Federal Criminal Sentencing Reform

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FEDERAL CRIMINAL SENTENCING REFORM

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INTRODUCTION

In the past eleven years, repeated efforts have been made in Congress to bring about comprehensive reform of the federal criminal code. These attempts have been uniformly unsuccessful, however, because of the unbridgeable gap between deeply held political and philosophical convictions. As a result, a consensus has formed both in Congress and in the Reagan Administration that, in the interests of addressing the most pressing problems of the criminal code, wide-ranging revision would best be left for another day. However, the most urgent of these problems, the criminal sentencing system, demands immediate legislative attention.

Sentencing is the cornerstone of any criminal justice system. If there is to be respect for the law, sentencing must be perceived as fair: fair for victims, for defendants, and for the community. Instead of nurturing respect, the current system breeds disrespect and confusion. In order to reform the system, to make it more equitable and better understood, the Sentencing Act of 1983 was introduced. Passage of this legislation is the most important step that Congress can take in the criminal justice arena.

That the Sentencing Act does not encompass comprehensive reform does not imply that efforts at broader reform should be forever abandoned. The need for comprehensive redrafting continues unabated. In fact, reference to the federal criminal “code” is something of a misnomer. This compilation of laws is not a uniformly drafted, well-organized code. Rather, it is an amalgam of laws formed on an ad hoc basis. This has resulted in a complexity, confusion, and conflict of laws and procedure that “have aggravated problems associated with

* Member, United States House of Representatives (D-N.J.); Dana College, 1934; J.D., Rutgers University School of Law (Newark), 1937.
3. Id.
7. One writer has commented that the thrust of the reform effort is to “organize the [federal criminal] code, codify the case law [the present code] had spawned, use consistent language to define the mental states and other elements of various crimes, and rectify an often irrational hierarchy of penalties.” Riley, supra note 4, at 14, col. 2.

218
rendering justice to the individual as well as to society.”

BACKGROUND

The most recent effort to recodify federal criminal laws began with President Lyndon Johnson's message to Congress on March 9, 1966, calling for a "National Strategy Against Crime." President Johnson proposed that a commission be appointed to review federal criminal laws and recommend revisions. This commission, which came to be known as the Brown Commission, issued its final report in January of 1971, as a proposed new Title 18 of the United States Code. This report has formed the foundation for all recent proposals for omnibus reform of federal criminal laws.

Legislative Efforts at Reform

Efforts to pass effective reform legislation began in the 93rd Congress in 1973. However, none of the bills introduced in that Congress were reported out of subcommittee. In the 94th Congress, a revised codification was introduced in the Senate, but stiff opposition precluded the Senate Judiciary Committee from acting on the measure.

With the help of Attorney General Griffin B. Bell in 1977, Senator John L. McClellan (D-Ark.), the late chairman of the Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures, and Senator Edward M. Kennedy (D-Mass.), drafted a compromise bill. The Senate Judiciary Committee reported the bill favorably, and the

8. H.R. REP. No. 1396, supra note 1, at 3.
10. Id. at 5368, 5396. Legislation to establish such a commission was introduced in both the House (H.R. 13548, 89th Cong., 2d Sess., 112 CONG. REC. 5776 (1966)) and the Senate (S. 3064, 89th Cong., 2d Sess., 112 CONG. REC. 5402 (1966)).
11. The Commission was chaired by the Honorable Edmund G. Brown, Sr., Governor of California. It had 12 members; 3 judges, 3 senators, 3 House members and 3 persons appointed by the President. Act of November 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516.
15. See generally id.
17. Some feel that S. 1 failed because it "contained a number of provisions that were anathema to civil liberties advocates." Riley, supra note 4, at 14, col. 2.
18. Senator John L. McClellan, D-Ark., had been a member of the Brown Commission and was in the forefront of revision attempts.
Senate passed the bill on January 30, 1978, by a vote of 72-15.21

Meanwhile, the House Judiciary Committee's subcommittee on Criminal Justice had been conducting public hearings22 and markup sessions on the McClellan-Kennedy bill23 and on another bill introduced by Representative William S. Cohen (R-Me.).24 The House subcommittee reported several shortcomings in these proposals.25 It doubted whether "omnibus" revision was desirable26 and proposed to cure the most glaring defects through pieces of separate legislation, implementing a so-called "incremental" approach.27 In addition, this subcommittee began reviewing proposals for sentencing reform.28 The session ended, however, before any of the proposals received consideration by the full House Judiciary Committee.

In the first session of the 96th Congress, Senator Kennedy introduced a new version of the Senate bill of the previous Congress.29 The Senate Judiciary Committee again reported the bill favorably.30

Under new leadership in the 96th Congress, the House Subcommittee on Criminal Justice reconsidered its position and decided against piecemeal changes. Among other concerns, the members feared an overlap between new provisions and unchanged sections of the code.31 However, the subcommittee also found previous omnibus efforts unacceptable.32 Therefore, it took a middle path,33 recommending that reform be limited to areas where the need was greatest. Those specific areas were identified as substantive criminal law and sentencing.34 With regard to highly controversial issues, such as capital punishment, espionage, and bail, the subcommittee chose to simply recodify current law.35

In August, 1979, the House subcommittee introduced a draft code after fifty meetings.36 Following ten days of hearings37 and sixty-nine

