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FROM VENGEANCE TO VENGEANCE:
SENTENCING REFORM AND THE DEMISE
OF REHABILITATION

Leonard Orland*

Within the past two years, a significant number of states have abandoned indeterminate sentencing and parole in favor of determinate sentencing codes. These statutes, while varying in detail, purport to move toward sentencing equality by establishing a system of determinate sentences which direct the sentencer to impose a flat sentence on the basis of statutory aggravants and mitigants. "Flat," "determinate," or "presumptive" sentencing codes have been promulgated from Maine\(^1\) to California,\(^2\) in such states as Indiana,\(^3\) Arizona,\(^4\) Illinois,\(^5\) and Minnesota.\(^6\) Similar legislation is pending in more than a dozen other state legislatures,\(^7\) while still

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7. See, e.g., Conn. Subst. H.B. 5987 (1978); Colo. H.B. 1589, 51st G.A., 2d Sess. (1978). "Substantial legislative action has taken place on sentencing proposals in Ohio, Alaska, Florida, Nebraska, Wisconsin, Washington and Tennessee. Legislatures in Kansas, Iowa, Michigan, North Carolina and Massachusetts are beginning to consider the issue. Substantial interest in the subject has been shown by officials in
other states are making efforts to have parole boards become the statutory vehicle for sentencing reform. A Model Sentencing and Corrections Act, featuring a presumptive sentencing matrix and a sentencing commission, was approved by the National Conference of Commissioners on Uniform State Laws in July, 1978. In addition, the United States Senate, by an overwhelming vote, has passed a comprehensive federal penal code which would establish a system of flat guideline sentences to be promulgated by a sentencing commission.

How did this extraordinary effort at penal law reform come about? What are its potential consequences?

**THE HISTORICAL CONTEXT**

It is difficult to dispute the historical truth that those who ignore the past are condemned to repeat it. Therefore, it is essential to evaluate the current sentencing reforms in their historical context.

Herbert Wechsler has observed that “[c]riminal law in the United States began on independence with reception of the English common law, which in the eighteenth century was both a
crude and bloody system." 11 In the years following the American Revolution, American criminal law did little more than fix penalties for major crimes. 12 Before the Civil War, the criminal law was composed of scattered piecemeal statutes which prescribed fixed sentences for specific offenses. The primary justification for these penalties was retribution. 13 Law reformers of the post-Civil War era, inspired by Edward Livingston and David Dudley Field, moved toward criminal law codification. At approximately the same time, American prison reformers, influenced by penal efforts of Maconochie in Australia and Crofton in Ireland, rejected retribution and enshrined rehabilitation as the prime goal of criminal law. 14 The prison reformers generated a movement which led to the widespread acceptance, between 1880 and 1920, of indeterminate sentencing with parole. By 1922, thirty-eight states had enacted some form of limited indeterminate sentencing structure; by the beginning of 1976, all states had adopted the indeterminacy approach. 15

The movement toward comprehensive indeterminate penal codes received substantial impetus from the Model Penal Code, adopted by the American Law Institute in 1962. The Model Penal Code groups all felonies into three categories. For each category, the Code mandates legislatively established maxima and minima. The judge then imposes an indeterminate sentence within these statutory parameters. 16 Under the Model Penal Code, the parole board, constrained only by the judicially imposed maxima and minima, decides when the inmate should be released.

In the decade from 1962 to 1972, United States penal law underwent extensive and rapid revision. By 1974, twenty-one states had enacted comprehensive, substantive penal codes based on the Model Penal Code; twenty-six states were in the process of penal code revision. Only three states had not planned substantive criminal law revision. 17

12. Id.
15. COUNCIL OF STATE GOVERNMENTS, DEFINITE SENTENCING: AN EXAMINATION OF PROPOSALS IN FOUR STATES 5 (1976).
17. See Wechsler, supra note 11, at 418, 466-68.
At the height of this substantive criminal law reform movement, a handful of books appeared which challenged the theoretical underpinning of the Model Penal Code. The first, *Struggle for Justice*,\(^{18}\) published by the American Friends Service Committee, was a sensitive yet trenchant probing of the coercive treatment model of parole. Shortly thereafter, Judge Marvin Frankel published *Criminal Sentences*, an enormously influential attack on the irrationality of the current sentencing structure and sentencing disparity.\(^{19}\) Judge Frankel called for the creation of a sentencing commission to curtail sentencing disparity and to create a basis for informed, consistent sentencing principles.\(^{20}\)

These multiple themes—the evils of sentencing disparity, the failure of coercive rehabilitation, the inability of parole boards to predict, the desirability of eliminating parole and returning to flat sentencing—were echoed in works by two influential reform committees, the Committee for the Study of Incarceration,\(^{21}\) and the Twentieth Century Fund Task Force on Criminal Sentencing,\(^{22}\) as well as in books by Fogel,\(^{23}\) Wilson,\(^{24}\) van den Haag,\(^{25}\) Orland,\(^{26}\) and Gaylin,\(^{27}\) among others.\(^{28}\) These works have produced what is perceived by some legislators as a consensus of informed opinion which can be distilled into the following propositions:

1. Sentencing disparity is widespread and is to be condemned.
2. Parole boards fail in their most important functions; dangerousness cannot be predicted and rehabilitation cannot be ascertained.
3. Parole board inconsistency and unfairness, as well as sentencing disparity, are widespread and legitimate causes of inmate discontent.

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20. *Id.* at 118.
Superimposed on this consensus was a broader theme, present in earlier literature, but restated most emphatically by Robert Martinson: Rehabilitation, tested empirically, is a failure; "nothing works" as a prison reform program to reduce recidivism. Since rehabilitation and the coercive rehabilitation model were viewed as deficient, the philosophical approach of penal code reformers shifted from treatment to vengeance as the primary justification for incarceration. However, the new code word was "just desert," rather than the theretofore discredited terms "punishment," "vengeance," or "retribution."

These skeptical reform books emerged in the midst of a national criminal law reform movement sparked not only by the Model Penal Code, but also by the substantive and procedural reform efforts of the American Bar Association Project on Standards for Criminal Justice, the President’s Commission on Law Enforcement and Administration of Justice, and the National Advisory Commission on Criminal Justice Standards and Goals. In the same period, an Attica Riot Commission Report heightened the nation’s consciousness of the plight of prisoners, and the United States Supreme Court produced an extraordinary series of decisions which created a legal revolution in the field of prisoners’ rights.
Sentencing reform thus was presented to state legislatures and Congress as a rational and "liberal" solution to the widespread shortcoming of the existing system of criminal punishment. Such liberal stalwarts as the American Civil Liberties Union took a firm position on the need to abandon indeterminacy in favor of determinate sentencing. The ACLU Board adopted a policy statement that declared that the ACLU "opposes indeterminate sentences" and "also opposes confining people in prison or determining the duration of confinement for the purpose of rehabilitating them."\footnote{37} ACLU affiliates supported the abandonment of indeterminacy in a number of states.\footnote{38}

As a former critic of indeterminacy,\footnote{39} I must now express my serious reservations about the abandonment of rehabilitation. These reservations are based on an examination of the legislative provisions emerging from this sentencing reform effort. Of primary

\footnote{37. American Civil Liberties Union National Board of Directors, Minutes 10 (Mar. 4-5, 1978).

