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ABOLISHING PAROLE: ASSURING FAIRNESS AND CERTAINTY IN SENTENCING

*Karen Skrivseth**

Congress has recently undertaken a major revision of sentencing practices in the federal criminal justice system.¹ The primary impetus for reform is dissatisfaction with the existing indeterminate

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The views stated in this Article are those of the author and do not necessarily represent the views of the United States Department of Justice.

1. S. 1437, 95th Cong., 2d Sess. (1978). This Article deals with §§ 101 and 124 of the bill. *Id.* §§ 101, 124. Section 101 of the bill, if enacted, will amend Title 18 of the United States Code regarding, *inter alia*, sentencing guidelines. All subsequent textual and footnote references to § 101 of the bill are to the proposed section numbers in Title 18 of the United States Code, and are hereinafter cited as Proposed 18 U.S.C. Section 124 of the bill, if enacted, will amend Title 28 of the United States Code to establish a Sentencing Commission. All subsequent textual and footnote references to § 124 of the bill are to proposed section numbers in Title 28 of the United States Code, and are hereinafter cited as Proposed 28 U.S.C.

This Article focuses on S. 1437 in the form that it passed the United States Senate by a vote of 72 to 15 on January 30, 1978. 124 CONG. REC. S860 (daily ed. Jan. 30, 1978). The bill was introduced in somewhat different form on May 2, 1977, by Senators McClellan and Kennedy, 123 CONG. REC. S6833 (daily ed. May 2, 1977). H.R. 6869, identical to the original version of S. 1437, was introduced by Congressman Rodino on May 3, 1977. 123 CONG. REC. H3959 (daily ed. May 3, 1977).

The major difference between the sentencing provisions in H.R. 6869 and those in S. 1437 is the Senate bill's marked transformation of the current indeterminate system into a determinate scheme. S. 1437 limits the use of indeterminate sentences to the unusual case in which the judge finds, consistent with sentencing guidelines, that only a prison setting can provide a needed rehabilitation program. Proposed 28 U.S.C., *supra*, §§ 994(b)(2), 994(j). See S. REP. NO. 605, 95th Cong., 1st Sess. 883, 1166 (1977). H.R. 6869 neither requires determinate sentencing nor restricts its application to a particular type of case. The bill's only specific limitation is that the maximum term of parole ineligibility that can be imposed is 90% of the term of imprisonment. H.R. 6869, 95th Cong., 1st Sess. § 101 (1977) (to have been codified, if enacted, in 18 U.S.C. § 2301(c)).

The Subcommittee on Criminal Justice of the House Committee on the Judiciary reported H.R. 13959, 95th Cong., 2nd Sess., 124 CONG. REC. H8970 (daily ed. Aug. 17, 1978). This bill proposes only minor changes in sentencing law which would not affect the amount of indeterminacy in sentencing or the role of the United States Parole Commission in determining prisoner release dates. This bill was not reported out of the full committee.

sentencing scheme² and its historical basis,³ the rehabilitation model.⁴ Under the present system, prison sentences are imposed in two stages. Initially, the judge determines the kind of sentence to impose;⁵ if imprisonment is selected, the judge must determine the maximum period the offender will spend in prison.⁶ The United States Parole Commission subsequently decides what portion of this term the offender actually serves.⁷ The original rationale for this indeterminate sentencing process was that it enabled the length of a prison sentence to be tailored to an offender's progress toward rehabilitation.⁸ The rehabilitative model, however, has been discredited,⁹ and in practice is no longer the sole or even primary basis for determining types or lengths of sentences.¹⁰

2. For purposes of this Article, an "indeterminate" sentence means a sentence to imprisonment which sets the maximum term a defendant will serve; the actual release date is determined after the sentence is imposed. A sentence is described as indeterminate even if the defendant is ineligible for release during a portion of the imprisonment term. A "determinate" sentence means a sentence of imprisonment that specifies the term a defendant will actually serve.

3. See Act of June 25, 1910, ch. 387, § 3, 36 Stat. 819; 45 CONG. REC. 6374 (1910) (remarks of Rep. Clayton); AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 34-40, 84 (1971).

4. See M. FRANKEL, CRIMINAL SENTENCES 86-102 (1973); N. MORRIS, THE FUTURE OF IMPRISONMENT 15-18 (1974); A. VON HIRSCH, DOING JUSTICE 9-18 (1976); J.Q. WILSON, THINKING ABOUT CRIME 59, 191-93 (1975); Plattner, *The Rehabilitation of Punishment*, PUB. INTEREST, Summer 1976, at 104; Von Hirsch, *The Aims of Imprisonment*, CURRENT HIST., July/Aug. 1976, at 1.

5. Most statutes that create a federal offense specify a maximum term of imprisonment and a maximum fine. The sentencing judge may impose any term of imprisonment or fine up to the legislative maximums, or a combination of the two sentences. See, e.g., 18 U.S.C. §§ 471, 875, 1341 (1976). For most offenses, the judge may suspend imposition or execution of the sentence and place the convicted defendant on probation, or impose a split sentence of up to six months in prison followed by probation. See, e.g., *id.* § 3651.

6. The statute that creates the offense specifies the maximum term of imprisonment. See note 5 *supra*. There is no general statute governing the imposition of prison terms. In a few cases, the statute dictates the actual term or a minimum term of imprisonment. See, e.g., 18 U.S.C. §§ 924(c), 2114 (1976). However, unless explicitly provided otherwise, a defendant convicted of an offense for which there is a "mandatory" term of imprisonment may be placed on probation, and, if sentenced to prison, paroled. Compare, for example, the sentencing provision applicable to a first offender under 18 U.S.C. § 924(c) with that applicable to a second offender. See also S. 2698, 94th Cong., 1st Sess. § 7, 121 CONG. REC. 37,561 (1975).

7. 18 U.S.C. §§ 4203(b), 4206(a) (1976). The United States Parole Commission has jurisdiction over any prisoner whose term exceeds one year. *Id.* § 4205(a).

8. See sources cited note 3 *supra*.

9. See P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM 27, 54, 69 (1977). See also sources cited note 4 *supra*.

10. The primary purposes for parole-release decisions are now to reduce un-

The Parole Commission itself has recognized that the theoretical individualization of sentences produced by deferring the parole decision has resulted in disparate sentences for similar defendants¹¹ and uncertainty about an offender's actual release date.¹² Although the Commission has attempted to ameliorate these problems,¹³ it cannot eliminate the disparity and uncertainty caused by the absence of adequate legislative guidance for sentencing judges.¹⁴

To remedy the problems of disparity and uncertainty inherent in the indeterminate model of sentencing, S. 1437—the proposed comprehensive revision of the Federal Criminal Code¹⁵ passed by the United States Senate in the 95th Congress¹⁶—establishes a Sentencing Commission empowered to issue guidelines to structure the exercise of discretion by the sentencing judge.¹⁷ This bill makes most judicially imposed sentences determinate, subject to reduction only for satisfactory compliance with institutional regulations.¹⁸ S. 1437 further limits the Parole Commission's responsibilities to setting release dates¹⁹ for a very small percentage of federal

warranted sentencing disparity and to provide increased certainty in sentencing. See 42 Fed. Reg. 39,808 (1977); Statement of Cecil C. McCall, Chairman, United States Parole Commission, presented to the Criminal Justice Subcommittee of the House Judiciary Committee, at 5, 29-30 (Apr. 18, 1978) (on file in office of the *Hofstra Law Review*) [hereinafter cited as Statement of Cecil C. McCall].

11. See 38 Fed. Reg. 31,942 (1973).

12. 42 Fed. Reg. 39,808 (1977).

13. In 1972 the Parole Commission began experimenting with parole guidelines to reduce unwarranted disparity in judicially imposed terms of imprisonment. P. Hoffman & D. Gottfredson, *Paroling Policy Guidelines: A Matter of Equity* (NCCD Parole Decision-Making Project, Supp. Rep. No. 9, 1973). Guidelines have been in use for all eligible federal prisoners since 1973, 38 Fed. Reg. 31,942 (1973); their use was legislatively endorsed in 1976 by amendment of §§ 4203(a)(1) and 4206(a) of Title 18 of the United States Code. Parole Commission and Reorganization Act, Pub. L. No. 94-233, § 2, 90 Stat. 219 (1976). To increase sentence certainty, in 1977 the Parole Commission began to issue "presumptive release dates" to most prisoners shortly after they commenced serving their sentences. 42 Fed. Reg. 39,808 (1977).

14. See *Reform of the Federal Criminal Laws: Hearings on S. 1437 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 8899, 8902 (1977) (statement of Pierce O'Donnell) [hereinafter cited as *1977 Senate Hearings*].

15. 18 U.S.C. (1976).

16. 124 CONG. REC. S860 (daily ed. Jan. 30, 1978). See note 1 *supra*.

17. Proposed 18 U.S.C., *supra* note 1, § 2003(a)(1)(D), (a)(2); Proposed 28 U.S.C., *supra* note 1, §§ 991, 994(a)(1).

18. See Proposed 18 U.S.C., *supra* note 1, §§ 2003(a)(1)(D), (a)(2), 3824(a)(1), (b); Proposed 28 U.S.C., *supra* note 1, § 994(b), (j); S. REP. NO. 605, 95th Cong., 1st Sess. 883 (1977).

19. Proposed 18 U.S.C., *supra* note 1, § 3831(a).

prisoners, and determining the terms and conditions of postrelease supervision for all prisoners whose terms of imprisonment exceed one year.²⁰

The parole provisions of S. 1437 indicate the Senate's awareness that most aspects of the present parole system should not be included in a determinate sentencing system. Unfortunately, S. 1437 does not go far enough: Effective determinate sentencing reform can best be accomplished by completely eliminating the existing parole structure. This Article argues that the United States Parole Commission should be abolished; all necessary parole functions can be incorporated into a fully determinate sentencing system without undue structural or financial disruption of the federal criminal justice system.²¹

UNWARRANTED DISPARITY AND UNCERTAINTY IN SENTENCING

In General

Unwarranted disparity in sentences imposed results when judges impose different sentences which cannot be justified by dissimilarities among offenses or histories or characteristics of defendants.²² Unwarranted disparity in sentences actually served occurs when mechanisms in the federal criminal justice system for correcting disparity in sentences imposed are not successful.²³ Uncer-

20. *Id.* § 3841.

