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## MISSED OPPORTUNITIES IN SENTENCING REFORM

*David L. Bazelon\**

Senator John McClellan, one of the Nation's most astute political observers, diagnosed the urgent need for reform of the Federal Criminal Code: "Our people," said the Senator, "today are restless with the administration of Justice."<sup>1</sup> Senator McClellan is right: Our people are indeed restless. They are restless because they are terrified of crime in the streets, the random muggings and burglaries that plague our cities and suburbs. Violent crime has deprived us of the safety of our public places and the security of our own homes. It has left us dispossessed, frightened, and alone. It has created a great public fear which in turn has spawned numerous political responses throughout the country. This Article will focus on the most ambitious response to date: S. 1437,<sup>2</sup> a bill passed by the Senate in January 1978,<sup>3</sup> to reorganize sentencing and other provisions of the Federal Criminal Code. By highlighting certain criticisms of this federal response, this Article is directed to decisionmakers throughout the states who are considering alternative approaches to sentencing reform.

### S. 1437: TREATING THE SYMPTOMS, IGNORING THE CAUSE

The connection between S. 1437 and violent crime may seem obscure, since such crime is generally a matter for state rather than federal jurisdiction. But S. 1437 is more than a much-needed clarification and reordering of the ramshackle Federal Criminal Code. It represents a fundamental transformation of our concept of the

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1. 119 CONG. REC. 998 (1973) (remarks of Sen. McClellan).

2. 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.

3. 124 CONG. REC. S854 (daily ed. Jan. 30, 1978).

criminal process. This transformation, fueled by the public's fear of violent crime, is best demonstrated by the provisions of the bill dealing with sentencing.<sup>4</sup> These provisions essentially deemphasize the value of rehabilitation.<sup>5</sup> For many years it was widely believed that the solution to crime is to rehabilitate the offender. This guiding faith of corrections now has been declared a false god. The reforms in S. 1437 emphasize, instead, the goals of incapacitation and deterrence. Thus, the bill envisions the criminal process as a vast engine of social control, designed to clear the streets of those who prey on law-abiding folk.

This vision, I believe, is almost willfully blind. The very scholars who decry rehabilitation as an exploded concept unsupported by empirical evidence<sup>6</sup> must admit that there is precious little hard evidence that the more uniform sentences, or even the longer sentences that may result from S. 1437,<sup>7</sup> will significantly

4. Proposed 18 U.S.C., *supra* note 2, §§ 2001-2306; Proposed 28 U.S.C., *supra* note 2, §§ 991-998.

5. For example, in setting forth the general purpose of Title 18, S. 1437 specifically notes that "imprisonment is generally not an appropriate means of promoting correction and rehabilitation." Proposed 18 U.S.C., *supra* note 2, § 101(b)(4). Section 101(b) sets forth four goals of sentencing for conduct proscribed by the bill:

- (1) deter such 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.* § 101(b)(1)-(4). While one purpose of the Sentencing Commission established by S. 1437 is to assure the achievement of the above goals, *id.* § 2001(a), it is instructed to give "particular attention" to "providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." Proposed 28 U.S.C., *supra* note 2, § 994(f).

6. See, e.g., M. FRANKEL, *CRIMINAL SENTENCES* (1973); Dershowitz, *Background Paper*, in TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *FAIR AND CERTAIN PUNISHMENT* 73-75, 98-100 (1976); Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INTEREST, Spring 1974, at 22.

7. See, e.g., Angell, *S. 1437: Repressive Compromise*, JERICHO, Sept.-Oct. 1977, at 1; Statement of Alvin J. Bronstein, Executive Director, National Prison Project of the American Civil Liberties Union Foundation, on H.R. 6869 before the Subcomm. on Criminal Justice, House Judiciary Comm. (Apr. 12, 1978) (on file in office of the *Hofstra Law Review*) [hereinafter cited as Statement of Alvin J. Bronstein].

