

1979

The Sentencing Commission in Sentencing Reform

Michael H. Tonry

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>

Recommended Citation

Tonry, Michael H. (1979) "The Sentencing Commission in Sentencing Reform," *Hofstra Law Review*: Vol. 7: Iss. 2, Article 4.
Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol7/iss2/4>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

THE SENTENCING COMMISSION IN SENTENCING REFORM

Michael H. Tonry*†

If statesmen and politicians can be distinguished, and the distinction applied to institutions, the Ninety-fifth Congress was not very statesmanlike. Not much legislation seems to have been enacted merely because it was right or because government might thereby be made fairer, more just, or even more efficient. During this time of congressional assertiveness and continuing disengagement from the Imperial Presidency, little legislative happened unless the issues involved were emotional and susceptible to demagoguery or unless new laws were sought by powerful political or economic interests.

Thus it was somewhat surprising that the Senate, on January 30, 1978, voted to establish a United States Sentencing Commission charged to develop and promulgate presumptive sentencing guidelines.¹ The bill, S. 1437,² was sponsored by Senators McClellan and Kennedy; it would have established a sentencing commission as the central feature of a major overhaul of the federal system of criminal sanctions.³

* Associate Professor of Law, University of Maryland Law School. A.B., 1966, University of North Carolina; LL.B., 1970, Yale University.

†. Preparation of this Article was supported in part by a grant from the National Institute of Corrections.

1. 124 CONG. REC. S860 (daily ed. Jan. 30, 1978). For an explanation of presumptive, prescriptive, and exhortative guidelines, see text accompanying notes 69-83 *infra*.

2. 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.

3. Other major features of S. 1437 include a requirement that judges give reasons for sentences, Proposed 18 U.S.C., *supra* note 2, § 2003(b), establishment of appellate sentence review, *id.* § 3725, and of statutory purposes of punishment, *id.* §§ 101(b), 2003(a)(1)(B), substantial abolition of parole, *id.* § 2302; Proposed 28 U.S.C., *supra* note 2, § 994(b)(2), (j), and diminished significance of "good time" reductions of prison sentences for institutional good conduct, Proposed 18 U.S.C., *supra* note 2, § 3824(b).

Senate passage of sentencing commission legislation probably resulted from incorporation of the substance of Senator Kennedy's earlier commission bills into S. 1437,⁴ rather than from a groundswell of interest in a promising new idea. S. 1437, the successor of earlier proposed federal criminal codes,⁵ was treated in the Senate as a grand compromise between liberal and conservative blocs; troublesome topics and proposals which had aroused controversy in earlier proposed codes were omitted or deferred for later, separate consideration.⁶ The fragility of the compromise that

The genealogy of S. 1437's sentencing commission can be traced to Judge Marvin Frankel's 1971 Marx Lectures at the University of Cincinnati Law School, Frankel, *Lawlessness in Sentencing*, 41 U. CINN. L. REV. 1 (1972). Judge Frankel, the original proponent of a politically insulated sentencing commission with rulemaking authority, describes his proposal as follows: "The proposed commission would be a permanent agency responsible for (1) the study of sentencing, corrections, and parole; (2) the formulation of laws and rules to which the studies pointed; and (3) the actual enactment of rules, subject to traditional checks by Congress and the courts." M. FRANKEL, CRIMINAL SENTENCES 119 (1973). A Yale Law School project, in which Judge Frankel participated, carried the initial proposal several steps forward by developing a model federal sentencing statute which included establishment of a sentencing commission. See P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977); for a review of the Yale study, see Von Hirsch, Book Review, 7 HOFSTRA L. REV. 457 (1979). This model was one source of the first federal sentencing commission bill, S. 2699, 94th Cong., 1st Sess. (1975), introduced by Senator Kennedy. Although S. 2699 differed in some important respects from the Yale proposal, it was patently derivative; the bill also owed much of its boilerplate to an early version of the Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, 90 Stat. 219 (codified at 18 U.S.C. §§ 4201-4218 (1976)). Senator Kennedy's bill, slightly altered, reappeared in the 95th Congress, first by itself as S. 181, 95th Cong., 1st Sess. (1977), and later as part of S. 1437, 95th Cong., 1st Sess. (1977). Four versions of S. 1437 were printed: The original version as introduced in May 1977; an August 15 committee print; a November 15 committee bill reported out by the Senate Judiciary Committee, see S. REP. NO. 605, 95th Cong., 1st Sess. 1, 10-15 (1977) [hereinafter cited as SENATE REPORT]; and the final version which passed the Senate on January 30, 1978. S. 1437, 95th Cong., 2d Sess. (1978).

A second influential federal sentencing commission proposal was S. 204, 95th Cong., 1st Sess. (1977), introduced by Senators Gary Hart and Jacob Javits; its primary draftsmen were Andrew von Hirsch and Richard Singer. See text accompanying notes 54, 74-76 & 88 *infra*; note 59 *infra*.

4. See 123 CONG. REC. S6833-34 (daily ed. May 2, 1977). Compare Proposed 28 U.S.C., *supra* note 2, with S. 2699, 94th Cong., 1st Sess. (1975) and S. 181, 95th Cong., 1st Sess. (1977).

5. For earlier Senate bills, see, e.g., S. 1, 94th Cong., 1st Sess. (1975); S. 1400, 93d Cong., 1st Sess. (1973); S. 1, 93d Cong., 1st Sess. (1973). See SENATE REPORT, *supra* note 3, at 10-13.

6. At the beginning of Senate floor consideration of S. 1437, Senator Kennedy observed:

S. 1437 was drafted with one overriding thought in mind—to avoid the controversies of the past, to bypass the pitfalls which have doomed previous

bound the coalition supporting S. 1437 was frequently mentioned.⁷ As the seventy-two to fifteen passage attests, the coalition held together.

But for integration of the commission proposal into S. 1437, prospects for a federal sentencing commission were poor. First, the proposal lacked a constituency of vested interests. It in no obvious way benefited important interests or enhanced the power of existing institutions, except the federal prosecutors and, ironically, the judiciary.⁸ Customary resistance to change, especially novel

code reform efforts. Controversial and provocative amendments were laid aside, to be dealt with separately on another day. This has been the key to the consensus which has highlighted the Senate's deliberations up to now—the recognized need for all sides to negotiate and compromise in order to achieve a final product worthy of passage.

124 CONG. REC. S10 (daily ed. Jan. 19, 1978). Earlier, Senator McClellan, introducing S. 1437 on May 2, 1977, described how the major obstacles were overcome:

[T]he bill introduced today is a product of the give and take that inevitably must be a part of the legislative process. Sixteen of the 22 major issues involved were resolved using the approach suggested by the leadership last Congress of adopting a policy of retaining current law. This was accomplished, in some instances, by deleting some sections in favor of relying on case law rules developed by the courts over the past 200 years; in other instances, by deleting certain modifications of current law; and, in still others by retaining current statutory law verbatim and including, if anything, simply a cross-reference to the current statutes; or by adopting language that all agree will duplicate current law with no significant change.

123 CONG. REC. S6834 (daily ed. May 2, 1977) (footnotes omitted).

For a review of the fitful progress of criminal law codification efforts, see Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics, and Prospects*, 41 LAW & CONTEMP. PROB. 1 (1977). Each major proposed federal criminal code, beginning with the report of the Brown Commission, see NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE (1971), has been embroiled in controversy. See, e.g., Crystal, *The Proposed Federal Criminal Justice Reform Act of 1975: A Civil Liberties Critique*, 6 SETON HALL L. REV. 591 (1975); Klein, *Extended Terms for Dangerous Offenders Under the Proposed Federal Criminal Code (S. 1.): The Emerging Legislative History*, 8 LOY. CHI. L.J. 319 (1977). See also Association of the Bar of the City of New York, Special Committee on the Proposed New Federal Criminal Code, *Three Versions of a Proposed New Federal Criminal Code (July 1974)*, reprinted in *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 7692 (1975).

7. See, e.g., 124 CONG. REC. S519 (daily ed. Jan. 25, 1978) (remarks of Sen. Kennedy on Unprinted Amendment No. 1115, which would have added capital punishment provision to S. 1437).

8. Although much of the federal judiciary seems to have distrusted S. 1437's sentencing scheme, S. 1437's near abolition of the release power of the United States Parole Commission, Proposed 18 U.S.C., *supra* note 2, § 2302; Proposed 28 U.S.C., *supra* note 2, § 994(b)(2), (j), would have given district court judges unprecedented power in our time to determine the real length of prison sentences. Under the pres-

change, would have to have been overcome. The proposal was opposed by the United States Parole Commission⁹ and much of the federal judiciary,¹⁰ two institutions which, with federal prosecutors, now set and administer federal sentencing policy. Second, the idea was novel. Nothing substantially similar had been tried in the United States.¹¹ Third, the idea was radical. Every institution in the federal criminal justice system would have been affected, and their accommodations and reactions could be only speculatively forecast. Fourth, most arguments against the commission were

ent regime, see 28 C.F.R. § 220 (1978), the Parole Commission determines the actual length of most prison sentences; the sentence length set by the judge plays only a minor role in fixing release dates. For an argument in favor of the present system, see Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 HOFSTRA L. REV. 89 (1978). On the Parole Commission's parole guidelines system generally, see Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810 (1975).