21. A number of recent publications suggest that parole in its present form should be abolished in the context of a determinate sentencing system. *See, e.g.*, A. NEIER, CRIME AND PUNISHMENT: A RADICAL SOLUTION 197-98 (1976); P. O'DONNELL, M. CHURGIN & D. CURTIS, *supra* note 9, at 68-71; Joint Committee of the Criminal Justice Section, American Bar Association, *The Legal Status of Prisoners*, 14 AMER. CRIM. L. REV. 377, 389-97 (1977); McLaughlin, *The Case of the Criminologist Who Changed His Mind*, Phila. Inquirer, Nov. 26, 1978 (Today Magazine), at 16, 40; A. von Hirsch & K. Hanrahan, *Abolish Parole?* 36-37 (Sept. 1978) (summary of report submitted to National Institute of Law Enforcement and Criminal Justice suggesting parole in its present form should be abolished, but Parole Commission should be retained to determine lengths of prison terms under sentencing guidelines promulgated by Sentencing Commission).

22. Sentences vary according to the judge who imposes sentence. *See, e.g.*, M. FRANKEL, *supra* note 4, at 21; A. Partridge & W. Eldridge, Second Circuit Sentencing Study, A Report to the Judges of the Second Circuit, *reprinted in Reform of the Federal Criminal Laws: Hearings on S. 1 and S. 1400 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 8101, 8104-14 (1974). Sentences imposed in different districts for similar offenses may also vary. *See generally* L.P. SUTTON, FEDERAL SENTENCING PATTERNS (1978).

23. For example, there are wide variations in time served in prison by male

tainty regarding the length of time a prisoner will serve in prison occurs when the date of release is subject to constant adjustment.²⁴

Disparity in Judicially Imposed Sentences

Under current federal law unwarranted disparity in sentences imposed is unavoidable. In many cases, there are several substantive criminal statutes under which a defendant may be prosecuted. These statutes usually provide different maximum sentences for similar offenses.²⁵ Congress has further enacted several sentencing statutes that judges may use in selecting an appropriate sentence within the statutory maximum.²⁶ Neither substantive criminal law nor sentencing statutes provide guidance to structure a judge's sentencing decision.

Generally, the sentencing judge has unfettered discretion to choose among a number of sentencing options. The judge may either impose a term of imprisonment, up to the maximum length specified for the particular offense, or a sentence to pay a fine, up to the maximum amount specified for the particular offense, or a

bank robbers of similar age, marital status, education, and prior criminal record. 1977 Senate Hearings, *supra* note 14, at 9200, 9228 app. (attachment D) (paper prepared by Karen Skrivseth, Office for Improvements in the Administration of Justice, U.S. Dep't of Justice).

24. The official report on the Attica riots indicates that the uncertainty of release dates was a major cause of the disturbance. NEW YORK STATE SPECIAL COMMISSION ON ATTICA, ATTICA (1972), *cited in* A. VON HIRSCH, *supra* note 4, at 158 n.11. Prisoners generally favor certainty regarding their release dates early in the sentencing process rather than the uncertainties of past Parole Commission practices. See Emmrich, *Pen Inmates Air Grips*, Atlanta Const., Dec. 5, 1978, at 1-C, col. 5.

25. For example, there are approximately 130 theft offenses under current law, with maximum sentences ranging from no imprisonment and a \$500 fine, 18 U.S.C. § 288 (1976), to 10 years of imprisonment and a \$10,000 fine, *id.* § 641. The theft statutes in current law are set forth in SUBCOMM. ON CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., IMPACT OF S. 1437 UPON PRESENT FEDERAL CRIMINAL LAWS, PT. II, at 1153-1223 (Comm. Print 1978). While the theft statutes occasionally vary the penalty according to the amount that is stolen, *e.g.*, 18 U.S.C. § 288 (1976), there is little difference among offenses that would justify differences in sentences. Embezzlement is an excellent illustration. The maximum penalty for embezzling manpower funds is a \$10,000 fine and two years of imprisonment if the amount embezzled is more than \$100; if the amount embezzled is not more than \$100 the maximum penalty is a \$1,000 fine and one year of imprisonment. *Id.* § 665(a). If a bankruptcy trustee embezzles any amount of money from a bankrupt estate, the maximum penalty is a \$5,000 fine and five years of imprisonment. *Id.* § 153. If a person entrusted with public funds embezzles them, the maximum penalty, if the amount embezzled is more than \$100, is a fine of the amount embezzled and 10 years of imprisonment; if the amount embezzled is \$100 or less, the maximum penalty is a \$1,000 fine and one year of imprisonment. *Id.* § 648.

26. See notes 27-51 *infra* and accompanying text.

combination of the two.²⁷ For most offenses, the judge has the additional options of placing the convicted offender on probation²⁸ or sentencing him or her to a "split sentence," consisting of a brief period in prison followed by probation.²⁹

In addition, the sentencing judge determines the period of time a prisoner must be incarcerated before he or she is eligible for parole.³⁰ The judge may prescribe that a prisoner whose term of imprisonment exceeds one year is eligible for parole immediately,³¹ or after serving up to one-third of the sentence.³² If the sentencing judge does not specify when the prisoner is eligible for parole, he or she is eligible by operation of law after one-third of the term is served.³³

Opportunities for exercising unstructured judicial discretion are compounded by the number of alternative sentencing statutes under which a judge may sentence offenders possessing particular characteristics. A defendant between the ages of eighteen and twenty-six may be sentenced under the Federal Youth Corrections Act.³⁴ Although typically under this Act an indeterminate six-year sentence is imposed which requires release of the offender on

27. Most statutes that create federal offenses specify the maximum prison term and maximum fine that may be imposed, and whether a fine, a term of imprisonment, or a combination of the two may be imposed. *See, e.g.*, 18 U.S.C. §§ 874, 2113(a) (1976). A few statutes provide only for a fine, *see, e.g., id.* § 288, or only for imprisonment, *see, e.g., id.* § 2112.

28. The judge may suspend the imposition or execution of the sentence of a person convicted of any offense not punishable by death or life imprisonment and place the person on probation. *Id.* § 3651.

29. *Id.* Under this section, the judge may split the sentence between a prison term of up to six months and a period of probation for any offense not punishable by death or life imprisonment if the maximum term of imprisonment is more than six months.

30. A person sentenced to a term of imprisonment of one year or less is not eligible for parole. *See id.* § 4205(a)-(b). Instead, the offender either serves his or her full term less good-time credit earned, *id.* § 4163, or, if the sentence is between six months and one year, the prisoner may be released "as if on parole" after serving one-third of the sentence. *Id.* § 4205(f). A person is released "as if on parole" by operation of law rather than by Parole Commission designation. The offender is subject to parole supervision as if the Commission had placed him or her on parole.

31. *Id.* § 4205(b)(2).

32. *Id.* § 4205(b)(1).

33. *Id.* § 4205(a).

34. *Id.* §§ 5005-5026. The Federal Youth Corrections Act applies, by its terms, to offenders under the age of 22 at the time of conviction, *id.* § 5006(d); however, the Act's sentencing provisions may be applied to defendants between the ages of 22 and 26 at the time of conviction. *Id.* § 4216. The juvenile delinquency statutes apply to persons who commit offenses before they are 18 years old if the offenses committed would be crimes if committed by adults. *Id.* § 5031.

parole after serving no more than four years,³⁵ the judge may sentence the offender to probation,³⁶ or to a term of imprisonment not exceeding the term that could have been imposed had the offender been sentenced as an adult.³⁷ An offender sentenced under the Federal Youth Corrections Act is eligible for parole immediately,³⁸ and generally is paroled at an earlier date than if he or she were sentenced as an adult.³⁹

A defendant who is an addict and is convicted of certain nonviolent offenses may be sentenced to undergo treatment under Title II of the Narcotic Addict Rehabilitation Act of 1966.⁴⁰ This sentence may be an indeterminate one that does not exceed either the sentence that would be applicable had the offender been a nonaddict adult, or a ten-year prison term, whichever is shorter.⁴¹ Such an offender is eligible for parole after "he has been treated for six months"⁴² and generally serves a shorter term of imprisonment than his or her regular adult counterpart.⁴³

There is one sentencing statute that is applied pursuant to the decision of the prosecutor rather than the sentencing judge.⁴⁴ If the offender has a substantial felony record,⁴⁵ makes a living by committing felonies,⁴⁶ or engages in racketeering activity,⁴⁷ the prosecutor may seek "dangerous special offender"⁴⁸ sentencing. If the judge finds that the offender belongs to one of these groups and is "dangerous,"⁴⁹ he or she may impose "an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law."⁵⁰ A similar

35. *Id.* §§ 5010(b), 5017(c).

36. *Id.* § 5010(a).

37. *Id.* § 5010(c).

38. *Id.* § 5017(a). See 28 C.F.R. § 2.5 (1978).

39. The guidelines issued by the United States Parole Commission for adult offenders are separate from those issued for persons sentenced under either the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1976), or title II of the Narcotic Addict Rehabilitation Act. *Id.* §§ 4251-4256. The adult guidelines recommend longer prison terms than the youth and addict guidelines for all offenses of moderate or greater severity. 28 C.F.R. § 2.20 (1978).

40. 18 U.S.C. §§ 4251-4256 (1976).

41. *Id.* §§ 4251, 4253(a).

42. *Id.* § 4254.

43. See note 39 *supra*.

44. 18 U.S.C. § 3575(a) (1976).

45. *Id.* § 3575(e)(1).

46. *Id.* § 3575(e)(2).

47. *Id.* § 3575(e)(3).

48. *Id.* § 3575(a).

49. *Id.* § 3575(a)-(b), (e)-(f).

50. *Id.* § 3575(b).

sentencing statute applies to persons who traffic in controlled substances.⁵¹

The inevitable consequence of the unbridled judicial discretion that results from both the varied maximum sentences applicable to similar offenses and the numerous sentencing alternatives available for each offense is that similarly situated defendants receive different types or lengths of sentences⁵² or are eligible for parole after different periods of time.⁵³ The appearance of unwarranted disparity is compounded by the absence of a requirement that judges state reasons for their sentences:⁵⁴ Even if seemingly unwarranted disparities in sentences are justified by differences among offenses and offenders, this cannot be ascertained from the records in criminal cases.

51. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 409, 21 U.S.C. § 849 (1976).

