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Presumption Against Incarceration

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PRESUMPTION AGAINST INCARCERATION

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Among the social maladies of our times, none has caused greater concern than the level of crime. Perils of war, revolution, inflation, and economic stability may be greater threats to the fabric of life, but their brooding presence does not eclipse the anxiety produced by the thought of more immediate dangers, such as robbery or assault. This preoccupation with crime naturally has led to greater public interest in the sentences imposed on convicted offenders. Government officials operating in the field of criminal justice, professional penologists, and students of the sentencing process have subjected American sentencing philosophy and practice to microscopic scrutiny. Intensified interest in the subject has produced a body of useful material[1] and has stimulated federal legislative proposals[2] that would radically alter the rules by which federal judges impose sentences.

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1. *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (Approved Draft 1968); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS (1967); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967). *See also* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); M. FRANKEL, CRIMINAL SENTENCES (1973); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); E. VAN DEN HAAG, PUNISHING CRIMINALS (1975); A. VON HIRSCH, DOING JUSTICE (1976).

2. *See, e.g.*, S. 1437, 95th Cong., 2d Sess. (1978); H.R. 13959, 95th Cong., 2d Sess. (1978). This Article deals primarily with §§ 101 and 124 of the Senate bill. 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 the proposed section numbers in Title 28 of the United States Code, and are hereinafter cited as Proposed 28 U.S.C.

Sentencing decisions are acutely difficult, not only because they radically affect the lives of offenders and their families, but also because sentencing objectives are frequently at cross-purposes. A prison sentence heavy enough to punish may erase the possibility of rehabilitation. A sentence severe enough to deter others may be unjust to the individual who has already "learned his lesson." Moreover, imprisonment, though fair to the offender, may impose large costs on society: the cost of supporting the offender's family, the loss of his tax contribution, the adverse effect on his children. Even the least questionable purpose of imprisonment—incapacitation ("keeping him off the street")—must be weighed against the rape, mayhem, and murder which occur in prison.[3]

From the studies, books, and legislative reports which have illumined the dark corners of the mysterious process of sentencing, certain basic propositions have become widely accepted: First, judges often fail to provide clear reasons for imposing particular sentences; second, the "medical model" of sentencing—imposing indeterminate prison sentences in the hope of rehabilitating offenders—should be abandoned, because it has not reduced recidivism and has resulted in widely disparate sentences;[4] and third, judges, like other persons, are influenced by their own values so that when the legislature establishes a wide range of possible sentences—as has generally been the case throughout the United States for the last fifty years—substantial disparity among sentences results. While there are significant differences of opinion as to how sentencing should be reformed, there is wide agreement that the range of sentences open to judges should be narrowed.[5]

Congress has responded to the general concern surrounding sentencing by considering a comprehensive new criminal statute, S. 1437,[6] which merits discussion both because it represents a well-organized effort to provide necessary guidance and because,

3. Within the last 2 years, 10 inmates have been murdered, apparently by fellow inmates, at the federal penitentiary in Atlanta. A Senate investigation, headed by Georgia Senator Sam Nunn, has been set up to examine conditions at the prison, including a possible drug ring within the prison. Atlanta J. & Const., Sept. 30, 1978, at 11-A, col. 1.

4. Disparity arises as follows: *X* and *Y* are each sentenced for armed robbery. However, either the sentencing judge in a determinate sentence system, or the parole board in an indeterminate sentence system, believes that it will take 10 years to rehabilitate *X* ("cure" would be the medical term), but only 5 years to rehabilitate *Y*. Accordingly, *X* serves twice as long as *Y* for the same crime.

5. *See* note 1 *supra*.

6. S. 1437, 95th Cong., 2d Sess. (1978). *See* note 2 *supra*.

although the bill's passage has so far been blocked in the House of Representatives, its sponsorship by Senator Edward M. Kennedy, Chairman of the Senate Judiciary Committee, gives reason to believe that its ultimate enactment is not a lost cause.