9. The Parole Commission supported parts of the proposal for apparently political reasons, but opposed those portions of the sentencing commission charge which would have affected the Parole Commission. See, e.g., *Reform of the Federal Criminal Laws: Hearing on S. 1437 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 9018, 9019-20 (1977) (statement of Curtis C. Crawford, Acting Chairman, U.S. Parole Comm'n, accompanied by Peter Hoffman, Dir. of Research, U.S. Parole Comm'n) [hereinafter cited as 1977 Hearings].

10. At its April 1976 meeting, the United States Judicial Conference disapproved S. 2699, 94th Cong., 1st Sess. (1975), an earlier version of S. 1437's sentencing commission provisions. Judicial Conference of the United States, Report of Proceedings 10-11 (St. Paul, Minn., April 7, 1976 & Wash., D.C., Sept. 23-24, 1976). See 1977 Hearings, *supra* note 9, at 8939, 8947 (statement of Hon. Gerald B. Tjoflat). On behalf of the Judicial Conference, Judge Alfonso J. Zirpoli proposed establishment of a *part-time* commission in the judicial branch; members would be appointed by the Judicial Conference. The commission would effectively be a subsidiary of the Administrative Office of the U.S. Courts. Statement of Senior District Judge Alfonso J. Zirpoli Concerning the Criminal Code Reform Act of 1978, S. 1437 and H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, Appendix D, at 11-13 (Apr. 10, 1978) (on file in office of the *Hofstra Law Review*). As things turned out, the House Judiciary Committee bill simply directed the Judicial Conference to promulgate advisory guidelines. H.R. 13959, 95th Cong., 2d Sess. § 101 (1978) (to be codified, if enacted, in 18 U.S.C. § 30101(a)-(c)). Section 101 of the bill, if enacted, will amend Title 18 of the United States Code. 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. (House version).

11. Minnesota and Pennsylvania have since established sentencing commissions. Legislation establishing the Minnesota Sentencing Guidelines Commission was enacted in March 1978. Act of Apr. 5, 1978, ch. 723, 1978 Minn. Sess. Law Serv. 705 (West). Late in 1978, Pennsylvania enacted Senate Bill No. 195, creating the Pennsylvania Commission on Sentencing. Act of Nov. 26, 1978, P.L. 1316, No. 319, 1978 Pa. Legis. Serv. 1054 (Purdon) (to be codified in 18 PA. CONS. STAT. §§ 1321(b), 1381-1386, 4104).

hard-headed, practical, and skeptical; most arguments in its support were based primarily on abstractions like principle, justice, and fairness. Fifth, the sentencing commission legislation raised potentially troublesome constitutional questions: whether the method for selection of commissioners comports with the requirements of article II, section 2, of the Constitution on appointment of officers of the United States;¹² and whether the commission's au-

12. U.S. CONST. art. II, § 2. Practical and strategic considerations favor placing the commission in the judicial branch and permitting judges to sit on the commission without formal nomination and confirmation. S. 1437 permits both results, but thereby raises problems under article II, section 2, of the Constitution. U.S. CONST. art. II, § 2.

The appointments problem arises from Proposed 28 U.S.C., *supra* note 2, § 991(a):

The President, after consultation with the Judicial Conference of the United States, shall appoint, by and with the advice and consent of the Senate, four members of the United States Sentencing Commission. . . . The Judicial Conference shall submit to the President, to the Committee on The Judiciary of the Senate, and to the Committee of the Judiciary of the House of Representatives, a list of at least seven judges of the United States whom the Conference considers best qualified to serve on the Commission. The President shall designate three . . . to serve on the Commission.

The commission's members are probably either "officers of the United States" or "inferior officers" within the meaning of article II, section 2, of the Constitution, which provides:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. Art. II, § 2, para. 2.

If the commission's members are "Officers" of the United States, they must be appointed by the President with the advice and consent of the Senate. If "inferior Officers," they may be appointed by the President, the "Courts of Law" or "Heads of Departments."

The Supreme Court's construction of article II, section 2, in *Buckley v. Valeo*, 424 U.S. 1 (1976), may have ramifications for the commission provisions of S. 1437. The Court examined the constitutionality of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, *as amended by* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263. The 1974 amendment created the Federal Election Commission, an eight-member body with responsibility for administration, oversight, and enforcement of the Act, including record-keeping, investigation, rulemaking, and determining eligibility for federal campaign funds. Among other things, the lawsuit challenged the constitutionality of the system by which the Commission's members were selected. 424 U.S. at 10-11, 117. The Commission had six voting members, of whom two each were appointed by the President, the Speaker of the House of Representatives, and the President pro tempore of the Senate. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208(a), 88 Stat. 1263 (amending § 310(a)(1) of Federal Election Campaign

Act of 1971). All voting members had to be confirmed by a majority of both houses of Congress. *Id.*

In a less than pellucid opinion, the Supreme Court held the Act's selection system unconstitutional. The Federal Election Commissioners were "Officers of the United States" and consequently could be appointed only in accordance with article II, section 2, which empowers neither the House nor the Senate to appoint "Officers of the United States," permits the House no voice in their selection, and gives the Senate an advising and consenting, not an initiating, role. 424 U.S. at 118-19. The Court did not clearly decide whether the Federal Election Commissioners were "Officers" or "inferior Officers."

There are bases for distinguishing between the Federal Election Commission and S. 1437's sentencing commission. Arguably, the Election Commission's *enforcement* authority is its distinguishing characteristic; rulemaking authority by itself need not necessarily be exercised by "Officers" or "inferior Officers." The sentencing commission would not have active enforcement powers. Moreover, different kinds of interests are affected by the two kinds of commissions. Legislation affecting voting and elections traditionally receives especially close scrutiny.

Nonetheless, *Buckley* may raise doubt about the constitutionality of S. 1437's appointment procedures. Proposed 28 U.S.C., *supra* note 2, § 991(a). If sentencing commissioners are "Officers of the United States," under *Buckley* the only constitutional method of appointment would be by the President by and with the advice and consent of the Senate. Since S. 1437's three judicial members are selected through the joint efforts of the Judicial Conference, the Senate, the House, and the President, these members would be incompetent to act. If the commissioners are "Inferior Officers," the judicial members again might be incompetent to act, since inferior officers can be appointed only by the President, the "Courts of Law," or "Heads of Departments." The Judicial Conference is neither a court of law nor a head of department.

The preceding paragraphs may overstate the constitutional problems raised by § 991(a). At minimum, a straight-faced argument can be made that *Buckley* casts constitutional doubt on § 991(a) and the competency of the commission's members to execute the responsibilities assigned them.

The possible applicability of *Buckley* was apparently long overlooked. The constitutionality of § 991(a)'s provisions on selection of members was apparently first questioned during the period between November 15, 1977, when the Senate Committee on the Judiciary reported out the committee bill, 123 CONG. REC. S19025 (daily ed. Nov. 18, 1977), and late January 1978, when the bill was considered on the Senate floor. 124 CONG. REC. S9 (daily ed. Jan. 19, 1978). The committee bill provided that the President would appoint four members and the Judicial Conference three:

The President shall appoint, by and with the advice and consent of the Senate, four members of the United States Sentencing Commission, one of whom shall be appointed, by and with the advice and consent of the Senate, as the chairman. The Judicial Conference shall designate three members of the United States Sentencing Commission.

S. 1437, 95th Cong., 1st Sess. § 124 (1977) (to be codified, if enacted, in 28 U.S.C. § 991(a)). The Congressional Research Service of the Library of Congress concluded that Judicial Conference designation of commissioners ran afoul of article II, section 2, as interpreted by *Buckley*. Congressional Research Service, *Constitutionality of Methods of Appointing of a Proposed United States Sentencing Commission*, reprinted in 124 CONG. REC. S199 (daily ed. Jan. 20, 1978). The Department of Justice, to the contrary, advised that no "serious constitutional question" was raised. 124 CONG. REC. S285 (daily ed. Jan. 23, 1978.) (remarks of Sen. Kennedy).

Nonetheless, Senator Kennedy agreed during floor deliberations to accept an

amendment, proposed by Senator Hart, which altered § 991(a) to its present form. 124 CONG. REC. S286-87 (daily ed. Jan. 23, 1978) (remarks of Sen. Kennedy accepting Unprinted Amendment No. 1097). Section 991(a) was later amended in another respect not material here. Unprinted Amendment No. 1132, 124 CONG. REC. S397-99 (daily ed. Jan. 24, 1978). Senator Kennedy suggested that the Hart amendment

remedies this whole situation by retaining the ultimate power of appointment in the Executive. If there ever was a constitutional issue, his amendment cures it. It insures that the President will appoint four members and then will also appoint the other three members from a group that will be recommended by the judges.