52. Of the 36,505 persons convicted of federal offenses in the twelve-month period ending June 30, 1978, 17,426, or 47.7%, were sentenced to terms of imprisonment. Administrative Office of the United States Courts, 1978 Annual Report of the Director for the Twelve-Month Period Ending June 30, 1978, Table D-7 (corrected table available from Administrative Office of the United States Courts). Even among similar offenses, there is substantial disparity concerning whether incarceration is imposed. For example, in the same period 1,979, or 42.1%, of the 4,698 persons convicted of "larceny" or "theft" were sentenced to terms of imprisonment, whereas 466, or 25.5%, of the 1,822 persons convicted of "embezzlement" were sent to prison. *Id.*, Table D-5 (corrected table available from Administrative Office of the United States Courts). This apparent disparity appears even when only felony convictions for larceny or theft are compared with felony convictions for embezzlement: Of the 3,547 defendants sentenced for a larceny or theft felony, 1,863, or 52.4%, were sentenced to prison, whereas 437, or 31.2%, of the 1,399 defendants sentenced for an embezzlement felony were sentenced to prison. The average term of imprisonment for the felony offenders was 24.5 months for persons convicted of larceny or theft and 13.5 months for persons convicted of embezzlement. *Id.* See also notes 22 & 23 *supra*.

53. Although 1,132, or 6.3%, of the 17,426 defendants sentenced to prison during the twelve-month period ending June 30, 1978, were eligible for early release on parole pursuant to 18 U.S.C. § 4205(b)(1) or (b)(2), there was substantial variation among districts regarding the percentage of prisoners sentenced under these provisions. For example, none of the district judges in the First Circuit imposed a sentence under § 4205(b)(1) or (b)(2) in any of the 412 cases in which a prison term was imposed in the twelve-month period, whereas half the defendants sentenced to prison (105 out of 212) by the United States District Court for the District of Kansas received sentences pursuant to one of these provisions. Administrative Office of the United States Courts, 1978 Annual Report of the Director for the Twelve-Month Period Ending June 30, 1978, Table D-7 (corrected table available from Administrative Office of United States Courts).

54. See, e.g., *United States v. Grayson*, 98 S. Ct. 2610, 2618 n.1 (1978) (Stewart, J., dissenting). See also Proposed Rules on Sentencing of the Judicial Council of the Second Circuit § III(c)(3) (Mar. 17, 1976), quoted in *United States v. Ramos*, 572 F.2d 360, 361 (2d Cir. 1978).

Disparity in Prison Terms Actually Served

Originally, the role of the United States Parole Commission was to determine whether a person sentenced to a term of imprisonment could be released from prison before the expiration of the term without undue risk that the offender would commit further criminal offenses.⁵⁵ As it became increasingly apparent that knowledge of human behavior is inadequate to predict when a prisoner has been rehabilitated,⁵⁶ the Parole Commission changed its focus from determining when rehabilitation has occurred to alleviating disparity in prison sentences and increasing certainty about release dates.

In 1973 the United States Parole Commission promulgated guidelines applicable to all federal prisoners eligible for parole⁵⁷ to mitigate unwarranted disparity in sentences to terms of imprisonment.⁵⁸ These guidelines recommend a range of months that each prisoner should spend in prison. This range is calculated by rating the offender according to his or her criminal history, drug dependence, and employment history,⁵⁹ and by categorizing the offense according to its relative severity.⁶⁰ In deciding whether to release a

55. See 45 CONG. REC. 6374 (1910) (remarks of Rep. Clayton).

56. See sources cited notes 3 & 4 *supra*.

57. The original parole guidelines appear at 38 Fed. Reg. 31,942 (1973). The current guidelines appear at 28 C.F.R. § 2.20 (1978). They are reproduced in Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 HOFSTRA L. REV. 89, 104-06 (1978). The United States Parole Commission is considering a substantial revision of the guidelines. 43 Fed. Reg. 46,859-67 (1978). The use of parole guidelines was legislatively endorsed by the enactment of the Parole Commission and Reorganization Act, Pub. L. No. 94-233, § 2, 90 Stat. 219 (1976) (codified at 18 U.S.C. §§ 4203(a) 1), 4206(a) (1976)).

58. See 28 C.F.R. § 2.20(a) (1978).

59. The list of offender characteristics, or "salient factor score," appears at 28 C.F.R. § 2.20 (1978). It is reproduced in Hoffman & Stover, *supra* note 57, at 107. The "salient factors" were selected after extensive empirical research concerning the history and characteristics of defendants released from prison and the relationship of those characteristics to the relative ability of parolees to avoid both violations of parole conditions that result in imprisonment and subsequent arrests or convictions. For a more detailed description of the items in the salient factor score, see U.S. Parole Comm'n Research Unit, U.S. Dep't of Justice, *Salient Factor Scoring Manual Revised* (U.S. Parole Comm'n Research Unit Rep. No. 14, 1977). For discussions of the development and revalidation of the salient factor score, see P. Hoffman & J. Beck, *Parole Decision-Making: A Salient Factor Score* (U.S. Board of Parole Research Unit Rep. No. 2, 1974); P. Hoffman & J. Beck, *Research Notes: Salient Factor Score Validation—A 1972 Release Cohort* (U.S. Board of Parole Research Unit Rep. No. 8, 1975); P. Hoffman, B. Stone-Meierhoefer & J. Beck, *Salient Factor Score and Release Behavior: Three Validation Samples* (U.S. Parole Comm'n Research Unit Rep. No. 15, 1977).

60. 28 C.F.R. § 2.20 (1978).

prisoner on parole, the Commission must consider the applicable guidelines range.⁶¹ A release date outside the guidelines range must be justified by a mitigating or an aggravating circumstance.⁶² Approximately eighty to eighty-five percent of parole-release decisions are within the guideline ranges.⁶³

Although parole guidelines have substantially reduced unwarranted disparity in lengths of prison terms, it is impossible for the Parole Commission alone to eliminate unwarranted disparity in sentences. For example, the Commission cannot affect disparity in sentencing that occurs when one of two similarly situated defendants is sentenced to a term of imprisonment while the other is placed on probation; nevertheless, this may be the greatest area of disparity.⁶⁴ The Commission cannot eliminate a prison sentence that should not have been imposed; it can only ameliorate this problem by releasing the prisoner on the date of parole eligibility. Conversely, the Commission cannot imprison a convicted person who should have been sentenced to a term of imprisonment but was not. Furthermore, the Parole Commission has no authority to lengthen the sentence of a person imprisoned for too short a period, or to shorten the term of imprisonment for a person who is not eligible for parole for an unreasonably long time.

Moreover, application of the guidelines can *produce* unwarranted disparity. The guidelines are not sufficiently detailed to re-

61. 18 U.S.C. § 4206(a) (1976); 28 C.F.R. § 2.20(b) (1978).

62. 18 U.S.C. § 4206(c) (1976); 28 C.F.R. § 2.20(c)-(d) (1978). An aggravating or mitigating circumstance may also be used to vary the severity rating for a decision within the guidelines. 28 C.F.R. § 2.20(d) (1978).

63. During the first half of fiscal year 1978, 82.5% of the prisoners released were incarcerated for the time recommended in the guidelines. S. Adelberg, *Workload and Decision Trends: Statistical Highlights, Interim Report for the Period Oct. 1976 to Mar. 1978*, at 15 (U.S. Parole Comm'n Research Unit Draft, July 12, 1978). The percentage of parole decisions within the guidelines since October 1974 has ranged from 79.9% for the period from October 1976 through September 1977 to 84.4% for the period from October 1974 through September 1975. B. Stone-Meierhoefer, *Workload and Decision Trends: Statistical Highlights 10/74-9/77*, at R-10 (U.S. Parole Comm'n Research Unit Rep. No. 18, 1977). The Parole Commission statistics show a release date outside the parole guidelines only if the deviation results from Commission discretion. A release date is considered to be within the guidelines if it falls outside the recommended range by operation of law. See P. Hoffman, *Federal Parole Guidelines: Three Years of Experience*, at J-5 (U.S. Board of Parole Research Unit Rep. No. 10, 1975).

64. A recently completed study of the feasibility of sentencing guidelines notes that what the authors call the "in-out" decision is a frequently overlooked aspect of unwarranted sentencing variation. L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, *SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION* 2-3 (1978).

flect important differences between offender and offense characteristics. Perhaps the most serious problem is that the guidelines frequently group dissimilar offenses in a single severity category.⁶⁵ Offense categorization rarely accounts for differences in the harm inflicted on victims.⁶⁶ Furthermore, the guidelines do not differentiate between an offender who has played a minor role in an offense and one who has planned and directed the commission of an offense by several other people.⁶⁷ It is virtually impossible to determine how the guidelines would differentiate between a defendant convicted of numerous counts and one convicted of a single count.⁶⁸

The list of offender characteristics in the parole guidelines⁶⁹ may also contribute to disparity. The rating for criminal history, for example, is determined by simply counting all prior felonies and most misdemeanors, without evaluating the relative seriousness of the prior offenses and with little regard for the length of time the prisoner obeyed the law prior to commission of the offense for which he or she is presently incarcerated.⁷⁰

65. For example, offering or accepting a bribe of a public official is treated in the current guidelines as an offense of moderate severity, with a guidelines recommendation that a prisoner spend from 12 to 32 months in prison, depending on the offender's characteristics. 28 C.F.R. § 2.20 (1978). The guidelines make no distinction regarding offense severity based on the quid pro quo for the bribe, the nature of the trust violated, the amount of the bribe, or the extensiveness of the bribery scheme. The proposed amendments to the guidelines set forth at 43 Fed. Reg. 46,863-67 (1978) would rank bribery according to the amount of the bribe or the monetary value of the favor demanded in return for the bribe; however, the amendments do not provide for other variations in offense characteristics. *See id.* at 46,867 n.11.

66. Property offenses are ranked according to the amount taken; robbery offenses are ranked according to whether a weapon was fired or a person injured. 28 C.F.R. § 2.20 (1978). However, property offense severity ratings do not distinguish between thefts where the defendant could not have known how much he or she would receive, and thefts where the defendant knew how much he or she was taking, such as embezzlement. The severity ratings also do not distinguish between similar amounts taken from victims who are able to withstand the loss and those who are not.

67. The parole guidelines rate the severity of conspiracy at the same level as the underlying offense if the offense is consummated, and at one level lower than the underlying offense if it is not consummated. 28 C.F.R. § 2.20 n.7 (1978) (adult guidelines). Thus, for example, the planner of a major bank robbery that is not consummated could be treated less severely than the person who holds up the bank alone, receives a small amount of money, and uses no weapon.

68. The notes to the guidelines state only that, "[i]f an offense behavior involved multiple separate offenses, the severity level may be increased." *Id.* at n.4.

69. *See* note 59 *supra* and accompanying text.

