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REFORM IN THE DETERMINATION
OF PRISON TERMS: EQUITY,
DETERMINACY, AND THE PAROLE
RELEASE FUNCTION

Peter B. Hoffman*†

Michael A. Stover**†

Traditional sentencing and parole practices1 have become the subject of widespread criticism. Dean Norval Morris of the University of Chicago Law School, for example, has recently described this country's sentencing procedures as "so arbitrary, discriminatory, and unprincipled that it is impossible to build a rational and humane prison system on them."2 Another prominent critic, United States District Judge Marvin Frankel, has bluntly concluded that sentencing presently constitutes "a vast wasteland in the law."3 Others, including Andrew von Hirsch,4 Alan Dershowitz,5 David Fogel,6 and the American Friends Service Committee,7 have depicted the problems engendered by current practices in equally vivid terms.

These criticisms are based upon two major concerns: unwarranted sentencing disparity8 and indeterminacy.9 Those advocat-
ing reform seem to have achieved considerable consensus on thegoals desired: greater equity and more determinancy. However,there is substantial disagreement regarding which structure andprocedures are most likely to achieve these goals. Meanwhile, vari-
sous state legislative bodies are considering sentencing reform andwidely divergent statutes and proposed statutes are being pro-
duced. On the federal level, the Senate has passed S. 1437 and
the House of Representatives is considering H.R. 13959. Although
these bills have major differences, both are designed to
recodify and reform the Federal Criminal Code, and both would
substantially alter federal sentencing practice.

At the same time, there is an increasing awareness in the
criminal justice field that unenvisioned and unintended conse-
quences of reform proposals have too often aggravated, rather than
mitigated, the problems leading to their enactment. The intent of
this Article is to examine the probable consequences of various
sentencing reform strategies from an operational or practical per-
spective.

INDETERMINACY

Under present federal law and the laws of most states, author-
ity for determining the actual duration of prison terms is
shared among the sentencing judge, paroling authority, and, to a
lesser extent, the prison system. In adult federal cases, for exam-
various ways. In this Article, it refers to the practice of traditional parole boards of
deferring the decision concerning parole release until well after the sentence has be-
gun.

10. For example, widely differing statutes relating to sentencing and parole
have recently been enacted. E.g., CAL. PENAL CODE §§ 1170-6 (West Cum. Supp.
1979); FLA. STAT. ANN. §§ 947.165, .172-.174 (West Cum. Supp. 1979); Act of Apr. 5,
1978, ch. 723, 1978 Minn. Sess. Law Serv. 705 (West); Act of July 20, 1978, ch. 481,
§§ 21-27, 1978 N.Y. Laws 848. See also the Federal Parole Commission and Reor-
13. A classic example is the experience of prohibition. More recently, a similar
concern has been raised by the expansion of diversionary programs. See Bollington,
Sprowls, Katkin & Phillips, A Critique of Diversionary Juvenile Justice, 24 CRIME
& DELINQUENCY 59 (1978).
REV. STAT. §§ 144.175-.270 (1977-1978). See generally V. O'LEARY & K. HANRAHAN,
PAROLE SYSTEMS IN THE UNITED STATES (3d ed. 1978).
16. In the federal system, credit for institutional good time reduces the maxi-
mum sentence and, thus, is available if parole is denied. The amount of reduction
varies, but generally a prisoner denied parole will be released by "good time" after
ple, a sentencing judge imposing a prison term of more than one year prescribes a maximum sentence within the limit set by statute for the offense. In addition, the judge may impose a minimum sentence equal to one-third of the maximum imposed, a lesser minimum, or no minimum at all. Within the constraints of the minimum sentence, if any, and the maximum sentence minus institutional good time, the actual duration of confinement is determined by the parole authority. The timing of this durational decision is one focus of controversy.

Under traditional parole practice, the decision regarding when a prisoner will be released is often deferred until well into the prisoner’s sentence. A prisoner is given a parole hearing shortly before completion of his or her minimum term. If the prisoner is not then granted parole, further consideration after an additional period of time is often scheduled. Consequently, a prisoner may receive several parole hearings before learning whether he or she will be granted parole and when he or she will actually be released.

From the perspective of the traditional rehabilitative model, this practice is both necessary and desirable. Under a treatment philosophy, parole release decisions are to be based primarily on rehabilitative concerns. The goal of the parole release authority is to identify the “optimum time” for the prisoner’s release. Thus, deferral of the release decision is necessary to enable rehabilitative progress to be monitored. Furthermore, it may even be argued that the uncertainty generated by this system has the positive function of motivating the prisoner to participate in rehabilitative programs.

After several decades of research, however, empirical evidence generally fails to demonstrate that institutional rehabilitative programs are effective or that the “optimum time” for release can be ascertained. Behavior in prison does not appear to be a good predictor of future criminal conduct.

18. Id.
20. For example, reconsideration may be scheduled at yearly intervals.
21. For a general overview of parole practices in the United States, see V. O'Leary & K. Hanrahan, supra note 15.
22. See, e.g., D. Lipton, R. Martinson & J. Wilks, The Effectiveness of Correctional Treatment (1975); Robison & Smith, The Effectiveness of Correctional Programs, 17 Crime & Delinquency 67 (1971).
Opponents of the traditional parole practice which defers the durational decision maintain that the psychological stress engendered by not knowing one's release date is morally unjustifiable. This uncertainty has been cited as a substantial contributor to prison unrest. It has been theorized that if determinacy is introduced into prison release decisions, not only will tensions created by uncertainty be reduced, but participation in prison rehabilitative programs may show more positive effects since such participation will be voluntary, not merely to impress a parole board.

The lack of demonstrated effectiveness of the traditional rehabilitative model renders the argument for an increase in determinacy compelling. The choice of the most effective method of accomplishing this goal, however, is not as straightforward. At first glance, abolition of the parole release function—so that the judicially fixed sentence determines the time actually served—might seem the most logical method. However, closer observation of this suggestion exposes certain disadvantages.

Advocates of determinacy in sentencing generally do not support truly determinate prison terms. Rather, they argue that a prisoner should be given a firm release date contingent upon his or her meeting a standard of institutional conduct. For example, while California has recently eliminated the parole release function in all but long term cases, it has created a "good time" mechanism in its place. A prisoner's term of confinement can still be reduced by up to one-third depending on institutional behavior. Other determinate sentencing proposals go so far as to provide for "day for day" good time.

To the extent that a system of good time release is substituted for the parole function, discretion to control the release date by

23. See, e.g., D. Fogel, supra note 6; N. Morris, supra note 2.
25. That is, such participation may reduce recidivism.
27. See note 22 supra and accompanying text.
defining and sanctioning institutional misbehavior is simply transferred from the parole board to the prison staff. Yet the liabilities of institutional control of prison release decisions formed a prime argument for the creation of independent releasing authorities, parole boards, in the first place.\footnote{31}

In addition, determinate sentencing precludes consideration of new information. Even if participation in rehabilitative programs were to be totally discounted, there are other factors that may change with time. For example, severe illness, effects of aging,\footnote{32} and assistance to institutional officials\footnote{33} are not thought of in the context of rehabilitation, but presently may be considered in prison release determinations. Similarly, public attitudes about an offense for which a long sentence has been imposed may change over time.\footnote{34} There may also be cases in which a sentence that was imposed when public feelings were intense appears, with the perspective of time, excessive.

Presently, it is the parole authority that is in the position to deal with the various factors of the type listed above. If the parole release function is eliminated, this discretion either will not be exercised, an alternative that appears unlikely, or, more likely, it will be exercised by someone else. Institutional officials are the prime candidates for such increased power, either directly, through greater use of furloughs or other community treatment procedures,\footnote{35} or indirectly, through the power to petition a court for resentencing.\footnote{36}

Most important, elimination of the parole release function would remove a prime check on sentencing disparity. This often implicit but extremely important parole board function is discussed


32. This factor may be particularly relevant in cases involving long sentences.

33. For example, prisoners may aid institutional officials in preventing escapes or in identifying participants engaged in illegal conduct within the institution.