38. For example, abolition of parole and reform of sentencing in Connecticut received substantial impetus from the Connecticut Civil Liberties Union. See Sacks, Promises, Performance, and Principles: An Empirical Study of Parole Decisionmaking in Connecticut, 9 CONN. L. REV. 347, 349-50 (1977). In Illinois, an ACLU spokesperson told the legislature: "I advocate the discontinuance of indeterminate sentencing in favor of fixed maximum terms to be imposed by the court at the time of sentencing." Statement of Alvin J. Bronstein, Executive Director, National Prison Project of the American Civil Liberties Union Foundation, presented to the Adult Corrections Subcommittee of the House Judiciary Committee of the Illinois General Assembly (May 10, 1976) (on file in office of the Hofstra Law Review). Certainly, Mr. Bronstein can find little satisfaction in legislative acceptance of the indeterminacy recommendation since the Illinois legislature has rejected his second suggestion: that the "fixed term should be relatively short, not to exceed two years in most cases." \textit{Id}. My own proposals suffered a similar fate. See note 39 infra.

39. For example, in \textit{Prisons: House of Darkness}, I stated: "Indeterminate sentences and parole boards should be abolished." L. ORLAND, \textit{supra} note 14, at 146. Like the ACLU, I added a caveat: "These proposals are made with some disquietude, since I recognize the possibility that they could, by the vicissitudes of legislative amendment or judicial construction, inadvertently lead to increased incarceration." \textit{Id}. at 157 n.23. At that time, I was a member of the Connecticut Parole Board and chairman of the Connecticut Department of Corrections Task Force to Draft a Substantive and Procedural Discipline Code. The question of the relative fairness of parole boards and prison discipline committees as determiners of time served has emerged as a significant issue in new determinate sentencing jurisdictions. See notes 115-121 infra and accompanying text.}
concern are the clearly repressive features of the new determinate sentencing codes. These codes present examples of how well-intentioned reform efforts can lead, almost perversely, to repressive and retrogressive legislation.

**THE DEMISE OF REHABILITATION?**

After examining "all available reports published in the English language on attempts at rehabilitation that had been made in our correction system and those of other countries from 1945 to 1967," Professor Martinson and his associates suggested in 1974 that these studies led them irrevocably to the conclusion that nothing works and that those involved in the criminal justice system had no idea how to rehabilitate offenders and reduce recidivism. However, in a later study, using more sophisticated research techniques and a wider data base "meant to improve upon the author's previous work," Professor Martinson did find that the recidivism rate had declined from the 1960's to the 1970's and that the recidivism rate for prisoners released on parole was lower than for those discharged without parole supervision.

Both the original and the revised Martinson data have been criticized for overstating their points. But the original data certainly justified the conclusion that it is difficult to prove that prison rehabilitation works. It by no means follows, however, that because of failure of proof, the sentencing structures of the penal codes of the United States should be completely revamped. Moreover, the notion that the Model Penal Code was drafted on the naive assumption that putting people in prison would in fact rehabilitate them may be an historical distortion. The American Law Institute debates suggest some skepticism by the Model Penal Code drafters and advisors concerning the probability that prison could achieve coerced rehabilitation. More importantly, the Model Penal Code's philosophy of rehabilitation had beneficial effects on correctional practice. It created a climate that made new rehabilitative

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40. Martinson, supra note 30, at 49. See also D. Lipton, R. Martinson & J. Wilks, The Effectiveness of Correctional Treatment (1975).
41. Martinson, supra note 30, at 49.
43. See Palmer, Martinson Revisited, 12 J. Research Crime & Delinquency 133 (1975).
programs possible and curbed the potential retributive impulses of legislators and administrators.

It remains to be seen what effect a return to a retributive philosophy will have on correctional practice and administration. One obvious problem concerns the attitudes of line officers. In the late 1960's, the Task Force on Corrections of the President's Commission on Law Enforcement and Administration of Justice concluded that custodial prison officers should not be considered simply personnel responsible for control and maintenance of prisoners: “[Custodial prison officers] may be the most influential persons in institutions simply by virtue of their numbers and their daily intimate contact with offenders. . . . They can by their attitude and understanding, reinforce or destroy the effectiveness of almost any correctional program.”45 Similarly, the literature of penology suggests that the “prison guard who commonly sees his role principally in terms of control, discipline and punishment is faced with a complex set of expectations centering around treatment operations. . . . [Guards] ‘must “use discretion” and somehow behave both custodially and therapeutically.’ ”46

The abandonment of rehabilitation and the return to a punishment rationale may have profound effects on prison staff. It can lead to the resurgence of custodial and punitive staff perspectives. More significantly, whatever positive impact the humanist, rehabilitative treatment approach has had may be lost. If correctional officers are told that rehabilitation is not their goal, they may not in fact have rehabilitation as their goal. If correctional officers are told that their business is to punish, they may in fact punish. The rhetoric of “just desert” may be translated into a punitive mode of daily operation by line correctional personnel.

The abandonment of rehabilitation may also have an adverse effect on recruitment of senior correctional personnel. It is questionable whether a retributive correctional system can attract humane, compassionate people as commissioners and wardens to administer a regime established to punish. Why should commissioners or wardens take risks or spend money for such programs as furlough and work or education release? Why should they make

efforts to improve prison life if the purpose of prison is to punish? Is there not a substantial risk that available rehabilitative programs will diminish or disappear? Would not that danger be even greater in jurisdictions which adopt the Model Sentencing and Corrections Act of the National Conference of Commissioners on Uniform State Laws which guarantees inmates a statutory right not to be rehabilitated, a right not to participate in treatment programs?  

The intellectual rehabilitation of retribution may have additional unintended adverse consequences: The theoretical legitimization of retribution may reinforce the acceptability of arguments made by Supreme Court Justices who assert that "retribution is a sufficient justification for legal executions." While Justice Marshall would hold that capital punishment is cruel and unusual punishment because retribution is an impermissible legislative purpose, Justice Stewart has tendered retribution as a proper rationale for the constitutionality of capital punishment. Those who press so vigorously to revive retribution to curb the shortcomings of rehabilitative sentencing must now confront the unintended consequences. The new California Penal Code, which eliminates indeterminacy by declaring that "the purpose" of criminal sanctions "is punishment," also contains a broad capital punishment provision. This illustrates how the new retributive jurisprudence can and probably will provide the intellectual justification for renewed legislative and judicial expansion of capital punishment.