70. U.S. Parole Comm'n Research Unit, U.S. Dep't of Justice, Guideline Appli-

Release-Date Uncertainty

The Parole Commission has recently become concerned with the problem of uncertainty about the length of time a prisoner will actually spend in prison. The problem arises because a convicted defendant who is sentenced to a term of imprisonment exceeding one year is eligible for release on parole for at least two-thirds of the term.⁷¹ To alleviate the problems caused when a prisoner is uncertain about his or her release date until soon before actual release,⁷² the Commission amended its rules to provide that a "presumptive release date" be set in most cases following an initial hearing held within 120 days of a prisoner's arrival at a federal institution.⁷³

The presumptive release date system, however, leaves several problems unsolved. The sentencing judge does not determine the length of time an offender spends in prison unless the judge actually imposes a sentence within or below the range suggested in the guidelines. This generally ensures that the prisoner is released at the expiration of his or her sentence less credit earned under the good-time statutes, since the Parole Commission almost always sets the presumptive release date at the date the sentence expires mi-

tion Manual, 4.19-.20 app. (U.S. Parole Comm'n Research Unit Rep. No. 16, 1977) (adopted by the Commission as Appendix 4, U.S. Parole Comm'n Procedure Manual, on May 1, 1978) [hereinafter cited as Guideline Application Manual]. Offenses of vagrancy, loitering, disorderly conduct, and public drunkenness, and violations of local ordinances and traffic infractions, except serious offenses such as hit and run driving or driving while intoxicated, are excluded from the category of prior convictions. Juvenile "status offenses" are also excluded. *Id.* at 4.19 app. Offenses are not counted if the prisoner, before committing the offense for which he or she is imprisoned, had spent 20 consecutive years in the community without committing a crime. *Id.* at 4.20 app. Similarly, a "substantial," unspecified period spent in the community without committing an offense may place the prisoner in a better risk category; this gives him or her a better salient factor score than would otherwise apply. *Id.*

71. 18 U.S.C. § 4205(a)-(b) (1976).

72. Under the Parole Commission rules in effect before 1978, the initial hearing was held at least 30 days before the expiration of the prisoner's minimum sentence or, if there were no minimum sentence, within 120 days of commencement of sentence. 28 C.F.R. § 2.12(a) (1976) (amended 1977). Thus, a defendant sentenced, for example, to seven years of imprisonment and who was eligible for parole after serving one-third of the term, *see* 18 U.S.C. § 4205(a) (1976), would not know for more than two years when he or she might be released. If parole were denied following the initial hearing, 28 C.F.R. § 2.13(a) (1976) (amended 1977), the defendant might not learn about release for another 18, or possibly 36, months—after one or two additional hearings had taken place, 28 C.F.R. § 2.14(d)(1)-(2) (1976) (amended 1977). In the course of these hearings, the offender might not learn how the guidelines were being applied. *See* 28 C.F.R. § 2.13(a), (c) (1976) (amended 1977).

73. 28 C.F.R. § 2.12 (1978).

nus good time.⁷⁴ However, this sentence is somewhat uncertain because the prisoner cannot know what effect the operation of the good-time statutes will have on his or her release date.⁷⁵

Uncertainty is increased if the sentence exceeds the parole guidelines, permitting release either on parole or at the expiration of sentence less good time. If the presumptive release date is other than the date the sentence expires less good time,⁷⁶ and the prisoner violates a prison regulation, the prisoner faces a complex pattern of release-date uncertainties. The Bureau of Prisons determines a prisoner's release date under the good-time statutes⁷⁷ at the same time that the Parole Commission sets the release date under the parole statutes.⁷⁸ Release occurs on either the prisoner's parole-release date⁷⁹ or the date the sentence expires, less good-time credit earned toward service of sentence⁸⁰ (for good behavior,⁸¹ participation in work programs,⁸² or meritorious service⁸³), whichever is earlier. However, a violation of prison regulations can affect the presumptive release date, whether or not this date is the date of expiration of sentence less good time. Such a violation is noted by the Bureau of Prisons in the prisoner's record. This may induce the Parole Commission to change the presumptive release

74. A prisoner in such a case would only be released on parole if the Parole Commission set a release date sufficiently below the guidelines to prevent the prisoner from earning enough good time to cause his or her mandatory release date to precede the parole-release date. This is unlikely since the Commission only sets release dates below the guidelines in approximately 8% of the cases and not all these cases involve relatively short sentences. S. Adelberg, *supra* note 63, at 13.

Most prisoners who are paroled rather than released at the expiration of sentence less good time are recipients of relatively long sentences. See B. Stone-Meierhoefer, *supra* note 63, at R-9. Of the prisoners released in fiscal year 1975, the average time served by persons released on parole was 27.8 months, or 37.8% of the average sentence; the prisoners released at the expiration of sentence less good time served an average of 12.6 months, or 67.8% of the average sentence. FEDERAL PRISON SYSTEM, U.S. DEP'T OF JUSTICE, STATISTICAL REPORT, FISCAL YEAR 1975, at 22 (1976). For a discussion of the good-time provisions, see notes text accompanying 77-85 *infra*; note 85 *infra*.

75. See note 85 *infra* and accompanying text.

76. Unlike judicial sentencing, setting presumptive release dates is a nonpublic procedure that masks from the public the actual time period a convicted defendant spends in prison.

77. 18 U.S.C. §§ 4161-4166 (1976).

78. *Id.* §§ 4201-4218.

79. *Id.* § 4206.

80. *Id.* § 4163.

81. *Id.* § 4161.

82. *Id.* § 4162.

83. *Id.*

date, even if this date is based on the parole guidelines.⁸⁴ The date may be delayed to the date of expiration of sentence minus good time. Moreover, the date of expiration of sentence minus good time is uncertain, because forfeited good time may be restored.⁸⁵ Thus, the prisoner who violates a prison regulation, and whose presumptive release date is below the date of expiration of sentence minus good time, could be released at any time between the original presumptive release date and the date of expiration of sentence less good time.

Need for Legislative Reform

The United States Parole Commission's participation in the sentencing process is too late to alleviate unwarranted sentencing disparity and uncertainties about release dates. The Parole Commission can attempt to correct these difficulties only after they occur; even then the Commission's authority does not extend to all cases. Comprehensive legislative reform is necessary to prevent unwarranted disparity and uncertainty from the outset of the sentencing process.

SENTENCING PROVISIONS OF S. 1437

S. 1437,⁸⁶ as passed by the Senate in the 95th Congress, would prevent unwarranted disparity and uncertainty from the start of the sentencing process, thus obviating the need for the Parole Commission's attempts to correct these problems after their inception. The bill would alleviate unwarranted disparity by providing for sentencing guidelines to structure judicial discretion in selecting sentences and for appellate review of sentencing decisions. In addition, S. 1437 would increase the certainty of a prisoner's release date by generally establishing fully determinate sen-

84. 28 C.F.R. §§ 2.14(a)(3)(iii), 2.34(a) (1978).

85. 18 U.S.C. §§ 4165-4166 (1976). Under Bureau of Prisons, U.S. Dep't of Justice, Policy Statement No. 7400.5D (July 7, 1975) (inmate discipline) [hereinafter cited as Policy Statement No. 7400.5D], "[a]ll or part of an inmate's accumulated good time may be forfeited." *Id.* at 13. Under Bureau of Prisons, U.S. Dep't of Justice, Policy Statement No. 7600.50C (Oct. 31, 1977) (extra good time) [hereinafter cited as Policy Statement No. 7600.50C], accumulated good time other than good time under 18 U.S.C. § 4161, *i.e.*, good time under 18 U.S.C. § 4162, that has already been earned cannot be forfeited. *Id.* at 3, 7. Only good time that has been earned for good institutional behavior can be forfeited for misconduct. The Institution Discipline Committee must consider granting withheld good time within six months of the conduct resulting in the withholding, and restoring forfeited good time within one year of the misconduct. Policy Statement No. 7400.5D, *supra*, at 13.

86. S. 1437, 95th Cong., 2d Sess. (1978). See note 1 *supra*.

tences; release dates would be subject to adjustment only for satisfactory compliance with institutional regulations.

Disparity

To ensure uniform and just sentencing, S. 1437 establishes within the judicial branch a Sentencing Commission which would promulgate guidelines to aid sentencing judges in determining appropriate sanctions.⁸⁷ The guidelines would recommend types of sentences and, if a term of imprisonment were recommended, a narrow durational range of imprisonment based on offender history and characteristics and the offenses committed.⁸⁸ The Commission would also be required to issue policy statements on sentencing matters.⁸⁹

The bill specifies for the first time the factors a judge should consider in imposing a sentence.⁹⁰ The sentencing judge should take into account the nature and circumstances of the offense and the history and characteristics of the offender. In addition, the judge would be required to consider the four general purposes of sentencing: To deter criminal conduct, to protect the public from further criminal activity by the defendant, to ensure just punishment, and to provide needed correctional treatment for the defendant in the most effective manner.⁹¹ The judge would also have to consider all types of sentences that could be imposed⁹² and the sentencing guidelines and policy statements promulgated by the Sentencing Commission.⁹³ The court could impose a sentence outside the guidelines only if it found that an aggravating or mitigating circumstance not adequately taken into account by the Sentencing Commission would justify departure from the recommended guidelines range.⁹⁴ The judge would be required to state reasons for any sentence imposed; if the sentence differed from the applicable guidelines range, the judge would be required to explain thoroughly the deviation.⁹⁵

87. Proposed 18 U.S.C., *supra* note 1, § 2003(a)(1)(D); Proposed 28 U.S.C., *supra* note 1, §§ 991(a), 994(a)(1). See M. FRANKEL, *supra* note 4, at 118-23; P. O'DONNELL, M. CHURGIN & D. CURTIS, *supra* note 9, at 51-53.

88. Proposed 28 U.S.C., *supra* note 1, § 994(a)(1), (b)(1).

89. *Id.* § 994(a)(2). See S. REP. NO. 605, 95th Cong., 1st Sess. 1165 (1977).

90. Proposed 18 U.S.C., *supra* note 1, § 2003(a).

91. *Id.* § 2003(a)(1)(B).

92. *Id.* § 2003(a)(1)(C).

93. *Id.* § 2003(a)(1)(D), (E).

94. *Id.* § 2003(a)(2).