34. Such attitudinal changes are presently occurring regarding laws dealing with illicit drugs.


36. A recent Maine statute abolishes parole board power to release. Sentences of imprisonment of more than one year are deemed tentative. The sentencing judge may resentence a prisoner to a lesser term upon petition of institutional officials. ME. REV. STAT. ANN. tit. 17-A, § 1154 (West 1978).}
in a subsequent section of this Article. 37

Whether these concerns justify retaining a paroling authority, or whether substitutes are preferable, need not be argued at this point. It is sufficient to emphasize that increased determinacy in the imposition of prison terms is not incompatible with the existence or utility of a paroling authority. State parole boards in Oregon and Minnesota, for example, presently operate under relatively "determinate" procedures. Each prisoner is given a hearing shortly after commitment at which a presumptive date of release is set contingent on avoidance of disciplinary infractions. 38 The United States Parole Commission has also moved in this direction. 39 Thus, traditional indeterminacy and uncertainty are eliminated, while authority to sanction institutional misconduct by postponing the presumptive date—or to advance the presumptive date when substantial changes in circumstances occur—is preserved. Most significantly, this authority is retained by an agency independent of the institutional chain of command. In addition to removing unnecessary uncertainty, adoption of a presumptive date system clarifies the paroling authority's role with respect to judicial sentencing.

REDUCTION OF UNWARRANTED SENTENCING DISPARITY

The problem of unwarranted disparity in sentencing is the second major concern of critics of traditional sentencing and parole practices. As articulated by Marvin Frankel, "[t]he evidence is conclusive that judges of widely varying attitudes on sentencing, ad-

37. See text accompanying notes 40-57 infra.
38. See OR. AD. R. 254-30-005-015; MINN. DEP'T OF CORRECTIONS, POLICY AND PROCEDURES MANUAL § 7-104 (1978).
39. Present United States Parole Commission regulations governing presumptive date procedures, see 28 C.F.R. §§ 2.12-14 (1978), provide that presumptive dates be set within 120 days of commitment for all prisoners with sentences of less than seven years. Id. § 2.12(a), (c)(1). Prisoners with longer sentences are given hearings when first eligible. Id. § 2.12(b). A presumptive date of up to four years is then set or a four-year reconsideration hearing is scheduled. Id. § 2.12(c)(2). Fewer than 4% of the 5,720 cases initially heard during the period from October 1977 to March 1978 were scheduled for four-year reconsideration hearings. However, the United States Parole Commission recently adopted rules which will grant immediate hearings to all prisoners except those with minimum terms of 10 years or more, and will allow presumptive dates to be set up to 10 years away. 44 Fed. Reg. 3404, 3405 (1979). The practical effect of this rule is to mandate presumptive dates (set within 120 days of confinement) for all but the most serious cases (estimated at fewer than 2% of prisoners committed each year).
ministering statutes that confer huge measures of discretion, mete
out widely divergent sentences where the differences are explaina-
ble only by the variations among the judges, not by material differ-
ences in the defendants or their crimes.”

The existence and extent of unwarranted sentencing disparity
is not a recent discovery. The literature on sentencing is replete
with examples of widely disparate sentences imposed on similarly
situated offenders. In 1967, the President’s Commission on Law
Enforcement and the Administration of Justice reported this prob-
lem as pervasive. In 1973, the National Advisory Commission on
Criminal Justice Standards and Goals described sentencing prac-
tices in this country as appalling.

The problem of disparate sentencing is not merely one which
offends an abstract concern for uniformity; it squarely denies the
principle of “equal justice under the law.” An excerpt from an
opinion by Justice Potter Stewart, written in 1958 while an appel-
late judge, is frequently quoted:

Justice is measured in many ways, but to a convicted criminal its
surest measure lies in the fairness of the sentence he receives.
... It is an anomaly that a judicial system which has developed
so scrupulous a concern for the protection of a criminal defend-
ant throughout every other stage of the proceedings against him
should have so neglected this most important dimension of fund-
damental justice.

Awareness of disparate sentencing practices has been criticized
as interfering with the orderly process of justice when knowledge-
able attorneys attempt to manipulate schedules to appear before
judges perceived to be lenient. Prison officials have stressed that
disparities are particularly apparent when offenders are confined
together. This creates frustration and hostility that is demoralizing

40. Frankel, supra note 3, at 21.
41. See, e.g., Bennett, The Sentence—Its Relation to Crime and Rehabilitation,
1956, at 15, 17.
42. PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMINISTRATION OF
JUSTICE, TASK FORCE REPORT: THE COURTS 23 (1967) [hereinafter cited as PRESI-
DENT’S COMM’N].
43. NATIONAL ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND
GOALS, CORRECTIONS 142 (1973).
44. Shepard v. United States, 257 F.2d 293, 294 (6th Cir. 1958).
45. PRESIDENT’S COMM’N, supra note 42, at 23-24.
and counterproductive to rehabilitative efforts.\textsuperscript{46}

Unwarranted disparities in sentencing result from a combination of three primary factors: (1) lack of clearly defined and accepted sentencing goals, priorities, and criteria; (2) substantial discretion exercised by sentencing judges and paroling authorities in the absence of such goals and criteria; and (3) the procedures under which this discretion is customarily exercised.

Sentencing and parole release decisions in this country have largely been left to the unfettered discretion of the officials involved. Legislatures have traditionally set high maximum penalties within which judges must choose specific sentences, but generally have provided little guidance for the exercise of this choice. Although the purposes of sentencing have often been defined as including deterrence, retribution, incapacitation, rehabilitation, and community condemnation to maintain respect for law,\textsuperscript{47} legislatures have been silent regarding which purposes are primary and how conflicts among the purposes are to be resolved. For example, federal law currently requires merely that in determining a sentence, the court consider “in its opinion the ends of justice and best interest of the public.”\textsuperscript{48}

In effect, sentencing policymaking has traditionally been delegated to a multitude of independent judges to be exercised in the context of individual cases.\textsuperscript{49} There has been no attempt to separate policymaking from individual sentencing determinations. Normally, some type of presentence investigation is available which attempts to provide an informational basis for an intelligent and “individualized” sentencing decision. Yet, which factors should be considered, under what circumstances, and how they are to be weighted are decisions left solely to the unfettered discretion of the individual decisionmakers.\textsuperscript{50}


\textsuperscript{49} Prior to the use of parole guidelines, parole discretion was also unstructured on the federal level.

\textsuperscript{50} Such factors include but are not limited to: circumstances of the offense, prior record, whether a guilty plea was entered, demeanor at trial, risk of recidivism, and social background.
Unfortunately, sentencing judges and paroling authorities generally have not attempted to fill this legislatively created gap by formally articulating sentencing principles and criteria, nor have sentencing and parole procedures been designed to identify the criteria currently used. The United States Parole Commission is an exception that is discussed in a subsequent section of this Article.51 In the federal system, for example, reasons for judicial sentencing decisions are not generally articulated, nor are they required,52 multi-judge sentencing panels are used only in a few scattered districts,53 and appellate review of a sentence within the statutory maximum is, for all practical purposes, unavailable.54 Given this lack of guided, reasoned, or reviewable discretion, it is not difficult to see how justifiable claims of arbitrary and capricious decisionmaking and unwarranted disparity result.