The four that will be public appointments must be . . . approved by the Senate. The remaining three would not be subject to advice and consent since they have been previously approved by the Congress as judges.

124 CONG. REC. S285 (daily ed. Jan. 23, 1978) (remarks of Sen. Kennedy).

Senator Kennedy's observation that judicial members have been approved previously by the Congress is a non sequitur. Confirmation as a federal district court judge does not constitute confirmation for a court of appeals post; confirmation for the court of appeals is not confirmation to the Supreme Court. It is thus unclear why Senate confirmation as a federal judge should constitute confirmation as an officer of the United States.

The reasons for S. 1437's hybrid appointment provision are relatively clear. Achievement of sentencing reform goals will be facilitated if the commission and its guidelines are supported and respected by the federal judiciary. In the face of constitutional complexities, § 991(a) was changed to its present form, but probably aims to achieve the same goal. The Judicial Conference short list assures a strong judicial presence on the commission and legitimates the judicial members by requiring that they bear a Judicial Conference imprimatur, yet avoids the need for Senate confirmation of the judicial members.

Doubts about § 991(a)'s constitutionality could be readily resolved by having the President appoint all seven commission members subject to a nonstatutory understanding, well-documented in the legislative history, that three of the commission's members will be federal judges. It should be possible by statute to protect judicial members from serving to their detriment: Commission salaries could be made comparable to those of federal court of appeals judges; provision could be made for judges to take leaves of absence from their posts without having to resign them; benefit and retirement plans for the federal judiciary and the commission could be dovetailed to assure that federal judges suffer no loss.

Under this plan, federal judges would have to endure confirmation proceedings. Confirmation proceedings would, appropriately, permit senatorial consideration of the qualifications of prospective judicial members. Since the sentencing commission would have enormous authority to establish delegated legislation, Congress should have an opportunity to consider the background and qualifications of the commission's members, including judicial members.

One risk in requiring Senate confirmation is that Senators might improperly question judges about their roles in fashioning particular decisions or writing particular opinions. Although in the abstract this raises separation of powers problems and could conceivably have a chilling effect on judges who might otherwise aspire to sentencing commission membership, the problem appears inherent in any possibility of judicial promotion. All federal judges except the Chief Justice are eligible for appointment to a higher federal judicial position. Their vulnerability to political second-guessing at confirmation hearings is no less than it would be for membership on a federal sentencing commission.

thority to set sentencing policy would be an unconstitutional delegation of legislative authority or an unconstitutional intrusion upon the independence of the judiciary.¹³

In the event, House consideration of the sentencing commission proposal was truer to the form of the Ninety-fifth Congress. The commission's anomalous vitality ended in the Criminal Justice Subcommittee of the House Judiciary Committee during the summer of 1978.¹⁴

Nonetheless, sentencing commission proposals remain timely and deserve attention. Commission legislation, likely to be resurrected in the Ninety-sixth Congress, has now been considered by two congresses and several state legislatures.¹⁵ It continues to offer promise as a means to make America's lawless sentencing system somewhat more principled, somewhat fairer, and slightly more certain.

This Article discusses some aspects of sentencing commission proposals and considers the commission's potential role in sentencing reform. Perforce the analysis is speculative and argumentative. Its emphasis is necessarily federal.¹⁶ The first part describes a legislative and institutional context in which a sentencing commission would be most likely to achieve principled and predictable sentencing practices. Next considered are key features of any sentencing commission proposal, specifically the commission's charge, the characteristics of its members, and the methods for their selection. The final section summarizes the main features of a model sentencing reform package.

13. Similar arguments have recently been raised in connection with the parole guidelines system of the United States Parole Commission. See *Geraghty v. United States Parole Comm'n*, 579 F.2d 238 (3d Cir. 1978), cert. granted, 99 S. Ct. 1420 (1979) (No. 78-572).

14. The sentencing commission did not survive. H.R. 13959, 95th Cong., 2d Sess. (1978), directs the Judicial Conference to develop merely "advisory" sentencing guidelines. Proposed 18 U.S.C. (House version), *supra* note 10, § 3101(c)(1).

15. Sentencing commissions have been established in Minnesota and Pennsylvania. See note 11 *supra*. Sentencing commission legislation has been seriously considered in Connecticut. See Legislative Commission to Study Alternate Methods of Sentencing Criminals, Report to the Legislature (Oct. 1977) (presented to the Connecticut General Assembly, Hartford, Connecticut). In New York an advisory committee on sentencing reform appointed by Governor Carey and chaired by Robert Morgenthau recently recommended establishment of a sentencing commission. See Goldstein, *Parole Boards Lose the Prison Keys*, N.Y. Times, Jan. 7, 1979, § 4, at 20, col. 3.

16. The prominent sentencing bills have been federal, see note 3 *supra*; federal legislative matters are more visible, federal records and reports more accessible.

This Article is not a brief for sentencing reform, but premises must be stated. By usage, the primary objectives of sentencing reform are these:

(1) *Regularity; fair consideration.*—Sentencing decisions should be made by judges under circumstances and pursuant to procedures which permit mature consideration of the characteristics of the offender and his offense;

(2) *Predictability.*—Sentencing decisions should be governed by published standards and policies and should be reasonably predictable.

(3) *Treatment as an equal.*¹⁷—Defendants should be treated as equals and should not receive punishments substantially more severe than those customarily imposed on similarly situated persons without reasoned and reviewable findings that circumstances exist peculiar or external to the defendant which make his punishment not substantially different from the norm or otherwise not inappropriate.

In other words, and purposely sidestepping problems in the philosophy of punishment, sentencing decisions should be reasonably consistent, made in accordance with published and accessible criteria, and based upon mature evaluation of the circumstances of the offender and his offense.

A SENTENCING COMMISSION IN CONTEXT

Judicial sentencing decisions should be regular, predictable, and reasonably consistent, but are now none of these things. The legislature, by promulgating sentence maximums greatly in excess of most sentences imposed or suffered,¹⁸ gives the judge little direction. Without other meaningful guidance, federal district court judges must rely primarily on their personal senses of justice and inevitably will impose widely disparate sentences. Nonetheless, judges are best suited to perform the fine tuning of punishment; but they should be given general guidance about appropriate sentences.

Congress is ill-equipped and institutionally unsuited to provide

17. This phrasing invokes Ronald Dworkin's distinction between a right to equal treatment and the right to be treated as an equal. See Dworkin, *The DeFunis Case: The Right to Go to Law School*, N.Y. REV. BOOKS, Feb. 5, 1976, at 29.

18. A. von Hirsch & K. Hanrahan, *Abolish Parole?* 30 (Sept. 1978) (summary of report submitted to National Institute of Law Enforcement and Criminal Justice).

the guidance necessary to achieve uniformity and fairness in judicial sentencing practices. A politically insulated, independent commission with rulemaking authority, subject to statutory criteria and limits, would be institutionally suited to do so. Less vulnerable than Congress to political pressures, and better able to devote sustained attention to sentencing, a commission with members of diverse but institutionally credible backgrounds would be able to develop informed and sensible general standards. Within broad contours of legislative policy, a commission could attempt to establish sentencing rules and policies which are ethically persuasive, constitutionally practicable, and which, if not manipulated by prosecutors and wilfully circumvented by trial judges, would be the basis for a reasonably just and predictable system of punishment. The mere existence of credible standards should encourage judicial consistency. At the same time, judges could be permitted to disregard presumptively applicable guidelines and, for stated reasons subject to sentence appeal and occasional parole review, to impose a sentence not envisaged by otherwise applicable standards. This system would tend to achieve more consistent sentences while assuring that each sentence results from careful consideration of the offender and offense.

Whether a sentencing commission will deliver on its promise will depend on its authority, organization, and operational context. No real sentencing commission will enjoy a perfect context. However, a best case can provide a reference for considering commission proposals and assessing their potential and can help us avoid some of the missteps that have characterized many proposed and enacted sentencing reforms.¹⁹

Improvements in sentencing law and practice must fail of their purposes, or at least operate in unanticipated ways, unless the system's complexity is recognized and allowed for. Decisions about the processing of defendants result at each stage from an amalgam of institutional pressures and constraints, agency policies, and personal judgments about the defendants' worthiness and blameworthiness.²⁰ Reform proposals can be considered sensibly only in terms of how they accommodate, or can be manipulated by, discretion they do not abolish or structure.

19. See text accompanying notes 21-28 *infra*.

20. In the federal system, for example, important roles are played by administrative and law enforcement agencies, United States attorneys, defense counsel, probation officers, trial and appellate judges, correctional authorities, parole hearing examiners, and the United States Parole Commission.

