. A. VON HIRSCH, supra note 9, at 98. “Predictive restraint” refers to the risk that defendant may commit another crime during the period of probation or of a suspended sentence. Id. at 19.


40. N. MORRIS, THE FUTURE OF IMPRISONMENT 73 (1974). “Just deserts” suggests the imposition of a sentence which fits the particular crime, rather than the individual characteristics of the offender. As used by Norval Morris, “desert” defines “the maximum of punishment that the community exacts from the criminal to express the severity of the injury his crime inflicted on the community as a condition of readmitting him to society.” Id. at 74. Therefore, it sets a “retributive maximum.” Id. at 75. Morris argues that, as a general principle of justice, “[p]unishment in excess of what is seen by that society at that time as a deserved punishment is tyranny.” Id. at
Without sentencing standards, it is virtually impossible for consistent scales of punishment to emerge.\textsuperscript{41} Sentencing disparity is not, as the Special Committee for The Association of the Bar has argued, merely a statistical problem.\textsuperscript{42} On the other hand, the primary argument against disparity should not be that it creates a major social problem by stirring inmate unrest within institutions. Granting that institutionalized offenders do complain, often correctly, about disparate treatment, it is unlikely that eradication of disparity will eliminate offender disquietude. Rather, the real curse of disparity is that it is the consequence of unstructured discretion,\textsuperscript{43} the converse of justice obtained through the rule of law, to which this country presumes itself to be dedicated. We permit judges to deprive persons of personal liberty without any reasonable and consistent standards, and without providing an opportunity for review.

\section*{Federal Legislation}

Professor Kenneth Culp Davis, the high priest of the American movement toward structured discretion in the criminal justice system,\textsuperscript{44} advocates a theory of controlled discretion which can be summarized as follows. As a first principle, discretion is indispensable in any system where some individualization is deemed necessary. Second, legislatures should strive to eliminate all unnecessary discretionary power. Third, where discretion is conferred by the legislature, the institution or official empowered to exercise that discretion,\textsuperscript{76} Professor Andrew von Hirsch prefers to call the principle one of “commensurate deserts,” emphasizing that the “[s]everity of punishment should be commensurate with the seriousness of the wrong.” A. Von Hirsch, \textit{supra} note 9, at 66 (1976) (emphasis deleted). For his argument that this principle is both a requirement of justice and a workable goal of punishment, see \textit{id.} at 69-76, 89-94.

\textsuperscript{42} Special Report, \textit{supra} note 25, at 1.
\textsuperscript{43} See M. Frankel, \textit{supra} note 12, at 5-11. In fact, Frankel raises constitutional questions:

The arbitrary cruelties perpetrated daily under our existing sentencing practices are not easy to reconcile with the cardinal principles of our Constitution. The largely unbridled powers of judges and prison officials stir questions under the clauses promising that life and liberty will not be denied except by “due process of law.” The crazy quilt of disparities—the wide differences in treatment of defendants whose situations and crimes look similar and whose divergent sentences are unaccounted for—stirs doubts as to whether the guarantee of the “equal protection of the laws” is being fulfilled.

\textit{Id.} at 103.

cretion, as well as any body reviewing it, should structure discretion to the extent feasible. Finally, discretion should be subject to restraints or checks, either by administrative or judicial review.\textsuperscript{45}

\textit{Senate Legislation: S. 1437}

The sentencing commission and guidelines approach contained in S. 1437, passed by the Senate in 1978, essentially comports with the formulation of Professor Davis. S. 1437 establishes outer limits of punishment by imposing maximum terms of imprisonment\textsuperscript{46} and probation,\textsuperscript{47} and maximum fines.\textsuperscript{48} In addition, the Senate bill provides some policy guidance\textsuperscript{49} for more refined structuring of sentences by: setting forth the purposes of sentencing,\textsuperscript{50} setting up a Federal Sentencing Commission to establish sentencing policies and practices,\textsuperscript{51} and stipulating what the Commission must consider in developing the sentencing guidelines themselves.\textsuperscript{52} Most impor-