47. Model Sentencing and Corrections Act § 4-126(a) (Draft for Approval to the National Conference of Commissioners on Uniform State Laws, July 28-Aug. 4, 1978) ("A confined person has a protected interest to choose whether to participate in educational, rehabilitative, recreational, or other treatment programs").


49. When the Supreme Court struck down the capital punishment statutes of Georgia and Texas in Furman v. Georgia, 408 U.S. 238 (1972), Justice Marshall's concurring opinion noted that "the public's desire for retribution . . . is a goal which the legislature cannot constitutionally pursue as its sole justification for capital punishment." Id. at 363. But four years later, the opinion of Justice Stewart in Gregg v. Georgia, 428 U.S. 153 (1976), sustained Georgia's capital punishment statute and declared that while "[r]etribution is no longer the dominant objective of the criminal law . . . neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men." Id. at 183 (quoting Williams v. New York, 337 U.S. 241, 248 (1949)).


51. Id. § 190.

52. Of course, even when rehabilitation formed the theoretical underpinning of criminal law, it was not seen as a bar to the death penalty. See Justice Black's opinion in Williams v. New York, 337 U.S. 241 (1949).
SENTENCING EQUALITY?

The most serious problem which emerges from the reassertion of a retributive approach to criminal sentencing is the correlation between the new sentencing codes and more severe statutory punishment. Provisions in the new sentencing codes which prohibit suspended sentences and authorize high maximum sentences present grave risks that these statutes will result in unwarranted and significant increases in incarceration levels. At the same time, it is unlikely that the new legislation will achieve the principal objective of the reformers—sentencing equality. The current sentencing legislation will not result in true sentencing equality. Rather, the responsibility for inequality will be shifted from sentencing judges and parole boards to prosecutors and prison administrators.

The Abandonment of Suspended Sentence and Probation

Both the Model Penal Code and the ABA Standards encourage suspended sentence as an alternative to imprisonment. "The legislature," the ABA Standards declare, "should authorize the sentencing court in every case to impose a sentence of probation. Exceptions to this principle are not favored and, if made, should be limited to the most serious offenses."

The new sentencing codes reject this wisdom. The Senate-passed revised Federal Criminal Code prohibits probation for specified drug offenses, as well as for certain offenses committed while the defendant is armed. Arizona prohibits suspended sentence and probation if the offender has a prior felony conviction, uses a deadly weapon or dangerous instrument, or knowingly inflicts serious physical injury. Illinois prohibits probation for all

53. See text accompanying notes 78-109 infra.
54. See text accompanying notes 110-114 infra.
55. See text accompanying notes 115-121 infra.
57. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION §§ 1.1-.2 (Tent. Draft 1970) [hereinafter cited as ABA PROBATION STANDARDS]; ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.3 (Approved Draft 1968) [hereinafter cited as ABA SENTENCING STANDARDS].
58. ABA PROBATION STANDARDS, supra note 57, § 1.1(a).
59. See note 10 supra.
60. Proposed 18 U.S.C., supra note 10, § 1811(b).
61. Id. § 1823(b).
63. Id. § 13-604(F).
64. Id.
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class X felonies, specified narcotics violations, and class 2 felonies committed by recidivists. Maine prohibits suspended sentence if the offender uses a firearm or is a second offender burglar. Indiana prohibits probation for offenders with prior felony convictions. California's new determinate sentencing code contains a special provision regarding use of firearms. The judge may not grant probation or suspend sentence for offenders who use firearms during the commission of murder, assault with intent to commit murder, robbery, kidnapping, first degree burglary, rape, and escape. Probation is also proscribed for specified recidivists and narcotic offenders. California has thus eliminated probation for a substantial number of serious felony offenders.

These unwarranted restrictions on judicial leniency must be viewed as a punitive, law and order approach. The results are undesirable for reasons spelled out by the President's Commission on Law Enforcement and the Administration of Justice, by the ABA Standards, and by the National Advisory Commission on Criminal Justice Standards and Goals. As the ABA Advisory Committee explained in its commentary to the Probations Standards:

[T]he basic reason underlying this view [that legislation should not prohibit probation eligibility] is that offenders and offenses are not fungible, that "[h]owever right it may be to take the gravest view of an offense in general, there will be cases comprehended in the definition where the circumstances were so unusual, or the mitigations so extreme, that a suspended sen-

65. ILL. ANN. STAT. ch. 38, § 1005-5-3(c)(2)(c) (Smith-Hurd Pamphlet Supp. 1978). Class X felonies include: Aggravated kidnapping, id. ch. 38, § 10-2(b)(1); rape, id. ch. 38, § 11-1; deviate sexual assault, id. ch. 38, § 11-3; heinous battery, id. ch. 38, § 12-4.1; armed robbery, id. ch. 38, § 18-2; aggravated arson, id. ch. 38, § 20-1.1; and treason, id. ch. 38, § 30-1.
66. Id. ch. 38, § 1005-5-3(c)(2)(D)-(E).
67. Id. ch. 38, § 1005-5-3(c)(2)(G).
69. Id. § 1156.
72. Id. § 1203.08.
73. Id. § 1203.07.
75. See ABA PROBATION STANDARDS and ABA SENTENCING STANDARDS, supra note 57.
76. NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON CORRECTIONS 141-86 (1973).
tence or probation would be proper.” MODEL PENAL CODE § 6.02 Comment at 13 (Tent. Draft No. 2, 1954). In addition . . . exclusions from probation eligibility have in practice been met by the same avoidance techniques reserved for other types of mandatory sentences, a practice which produces unnecessary distortions and introduces unnecessary seeds of disrespect for the system.77

Excessively High Maxima

Unfortunately, the new sentencing codes may result in a substantial increase in time actually served by prisoners. The authorized statutory maxima in all the new codes are excessively high.

Under the Senate-passed Federal Criminal Code, the authorized maxima is life for A felons,78 20 years for B felons,79 10 years for C felons,80 and 5 years for D felons.81 Of course, it is possible that the Sentencing Commission established by the Code will create sentencing guidelines that mitigate the harshness of these maxima. However, this likelihood is reduced by the Commission’s statutory functions and responsibilities. While the bill requires the Commission to accomplish sentencing fairness and reduction of disparity,82 it fails to direct the Commission to reserve the upper level of maximum terms for exceptional cases. Moreover, the bill sharply circumscribes the ability of the Commission to promulgate guidelines which make the defendant eligible for early release.83

The authorized maximum sentences in the new state codes are even more excessive than the proposed federal bill. These codes create far greater risks of unwarranted harshness.