S. 1437 would rationalize the sentencing process in two ways: By specifying the factors which a judge must take into consideration in determining a sentence,[7] and by narrowing the range of sentences which a judge may impose in ordinary circumstances. The limitation of range would be accomplished by the creation of a Sentencing Commission[8] authorized to specify a narrow range of sentence, within the limits set by the legislature, which judges would be obligated to follow except when they find mitigating or aggravating circumstances. If such circumstances are present, a judge could impose a lesser or greater sentence provided he states his reasons for doing so on the record.[9]

Yet, whatever the virtues of S. 1437 or the contribution of expert thought to greater fairness in sentencing, neither the statute nor the experts have addressed satisfactorily the major question facing every judge in every sentencing decision: prison or not? This question is at the core of every sentencing determination. Each sentencing judge necessarily starts his consideration from *some* presumption, either that an offender should not be imprisoned unless there are positive reasons for such a sentence, or that he should be imprisoned unless there are positive reasons against such a disposition. Nevertheless, except in one stringently limited instance,[10] S. 1437, "like current law, creates no presumption for or against probation."[11] Rather, the bill leaves the decision to the new

7. Proposed 18 U.S.C., *supra* note 2, § 2003(a).

8. Proposed 28 U.S.C., *supra* note 2, §§ 991-998.

9. *See* Proposed 18 U.S.C., *supra* note 2, § 2003(a).

10. Proposed 18 U.S.C., *supra* note 2, § 994(i). Section 994(i) does enjoin the Commission to "ensure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *Id.* While this provision commendably endorses the concept of a presumption of sorts in a limited number of cases, it does not accomplish the objective recommended by this Article, because (1) it creates no legislatively fixed presumption; (2) it merely requires the Commission to make sure that its guidelines will "reflect the general appropriateness of imposing a sentence other than imprisonment," but does not create an actual presumption; and (3) it applies only to first offenders. While the further limitation that the first offender in question shall not have been convicted of a crime of violence or an otherwise serious offense may be an acceptable caveat to a presumption in favor of probation, this Article argues that the presumption ought not be limited automatically to first offenders.

11. SENATE COMM. ON THE JUDICIARY, REPORT TO ACCOMPANY S. 1437, S. REP. NO. 605, 95th Cong., 1st Sess. 900 (1977).

Sentencing Commission, which "[t]he [Senate Judiciary] Committee believes . . . can more adequately [than Congress] delineate those cases in which a term of probation is preferable to a term of imprisonment."[12] It is submitted that the new legislation should incorporate a presumption in favor of probation[13] and that this decision is too fundamental to be delegated to the Sentencing Commission and thus should be made by Congress.

The American Bar Association's Project on the Administration of Criminal Justice (ABA Sentencing Project) provides a comprehensive list of the reasons why probation is preferable to imprisonment:

> Probation is a desirable disposition in appropriate cases because:
>
> (i) it maximizes the liberty of the individual while at the same time vindicating the authority of the law and effectively protecting the public from further violations of law;
>
> (ii) it affirmatively promotes the rehabilitation of the offender by continuing normal community contacts;
>
> (iii) it avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community;
>
> (iv) it greatly reduces the financial cost to the public treasury of an effective correctional system;
>
> (v) it minimizes the impact of the conviction upon innocent dependents of the offender.[14]

In other words, a noncustodial sentence benefits not only the offender but also the offender's family and the state.

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12. *Id.* It is true that § 2102, Proposed 18 U.S.C., *supra* note 2, § 2102, requires a judge to consider the factors set forth in § 2003(a) in determining whether to impose a sentence of probation. However, these factors, which include "the nature and circumstances of the offense and the history and characteristics of the defendant," *id.* § 2003(a)(A), "the need for the sentence imposed," *id.* § 2003(a)(B), "the kinds of sentences available," *id.* § 2003(a)(C), "the sentencing range established . . . as set forth in the guidelines that are issued by the Sentencing Commission," *id.* § 2003(a)(D), "any pertinent policy statement issued by the Sentencing Commission," *id.* § 2003(a)(E), and "the need to avoid unwarranted sentence disparities," *id.* § 2003(a)(F), are so general that they are of little assistance in deciding whether a sentence of imprisonment should or should not be imposed.