26. Id. at 3.
27. Id. at 4.
28. Id. at 45-47.
32. Id.
33. Id.
34. Id.
35. Id.
36. The draft was introduced in the Senate as S. 1723, 96th Cong., 1st Sess., 125 Cong. Rec. 23,537 (1979).
37. Hearings on the Revision of Federal Criminal Laws: Hearing Before the Subcomm. on Crim-
additional meetings spent revising the draft bill, the bill was passed on
to committee on January 7, 1980.\footnote{H.R. 6233, 96th Cong., 2d Sess., 126 CONG. REC. 286 (1980).} The Judiciary Committee reported
the legislation to the full House on July 2, 1980.\footnote{H.R. 6915, 96th Cong., 2d Sess., 126 CONG. REC. 6459 (1980).}

For the first time in this seven-year effort to revise the federal crimi-
nal code, the Judiciary Committee of each House had reported out a
bill.\footnote{S. REP. No. 553, supra note 30; H.R. 6915, supra note 39.} The revision did not become law in the 96th Congress, however.
The House leadership was hesitant to schedule the legislation for floor
consideration and risk a bitter fight on the matter unless the Senate
acted first. A timing problem arose, however, because Senator Ken-
nedy was campaigning for the Democratic presidential nomination and
was not inclined to attempt to schedule floor action.\footnote{Riley, supra note 4, at 14, col. 3.} Once the nomi-
nation was decided, Senator Kennedy did seek to bring the legislation
to the floor, but threats of filibuster by opponents, notably Senators
Jesse Helms (R-N.C.) and James A. McClure (R-Idaho), consigned the
proposed reforms to the legislative graveyard.\footnote{Drinan, supra note 42, at 514.}

Reform bills were considered again in subcommittee during the
97th Congress,\footnote{The Senate Judiciary Committee even managed to report a recodification bill. S. 1630, 97th Cong., 1st Sess., 128 CONG. REC. 522 (daily ed. Jan. 25, 1982).} but preemptive political maneuvering prevented their
consideration by the full Judiciary Committee.\footnote{The bill was strongly opposed by conservatives on the Senate floor. Riley, supra note 4, at 1, col. 4.} By this time the polit-
ical and philosophical divergences had become so pronounced that lit-
tle hope remained of reaching accommodation among the competing
views on controversial issues.\footnote{The initial liberal-conservative compromise had by this time eroded away. Id.}

A few examples, taken from the histories of the bills reported out by
the Judiciary Committee in the 96th Congress, will illustrate the magni-
tude of the problem.

### Concern Over Jurisdiction

One of the most significant differences between the House and Sen-
ate involved their respective views on the proper scope of federal crimi-
nal jurisdiction.\footnote{Drinan, supra note 46, at 514.} The Brown Commission\footnote{See discussion supra note 11.} recommended that federal criminal jurisdiction be expanded so that federal courts could
exercise ancillary jurisdiction over criminal conduct that occurred dur-
ding the commission of a federal crime.\footnote{See H.R. REP. NO. 1396, supra note 1, at 15; S. REP. NO. 553, supra note 30, at 35.} Without this expansion, fed-
eral courts would often lack a basis for jurisdiction over these crimes. For example, current law allows federal courts to exercise jurisdiction over the robbery of a local business if the robbery affects interstate or foreign commerce. However, no federal jurisdiction exists over any murder that might occur during the robbery. Rather, federal law increases the penalty for robbery to life imprisonment. Ancillary jurisdiction would allow federal prosecution of the murder itself.

Supporters of ancillary jurisdiction argued that it would increase efficiency by allowing the consolidation of trials and plea bargaining. In addition, they argued that it would avoid "the alleged unfairness of several current provisions that increase penalties for persons who cause injury or death during the course of a federal offense, without specifying any requisite state of mind for the enhanced penalties." Persuaded by these arguments, the Senate Judiciary Committee adopted a modification of the Brown Commission's recommendation for ancillary jurisdiction.

Not convinced by the ancillary jurisdiction arguments of the Brown Commission, opponents viewed the proposal as one that would expand federal authority to the detriment of state jurisdiction, create some three hundred new federal crimes, and aggravate the problem of inconsistent verdicts. The latter conclusion was based on the fact that some states prohibit subsequent state prosecutions after a federal prosecution. In those states, a serious offender acquitted in federal court would go unpunished for state crimes. The House Judiciary Committee heard no evidence to convince the members that state courts could not handle both a robbery and a murder committed during the robbery, and concluded that the problem of inconsistent verdicts compelled rejection of ancillary jurisdiction proposals. In addition, the House Committee feared that state authorities would have no incentive to prosecute if the Federal Government were to proceed first.

Rather than expand federal jurisdiction, the House bill retained the provisions of current federal law that increase penalties when certain results occur, such as death or bodily injury. However, the bill

54. Id.
55. S. 1722, supra note 29, § 201.
59. Id. at 17.
60. Id. at 19.
61. Id.
62. Id. at 17.
63. H.R. 6915, supra note 39.
64. Drinan, supra note 42, at 516. See also H.R. Rep. No. 1396, supra note 1, at 19.
did require proof that the defendant possessed a particular state of mind before the increased penalty would apply.\textsuperscript{65}

In this case, deficiencies in the current law were widely recognized.\textsuperscript{66} Yet both judiciary committees, whose members were much more attuned to each other than they are today, differed sharply on how to resolve the problem.\textsuperscript{67} This speaks volumes of the difficulty of omnibus reform.