Arizona has the dubious honor of mandating the harshest mandatory statutory maxima.84 First offenders are subject to some-

77. ABA PROBATION STANDARDS, supra note 57, Commentary at 22. This point has not been missed by prosecutors bent on coercive plea bargaining. See text accompanying notes 110-114 infra.
79. Id. § 2301(b)(2).
80. Id. § 2301(b)(3).
81. Id. § 2301(b)(4).
83. Id. § 994(b)(2).
84. The Arizona legislature appears to realize that harsh sentences may require funding for massive expansion of prison facilities. The new Arizona code specifies that the mandatory period of time to be served before parole eligibility will not go into effect until two conditions have been met: five thousand inmate spaces must be available by July 1, 1980; and money must have been appropriated for an additional five thousand new spaces by July 1, 1981.
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what reasonable flat sentences: 7 years for class 2, 5 years for class 3, and 4 years for class 4 felonies. However, the sentencer is authorized to increase the sentences of class 4 or 5 felons by 25% or decrease them by 50% based on the presence or absence of statutory aggravants or mitigants. For more serious felony categories, the authorized increase jumps to 100%. Interestingly, the shopping list of aggravants includes, in addition to the usual factors such as inflicting serious physical injury or presence of an accomplice, "any other factors which the court may deem appropriate to the ends of justice."

These authorized Arizona sentences, which permit courts to impose flat sentences of 14 years for class 2 and 10 years for class 3 felons, apply only to unarmed offenders without prior felony convictions who do not inflict harm. If any aggravating factors are present, a grotesque series of bewildering mandatory multiplier sentences are triggered. The sentences of class 4 felons may be doubled if the offender has a prior conviction, while class 2 and 3 felons with one prior conviction may have their sentences tripled, and those with two or more prior convictions may have their terms quadrupled. Similar harsh (and unrealistic) mandatory multipliers apply to felonies which involve the "use or exhibition of a deadly weapon or dangerous instrument" and to offenders who intentionally, knowingly, or recklessly inflict serious physical injury upon another. For example, class 4 felons who meet either of these

LEAGUE OF WOMEN VOTERS OF OKLAHOMA, SENTENCING: OKLAHOMA PENAL SYSTEM 30 (1978). On the cost of massive expansion of incarceration, see note 43 infra and accompanying text.

85. ARIZ. REV. STAT. ANN. § 13-701 (West Special Supp. 1978). Examples of class 2 felonies include second-degree murder, id. § 13-1104(B), first-degree burglary, id. § 13-1508(B), and kidnapping, id. § 13-1304(B). Class 3 encompasses manslaughter, id. § 13-1103(B), second-degree burglary, id. § 13-1507(B), and aggravated assault, id. § 13-1204(B). Negligent homicide is one example of a class 4 felony. Id. § 13-1102(B).

86. Id. § 13-702(A).
87. Id. § 13-702(B).
88. Id. § 13-702(D)(1).
89. Id. § 13-702(D)(4).
90. Id. § 13-702(D)(9). The same open-ended factor is included as a mitigant.

Id. § 13-702(3)(S).
91. Id. § 13-604(A).
92. Id.

93. Id. § 13-604(B). Offenders with prior convictions who commit class 2 or 3 felonies are eligible for probation, parole, or suspension of sentence only after at least two-thirds of the sentence imposed by the court is served. Id. Similar restrictions are placed on all felony categories. See generally id. § 13-604.
94. Id.§ 13-604(D).
95. Id. § 13-604(F).
criteria may have their sentences doubled. If the offender has a prior felony conviction, the sentence must be doubled and may be tripled. If he or she has two or more prior convictions, the prison term must be tripled and may be quadrupled.\footnote{Id. These multipliers also apply to class 2 or 3 felons. See id. § 13-604(G).}

While Arizona's mandatory sentences are clearly the harshest in the nation, other state statutes also authorize high maxima. Surprisingly, many establish a broad range of permissible terms. This significantly reduces the potential for achieving sentencing uniformity. For example, the new Indiana maxima for major felonies fall into five categories, each containing statutory aggravants and mitigants. The authorized penalty for murder is death or a fixed term of 40 years which may be aggravated by an increase of 20 years or mitigated by a decrease of 10 years. Thus, the sentence range is 30 to 60 years; this is without regard to provisions for habitual offenders or consecutive sentences.\footnote{IND. CODE ANN. § 35-50-2-3 (Burns Cum. Supp. 1978).} For class A felonies, the authorized fixed sentence is 30 years, permitting 20 years for aggravation and 10 years in mitigation—an effective fixed sentencing range of 20 to 50 years.\footnote{Id. § 35-50-2-4.} Similarly, the actual sentencing range for class B felonies is 6 to 20 years;\footnote{Id. § 35-50-2-5.} and class C felons can be sentenced from 2 to 8 years in prison.\footnote{Id. § 35-50-2-6.}

The new Illinois legislation also establishes wide sentencing ranges. For example, X classified felons may receive a fixed sentence of 6 to 30 years,\footnote{ILL. ANN. STAT. ch. 38, § 1005-8-1(a)(3) (Smith-Hurd Pamphlet Supp. 1978).} or a possible extended term of 30 to 60 years if specified aggravants are present.\footnote{Id. ch. 38, § 1005-8-2(a)(2).} Class 1 felons may receive authorized sentences of 4 to 15 years,\footnote{Id. ch. 38, § 1005-8-1(a)(4).} with a permissible extended term of 15 to 30 years.\footnote{Id. ch. 38, § 1005-8-2(a)(3).} Class 2 felons may receive 3 to 7 years,\footnote{Id. ch. 38, § 1005-8-1(a)(5).} or an extended term of 7 to 14 years,\footnote{Id. ch. 38, § 1005-8-2(a)(4).} while class 3 felons may be sentenced to 2 to 5 years,\footnote{Id. ch. 38, § 1005-8-1(a)(6).} or an extended term of 5 to 10 years.\footnote{Id. ch. 38, § 1005-8-2(a)(5).}
In contrast to the federal bill, which sharply limits the guideline sentence range, the extremely broad (and harsh) sentencing ranges of the new state sentencing codes, coupled with the expansive nature of the statutory aggravants and mitigants, make the achievement of sentencing uniformity a nullity. The Illinois sentencing ranges already described provide a useful example. The effective range for X felons is 6 to 65 years, while a felon convicted of a less serious class 1 offense may receive a term within the wide range of 4 to 30 years. There is no reason to assume that all X felons will serve more time than all or even most class 1 felons. In fact, there is no reason to assume most X felons will serve more time than most class 1 felons. Even among similarly situated X offenders, there is no reason to assume that similar sentences will be imposed.