The major source of concern regarding imposition of longer sentences under S. 1437 is § 2301(b), which sets forth the maximum authorized terms of imprisonment for nine categories of offenses. Proposed 18 U.S.C., *supra* note 2, § 2301(b). Mr. Bronstein notes that the maximums, if imposed, are too long and in some cases are far greater than average terms presently served. He then explains:

Some proponents of the bill argue that these are only maximum possible sentences and that the Sentencing Commission will establish ranges of sen-

reduce crime. In addition, while the concept of deterrence may have application in the area of white collar crime, it has little or no meaning in the alienated world of violent street crime. This world is one of savage deprivation. Virtually all street crime comes out of wretched poverty, broken families, malnutrition, mental and physical illness, mental retardation, racial discrimination, and lack of opportunity. Street crime springs from the anger and resentment of those who have been twisted by a culture of grinding oppression. The roots of street crime are thus embedded deep within the inequities of our very social structure.<sup>8</sup> So long as these inequities remain, the roots will be continually refreshed and rejuvenated. To speak of incapacitation and deterrence in this context is to consign oneself to a treadmill, unable to stem the increasing crime rates despite a succession of repressive measures.

Street crime is a social problem that can be reduced only by addressing its basic causes. But, as Senator Kennedy has accurately pointed out, S. 1437 ignores these causes.<sup>9</sup> It is designed instead to facilitate the work of those who pull the levers of our vast machine of criminal justice. There is certainly nothing intrinsically wrong with this goal. But the public's fear of crime, paradoxically, represents a precious political resource. Properly focused, it could fuel programs designed to eliminate the real social causes of street crime. If the impetus for reform is exhausted in an effort to enact S. 1437, a valuable political opportunity will have been squandered. Thus, my greatest reservation about this bill is that it misdirects the attention of the public; it is a bill that, in its basic philosophy, caters to the public's fear rather than uses this fear to educate the public about the roots of crime.

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tences far lower. However, that depends too much on the makeup and feelings of a Sentencing Commission and to some extent constitutes an abdication of Congressional responsibility. The possibility exists of a series of Draconian sentence lengths.

Statement of Alvin J. Bronstein, *supra*, at 6. In an attempt to eliminate disparities, two other provisions of S. 1437 increase the possibility that offenders will actually serve longer prison sentences. Section 994(b)(2) directs the Sentencing Commission to "specify that the term of imprisonment is not to be subject to a defendant's early release, other than in an exceptional situation." Proposed 28 U.S.C., *supra* note 2, § 994(b)(2). In addition, § 3824(b) reduces the amount of time a prisoner can earn for good behavior. Proposed 18 U.S.C., *supra* note 2, § 3824(b).

8. I am not suggesting that poverty equals crime. I am merely stating the obvious: poverty and the deprivation and discrimination that so often accompany it create the conditions that make street crime more likely.

9. 123 CONG. REC. S15,962 (daily ed. Sept. 29, 1977) (remarks of Sen. Kennedy).

This reservation illuminates a number of other opportunities missed by S. 1437. Our vision of the criminal process is deeply affected by our understanding of the nature and causes of crime. Since the roots of street crime are embedded in the inequities of our social structure, the criminal justice system can most intelligently be viewed as one instrument for educating ourselves about the nature and effects of that structure. This perspective is implicit in the very concept of criminal justice: Criminal justice is preeminently the process through which society pronounces moral judgment on those who have offended its laws. When in our everyday lives we judge or condemn those whom we know well, we do so in a context thick with circumstances we consider relevant and important. There is no reason why these surrounding circumstances become less relevant in the criminal arena. Therefore, when society pronounces the moral judgment of criminal conviction, it must be done within the rich context of an offender's background. This includes social, educational, familial, vocational, psychological, and even physiological factors. The availability of this information is a necessary prerequisite for using the criminal justice system as a means of educating ourselves about the social origins of crime.

This information is necessary not only for determining responsibility or *mens rea* for a criminal conviction, but also for the sentencing process after conviction. In sentencing, John Winthrop pointed out in 1644: "Justice ought to render to every man according to his deserving."<sup>10</sup> When a sentence of death is at issue, the Supreme Court has given this principle constitutional grounding. In *Woodson v. North Carolina*,<sup>11</sup> for example, Justice Stewart stated, announcing the judgment of the Court:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.<sup>12</sup>

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10. PURITAN POLITICAL IDEAS 149 (E. Morgan ed. 1965).

11. 428 U.S. 280 (1976).

12. *Id.* at 304.

In *Roberts v. Louisiana*,<sup>13</sup> the Court noted some of the myriad of factors to be considered at sentencing: "Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts . . . ."<sup>14</sup>

The Court's reasoning, as a matter of moral if not constitutional logic, applies to the sentencing of defendants for all offenses. Properly conceived, the pronouncement of a criminal sentence forces the participants in the criminal process to confront anew the moral and political complexities inherent in the criminal act. The social and psychological factors underlying street crime may have so transformed some defendants that little hope exists for their rehabilitation. The safety of society may indeed require them to be incapacitated, particularly if the only available alternative is to return them to the twisted world of their origins. Such defendants are doubly cursed. In these cases, however, the very unearthing of the social and psychological factors will at least direct society's attention toward the strong possibility that these same factors will also transform a defendant's children or younger brothers and sisters. Our sense of criminal justice thus sensitizes our sense of social justice, and expands the criminal process into the political process.