\begin{itemize}
\item \textsuperscript{45} Thomas, supra note 14, at 139-40. Davis and others have argued forcefully that prosecutors', as well as judges', discretion must be structured. See K. Davis, supra note 44, at 188-214; Bazelon, Missed Opportunities in Sentencing Reform, 7 Hofstra L. Rev. 57, 68 (1978). In fact, some oppose the guidelines approach for sentencing judges, absent similar structuring of prosecutorial discretion. However, this argument proves too much, chiefly for two reasons: (1) Certainly, prosecutors' discretion will be markedly influenced and thus structured by constraints placed by guidelines upon sentencing judges; and (2) we must start somewhere to shape discretion in the criminal justice system—and the most accessible, effective, and significant place to begin is with the sentencing function of the courts.
\item \textsuperscript{46} Proposed 18 U.S.C., supra note 3, § 2301.
\item \textsuperscript{47} Id. § 2101.
\item \textsuperscript{48} Id. § 2201.
\item \textsuperscript{49} It could be argued that Congress should give more policy guidance to the Sentencing Commission. While this is a fair position, it does not, of course, negate the usefulness of sentencing guidelines as such.
\item \textsuperscript{50} Proposed 18 U.S.C., supra note 3, § 101(b). These four general purposes are to: "(1) deter such [unlawful] conduct; (2) protect the public from persons who engage in such conduct; (3) assure just punishment for such conduct; [and] (4) promote the correction and rehabilitation of persons who engage in such conduct, recognizing that imprisonment is generally not an appropriate means of promoting correction and rehabilitation . . . ." Id.
\item \textsuperscript{51} Proposed 28 U.S.C., supra note 3, § 991. The two major purposes of the Commission are: (1) To "establish sentencing policies and practices for the federal criminal justice system," id. § 991(b)(1); and (2) to "develop means of measuring the degree to which the sentencing, penal and correctional practices are effective in meeting the purposes of sentencing as set forth in section 101(b) . . . ." Id. § 991 (b)(2). See note 50 supra. In its role as policymaker for the federal system, the Commission is directed to assure that the four purposes of sentencing are met, see note 50 supra, to provide certainty and fairness in sentencing, and to avoid unwarranted disparities among similarly situated defendants "while maintaining sufficient flexibility to permit individualized sentences when warranted." Proposed 28 U.S.C., supra note 3, § 991(b)(1)(B).
\item \textsuperscript{52} Section 994 provides extensive guidance to the Commission in its task of
\end{itemize}
tant, the bill requires United States district court judges to impose sentences upon offenders, constrained by the guidelines, but with power nonetheless to deviate therefrom to do individual justice in those relatively few cases where the guidelines seem inapposite.\(^53\)

The courts of appeal would be required to review sentences which are above\(^54\) or below\(^55\) the guidelines prescribed by the National Commission. The structuring role of the Commission is illustrated by the portion of the Report of the Judiciary Committee of the Senate concerning Class C felonies, which would carry a legislative maximum of twelve years.\(^56\) The Judiciary Committee states that it expects the Commission to recommend guidelines considerably less
developing and implementing sentencing guidelines. See Proposed 28 U.S.C., supra note 3, § 994. The range for each category of offense is specifically limited: The maximum for each term cannot exceed the minimum “by more than 12 months or 25 percent, whichever is greater.” Id. § 994(b)(1). In addition, the guidelines must stipulate that, except in “an exceptional situation,” no form of imprisonment is subject to early release. Id. § 994(b)(2).

While not limiting the Commission’s considerations, the Senate set forth factors which shall be considered in establishing both categories of offenses and categories of defendants. Id. § 994(c)-(d). For example, in creating categories of offenses, factors to be examined include the grade of the offense, circumstances mitigating or aggravating the seriousness of the offense, nature of the harm caused, the “community view” of the offense’s gravity, public concern generated by such conduct, the general deterrent value of a particular penalty, and the current incidence of the offense. Id. § 994(c). Similarly, establishment of categories of defendants are to be guided by such factors as the defendant’s age, education, vocational skills, relevant mental or emotional condition, physical condition (including drug dependence), previous employment record, family ties and responsibilities, community ties, role in the offense, and criminal history. Id. § 994(d).

The policy mandates of § 994, however, go far beyond the above provisions. Among its directives to the Commission are: (1) The guidelines must take into account the capacity of penal and correctional facilities to assure that they are not overtaxed, id. § 994(g); (2) substantial prison terms are required for certain types of defendants, including those with a history of prior felony convictions, id. § 994(h); (3) the guidelines should “reflect the general appropriateness of imposing a sentence other than imprisonment” on first offenders not convicted of a serious offense, id. § 994(i); (4) terms of imprisonment should not be imposed for the sole purpose of providing educational training, medical care, or other rehabilitative treatment, id. § 994(j); and, most importantly, (5) the Commission “shall be guided” by the average sentences presently imposed and by the length of prison terms “actually served,” id. § 994(1).