95. *Id.* § 2003(b). The purposes of requiring a statement of reasons for a sen-

S. 1437 provides for appellate review of sentences outside the guidelines range.⁹⁶ A defendant could appeal a sentence above the guidelines recommendation;⁹⁷ the government could appeal a sentence below the recommended range if the Attorney General or his or her designee approved the appeal.⁹⁸ If the court of appeals determined that the sentence was unreasonable, it would be required to state specific reasons for its findings, and either remand the case for imposition of an appropriate sentence or for further sentencing proceedings,⁹⁹ or resentence the defendant itself. To ensure consistent interpretation of the guidelines, appellate review would be available on petition¹⁰⁰ for sentences imposed within the guidelines range if the defendant or the government alleged that the guidelines had been incorrectly applied and the sentencing judge disagreed.

Uncertainty

S. 1437 would ensure release-date certainty for most prisoners. The bill requires that, in most cases, the prison sentence actually served equal the sentence imposed less credit for satisfactory compliance with institutional disciplinary regulations.¹⁰¹ The average prison term imposed must be similar to that now served, rather than that now imposed.¹⁰² The judge would be permitted to

tence within the guidelines are: (1) To make clear to the defendant and the public the purposes to be served by the sentence; (2) to provide guidance to probation or prison officials in determining the appropriate type of prison or community based facility, if any, and program for the defendant; and (3) to address differences among sentences specified in the guidelines for persons convicted of the same offense. These differences reflect different purposes of sentences, such as probation to rehabilitate a first offender and incarceration to incapacitate or deter a second offender. See 1977 Senate Hearings, *supra* note 14, at 8899, 8901-02 (statement of Pierce O'Donnell, Michael J. Churgin & Dennis E. Curtis); M. FRANKEL, *supra* note 4, at 108-11.

96. Proposed 18 U.S.C., *supra* note 1, § 3725(a)-(b). Sentences that result from plea agreements are exceptions to the right of appellate review of sentences outside the guidelines range. *Id.*

97. Proposed 18 U.S.C., *supra* note 1, § 3725(a).

98. *Id.* § 3725(b).

99. *Id.* § 3725(e).

100. If the defendant or the government alleged that the guidelines had been incorrectly applied, either could petition the United States Court of Appeals for leave to appeal an order by the sentencing judge granting or denying a motion to correct the sentence. *Id.* §§ 3723(b), 3724(d); S. 1437, 95th Cong., 2d Sess. § 111(t) (1978) (proposed amendment to FED. R. CRIM. P. 35(b)(2)).

101. Proposed 18 U.S.C., *supra* note 1, § 3824(a)(1). See note 103 *infra* and accompanying text.

102. See Proposed 18 U.S.C., *supra* note 1, § 2003(a)(2); Proposed 28 U.S.C., *supra* note 1, § 994(g), (l).

make a prisoner eligible for release on parole only in an exceptional case where the guidelines specified that the sentence could include eligibility for early release by the Parole Commission and the judge found that "imprisonment appears to be the sole means of achieving [a specific rehabilitation purpose]."¹⁰³ To ensure that the Parole Commission would implement a release policy consistent with sentencing decisions,¹⁰⁴ S. 1437 requires the Parole Commission to base its release determinations on guidelines promulgated for it by the Sentencing Commission.¹⁰⁵

Although S. 1437 would substantially curtail indeterminate sentences and parole release, it does not represent abandonment of rehabilitation efforts.¹⁰⁶ Rather, it recognizes that rehabilitation should not be the principal reason for most prison terms, nor is it an appropriate basis for determining prison-term length. Instead of concentrating exclusively or primarily on rehabilitation, S. 1437 recognizes four purposes of sentencing: Just punishment; deterrence of criminal conduct by the offender and other, potential offenders; incapacitation of the offender to protect the public; and rehabilitation.¹⁰⁷ The Sentencing Commission would be required to consider these purposes in formulating sentencing guidelines for federal offenses and general sentencing policy statements.¹⁰⁸ S. 1437 does not place greater weight on any one purpose, nor does it define the degree of potential overlap among the purposes. Rather, it allows the Sentencing Commission to evaluate the extent to which each sentencing purpose should and would be served by a particular type and length of sentence for any given offense.¹⁰⁹

103. Proposed 28 U.S.C., *supra* note 1, § 944(j). *See also* Proposed 28 U.S.C., *supra* note 1, § 994(b)(2); text accompanying note 8 *supra*.

104. *See* Proposed 18 U.S.C., *supra* note 1, § 3831(c)(1).

105. Proposed 18 U.S.C., *supra* note 1, § 3831(c); Proposed 28 U.S.C., *supra* note 1, § 994(e)(1).

106. *See* S. REP. NO. 605, 95th Cong., 1st Sess. 892 (1977); 1977 Senate Hearings, *supra* note 14, at 8880, 8881 (statement of Norman A. Carlson, Director, Bureau of Prisons); *id.* at 8595-96 (remarks of Sen. Kennedy).

107. Proposed 18 U.S.C., *supra* note 1, § 101(b). *See* 1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 3-4 (1970); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 35-61 (1968).

108. Proposed 28 U.S.C., *supra* note 1, § 991(b)(1)(A).

109. There are several directives to the Sentencing Commission and the sentencing judge designed to provide general guidance regarding the purposes of sentencing in particular types of cases. First, S. 1437, in effect, emphasizes incapacitation and just punishment for certain offenders with extensive criminal records, or for offenders involved in criminal activity as a means of livelihood or as part of a major conspiracy, by requiring that the sentencing guidelines provide that most persons in these categories receive a "substantial term of imprisonment." *Id.* §

The substantial narrowing of the parole-release function accomplished by S. 1437 is a recognition and affirmation of the minimal utility of parole release in a predominantly determinate sentencing scheme. Guidelines would promote sentencing fairness, virtual eradication of indeterminacy, and release-date certainty. Thus, the primary purposes of the parole-release mechanism—to alleviate unwarranted disparity among sentences and provide release-date certainty—would be better accomplished under S. 1437.

Although S. 1437 would severely diminish the parole-release function, the bill would expand the role of the Parole Commission in setting terms and conditions of postrelease supervision for every prisoner whose term exceeds one year, even if it did not set the release date.¹¹⁰ The postrelease parole term would be separate from the term of imprisonment; the authorized maximum parole term would vary according to the grade of the offense.¹¹¹ The Parole Commission would determine the length and conditions of the parole term on the basis of parole guidelines and policy statements promulgated by the Sentencing Commission, characteristics of the offense and offender, and the need to protect the public or provide training, medical services, or other correctional treatment to the parolee.¹¹²

The question remains whether S. 1437 should be amended to make all prison sentences fully determinate and to eliminate the United States Parole Commission. S. 1437 eliminates the need for a parole system to alleviate unwarranted disparity in prison terms or to provide more certainty in release dates for most prisoners.¹¹³ The Carter Administration supports the creation of a fully determinate sentencing system without a Parole Commission.¹¹⁴ Conversely, the Parole Commission argues that S. 1437 unnecessarily

994(h). In addition, S. 1437 cautions that a sentence to imprisonment is generally inappropriate in cases in which defendant "is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *Id.* § 994(i). S. 1437 further provides that "imprisonment is generally not an appropriate means of promoting correction and rehabilitation." Proposed 18 U.S.C., *supra* note 1, § 101(b)(4). *See* Proposed 28 U.S.C., *supra* note 1, § 994(b)(2), (j).

110. *See* Proposed 18 U.S.C., *supra* note 1, § 3841.

111. *Id.* § 3843(b).

112. *Id.* § 3843(a).

113. *See* text accompanying notes 87-89 *supra*.

114. Statement of Ronald L. Gainer, Deputy Assistant Attorney General, Office for Improvements in the Administration of Justice, U.S. Dep't of Justice, Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary Concerning the Sentencing Provisions of H.R. 6869 and S. 1437, at 68 (Apr. 6, 1978) (on file in office of the *Hofstra Law Review*) [hereinafter cited as Statement of Ronald L. Gainer].

curtails its authority; the Commission advocates retaining its power to determine "actual duration of confinement in the twenty-five percent of all criminal sentences that involve imprisonment of more than one year."¹¹⁵

If the Parole Commission is abolished, other sectors of the federal criminal justice system must absorb traditional parole functions: providing assistance in maintaining institutional discipline, encouraging participation in rehabilitation programs, preventing further criminal activity by persons recently released from prison to assist in their transition to the community. The next section explores dismantling the formal parole-release structure and distributing the Parole Commission's functions within the criminal justice system.

ABOLITION OF PAROLE IN A FULLY DETERMINATE SENTENCING GUIDELINES SYSTEM

Abolition of the Parole-Release Mechanism

The responsibilities of the Parole Commission under S. 1437 are limited to setting release dates in cases where the sentencing judge decides that a convicted defendant needs a rehabilitation program which is available only in prison.¹¹⁶ Because it is impossible to determine whether a particular defendant has been "rehabilitated,"¹¹⁷ the Department of Justice, in stating the Carter Administration recommendation,¹¹⁸ argues that even prison sentences for rehabilitative purposes should be determinate.¹¹⁹ This would result in terms of imprisonment that are just "long enough for the rehabilitation program to work if it is going to work at all."¹²⁰ Terminating the Parole Commission's power to set release dates would eliminate the remaining vestiges of indeterminate sentencing from the federal criminal law. The prisoner, certain of his or her release date from the outset of the sentence, could easily determine the effect "good time" credit would have on the time he or she actually will spend in prison.

The United States Parole Commission, conceding that

115. See Statement of Cecil C. McCall, *supra* note 10, at 29.

116. Proposed 28 U.S.C., *supra* note 1, § 994(b)(2), (j). See notes 103-106 *supra* and accompanying text.

117. See sources cited note 4 *supra*.

118. See Statement of Ronald L. Gainer, *supra* note 114.

119. *Id.*

120. *Id.* at 68.

sentencing guidelines are desirable for "the structuring of judicial discretion in making the critical choice between fine, probation, a 'split' sentence . . . , or incarceration,"¹²¹ envisions a role for itself within a guidelines system. The Commission favors its own retention to determine, at the outset of the term, the actual length of prison sentences that exceed one year.¹²² It wishes to employ the presumptive release date method it now uses, but with congressional approval.¹²³

The Commission's position is unjustified. The use of presumptive release dates is even more problematic under a guidelines sentencing scheme than it is under current law.¹²⁴ Dividing decisionmaking about types and lengths of sentences between judges and the Parole Commission would make it difficult for the system to fashion the most appropriate sentence for a particular defendant. Partitioning the sentencing decision between two uncoordinated, independent authorities would promote inconsistency and unfairness. Differences in sentencing philosophies and practices would inevitably occur if two bodies, one in the judicial branch, the other in the executive branch, simultaneously promulgated and implemented sentencing guidelines. For example, the Sentencing Commission might recommend incarceration for a particular combination of offense and offender characteristics, believing that a brief prison term would deter the defendant from future criminal conduct; the Parole Commission, however, might assign a substantially longer term, advocating imprisonment as just punishment.

