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## Corrections: A Tale of Two Bills

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# CORRECTIONS: A TALE OF TWO BILLS

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The *Journal of Legislation*, in its Summer 1984 issue, published two articles discussing current federal legislative attempts at sentencing reform. The first article,<sup>1</sup> by Congressman Peter W. Rodino, Jr. (D-N.J.), discusses the Sentencing Act of 1983 (H.R. 4554).<sup>2</sup> The second article,<sup>3</sup> by Senator William L. Armstrong (R-Co.), discusses the Sentencing Improvement Act (S. 1644).<sup>4</sup> Both bills seek to reform the way in which federal courts sentence criminals. In an attempt to clarify some of the basic problems with such reformation schemes, this comment discusses and critiques several features of the two bills.<sup>5</sup>

## HOUSE BILL 4554

House Bill 4554, by far the more comprehensive bill, contains many provisions of interest to those concerned with problems of contemporary corrections. In section 1 of the bill, a hierarchy of correctional goals is set out. This provision commands a sentencing court to "assure that the severity [of the sentence] is not greater than that which is proportionate to the culpability of the offender and is directly related to the harm done . . . ."<sup>6</sup> In addition it provides that courts should "adhere as closely as possible to the principle that offenders convicted of similar offenses committed under similar circumstances should receive similar sentences . . . ."<sup>7</sup> Furthermore, to the extent compatible with these objectives, the court should seek to accomplish the following: promote respect for the law; provide deterrence; protect the public from further offenses by the offender; provide adequate correctional treatment for the offender; afford the victim restitution; and reconcile the victim, community, and offender.<sup>8</sup>

In a certain sense, this ordering merely lists traditional sentencing concerns. Two points bear mention, however. First, by listing the proportionality point first,

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1. Rodino, *Federal Criminal Sentencing Reform*, 11 J. LEGIS. 218 (1984).
2. H.R. 4554, 98th Cong., 1st Sess., 129 CONG. REC. H10581 (daily ed. Nov. 18, 1983).
3. Armstrong, *Prudent Use of Prison Space: The Sentencing Improvement Act*, 11 J. LEGIS. 237 (1984).
4. S. 1644, 98th Cong., 1st Sess., 129 CONG. REC. S10,371-77 (daily ed. July 20, 1983).
5. A third bill, entitled "The Comprehensive Crime Control Act of 1983" (H.R. 2151), was recently passed by the U.S. House of Representatives. H.R. 2151, 98th Cong., 2d Sess., 129 CONG. REC. H126 (daily ed. Mar. 16, 1983). See 36 CRIM. L. REP. (BNA) 2019-20 (Oct. 3, 1984). The sentencing provisions of H.R. 2151 are quite similar to those of H.R. 4554. Some of those provisions, however, deserve note. The bill creates the United States Sentencing Commission, which is to establish guidelines for sentencing. In drafting such guidelines, the Commission must examine the average sentences imposed in each category of offense and the length of terms actually served. Moreover, the bill requires the Commission's guidelines to specify a substantial term of imprisonment for the following classes of defendants: a defendant who has a history of two or more Federal, State or local felony convictions for offenses committed on different occasions; a defendant who has committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income; a defendant who has committed a RICO-type conspiracy in which the defendant had a managerial or supervisory role; a defendant who has committed a felonious crime of violence, for which he was ultimately convicted; or a defendant who has a felony set forth in 21 U.S.C. §§841-960 (Drug Abuse Prevention and Control Act of 1970) which involved trafficking in a substantial quantity of a controlled substance.
6. H.R. 4554, *supra* note 2, § 2 (proposed new ch. 225, § 3521(1) of title 18 U.S.C.).
7. *Id.* (proposed new ch. 225, § 3521(2) of title 18 U.S.C.).
8. The text of § 3521 provides:

even though in the form of a limitation, and the rehabilitative objective sixth, and specifically subordinate to the proportionality objective,<sup>9</sup> the bill strongly signals the ascendancy of the "just deserts" theory and the fading of the rehabilitative ideal.<sup>10</sup> This change in priorities is reflected by a separate provision stressing that the "defendant's need for education, vocational training or correctional treatment" does not in itself justify imposing imprisonment nor does it justify lengthening the term of imprisonment beyond the point necessary to satisfy the other purposes of sentencing.<sup>11</sup>