The Impact of Plea Bargaining

These new sentencing statutes invite prosecutorial abuse, an additional reason why the goal of sentencing equality will remain unfulfilled. As Professor Zimring has reminded us:

The paradox of prosecutorial power under determinate sentencing is that exercising discretion from two of the three discretionary agencies [legislative and judicial] in criminal sentencing does not necessarily reduce either the role of discretion in sentence determination or the total amount of sentence disparity. . . . [N]o serious program to create a rule of law in determining punishment can ignore the pivotal role of the American prosecutor.”

In addition, Professor Alschuler’s point remains unchallenged: “[F]ixed and presumptive sentencing schemes . . . 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.” With such sentencing approaches, “the unchecked discretion over sentencing that has apparently distinguished our nation from all others would . . . reside, not just predominantly, but exclusively in the prosecutor’s office.”

110. F. Zimring, Making the Punishment Fit the Crime 12-13 (1977) (occasional papers from University of Chicago Law School).
112. Id. at 71.
None of the new codes address the problem that unbridled prosecutorial discretion presents to uniform sentencing. In fact, the new codes exacerbate the problem of inequality in prosecutorial sentencing. These sentencing statutes, by accident or design, are structured to maximize prosecutorial advantage in plea bargaining since harsh mandatory sentences can be circumvented by substituting lesser included or attempt offenses. Moreover, the prosecutorial power created by statutory special offender categories is rendered even more ominous by virtue of the Supreme Court's decision in *Bordenkircher v. Hayes.* The Court sustained the constitutionality of a prosecutor's threats, during plea bargaining, to prosecute the defendant as an habitual offender if he did not acquiesce in a guilty plea on a nonhabitual offender charge.

**The Catch 22 of Good Time**

The reform literature reflects concern that disparity in judicial sentencing is further increased by parole boards, which cannot rationally determine when a defendant is rehabilitated. But the new state sentencing codes raise the risk that the tyrannical arbitrariness of the parole board will be replaced by the tyranny of prison discipline committees, which have power to grant or take away substantial periods of good time.

It has been asserted that the public is deceived by an indeterminate sentence/parole system because sentences imposed do not correspond with time actually served. However, it is a mistake to assume that the flat sentences of the new state sentencing codes are less likely to deceive the public. In fact, the effect of the Illinois and Indiana sentencing schemes is to delegate power to

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113. See, e.g., T. Clear, J. Hewitt & R. Regoli, *Discretion and the Determinate Sentence: Its Distribution, Control and Effect on Time Served* (Nov. 16-20, 1977) (paper presented to the American Society of Criminology). The authors observed: The Indiana Code has been described by many insiders as a “prosecutor's” law. Much of the increased prosecutorial discretion is based in the substantive law. For example, a number of offenses are non-suspendable. But the new penal code provides that any offense which can be charged may also be charged as an “attempted” offense, which carries the same penalty (except in the case of murder). The primary distinction is that all “attempted” offenses are suspendable. The new “attempt” clause has the dual effect of giving the prosecutor flexibility to bargain while silently providing added pressure on the defendant [sic] to bargain, since attempt is an offense whose elements of proof are generally much less rigorous than the regular criminal statutes.  

*Id.* at 11 (footnote omitted).

prison disciplinary committees to cut time in half or to double it in much the same way that parole boards extend or reduce time. Moreover, legislation in states such as Indiana places no statutory restraints on the grant or deprivation of good time. This is in sharp contrast to the federal bill which limits good time loss to 10% of sentence.115

Under the Indiana sentencing code, the prison committee initially assigns all inmates one day of credit for each day of imprisonment.116 However, the discipline hearing committee can reassign an inmate to receive only one day of good time credit for each two days served117 or to receive no credit.118 There are no substantive standards for prison misconduct and the standard for reassignment is literally open ended. The potential pernicious consequences of prospective reassignment of credit time are intensified by the commissioner of correction’s broad discretion to take away credit time for violation of any disciplinary rule.119 The disparate effect of Indiana’s good time structure on time actually served by inmates is substantial. Two inmates who receive a fixed flat sentence of 30 years may actually serve 15 or 30 years, depending upon whether credit time is awarded by class assignment or taken away by disciplinary committee action.

While Indiana’s good time legislation is the most unfair in the nation in its unlimited delegation of discretion to correctional authorities, potential for abuse and unfairness inheres in any major good time system which permits substantial cuts for prison misconduct. Illinois awards one day of good time for each day served and establishes minimal procedural rules for allegations of prison misconduct, but permits the loss of “one year of good conduct credit for any one infraction.”120 The notion that sentencing code reform will lead to equality of time served in Indiana, Illinois, or any other state employing determinate sentencing and a major good time credit system is illusory. All that Indiana and Illinois have done is shift the locus of potential arbitrary power from the parole board to the prison disciplinary committee.

This result can hardly be viewed with satisfaction. There is no

117. Id. § 35-50-6-3(b).
118. Id. § 35-50-6-3(c).
119. Id. § 35-50-6-5.
reason to assume that prison discipline committees are capable by inclination, training, or education of acting more fairly than parole boards. Moreover, even if such committees were inclined to act fairly, this goal is unattainable without substantive standards concerning what constitutes prison misconduct and the maximum amount of good time which can be withdrawn for each offense. This reality will create consternation among those civil libertarians who proposed the abolition of parole in the first place. More important, it should spawn a host of new litigation in the 1980's much like the prisoner's rights litigation of the 1970's. These new lawsuits could claim that the entire process of granting and taking away good time violates due process because no substantive standards of misconduct exist. Prisoners could also claim cruel and unusual punishment when the sanction imposed is disproportionate to the misconduct charged.

**Sentencing Commissions as a Solution**

The capability of a sentencing commission to solve problems of sentencing harshness and inequality depends upon the underlying structure of the criminal code and the precision with which the legislature delegates and structures the responsibilities of the sentencing commission. In a state such as Illinois, with harsh and expansive sentencing ranges, and the potential for unfairness and disparity in good time administration, the chances that a sentencing commission will achieve sentencing equality is nil. Probability of success increases somewhat in states such as Minnesota.

121. I have had the benefit of extensive experience in Connecticut's prison system. While serving as a parole board member committed to the due process mandates of Morrissey v. Brewer, 408 U.S. 471 (1972), I also drafted a discipline code to meet the due process requirements of Wolff v. McDonnell, 418 U.S. 539 (1974), and trained state correctional officers to implement the code. If the choice for determining time served must be placed either with a discipline committee or a parole board, the latter is, by any standard, the better choice.

122. See notes 101-108 supra and accompanying text.

123. See text accompanying note 120 supra.

124. ILL. ANN. STAT. ch. 38, § 1005-10-1 (Smith-Hurd Pamphlet Supp. 1978), establishes a Criminal Sentencing Commission, while id. ch. 38, § 1005-10-2(5), authorizes the commission to "develop standardized sentencing guidelines designed to provide for greater uniformity in the imposition of criminal sentences."