In addition, segmenting the sentencing decision unfortunately might result in freezing the thinking of policymakers in traditional, less progressive, sentencing concepts. It is conceivable, for example, that a very heavy fine is a more severe penalty than a brief prison term for a white-collar criminal who has made substantial financial gain as a result of his or her crime. Yet two sets of guidelines—one for type of sentence, the other for length of prison term—probably would preclude structuring guidelines to accommodate this kind of sentencing. Conversely, comprehensive sentencing guidelines would present types and ranges of sentences for particular offenses in a continuum which, when appropriate,

121. Statement of Cecil C. McCall, *supra* note 10, at 29.

122. *Id.*

123. *Id.* at 30.

124. For a discussion of current difficulties, *see* text accompanying notes 71-85.

could avoid making imprisonment the harshest alternative.

It is also difficult to understand how appellate review of sentences would work under the Parole Commission proposal. It appears that the courts would review decisions regarding types of sentences, while the Parole Commission would review decisions regarding the appropriateness of the length of prison terms. It is unclear whether a defendant sentenced both to imprisonment and to pay a fine would be required to seek review of the prison term from the Parole Commission and review of the fine from the courts.

In further attacking the sentencing system in S. 1437, the Parole Commission argues that sentencing judges in such a system would continue to impose disparate sentences,¹²⁵ because of inconsistent guidelines interpretations¹²⁶ and because judges would construe the guidelines "to suit their individual concepts of justice."¹²⁷ In the same statement, however, the Commission admits that it is valuable for the sentencing judge to interpret the guidelines in determining the type of sentence to impose.¹²⁸ In addition, the Commission ignores the fact that judges review the impact that the parole guidelines will have on the sentences they impose; since July 1, 1978, presentence reports have included information about the applicable parole guidelines and the typical sentence for the offense.¹²⁹ Although this information is not as complex as sentencing guidelines, it indicates that sentencing judges and probation officers who prepare presentence reports will have had several years' experience interpreting parole guidelines before sentencing guidelines are in effect.¹³⁰ Furthermore, the Commission's unfortunate conclusion that sentencing judges would interpret the guidelines according to their personal sentencing philosophies, rather than apply the law neutrally and fairly, is insupportable. Appellate review

125. Statement of Cecil C. McCall, *supra* note 10, at 8-10.

126. *Id.*

127. *Id.* at 10.

128. *Id.* at 8, 29.

129. DIVISION OF PROBATION, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE PRESENTENCE INVESTIGATION REPORT 6, 16 (1978) [hereinafter cited as PRESENTENCE INVESTIGATION REPORT].

130. Parole guidelines have been in existence since 1973. *See* note 13 *supra*. For a number of years, some judges have been examining the implications of the Parole Commission's application of its guidelines to the sentences they impose. Other judges have been aware of the effect of the guidelines on judicially imposed sentences, since probation reports must include guidelines information. *See* PRESENTENCE INVESTIGATION REPORT, *supra* note 129.

would be available for the unusual case in which the guidelines are intentionally ignored or misapplied.

Absorption of Parole Functions by the System

If Congress abolishes the United States Parole Commission, other facets of the federal criminal justice system will assure adequate institutional discipline, encourage rehabilitation, and provide postrelease supervision and services.

Institutional Discipline.—Both the good-time allowance and parole-release mechanisms in current law are designed to induce institutional discipline by holding out the possibility of early release if prison regulations are obeyed. However, release-date uncertainties caused by the complexity and interrelationship of the two systems¹³¹ make improvement of institutional behavior much less certain than under a simpler system.

Although good-time provisions may affect the behavior of prisoners who wish to remain eligible for parole, prison officials indicate that current good-time laws probably have little impact on the behavior of prisoners who anticipate release on parole.¹³² The system for administering good-time statutes is so cumbersome that credit is only withheld or forfeited¹³³ for the most serious disciplinary problems.¹³⁴ Prison officials further assert that other means of dealing with normal disciplinary problems,¹³⁵ such as denial of privileges, effectively maintain discipline.¹³⁶ Moreover, according to prison officials, prisoners give little weight to the risk of forfeiting good time, because they assume it will be restored by the

131. See text accompanying notes 76-85 *supra*.

132. Statement of Norman A. Carlson, Director, Federal Bureau of Prisons, Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary Concerning the Sentencing Provisions of H.R. 6869 and S. 1437, at 7 (Apr. 10, 1978) (on file in office of the *Hofstra Law Review*) [hereinafter cited as Statement of Norman A. Carlson].

133. Any amount of statutory good time accumulated before a violation may be forfeited, 18 U.S.C. § 4165 (1976); Policy Statement No. 7400.5D, *supra* note 85, at 13, since there is no vesting of good time except industrial or meritorious good time. Policy Statement No. 7600.50C, *supra* note 85.

134. Policy Statement No. 7400.5D, *supra* note 85, at 8.

135. Disciplinary measures now used by the Bureau of Prisons include: changing a prisoner's housing assignment or job; placing him or her in administrative detention or segregation; and, in extreme cases, assigning a prisoner to a more secure facility or criminally prosecuting him or her for the offense committed while in prison. See Policy Statement No. 7400.5D, *supra* note 85.

136. Statement of Norman A. Carlson, *supra* note 132, at 7.

Institution Discipline Committee.¹³⁷ It is likely, however, that conditioning presumptive release dates on continued good institutional behavior may affect prisoners' attitudes about forfeiture of good time.

Abolishing the Parole Commission and establishing a simplified version of the current good-time allowance is a preferable alternative to the present incentive system for promoting institutional order. Although the effects of this approach on prison behavior cannot be predicted with certainty, prison officials believe that disciplinary problems would not increase.¹³⁸ With the elimination of parole in most cases, good time would become more important, because it would be the sole mechanism for most prisoners to reduce their time in prison. Allowing periodic vesting of credit toward early release, rather than permitting forfeiture and subsequent restoration of earned credit, would create a continuing incentive for prisoners to earn good time through compliance with institutional rules. The key advantage of periodic vesting is that it would result in certainty that credit earned for good behavior within a specified period is irrevocable. This would enable the prisoner to calculate his or her release date, fully aware of the kind of behavior that will be rewarded with credit toward early release. A system of periodic vesting would also be less cumbersome to administer than the current system; absent serious infractions, the system could probably be administered as a routine bookkeeping matter.

Participation in Rehabilitation Programs.—Although in the past parole decisions were influenced by prisoner participation in rehabilitation programs, this is rarely, if ever, the case under current practice.¹³⁹ It is difficult to ascertain, however, the extent to which prisoners continue to believe that parole officials are influenced by such participation.¹⁴⁰ In most cases, a presumptive re-

137. See note 85 and accompanying text.

138. Statement of Norman A. Carlson, *supra* note 132, at 7.

139. The salient factor score for the application of the parole guidelines contains no rehabilitation factor. 28 C.F.R. § 2.20 (1978). The Guideline Application Manual, *supra* note 70, at 4.17 app., provides that a prisoner may be paroled before the applicable guideline date if he or she "has made a record of clearly exceptional institutional program achievement over a substantial period of time." It goes on to note that "[a] clear conduct record and a good program achievement is [*sic*] expected. This [reason for early parole] is reserved for cases in which the prisoner's record of program achievement is clearly exceptional, and should be supported by the hearing summary." *Id.*

140. According to a student study, Project, *Parole Release Decisionmaking and*

lease date is set early in the term of imprisonment,¹⁴¹ this date is not advanced "except under clearly exceptional circumstances."¹⁴²

In any event, participation in rehabilitation programs would not be affected by abolition of parole. A growing concern that involuntary participation in vocational training and rehabilitation programs is detrimental to rehabilitation¹⁴³ has led the Federal Bureau of Prisons to change its policies concerning requirements that a prisoner participate in particular programs. Under current policy,¹⁴⁴ prisoners meet with prison officials to develop an appropriate program of work and involvement in other activities. This policy stems from the belief that a prisoner will benefit more from a program in which he or she participates voluntarily than from one in which participation is mandated.¹⁴⁵

Recent experience of the Bureau of Prisons indicates that substituting voluntary for involuntary participation in programs "is not detrimental to prison rehabilitation in any way."¹⁴⁶ There is

the Sentencing Process, 84 YALE L.J. 810, 829-30 (1975), prisoners have the impression that officials are influenced by participation in rehabilitation programs in part because discussion in parole hearings emphasizes rehabilitation-oriented matters, rather than the facts necessary to determine which guidelines apply to the prisoner. A Bureau of Prisons survey of the heads of federal institutions indicates that, at least in early 1977, 45% of the prison officials who responded to the survey believe that inmates think the Parole Commission considers participation in programs, while 4% believe the inmates think the Parole Commission does not consider participation in programs. Memo of Roy E. Gerard, Assistant Director, Correctional Programs Division, to Executive Staff of Bureau of Prisons (Mar. 7, 1977) [hereinafter cited as Memo of Roy E. Gerard]. In fact, in recent years, it has been unusual for a prisoner to be released early on the basis of an unusual level of rehabilitation. For example, in the period from October 1973 through March 1974, the Parole Commission made 45 decisions below the guidelines in one region; 17 of the decisions were for "outstanding institutional progress," and 3 were because "clinical judgment indicate[d] better risk than [was] indicated by salient factor score." P. Hoffman & L. DeGostin, Parole Decision-Making: Structuring Discretion, at E-11 (U.S. Board of Parole Research Unit Rep. No. 5, 1976). Current Parole Commission rules state that, at the initial hearing, the hearing "examiners shall discuss with the prisoner his offense severity rating and salient factor score as described in § 2.20, his institutional conduct and, in addition, any other matter the panel may deem relevant." 28 C.F.R. § 2.13(a) (1978) (discussing 28 C.F.R. § 2.20 (1978)).

141. 28 C.F.R. § 2.12 (1978).

142. *Id.* § 2.14(a)(3)(ii).

143. Carlson, *Corrections in the United States Today: A Balance Has Been Struck*, 13 AM. CRIM. L.R. 615, 627-35 (1976).

144. Bureau of Prisons, U.S. Dep't of Justice, Policy Statement No. 35000.2 (Mar. 7, 1978) (optional programming).

145. Address by Norman A. Carlson, 47th Annual Criminal Justice Institute of Florida Council on Crime and Delinquency 4-5 (July 7, 1976).