**Difficulty Over Definitions**

Differing approaches to the definitions of certain offenses further exemplify this difficulty. Four offenses in the Senate bill,\textsuperscript{68} which would be included in a chapter of Title 18 called "Offenses Involving Government Processes," were extremely controversial: "Obstructing a Government Function by Fraud",\textsuperscript{69} "Obstructing a Government Function by Physical Interference",\textsuperscript{70} "Tampering with a Victim, Witness or Informant",\textsuperscript{71} and "False Statements."\textsuperscript{72}

The House Judiciary Committee found the proposed definitions of the offenses to be so ambiguous or so broad as to stretch the limits of due process, and possibly to render criminal a range of harmless conduct.\textsuperscript{73} The House bill, therefore, included narrower, specific offenses.

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\textsuperscript{66} Drinan, \textit{supra} note 42, at 518.

\textsuperscript{67} \textit{See generally id.}

\textsuperscript{68} S. 1722, \textit{supra} note 29.

\textsuperscript{69} S. 1722 proposed a new § 1301 for title 18 of the United States Code which would make it unlawful to intentionally obstruct or impair "a government function through misrepresentation, chicanery, trickery, deceit, craft, overreaching, or other dishonest means." S. 1722, \textit{supra} note 29, § 1301.

\textsuperscript{70} Proposed section 1302 of title 18 prohibited "obstruction or impairment", "by means of physical obstacle or interference" with governmental functions involving the official duties of a public servant. As reported by the Senate Judiciary Committee, the section limited the protected functions to those of public "officials" (a defined term), judges, jurors, law enforcement and correction personnel. S. 1722, \textit{supra} note 29, § 1302.

\textsuperscript{71} Proposed section 1323 of title 18 included a residual clause prohibiting "any other act with intent to influence improperly, or to obstruct or impair, the ... administration of justice ..." S. 1722, \textit{supra} note 29, § 1323.

\textsuperscript{72} Proposed section 1343 of title 18 of the U.S. Code prohibited, \textit{inter alia}, material oral false statements to "a person assigned noncriminal investigative responsibility by statute, or by a regulation, rule, or order issued pursuant thereto, or by head of a government agency ..." S. 1722, \textit{supra} note 29, § 1343.

\textsuperscript{73} The committee noted, for example, that the terms used in proposed section 1301 were those used by the Supreme Court in interpreting 18 U.S.C. § 371 (1982) (Conspiracy to Defraud the Government). The Committee felt that, while this broad definition—which had repeatedly applied to the new areas of conduct—might have been justified in the infancy of federal criminal law, in the modern code—with specific offenses to cover conduct—it only served as an additional weapon for the prosecution, providing bargaining leverage and frequently allowing avoidance of the burdens of proving the elements of the more specific offenses. See H.R. REP. NO. 1396, \textit{supra} note 1, at 133-37, 141-42. Proposed section 1302 had been criticized as interfering with legitimate public demonstrations. Although the Committee did not reach a specific conclusion about the validity of that criticism, it did determine that a provision covering \textit{all} physical interferences, assaultive and non-assaultive, could reach trivial conduct that simply should not be denominated criminal. \textit{Id.} at 138. The term "improperly", used in the omnibus clause of proposed section 1323, was considered extremely vague: what was improper would depend too heavily on the perspective of the person or persons
designed to prohibit the undesirable conduct without overreaching.\(^74\) The major concern was to avoid interfering with state criminal jurisdiction or chilling the exercise of constitutional rights.\(^75\) Nevertheless, the House provisions were criticized as undermining effective law enforcement.\(^76\)

### Obstacles to Reform

Interest groups have always affected the course of federal criminal code reform in Congress.\(^77\) In particular, civil liberties groups objected to changes in the criminal law which they believed to be repressive.\(^78\) In an effort to meet these criticisms the code was redrafted,\(^79\) but in a way that drew fire from conservatives who found some changes too permissive. The same conservatives wanted changes of their own liking in the highly controversial areas that were to be recodified.\(^80\) In short, the greater the number of issues disputed, the less likely was the prospect of compromise necessary to achieve passage of the legislation.\(^81\)

An additional factor that influences legislative change is time. Unlike the Senate, the House is not a continuing body; all its members are elected every two years;\(^82\) its committee and subcommittee chairs change more often than in the Senate. New chairpersons bring with them new perspectives. In the final analysis, two years is simply not

\(^74\) For example, under proposed section 1701 of title 1 physical interferences were only prohibited to the extent that they are prohibited under current law. H.R. 6915, supra note 39. See H.R. Rep. No. 1396, supra note 1, at 137-39. “Fraud” was given a clear definition, and included oral false statements. Such fraud, however, was only prohibited when it produced a particular result, which could be measured objectively by a trier of fact. See H.R. Rep. No. 1396, supra note 1, at 14, 141-43. The government’s protection against fraud that could not be anticipated was continued by an inclusion of “Conspiracy to interfere with a Government function by fraud;” under proposed section 1705. See H.R. Rep. No. 1396, supra note 1, at 141-43.

\(^75\) See, e.g., H.R. Rep. No. 1396, supra note 1, at 154-59, 163, 297.

\(^76\) See, e.g., Revision Hearings, supra note 37.

\(^77\) Drinan, supra note 43, at 521-23.