Without articulation of an underlying sentencing policy, it is questionable whether mere addition of procedural reforms, such as sentencing panels, written reasons, and appellate review, would be sufficient to produce the equity desired. A panel approach has been the rule among parole boards, yet criticisms of disparate parole decisionmaking have not been rare.55 There is some evidence that merely providing written reasons in each case does not appreciably reduce disparity, and that the reasons given tend to be rote generalizations.56 Moreover, without clearly articulated policy and meaningful sentencing reasons at the trial court level, appellate review is likely to be ineffective.57

Strategies for Disparity Reduction

Proposals for reducing unwarranted sentencing disparity essentially fall into two categories. Mandatory sentencing proposals comprise the first category. This approach seeks to maximize legislative control of the penalty schedule. Judicial or administrative discre-

51. See text accompanying notes 75-88 infra.
52. Frankel, supra note 3, at 9.
53. Id. at 20-22.
54. Id. at 23-28.
55. See, e.g., CITIZENS' INQUIRY ON PAROLE AND CRIMINAL JUSTICE, INC., SUMMARY REPORT ON NEW YORK PAROLE (1974).
tion in penalty determinations is to be minimized or eliminated entirely. The second category consists of what may be described as "sentencing guidelines" proposals, which aim at making the exercise of discretion more structured and reasoned, rather than eliminating it.

Mandatory Sentencing Proposals.—There are two basic types of mandatory sentencing proposals, albeit with numerous variations. The simplest involves legislative establishment of a specific penalty for each statutory offense, or combination of statutory offense and prior record. No judicial discretion is allowed, regardless of mitigating or aggravating circumstances, and no parole release is provided. The second type of mandatory sentencing proposal is called "presumptive sentencing." The legislature prescribes a sentence for each statutory offense or class of offenses, but the sentencing judge may vary the penalty by a prescribed amount if the judge finds mitigating or aggravating circumstances. Recent legislation in California falls into this category.

The image of mandatory sentencing may appeal to lawmakers and citizens who desire to make punishments more predictable. It is also clear that legislators ought to give more attention to specifying the underlying rationale and priorities for imposition of criminal sanctions. However, there are a number of very troublesome problems raised by mandatory sentencing approaches.

It is unlikely that any legislature will be able to specify in advance and in sufficient detail all the factors and combinations of factors necessary to eliminate judicial discretion while ensuring a sys-

58. An example is a criminal code section which might read: "First degree burglary shall be punished by imprisonment for three years."
59. Such a statute might read: "First degree burglary with one or more prior felony convictions shall be punished by imprisonment for five years."
60. This approach has been recommended in STRUGGLE FOR JUSTICE, supra note 7, at 144. A variant on this approach is the mandatory minimum sentence, which does not specify the penalty to be imposed, but dictates what may not be imposed (e.g., probation may not be granted if the offense involves use of a weapon). Since this variant does not purport to be a comprehensive solution to the disparity problem, it is not addressed here.
61. This type of statute might provide: "Sale of narcotics shall be punished by imprisonment for four years, plus or minus one year."
62. For instance, imprisonment may be increased from four to five years for sale of narcotics to a minor.
63. CAL. PENAL CODE §§ 1170-.6 (West Cum. Supp. 1978). These restrictions apply only to determining the length of prison terms; discretion to choose probation or other sanctions lesser than imprisonment is not affected.
tem congruent with present notions of equity and justice in sentencing. As the Supreme Court has recently noted in *Woodson v. North Carolina*:\(^64\)

This court has previously recognized that "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." . . . Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development.\(^65\)

Furthermore, as Professor Franklin Zimring has pointed out, our ability to define criminal acts in the context of legislation is limited:

Any system of punishment that attaches a single sanction to a particular offense must define offenses with a morally persuasive precision that present laws do not possess. . . .

The problem is not simply that any such penal code will make our present statutes look like Reader's Digest Condensed Books; we lack the capacity to define into formal law the nuances of situation, intent, and social harm that condition the seriousness of particular criminal acts.\(^66\)

This problem is less acute in presumptive sentencing proposals, which allow for limited sentencing discretion; however, it is still substantial. There is little reason to believe that a narrow legislatively determined range of discretion would be sufficient to accommodate the more unusual cases, the very cases for which discretion is most required. Yet, if the legislative range is sufficiently broad to accommodate such cases, the effect on present sentencing disparity is likely to be minimal. Similarly, narrowly drawn legislative determinations of mitigating or aggravating factors which may override a presumptive sentence are not likely to be sufficiently inclusive to encompass all appropriate exceptions, but broadly drawn standards will provide only minimal discretionary control.

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64. 428 U.S. 280 (1976).
65. Id. at 304 (citation omitted) (quoting Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937)). While the holding in this case, that failure to consider the circumstances of the offense and the character and record of the offender is unconstitutional, was specifically restricted to the imposition of capital penalties, the underlying rationale would appear to apply to other sentencing dispositions.
In addition, there is concern that if the legislature moves beyond its traditional role of specifying maximum permissible sentences for broad classes of criminal behavior and sets terms to be actually served for specific offense behaviors, an unanticipated potential for severe increases in penalty lengths will result. Even if the initial penalties appear reasonable, dramatic incidents, such as a particularly brutal robbery occurring close to election time, may provide insurmountable political pressure for increased sentences. As noted by Marvin Frankel,

Many of our criminal laws are enacted in an access of righteous indignation, with legislators fervidly outshouting each other, with little thought or attention given to the large number of years inserted as maximum penalties. Written at the random, accidental times when particular evils come to be perceived, the statutes are not harmonized or coordinated with each other. The resulting jumbles of harsh anomalies are practically inevitable.\(^6\)

Proponents of legislative sentencing may argue that the increased ability to project prison costs under a legislatively fixed sentencing model will deter legislators from wholesale increases in penalties.\(^6\) However, this has not been demonstrated; it is equally likely that, given more immediate political considerations, such deterrent effect will be minimal.

Moreover, there is concern that the legislative process is too cumbersome for proper monitoring of sentencing practice and modification of legislatively set terms. In addition, there may be considerable legislative reluctance to respond to recommendations for downward modification.\(^6\) While harsh application of outmoded penalties may result in considerable injustice, it is questionable whether the types of persons who become enmeshed in the criminal justice system as criminal defendants and prisoners can engender the same degree of sympathy and public concern as those perceived to be innocent victims.

There is also substantial concern that by eliminating or severely restricting judicial discretion, a mandatory sentencing approach will merely shift the exercise of discretion to the prosecutor, who selects which crimes to charge and controls the plea bargaining process. Professor Albert Alschuler has summarized this concern:

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68. D. FOGEL, supra note 6, at 258-60.
69. Although laws governing private sexual relationships among consenting adults are rarely, if ever, enforced, they are quite resistant to legislative repeal.
In my view, fixed and presumptive sentencing schemes of the sort commonly advocated today (and of the sort enacted in California) are unlikely to achieve their objectives so long as they leave the prosecutor's power to formulate charges and to bargain for guilty pleas unchecked. Indeed, this sort of reform is likely to produce its antithesis—to yield a system every bit as lawless as the current sentencing regime but one in which discretion is concentrated in an inappropriate agency and in which the benefits of this discretion are made available only to defendants who sacrifice their constitutional rights.\(^7\)

While disparity might appear to be reduced by a mandatory or presumptive penalty scheme, the problem would actually be masked: discretion would merely be shifted and hidden. In fact, the disparity problem is likely to become exacerbated; when the exercise of discretion becomes less visible, it becomes less subject to control.

**A Guideline Model.**—The "guidelines" model, a substantially different alternative, is preferred by the writers of this Article. The legislature continues its traditional practice of setting the maximum permissible penalties for broad classes of criminal conduct. However, it also articulates general principles to guide the imposition of such penalties. The task of formulating explicit sentencing policy under these standards is delegated to a smaller and more specialized body.\(^7\) This body develops explicit sentencing guidelines by identifying the primary factors to be considered in sentencing and how they should be weighed. For each combination of major factors, the guidelines specify a particular penalty or penalty range. The individual sentencing decisionmaker is required to apply the guidelines to each case. Normally, a decision within the guideline range is expected. However, discretion to depart from the guidelines is retained, provided adequate on-the-record justifications for such departure are supplied.\(^7\)

Consequently, each defendant is informed how the guideline range for his or her case was calculated and the specific reasons for any departure from the sentence or range prescribed by the

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71. This smaller specialized body might be a sentencing commission, a committee of the judiciary, a paroling authority, or some combination of these groups.