53. Proposed 18 U.S.C., supra note 3, § 2003(a)(2). Specifically, this section provides that “[t]he court shall impose a sentence within the range . . . unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a different sentence.” Id.


55. Id. § 3725(b).

56. Id. § 2301(b)(3).
than the twelve year maximum.\(^5\) Accepting this as true, there is the further possibility that the sentencing judge may impose a sentence less than the Class C felony guideline promulgated by the Commission. If the judge does so, his or her reasons must be stated;\(^5\) the sentence will then be subject to appellate review.

Undeniably, the primary purpose of the Commission is to structure and restrain discretion of individual sentencing judges. The Senate Judiciary Committee Report clearly indicates and supports this important purpose and function.\(^6\) Indeed, the commission approach, supported by limited appellate review, will provide greater control of discretion than would a system of appellate review absent sentencing guidelines. This is because panels of judges hearing appeals can be expected to “individualize” sentences in a manner similar to single district court judges. No doubt, this phenomenon will have some impact even under S. 1437’s relatively limited appellate review system; but surely it is minimal compared to a scheme of unlimited appellate review.

Since the Commission is the most powerful check upon individual discretion under S. 1437, its make-up is of paramount importance. Judge Frankel and other witnesses before the Senate Judiciary Committee argued that sentencing is too important a subject to be left exclusively to professional sentencers: The Commission should be composed of people of diverse experience, including but not limited to sitting judges.\(^6\) The Senate has to a great extent accepted this argument.\(^6\) Specifically, it has provided that the President, after consultation with the Judicial Conference,\(^6\) appoint the

\(^{58}\) Proposed 18 U.S.C., supra note 3, § 2003(b).

\(^{61}\) S. 1437 provides that “[t]he Commission shall have both judicial and non-judicial members and shall, to the extent practicable, have a membership representing a variety of backgrounds and reflecting participation and interest in the criminal justice process.” Proposed 28 U.S.C., supra note 3, § 991(a).

\(^{62}\) See 28 U.S.C. § 331 (1976). The Judicial Conference, headed by the Chief Justice of the United States Supreme Court, consists primarily of the chief judges of each judicial circuit and one district judge elected from each circuit. Conferences
Chairperson and three members subject to confirmation of all appointees by the full Senate. No attempt has been made to mandate skills, professional attainments, or other prerequisites for the first four Commission members. The remaining three members of the seven person Commission must be federal judges chosen by the President from a list of seven judges recommended by the Judicial Conference. In addition, it is important that the Senate has provided carefully for a professional staff to assist the Commission in its data-collecting, research, and guidelines promulgation functions.

If enacted, these simple provisions for structuring the Commission should be of paramount importance in ensuring the Commission’s effectiveness.

Arguably, S. 1437’s provisions regarding the power of the Commission and the role of its sentencing guidelines pose an unanswered question: Can a sentenced offender attack the guideline promulgated by the Commission under which he or she was sentenced? In other words, can there be appeal to attack the discretion of the Commission? S. 1437 wisely does not provide for such an appeal. If such appeals were permitted, we would have, in effect, a system of appeals against all sentences, a result clearly neither intended nor desirable at this stage. However, the Commission’s “discretion” is not unfettered. Congress retains the right under S. 1437 to review and rescind Commission guidelines and the Commission is obliged to base its guidelines on current sentencing data obtained from the United States courts.

Moreover, as a result of hearing and determining those cases where sentencing judges go above or below applicable guidelines imposed by the Commission, the courts of appeal will provide, in time, at least some guidance to the Commission. Thus, important as the Commission will be, its discretion is sufficiently constrained by Congress and appellate courts.

Concededly, the sentencing provisions of S. 1437 can be im-

must be held at least once a year. Responsibilities of the Judicial Conference include: (1) Preparation of plans for assignments of judges; (2) oversight of the conduct of business in the courts; (3) continuous study of the operation of the general rules of practice and procedure prescribed by the Supreme Court; and (4) recommendations for changes in procedure and operations.