Few sentencing reform analyses, however, address the complexity of the criminal justice system or the problem of myriad discretion. The Twentieth Century Fund Task Force on Criminal Sentencing noted, but ignored, the prosecutor's role in determining the offense and facts, which together form the bases of judicial sentencing decisions.²¹ Recent Maine legislation abolished parole release,²² but did nothing to structure judicial and prosecutorial decisions; without a parole agency to set release dates and bring some consistency to sentences which result from the decisions of numerous judges and prosecutors, the result may be greater sentencing disparity than occurred before the change.²³ Recent Illinois legislation created a good-time system of such magnitude that it may evolve into a parole release system administered by correctional authorities.²⁴ California legislation²⁵ ignores the prosecutorial role in sentencing;²⁶ by setting a detailed statutory sentencing tariff, California may give far too much unchecked sentencing power to the prosecutor.²⁷ Accordingly, vague, exhortative "guidelines" issued by the California Judicial Council concerning the role of aggravating and mitigating circumstances in sentencing may counter prosecutorial influence by reducing the predictability of judges' decisions.²⁸ If sentences were completely

21. See TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 26-27 (1976).

22. See ME. REV. STAT. ANN. tit. 17-A, §§ 1251-1254 (West 1978). Release discretion may have shifted to Maine correctional authorities under liberal work-release, furlough, and good-time provisions. See, e.g., *id.* § 1253(3)-(4).

23. See Zimring, *A Consumer's Guide to Sentencing Reform: Making the Punishment Fit the Crime*, HASTINGS CENTER REPORT, Dec. 1976, at 15.

24. See ILL. ANN. STAT. ch. 38, §§ 1003-3-3, 1003-6-3. Illinois has established 50% good time. Every day served is credited as two. *Id.* § 1003-6-3(a)(2). See Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29, 45 (1978).

25. CAL. PENAL CODE §§ 1170-6 (West Cum. Supp. 1978).

26. This is equally true of S. 1437. Judge Bazelon has pointed out:

[T]o the extent that S. 1437 succeeds in creating predictable and uniform sentences, the discretion of the prosecutor to decide which defendants to prosecute for what crimes becomes all the more important. At present, sentencing discretion is shaped primarily by prosecution, judges, and parole boards. Uniform and mandatory sentencing would merely transfer most of this discretion to prosecutors, who would in effect set sentences by their decisions about whom to charge with what crime and whether to plea bargain.

Bazelon, *Missed Opportunities in Sentencing Reform*, 7 HOFSTRA L. REV. 57, 68 (1978).

27. See, e.g., Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentences*, 126 U. PA. L. REV. 550, 570-74 (1978).

28. The California legislature empowered the State's Judicial Council to de-

predictable, the prosecutor could fix the sentence by charging (or not dropping) one offense rather than another. As judicial decisions become less predictable, the prosecutor's decisions will count for less.

The ropewalker provides an appropriate metaphor. Once balanced on the wire, he cannot move one part of his body without adjusting some compensating limb, else he will plummet to the ground.²⁹ Similarly, the goal of sentencing reform should be to bal-

velop sentencing rules for superior courts. CAL. PENAL CODE § 1170.3 (West Cum. Supp. 1978):

The Judicial Council shall seek to promote uniformity in sentencing under Section 1170, by the adoption of rules providing criteria for the consideration of the trial judge at the time of sentencing regarding the court's decision to:

- (a) Grant or deny probation.
- (b) Impose the lower or upper prison term.
- (c) Impose concurrent or consecutive sentences.
- (d) Consider an additional sentence for prior prison terms.
- (e) Impose an additional sentence for being armed with a deadly weapon, using a firearm, and excessive taking or damage, or the infliction of great bodily injury.

Id. CAL. PENAL CODE § 1170(a)(2) (West Cum. Supp. 1978) provides in part: "In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council." The Judicial Council, despite the "shall," in reliance upon the words "for the consideration of the trial judge" in § 1170.3, concluded that "the criteria in the rules are only for the *consideration* of the trial judge at the time of sentencing." Sentencing Practices Advisory Committee, Judicial Council of California, Report and Recommendation Concerning Proposed Sentencing Rules and Recommended Reporting System 5 (Jan. 1977) (emphasis in original). Accordingly, the promulgated sentencing rules are advisory only. Rule 408(a) provides in part: "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made." CAL. R. CT. 408(a).

29. The questions whether, and to what extent, parole authorities will retain authority to set release dates, and parole decisions will be governed by guidelines, illustrate the importance of context and awareness of complexity. For detailed discussion of parole abolition, see Skrivseth, *Abolishing Parole: Assuring Fairness and Certainty in Sentencing*, 7 HOFSTRA L. REV. 281 (1979). The wisdom of abolishing parole release authority will depend in large part on the coherence of offense classification, the ranges of authorized sentences, the nature of plea bargaining in the jurisdiction (for example, whether prosecutors agree to sentence bargains or only to charge bargains), the extent to which judicial and prosecutorial discretion is structured, and the availability of appellate review. Thus, the case for parole abolition in the federal system, without other major statutory and structural changes, is not very persuasive: Offense classification is nonexistent and authorized maximum sentences arbitrary; plea, charge, and sentence-bargaining practices vary widely across the country; sentencing discretion is not structured; and appellate sentence review, while gradually developing under the eighth amendment, remains exiguous. Moreover, determinate sentencing schemes cannot be evaluated sensibly without regard for changes in caseloads and institutional populations, incentives for guilty pleas, police behavior, and pressures on probation officers, prosecutors, and parole and correctional authorities.

ance the system around the judge while accommodating the needs and constraints of other agencies, else it will fail to provide reasonably fair and consistent treatment of offenders. Too little guidance for judges assures wide disparities, creates too heavy dependence on parole release, and produces an administrative sentencing system for many defendants. Tight guidelines would place too much weight on the prosecutorial limb and tend to increase prosecutorial influence. An ideal system will produce general equilibrium.

To put and maintain the sentencing system in optimum balance will not be easy. But that must be the task. The following paragraphs elaborate on an optimum context in which a sentencing commission could best further sentencing goals of regularity, predictability, and treatment of offenders as equals.

A rational system of offense classification is a condition precedent to a just system of sentencing. The criminal law embodies community values and moral premises in its characterization of certain conduct as criminal, in its scaling of offenses, and in its recognition of justifying, excusing, and mitigating defenses. Capricious punishment decisions are inevitable unless authorized penalties are proportioned in some morally coherent way to the relative blameworthiness of conduct. When the same sentences can be imposed for attempts and completed offenses, for different grades of the same offense, for different offenses of widely divergent blameworthiness, they will be. The moral and policy choices which underlie the substantive law will be made nugatory. The optimum context would include a rational system of offense classification and a morally coherent criminal law.

The optimum context incorporates no assumptions about the operation of administrative and law enforcement agencies, even though they initiate many criminal cases.³⁰ A nascent literature

The Parole Commission is the only major time-setting institution in the present federal system which can consistently adapt for arbitrary decisions by the other major actors. Abolition of parole, by itself, could only make sentencing less consistent and predictable. Thus, the merits of a proposal for a presumptive sentencing standard—such as that enacted in California, CAL. PENAL CODE §§ 1170-6 (West Cum. Supp. 1978), will differ depending upon whether parole release authority is abolished or retained. Retention may operate to reduce unwarranted disparity if judges willfully circumvent guidelines or follow them slavishly in the wake of willful prosecutorial manipulation. Abolition will enhance the prosecutor's power. Establishing merely advisory guidelines will permit judges to police prosecutors' decisions. Moreover, if parole release is abolished, the existence of meaningful appellate sentence review or of a credible system of prosecutorial guidelines should affect reactions to the guidelines proposal.

30. Although sentencing reformers have become increasingly aware of and con-

confirms intuition that agencies vary widely in the existence and rigor of procedures and standards for referring apparent offenders for prosecution by United States attorneys.³¹ While agency referrals should at least be soundly based on evidence, justified by agency priorities and resources, and not capricious, this cannot be assumed. The large number of agencies, their law enforcement mission, the existence of prosecutors and judges to review referrals, and the difficulties experienced to date in the parallel effort to structure prosecutorial decisions argue for assuming only that referrals will be made.

Prosecutorial charging decisions and plea, charge, and sentence bargains should be governed by administrative guidelines promulgated by the Justice Department and subject to regular review by supervisory personnel and to administrative, but not judicial, review initiated by defendants. Prosecutors would be required to state in open court the reasons for dismissing or not prosecuting charges in exchange for a defendant's guilty plea.

The sentencing commission would promulgate sentencing guidelines which establish appropriate types and amounts of punishment for defined categories of convicted offenders. Judges, in setting sentences, would be required to consider, among other things, applicable guidelines and to give reasons for sentences imposed. All prison sentences would be appealable, whether imposed after guilty plea, or bench or jury trial. The standard for review would be less rigorous for sentences imposed within the guidelines than for those imposed without. Lawful sentences imposed in accordance with applicable guidelines could be altered only if they are found to be "clearly erroneous" or "clearly unreasonable"; sentences not in accord would be remediable if the appellate court finds them "inappropriate" or "unreasonable."

cerned about prosecutorial power under determinate sentencing regimes, *see, e.g.*, Bazelon, *supra* note 26, at 68; Orland, *supra* note 24, at 43-44, little attention is paid to police discretion. Since the appearance of Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960), control of police discretion has been a central concern of sociological studies of police. *See, e.g.*, J. SKOLNICK, *JUSTICE WITHOUT TRIAL* (1966).