72. See note 86 infra and accompanying text.
guidelines. This system focuses on departures from customary policy, which is represented by the applicable guideline range. Thus, it is likely to avoid generalized reasons, which tend to be given when reasons are required without articulation of underlying policy.\(^7\)

In addition, a guidelines system facilitates appellate review. In contrast to jurisdictions in which appellate review of sentencing is currently provided, such review under a guidelines system has a specific focus. Two sequential questions are asked. First, were the guidelines correctly applied? Second, if a sentence outside the guidelines was imposed, were the reasons given for the departure sufficient?\(^7\) or, if the decision was within the guidelines, was compliance with customary policy unreasonable? Furthermore, the guideline setting authority monitors guideline usage on an ongoing basis to ensure compliance and consider circumstances warranting further specification, classification, or modification of the guideline standards.

An operating example of a guidelines model is provided by the United States Parole Commission.\(^7\) The Commission, faced in the late 1960's and early 1970's with criticisms similar to those now leveled at sentencing judges,\(^7\) established a pilot project\(^7\) which featured hearings conducted by panels of two hearing examiners, written reasons in cases of parole denial, an administrative review process, and use of decision guidelines. Based on experience with this pilot project, revised decisionmaking procedures incorporating these features were developed and applied to all federal parole decisions.\(^7\) In 1976, the Parole Commission and Reorganization Act mandated continued use of these features, including the guidelines system.\(^7\)

The guidelines matrix is depicted in Table I. It consists of a

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73. Absent a clear articulation of underlying policy, written reasons tend to be routine and boilerplate. See note 56 supra and accompanying text.

74. Appellate review is necessarily ineffective without precise reasons stated by the sentencing judge. See note 57 supra and accompanying text.

75. Formerly the United States Board of Parole. (The agency's name was changed in 1976).

76. These criticisms include charges of standardless decisions, as well as arbitrary and disparate decisionmaking. See K. Davis, discretionary justice 126-42 (1969).

77. This project commenced in 1972.


79. 18 U.S.C. §§ 4201-4218 (1976). These guidelines were originally developed
two-axis chart. The vertical axis determines the severity or gravity of the prisoner's present offense behavior. Seven categories of offense severity are designated. For each, the Commission has supplied examples of common offense behaviors. These examples were determined by consensus judgment of Commission members. Not all possible offense behaviors are listed. Those not listed are categorized by comparison with similar offense behaviors which are listed, or by interpolation or extrapolation therefrom. On the horizontal axis, four categories of parole prognosis, from very good to poor, are defined. An actuarial device known as a salient factor score (see Table II) was empirically developed to aid in making prognosis assessments.

For each combination of offense (severity) and offender (parole prognosis) characteristics, a guideline range is provided. This decisional range indicates customary parole policy by specifying the number of months to be served before release, assuming the prisoner demonstrates good institutional behavior. Thus, an adult parole applicant with a low moderate severity offense, for example forgery of less than $1,000, and good parole prognosis, indicated by a salient factor score of 6-8, can expect to serve between twelve and sixteen months before parole release. A very high severity/poor risk case, on the other hand, such as an armed robbery and a salient factor score of 0-3, can expect to serve from sixty to seventy-two months, absent exceptional circumstances. For the most serious cases, including murder and kidnapping, the guidelines do not specify upper limits. Decisions in the small number of as part of a three-year study of parole decisionmaking. The study was funded by the Law Enforcement Assistance Administration and was conducted by the Research Center of the National Council on Crime and Delinquency. This was a collaborative effort among parole board members, their staff, and research staff. For a description of the development of these guidelines, see D. Gottfredson, L. Wilkins & P. Hoffman, PAROLE AND SENTENCING GUIDELINES (1978) [hereinafter cited as PAROLE AND SENTENCING GUIDELINES].


81. See PAROLE AND SENTENCING GUIDELINES, supra note 79, at 41-67.

82. Id. at 69-80.

83. This policy is subject to the limitations of the judicially imposed sentence.
### TABLE I

**ADULT GUIDELINES FOR DECISIONMAKING**

[Guidelines for Decisionmaking, Customary Total Time to be Served before Release (including jail time)]

<table>
<thead>
<tr>
<th>OFFENSE CHARACTERISTICS: Severity of Offense Behavior [Examples]</th>
<th>OFFENDER CHARACTERISTICS: Parole Prognosis [Salient Factor Score]</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>LOW</strong></td>
<td>Very Good (11 to 9)</td>
</tr>
<tr>
<td>Escape [open institution or program (e.g., CTC, work release)—absent less than 7 days]</td>
<td>6-10 months</td>
</tr>
<tr>
<td>Marihuana or &quot;soft drugs,&quot; simple possession (small quantity for own use)</td>
<td></td>
</tr>
<tr>
<td>Property offenses [theft or simple possession of stolen property] less than $1,000</td>
<td></td>
</tr>
<tr>
<td><strong>LOW MODERATE</strong></td>
<td></td>
</tr>
<tr>
<td>Alcohol law violations</td>
<td></td>
</tr>
<tr>
<td>Counterfeit currency (passing/possession less than $1,000)</td>
<td></td>
</tr>
<tr>
<td>Immigration law violations</td>
<td></td>
</tr>
<tr>
<td>Income tax evasion (less than $10,000)</td>
<td></td>
</tr>
<tr>
<td>Property offenses [forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell] less than $1,000</td>
<td>8-12 months</td>
</tr>
<tr>
<td>Selective Service Act violations</td>
<td></td>
</tr>
<tr>
<td><strong>MODERATE</strong></td>
<td></td>
</tr>
<tr>
<td>Bribery of a public official (offering or accepting)</td>
<td></td>
</tr>
<tr>
<td>Counterfeit currency (passing/possession $1,000 to $19,999)</td>
<td></td>
</tr>
<tr>
<td>Drugs:</td>
<td></td>
</tr>
<tr>
<td>Marihuana, possession with intent to distribute/sale [small scale (e.g., less than 50 lbs.)]</td>
<td></td>
</tr>
<tr>
<td>&quot;Soft drugs,&quot; possession with intent to distribute/sale (less than $500)</td>
<td></td>
</tr>
<tr>
<td>Escape [secure program or institution, or absent 7 days or more—no fear or threat used]</td>
<td></td>
</tr>
<tr>
<td>Firearms Act, possession/purchase/sale (single weapon not sawed-off shotgun or machine gun)</td>
<td>12-16 months</td>
</tr>
<tr>
<td>Crime</td>
<td>HIGH</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>-------------------------------------------</td>
</tr>
<tr>
<td>Income tax evasion ($10,000 to $50,000)</td>
<td></td>
</tr>
<tr>
<td>Mailing threatening communication(s)</td>
<td></td>
</tr>
<tr>
<td>Mispriison of felony</td>
<td></td>
</tr>
<tr>
<td>Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] $1,000-$19,999</td>
<td></td>
</tr>
<tr>
<td>Smuggling/transporting of alien(s)</td>
<td></td>
</tr>
<tr>
<td>Theft of motor vehicle (not multiple theft or for resale)</td>
<td></td>
</tr>
<tr>
<td>Counterfeit currency (passing/possession $20,000 to $100,000)</td>
<td>16-20 months</td>
</tr>
<tr>
<td>Counterfeiting (manufacturing)</td>
<td>20-26 months</td>
</tr>
<tr>
<td>Drugs:</td>
<td></td>
</tr>
<tr>
<td>Marihuana, possession with intent to distribute/sale [medium scale (e.g., 50 to 1,999 lbs.)]</td>
<td></td>
</tr>
<tr>
<td>&quot;Soft drugs,&quot; possession with intent to distribute/sale ($500 to $5,000)</td>
<td></td>
</tr>
<tr>
<td>Explosives, possession/transportation</td>
<td></td>
</tr>
<tr>
<td>Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons)</td>
<td></td>
</tr>
<tr>
<td>Mann Act (no force—commercial purposes)</td>
<td></td>
</tr>
<tr>
<td>Theft of motor vehicle for resale</td>
<td></td>
</tr>
<tr>
<td>Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] $20,000 to $100,000</td>
<td></td>
</tr>
<tr>
<td>Robbery (weapon or threat)</td>
<td>26-36 months</td>
</tr>
<tr>
<td>Breaking and entering [bank or post office—entry or attempted entry to vault]</td>
<td>36-48 months</td>
</tr>
<tr>
<td>Drugs:</td>
<td></td>
</tr>
<tr>
<td>Marihuana, possession with intent to distribute/sale [large scale (e.g., 2,000 lbs. or more)]</td>
<td>60-72 months</td>
</tr>
<tr>
<td>&quot;Soft drugs,&quot; possession with intent to distribute/sale (over $5,000)</td>
<td></td>
</tr>
<tr>
<td>&quot;Hard drugs,&quot; possession with intent to distribute/sale (not exceeding $100,000)</td>
<td></td>
</tr>
<tr>
<td>Extortion</td>
<td></td>
</tr>
<tr>
<td>Mann Act (force)</td>
<td></td>
</tr>
<tr>
<td>Property offenses [theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property] over $100,000 but not exceeding $500,000</td>
<td></td>
</tr>
</tbody>
</table>
TABLE I (continued)