Certainly, some observers might see this change in priorities as a justifiable reaction to the alleged failure of the rehabilitative ideal.<sup>12</sup> Others, however, would argue that the real failure has been society's unwillingness or inability to provide either sufficient resources necessary for modern job training and advanced education, or sufficient employment opportunities.<sup>13</sup>

Whatever the outcome of such debates, however, a second point must be made. Even assuming that the authors intend to establish a descending priority among sentencing purposes, the bill's impact will, in many cases, be negligible. No such extrinsic ordering can assess the intrinsic intensity of the value underlying each purpose as that purpose may relate to a specific defendant's case. The unique circumstances of each case will require judges to weigh each sentencing goal differently, a process which normally will supersede the bill's order of priority. At the sentencing stage of a mail fraud case, for example, the goal of promoting respect for the law may be an important consideration, but not as important as, for example, restitution may be.<sup>14</sup>

In sentencing a person convicted of an offense, the court shall—

(1) assure that the severity of the sentence is not greater than that which is proportionate to the culpability of the offender and is directly related to the harm done;

(2) adhere as closely as possible to the principle that offenders convicted of similar offenses committed under similar circumstances should receive similar sentences;

(3) to the extent not inconsistent with the requirements of paragraphs (1) and (2) of this section endeavor to—

(A) promote respect for the law;

(B) provide adequate deterrence to offenses by others;

(C) protect the public from further offenses by the offender;

(D) provide the offender with needed education, vocational training, medical care, and other correctional treatment in the most effective manner;

(E) provide restitution to victims of offenses; and

(F) reconcile the victim, community, and offender.

9. The specific language reads "to the extent not inconsistent with. . . ." *Id.* (proposed new ch. 225, § 3521(3) of title 18 U.S.C.).

10. The "just deserts" theory, which reflects a proportionality principle, holds that the "[s]everity of punishment should be commensurate with the seriousness of the wrong." A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENT* 69 (1976). *But see* H.R. 4554, *supra* note 2, § 2. (proposed new ch. 231, § 3583(b) (4),(6),(8) of title 18 U.S.C.). The court may require that a defendant undertake employment or job training, abstain from drugs and alcohol, or undergo "psychiatric treatment." Cf. BUREAU OF JUSTICE STATISTICS U.S. DEPT. OF JUSTICE, *REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA* 71 (1983):

By the early 1970's, researchers and critics of the justice system began to reveal that the mixed goals of the justice system and the discretionary opportunities for judges to fashion sanctions had been based on assumptions that could not be validated about the ability of various programs to change offender behavior or predict future criminality.

11. H.R. 4554, *supra* note 2, § 2 (proposed new ch. 227, § 3541 of title 18 U.S.C.).

12. *See, e.g.,* Rodino, *supra* note 1, at 227: "Rehabilitation, the ostensible rationale for imprisonment through most of this century, has fallen into disfavor. . . ."

13. Chief Justice Warren E. Burger recognized the seriousness of this deficiency in a speech before the American Bar Association in Houston on February 9, 1981. He called for the creation of mandatory vocational and educational programs in prisons and for a broad scale physical rehabilitation of the penal institutions to provide a decent setting for such programs. *See* N.Y. TIMES, Feb. 9, 1981, at D-10, col. 1.

14. In fraud cases, judges may feel that restoring the victim to the status quo serves a more valuable purpose than holding the defendant out as an example to society.

Moreover, sentencing purposes often conflict with one another.<sup>15</sup> In that same mail fraud case, a long prison term may best promote respect for the law yet least allow for eventual restitution. Thus, despite the bill's textual specificity,<sup>16</sup> sentencing courts always will be forced to exercise their judgment on issues ultimately too complex for finely-tuned regulation. Whatever criticisms might be leveled at the bill's sentencing scheme,<sup>17</sup> however, the setting out of its purposes remains important to establishing a congressional sentencing philosophy. The specific mention of the goals of restitution<sup>18</sup> and of victim and offender reconciliation<sup>19</sup> emphasizes the often ignored tripartite nature of the criminal reform process.