13. For purposes of this Article, probation is intended to include any nonincarcerative disposition or sentence other than a fine in which the court (1) establishes conditions of behavior or performance, such as community service or living in a community treatment center in the defendant's community, which the defendant must meet for a specified period, and (2) preserves the court's authority to impose an incarcerative term if any such condition is violated.

14. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 1.2 (Approved Draft 1970).

The obvious advantage to an offender of a sentence of probation is that it rescues him from all the disabling effects of loss of freedom. While life in prison has traditionally connoted a tedious routine relieved only by meaningless work, recent newspaper reports and court decisions have emphasized the acute physical discomfort and sheer personal fear which dominate many prisons in America. In the words of a witness at the Senate hearings on S. 1437:

> Prisoners are forced to spend almost all of their time idle, with little or no privacy, subject to unbearable noise, in an atmosphere of hostility and in constant fear of assault. Institutional emphasis on impersonal regimentation and control is increased. Tension and violence skyrocket. In the short run, wide scale violence or rioting is inevitable.[15]

Moreover, removing an offender from the community is acknowledged to impair severely any chance of later adjustment to community life. Chief Justice Burger, while addressing the National Conference on Prisons in 1971, gave this view of prison dead time and its consequences:

> Playing cards, watching television or an occasional movie with nothing more, is building up to an expensive accounting when these men are released—if not before. Such crude recreation may keep men quiet for the time, but it is a quiet that is ominous for the society they will try to re-enter.[16]

Ironically, incarceration is responsibly argued to increase recidivism, not only because it fails to train inmates to lead constructive lives on the outside, but also because prison is widely considered to be a training ground for more advanced criminal skills:

> Often institutionalization will result in little more than education of the offender in more sophisticated methods of engaging in criminal conduct, and certainly a great deal less than a realistic program of rehabilitation. Particularly in the case of first offenders, there is a much greater chance in most cases of avoiding a subsequent offense by helping the offender adjust to society than removing him from it.[17]

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15. *Reform of the Federal Criminal Laws: Hearings on S. 1437 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 9058, 9080-81 (1977) (statement of Nancy Crisman, ACLU staff attorney familiar with Alabama prison litigation before Judge Frank Johnson).

16. Address by Chief Justice Burger, National Conference on Prisons (Dec. 7, 1971), *quoted in* Rhem v. Malcolm, 371 F. Supp. 594, 612 (S.D.N.Y. 1974).

17. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STAN-

Many traditional objectives of penology besides rehabilitation are thought to be frustrated by imprisonment. Discouragingly high rates of recidivism for former inmates suggest that specific deterrence does not result from incarceration.[18] The rise in national crime rates and prison overcrowding also undercut the argument that stiff prison terms generally deter crime.[19] While incarceration may limit the individual's contribution to crime in the community during the period of his imprisonment, numerous studies of prison life indicate that it in fact generates *more* crime, and simply confines it within the prison.[20] Furthermore, because offenders may be made more dangerous by imprisonment, the ultimate result may be to increase crime in the community.

The one successful result of imprisonment appears to be retribution: society's revenge on those who have broken its laws. As Benjamin Ward, former Commissioner of the New York State Department of Correctional Services, has said:

> [I]f you take a look at any one of our prison systems you would be hard pressed to come to the conclusion that prisons help anyone except you and me and my mother and my sister. They feel better when that rapist and that burglar and that robber get punished. That is what they think should happen to him.[21]

DARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.3, Comment e at 72-73 (Approved Draft 1968) (citations omitted).

18. D. Newman, V. O'Leary & S. Christianson, Community Alternatives to Maximum Security Institutionalization for Selected Offenders 210 (June 30, 1975) (final project report) (Institute for Public Policy Alternatives, State University of New York) [hereinafter cited as SUNY Report].

19. *Id.* at 208-09.