ADULT GUIDELINES FOR DECISIONMAKING

[Guidelines for Decisionmaking, Customary Total Time to be Served before Release (including jail time)]

<table>
<thead>
<tr>
<th>OFFENSE CHARACTERISTICS:</th>
<th>OFFENDER CHARACTERISTICS:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Severity of Offense Behavior</td>
<td>Parole Prognosis [Salient Factor Score]</td>
</tr>
<tr>
<td>[Examples]</td>
<td>Very Good</td>
</tr>
<tr>
<td></td>
<td>(11 to 9)</td>
</tr>
<tr>
<td><strong>GREATEST I</strong></td>
<td></td>
</tr>
<tr>
<td>Aggravated felony (e.g., robbery: Weapon fired—no serious injury)</td>
<td>40-55 months</td>
</tr>
<tr>
<td>Explosive detonation (involving potential risk of physical injury to person(s)—no serious injury occurred)</td>
<td></td>
</tr>
<tr>
<td>Robbery [multiple instances (2-3)]</td>
<td></td>
</tr>
<tr>
<td>“Hard drugs,” possession with intent to distribute/sale—large scale (e.g., over $100,000)</td>
<td></td>
</tr>
<tr>
<td>Sexual act—force (e.g., forcible rape)</td>
<td></td>
</tr>
<tr>
<td><strong>GREATEST II</strong></td>
<td></td>
</tr>
<tr>
<td>Aggravated felony—serious injury (e.g., injury involving substantial risk of death, or protracted disability, or disfigurement)</td>
<td></td>
</tr>
<tr>
<td>Aircraft hijacking</td>
<td></td>
</tr>
<tr>
<td>Espionage</td>
<td></td>
</tr>
<tr>
<td>Kidnapping</td>
<td></td>
</tr>
<tr>
<td>Homicide (intentional or committed during other crime)</td>
<td></td>
</tr>
</tbody>
</table>

Notes: 1. These guidelines are predicated upon good institutional conduct and program performance.
2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
4. If an offense behavior involved multiple separate offenses, the severity level may be increased.
5. If a continuance is to be given, allow 30 days (1 month) for release program provision.
6. “Hard drugs” include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes. “Soft drugs” include, but are not limited to, barbiturates, amphetamines, LSD, and hashish.
7. Conspiracy shall be rated for guideline purposes according to the underlying offense behavior if such behavior was consummated. If the offense is unconsummated, the conspiracy will be rated one step below the consummated offense.
TABLE II
SALIENT FACTOR SCORE

Register Number ___________________________ Name ___________________________

ITEM A  .................................................................
No prior convictions (adult or juvenile) = 3
One prior conviction = 2
Two or three prior convictions = 1
Four or more prior convictions = 0

ITEM B  .................................................................
No prior incarcerations (adult or juvenile) = 2
One or two prior incarcerations = 1
Three or more prior incarcerations = 0

ITEM C  .................................................................
Age at first commitment (adult or juvenile)
26 or older = 2
18-25 = 1
17 or younger = 0

ITEM D  .................................................................
Commitment offense did not involve auto theft or check(s) (forgery/larceny) = 1
Commitment offense involved auto theft \[X\], or check(s) \[Y\], or both \[Z\] = 0

ITEM E  .................................................................
Never had parole revoked or been committed for a new offense while on parole, and not a probation violator this time = 1
Has had parole revoked or been committed for a new offense while on parole \[X\], or is a probation violator this time \[Y\], or both \[Z\] = 0

ITEM F  .................................................................
No history of heroin or opiate dependence = 1
Otherwise = 0

ITEM G  .................................................................
Verified employment (or full-time school attendance)
for a total of at least 6 months during the last 2 years in the community = 1
Otherwise = 0

TOTAL SCORE  .....................................................

* NOTE TO EXAMINERS:
If item D or E is scored 0, place the appropriate letter (X, Y or Z) on the line to the right of the box.
cases in this category must be made by comparing with and extrapolating from the offenses and time ranges in the immediately preceding severity level.

Decisions above or below the guidelines must be for "good cause" and accompanied by specific written reasons. For example, aggravating factors, such as unusual cruelty toward the victim, a particularly large scale or unusually sophisticated offense behavior, or a repetitive pattern of assaultive conduct, may justify a decision above the guidelines if specific factual support is provided. Similarly, diminished mental capacity, a poor prognosis score resulting exclusively from trivial prior offenses, or severe medical problems could support a decision below the guidelines range. During the period from October 1976 to September 1977, approximately 10,000 decisions were rendered at initial parole hearings. In eighty percent of these cases, the Commission's decisions were within the guidelines range; decisions above or below the guidelines were made in twenty percent of the cases.

By Commission policy, revision of the guideline model is periodically considered. The Commission can examine the adequacy of reasons specified in prior cases for departure from the guidelines and determine whether there are recurring circumstances that require supplemental policy or policy clarification. In addition, the Commissioners can consider whether modification of the offense behavior classifications, predictive device (salient factor score), or guideline ranges is warranted.

**ALLOCATION OF RESPONSIBILITY FOR DETERMINING ACTUAL DURATION OF PRISON TERMS**

Combining a procedure for setting presumptive parole dates at initial hearings held shortly after commitment with a guideline sys-

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84. Of the 5720 prisoners given initial hearings during the six month period from October 1977 to March 1978, fewer than 2.5% had offenses rated in the Greatest II Severity category.

85. Federal law provides that the prisoner must be given written notice stating with particularity reasons for any departure from the guidelines. 18 U.S.C. § 4206(c) (1976).

86. Examples of the circumstances that warrant decisions outside the guidelines are listed in Guideline Application Manual, supra note 80, at 4.1-17.

87. See B. Stone-Meierhoefer, Workload and Decision Trends: Statistical Highlights 10/74-9/77, at R10 (U.S. Parole Comm'n Research Unit Rep. No. 18, 1977). This 20% figure includes only discretionary decisions outside the guidelines. Decisions limited by the judicial sentence were not considered discretionary guideline departures. See id. at R16 note.