146. Letter from Norman A. Carlson, Director, Federal Bureau of Prisons, to

a growing belief among corrections officials and researchers that prisoners who know their release dates are motivated to participate in programs that will benefit them.¹⁴⁷

Community Supervision.—Under current law, persons released on parole receive community supervision by probation officers until their sentences expire or they are released from parole supervision.¹⁴⁸ In addition, persons released after serving their terms of imprisonment, less good-time deductions, are subject to supervision for the remainder of their maximum terms, less 180 days.¹⁴⁹ This supervision is intended to serve two arguably conflicting purposes:¹⁵⁰ protecting the community from additional crimes by parolees and facilitating their return to the community by assisting them to obtain such things as employment and medical services.

In contrast to the arbitrariness of current practices, parole supervision should be allocated more rationally—according to the needs of the offender, the protection needed by the community,¹⁵¹ and the purposes of the prisoner's sentence. Under existing law, parole supervision is provided and services, such as employment and necessary medical assistance, are available regardless of need if the offender is released either on parole or if, at the expiration of the sentence less good time, the prisoner has earned at least 180 days of good-time deductions.¹⁵² Conversely, no supervision or services are provided to the prisoner who is released at the expira-

Harry A. Scarr, Assistant Director, Office of Policy and Planning, United States Department of Justice (Oct. 5, 1976). In a memorandum outlining the results of a survey of officials, Roy Gerard, Assistant Director of the Correctional Programs Division of the Bureau of Prisons, indicated that 62% of the Bureau of Prisons officials who responded to the questionnaire found that making rehabilitation programs in their institutions voluntary did not significantly change inmate participation, 24% found that making the programs voluntary increased enrollment, and 10% found that enrollment decreased. Memo of Roy E. Gerard, *supra* note 140.

147. 1977 Senate Hearings, *supra* note 14, at 9079, 9082-83 (testimony of Nancy Crisman, ACLU national prison project). This position was also adopted by Lawrence Bennet, Director of Research, California State Department of Corrections, and Owen Kennedy, Gerard M. Farkas, and James D. Henderson, regional directors of the Federal Bureau of Prisons, in telephone interviews with Stephen Finan, Office of Policy and Planning, United States Department of Justice (1976).

148. 18 U.S.C. §§ 4210-4211 (1976).

149. *Id.* § 4164.

150. See D. STANLEY, PRISONERS AMONG US 102-03 (1976).

151. See generally Martinson & Wilks, *Save Parole Supervision*, FED. PROBATION, Sept. 1977, at 23, reprinted in 1977 Senate Hearings, *supra* note 14, at 9257.

152. 18 U.S.C. §§ 4164, 4210 (1976).

tion of the sentence if the prisoner has earned less than 180 days of good-time deductions,¹⁵³ regardless of the purpose of the sentence and the prisoner's need for supervision or services to assist his or her transition back into the community.

Although S. 1437 strictly limits the power of the Parole Commission to set release dates, it expands the Commission's role in setting terms and conditions of postrelease supervision. Unlike current law, S. 1437 would subject each prisoner sentenced to more than one year's imprisonment to postrelease supervision,¹⁵⁴ regardless of whether the prisoner serves the full sentence,¹⁵⁵ or is released early either by the Parole Commission¹⁵⁶ or because of credit earned for satisfactory compliance with institutional discipline rules.¹⁵⁷ The Senate bill further requires that the Bureau of Prisons provide, to the extent possible, that a prisoner spend the last six months of a sentence that exceeds one year or the last thirty days of a shorter sentence "under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community."¹⁵⁸ During this period, the probation system would, where practical, provide services to the prisoner.¹⁵⁹

Essentially, S. 1437 would assure that postrelease supervision is given to any person with a sentence exceeding one year who needs it. Unfortunately, the bill would accomplish this by retaining the Parole Commission to set terms and conditions of release even in cases where postrelease supervision is not necessary. The result would be both expensive and cumbersome.

A better approach to determining the need for and conditions of postrelease supervision is to transfer this decision from the Parole Commission to the sentencing judge. By considering the purposes of sentencing in the particular case, the offense, the characteristics of the offender, and the recommendations in the sentencing guidelines and policy statements, the judge could decide whether a period of postrelease supervision is advisable.¹⁶⁰ Such supervision would probably be inappropriate when the primary

153. 18 U.S.C. § 4164 (1976).

154. Proposed 18 U.S.C., *supra* note 1, § 3841.

155. *Id.* §§ 3824(a)(1)-(2), 3841.

156. *Id.* § 3824(a)(1)(b).

157. *Id.* § 3824(a)(2).

158. *Id.* § 3824(c). See S. REP. NO. 605, 95th Cong., 1st Sess. 1081-82 (1977).

159. Proposed 18 U.S.C., *supra* note 1, § 3824(c); S. REP. NO. 605, 95th Cong., 1st Sess. 1081-82 (1977).

160. See Statement of Ronald L. Gainer, *supra* note 114, at 70-71.

purpose of the sentence is just punishment or general deterrence; it might be appropriate when the primary sentencing purpose is incapacitation or rehabilitation.¹⁶¹

Services should be provided by the probation system if a former prisoner requests them during the first few months after release, regardless of whether the prisoner is subject to postrelease supervision.¹⁶² Thus, for example, a former prisoner could request and receive assistance in securing a job or necessary medical services, such as community drug-treatment programs, from the probation system.

*Effect of Abolishing the Parole Commission on the
Federal Criminal Justice System*

In addition to abolishing the Parole Commission, the creation of a fully determinate sentencing system will substantially affect the Bureau of Prisons, the probation system, and the federal courts.

United States Parole Commission.—While this proposal would strip the Parole Commission of jurisdiction over persons sentenced after the effective date of a determinate sentencing code, it will be necessary to phase out the Commission gradually to enable it to continue to deal with persons sentenced before this date.¹⁶³ Since the average prisoner released on parole in a recent year served 26.9 months in prison,¹⁶⁴ it appears that the Commission must retain all of its employees for at least the first two years after the effective date of a sentencing guidelines system abolishing parole. Even after the Commission is fully abolished, most parole special-

161. *Id.* at 71. This testimony suggests that postrelease supervision could be for a period of six months or one year, rather than the longer periods provided for in S. 1437, *see* Proposed 18 U.S.C., *supra* note 1, § 3843(b). -

162. Statement of Ronald L. Gainer, *supra* note 114, at 70.

163. A possible alternative to gradually phasing out the Commission is to abolish the Commission on the effective date of the determinate sentencing code and require that a designated authority determine each prisoner's probable release date under the latest parole guidelines, as well as the sentence the prisoner would have received pursuant to the new sentencing guidelines. The prisoner would be released on the earlier of the two dates. When the California legislature recently enacted a determinate sentencing statute, it required the Community Release Board to determine what each prisoner's sentence would be under the new provisions; however, if the newer sentence would be shorter than the time that the prisoner would have served under the indeterminate sentencing law, and specified aggravating circumstances were present, the parole date could be set at a later date. CAL. PENAL CODE § 1170.2 (West Cum. Supp. 1978).

164. Federal Prison System, U.S. Dep't of Justice, Statistical Report, Fiscal Year 1976 (forthcoming).

ists should have little difficulty finding employment in federal or state corrections systems, state parole boards, or other fields related to criminal justice. In fact, some parole employees have knowledge and experience needed by the Sentencing Commission in developing its guidelines and policy statements.

The United States Parole Commission is an extremely costly and complex mechanism for setting release dates for federal prisoners.¹⁶⁵ This is especially true because many of the Commission hearings and review proceedings are probably unnecessary. Hearings are held even when there is no realistic prospect that they will result in changing a presumptive release date,¹⁶⁶ or when the record clearly indicates that the parole guidelines release date or the date of expiration of sentence is the presumptive release date. Further, abolishing parole would obviate the need for complicated and repetitive review procedures. Under current law, the first stage of review of the parole examiner's decision is conducted by the regional commissioner.¹⁶⁷ If the regional commissioner wishes to reverse the decision of the hearing examiners or alter the release date by more than 180 days, other regional commissioners must review the record.¹⁶⁸ There is a final appeal to the National Appeals Board.¹⁶⁹

Sentencing guidelines and policy statements will have to be carefully drawn to avoid unintended changes in sentencing practice. For example, factors justifying a release-date decision outside the parole guidelines must be appropriately dealt with in the sentencing guidelines. These factors include: aggravating or mitigating offense factors, credit for past or future service in state custody for other offenses, judgments indicating a higher or lower risk of repeated criminal behavior than suggested by the factors taken into consideration in the guidelines, and health or mental capacity problems that justify a lighter or heavier sentence than might ordinarily be given.¹⁷⁰

165. According to the Parole Commission, it spent approximately \$3,390,000 in fiscal year 1976 to produce 27,471 parole decisions of all types at a cost of approximately \$123.44 per decision. Memo from Jim Fife, Executive Assistant to the Chairman of the Parole Commission, to Stephen Finan, Office of Policy and Planning (Sept. 17, 1976) (on file in office of the *Hofstra Law Review*).

166. See 28 C.F.R. § 2.14(a)(3) (1978).

167. 28 C.F.R. § 2.25(a) (1978).

168. *Id.* § 2.25(b).

169. *Id.* § 2.26 (1978).

170. Many of these cases are based on a rehabilitation theory of sentencing that probably would not be used as the basis of determining the length of sentence under

Bureau of Prisons.—It is unlikely that a determinate sentencing system will have any appreciable effect on the size of the federal prison population and, therefore, on the budget of the Bureau of Prisons. In establishing sentencing guidelines, the Sentencing Commission will make judgments about the appropriateness of incarceration for each type of offense and offender. The process of determining which categories of offenders should be imprisoned will result in establishing priorities for use of prison facilities. These priorities may cause some changes in the makeup of the prison population, such as more repeat offenders and fewer first-offense car thieves. The bill should not, however, substantially alter the current average term of imprisonment or the size of the prison population: The Sentencing Commission is required to consider the capacity of the federal prison system when creating the guidelines.¹⁷¹

The simplified procedure that would result from using credit toward early release, rather than the parole system, to determine release dates should be less costly for the Bureau of Prisons to administer than the existing good-time allowance procedure.¹⁷² Under a system that periodically vests credit for good behavior and denies credit for bad behavior during the same short period, recordkeeping would be less time consuming than under the more complex forfeiture provisions of current law. These provisions permit forfeiture of any statutory good time accumulated up to the time of a violation of institutional rules.¹⁷³ In addition, since the simplified procedure would preclude restoration of credit withheld or forfeited as a result of a prisoner's noncompliance with institutional regulations during a specified period, the cost of periodically

the determinate sentencing proposals. See Guideline Application Manual, *supra* note 70, at 4.13-.17 app.