The section of H.R. 4554 entitled "Imposition of Sentence" sets out possible dispositions in a roughly ascending order of severity and requires sentencing courts to impose the "least severe appropriate" disposition.<sup>20</sup> This requirement channels judicial discretion by requiring courts to focus specifically on a controlled, rational sentencing procedure, thus pre-empting a visceral reaction in sentencing. A similar device was used in the Federal Bail Reform Act of 1966,<sup>21</sup> which required judges in setting release conditions to select, from among increasingly restrictive conditions, the first condition which reasonably would assure the accused's appearance for trial.<sup>22</sup>

House Bill 4554 also requires judges imposing sentences to state on the record both the rationale behind the particular sentence imposed and also why that sentence is the least severe penalty appropriate to the case.<sup>23</sup> Despite the apparent logical redundancy of the second requirement, the provision insists that courts specifically consider less punitive alternatives to the sentence imposed. By requiring a statement of reasons for which these alternatives were rejected, the bill makes courts more accountable.<sup>24</sup>

Other interesting provisions of H.R. 4554 surround the sentencing procedure itself. The bill provides defendants and their attorneys a copy of the presentence report and grants them—along with government attorneys—an opportunity to comment on the report at least ten days before the actual presentence hearing.<sup>25</sup> The prosecution and defense, respectively, are allocated specific burdens of proof vis-a-vis specified categories of sentencing evidence.<sup>26</sup>

Regarding the actual disposition of defendants, the bill recognizes that tradi-

15. See BUREAU OF JUSTICE STATISTICS, *supra* note 10, at 71.

16. H.R. 4554, *supra* note 2, § 2 (proposed new ch. 225, § 3522 of title 18 U.S.C.). The proposed text of § 3522 provides:

(a) The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the purposes of sentencing;

(3) sentencing options (including effective alternatives to imprisonment) under section 3523 of this title; and

(4) applicable sentencing guidelines prescribed under chapter 239 of this title.

17. The provision might better list the proportionality and sentencing uniformity concerns as limiting provisions *after* setting the immediate objectives of sentencing in a particular case.

18. H.R. 4554, *supra* note 2, § 2 (proposed new ch. 225, § 3521(3)(E) of title 18 U.S.C.).

19. *Id.* (proposed new ch. 225, § 3521(F) of title 18 U.S.C.).

20. *Id.* (proposed new ch. 225, § 3523(b)(2) of title 18 U.S.C.).

21. 18 U.S.C. § 3146 (1982).

22. *Id.* § 3146(a). If no single condition will suffice, the judicial officer is to impose "any combination," and presumably the least restrictive such combination.

23. *Cf. id.* § 3146(d). H.R. 4554, *supra* note 2, § 2 (proposed new ch. 225, § 3523(b)(3) of title 18 U.S.C.).

24. See *infra* text accompanying notes 27-32. This accountability is both psychological, since a judge must seriously consider the alternatives, and formal, since there is the possibility of appeal.

25. H.R. 4554, *supra* note 2, § 2 (proposed new ch. 225 § 3524(b)(1)(A) of title 18 U.S.C.). The defendant may waive the ten day minimum period. *Id.* § 3524(b)(1)(C).

26. The bill provides that

tional fines have been fiscally insignificant to some corporate defendants. Accordingly, H.R. 4554 recommends fines up to \$1,000,000, depending on the nature of the offense, where "the defendant is other than an individual."<sup>27</sup> Moreover, if the defendant, corporate or otherwise, derived pecuniary gain from the offense or if the offense resulted in serious bodily injury, death, or damage to or loss of property, the bill authorizes fines of twice the gain derived or twice the gross loss caused if either amount is larger than the otherwise specified fine.<sup>28</sup> House Bill 4554 permits the imposition of probation as the most appropriate penalty.<sup>29</sup> As a condition of probation, the bill allows judges to require defendants to perform community services.<sup>30</sup> This alternate penalty recognizes that in many cases community service may offer a cheaper, more humane, and even more rehabilitative disposition than incarceration.<sup>31</sup> In addition, community service may constitute one way in which offenders can be reconciled with society in a manner consistent with the bill's objective.<sup>32</sup>