64. Id. This section further mandates that, of the four members appointed by the President, no more than two may be members of the same political party. Id.
66. Section 994(o) provides that the Commission shall report the guidelines to Congress; they shall take effect 180 days thereafter. Id. § 994(o).
67. Id. § 994(l).
proved after further scrutiny. Complaints have already been voiced about the repeal, probably inadvertent, of the Federal Youth Corrections Act (FYCA); the length of some maximum prison terms; and mandatory minimum sentences for certain crimes, such as certain drug offenses. These complaints cannot be dismissed as unreasonable; they deserve attention by Congress. On the other hand, they are issues which can be addressed, and redressed, within the context of the present bill.

In theory, once it establishes a sentencing commission, Congress should not impose mandatory minima; its role should be to fix maximum punishments only. Critics of S. 1437, therefore, understandably have complained that the Senate, after establishing a sentencing commission, went too far by legislating mandatory minimum sentences in limited instances. This criticism is supported by considerable evidence in England and the United States that mandatory minimum sentences usually frustrate public expectations and, more specifically, the apparent objectives of the legislatures.

In addition, mandatory minimum sentences fail to anticipate the incredible diversity of facts of given offenses and of the nature of offenders. Perhaps more important, mandatory minima ignore the reality that prosecutors, whose discretion so far is largely uncontrolled, present cases, and these cases do not always fit the original legislative objectives in setting sentencing minima. Furthermore, judges chafe under the mandate of minimum sentences, facing as they must those occasional cases which involve unusual circumstances of the offense and extraordinary characteristics of certain offenders.

68. 18 U.S.C. §§ 5005-5026 (1976) contain the present provisions regarding the Federal Youth Corrections Act.
71. We have learned this all too clearly in New York in recent years under the so-called “Rockefeller Drug Statute.” See JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION, THE NATION’S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE (1977). See generally Thomas, supra note 14, at 144-48.
Despite the passage of this comprehensive sentencing reform title by the Senate, the prospects for complete and final Congressional action in the near future are dubious. Indeed, reasonable persons can be pardoned for wondering whether the federal legislature, bench, and bar are prepared to accept structuring of the currently unfettered discretion of United States sentencing judges.

Early in the summer of 1978, the Criminal Justice Subcommittee of the House Judiciary Committee announced completion of its “labors” by recommending a new criminal code,72 which is little more than present Title 18 of the United States Code embellished by minor and cosmetic changes. The Washington Post promptly editorialized that the House Subcommittee effort is nothing but a “farce.”73 With equal accuracy but more tact, the American Bar Association and the Federal Advisory Corrections Council74 pointed out that the House effort does not constitute serious criminal code reform.75

While the House Subcommittee professes to give credence to sentencing guidelines, its treatment of this subject is entirely different from that of S. 1437. In one of its few “new proposals,” chapter 301,76 the Subcommittee deals with sentencing, including sentencing data, guidelines, and appellate review of sentences imposed by United States district judges. In the key section of chapter 301, entitled “Sentencing Data and Guidelines,”77 the Subcommittee proposes that the Judicial Conference of the United States, “for the purposes of assisting Judges to eliminate unwarranted disparity in sentencing and to improve the administration of justice, shall obtain and analyze on a continuing basis data on the sentences imposed by Federal courts in criminal cases.”78 In addition, it pro-

74. See 18 U.S.C. § 5002 (1976). The Advisory Corrections Council is composed of a federal circuit court judge and two federal district court judges, with the council’s chair designated by the Attorney General. The purpose of the council is to consider problems of offender treatment and correction and to make recommendations to improve the administration of criminal justice.
76. H.R. 13959, 95th Cong., 2d Sess. § 101 (1978). Section 101 of the bill, if enacted, will amend Title 18 of the United States Code. All subsequent textual and footnote references to § 101 of the bill are to the proposed section numbers in Title 18 of the United States Code, and are hereinafter cited as Proposed 18 U.S.C. (House version).
78. Id. § 30101(a).
vides that the “Judicial Conference shall . . . develop on a continuing basis advisory sentencing guidelines for Federal judges to use in determining whether to imprison convicted persons and in determining the nature and extent of sentences in criminal cases.”