S. 1437 attempts to automate this important and delicate process. The Sentencing Commission it proposes would create various "categories of offenses"<sup>15</sup> using specific criteria delineated in the bill.<sup>16</sup> These criteria include "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense,"<sup>17</sup> and "the nature and degree of the harm caused by the offense."<sup>18</sup> The Commission would also establish categories

13. 431 U.S. 633 (1977) (per curiam).

14. *Id.* at 637.

15. Proposed 28 U.S.C., *supra* note 2, § 994(c).

16. *Id.*

17. *Id.* § 994(c)(2).

18. *Id.* § 994(c)(3). The Commission is also mandated to consider, in addition to other relevant factors, the following:

- (1) the grade of the offense;
- (2) the community view of the gravity of the offense;
- (3) the public concern generated by the offense;
- (4) the deterrent effect a particular sentence may have on the commission of the offense by others; and

of defendants by considering specified factors.<sup>19</sup> These factors include “mental and emotional condition to the extent that such condition mitigates the defendant’s culpability,”<sup>20</sup> “vocational skills,”<sup>21</sup> and “physical condition.”<sup>22</sup> For each category of defendant and offense, the Commission would recommend a range for a presumptive sentence.<sup>23</sup> A sentence imposed within the guidelines is not appealable; a sentence outside the guidelines is.<sup>24</sup> The judge must give a statement of reasons in either case,<sup>25</sup> but if a sentence outside the guidelines is imposed, it must be justified by a “specific reason.”<sup>26</sup>

The assumption that defendants or offenses can be “categorized” in a meaningful way is problematic. The variety of possible situations simply defies such bright lines. While the enterprise of categorization seems to be derived from the recent guidelines

(5) the current incidence of the offense in the community and in the nation as a whole.

*Id.* § 994(c).

19. *Id.* § 994(d).

20. *Id.*

21. *Id.* § 994(d)(3).

22. *Id.* § 994(d)(5). In establishing categories of defendants, the other minimum criteria which the Commission must consider are:

(1) age;

(2) education;

(3) previous employment record;

(4) family ties and responsibilities;

(5) community ties;

(6) role in the offense;

(7) criminal history; and

(8) degree of dependence upon criminal activity for a livelihood.

*Id.* § 994(d).

23. Section 994(b) states: “The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.” *Id.* § 994(b). The permissible range of sentence is controlled by section 994(b)(1), which stipulates that: “the maximum of the range established for such a term [of imprisonment] shall not exceed the minimum of that range by more than 12 months or 25 percent, whichever is greater.” *Id.* § 994(b)(1).

24. Proposed 18 U.S.C., *supra* note 2, § 3725. The sentencing provisions provide that imposition of sentence must be within the range set by the guidelines 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.* § 2003(a)(2). If the court imposes a sentence which is greater than the maximum stipulated by the guidelines, the defendant may appeal. *Id.* § 3725(a). If the sentence falls below the guidelines minimum, the Government may appeal. *Id.* § 3725(b).

25. *Id.* § 2003(b).

26. *Id.*

issued by the United States Parole Commission,<sup>27</sup> the success of the parole guidelines actually offers little assurance of successful disposition of the task facing the proposed Sentencing Commission. For example, the "salient factor score"<sup>28</sup> by which the parole guidelines classify prisoners is based on characteristics statistically determined to have high predictive power in distinguishing successful from unsuccessful releasees. But if incapacitation is not to be the sole end of the sentencing process, no such rational means of classifying defendants exists for the Sentencing Commission. There are an infinite number of ways of characterizing any individual defendant, and which characteristics are relevant must be determined by the particular circumstances of the specific case. By masking these differences, the apparently "precise" categories of the Commission might produce grave injustice: Why, for instance, should two defendants receive different sentences simply because their "physical conditions" are different? In some circumstances, this factor will be relevant; in other circumstances it will not. But its relevance cannot be determined in the abstract.<sup>29</sup>