Among the bill's more innovative provisions is one which requires defendants who are directors, officers or managing agents of an organization to relinquish their controlling position in certain situations as a condition of probation.<sup>33</sup> This relinquishment, however, does not extend beyond the expiration of the maximum authorized probation term.<sup>34</sup>

House Bill 4554 devotes a full subchapter to restitution.<sup>35</sup> This broad provi-

(3) the Government should prove beyond a reasonable doubt any previous criminal conviction of the defendant the existence of which—

(A) is not asserted in the presentence report; or

(B) is asserted in the presentence report but specifically denied by the defendant;

(4) the Government shall prove by a preponderance of the evidence any other fact alleged by the Government that—

(A) supplements or contradicts the facts asserted in the presentence report; or

(B) is asserted in the presentence report but is placed in controversy by credible evidence offered by the defendant; and

(5) the defendant shall prove by a preponderance of the evidence any fact alleged by the defendant that is not asserted in the presentence report, except to the extent that the Government has the burden of proof under paragraphs (3) and (4) of this subsection.

H.R. 4554, *supra* note 2, § 2 (proposed new ch. 225, § 3525(c)(3) through (5) of title 18 U.S.C.). Each party is also given a burden of proof with regard to restitution matters. *See id.* (proposed new ch. 231, § 3604(c) of title 18 U.S.C.).

27. *Id.* (proposed new ch. 229, § 3561 (a)(2) of title 18 U.S.C.). Fines for individuals range up to \$250,000. *Id.* (proposed new ch. 229, § 3561(a)(1) of title 18 U.S.C.).

28. *Id.* (proposed new ch. 229, § 3561(a)(3) of title 18 U.S.C.). Fines may be modified or even rescinded. *See id.* (proposed new ch. 229, § 3565 of title 18 U.S.C.).

29. *Id.* (proposed new ch. 225, § 3523(a) of title 18 U.S.C.).

30. *Id.* (proposed new ch. 231, § 3583(b)(11) of title 18 U.S.C.). On community service generally, *see* Umbreit, *Community Service Sentencing: Jail Alternative or Added Sanction?* FED. PROBATION 3 (1981); Read, *How Restitution Works in Georgia*, 60 JUDICATURE 323 (1977); Bergman, *Community Service in England: An Alternative to Custodial Sentence*, FED. PROBATION 43 (1975). Bergman sees four conditions for effective community service orders: (1) a task meaningful to the individual and beneficial to the community; (2) help to the individual's personal adjustment and development; (3) the opportunity to continue the work even after the order has expired; and (4) instilling in the individual a greater awareness of the needs of others. *Id.* at 44.

31. Umbreit, *supra* note 30, at 3. *See also* Bergman, *supra* note 30, at 45: "Community Service seems to satisfy the rehabilitative aspect more so than do fines, probation, or custodial sentences as there is a real reparation for the wrongs that have been committed."

32. *See* Read, *supra* note 30, at 330: "Since people recognize the value of these tasks, the public offender becomes a community resource and asset rather than a community liability." According to Bergman, "community service helps establish a dialogue with the community and the offender . . . . This device, probably more than any other, provides a way by which the offender and the community may become reciprocally involved and reconciled." Bergman, *supra* note 30, at 45, 46.