31. *See, e.g.*, Frase and Rikoski, *Processing of Federal Criminal Matters in the Northern District of Illinois* (to be published by National Institute of Law Enforcement and Criminal Justice); Frase, *The Decision to Prosecute Federal Criminal Charges—A Quantitative Study of Prosecutorial Discretion* (1977) (prepared for Center for Studies in Criminal Justice, University of Chicago Law School); Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036 (1972).

A streamlined parole administration would possess authority to consider early release dates for prisoners sentenced to terms in excess of the maximum authorized by applicable guidelines. Subject to release guidelines set by the sentencing commission, the parole administration would fix release dates not earlier than the minimum sentence established in the sentencing guideline applicable to each defendant at the time of sentencing. A modest statutory system of vesting good time would be administered by correctional authorities, subject to requirements of due process. Good-time credits would automatically vest unless the prison administration promptly, for cause, decides to withhold it. Finally, for most prisoners, correctional authorities would have full authority to determine institutional assignments, including assignments to educational and work furloughs, to community-based facilities and, within defined statutory limits (*e.g.*, final one-third of net sentence after good-time allowance), to conditional and terminal furloughs.

The optimum context likely has only heuristic value. Regulation of prosecutorial discretion may be politically impossible and administratively impracticable. The political influence of the federal judiciary may be such that meaningful appellate sentence review, a sentencing commission not controlled by the judiciary, and the limited parole release system described above may be impossible. Establishment of a sensible offense classification system and a morally coherent criminal law may also be impossible.

Nonetheless, considering the sentencing commission and the problems it raises in terms of the best case may aid in assessing the role a commission might play and suggest adjustment to commission proposals to reflect squalid realities. It may be that so much of the optimum context will be lacking that the sentencing commission cannot be adequately adapted and ought not be established. That is worth knowing. If so, the idea—if it has virtue—can be retired, to be recalled in some more idealistic future or, like Sheldon Glueck's expert sentencing panel,³² to enter the arcana of sentencing lore.

Here is the case for establishing a sentencing commission within an optimum context. An independent rulemaking commission would be constitutionally well-suited to act as the intermediary between legislature and judge. Legislatures are too political,³³

32. S. GLUECK, *CRIME AND JUSTICE* 225-26 (1936), *discussed in* M. FRANKEL, *CRIMINAL SENTENCES*, *supra* note 3, at 74-75.

33. *See, e.g.*, F. Zimring, *Making the Punishment Fit the Crime* (1977) (occa-

too busy, and lack sufficient expertise to make punishment decisions other than those (1) defining criminal conduct, (2) expressing community values of blameworthiness by classifying offenses and thereby establishing outer boundaries of punishment for particular kinds of criminal conduct, and (3) establishing machinery and broad criteria for administration of the criminal law and just imposition of punishment.

The sentencing commission could establish and, on the basis of accumulating knowledge and its members' increasing understanding, continually refine criteria for sentencing. Continuing refinement would provide some assurance that most defendants have been neither over- nor under-charged; that offenses of conviction bear a reasonable resemblance to underlying facts; that defendants are processed in accordance with articulable and published policies; that all available relevant information about the defendant and his offense is made available to judges; and that judges' application of the commission's sentencing criteria are subject to meaningful review by others.

Within the logic of the legislative system of offense classification, subject to statutory criteria for punishment decisions, the sentencing commission could attempt seriously and systematically to set standards for appropriate punishments. The commission could wrestle with the difficult questions raised by criminal punishment, such as what facts about the offender and his offense are germane to punishment decisions; are the same facts germane to both incarcerative and nonincarcerative sentences; what do we know about deterrence, incapacitation, and rehabilitation, and what information, if any, does that knowledge suggest for inclusion as cri-

sional papers from University of Chicago Law School).

It is the hope of most of the advocates of determinate sentencing that the responsibilities thrust on the legislature by their reforms will educate democratically elected officials to view their function with realism and responsibility—to recognize the need for priorities and moderation in fixing punishment. This is a hope, not firmly supported by the history of penal policy and not encouraged by a close look at the operation and personnel of state legislature.

Yet reallocating power to the legislature means gambling on our ability to make major changes in the way elected officials think, talk and act about crime. Once a determinate sentencing bill is before a legislative body, it takes no more than an eraser to make a one-year "presumptive sentence" into a six-year sentence for the same offense. The delicate scheme of priorities in any well-conceived sentencing proposal can be torpedoed by amendment with ease and political appeal.

Id. at 13.

teria for punishment; what are the appropriate roles of conceptions of harm and culpability in calculating deserved punishment; should sentencing be based on the "real offense" or only on those facts necessary to support the offense of conviction; should there be a guilty plea "discount" and what should it be; how much latitude should a judge be permitted in tailoring punishment to his perception of the facts of the case and the offender's culpability, and to his personal sense of justice; what are the caseload limits of our punishment machinery and how should those limits affect punishment criteria; within statutory offense classes, how should offense severity be scaled; should sentencing criteria include factors which are race- or class-biased;³⁴ and should geography—regional, moral, social, or political attitudes—play a significant role in punishment?

A sentencing commission must operate within its constitutional and statutory context. The form and content of its sentencing rules should further the values of predictability, fairness, and treatment as an equal in the face of myriad forces which operate to frustrate their achievement. If, however, we ignore those forces, we can consider how a commission ought to operate, and then how it should adapt to the world around it. The next section of this Article discusses important aspects of a sentencing commission in an optimum context.

ANATOMY OF A SENTENCING COMMISSION

The sentencing commission may offer promise as a means to achievement of sentencing reform goals. What the commission will and can do, however, will depend on who its members are and on its authority. Thus, the major issues to be addressed here are the commission's composition, the method for selecting members, and the commission's charge from the legislature.

Composition of the Commission

The sentencing commission's membership will be its single most important characteristic. Even in the most promising of systemic and statutory settings, the commission's effectiveness will depend on its policy decisions, and its policy decisions will depend

34. If it is known that a significantly larger proportion of whites than blacks have postsecondary education, a sentencing system which systematically uses low educational levels as a negative consideration in sentencing will adversely affect blacks as a class. Conversely, low education as a mitigating factor in sentencing would adversely affect whites as a class.

on its members. The commission will have to tread a fine line to secure and maintain its credibility with Congress, the federal judiciary, and other institutions comprising the federal criminal justice system. The commission must be independent, prepared to assert its authority over the remonstrances of affected interests, and the force of public stereotype and emotion. Yet, it must be sufficiently sensitive to judicial and other sensibilities and needs to maintain judicial morale and attract support throughout the criminal justice system.

Initial credibility can be fostered by selection of commissioners of integrity and stature, and by informed use of symbols. The commissioners should be treated as officials of the highest rank, their importance underscored by all of the trappings of high office: salaries equivalent to those paid Cabinet members or Court of Appeals judges,³⁵ corresponding perquisites and resources, and appointment comparable in form and substance to that of other officials of highest rank.

If the commission loses its initial credibility, the most favorable equilibrium will shift. Judges and prosecutors will be less likely to accept the commission's authority and defer to its policies. Increased prosecutorial manipulation and judicial circumvention of sentencing standards will shift the locus of sentencing policy from the commission, modulated by the judge, to the prosecutor and the judge. Although appellate sentence review and parole release authority may force the system back into balance, they may not. The problem is best anticipated and avoided.

Continuing credibility will depend on the halo effect derived from the personal authority of the commissioners and the trappings of their offices, the commission's professionalism, the apparent wisdom of published sentencing standards, a sensitivity both apparent and real to the views, needs, and constraints of officials and agencies, and the effectiveness of the commissioners at selling both

35. The importance of form in this regard has been emphasized by, among others, Judge Marvin E. Frankel:

This commission ought to be . . . an illustrious agency. . . . The prospects for success will hinge upon the possibility of attracting as Commissioners people of rich qualifications and high repute. Presidential selection will enhance that possibility.

. . . The pay, I suggest, should be stated at the rate for judges on the Courts of Appeals and members of Congress. The amount at stake is trivial. The symbolic value, whether or not it is quite momentous, surely warrants the added costs.

1977 *Hearings*, *supra* note 9, at 8877, 8879 (statement of Hon. Marvin E. Frankel).

the commission and its product. The commission will have to be aware of—sensitive to, but not dominated by—the parochial interests and policy preferences of professionals and practitioners. Maintaining credibility will be difficult and will depend in large part on who the commissioners are.

Commission membership can be approached in two ways: in terms of commission models which encompass or determine membership credentials or in terms of appropriate or useful individual backgrounds. This section discusses three commission models, and the relevant professional stance and experience of potential commissioners. Each model assumes that the commission will have adequate staff and material support.