125. Minnesota has established a sentencing commission, Act of Apr. 5, 1978, ch. 723, § 9(1), 1978 Minn. Sess. Law Serv. 705 (West) (to be codified in MINN. STAT. ANN. § 244.09(1) (West)), which is directed to formulate guidelines by January 1, 1980, id. § 9(12) (to be codified in MINN. STAT. ANN. § 244.09(12) (West)). The guidelines are to establish "[t]he circumstances under which imprisonment of an offender is proper," id. § 9(5)(1) (to be codified in MINN. STAT. ANN. § 244.09(5)(1)
which provides for vesting of good time. 126

The structure of the Sentencing Commission contemplated in the proposed Federal Criminal Code 127 offers hope that this Commission could become a significant instrument for sentencing reform. Among the virtues of the sentencing provisions in the federal bill are those sections which specify that a term of imprisonment for the specific purpose of rehabilitation is generally inappropriate, 128 that guidelines should assure that available capacities of correctional facilities are not exceeded, 129 that sentences of imprisonment are inappropriate for nonviolent first offenders, 130 that consecutive sentences should be circumscribed, 131 and that initial guidelines should reflect the average sentences currently imposed and the length of prison time actually served under these sentences. 132 However, the proposed federal sentencing structure contemplates high maxima and does not direct either the sentencer or the Commission to impose the lowest sentence possible. Therefore, while attaining greater uniformity, S. 1437 creates the risk of generally higher sentences than under existing indeterminate systems.

While the high maxima presently authorized by the proposed Federal Criminal Code could lead to harsh sentences, 133 that

(1978), and a “presumptive, fixed sentence for offenders for whom imprisonment is proper,” id. § 9(5)(2) (to be codified in MINN. STAT. ANN. § 244.09(5)(2) (West)).

126. Act of Apr. 5, 1978, ch. 723, § 9(1), 1978 Minn. Sess. Law Serv. 705 (West) (to be codified in MINN. STAT. ANN. § 244.09(1) (West)).


128. See id. § 994(f).

129. Id. § 994(g).

130. Id. § 994(i).

131. Id. § 994(p).

132. Id. § 994(l). However, the Commission need not be guided by terms presently served if they do not “adequately reflect a basis for a sentencing range that is consistent with the purpose of sentencing” outlined in the bill. Id.

133. The concerns that S. 1437 may lead to increased incarceration have been summarized by the Association of the Bar of the City of New York’s Special Committee on the Proposed New Federal Criminal Code:

It seems clear that S. 1437 is likely to increase the frequency and length of jail sentences. The maximum terms for the grades of offenses are lengthy (Section 2301) and there are some offenses (drugs and weapons) for which a two-year jail sentence is mandated (Section 1811 and 1823). There is a presumption against early release (Section 994(b) (2)). The sentencing Commission must assure substantial terms of incarceration for recidivists, professional criminals, and the managers of organized criminal activities (Section 994(h)). When a sentence of imprisonment is imposed, the guidelines must specify a sentencing range whose maximum does not exceed its minimum by more than twenty-five percent (Section 994(b) (1)).
risk could be reduced and the bill could be made substantially more just by relatively modest changes. Amendments should be designed to reduce relatively high maxima,\textsuperscript{134} declare that maxima are to be reserved for exceptional cases,\textsuperscript{135} eliminate mandatory minimum sentences.

This Committee cannot understand either the apparent presumption in favor of imprisonment or the reason for the increasing—and in certain cases mandating—of the frequency and length of jail sentences. The draftsmen of S.1437 have not cited any data or study to support their approach. Moreover, we do not favor mandatory minimum sentences.

We do not favor mandatory minimum sentences.\textsuperscript{134} Prior mandatory minimum sentences have been unevenly applied and frequently evaded by both judges and prosecutors. Moreover, when faced with such a sentence, defendants often have little choice but to insist upon trials, seriously clogging the already overburdened courts.

A further source of irrationality is the listing of factors in Section 994(h) each of which will individually mandate a guideline requiring a substantial term of imprisonment. For example, should a “substantial term of imprisonment” be imposed whenever a person derives a substantial part of his income from conduct which turns out to be criminal, even though it may not have been at all clear that the conduct was, in fact, criminal at the time it occurred? Similarly, should a substantial term be required where the defendant had virtually no income, but substantially all of it came from a series of petty thefts? In the same vein, does it make sense to require the imposition of a substantial term on the basis of a “history” of prior felony convictions without attention to the nature of the convictions, how far in the past they occurred, or other possibly relevant factors?

The Committee believes that a rational and fair system must be flexible and must minimize the breach between the offender and society and that the proposals contained in S.1437 will not achieve these objectives. Among other things, we specifically oppose the bill’s presumption against probation.

The approach of increased incarceration is embodied in, if not established by, the concept of guidelines. Indeed, given the stated purposes of the criminal law contained in Section 101(b), to wit, to deter, to protect the public, and to assure just punishment, we doubt that there will be many guidelines or policies which will suggest probation without a term of imprisonment.

Moreover, no method for the development or justification of the guidelines is specified or required. Although the Sentencing Commission is required to consider certain factors, it appears to us that many of these suggested factors cannot be quantified.


\url{http://scholarlycommons.law.hofstra.edu/hlr/vol7/iss1/3}
minimum prison sentences, and make parole a component of the original sentence rather than an additional period to be served. In addition, the Sentencing Commission's guidelines should require the sentencer to impose the least restrictive nonprison sanction or, if a prison sentence is to be imposed, the shortest appropriate sentence. This last suggestion would incorporate Norval Morris' "principle of parsimony" under which the sentencer should impose the "least restrictive (punitive) sanction necessary to achieve defined social purposes." These amendments would permit the otherwise intelligently conceived Federal Sentencing Commission to develop sorely needed sentencing principles without being fettered by an unrealistic and unnecessary mandate to develop guidelines which may promote long prison sentences.

CONCLUSION

Mindful that reform suggestions appear to be inherently susceptible to repressive modification, and believing firmly in Professor Zimring's admonition that sentencing reform "is one area where we have to proceed with extraordinary humility," I offer several modest generalizations:

1. While it may be intellectually attractive, a sentencing code which declares rehabilitation dead and perceives the purpose of sentencing as punishment may undermine the effectiveness of well-trained treatment staffs and sound treatment programs.

2. Lower but disparate sentences are preferable to higher but equal sentences.

3. The new state sentencing codes that seek to create sentencing equality will probably not achieve this result. Rather, there is a substantial likelihood that higher unequal sentences will replace lower unequal sentences.


(4) Discretionary release of offenders by prison discipline committees based on good time credit is as bad, if not worse, than release by parole boards. There is every reason to believe prison disciplinary committees will act at least as arbitrarily and unfairly as parole boards.