20. *Id.* at 218-21. The SUNY Report, *supra* note 18, also points out that incarceration is likely to increase rates of recidivism by making inmates more violent; and that the effort to imprison violent offenders is both over- and under-inclusive. *Id.*

For instance, following the decision in Baxstrom v. Herold, 383 U.S. 107 (1966) (invalidating automatic transfer to hospitals for criminally insane of those who had served sentences in full, but were considered too dangerous for release), a large number of inmates were transferred from a New York facility for the criminally insane to a conventional hospital for the mentally ill. No disciplinary problems resulted from the transfer and, in fact, a large number of the inmates were released within a short period of time from the hospitals. *Id.* at 218.

On the other hand, the SUNY Report suggests that, since only a fraction of actual offenders are ever apprehended, and those who are apprehended generally do not serve lengthy terms, the attempt to incarcerate the dangerous criminals in our society is under-inclusive. *Id.* at 219.

21. *Reform of the Federal Criminal Laws: Hearings on S. 1437 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 9091, 9106 (1977) (testimony of Benjamin Ward, Commissioner, New York State Dep't of Correctional Services).

However, the grim conditions of incarceration and the incalculable psychological effect that life in a prison environment may have on an inmate create, in the words of Norval Morris, a "moral imperative" to weigh carefully the consequences of our penal sanctions.[22]

A major disadvantage of incarceration, from the point of view of the state, is its staggering expense. *Instead of Jail*, a recent study published by the Law Enforcement Assistance Administration, describes some of the costs of maintaining a prisoner:

> Booking a person into jail costs about $24. Keeping him there costs almost $12 a day. Annual jail operating expenditures are approaching the $1 billion level nationwide.
>
> The full costs of jailing are much higher. The community in which jail incarceration is used more than minimally faces the prospect of expanding or replacing its chronically overcrowded detention facilities—at more than $27,000 per bed. Physical and program improvements needed to comply with jail standards being adopted in many states may be almost as costly as new construction.[23]

The cost of maintaining a federal prisoner is even greater. According to M. Kay Harris, testifying on S. 1437 before the Senate Subcommittee on Criminal Laws and Procedures, the Congressional Budget Office estimated that the cost of maintaining a federal prisoner for one year in a new prison recently exceeded $17,000, while the cost of constructing one prison bed is now about $43,000 in the federal system.[24] Other, less easily quantified public costs also result from incarceration, including the lost productivity of the inmate's forfeited employment and the possible need to maintain the inmate's family on public welfare.

A final disadvantage of incarceration is that it often extends punishment for a crime to the offender's family. Not only is the family burdened financially, since in many cases the offender is the family breadwinner, but, perhaps more importantly, separation places incalculable emotional strain on relatives—particularly young children. The weakening of family ties in turn increases the

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22. *Id.* at 9337.

23. J. Galvin, W. Busher, W. Greene, G. Kemp, N. Harlow & K. Hoffman, Instead of Jail 1 (Oct. 1977) (LEAA project on pre- and post-trial alternatives to incarceration).

24. *Reform of the Federal Criminal Laws: Hearings on S. 1437 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 9123, 9130 (1977) (statement of M. Kay Harris, Coordinator, National Moratorium on Prison Construction).

isolation of the inmate and exacerbates the difficulty of returning to a normal life following release.

In comparison, probation is a relatively inexpensive method of supervision. The National Survey of Corrections, reported in the President's Task Force Report on Corrections, found that in 1965 the average state spent approximately $3,400 a year, excluding capital costs, to keep a youth in a state training school; the cost of keeping him on probation was only about one-tenth of that amount.[25] Similarly, the ABA Sentencing Project found that, in 1964, the per capita cost of probation in the federal system was $215 annually whereas the cost of housing a prisoner was $2,318.[26] While the validity of these comparisons is in some measure questionable, since expenditures for probation are undeniably too meager at present, the disparity of a one-to-ten ratio indicates that probation expenditures can be increased several times over and still be less costly than incarceration.