\(^78\) Members of the American Civil Liberties Union testified before the Senate Judiciary Committee that “[u]nder the unfettered terms of S. 1722, it would be up to the prosecutor to determine whether a large demonstration on federal grounds . . . was or was not obstructing a government function.” See Revision Hearings, supra note 37, at 10176-77 (statement of John Shattuck & David Landau). The A.C.L.U. also thought the proposed statute was overbroad and vague, and that: “every mass demonstration would, at one moment or another, fall within its prohibitions.” Id. See also Drinan, supra note 42, at 521.

\(^79\) See, e.g., H.R. Rep. No. 1396, supra note 1, at 138.

\(^80\) Drinan, supra note 42, at 521.

\(^81\) See generally id.

\(^82\) U.S. Const. art. I, § 2.
long enough to develop, refine, and enact complicated and controversial legislation such as a new criminal code.

In the end, criminal code reform failed in the 96th Congress, the victim of political and philosophical differences and time constraints. Nonetheless, efforts to bring about less than comprehensive reform should not be abandoned. To say that we cannot do everything is not to say that we can do nothing.

THE NEED FOR SENTENCING REFORM

The federal criminal sentencing process demands congressional attention. Current practices result in a wide disparity among sentences imposed on defendants convicted of similar crimes.83 A system that does not provide equal treatment can only foster contempt among those who believe they have been treated unfairly. Respect for the law cannot flourish among convicted defendants or the public when justice is undercut by unequal treatment.

Undoubtedly, the primary responsibility for equitable administration of the criminal justice system rests with the states. In fact, many states have begun to search for fair and practical alternatives to the long-established practice of indeterminate sentencing.84 Most often, however, the states have looked to the Federal Government as a model for their agencies, institutions, and laws. This reliance on the Government for innovative proposals tacitly recognizes that the Federal Government can afford to experiment with alternatives that may benefit the criminal justice systems of all fifty states. In the area of criminal sentencing, the repeated failure of Congress to pass omnibus reform legislation has left the states without direction.

In the absence of clear guidelines derived from federally sponsored empirical studies, many states have implemented various combinations of remedies, including mandatory minimum sentences, fixed-time (determinate) sentences, sentencing guidelines, and the abolition of parole.85 While each of these alternatives has its strengths,86 each also has the potential to exacerbate two serious problems: prison overcrowd-


85. Id. See also U.S. Dep't of Justice, Report to the Nation on Crime and Justice 72 (1983). The Administration's current sentencing bill, S. 1762, includes guidelines promulgated by a presidentially-appointed commission and a provision calling for abolition of parole.

86. Id.
ing and the elimination of judicial discretion. In the past decade, our nation has experienced a phenomenal rise in its prison population. This increase has been due not merely to a higher crime rate but also to increased incarceration rates and longer prison sentences. The upshot is that our nation's prisons and jails are seriously overcrowded.

Furthermore, any new sentencing alternative that curtails the discretion of judges to determine who is to be incarcerated, and for how long, deprives the criminal justice system of a means to control prison population. The only way to prevent overcrowding without such control is to build new prisons; yet voters and their elected representatives are notoriously reluctant to appropriate money for prison construction.

Whether eliminating judicial discretion in sentencing will reduce unwarranted disparity is questionable. Discretion appears to be an enduring component of any sentencing policy. Allocating sentences purely on the basis of the offense and the offender's prior record does not eliminate discretion, it merely shifts the discretion to an earlier stage. Police officers and prosecuting attorneys may determine the sentence by their decision of what charges to bring against a defendant. It is doubtful that a prosecutor, who is an advocate for one side in the criminal justice system, will be better able to determine who should be imprisoned than is the judge.

Moreover, shackling discretion through overly narrow definitions of offense and offender categories may introduce new forms of unwarranted disparity. The need to establish a finite, workable number of categories means that some important distinctions among offenses and/or offenders will be ignored. Do we really believe, for example, that an elderly man who owns a gun for self-protection and shoots a young

88. Id.
89. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 530 (1982).
90. The high crime rate of recent years may be due to numerous inseparable factors such as the increase in the population of crime-prone age, greater reporting of crime, and stricter law enforcement. See generally Chaiken & Chaiken, Crime Rates and the Active Criminal, in CRIME AND PUBLIC POLICY 11 (J. Wilson ed. 1983).
91. See BUREAU OF JUSTICE STATISTICS, supra note 89.
94. See generally PROSECUTORIAL DISCRETION, supra note 87.
95. Id.
burglar in circumstances not amounting to self-defense should be imprisoned under a “use-a-gun, go-to-jail” law?

THE SENTENCING ACT OF 1983

The Sentencing Act of 1983, H.R. 4554, was introduced in the current Congress to address the problems in the present system. Its purposes are to reduce unwarranted sentencing disparity, to improve the quality of information available to the sentencing judge, to ensure that prison space is used efficiently, to incapacitate dangerous offenders, to encourage the development of effective alternatives to prison for nonviolent criminals, and to provide more severe nonprison forms of punishment for white-collar and corporate criminals. H.R. 4554 provides for discretionary sentencing guidelines and modifies the role of administrative boards in determining prisoner release.

In addition to these rather pragmatic concerns, H.R. 4554 attempts to respond to a very fundamental cause of sentence disparity under current federal law. American jurisprudence provides judges with little coherent guidance as to the objectives that the criminal justice system is designed to achieve through sentencing criminals to specified terms of imprisonment. As a result, in many instances disparity in sentencing will not be explained by assessing the severity of the crime nor by reviewing the defendant’s criminal history.