*United Nations Security Council Model.*³⁶—The best developed proposal for a formally representative sentencing commission has been presented by Marvin Zalman.³⁷ Zalman proposes creation in states of “a central policymaking board with legal authority to order modifications” in prosecutorial, judicial, and parole practices.³⁸ Board members representing affected agencies would be appointed (in states where the respective agencies are centrally organized and managed) or elected by professional constituencies (where officials, usually prosecutors and occasionally criminal court judges, are locally appointed or elected or are not part of a statewide hierarchy).³⁹ Each representative would possess a veto power over proposed policies and rules.⁴⁰

Zalman offers several arguments in support of his representative model. First, only policy decisions acceptable to all relevant agencies would be politically practicable: “[R]adical interference with the internal workings of autonomous agencies is such a

36. See Zalman, *A Commission Model of Sentencing*, 53 NOTRE DAME LAW. 266, 277 (1977).

37. See generally *id.* Zalman’s proposal is discussed here as a general model for a formally representative sentencing commission. Others, however, have suggested a similar design. The International Association of Chiefs of Police has endorsed a proposal that a nine-member representative commission include the Attorney General, the Director of the Bureau of Prisons, the Chairman of the United States Parole Commission, law enforcement representatives from the Departments of Justice and Treasury, and four federal judges. See 1977 *Hearings*, *supra* note 9, at 9447, 9450 (statement of Glenn King, executive director, International Association of Chiefs of Police). The newly established Minnesota and Pennsylvania sentencing commissions are both formally representative. See note 11 *supra*.

38. Zalman, *supra* note 36, at 275.

39. *Id.*

40. *Id.* at 275-77.

great departure from the norm that the notion would be politically infeasible.”⁴¹ Second, because many judges and prosecutors are elected, unless the rulemaking commission is “composed of representatives from the key agencies concerned with the sentencing function, namely, the prosecutors, judges, and parole board,”⁴² it “may violate democratic ideals and constitutional concepts of the separation of powers.”⁴³ Third, sentencing authority is diffuse; financial, personnel, and ideological constraints are real. Veto power in representative commissioners responsibly incorporates into the commission’s task the likely operational vetoes of the agencies they represent.

Other implicit arguments could be offered to support Zalman’s proposal. A representative commission, regardless of veto power, might assure that policy will be informed by awareness of the constraints, and practical and political problems which face each involved agency. The presence on the commission of formal representatives may enhance the credibility of the commission and its rules with the affected agencies, and make them more likely to defer to the commission’s authority and policy decisions.

Moreover, a representative commission might enhance the credibility of commissioners as spokesmen for the commission and its decisions. The judicial or prosecutorial members, because they are formal representatives and respected professionals, should be influential proponents of commission policies. Their participation in the policymaking process should give them a personal stake in successful implementation of commission guidelines. Their professional stature should make their constituencies more receptive to the case they present for the commission’s rules.

Zalman’s arguments are of varying persuasiveness. The express arguments based on political infeasibility, democratic ideals, and practical constraints have some merit, but are overstated. To the extent that they argue for a veto, they go too far. Reasonable people can differ about the appropriate level of state paternalism over individual citizens, but there can be no serious doubt that legislatures, and administrative agencies to which rulemaking authority is delegated, should have authority to impose policy decisions on recalcitrant prosecutors and judges. Legislatures possess authority to abolish parole or plea bargaining, to alter authorized sentences, to

41. *Id.* at 275.

42. *Id.*

43. *Id.*

establish mandatory minimum and maximum sentences; surely they possess the power to structure prosecutorial and judicial discretion. Further, while in a free society the state is often obliged to defer to the individual's judgment of his or her own needs and priorities, however unwise that judgment may appear, it certainly need not defer to the views of prosecutors or judges about the proper performances of their functions. That judges or parole authorities might claim complete authority to determine sentences in individual cases does not establish that either grant of authority would necessarily be wise public policy.

The problems raised by Zalman's express arguments are not insubstantial. The perceptions from which they are derived may signal serious impediments to implementation of policy. However, the remaining arguments concerning awareness of operational constraints, institutional authority, and creation of ambassadors to the agencies, are sound. Representativeness may facilitate development and application of sensible policies.

Nonetheless, the arguments for representativeness should be viewed as suggestive but not determinative. Awareness of differing points of view and practical constraints is obviously important to establishment of sentencing policy. But there are dangers. Especially in states, the presence of elected judges and prosecutors might give rise to unhealthy amounts of petty ambition, partisanship, and political posturing. Formal representativeness might also lead to a sphere of influence approach to sentencing policy. Each bloc of representatives might receive group deference to its views about the practices and policies of its agency. Someone must impose policy on prosecutors, judges, and parole authorities; a commission which deferred, in due course, to the self-perceived needs and priorities of each, would be unlikely to do so.

Representativeness must also be weighed against other considerations. Concern for successful implementation of commission policies may argue loudly for a judicial voice in the sentencing commission. To the extent that other concerns argue for a commission comprised largely, substantially, or solely of judges, representativeness must be sacrificed. Concerns about collegiality and manageable size may compel a commission which is too small (say five or seven members) to permit representativeness. If a seven-member commission were to include three judges, and one or two social scientists, too few slots would remain for "representatives."

There is always the problem of definition. Who should be represented? The following suggestions might reasonably be offered:

police, prosecutors, public defenders, private defense counsel, probation and parole officers, trial judges, appellate judges, parole administrators, correctional administrators, ex-offenders, prisoners, criminal justice researchers, academics, legislators, and the general public. Loud voices will also call for female and racial minority representatives as well as for political party balance.⁴⁴ Such a menu would be a sure recipe for inertia, if not breakdown. Who can say which of the constituencies listed above should be represented on a sentencing commission? Each would bring an important point of view or a special expertise. Yet a commission large enough to give each representation would be too large to be manageable and to act as a close collegial body. Some representativeness, however, is probably necessary. A significant judicial presence is no doubt essential if the commission is to achieve legitimacy with the judiciary. Broad diversity of background and constituency is similarly important. A commission including only prosecutors, judges, and parole administrators might be too narrow and parochial, too likely to have members anxious to defer to one another; members from other relevant backgrounds would probably be wise, but not so many as to make the commission unwieldy. Relevant experience, not representativeness, should be the basis for membership selection.

A sentencing commission ought not be designed to make it an adversarial, politically-charged forum. But with representation goes responsibility to a constituency. Congressmen are notoriously unsympathetic to policy changes which will mean less money or fewer jobs for their districts. Representatives of officials and agencies may similarly approach policy from a perspective of parochial interests and needs. A sphere of influence or adversary approach to sentencing policy might result. If the latter, the sentencing commission is unlikely to achieve and maintain essential credibility with important constituencies.

The issues and problems for sentencing reform are complex, the results of changes uncertain and unpredictable. Some approaches to sentencing reform may be novel and require a genuine openness and receptivity if they are to be heard, much less understood or adopted. Formal representatives are not likely to admit to the existence or solubility of some problems and to consider the

44. The final floor amendment to § 991(a), Proposed 28 U.S.C., *supra* note 2, § 991(a), as passed, dealt with party balance. Unprinted Amendment No. 1132, 124 CONG. REC. S545 (daily ed. Jan. 26, 1978).

desirability of some solutions. Parole administrators may be especially unreceptive to arguments for abolishing or reducing the role of parole decisions; both probation and parole officers may resist sentencing schemes eliminating parole supervision. Politically independent prosecutors may be impatient with arguments for enforceable prosecutorial charge, plea, and sentence bargaining rules.

The case for a formally representative commission is not compelling. The arguments in its support do, however, emphasize the importance of a sensitivity to the characters and requirements of operating agencies, and the commission's need to achieve legitimacy. Many of these concerns can be addressed without accepting some of the disadvantages of a representative commission.

Judicial Model.—The second model is a judicial commission composed solely of judges.⁴⁵ The case for this type of commission is not insubstantial. Sentencing is, and ought to be, a task of judges. Both the appearance and the reality of a judicial role are important. Sentencing policy should be informed by the experiences, insights, and sensibilities of judges. Sentencing is judicial territory. Many judges probably believe that sentencing reform proposals threaten an improper intrusion on judicial autonomy. A commission composed of respected trial and appellate judges would probably best be able to reassure judges that their needs, concerns, and views have been considered in setting sentencing policy. Put negatively, if judges are unsympathetic or hostile, they can frustrate the workings of any sentencing system. Judicial acquiescence and support are most likely if the commission is composed solely of judges, most unlikely if it contains few or none.

Serious arguments can be raised against a judicial sentencing commission. First, judges may be unduly deferential to the autonomy of other judges. Experience with appellate sentence review so counsels.⁴⁶ Similarly, the California Judicial Council's enactment of vague exhortative guidelines under California's Uniform Determinate Sentencing Act⁴⁷ should lead to a less than sanguine view of

45. This, in effect, was the proposal of the Criminal Justice Subcommittee of the House of Representatives. The Subcommittee's Proposed Federal Criminal Code charged the Judicial Conference to develop "advisory sentencing guidelines for Federal judges to use in determining whether to imprison convicted persons and in determining the nature and extent of sentences in criminal cases." Proposed 18 U.S.C. (House version), *supra* note 10, at § 30101(c)(1).