A presumption against incarceration does not mean that no offenders would be sent to prison. Various studies have developed guidelines for determining when imprisonment is necessary. The American Law Institute's Model Penal Code recommends that a court not impose a sentence of imprisonment unless

> having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:
>
> (a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
>
> (b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
>
> (c) a lesser sentence will depreciate the seriousness of the defendant's crime.[27]

The Model Penal Code further suggests that the following factors be given weight in favor of withholding a sentence of imprisonment:

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25. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 28 (1967).

26. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.3, Comment e at 73 (Approved Draft 1968).

27. MODEL PENAL CODE § 7.01(1) (Proposed Official Draft 1962).

(a) the defendant's criminal conduct neither caused nor threatened serious harm;

(b) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm;

(c) the defendant acted under a strong provocation;

(d) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(e) the victim of the defendant's criminal conduct induced or facilitated its commission;

(f) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;

(g) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;

(h) the defendant's criminal conduct was the result of circumstances unlikely to recur;

(i) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;

(j) the defendant is particularly likely to respond affirmatively to probationary treatment;

(k) the imprisonment of the defendant would entail excessive hardship to himself or his dependents.[28]

The most comprehensive test for deciding between probation and incarceration was set out by the late Judge Herlands, who recommended that a sentencing judge be guided by the following considerations:

> In making a sound evaluation and decision, the sentencing judge must (1) analyze the personality of the defendant, his problems, needs and concerns; (2) reach a conclusion as to the future adjustment of the defendant ["Will prison help or harm him? Is he a good risk for rehabilitation?"]; and (3) determine whether the defendant, if not imprisoned, poses a distinct threat to the safety of the community.[29]

Judge Herlands' test also includes twenty-six factors to be used in determining the advisability of a prison term.[30] Assuming that Congress were to adopt a presumption in favor of probation, the

28. *Id.* § 7.01(2).

29. Herlands, *When and How Should a Sentencing Judge Use Probation*, 35 F.R.D. 487, 494 (1964) (brackets in original).

30. *Id.* at 494-96.

Sentencing Commission, which is entrusted under S. 1437 with the obligation of making specific sentencing choices, would be free to draw on the above models in selecting cases in which imprisonment would be a justified sentence.

The decision, prison or not, is, as I have said, at the core of every sentencing decision. Nevertheless, S. 1437 leaves the decision whether there should be a presumption, and what the nature of the presumption should be, to the Sentencing Commission.[31] The Senate Report on S. 1437 explains:

> During a period in which the incidence of a particular kind of crime is increasing rapidly, it may be entirely appropriate for the court to give paramount emphasis to the deterrent purpose of sentencing. Conversely, in a situation involving an offense of little notoriety and of less than rampant frequency that is committed under circumstances indicating little likelihood of recidivism, the singular significance of the rehabilitative purposes of sentencing may well almost mandate a sentence to probation. In all cases, the section's concentration of attention upon the aims of the criminal justice system is designed to encourage the intelligent balancing of often competing considerations and the intelligent exercise of judicial discretion.[32]

The Report concludes that "[t]he statement of a preferred type of sentence in S. 1437, as reported, might serve only to undermine the flexibility with which the criminal justice system can determine the appropriate sentence in a particular case as knowledge of human behavior increases."[33]

No one can quarrel with the considerations which the Report expresses, but even if flexibility were the desired end, it does not follow that Congress should stand back from the ultimate question whether probation should be the sentence of preference, that is, the sentence to be imposed in the absence of sound reasons to the contrary. Creation of law on the most vital of sentencing determinations is the responsibility and obligation of the elected representatives of the people. It should not be delegated to an administrative agency which could change the rule merely by its fiat, particularly an agency whose capacities are necessarily unknown and which will, at the outset, proceed in altogether uncharted territory.

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31. *See* text accompanying notes 11 & 12 *supra*; note 12 *supra*.

32. SENATE COMM. ON THE JUDICIARY, REPORT TO ACCOMPANY S. 1437, S. REP. NO. 605, 95th Cong., 1st Sess. 902 (1977).

33. *Id.*