Rationale For Incarceration

The purpose of criminal sanctions has been a focus of debate throughout history. Rehabilitation, the ostensible rationale for imprisonment through most of this century, has fallen into disfavor and with it the practice of indeterminate sentencing and parole. The belief that we can “cure” criminals through correctional treatment has been abandoned. Current scholars stress incapacitation, retribution, and punishment. Notions of retribution and punishment are particularly popular because of the public demand that authorities “get

97. Id. § 4 (proposed new ch. 239, § 3521(2) of title 18 U.S.C.).
98. Id. § 2 (proposed new ch. 225, §§ 3524, 3525 of title 18 U.S.C.).
100. Id. § 2 (proposed new chs. 225, 231, § 3521(3)(C) of title 18 U.S.C.).
101. See id. (proposed new chs. 225, 231, §§ 3523(b), 3583(b) of title 18 U.S.C.).
103. Id. § 5 (proposed new ch. 311 of title 18 U.S.C.).
104. See comptroller general, u.s. general accounting office, reducing federal judicial sentencing and prosecuting disparities: a systematic approach needed 17, 18 (1979).
105. See id. at 5.
106. See a. von hirsch & k. hanrahan, the question of parole 13 (1979).
107. See id.
108. See r. singer, just deserts: sentencing based on equality and desert 1-8 (1979).
109. See id. at 7.
110. See, e.g., greenwood, controlling the crime rate through imprisonment, in crime and public policy 251-72 (j. wilson ed. 1983); blumstein, selective incapacity as a means of
tough" on criminals.\textsuperscript{111}

Gradually, we are learning that criminal sanctions can and should serve a variety of purposes.\textsuperscript{112} No single objective is sufficient to support an all-encompassing framework on which all sentencing decisions may rest. Thus, even as we recognize that individuals must receive their "just deserts" and that society has a right to extract a legitimate vengeance for wrongful acts, no person can determine the precise degree of moral culpability to be attached to a particular crime, nor how to translate that culpability into a specific sentence.\textsuperscript{113} Moreover, few would carry retribution to its logical extreme. Thus, few would consider it worthwhile to imprison a robber who is permanently paralyzed from the neck down, except perhaps for deterrent purposes. Even the pervasive concept of just deserts can serve only as a guide to fixing the relative severity of sentences of various crimes.\textsuperscript{114}

Nor can the principles of incapacitation or deterrence provide an overriding framework for sentencing decisions. Common sense suggests that punishment deters; yet we have no reliable means to determine the differential deterrent value of various sentences.\textsuperscript{115} Furthermore, no one would propose the death penalty for petty theft, even if we were convinced that capital punishment would drastically reduce the incidence of the crime. Likewise, individuals assuredly would be prevented from pursuing criminal careers if every crime carried a life sentence. Equitable principles underlying our criminal justice system, however, including those on which the eighth amendment\textsuperscript{116} rests, preclude such a policy.

Rehabilitation raises different questions. Clearly, some prisoners can be rehabilitated; others can not.\textsuperscript{117} Unfortunately, we have no means of distinguishing between those who will benefit from prison and those who will not.\textsuperscript{118} Thus, serious doubts have been raised about whether a sentence as severe as imprisonment should ever be justified by a desire for rehabilitation. Rehabilitation may, however, be an important criterion in assessing the value of alternative sentences.

The Sentencing Act of 1983 (H.R. 4554) would provide the judici-
ary with a list of factors to be considered in imposing criminal sentences.119 First, H.R. 4554 instructs the sentencing judge to consider each of the traditional purposes of sentencing: deterrence, incapacitation, and rehabilitation.120 Other provisions then direct the court to consider ordering restitution to the victims of crimes,121 and to evaluate the likelihood of reconciliation of the offender with his family and his community as functions of sentencing.122 This legislation is the first that would make clear to federal judges that these goals are to be satisfied only within the limits imposed by the necessity of ensuring that defendants are justly punished, and that sentences are uniformly imposed, commensurate with the culpability of the offender and the harm done.123

Sentencing Provisions

As effective alternatives to imprisonment, the legislation establishes new sentences for white-collar and corporate criminals124 and substantially increases the maximum fines for all offenses.125 For organizations, fines of up to $1,000,000 may be assessed for felonies or misdemeanors causing loss of life,126 while limits of $50,000 to $250,000 may be imposed for other offenses.127 The maximum penalty under current federal law varies, but only infrequently does it approach these levels.128 Furthermore, if the monetary loss to the victim or the gain to the defendant is measurable, the defendant may be fined alternatively up to twice such loss or gain.129 This provision is designed both to deprive criminals of their ill-gotten gain and to deter future wrongdoers.