46. See, e.g., Zeisel & Diamond, *Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut*, 1977 AM. B. FOUNDATION RESEARCH J. 881.

47. Uniform Determinate Sentencing Act of 1976, ch. 1139, 1976 Cal. Legis.

the likelihood that a group of judges will create exacting standards for other judges.⁴⁸ Moreover, it was not so long ago that the United States Judicial Conference, which would select commission members under most of the federal bills and proposals, officially opposed the original sentencing commission proposal.⁴⁹

Second, a judicial sentencing commission might suffer from an unhealthy self-assurance. Parole administrators, social scientists, civil libertarians, ex-offenders, and others do have important things to say about sentencing. The considerable personal, institutional, and legal deference accorded judges might make a judicial sentencing commission less than ideally open to the views of others on a topic so traditionally judicial. Yet the commission must be receptive to other voices if it is to be adequately informed, wise, and just. There are other actors in sentencing. Prosecutors and parole administrators are at least the judges' equals in sentencing. The commission and its rules must be fully open to their needs and constraints if the commission's policies are to be credible. It is for this reason particularly that the arguments in favor of a representative commission are so important.

Third, another major argument in support of a representative sentencing commission—that any of the major agencies can operationally veto an uncongenial policy—must be considered. The credibility of the commission and its rules, and the prospect that prosecutors and parole authorities will try to live with them, will be enhanced if it appears that the commission is aware of and sensitive to their needs and constraints. A commission composed only of judges is not likely to reassure other participants in the criminal justice system that their needs have been fully considered. Similarly, a prosecutorial member is more likely to be an effective spokesman to other prosecutors than is a judge.

Fourth, a sentencing commission composed solely of judges might exhibit an "upstream" conception of sentence length.⁵⁰ Amidst the many officials who can affect the length of prison sentences, judges, in imposing sentences, have experience with sentencing numbers greatly in excess of sentences actually served.

Serv. 4752 (West), as amended by Act of June 29, 1977, ch. 165, 1977 Cal. Legis. Serv. 433 (West). See CAL. PENAL CODE 1170-.6 (West Cum. Supp. 1978).

48. See note 28 *supra*.

49. See note 10 *supra*.

50. Professor Andrew von Hirsch has made this argument on several occasions. See, e.g., 1977 Hearings, *supra* note 9, at 8977, 8979, 8981-82 (statement of Prof. Andrew von Hirsch, School of Criminal Justice, Rutgers University).

An "upstream" conception of sentence length might produce guidelines calling for very long sentences, even if parole release were abolished. If parole release were retained, long recommended sentences could still result. Judges might establish guideline ranges intended to anticipate parole release policies.

Fifth, membership on a sentencing commission should be a full-time task; membership on a judicial sentencing commission is likely to be a sideline at most. The task of developing sentencing rules will not be simple. A commission must wrestle with problems of punishment jurisprudence, a scant but evolving knowledge of the deterrent and incapacitative effects of punishment and the rehabilitative effects of social-welfare measures, and our modest understanding of the accommodative behavior of bureaucracies and bureaucrats. Developing and continually refining sentencing rules in light of experience, changing social needs, and increasing knowledge will require the full-time energies of talented people. A judicial sentencing commission is unlikely to permit that.

Thus, as with the representative commission, the judicial commission model contains much that is persuasive, but fails to meet important needs.

Elite Model.—An elite sentencing commission might be a blue-ribbon group of experts. Under this model, people of intelligence, relevant experience, vision, and imagination would be selected so that the commission would be broadly, but not formally, representative. Membership selection should be informed by concern for the personal authority of prospective members, by their credibility with particular constituencies, and by the need to build bridges. Once constituted, the commission would be set free to fix sentencing rules within wide statutory criteria, subject to its own sense of the possible, the just, and the wise.

The major strengths and weaknesses of an elite commission are patent in the contrast with the representative and judicial models. It may bring broader vision, greater imagination, and more genuine agnosticism to the task than would a representative or judicial commission; conversely, it might be less than adequately sensitive to real institutional needs and constraints, to the depth and force of public opinions and values, and to the likelihood of dysfunctional institutional accommodations. Members of genuine stature and recognition to the general public and the law reform and academic communities would augur well for the commission's integrity, reform credentials, seriousness of purpose, and freedom

from bureaucratic or professional ideology. That very status, however, may make the commission less credible and authoritative in the professional, judicial, and bureaucratic communities.

Nonetheless, though the case for an elite commission is mixed, it appears the optimal model. It is likely that a representative commission, like its model the United Nations, would do nothing to substantially affect its constituent agencies' perceptions of their own bureaucratic and institutional needs. Equally unfortunately, a commission composed entirely or largely of professional correctional and bureaucratic administrators might exhibit extreme deference to legislative constraints and to political and judicial sensibilities. A cautious and conservative commission, unduly sensitive to these concerns, would be likely to assert its authority timidly. Its guidelines might offend no one's sensibilities and impinge on no one's discretions, but this would produce little progress toward ordered and principled sentencing. To the extent that such concerns are real, a little judicial hubris might not be a bad thing. However, a sentencing commission composed solely of judges might be extremely deferential to judicial sentencing discretion and, ultimately, inconsequential. Guidelines consistent with such deference might be mere platitudes.

An elite commission, however, could more effectively accommodate both the agencies and the judiciary. It could seek derivative institutional authority and credibility from the authority and credibility of its members. So long as it is not formed on a constitutive principle of representativeness, agency or interest background need not be a disqualification for membership. Similarly, an elite commission could include judicial members; provision could be made to permit their membership without forfeiture of salary or judicial tenure.

A large number of membership pools suggest themselves for representation on an elite commission. Several of the more obvious are mentioned above. The commission should include some sitting federal judges to assure the judiciary that experienced federal judges are influential in establishing sentencing policy and that the commission's decisions are sensitive to judicial sensibilities and morale.

Some commissioners might have backgrounds in correctional or parole administration. Intelligent sentencing policy must be informed by knowledge of the operations, effects, and effectiveness of imprisonment, probation, and parole. Sentencing policy must also reflect an appreciation of the actual durations of imprisonment,

which bear little relation to the sentence maxima established by legislators and imposed by judges.⁵¹ Commission members drawn from correctional and parole backgrounds would bring these sensitivities with them.

Probably the commission should include a lawyer or two—a lawyer with experience and background in the criminal justice system, not a Washington generalist who bounces from federal agency to congressional committee to private practice and back again with the change of seasons. The commission will have to confront and resolve difficult legal problems, constitutional and otherwise, in developing sentencing policy. Although a commission would no doubt be advised by its own staff counsel, it would benefit from the membership of a lawyer who is aware of the complexities of sentencing practices and who can identify, understand, and assess difficult legal concerns.

The commission might properly include a criminologist or a sophisticated research professional. Serious scholars of the criminal justice system could bring a unique expertise and insight. A criminal justice research professional might be especially appropriate to a sentencing commission which is, after all, an institution conceived as a mechanism for development of sentencing guidelines—a concept directly resulting from the enormous and ambitious research project which inspired the United States Parole Commission's parole guidelines.⁵² Criminal justice researchers could also bring to the commission a familiarity with research and access to knowledge of the operations, effects, and effectiveness of sentencing practices and correctional programs.

The effectiveness of the sentencing commission will depend on the drive, enthusiasm, and commitment of its members. The infusion of partisan politics and uninterested time-servers is unlikely to further the cause of principled sentencing practice. The sentencing commission should not become a haven for "gentlemen," gifted amateurs, and temporarily unengaged lawyers. Nor should membership provide a high status sinecure for unemployed former congressmen and campaign contributors. Achievement of fair and prin-

51. See, e.g., Low, *Preliminary Memorandum on Sentencing Structure*, in 2 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1250 (1970).

52. Gottfredson, Hoffman, Sigler & Wilkins, *Making Paroling Policy Explicit*, 21 CRIME & DELINQUENCY 34 (1975); P. Hoffman, *Federal Parole Guidelines: Three Years of Experience* (United States Board of Parole Research Unit Rep. No. 10, 1975).

ciplined sentencing is an important objective in a just and humane society. Selection of members who can bring sensitivity, experience, and a sense of purpose to the commission is essential if a serious effort toward that end is to be made.

Selection of Commission Members

The preceding section discussed commission membership models and argued that an elite commission, heterogeneous but not formally representative, offers the greatest promise of openness, receptivity to proposals for change, and freedom from institutional preoccupations. The mechanics of membership selection are only germane to an elite sentencing commission. A judicial sentencing commission would be composed of judges. It is conceivable that the President would appoint sitting judges to a judicial sentencing commission, but that seems both politically and institutionally unlikely. Similarly, if a representative sentencing commission were established, the bulk of its members would be elected or designated by their respective constituencies.