#### WEAKNESSES IN S. 1437'S STATUTORY SCHEME

##### *Inadequate Appellate Review*

In addition to basing the sentencing structure on an erroneous foundation, there are serious weaknesses with the statutory sentencing scheme created by S. 1437. The incentive structure created by the bill is counterproductive. By insulating sentences set within the guidelines from appellate review, the bill encourages sentencing judges to focus on an abstract table of numbers rather than concentrate on the case actually before them. Few judges will brave the scrutiny of a review procedure when they can retreat to the relative safety of a presumptive sentence. Furthermore, it is likely that the "statement of reasons" required in such circumstances will fast become the meaningless boilerplate with which we are already too familiar. Since the guidelines cannot possibly encompass the rich complexity of the particular case, the educational

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27. 42 Fed. Reg. 39,813 (1977) (to be codified in 28 C.F.R. § 2.20).

28. *Id.* (to be codified in 28 C.F.R. § 2.20(e)).

29. I still cling to the ideal of individualized justice. In abandoning individualization here, it may become progressively easier to abandon it elsewhere. If we shift from concern for the individual to mechanical principles of fairness, we may forget about the individual altogether. Surely review procedures by panels of judges at the trial or appellate level can end wide disparities in sentencing without ignoring differences in offenders that justify different treatment.



potential and moral underpinnings of the sentencing process will be lost. Therefore I would recommend that *all* sentences, whether within or outside the guidelines, be subject to review and be accompanied by a precise statement of the specific purpose to be served by the proposed sentence and of the evidence supporting it in the record. S. 1437 may be the last opportunity for a generation to establish comprehensive appellate review, an essential reform.

When reviewing a sentencing decision, the reviewing institution, whatever its composition, also should be required to specify the reasons for its decision. In this manner, society's actual values concerning criminal behavior will become explicit, and the criminal process will be able to reassume its moral and educational function. Moreover, the Sentencing Commission itself could be designed to serve this function. I would therefore suggest that in promulgating guidelines, the Commission's actions be subject to judicial review and be supported "on the record." The Commission should not, however, be required to follow the full panoply of procedures set out in sections 5<sup>30</sup> and 7<sup>31</sup> of the Administrative Procedure Act.

#### *Inadequate Information in Offense-Defendant Categorization*

My second specific objection to the statutory scheme concerns the process by which the particular offense and defendant categories are chosen. These categories, taken together, determine the presumptive range of sentences. But the categories are predicated on such judgmental factors as "the circumstances under which the offense was committed"<sup>32</sup> and "the mental and emotional condition"<sup>33</sup> of the defendant. The application of these factors to a particular case therefore involves the exercise of considerable discretion.<sup>34</sup> If S. 1437 is to achieve its admirable goal of reducing

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30. 5 U.S.C. § 554 (1976). This section pertains to adjudications by federal administrative agencies required by statute to be determined on the record after opportunity for an agency hearing. It sets forth the minimum procedural requirements agencies must follow, including timely notice, an opportunity to submit facts and arguments, and an impartial hearing as defined by § 556. *Id.* § 554.

31. 5 U.S.C. § 556 (1976). This section describes the procedures to be followed in federal administrative hearings concerning § 553 rulemaking or § 554 adjudications. Its mandates include: (1) an impartial hearing officer; (2) an opportunity to present oral or documentary evidence, and to cross-examine witnesses; (3) a decision by the hearing officer on the whole record of the proceeding; and (4) a statement of findings, conclusions, and reasons pursuant to § 557. *Id.* § 556.

32. Proposed 28 U.S.C., *supra* note 2, § 994(c)(2).

33. *Id.* § 994(d)(4).

34. This has already proved to be a problem with the "Offense Security" index

unwarranted discrepancies between sentences of truly similarly situated defendants, this discretion must be checked. Both defense counsel and prosecution should be involved in the process of determining the appropriate category for the offense and the defendant, and the particular categories assigned by the sentencing court should be subject to review.

This recommendation offers an additional advantage. Proper functioning of the moral and political process of sentencing and accurate application of the Sentencing Commission's guidelines depend on the sentencing judge possessing adequate information concerning the defendant and offense. In recognizing this problem, S. 1437 contemplates that the judge will receive the appropriate information from a presentence report authored by a federal probation officer,<sup>35</sup> and from various other optional presentence examinations and studies.<sup>36</sup> However, these sources of information are likely to prove insufficient. Although the Federal Probation Officer Service has vastly improved since a study of its operations was conducted by Georgetown University in 1962,<sup>37</sup> the individual probation officer still serves at the discretion of the court.<sup>38</sup> This is bound to undermine the officer's function as a source of professional and *independent* information. In such circumstances, presentence reports will inevitably reflect the preconceptions and biases of the sentencing judge. Although S. 1437 would ameliorate this situation somewhat by permitting the removal of a probation officer only "for cause,"<sup>39</sup> officers will not be truly independent until their job tenure is not tied to the desires of the court. The infor-

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created by the guidelines of the Board of Parole. See Project, *Parole Release Decision-making and the Sentencing Process*, 84 YALE L.J. 810 (1975).