33. H.R. 4554, *supra* note 2, § 2 (proposed new ch. 231, § 3583(c)(1) of title 18 U.S.C.).

34. *Id.*

35. H.R. 4554, *supra* note 2, § 2 (proposed new ch. 231, §3601). In 1982, the Federal Government enacted a restitution law. *See* The Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 3579-80

sion specifies that a "defendant who is found guilty of an offense may be ordered to make restitution to any victim of the offense."<sup>36</sup> This requirement extends not only to property losses but also to losses associated with bodily injury or death.<sup>37</sup> Additionally, the beneficiaries of such restitution may include the victim,<sup>38</sup> persons designated by the victim,<sup>39</sup> third parties — for example, insurance companies — who have compensated the victim for a loss,<sup>40</sup> or the victim's estate.<sup>41</sup> The restitution provisions may invite litigation challenging the award of "damages" without the right to jury trial as provided for in the seventh amendment.<sup>42</sup> The current mood among state legislatures, however, is so victim-conscious that such suits are unlikely to ultimately succeed.<sup>43</sup> Under H.R. 4554, courts may also require defendants convicted of fraud or other intentional deceptions to give "readily identifiable" victims some "notice and explanation" of their conviction.<sup>44</sup> Underlying this provision is the desire to help victims recover their losses.

The bill allows a defendant to appeal a sentence not only on the traditional grounds that it violates the Constitution or laws of the United States,<sup>45</sup> but also on the grounds that the sentence is "unreasonable."<sup>46</sup> The bill seems to anticipate that the typical appeal on this ground will challenge the harshness of the sentence imposed. It accommodates unlimited discretion in the opposite direction, however, in that it denies the prosecution the right to appeal the leniency of a sentence.<sup>47</sup> The defendant's right to appeal is not totally unrestricted. The bill precludes appeals which question the reasonableness of any sentence which is entered pursuant to a plea agreement accepted by the court.<sup>48</sup> In addition to reflect-

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(1982). "Furthermore, by 1979, nearly all states had statutory provisions for the collection and disbursement of restitution funds." BUREAU OF JUSTICE STATISTICS, *supra* note 10, at 73.

36. H.R. 4554, *supra* note 2, § 2 (proposed new ch. 231, § 3601(a) of title 18 U.S.C.).

37. *Id.* (proposed new ch. 231 § 3602 of title 18 U.S.C.).

38. *Id.*

39. *Id.* § 3602(a)(4).

40. *Id.* § 3602(c)(1).

41. *Id.* § 3602(b). Apparently, however, only the victim (or the Government) may seek to enforce a restitution order "in the same manner as a judgment in a civil action." *Id.* (proposed new ch. 236 § 3605 of title 18 U.S.C.).

42. See U.S. CONST. amend. VII: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." See also Note, *Where Offenders Pay For Their Crimes: Victim Restitution and Its Constitutionality*, 59 NOTRE DAME L. REV. 685 (1984) (a discussion of the possible conflict between the award of damages and the seventh amendment). In *United States v. Welden*, 568 F. Supp. 516 (N.D. Ala. 1983), a federal district court held the restitution provisions of the Victim and Witness Protection Act unconstitutional as violations of the convicted person's seventh amendment right to a jury trial.

43. Many states have recently enacted restitution statutes which allow state courts the option of restitution sentencing. See, e.g., ALA. CODE §§ 15-18-65 to -78 (1982 & Supp. 1983); ARIZ. REV. STAT. ANN. § 13-603C (Supp. 1983-1984); FLA. STAT. ANN. § 775.089 (West Supp. 1983); HAWAII REV. STAT. § 706-605(1)(e) (Supp. 1982); ILL. ANN. STAT. ch. 38, § 1005-5-6 (Smith-Hurd 1982); KY. REV. STAT. ANN. § 431.200 (Baldwin 1983); ME. REV. STAT. ANN. tit. 17-A, §§ 1321-30 (1983 & Supp. 1983-1984); MISS. CODE ANN. §§ 99-37-1 to -23 (Supp. 1983); N.J. STAT. ANN. § 2C:43-3 (West 1982); OHIO REV. CODE ANN. § 2929.11 (Page Supp. 1982); OR. REV. STAT. §§ 137.103, .106, .109 (1981); PA. STAT. ANN. tit. 18, § 1106 (Purdon 1983); UTAH CODE ANN. § 76-3-201 (Supp. 1983); WASH. REV. CODE ANN. § 9A.20.030 (Supp. 1983-1984). See also Note, *supra* note 42 (an overview of contemporary restitution and an analysis of The Victim and Witness Protection Act of 1982 and *United States v. Welden*); Note, *The 1981 Oklahoma Crime Victim Compensation Act*, 17 TULSA L.J. 260 (1981) (a historical development of victim compensation and an analysis of Oklahoma's victim compensation statute).