In addition to establishing new penalty schedules, the bill prescribes equitable remedies to apply to corporate crime. Among these, H.R. 4554 sets forth procedures for probation130 and orders of restitution.131 It authorizes the appointment of a special master to supervise the compliance of an organization with conditions of probation.132 Individual

120. Id. (proposed new ch. 225, § 3521(3) of title 18 U.S.C.).
121. Id (proposed new ch. 225, § 3521(3)(e) of title 18 U.S.C.).
122. Id § 2. Section two of H.R. 4554 would amend title 18 U.S.C. by deleting current chapter 225 (verdict), chapter 227 (sentencing, judgment, and execution), chapter 229 (fines, penalties and forfeitures), and chapter 231 (probation), and enacting new chapters governing the imposition of sentence following conviction of a crime. Instructions to the court on the purposes of sentencing are in proposed new section 3521 of title 18.
125. Id.
126. Id (proposed new ch. 229, § 3561(a)(2) of title 18 U.S.C.).
127. Id.
128. For example, current law provides for a $20,000 maximum fine for transportation of explosives with the knowledge that they will be used to kill or injure, when it results in personal injury. 18 U.S.C. § 844(d) (1982).
130. Id. § 2 (proposed new ch. 231 of title 18 U.S.C.).
offenders can also be disqualified from holding corporate office during the probation period. 133 A court can also require a defendant to notify any victims that there has been a criminal conviction. 134 The aim here is to facilitate restoring victims to their position prior to the offense.

It must be remembered that H.R. 4554 is designed to provide an equitable balance between the interests of the victim and the rights of the defendant. In addressing post-conviction sentencing procedure, this legislation requires the probation service to prepare for the court a presentence report. 135 The report must be disclosed to the defendant 136 and a separate hearing must be held before sentencing to allow the defendant an opportunity to rebut any inaccurate data included in the presentence report. 137

Sentencing Guidelines

The legislation instructs the court to prescribe a sentence that comports with sentencing guidelines, unless aggravating or mitigating circumstances warrant departure from the guidelines. 138 Before imposing a sentence, the court must evaluate sentencing options, which are enumerated in order of increasing severity. 139 The court must impose the least severe sanction necessary to achieve the purposes of sentencing. 140 The court must resolve any factual disputes and state on the record why a particular sentence was imposed and why it is the least severe alternative. 141

The success of H.R. 4554 in achieving effective sentencing reform rests with the promulgation of sentencing guidelines. Therefore, H.R. 4554 establishes procedures for promulgating these guidelines. 142 Once in place, the guidelines will reduce sentence disparity by giving the courts sentencing standards which do not exist today. 143 They will help the courts and Congress to relate levels of punishment to clear-cut categories of offenders and offenses. The development of the guidelines would necessarily provide a forum for creating national sentencing policies.

133. Id. (proposed new ch. 231, § 3583(c)(1) of title 18 U.S.C.).
134. Id. (proposed new ch. 231, § 3621 of title 18 U.S.C.).
135. Id. (proposed new ch. 225, § 3524(a) of title 18 U.S.C.).
136. Id. (proposed new ch. 225, § 3524(b) of title 18 U.S.C.).
137. Id. (proposed new ch. 225, § 3525 of title 18 U.S.C.).
139. Id. (proposed new ch. 225, § 3523(a) of title 18 U.S.C.).
140. Id. (proposed new ch. 225, § 3523(b)(2) of title 18 U.S.C.).
141. Id. (proposed new ch. 225, § 3523(b) of title 18 U.S.C.).
142. Id. § 4.

The indeterminate sentence first permits the sentencing court to sentence a convicted offender within vast statutory limits ranging in some cases from probation to life imprisonment. The broad discretion conferred upon federal judges results in sentencing disparity. . . .

Id. at 222.
The Sentencing Commission

Developing specific standards will be the task of a commission of the Judicial Conference of the United States. This proposed provision contrasts with those of prior sentencing legislation which called for guidelines to be set by a sentencing commission composed of presidential appointees.

The former provision is justified on the ground that a presidentially-appointed panel can too easily be dominated by political interests. The temptation to seek public approval by appearing tough on crime and therefore to propose standards biased in favor of prosecution and incarceration might prove too great. Such a bias could readily defeat the effort to keep our prison population under control, and result in forced reliance on early release programs to avoid overcrowding, shifting the system even further from "truth in sentencing."

Use of the Judicial Conference has much to recommend it. First, the procedures of the Judicial Conference are familiar to Congress. Second, when judges take part in the formulation of sentencing guidelines, they will likely perceive the standards as fair, consistent, and practical. Third, the Judicial Conference has the resources to do the job without the necessity of creating another commission. Furthermore, by reserving ultimate decision on the guidelines to Congress, this plan preserves for Congress its constitutional responsibility to declare what conduct is criminal and to set maximum criminal sanctions.

The proposed guidelines prescribed by H.R. 4554 are based on categories of defendants and offenses. In this way, offenders with similar criminal histories convicted of offenses in the same category should not receive substantially different sentences. The guidelines indicate the range of appropriate fines or imprisonment for each category, and the circumstances under which cumulative sentences are appropriate. The maximum appropriate prison term is not to exceed four-fifths of the maximum for the offense, except for violent career criminals. The minimum limit of the guidelines range for violent career criminals

147. The Judicial Conference is uniquely able to suggest the necessary guidelines. Such a function would be similar in nature to other functions performed by the Judicial Conference. It has, for example, many standing committees such as the rules committee and also has at its disposal vast informational resources.
149. Id.
150. Id. (proposed new ch. 239, § 3792(a) of title 18 U.S.C.).
151. Id. (proposed new ch. 239, § 3792(c) of title 18 U.S.C.).
152. Id. (proposed new ch. 239, § 3792(c)(2) of title 18 U.S.C.).
must not be less than two-thirds the maximum imprisonment for the
offense. The guidelines will also help the court set the proper condi-
tions of probation.