171. See Proposed 28 U.S.C., *supra* note 1, § 994(g). Discussing his earlier sentencing guidelines bill, S. 2699, 94th Cong., 1st Sess. (1975), Senator Edward M. Kennedy stated:

It is likely that the guidelines would mandate sentences substantially less than the maximums now authorized by law. But in terms of actual time served I do not see a radical change. Nor do I perceive the possibility of the guidelines approach increasing prison populations. I suspect that sentences of imprisonment would be reserved for the more serious crimes, with petty offenders—too often the cause of overcrowded prisons—avoiding lengthy prison terms.

Kennedy, *Criminal Sentencing: A Game of Chance*, 60 JUD. 208, 214 (1976).

172. For current good-time allowance rules, see 18 U.S.C. §§ 4161-4166 (1976).

173. *Id.* § 4165.

reviewing the appropriateness of restoration of credit would be eliminated. Further, the provisions toward credit for early release would directly affect the prison terms of all prisoners to whom they apply, rather than only the terms of those released at the expiration of sentence less good-time and those whose presumptive release dates are adjusted because of poor institutional behavior.

United States Probation System.—Although the United States Parole Commission determines when to release a prisoner on parole,¹⁷⁴ probation officers supervise the parolees.¹⁷⁵ If the Parole Commission were abolished and postrelease supervision were made part of the sentence in appropriate cases, the nature of the persons supervised, rather than their number, would probably change. The decision whether to place an offender on postrelease supervision should be based on the purposes of the sentence, not on the often arbitrary selection of the statute under which the offender is sentenced. Furthermore, the determination of the length of the supervision period should not be affected by the term of imprisonment, nor does the maximum supervision period need to be as long as it often is under current law.

In addition, it would be necessary for the probation system to provide services for releasees not placed on postrelease supervision, for a brief period immediately following their release. To do so, the probation system would work closely with halfway houses and other community-based treatment centers.¹⁷⁶ The cost of this would depend on the ability of the probation system to develop programs the prisoners view as helpful. To prepare for release, many prisoners would probably seek the services provided—particularly assistance in obtaining employment—while still in custody. Once released, however, there might be less incentive for former prisoners to request services from the probation system, because the programs would be entirely voluntary and offenders would no longer be under any form of supervision.

174. *Id.* §§ 4203(b), 4206.

175. *Id.* §§ 3655, 4203(b)(4); 28 C.F.R. § 2.38(a) (1978).

176. Under current law, a parolee or mandatory releasee may be required, as a condition of release, to reside in or participate in a program of a residential community treatment center. 18 U.S.C. § 4209(c)(1) (1976). Thus, the probation system currently works with the Bureau of Prisons in the community treatment centers to carry out its responsibility of supervising releasees. *Id.* §§ 3655, 4203(b)(4); 28 C.F.R. § 2.38(a) (1978).

Federal Court System.—The creation of the United States Sentencing Commission is the only aspect of the determinate sentencing proposal that would have a measurable impact on the resources of the federal courts. However, other aspects of the sentencing proposal would affect sentencing proceedings and issues before the appellate courts.

The major cost of reform to the federal court system would probably be expenditures for the United States Sentencing Commission. Under S. 1437, compensation for the seven-member Commission would be equivalent to that for judges of the United States Courts of Appeals.¹⁷⁷ The Commission would have a full-time staff of experts in fields related to corrections and a GS-18 staff director.¹⁷⁸ It would also have power, in connection with its duty to promulgate sentencing guidelines and policy statements, to conduct a research program.¹⁷⁹

It is unlikely that the cost to the federal court system of the sentencing process for an individual case will be appreciably different under the proposal than under current law. Rule 32(a)(1) of the Federal Rules of Criminal Procedure requires that the defendant be permitted to make a statement in his or her own behalf, and that defense counsel and the attorney for the government also be permitted to speak to the court.¹⁸⁰ The only change in the sentencing hearing effected by a sentencing guidelines system would be that the judge must announce how the guidelines apply to the convicted defendant and permit the defense and prosecution to comment on the classification. This change should not necessitate more time for the hearing; rather, it should focus the hearing on the characteristics of the offense and the offender, considerations which are most important to the determination of an appropriate sentence.

Determinate guidelines sentences undoubtedly would affect defendants' decisions whether to plead guilty. If, for example, a defendant were charged under current law with an offense carrying a potential maximum prison term of ten years, the defendant might

177. Proposed 28 U.S.C., *supra* note 1, § 992(c).

178. Proposed 28 U.S.C., *supra* note 1, § 995(a)(2); *see* 1977 Senate Hearings, *supra* note 14, at 9005 (statement of Ronald L. Gainer, Acting Deputy Assistant Attorney General for Improvements in the Administration of Criminal Justice, U.S. Dep't of Justice).

179. Proposed 28 U.S.C., *supra* note 1, § 995(a)(12).

180. FED. R. CRIM. P. 32(a)(1).

be reluctant to plead guilty to the charge even if he or she knows that the average time served in prison by persons convicted of the same offense is substantially shorter than ten years. Under a sentencing guidelines system, however, the offender knows the recommended sentence for a person with the same offense/offender characteristics and criminal history. If the defendant knows that the evidence against him or her is strong and believes that the recommended sentence is reasonable, the defendant might be more inclined to plead guilty than under current law. Conversely, if the defendant believes that the evidence is not strong, or that the sentence recommended in the guidelines is too high, he or she might be more inclined to go to trial and require the government to prove its case.

It is difficult to estimate the cost of permitting appellate review of sentences outside the sentencing guidelines, since the number of cases that will be appealed is unknown.¹⁸¹ It is unlikely that all sentences outside the guidelines will result in petitions for appellate review. The requirement of Attorney General approval of appeals by the government should minimize the number of appeals of sentences below the guidelines. Such appeals probably will be limited by Department of Justice policy to cases in which the sentence is substantially lower than the circumstances warrant or where the judge's stated reasons for setting a sentence below the recommended guidelines range could establish undesirable precedent. Moreover, a sentence may not vary sufficiently from the guidelines to warrant an appeal, particularly if the sentencing judge articulates justifiable reasons for the sentence. Although the initial level of appeals may be relatively high, it will probably diminish considerably as a body of case law develops concerning the appropriateness of particular reasons for sentences outside the guidelines.¹⁸² Connecticut and Massachusetts, which have provisions for appellate review of sentences, have found that appeal of a sentence that follows a conviction after a trial is more likely than appeal of a

181. For a description of the appellate procedure under S. 1437, see notes 96-100 *supra* and accompanying text.

182. It has even been suggested that the availability of appellate review of sentences might reduce the burden on the courts of appeals. Some commentators believe that many groundless appeals and petitions for habeas corpus now filed probably would not be brought if the convicted defendant had a mechanism for challenging his or her sentence. See, e.g., M. FRANKEL, *supra* note 4, at 81-82; Richey, *Appellate Review of Sentencing: Recommendation for a Hybrid Approach*, 7 HOFSTRA L. REV. 71, 77 (1978).

sentence that follows a guilty plea, and that most appeals occur when the sentence exceeds three years in Connecticut and five years in Massachusetts.¹⁸³

There may also be motions to correct sentence that claim inaccurate categorization of the offense or offender resulted in inappropriate application of the guidelines. Such motions, however, will probably not be burdensome. In most cases, the prosecution and defense will not disagree about the application of the offense and offender characteristics specified in the guidelines; if such disagreement does occur, it is likely to be focused on a narrow issue. Furthermore, review of judges' decisions on such motions would be only by petition for leave to appeal.¹⁸⁴ This would enable appellate courts to limit review of guidelines-application cases to those which the courts believe present problems.

CONCLUSION

The fairness and effectiveness of the federal sentencing process will be enhanced if S. 1437 is enacted. S. 1437 shifts the focus of federal sentencing law away from the outmoded theory of rehabilitation, thereby permitting a more balanced approach to sentencing—the end-product of the criminal justice system. In addition, enactment of S. 1437 would result in providing guidance to judges, enabling them to implement their sentencing responsibilities more fairly. This would serve to eliminate unwarranted disparity in sentences imposed. S. 1437 would also introduce a logical division of related functions: The sentencing judge, rather than the Parole Commission, would determine the appropriate effects of offense and offender characteristics (known at the time of sentencing) on a prisoner's release date; the Parole Commission would determine the effect that subsequent events should have on the release date in those unusual cases in which progress in a correctional program is relevant to the release date. Finally, S. 1437 would permit continual refinement of federal sentencing policy and practices by providing for evaluation of the effectiveness of the sentencing guidelines and for appellate opinions regarding sentences outside the guidelines.

183. Zeisel & Diamond, *Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut*, 1977 AM. B. FOUNDATION RESEARCH J. 881, 902-06. In Massachusetts 7% of the sentences following guilty pleas were appealed, while 26% of the sentences following conviction at trial were appealed; in Connecticut 16% of the sentences following guilty pleas were appealed, while 50% of the sentences following convictions at trial were appealed. *Id.*

184. Proposed 18 U.S.C., *supra* note 1, §§ 3723(b), 3724(d).

Amending S. 1437 to abolish parole would eliminate the last vestiges of indeterminate sentencing. This would enable both prisoners and the public to know that an announced prison sentence actually represents the length of time a prisoner will spend in prison.¹⁸⁵ Abolishing parole also would eliminate the current costly duplication of effort that occurs because both the sentencing judge and the Parole Commission evaluate information available at the time of sentencing, often with inconsistent results. The Parole Commission has been attempting to reduce unwarranted disparity in prison sentences for a number of years, but application of sentencing guidelines in a single proceeding at the beginning of the sentencing process will avoid unwarranted disparity in all aspects of the sentencing decision.

Abolition of parole would not have a deleterious effect on prison discipline or participation in institutional educational and vocational programs; in fact, it would have a favorable effect because of the increased certainty of the release date—an incentive to plan for the future. Furthermore, limiting parole supervision to those cases where the purposes of sentencing suggest the desirability of postrelease supervision would have little, if any, effect on the recidivism rate of released prisoners; it would, on the other hand, enable probation officers to concentrate their postrelease-supervision efforts on those releasees who most need supervision and on providing services to all other releasees in a noncoercive context.

185. The sentence imposed, however, would be subject to a small reduction for good behavior in prison.