35. Proposed 18 U.S.C., *supra* note 2, § 2002(a).

36. To obtain more information for the purpose of imposing sentence, the bill specifically provides that the court may order the defendant into the custody of the Bureau of Prisons for not more than sixty days, with the possibility of an extension for another sixty days. *Id.* § 2202(b). In addition, § 2002(c) permits the court to order a presentence report on the defendant's mental condition. *Id.* § 2002(c).

37. A. Pye, G. Shadoan & J. Snee, A Preliminary Survey of the Federal Probation System (Mar. 4, 1963) (report on study conducted by Georgetown University).

38. Proposed 18 U.S.C., *supra* note 2, § 3802.

39. Section 3802(a) provides that:

A district court of the United States shall appoint qualified persons to serve, with or without compensation, as probation officers within the jurisdiction and under the direction of the court making the appointment. The court may, for cause, remove a probation officer appointed to serve with compensation, and may, in its discretion, remove a probation officer appointed to serve without compensation.

*Id.* § 3802(a).

mation provided by presentence reports is also likely to be insufficient because the probation officer will be tempted to focus the report almost exclusively on the factors set forth by the Sentencing Commission and ignore or deemphasize circumstances which, although unforeseen by the Commission, might be equally pertinent to the sentencing decision.

Past experience teaches that the other optional sources of information made available to the sentencing judge by S. 1437 may prove inadequate. The Federal Youth Corrections Act,<sup>40</sup> for example, offers a sentencing judge the option of receiving analogous, supposedly detailed studies of whether a youth offender will derive benefit from treatment.<sup>41</sup> But in the District of Columbia Circuit, personal experience in case after case reveals that these studies consist of nothing more than conclusory cliches, meaningless boilerplate masking the absence of any real information. The total inadequacy of these studies has undermined the noble rehabilitative end of the Youth Corrections Act; there is no reason to believe the ends of the Sentencing Commission will be any better served by such studies.

These deficiencies in information necessary for proper sentencing might be remedied if the adversary system were brought into the process of determining the categories for the offense and defendant. Both the prosecution and defense would then have an interest in bringing all conceivably pertinent data to the attention of the sentencing judge. At a hearing before determination of sentence, the background of the offender and the offense could be thoroughly explored. If, for example, the goal of rehabilitation is to be seriously considered, information must be presented concerning the needs of the defendant, the possibility of his or her rehabilitation, and the availability of appropriate postconviction programs. If it is discovered that a defendant needs rehabilitative services that are unavailable, such a finding should be made explicit. The process may thereby contribute to public awareness and perhaps even create political support for the provision of necessary services.

While the adversary system is undoubtedly the best available engine for generating this needed information, the strains placed on the system in this area are significant, particularly when representation of indigent defendants by appointed counsel is involved. As I have noted elsewhere, there is widespread inadequacy of rep-

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40. 18 U.S.C. §§ 5005-5006, 5010-5026 (1976).

41. *Id.* § 5010(e).

resentation in these circumstances.<sup>42</sup> But, while ensuring the effective assistance of counsel may ultimately be the responsibility of the courts, this problem is exacerbated by the Criminal Justice Act,<sup>43</sup> the basic principles of which are adopted by S. 1437.<sup>44</sup>

The Criminal Justice Act provides for the representation of indigent defendants by public-defender organizations,<sup>45</sup> some of which are excellent. But these organizations are, for the most part, shamelessly overworked and cannot begin to meet the total need for representation of the indigent. Therefore, the Act also provides for the appointment of individual counsel to be compensated at prescribed rates for their time and expenses.<sup>46</sup> Counsel are required to submit sworn vouchers detailing these items to the court before whom they have represented their client.<sup>47</sup> But in language that has been wholly incorporated into S. 1437, the Act also states that "[t]he court shall fix the compensation and reimbursement to be paid to the attorney."<sup>48</sup> This language has been interpreted to give broad discretion to district court judges: They can ignore the vouchers and compensate appointed attorneys below the statutory rate. These decisions are thought to be unreviewable by an appellate court.<sup>49</sup> The Act thus creates a system wherein defense counsel must depend upon the good will of a judge for appointment and compensation. There are numerous and subtle ways by which an attorney's duty to represent zealously his or her client can be undercut in such circumstances. Defense counsel might hesitate, for example, before offering motions that could aggravate or antagonize a judge. Particularly when sentencing a convicted defendant, a time when many judges are notoriously unreceptive to vigorous advocacy, the effective functioning of the adversary system might be undermined.