88. 28 C.F.R. § 2.20(g) (1978).
Reform in the Determination of Prison Terms provides relative determinacy and reduces unwarranted disparity in prison terms. Yet it is not sufficient for parole boards to use decision guidelines, while judicial discretion is left unfettered. Parole boards cannot affect unwarranted disparity in nonprison sentences or in judicial constraints on parole board action. Thus, efforts are now being made in several jurisdictions to apply a guideline model to judicial sentencing decisions.

Congress, in the context of revising the Federal Criminal Code, is considering the extension of a guideline system to judicial sentencing decisions. One issue of concern is the appropriate role, if any, for the paroling authority. There are at least two clearly distinguishable strategies for allocation of sentencing power under a guideline system.

The "single authority model" eliminates the parole release function. The sentencing judge determines, pursuant to guidelines, the nature of the sentence: the fine, probation period, jail term, or term of imprisonment. Terms of imprisonment, once imposed, are served in full, possibly subject to reduction for acceptable institutional behavior.

The "dual authority model" divides responsibility between the judiciary and the parole board. As in the single authority model, the sentencing judge decides, pursuant to guidelines, whether to impose a fine, probation period, jail term, or term of imprisonment. However, the actual duration of any term of imprisonment imposed is determined by the paroling authority pursuant to guidelines and presumptive date procedures. This division of authority could be absolute, or judicial authority to limit the maxi-


90. That is, constraints may be placed on parole board action by inappropriately high judicial minimum or inappropriately low judicial maximum sentences.


93. For the purposes of this Article, imprisonment is exclusively defined to include sentences to penal institutions for periods in excess of one year. This term must be distinguished from jail sentences, which include terms of one year or less.

94. For example, in the state of Washington if a judge decides to impose a
mum term could be retained.\textsuperscript{95}

On the surface, the first strategy appears more tidy in that it functions with a single decisionmaking authority: the judiciary. However, theoretical tidiness is not much comfort if the proposal unravels when put into practice. Consequently, it is essential that each strategy be examined and its ability to achieve desired goals assessed.

Four goals are identified for purposes of analysis: (1) Reducing unwarranted disparity in the actual duration of prison terms; (2) reducing uncertainty or indeterminacy, without precluding the ability to respond to significant changes in circumstances; (3) ensuring fair and effective administration of prison discipline; and (4) avoiding excessive incarceration and skyrocketing prison populations. These goals are considered in the context of the federal reform effort. The underlying principles, however, apply equally to state systems.

\textit{The Impact on Disparity}

Both the single and dual authority models provide for judicial determination of the nature of the sentence pursuant to a guidelines system. Under the single authority model, the sentencing judge also determines the actual duration of prison confinement; whereas in the dual authority model, this decision is made by a separate, specialized authority. We now turn to a primary question: Which model is more likely in practice to provide reduction in unwarranted disparity?

Under the single authority model proposed in S. 1437,\textsuperscript{96} determination of actual duration of prison confinement is shifted from the parole authority to the sentencing judge. Sentences of imprisonment in almost all cases would be served in full without the possibility of parole release,\textsuperscript{97} and statutory reduction for good behavior.

\textsuperscript{95} See note 17 supra and accompanying text.

\textsuperscript{96} S. 1437, 95th Cong., 2d Sess. (1978). This Article deals with §§ 101 and 124 of the bill. \textit{Id.} §§ 101, 124. Section 101 of the bill, if enacted, will amend Title 18 of the United States Code regarding, \textit{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.

\textsuperscript{97} Proposed 28 U.S.C., \textit{supra} note 96, § 944(b)(2). This is not to be confused with the provision of parole supervision. Under the proposed amendments to Title
ior is very limited. A statement of specific reasons for any sentence outside the guidelines is required, and there is a limited right of appellate review. A Sentencing Commission is established to issue guidelines and policy statements, but it lacks responsibility or authority to review individual cases, except for research purposes after the actual decisions have been made.

While it seems clear that the introduction of such guidelines would provide some reduction of disparity in the present totally structureless area of judicial sentencing, there are serious obstacles that would prevent a single authority model from controlling unwarranted disparity in the actual duration of prison terms with anywhere near the effectiveness of the dual authority model. Indeed, such disparity is likely to increase under the single authority model proposed in S. 1437.

“The judiciary” actually consists of an extremely large number of highly decentralized decisionmakers with a strong tradition of independence. Decisions are made by single individuals. Moreover, many judges hold very firm beliefs about “individualized” sentencing. While judicial independence historically has protected private freedoms against government abuse, it has also made it difficult to coordinate and direct judges. Such independence is demonstrated by the wide divergence in probation supervision practice

18 of the United States Code, a period of parole supervision is a separate and additional part of all sentences in excess of one year. Proposed 18 U.S.C., supra note 96, §§ 2304, 3841, 3843.

98. Proposed 18 U.S.C., supra note 96, § 3824(b). Three days credit for institutional good behavior is given at the end of each calendar month after the first year of imprisonment. See text accompanying notes 129 & 130 infra.


100. Id. § 3725.


102. Id. §§ 994(q), 995.

103. This is especially true regarding the choice of probation or incarceration. For judicial decisions concerning the character of the sentence, which are presently totally unstructured, a guidelines model are discussed below. See text accompanying notes 105-112 infra. For judicial decisions concerning the character of the sentence, which are presently totally unstructured, a guidelines model should, nevertheless, achieve a substantial improvement over current practice.


106. As indicated earlier, the use of multi-judge “sentencing councils” is rather limited. See note 53 supra and accompanying text. In addition, judicial sentencing councils are merely advisory; the individual sentencing judge retains actual decision-making power.
among the ninety-two federal judicial districts. The Administrative Office of United States Courts performs the function proposed for the Sentencing Commission: providing a central office to coordinate judicial and probation operations. However, the Administrative Office has not produced uniformity among the federal districts. For example, a recent General Accounting Office study found wide district-to-district disparity in minimum required contact levels of probation officer case supervision, despite relatively clear standards issued by the Administrative Office.

Moreover, guideline assessments under S. 1437 are likely to be delegated to the probation staff that presently prepares pre-sentence investigations, introducing an even larger number of agents into the process. It is unlikely that the detailed instruction and ongoing training necessary for guidelines to be operationally effective can be given to such vast numbers of personnel. Obviously such instruction and training cannot be provided as effectively as it can to the much smaller group of members and examiners who comprise the paroling authority. This distinction is crucial because what is actually applied with a guidelines system is a complex set of standards and principles, rather than a simple set of mandatory rules.

In addition, decisions relating to sentencing in general, and terms of imprisonment in particular, are but a small part of the judicial role. On the average, a federal judge annually imposes fewer than thirty sentences of imprisonment which exceed one year. Not only does the part-time nature of this task preclude developing proficiency in applying guidelines consistently, but it also limits each judge’s exposure to the broad range of cases involving prison terms. Such exposure is important because sentencing involves complex comparative judgments; guidelines aid in, rather than substitute for, making these judgments.

107. Federal probation officers in each district are appointed by and report to the Chief District Judge.
108. This is not intended as a criticism of the personnel involved; rather, it is noted as an inherent structural limitation.
110. There are presently 1,697 United States probation officers.
111. There are nine parole commissioners, 18 U.S.C. § 4202 (1976), and 36 hearing examiners.
In contrast, the parole authority is composed of a small group of decisionmakers who determine the length of prison confinements on a full-time basis, vote in panels rather than individually, and see the entire spectrum of defendants sentenced to imprisonment. Thus, the structure of a paroling authority under a guideline system contains substantial additional checks that control unwarranted disparity. These include: (1) A small number of decisionmakers, which facilitates consultation, sharing views, and intensive and ongoing training; (2) panel as opposed to individual decisionmaking; (3) guideline application on a primary, or full-time, rather than a secondary, or part-time, basis; (4) exposure to the full spectrum of defendants sentenced to prison, rather than to a narrow slice of such cases; and (5) considerable isolation from potential local pressures. In our opinion, a guidelines system can be of substantial utility. However, it is a major error to expect it to work without carefully designed supplemental checks.