Even the most tightly drawn sentencing guidelines could be will-
fully or unknowingly circumvented through unfettered use of
prosecutorial discretion. Persons with similar criminal histories con-
victed of like offenses could receive markedly different sentences,
depending upon their success in plea bargaining.

United States Attorneys have diverse prosecutorial policies and no
adequate standards to guide those policies. Since plea bargaining
severely limits the range of punishment a federal judge can impose, the
risk would remain that the application of justice would be disparate for
reasons unrelated to the guilt of the offender. To lessen the current
inequities, the Judicial Conference would develop standards to coordi-
nate sentencing and plea bargaining policies.

To ensure that the commission reflects a diversity of views, H.R.
4554 requires that, while five of the nine members are to be active fed-
eral judges, the other four cannot be judges or former judges.

Supervised Release

The Sentencing Act of 1983 also reevaluates the function and effec-
tiveness of parole. For most of this century, rehabilitation and judicial
discretion played a central role in sentencing. The criminal was con-
sidered ill, and a period of imprisonment was to provide a cure.
Because it was impossible to predict the length of incarceration neces-
sary to effect the cure, the parole board was to assess the inmate's pro-
gress and decide when the prisoner should be released. However,
parole boards, operating without policies or standards, have been un-
able to determine when a prisoner is rehabilitated. The lack of cer-
tainty created by such a system has been blamed for fostering prison
unrest and disrespect for the law.

Parole has also been criticized because of the realization that prison

153. Id. (proposed new ch. 239, § 3792(d) of title 18 U.S.C.).
154. Id. (proposed new ch. 239, § 3792(c) (3) of title 18 U.S.C.).
156. Id.
157. Id.
159. Id. (proposed new ch. 239, § 3794(b)(2) of title 18 U.S.C.).
161. AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 84 (1981) [hereinafter cited as STRUGGLE FOR JUSTICE].
162. Id.
163. See generally Von Hirsch, Prediction of Criminal Conduct and Preventive Confinement of Con-
164. See STRUGGLE FOR JUSTICE, supra note 161, at 121-44 (1971); Federal Criminal Law Revi-
programs have had little effect on rehabilitation. Social science literature has shown either that prison programs have little effect on whether a prisoner will commit new crimes upon release or that it is impossible to predict which programs work and under what circumstances.\textsuperscript{165}

In the early 1970's, the United States Parole Board, as it was known then, developed and effected parole-release guidelines.\textsuperscript{166} These guidelines were not based on good conduct, for which no objective criteria for evaluation existed and which could be feigned, but on the seriousness of a person's crime and criminal history.\textsuperscript{167} This created a fairer parole system, but problems persisted: inmates still did not know when they would be released and no explicit procedures existed to protect prisoners in the parole process.\textsuperscript{168} In response to these deficiencies, Congress passed the Parole Commission and Reorganization Act of 1976.\textsuperscript{169} Guidelines were statutorily mandated, ensuring procedural fairness and certainty of presumptive release dates.\textsuperscript{170} This system has allowed the Parole Commission, as it is now known, to set realistic prison terms\textsuperscript{171} and to reduce sentence disparity.\textsuperscript{172}

Because these guidelines have been successfully utilized, critics of parole argue that application of the guidelines should be transferred from the end of the process to the beginning. The guidelines could then apply to all sentencing decisions and not just sentences involving prison terms of more than one year.\textsuperscript{173} Critics also see parole as being "soft" on criminals, contending that it undercuts the symbolic function of imprisonment.\textsuperscript{174} Furthermore, they assert that once sentencing guidelines are created, parole becomes duplicative: having two sets of guidelines (sentencing and parole) would allow the Parole Commission to overrule judicially developed guidelines.\textsuperscript{175}

Conversely, advocates of parole argue that it serves a "safety net"

\textsuperscript{165} D. LIPTON, R. MARTINSON & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT 627 (1975).
\textsuperscript{166} SILBERMAN, supra note 112, at 290; R. Wool, The new parole and the case of Mr. Simms, N.Y. Times, July 29, 1973, § 6 (Magazine), at 25.
\textsuperscript{167} SILBERMAN, supra note 112. The parole board was concerned with three sets of factors: [t]he seriousness of the offense (whether or not the victim was injured, and how seriously, and how big a financial loss the victim suffered); the nature and seriousness of the offender's prior record; and the way he conducted himself in prison. . . . (Since institutional behavior played a relatively minor role in parole decisions, the guidelines gear decisions to the first two factors).
\textsuperscript{171} See VON HIRSCH & HANRAHAN, supra note 106, at 89-90; Blumstein & Cohen, Sentencing of Convicted Offenders: An Analysis of the Public's View, 14 LAW & SOC'Y REV. (1980).
\textsuperscript{173} S. REP. No. 553, 96th Cong., 1st Sess. 912-32 (1980).
\textsuperscript{174} Von Hirsch, supra note 163, at xvi.
function by reducing prison terms that are too long and by controlling fluctuation of prison terms. Supporters assert that abrupt abolition of parole would eliminate this essential equity-restoring mechanism.

The Sentencing Act of 1983 both preserves the safety net and deals with the problems that critics of parole cite, by integrating the parole function with sentencing guidelines. The legislation keys the earliest eligibility for supervised release, a date that must be set within 120 days of accepting a prisoner into custody, to the expiration of eighty percent of the minimum applicable guidelines or, for those sentenced under the relevant guidelines, eighty percent of the prison term imposed. Regarding the setting of this date, prisoners are guaranteed certain due process rights such as notice of hearing, access to documents, and consultation with a qualified representative.