44. H.R. 4554, *supra* note 2, § 2 (proposed new ch. 231, § 3621 of title 18 U.S.C.).

45. *Id.* § 3 (proposed amendments to ch. 235, § 3732(a) of title 18 U.S.C.).

46. *Id.* § 3 (proposed amendments to ch. 235, § 3732(b)(1) of title 18 U.S.C.).

47. See *id.* § 3731. Compare the provisions of S. 1762, note 66, *infra*, which allow both the government and the defendant to appeal sentences falling outside the sentencing guidelines called for by the legislation.

48. H.R. 4554, *supra* note 2, § 3 (proposed amendments to ch. 235 § 3732(b)(2)(A) of title 18 U.S.C.). This provision applies where the sentence (1) is not greater than the prosecutor recommended or

ing a concern that appellate courts not be flooded by sentence appeals, this limitation manifests an awareness that, absent such express limitation, appellate sentence review exposes to appeal even guilty plea situations.<sup>49</sup> These situations, of course, constitute a large percentage of convictions.<sup>50</sup>

A key feature of H.R. 4554 is its provision for the establishing standards relating to "sentencing guidelines."<sup>51</sup> The bill authorizes the Judicial Conference of the United States to prescribe for the approval of Congress sentencing guidelines for the promotion of fairness, certainty, and uniformity in sentencing.<sup>52</sup> Each guideline should set out "the appropriate disposition of a case within specific offender categories and within each offense category."<sup>53</sup> Moreover, any guideline submitted must be accompanied by an impact statement, setting out the expected effect of the guideline on Federal courts, prisons, and expenditures.<sup>54</sup> This impact statement is intended to help develop a cost-benefit analysis of each proposed guideline. These analyses will be especially important in light of current concerns regarding court dockets, prison overcrowding and budget deficits. The House bill further establishes, within the Judicial Conference, a Sentencing Guidelines Commission to gather and analyze sentencing information on a continuing basis.<sup>55</sup> Furthermore, the Commission is charged with the duty to recommend sentencing guidelines to the Conference and standards relating to their implementation.<sup>56</sup> The provisions relating to sentencing guidelines are intended to improve significantly both the fairness of sentencing and the appearance of fairness. This improvement is intended to effect a consequent diminution in the resentment caused when the person sentenced feels the system has treated him arbitrarily.

One concern remains, however, relating to the make-up of the Commission. Five of its nine members are to be Federal judges.<sup>57</sup> Given the wide range of extra-judicial expertise relevant to the sentencing decision, the judiciary seems overrepresented. On the other hand, such majority representation might be necessary to secure the respect and cooperation of Federal judges on whom, in the final analysis, effective implementation of the guidelines depends.<sup>58</sup>

One further problem with H.R. 4554 is its emphatic attention to detail, especially regarding the operation of executive agencies with which it deals. Many of the matters the bill specifically addresses could have been reserved for agency discretion or consolidated into a more comprehensive statutory statement, with elaboration left to the agencies. Agencies need a fair amount of discretion to deal with the great variety of situations that arise, situations in connection with which the agencies are more expert than Congress.<sup>59</sup> Further, detailed legislation creates

agreed not to oppose; or (2) where the sentence was agreed to by both the prosecution and the defense.  
*Id.*

49. "Congress has pondered for decades the concept of appellate review of sentences and [due to concerns over flooding the appellate courts] has hesitated to act." *Solem v. Helm*, — U.S. —, 103 S. Ct. 3001, 3022 (1983) (dissenting opinion).

50. See BUREAU OF JUSTICE STATISTICS, *supra* note 10, at 65.

51. H.R. 4554, *supra* note 2, § 4(a) (proposed new ch. 239, §§ 3791-97 of title 18 U.S.C.). Specifically mandated is the development of standards for coordinating sentencing and plea bargaining policies. Rodino, *supra* note 1, at 232 (citing H.R. 4554, § 4 (proposed new ch. 239, § 3793(a) of title 18 U.S.C.)).