The situation could be easily remedied if the appointment and compensation of counsel were accomplished through an independent institution; counsel would then not be dependent upon the good graces of a judge for their appointment and compensation.

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42. See Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811 (1976); Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973).

43. 18 U.S.C. § 3006A (1976).

44. See Proposed 18 U.S.C., *supra* note 2, §§ 3401-3405.

45. 18 U.S.C. § 3006A(a)-(b) (1976).

46. *Id.* § 3006A(d).

47. *Id.* § 3006A(d)(4).

48. *Id.*; Proposed 18 U.S.C., *supra* note 2, § 3403(a)(4).

49. See *Camenisch v. United States*, 553 F.2d 1271 (D.C. Cir. 1976); *United States ex rel. Bibbs v. Twomey*, 538 F.2d 151, 154 (7th Cir. 1976).

Such an arrangement would have other advantages. The arbitrary treatment of attorneys' vouchers stems from the possibility of fraud inherent in the present Criminal Justice Act. Judges simply do not have the staff or facilities to double check attorneys' representations, and thus must resort to capricious measures. This arbitrary and humiliating treatment of lawyers has in turn assured the continued low quality of the CJA bar, since more competent lawyers will inevitably seek more reliable employment elsewhere. If appointed counsel were compensated through an independent institution, however, means could be developed both to rationalize payment procedures and to minimize the possibility of fraud. The resulting climate would be more hospitable and thus might attract a more dedicated and professional class of lawyers. S. 1437 should not miss the unparalleled opportunity to accomplish these important improvements.

#### *Unreviewable Prosecutorial Discretion*

Finally, S. 1437's failure to institute one very specific reform may ultimately undermine its own purpose. The major impetus behind the creation of the Sentencing Commission is the attempt to reduce the lawless disparity of sentences now imposed on similar defendants convicted of similar crimes. The commission approach should reduce that disparity somewhat, and to that extent it deserves praise. But to the extent that S. 1437 succeeds in creating predictable and uniform sentences, the discretion of the prosecutor to decide which defendants to prosecute for what crimes becomes all the more important. At present, sentencing discretion is shared primarily by prosecutors, judges, and parole boards. Uniform and mandatory sentencing would merely transfer most of this discretion to prosecutors, who would in effect set sentences by their decisions about whom to charge with what crime and whether to plea bargain. Prosecutorial discretion is, at present, almost completely insulated from judicial review. The exercise of this discretion will thus recreate the very lawless disparities the Sentencing Commission was designed to eliminate. In the hands of the prosecutor, these discrepancies will be even less visible, and thus more insidious. More than nine years ago I stated in *Scott v. United States*<sup>50</sup> that "the standards which guide prosecutors in the exercise of their discretion are as much a part of the law as the rules applied in

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50. 419 F.2d 264 (D.C. Cir. 1969).

court.”<sup>51</sup> To achieve its own ends, S. 1437 *must* be amended to provide courts the means to review prosecutorial discretion. Not to do so would be to squander the greatest opportunity of all.

#### CONCLUSION

S. 1437 is an ambitious, yet flawed, approach to the tortuous problem of sentencing reform. I have outlined some of my specific objections to the bill’s sentencing provisions. But my greatest concern is that in seeking to automate the sentencing process, the bill moves away from the ideal of individualized justice and deprives participants in the process, and the public itself, of the information that is essential to our concept of criminal justice. With respect to the remainder of S. 1437, I offer only the following caveat, which is echoed in Senator Kennedy’s remarks in introducing the bill:<sup>52</sup> Because S. 1437 fails to confront the social injustices that breed crime in the first instance, it must not be viewed as the panacea for crime in America.

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51. *Id.* at 277.

52. *See* 123 CONG. REC. S15,962 (daily ed. Sept. 29, 1977) (remarks of Sen. Kennedy).