To help courts implement the guideline system without undue disruption of court procedure and to permit experimentation during development of the guidelines, H.R. 4554 does not limit guideline range. Because of this, the initial guidelines for some categories may be very broad (for example, four to ten years) and thus reintroduce disparity into the system. To prevent such inequity, H.R. 4554 authorizes the Board of Imprisonment (the Board), which would replace the Parole Commission, to consider offense and offender characteristics in setting the supervised release date, but only to the degree necessary to remedy intra-guideline disparity. Thus, the Board is not authorized to correct disparity resulting from an offender being sentenced above the guideline; it cannot override a court's decision that such a sentence is appropriate. If the guidelines are properly narrow when proposed or gradually become so, the role of the Board in reducing disparity will, of necessity, become redundant.

Another potential problem is that the guidelines might set a sentence range that far exceeds the average time now served for similar offenses. This could result in prison overcrowding. To remedy this possible effect, the legislation permits release dates to be advanced 120 days when prison population exceeds capacity. However, this safety valve is not applicable to violent career criminals.

The concept of "good time" would also be integrated into the release provisions of the bill, but in a manner different from current

176. See Hearings on H.R. 6869, supra note 22, at 791.
177. Id.
179. Id. § 5. This amends 18 U.S.C., ch. 311 (parole) by replacing it with a new chapter (supervised release) under sections 4201-4211.
180. Id. (proposed new ch. 311, § 4203 of title 18 U.S.C.).
181. Id. § 2 (proposed new ch. 225, § 3522 to title 18 U.S.C.).
182. Id. § 5 (proposed new ch. 311, § 4210 of title 18 U.S.C.).
183. Id. (proposed new ch. 311, § 4201 of title 18 U.S.C.).
185. Id. § 5 (proposed new ch. 311, § 4201(0)(1) of title 18 U.S.C.).
186. Id.
The release date cannot be advanced for good behavior, but may be retarded if the Board finds the prisoner guilty of serious misconduct while imprisoned. Currently, good behavior credits are deducted from the maximum sentence, which is often not served. Under H.R. 4554, penalties for misconduct are to be added to the actual time served. Thus, every prisoner will have an incentive not to misbehave.

The replacement of good time and parole with an integrated system of Board-determined release criteria within statutory limits would bring the system closer to achieving "truth in sentencing," and would make it more rational and more easily understood. The system would also permit a mandatory period of supervision for all prisoners upon their release. In contrast, inmates who are now incarcerated the longest because of misbehavior in prison—those who should have the longest possible supervision before being dismissed—actually have the shortest period of post-release supervision. Those who behave the best and, therefore, least need post-release supervision, are supervised the longest. Under H.R. 4554, the severity of the crime determines the length of supervision: three years for the most serious crimes, two years or less for lesser offenses.

CONCLUSION

The political and philosophical divisions in Congress will likely preclude sweeping revision of the criminal code in the immediate future, despite the desirability of a comprehensive measure. Lesser differences have thwarted all recent efforts at omnibus revision, and the current dichotomy counsels against an attempt at this time.

Sentencing is the cornerstone of any criminal justice system. If the system is to meet the needs of society, sentencing must be perceived as fair and equitable to the victims, the offender, and the community. It must be understood and supported by the public and all elements of the criminal justice system. The current federal sentencing process demands urgent congressional attention and cannot await broader reform. Deficiencies in the law result in wide disparity among sentences imposed for similar crimes. The system does not provide equal treat-

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187. Id. (proposed new ch. 311, § 4202(b) of title 18 U.S.C.).
188. Id.
191. Id. (proposed new ch. 311, § 4201(a) of title 18 U.S.C.).
192. Such is the situation where a prisoner has served his maximum sentence (or close to the maximum) for reasons of bad behavior in prison, leaving little or no time on supervised parole.
193. Conversely, a prisoner who fails to serve the maximum nevertheless remains on supervised parole for the remainder of the sentence following his release. Thus, community resources are expended to supervise the activities of the prisoner who has been released for "good behavior."
ment, and those who believe they have been treated unfairly—whether victim, offender, or community—become contemptuous of it.

The Sentencing Act of 1983 addresses the imperfections of current law. It provides clear legislative guidance to the judiciary regarding the purposes of sentencing, the factors to be considered in imposing a sentence, and the kinds of sentences available. H.R. 4554 requires imposition of the least severe sentence that will be consistent with the safety of the public and the gravity of the crime. The legislation controls prosecutorial discretion by coordinating plea bargaining and sentencing guidelines. It stresses incapacitation of violent and repeat offenders, while providing alternatives to prison for nonviolent offenders, such as day fines and community service. The bill provides an efficient safety valve for prison overpopulation. The Sentencing Act of 1983 stresses restitution to victims and promotes reconciliation of the offender with his family and with the community. The legislation also provides for more severe punishment for white-collar crime.

Even though the bill structures the sentencing system to a greater and presumably more coherent degree, it does not do so at the risk of denying defendants their rights. It emphasizes adherence to procedural due process through use of a detailed sentence hearing. In sum, H.R. 4554 will reduce sentence disparity, improve the quality of justice, ensure that expensive prison space is used efficiently to incapacitate dangerous offenders, and encourage “creative sentencing” as an effective alternative to prison for nonviolent offenders.