52. H.R. 4554, *supra* note 2, § 4(a) (proposed new ch. 239, § 3791(a)(1) of Title 18 U.S.C.).

53. *Id.* § 3792(b).

54. *Id.* § 3791(b).

55. *Id.* § 3793.

56. *Id.* § 3793(a). The Commission will, among its other duties, recommend standards for judges in the acceptance of plea agreements, *id.* § 3793(a)(4), and standards for assessing federal prison capacity, *id.* § 3793(a)(6).

57. See Rodino, *supra* note 1, at 231.

58. *Id.*

59. See *Administrative Law and Governmental Relations of the Committee on the Judiciary, 1975: Hearings*

the danger that an untoward amount of agency effort will be directed at ascertaining the statutory requirements and assuring that in each case every statutory base is touched.<sup>60</sup> Bureaucracy, make-work and wheel-spinning result.<sup>61</sup>

### SENATE BILL 1644

The second penal reform bill recently addressed in the *Journal of Legislation* is the Sentencing Improvement Act of 1983 (S. 1644).<sup>62</sup> A more limited and focused bill than H.R. 4554, S. 1644 uses as its take-off point the current problem of prison overcrowding. According to the bill, prison space is a scarce resource<sup>63</sup> which must be reserved for "those dangerous and violent criminals who pose the most serious threat to society."<sup>64</sup> The Senate bill proposes that a variety of alternative sentences and penalties, including restitution and community service,<sup>65</sup> be used for nonviolent and nondangerous offenses.<sup>66</sup>

Alternative sentences such as restitution and community service, however, unless carefully administered, may fail as alternatives to incarceration, becoming instead added penalties for those who otherwise would have been placed on probation.<sup>67</sup> As one commentator cautions, a "primary objective in diversion-from-prison programs is to ensure that the method of selecting offenders guarantees that program participants are people who would otherwise be imprisoned."<sup>68</sup>

A separate section of S. 1644 establishes a presumption that imprisonment is an appropriate disposition for specified categories of offenses and inappropriate for others.<sup>69</sup> Nonetheless, sentencing courts retain considerable discretion in fashion-

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on H.R. 3658, H.R. 8231 and Related Bills Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 444 (1975) (statement of Stephen Kurzman, Assistant Secretary for Legislation, H.E.W.).

60. *See id.* at 447.

61. The Supreme Court struck down the legislative veto in *Immigration and Naturalization Service v. Chadha*, — U.S. —, 103 S. Ct. 2764 (1983). This may make detailed statutes more attractive to Congress. *See note, INS v. Chadha; The Future Demise of Legislative Delegation and the Need for a Constitutional Amendment*, 11 J. LEGIS, 317 (1984).

62. S. 1644, *supra* note 4.

63. *Id.* S. 1644, *supra* note 4, (proposed new ch. 232, § 3671(b) of title 18 U.S.C.).

64. *Id.*

65. Community service can be seen as one form of restitution. *See Read, supra* note 30, at 324, 326, 331. This seems especially true if the offender, financially unable to make restitution to the victim, is required to perform community service for a number of hours directly reflecting the "dollar value of restitution owed." *See id.* at 330. Community service programs have been called "service restitution" or "symbolic restitution." Umbreit, *supra* note 30, at 3.

66. S. 1644, *supra* note 4, (proposed new ch. 232, § 3671(b) of title 18 U.S.C.). The U.S. Senate, on February 2, 1984, passed S. 1762, the Comprehensive Crime Control Act of 1984. *See S. 1762*, 98th Cong., 2d. Sess., 130 CONG. REC. S759 (daily ed. Feb. 2, 1984). As an amendment to that act, a resolution expressing the sense of the Senate (but not carrying the force of law) and reflecting the spirit of S. 1644 was offered and accepted. The purpose of the amendment was to encourage judges to implement that spirit pending the promulgation of the sentencing guidelines called for by S. 1762. The sponsors of S. 1644 remained hopeful, however, that that legislation would itself ultimately be passed. *See id.* at S. 542-45.