Proponents of the single authority model argue that an adequate compliance mechanism is provided by S. 1437's provision for appellate review. However, such an argument is not persuasive for several reasons. There are drastic limitations on the scope of appellate review, apparently out of concern that the already overworked appellate courts would not be able to handle a large added burden from sentencing appeals. Under S. 1437, a defendant can only appeal a sentence that is above the guidelines. There is no right to appeal a sentence within or below the guidelines, even if the defendant can make a persuasive argument that mitigating factors warranting a lower sentence are present. Moreover, there appears to be no right to appeal on the basis of an alleged misapplication of the guideline range or misinterpretation of the factors determining the guideline range selected.


114. Proposed 18 U.S.C., supra note 96, § 3725. In addition, the government may appeal a sentence below the guidelines. However, the defendant may not appeal a sentence equal to or less than that recommended or not opposed by the prosecutor pursuant to a plea agreement. The defendant also may not appeal if the sentence actually imposed was specified in the accepted plea agreement. Similarly, the government may not appeal if the sentence imposed is equal to or greater than that recommended or not opposed by the prosecutor, or if the sentence actually imposed was specified in the accepted plea agreement.

115. The defendant's right to challenge the legality of a sentence under rule 35 of the Federal Rules of Criminal Procedure, FED. R. CRIM. P. 35, is of limited value, since a misapplication of the guidelines may not always amount to clear illegality.
In addition, there is little indication that the decisions of the numerous panels of the eleven courts of appeals will provide a truly consistent and rational sentencing policy. The sentencing judge may depart from the guidelines whenever he or she 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.” The standard for appellate reversal is a finding that the sentence is “unreasonable.” Thus, diverse trial and appellate court departures from sentences recommended by the guidelines are inevitable. Furthermore, it is highly unlikely that already overworked appellate courts will assume an activist role in sentencing review. Clearly, there is no historical tradition of appellate involvement with sentencing review; rather, considerable deference is paid to the trial judge’s ability to observe the defendant. These concerns are highlighted by Andrew von Hirsch and Kathleen Hanrahan in a discussion of the utility of the dual authority model: “It will be difficult enough [even with the introduction of appellate review of sentences] to ensure that these individual [judicial] decision-makers abide by the [Sentencing] Commission’s standards in their ‘in-out’ decisions [whether to imprison or grant probation]. The standards concerning duration of imprisonment are apt to be still more complex and difficult to police.” It should be noted that under current parole law, administrative review by a specialized section of the Parole Commission may be obtained by any prisoner denied parole.

Determinacy, Changing Circumstances, and Disciplinary Infractions

It might appear that a single authority model would provide more determinacy than the dual authority model. However, a dual authority structure, coupled with a presumptive release date plan, would be just as effective in eliminating gross indeterminacy. Fur-
Therefore, the important question is: How do the two models screen and treat cases involving “changed” circumstances, including disciplinary infractions?

Such circumstances may be classified into four categories: (1) Circumstances relevant to the defendant that are unknown or unforeseen at the time of sentencing (e.g., severe illness, effects of aging in long term cases, help to prison or prosecutorial authorities); (2) circumstances concerning classes of individuals (e.g., severe prison overcrowding, reduced societal evaluation of the seriousness of particular offenses); (3) circumstances relating to disciplinary infractions; and (4) circumstances relating to achievement in institutional programs.

Unforeseen Individual Circumstances.—Under the single authority model proposed in S. 1437, the Director of the Bureau of Prisons is authorized to petition the court for resentencing in exceptional circumstances. However, because the federal prison system is decentralized, this would increase the number of decisionmakers upon whom reliance to initiate such requests would be placed. The effectiveness of this provision in reducing unwarranted disparity also depends on consistent responses from the judiciary to petitions for resentencing, raising the potential disparity problem noted earlier. Moreover, there is no provision for periodic review by the original decisionmaker to ascertain the existence of exceptional circumstances—a troublesome void when the population concerned is not particularly articulate.

In contrast, the dual authority model provides an efficient vehicle for more consistent responses to exceptional circumstances. Such circumstances can be brought to the attention of the parole authority by a petition of the prisoner or warden, or discovered at formal periodic reviews of each presumptive date.

121. See text accompanying notes 29 & 30 supra.
123. There are presently 39 federal institutions, with numerous case managers and classification personnel. Furthermore, expanded use is being made of state facilities which each house small numbers of federal prisoners.
124. See notes 40-57 supra and accompanying text.
125. Current federal law provides for periodic reviews of parole denials at least once each 18 months for prisoners with sentences of more than one year and less than seven years; and at least once each 24 months for prisoners with sentences of seven years or more. 18 U.S.C. § 4208(h) (1976). Parole Commission regulations in 28 C.F.R. § 2.14(a) (1978) provide in part:
Reduced Societal Attitudes or Severe Overcrowding.—A single authority model cannot respond efficiently to prisoners with offenses towards which societal attitudes have grown more lenient. The Sentencing Commission may reduce guideline penalties prospectively under S. 1437. However, there is no mechanism for reevaluating cases already sentenced. Similarly, although the Sentencing Commission is given a mandate to consider overcrowding, it can only act prospectively. Thus, in either case, disparity between prisoners sentenced before and after a change in the guidelines occurs would remain.

In contrast, the dual authority model provides a considerably more efficient vehicle for responding to such circumstances. If societal attitudes toward particular offenses become more tolerant, retrospective advancement of presumptive release dates can be made. To alleviate overcrowding, a parole authority can make immediate but smaller changes more equally throughout the prison population. It is not suggested that a parole authority should be routinely used for adjusting institutional populations; rather, the unique ability afforded by the dual authority model to react equitably to se-

(a) Interim proceedings. The purpose of an interim proceeding required by 18 U.S.C. 4208(h) shall be to consider any significant developments or changes in the prisoner's status that may have occurred subsequent to the initial hearing.

(3) Following an interim hearing, the Commission may:
   (i) Order no change in the previous decision;
   (ii) Advance a presumptive release date, or the date of a four-year reconsideration hearing. However, it shall be the policy of the Commission that once set, a presumptive release date or the date of a four-year reconsideration hearing shall not be advanced except upon clearly exceptional circumstances;
   (iii) Retard or rescind a presumptive parole date for reason of disciplinary infractions.

In addition, 28 C.F.R. § 2.15 (1978) provides:

When a prisoner has served the minimum term of imprisonment required by law, the Bureau of Prisons may petition the responsible Regional Commissioner for reopening the case under § 2.28 and consideration for parole prior to the date set by the Commission at the initial or review hearing. The petition must show cause why it should be granted, i.e., an emergency, hardship, or the existence of other extraordinary circumstances that would warrant consideration of early parole.

126. Examples of such offenses include selective service and certain drug offenses.
128. Id. § 994(g).
vere overcrowding in a manner not possible under the single authority model is emphasized.

Disciplinary Infractions.—Disciplinary infractions present a somewhat different concern. Although earlier drafts eliminated "good time" completely, S. 1437, as it passed the Senate, allows three days credit for institutional good time that vests monthly. Since neither vested nor future good time can be forfeited, the limit on lost good time is three days for any and all infractions occurring within the course of one month.129 Thus, if a prisoner violates an institutional rule, he or she can only lose the good time to be earned during that month. Consequently, there is severe doubt that S. 1437 provides a sufficient sanction for serious institutional misconduct. However, increasing the amount of institutional good time that can be awarded has the liability of increasing institutional power.130 Again, the dual authority model can more efficiently sanction misconduct, and is free of institutional dominance. For example, if a total of twenty percent good time reduction is deemed sufficient, the legislation could specify that the initial presumptive date be set no later than upon completion of eighty percent of the judicial maximum sentence. Thereafter, a presumptive date could be postponed by the paroling authority, for a period of up to twenty percent of the original sentence, upon a due process finding of institutional misconduct.