(5) Under the new determinate sentencing structures, uncontrolled judicial sentencing discretion may well be replaced by uncontrolled prosecutorial sentencing discretion due to prosecutors' power over the charging process and the prevalence of plea bargained sentences. The result may be a "net increase in the amount of capriciousness and disparity in the sentences offenders serve."\(^1\)

(6) Sentencing commissions, particularly as fashioned by the proposed Federal Criminal Code, are a potentially attractive solution to the problem of disparity. However, sentencing commissions may increase incarceration levels unless the maximum sentencing terms are reduced and commissions are authorized to impose the least oppressive sentence.

A consequence of these new sentencing codes may also be to substantially increase the prison population of the United States.\(^2\)

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141. C. Silberman, Criminal Violence, Criminal Justice 295 (1978). Silberman's comment came within the context of the following observations:

As is true of proposals for mandatory minimum and flat-time sentencing, presumptive sentencing would not reduce the total amount of discretion now exercised in the system; it would simply shift the discretion now exercised by judges and parole boards to prosecutors—who already exercise more discretionary power than anyone, with the possible exception of the police. Since the offense for which offenders were convicted would largely determine the sentence they received, prosecutors would become the sentencing authority through their control of the charging process.

The result is likely to be a net increase in the amount of capriciousness and disparity in the sentences offenders serve. Under the present system, discretion is diffused among three more or less autonomous groups of officials: prosecutors, judges, and parole board members. Diffusion creates a certain untidiness that fastidious legal scholars find upsetting; but when people's lives and liberties are at stake, untidiness may be preferable to an antiseptically neat and conceptually clean sentencing system. In practice, diffusion of discretion provides a leavening effect: judicial discretion frequently provides a check on abuse of prosecutorial power; parole board discretion serves to limit abuse of judicial power; and discretion in all three agencies serves to temper the harshness that prosecutors, judges, and legislators feel compelled to show in making sentencing decisions.

Id. at 295-96 (footnote omitted) (emphasis added).

142. John P. Conrad has noted that in "Ohio, where our General Assembly has been considering a flat-term bill, an analysis of its impact on the prison population
But the federal courts have indicated that they will not tolerate massive overcrowding or unsafe penal institutions. Hence, states which adhere to unrealistic sentencing legislation may well have to embark upon a massive prison construction program. This self-generated need to expand prison capacity may force concerned Americans to face hard questions: Does the United States want or need to double the prison population from 400,000 to 800,000? Will American taxpayers be willing to pay for the inevitable and enormous construction costs, presently estimated at $50,000 for each new prison bed?\textsuperscript{143} American prison sentences already exceed those of most other Western nations.\textsuperscript{144} Is it wise to embark upon legislative reforms which may further strengthen the role of the United States as the champion of lengthy prison confinement?\textsuperscript{145} I think not.

The future of rehabilitation is as bright or as dismal today as it was a decade or two decades ago. It would be a profound mistake to attempt to legislate rehabilitation out of existence and to substitute a system of sentencing based upon vengeance, the consequences of which will be to substantially increase time served in United States prisons.

\begin{itemize}
\item indicates that four years after enactment the population will increase by 21 percent \ldots\textsuperscript{4} Conrad, \textit{In My Opinion}, CORRECTIONS MAGAZINE, supra note 7, at i.

\textsuperscript{143} In Connecticut, the current cost for the construction of a new prison bed is approximately $50,000 and the maintenance cost for one prisoner for a year is $9,000. \textit{See} Sacks, supra note 38, at 408.

\textsuperscript{144} After reviewing comparative statistics, Judge Frankel concluded that "the United States probably has the longest sentences by a wide margin of any industrialized nation." M. FRANKEL, supra note 19, at 58 (footnote omitted).

\textsuperscript{145} The contrast between sentencing reform approaches in the United States and those recently proposed in England is particularly dramatic. England already has substantially lower sentences than the United States and an established system of appellate review of sentences designed to reduce sentencing disparity. \textit{See} Meador, \textit{Appendix C: The Review of Criminal Sentences in England}, in \textit{AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES} 94-160 (1968); \textit{NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON CORRECTIONS} 151 (1973); \textit{ORLAND, supra note 14, at 112-13. See generally, D.A. THOMAS, PRINCIPLES OF SENTENCING (1970). Yet the English Advisory Council on the Penal System has recently proposed a significant reduction in authorized maximum sentences so as to make sentences "comparable with 90 per cent of the sentences actually imposed by the Crown Court in the years 1974, 1975 and 1976." Editor's preface, \textit{Sentences of Imprisonment}, 1978 CRIM. L. REV. 709, 709. The resultant reductions would be quite substantial: the maximum sentence for rape would drop from life to 7 years, for wounding with intent to cause grievous bodily harm from life to 5 years, for burglary or handling stolen goods from 14 to 3 years. \textit{See} Radzinowicz & Hood, \textit{A Dangerous Direction for Sentencing Reform}, 1978 CRIM. L. REV. 713, 713.
\end{itemize}
APPENDIX


Amendment A

Reduction of Maxima.—The maxima specified in § 2301 of S. 1437 should be modified to reflect the original recommendations of the National Commission on Reform of Federal Criminal Laws, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE § 3201 (1971) [hereinafter referred to as PROPOSED NEW FEDERAL CRIMINAL CODE], as follows (additions italicized, deletions struck):

§ 2301. Sentence of Imprisonment

(a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment.

(b) AUTHORIZED MAXIMUM TERMS.—The maximum term of every sentence shall include a prison term and a parole term. The authorized maximum terms of imprisonment are:

(1) for a Class A felony, the defendant's life or any period of time not more than 30 years, including a parole term under § 2303;

(2) for a Class B felony, not more than twenty-five years, including a parole term under § 2303;

(3) for a Class C felony, not more than seven years, including a parole term under § 2303;

(4) for a Class D felony, not more than five years, including a parole term under § 2303;

(5) for a Class E felony, not more than two years and six months;

(6) for a Class A misdemeanor, not more than one year;

(7) for a Class B misdemeanor, not more than six months;

(8) for a Class C misdemeanor, not more than thirty days;

(9) for an infraction, not more than five days.

(c) ELIGIBILITY FOR EARLY RELEASE.—A term of imprisonment in excess of one year may be imposed to be served in full or may be imposed to be served subject to the defendant's eligibility for early release during any portion of the term pursuant to the provision of subchapter D of chapter 38. A term of imprisonment of one year or less shall be imposed to be served in full, confinement during such period of one year or less being authorized as a condition of probation by the provisions of section 2103(b)(11).
Reserving Upper Range for Dangerous Offenders.—Section 2301 of S. 1437 should be modified by adding, as a new section (d), the following provision (adopted from PROPOSED NEW FEDERAL CRIMINAL CODE, supra):

(d) UPPER-RANGE IMPRISONMENT ONLY FOR DANGEROUS FELONS—The maximum term for a felony shall not be set at more than 20 years for a Class A felony, 10 years for a Class B felony, 5 years for a Class C felony or 2 years for a Class D felony unless, having regard to the nature and circumstances of the offense and the history and character of the defendant as it relates to that offense, and the relevant Sentencing Commission guidelines and policy statements, the court is of the opinion that a term in excess of these limits is required for the protection of the public from further criminal conduct by the defendant.