67. *See Umbreit, supra* note 30, at 3. Umbreit suggests that community service programs in the United States have largely been used for cases traditionally disposed of by fine or probation, not incarceration. *Id.* at 4. *See also Read, supra* note 30, at 327.

68. Read, *supra* note 30, at 327.

69. S. 1644, *supra* note 4, (proposed new ch. 232, § 3672 of title 18 U.S.C.). "Inappropriate categories for incarceration are those that do not involve the threat or use of force, endanger national security, threaten or cause serious physical harm to others, and that none of the following circumstances are present:" (1) offense constituted offender's major source of income and required special skill, or (2) defendant expected to receive or received compensation for the offense, or (3) offense involved the illegal manufacture, importation, exportation, distribution or dispensing of a controlled substance, or (4) defendant was convicted of an offense involving explosives or firearms, or (5) the defendant was convicted of an offense involving a violation of the public trust, or (6) there are substantial and compelling reasons for imposing a prison sentence. *Id.*



ing penal terms.<sup>70</sup>

Perhaps the most interesting provision of S. 1644 is allowing courts, when there are no ascertainable victims of the offense, to order defendants to contribute an amount not greater than the gain from the offense to a Victim Fund.<sup>71</sup> Monies in the Fund are administered by the Treasurer of the United States and distributed on a per capita basis to programs in all states having similar victim compensation funds.<sup>72</sup> This provision effects three worthwhile purposes: first, it deprives the offender of his ill-gotten gain; second, it funds a good cause; and third, it encourages states to establish or maintain victim compensation programs.

Senate bill 1644 thus does many good things, and it is, therefore, perhaps unduly critical to suggest that it does them largely for the wrong reason. Restitution, community service, and other alternative sentences are desirable sentencing goals in themselves. In contrast, many commentators agree that imprisonment dehumanizes and brutalizes prisoners, hardening them against society.<sup>73</sup> Consequently, they assert that imprisonment should be used as rarely as is consistent with public safety. Imprisonment versus nonimprisonment transcends the purely economic question of our ability or willingness to provide the tax monies for new prisons.<sup>74</sup> It involves assessments of effective rehabilitation, the humane treatment of offenders and the protection of our citizens. The erroneous assumption behind S. 1644, and of Senator Armstrong's able defense of it, is its implication that prison sentences are to be avoided only because we do not have enough prisons.<sup>75</sup>

### CONCLUSION

Both H.R. 4554 and S. 1644 provide many needed reforms. Were either to become law, however, our country would still have an archaic, inhumane corrections system. The pity is that our society remains unwilling to pay the price of effective, humane corrections and appears unlikely to do so in the foreseeable future.

70. *Id.* (proposed new ch. 232, § 3672 of title 18 U.S.C.). Section 3672 is entitled, "Offenses for which restitution and community service *should* be imposed" (emphasis added). Moreover, despite the presumption, a defendant may be sentenced to imprisonment if there are "specified substantial and compelling reasons". *Id.* § 3672(b)(6).

71. *Id.* (proposed new ch. 232, § 3673(b) of title 18 U.S.C.).

72. At least 37 states and the District of Columbia have compensation programs for victims of violent crime. BUREAU OF JUSTICE STATISTICS, *supra* note 10, at 26. In 1980, \$34 million in victim compensation was awarded. *Id.*

73. *See, e.g.,* D. Cressy, *Adult Felons in Prisons*, in PRISONS IN AMERICA 124 (1983).

74. Admittedly, imprisonment is our most expensive sentencing device. At the Federal level, the average annual cost per inmate exceeds \$13,000. Among the states, annual per inmate cost ranges from \$5121 to \$22,748. In 1982 dollars, estimates of prison construction costs ranged from \$34,000 per prison bed to \$110,000. BUREAU OF JUSTICE STATISTICS, *supra* note 10, at 93.

75. *See* Armstrong, *supra* note 3, at 238: "Unfortunately, this country's prison capacity is not growing nearly as fast [as the prison population]." (Emphasis added). *Cf.* Rodino, *supra* note 1, at 226.