Rehabilitative Programming.—Under S. 1437, participation in rehabilitative programs cannot be considered in release determinations unless the judge at the time of sentencing deems the case exceptional and provides for parole eligibility.131 Despite the apparent general lack of effectiveness of present rehabilitative programs, few would preclude the possibility that specialized programs which demonstrably reduce recidivism for certain types of prisoners will be discovered. Under S. 1437, even minimal incentives or rewards for rehabilitative participation are barred.

The dual authority/presumptive date model, however, allows limited advancement of presumptive dates upon completion of

129. Proposed 18 U.S.C., supra note 96, § 3824(b) provides that a prisoner serving a term of more than one year, other than a life term, can earn up to three days good time per month.
130. See text accompanying notes 31, 35 & 36 supra; note 31 supra.
131. Proposed 28 U.S.C., supra note 96, § 994(b)(2). This is termed "early release eligibility."
"certified" programs. Such a system must be structured carefully to avoid reintroducing indeterminacy. However, the alternative of merely warehousing large numbers of prisoners, even if effective programs are discovered, appears less desirable.

Potential Increase in Prison Population

There is also serious concern that the single authority model will lead to a substantial increase in the federal prison population.\textsuperscript{132} If the parole release function is almost totally eliminated and institutional good time substantially diminished, there is no guarantee that either the guidelines or judicial sentences will be sufficiently reduced to shift from the long sentences presently meted out to the "real time" sentences required.\textsuperscript{133} For example, concern about a potential adverse public reaction to the appearance of leniency could induce the Sentencing Commission members and sentencing judges to be cautious.\textsuperscript{134} Such caution could easily cause a net rise in actual time served; even small increases could have devastating effects on an already overcrowded system.\textsuperscript{135}

The Dual Authority Alternative

The frankly experimental nature of the single authority model characterized by S. 1437 contains serious inherent risks. There is no real need to undertake such risks. A practical approach to re-

\textsuperscript{132} As of September 5, 1978, there were 27,923 federal prisoners in Bureau of Prisons custody; the Bureau of Prisons reports that this is 22.11\% over physical capacity. U.S. DEPARTMENT OF JUSTICE, FEDERAL PRISON SYSTEM, MONDAY MORNING HIGHLIGHTS, Sept. 11, 1978, at 7.

\textsuperscript{133} "Real time" is the period of actual confinement. The maximum sentence imposed consists of the actual period of confinement plus the period served on parole or under mandatory release supervision. Under present law, the vast majority of prisoners are released by parole or mandatory release substantially before completion of the maximum term.

\textsuperscript{134} This is a particularly troublesome concern, given the substantial diminution of present judicial sentence lengths that would be required. According to figures provided by the Bureau of Prisons, federal prisoners sentenced to more than one year serve in custody, on the average, approximately 42\% of sentence imposed.

\textsuperscript{135} From a financial perspective alone, an increase in actual time served from the present average of 42\% to an average of 50\% of sentence lengths imposed would add 52,066 cumulative months in custody yearly, at an estimated cost of $32,940,713 for operational expenditures and an estimated capital construction cost of $179,743,884 to build the facilities to house such prisoners. These estimates are based on Bureau of Prison's figures of $7,692 per bed for operational costs and $39,000 per bed for construction costs, and do not take inflation into account.
A form that avoids the serious problems outlined above is represented by the general direction taken by Oregon and emerging in the effort of the Subcommittee on Criminal Justice of the House of Representatives.

Under recent Oregon legislation, an Advisory Commission on Prison Terms and Parole Standards is created. This Commission is comprised of a five-member parole board and five judges appointed by the Chief Justice of the Oregon Supreme Court. This body develops guidelines for use by the parole board in determining the actual duration of prison terms, which are set under presumptive date procedures. Judges retain authority to determine the nature of the sentence and its maximum duration. Judicial authority to fix a minimum term is also provided, but such minimum may be overridden by the affirmative vote of four parole board members. In addition, judges are required to state reasons for the sentence imposed, and appellate review upon petition of the defendant is available.

While the Joint Commission and guidelines/presumptive date provisions are a substantial step forward, in several important respects the Oregon statute does not go far enough. Parole board discretion is structured, but judicial discretion is left unfettered, despite appellate review and the requirement of written reasons. Of lesser importance, a mechanism for giving credit for institutional good time is retained, even though the use of presumptive date procedures would appear to obviate its need.

The legislation reported by the House Subcommittee on Criminal Justice goes beyond the Oregon statute. Under this proposal, the Judicial Conference of the United States is directed to create advisory sentencing guidelines for the specific purpose of reducing unwarranted judicial sentencing disparity. Judges are required to furnish written reasons for sentences imposed and sentence review upon appeal by the defendant is provided. The present parole board authority to determine the actual duration of

137. 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 regarding, inter alia, sentencing and parole 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. (House version).
139. Id. § 30102(b).
140. Id. § 30103.
confinement within judicially set limits using its guideline system is retained,¹⁴¹ and a presumptive date procedure is specifically mandated.¹⁴²

Nevertheless, further action in several areas appears warranted. First, the Subcommittee bill does not mandate the Judicial Conference and Parole Commission to coordinate their guidelines. While it might be expected that such action would be taken administratively, a specific mandate to consult regularly for this purpose, or a Joint Commission model such as that created by Oregon, is preferable. Second, given the mandate for presumptive release date procedures, retention of the present relatively complex good time structure is unnecessary. A simpler procedure, providing greater protection from institutional dominance, is to statutorily require, in lieu of institutional good time, that the original presumptive release date not exceed a certain proportion (e.g., eighty percent) of the maximum judicial sentence imposed; and that, once set, the parole authority may postpone a presumptive date by up to a given percentage (e.g., twenty percent) of the period of confinement initially set upon a finding of serious institutional misconduct. Third, a clearer division of authority between the sentencing judge and parole authority appears possible. For example, the disparity caused by uneven application of minimum sentences in the federal system has been noted as a serious problem at least as far back as 1958.¹⁴³ Given parole guidelines, judicial minimums should not be authorized, except perhaps in the most heinous cases. To the extent that authority for judicial minimum terms is retained, a parole authority override provision, such as that incorporated in the Oregon statute, would appear desirable. A similar argument for a clearer division of authority could be made concerning the judicial maximum sentence. Absolute division of responsibility could be provided by mandating that once the sentencing judge imposes a prison commitment, full authority is to be vested in the Parole Commission to determine the presumptive release date within the statutory maximum. If legislative maximum terms were significantly lower than they presently are, this would appear an appropriate solution. However, given the exceedingly high maximums specified by current law, a strong argument can be

¹⁴¹. Id. §§ 41305-41306.
¹⁴². Id. § 41308(a).
made that retaining judicial authority to set the maximum, as an added check, constitutes a wiser approach.144

**SUMMARY**

The sentencing power is an awesome one, particularly concerning imposition of prison terms; prudence in legislative reform is advisable. There appears to be substantial concurrence on the reform goals desired: greater equity and determinacy. Disagreement centers on the most effective strategy for achieving these goals. This Article has focused on the differences between the single and dual authority guideline models, and presents the argument that, from an operational or practical perspective, the dual authority model—involving multiple checks on discretion—is substantially more likely to produce the actual improvement in sentencing practices desired.

144. For example, it would appear unnecessary to impose the twenty year statutory maximum currently provided for bank robbery in each case. 18 U.S.C. § 2113(a) (1976). Rather, judicial sentencing guidelines could provide a lower maximum (e.g., 10 years) unless particularly aggravating factors are present. Obviously, such guidelines would not have to be as complex as those recommending the actual durational decision. Thus, the problem of consistent implementation noted earlier should be minimized.