79 It is further provided that the Judicial Conference may look to other federal agencies, particularly the Administrative Office of the United States Court80 and the Federal Judicial Center,81 for assistance in developing sentencing guidelines.82

Doubtless, the House Subcommittee was partially motivated by a desire not to create a new “bureaucracy” such as the Sentencing Commission established by the Senate in its bill. To this extent, the House approach cannot be deemed totally irrational. But the critical point is that, although the Judicial Conference has adequate staff and expert assistance to draft guidelines for federal sentencing judges, section 301.01 provides that the guidelines are to be advisory only.83 For those concerned about effective structuring of sentencing discretion, this is highly inadequate. Moreover, the bill does not define who, acting for the Judicial Conference, will promulgate the guidelines. Either a group of judges, staff members of the Administrative Office of the United States Courts, the Judicial Center, or a mixture of these groups, would probably do the job. One or more of these groups could set workable guidelines. But the process would be invisible to the public and would suffer the weakness of not involving skills and experiences broader than those of judges and judicial administrators.

An additional weakness of the House bill is that it does not directly tie the advisory guidelines to review by appeal. According to the appellate review provision,84 appeals against all sentences will be allowed, with two exceptions: (1) Where the sentence is part of

79. Id. § 30101(c)(1).
80. See 28 U.S.C. §§ 601-611 (1976). This body serves as the administrative arm of the judicial branch of the federal government. Its functions include supervising court personnel, determining the courts' needs, and preparing statistical data and reports on the business of the courts.
81. See id. §§ 620-629. The Center is established within the judicial branch to further the development and adoption of improved judicial administration in federal courts. Its functions include coordinating and conducting research studies on court operations, recommending improvements in the administration and management of courts, and creating programs of continuing education for all members of the judicial branch.
83. See note 79 supra and accompanying text.
and in compliance with a sentence agreement accepted by the defendant, the prosecutor, and the court; and (2) where defendant falls within a narrowly defined category of "dangerous special offenders." However, the House bill unfortunately makes no effort to relate sentencing guidelines to the appeals process. There is no obligation on the part of appellate courts to consider or refer to relevant guidelines in reviewing sentences imposed by lower courts. According to the House Subcommittee, the standard on appeal will be whether the sentence imposed is "clearly unreasonable." But nothing is said to suggest that appellate courts must consider the guidelines developed by the Judicial Conference in considering whether a given sentence is clearly unreasonable.

In short, despite its efforts, the House Subcommittee does not appear to view our federal criminal system as one needing careful structuring of sentencing discretion. The appellate review provision theoretically offers some hope for the eventual development of sentencing case law within each of the eleven circuits of the United States court system. Such a process, however, would take years to mature and would amount to less than a uniform structure of sentencing in the federal system, if only because the Supreme Court of the United States would be sorely pressed to assume the additional task of resolving conflicts between the circuits. The present burdens on the Supreme Court are too well known to require documentation here; its docket would quickly become unmanageable if it were to take sentencing appeals.

CONCLUSION

Criticisms of S. 1437 raise specific questions which can be resolved without undercutting the entire scheme of sentencing reform. Yet many continue to resist serious sentencing reform. This is odd for a nation long preoccupied with the notion that restraints on the discretion of police, prosecutors, and judges are both necessary

85. Id. § 30103(a).
86. Id. § 30103(e). In determining whether the sentence imposed is clearly unreasonable, the court is directed to consider, among other relevant factors, the following: "(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the opportunity of the district court to observe the defendant; and (3) any findings upon which the sentence was based and the statement of reasons required under . . . this title." Id. § 30103(d).
87. Concededly, as a practical matter, the courts of appeal would consider "advisory guidelines." But the point remains that neither sentencing judges nor appellate panels would be required to do so. As a result, confusion and disparate views on sentencing would almost certainly continue.
and desirable. The American public would like to see a sentencing system which is honest, fair, and modestly effective. We do not have such a system now. To the extent feasible, penal sanctions should be designed to prevent or control crime, yet should be just and fair. These goals have not been achieved by granting uncontrolled discretion to individual judges.

Although it is debatable whether any sentencing scheme can prevent crime, most experts and nonexperts agree that certainty of punishment will deter crime.\textsuperscript{88} Guidelines, by structuring discretion, offer reasonable expectations of certain punishment. Guidelines promise the fairness of direct relation between severity of punishment and severity of offense. They also permit achievement of consistency and uniformity: similar penalties for similar crimes committed under similar circumstances. Guidelines are meant for people who choose to live under a system of law and rules. We are such a people.

\textsuperscript{88} See, e.g., A. VON HIRSCH, supra note 9, at 61-62; Dershowitz, supra note 13, at 72.