Amendment C

Elimination of Mandatory Minima.—The following sections of S. 1437, which establishes mandatory prison sentences for drug and weapons offenses should be modified as follows (deletions struck):

§ 1811. Trafficking in an Opiate
(a) OFFENSE.—A person is guilty of an offense if he:
(1) manufactures or traffics in an opiate;
(2) creates or traffics in a counterfeit substance containing an opiate;
(3) imports or exports an opiate, or possesses an opiate aboard a vehicle arriving in or departing from the United States or the customs territory of the United States; or
(4) manufactures or traffics in an opiate for import into the United States.
(b) GRADING.—An offense described in this section is:
(1) a Class B felony if:
   (A) the opiate weighs 100 grams or more;
   (B) the offense consists of distributing the opiate to a person who is less than eighteen years old and who is at least five years younger than the defendant; or
   (C) the offense is committed after the defendant had been convicted of a felony under federal, state or foreign law relating to an opiate, or while he was on release pending trial for an offense described in subsection (a);
(2) a Class C felony in any other case.

Notwithstanding the provisions of part III of this title, the court may not sentence the defendant to probation but shall sentence him after consideration of the factors set forth in section 2003(a), to a term of imprison-
ment of not less than two years without designating eligibility for early release during at least the first two years of the term, with the sentence to run consecutively to any other term of imprisonment imposed upon the defendant, unless the court finds that, at the time of the offense, the defendant was less than eighteen years old, the defendant's mental capacity was significantly impaired, although the impairment was not such as to constitute a defense to prosecution; the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution; or the defendant was an accomplice whose participation in the offense was relatively minor.

§ 1823. Using a Weapon in the Course of a Crime

(a) Offense.—A person is guilty of an offense if, during and in relation to the commission of a crime of violence, other than a misdemeanor that consists solely of damage to property and that does not place another person in danger of death or serious bodily injury, he:

(1) displays or otherwise uses a firearm or a destructive device;

(2) possesses a firearm or a destructive device; or

(3) displays or otherwise uses:

(A) a dangerous weapon other than a firearm or a destructive device; or

(B) an imitation of a firearm or a destructive device.

(b) Grading.—An offense described in this section is:

(1) a Class D felony in the circumstances set forth in subsection (a)(1);

(2) a Class E felony in the circumstances set forth in subsection (a)(2) or (a)(3).

Notwithstanding the provisions of part III of this title, if the offense is committed in the circumstances set forth in subsection (a)(1) or (a)(2), the court may not sentence the defendant to probation but shall sentence him, after consideration of the factors set forth in section 2003(a), to a term of imprisonment of not less than two years for an offense described in subsection (a)(1) or one year for an offense described in subsection (a)(2), without designating eligibility for early release during at least the first two years of the term for an offense described in subsection (a)(1) or at least the first year of the term for an offense described in subsection (a)(2), with the sentence to run consecutively to any other term of imprisonment imposed upon the defendant, unless the court finds that, at the time of the offense, the defendant was less than eighteen years old, the defendant's mental capacity was significantly impaired, although the impairment was not such as to constitute a defense to prosecution; the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution; the defendant was an accomplice whose participation in the offense was relatively minor; or the defendant establishes by a preponderance of the evidence that he committed the offense based upon a good faith belief that he was acting to protect a person or property from conduct constituting a felony, although not under such circumstances as would constitute a defense to prosecution.
Amendment D

Parole Component of Sentences.—Section 2303 of S. 1437 should be modified as follows (additions italicized):

§ 2303. Parole Term and Contingent Imprisonment Term Included in a Sentence of Imprisonment

A sentence to a term of imprisonment in excess of one year automatically includes, in addition to the specified term of imprisonment a separate:

(a) term of parole, the incidents of which are governed by the provisions of subchapter E of chapter 38; and

(b) contingent term of imprisonment of:

(1) ninety days in the case of a felony; or

(2) thirty days in the case of two or more misdemeanors;

that may, in the event of recommitment for violation of a condition of parole, be ordered to be served by a defendant who was released pursuant to section 3824(a)(1), or, if the contingent term of imprisonment is longer, by a defendant who was released pursuant to section 3824(a)(2) in lieu of the term of the original sentence minus the portion of the original sentence served in confinement prior to the defendant’s release, provided that combined prison term, parole term and contingent term of imprisonment shall not exceed the maxima specified in § 2301.

Amendment E

Minimization of Imprisonment Sentences.—Section 994 of S. 1437 should be modified as follows (additions italicized, deletions struck):

§ 994. Duties of Commission

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1) and (e)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities, recognition that many prison sentences are significantly higher than are needed to adequately protect the public, and the general principle that sentences should call for the minimum amount of custody or confinement consistent with the protection of the public and the gravity of the offense.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) and (e)(1), shall seek to satisfy the purposes of sentencing as set out of in section 101(b) of title 18, United States Code, taking into account that a sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary, and the nature and capacity of the penal, correctional, and other facilities and services available in order not only to assure that the most appropriate facilities and services are utilized to fulfill the applicable purposes but
also to assure that the available rated capacities of such facilities and services will not be exceeded.

(h) The Commission shall assure that the guidelines will specify a sentence to a substantial term an upper range of imprisonment under § 2301(d) only in a case in which the defendant:

(1) has a history of prior federal, state, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity; or

(4) committed a crime of violence which constitutes a felony while on release pending trial, sentence, or appeal from a federal, state or local felony for which he was ultimately convicted.

(i) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in most cases, particularly those in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.

(j) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of providing the defendant with needed educational or vocational training, medical care, or other correctional treatment, other than in an exceptional case in which imprisonment appears to be the sole means of achieving such purpose and in which the court makes specific findings as to that fact.

(k) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) and (e)(1) reflect the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of multiple offenses committed at different times.

(l) The Commission in initially promulgating guidelines for particular categories of cases, shall not exceed, be guided by the average sentences imposed in cases involving sentences to terms of imprisonment, the length of such terms actually served in such categories of cases prior to the creation of the Commission and—in cases involving sentences to terms of imprisonment, the length of such terms actually served, unless the Commission determines that such a length of term of imprisonment does not adequately reflect a basis for a sentencing range that is consistent with the purposes of sentencing described in subsection 101(b) of title 18, United States Code.