It is not unreasonable to assume that the identities of the commission's members will be determined by the identity of the person or institution which selects them. In the federal system, the choice seems to be between the President and the judiciary (or the Judicial Conference). Constitutional problems probably forbid congressional selection of sentencing commission members.⁵³ Successive federal sentencing commission proposals have shifted from a judicially appointed commission to one chosen by the President.⁵⁴ In S. 1437, as passed, four of the commission's members would be appointed by the President after consultation with the Judicial Conference and with the advice and consent of the Senate.⁵⁵ The remaining three members would be designated by the President

53. See note 12 *supra*.

54. Under Senator Kennedy's early sentencing commission bills, the United States Judicial Conference would select the commission's members. See S. 2699, 94th Cong., 1st Sess. § 5 (1975) (to have been codified, if enacted, at 18 U.S.C. § 3802); S. 181, 95th Cong., 1st Sess. § 5 (1977) (to have been codified at 18 U.S.C. § 3802). In contrast, under the Hart-Javits bill the President would control selection. See S. 204, 95th Cong., 1st Sess. § 4(a)(1) (1977).

Later S. 1437 versions successively diminished the role of the Judicial Conference. Both the August 4 committee print and the committee bill proposed a seven-member commission, three of the members to be designated by the Judicial Conference. S. 1437, as passed, retreats still further. See text accompanying notes 55-56 *infra*.

55. Proposed 28 U.S.C., *supra* note 2, § 991(a).

from a list of seven federal judges proposed by the Judicial Conference.⁵⁶ Constitutional problems raised by *Buckley v. Valeo*⁵⁷ are partly responsible for S. 1437's selection provisions.⁵⁸ The general trend in successive versions of the bill has been to diminish the judicial voice in member selection and probably arises from concern that the Judicial Conference would designate only judges for commission membership and that, for reasons discussed in a preceding section, the commission should contain a fair number of people who are not judges.

Although the commission bills have pulled back from judicial selection,⁵⁹ the lineal antecedents of S. 1437, at least, recognized the importance of a strong judicial presence.⁶⁰ The judge's central role in sentencing, the power of judges to circumvent or nullify guidelines, the importance of the judicial perspective and experience—all argue for a significant judicial voice in the sentencing commission.

Three major arguments can be made against judicial selection of members or judicial domination of the commission. First, judges are likely to select judges, particularly retired judges, to be members of a sentencing commission. A commission devoid of specialists of nonjudicial backgrounds and perspectives would likely not give full consideration to the institutional concerns of the other actors and agencies in the sentencing process. Judge Harold Tyler once noted, in this context, that "sentences are too important . . .

56. *Id.*

57. 424 U.S. 1 (1976).

58. See note 12 *supra*.

59. Section 5 of S. 2699, 94th Cong., 1st Sess. (1975) (to have been codified, if enacted, at 18 U.S.C. § 3802), and of S. 181, 95th Cong., 1st Sess. (1977) (to have been codified, if enacted, at 18 U.S.C. § 3802), provided for Judicial Conference appointment of commissioners. Section 4(a)(1) of S. 204, 95th Cong., 1st Sess. (1977), shifted the appointment power to the President, by and with the consent of the Senate. Similarly, although S. 1437 as introduced, see note 3 *supra*, empowered the Judicial Conference to designate commission members, S. 1437 as passed by the Senate vests the President with ultimate selective authority, subject to congressional modification, Proposed 28 U.S.C., *supra* note 2, § 991(a); the Judicial Conference assumes an advisory role, *id.* However, four of the commission's seven members *must* be designated by the President from a list of seven federal judges submitted by the Judicial Conference. *Id.*

60. Although S. 2699 and S. 181 did not mention the composition of the commission, the bills each provided for appointment of the commissioners by the Judicial Conference. See note 59 *supra*. Plainly, the draftsmen contemplated significant judicial representation on the commission. S. 1437 expressly provides for Presidential selection of three judges from a list of seven federal judges provided by the Judicial Conference. Proposed 28 U.S.C., *supra* note 2, § 991(a); see text accompanying note 50 *supra*.

to be left to the judges alone.”⁶¹ Other major affected interests, such as prosecutors, and correctional and parole administrators, should be heard in order to provide the rulemakers with the widest scope of institutional and political awareness and acumen. Similarly, implementation of a reformed sentencing system will require cooperation of other agencies. That cooperation may be affected by the credibility of the commission and the extent to which the commission’s rules are, and appear to be, sensitive to the practical problems confronting other criminal justice practitioners. Finally, strong impetus for sentencing reform stems from the view that the existing system is fundamentally unjust and that unstructured discretion of judges is part of the problem. A commission of judges may not share this view.

A second problem is that the judges selected for membership on a sentencing commission may fear loss of autonomy or independence and find the entire subject of structured judicial discretion an uncongenial one.⁶² Many judges may have implicit territorial concerns and therefore be unsympathetic to revisions of the sentencing system which diminish judicial authority. Judges may believe themselves to be the only appropriate people to impose punishment: No imaginable set of rules or standards can sensibly reflect the myriad aggravating and mitigating circumstances which judges properly take into account in setting sentence. That perspective is unlikely to facilitate development of powerful sentencing guidelines or rules.

A judicially appointed judicial membership is unwise for a third reason: Judges may be particularly unsympathetic to changes which may add to the courts’ burdens. The courts, like all parts of the justice system, are overburdened. Judges must be concerned with problems of efficiency and economy. The workloads of federal trial and appellate courts may increase if a sentencing guidelines system is established. The practices, procedures, and forms used in the federal district courts will have to be altered. The behavior of prosecutors and judges will alter in ways that are not completely

61. 1977 *Hearings*, *supra* note 9, at 8959, 8961 (statement of Hon. Harold R. Tyler, Jr.).

62. As the idea of sentencing guidelines becomes less exotic and unfamiliar, however, judges seem to be becoming less threatened. *See, e.g.*, Critellis, *Preface* to L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, *SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION* (1978). *But see* Robin, *Judicial Resistance to Sentencing Accountability*, 21 *CRIME & DELINQUENCY* 201 (1975).

foreseeable. Defense lawyers can be expected to test the guideline system. Appellate sentence review will assure many sentence appeals. It is possible that a commission comprised of federal judges would be more likely than other similarly distinguished groups to reach a cost-benefit decision that the results of a meaningful sentencing guideline system do not justify the additional workload which such a system would produce. Should that view be held by the Chief Justice, or the Judicial Conference, judicially selected members of the commission might be sympathetic to it, and approach their task with these concerns preeminently in mind.

Judge Morris Lasker recently suggested four other objections to Judicial Conference selection of sentencing commission members: (1) Presidential appointment would confer greater status or dignity on appointees; (2) presidential appointment might help confer equal status on nonjudicial and judicial members, thereby lessening the likelihood of judicial domination of the commission; (3) appointment by the Conference would be inefficient (the Judicial Conference has approximately twenty-five members); and (4) appointment by the Conference might breed dissension among federal judges if membership is viewed as psychic or political patronage.⁶³

Nonetheless, arguments for judicial selection can be made. Most deal with the central role of the judiciary in sentencing and the likelihood that judicial appointment will help assure credibility. Moreover, Judicial Conference appointment of sentencing commission members might be a safeguard against partisan political appointments. The Conference,⁶⁴ an organization of sitting federal judges dominated by senior judges of the United States Courts of Appeals, should be much less inclined than the President to make unsuitable patronage appointments. However, the risk of partisan or patronage appointments is probably small in any event. There is certainly a reasonable chance that the President would appoint people of vision and relevant experience, and that the Senate would not undermine its own hopeful innovation by approving appointments of unsuitable commissioners. Thus, while patronage danger exists in a Presidential selection scheme, a fundamental counterveiling consideration ultimately outweighs it. Judicial domi-

63. 1977 *Hearings*, *supra* note 9, at 8967, 8972 (statement of Hon. Morris E. Lasker).

64. See 28 U.S.C. § 331 (1976).

nation of a sentencing commission appointed by judges is likely and would probably portend adoption of policies overly solicitous of judicial sensibilities and perceived needs.

The final version of S. 1437, if it is constitutionally adequate, may be a sound compromise. The President could select members of diverse backgrounds. The requirement that the President select three judges from a list of at least seven federal judges provided by the Judicial Conference⁶⁵ would assure a considerable judicial presence and perhaps would enhance the commission's credibility in the eyes of the judiciary. Moreover, this provision may lessen the prospect that judicial members will take an extremely narrow view of the commission's task. The President could take into account the likely views, interests, and receptivity to innovation of the various judicial nominees and choose from among them on that basis.

The Commission's Charge

A major theme of this Article is that what the commission does will be determined largely by who the commissioners are. Nonetheless, the commission's charge is important. Certainly, the commission must have sufficient authority and resources to undertake research into sentencing practices and the efficacy of penal measures, hold hearings, collect data, require federal probation officers and court clerks regularly to report both on individual sentencing decisions and overall criminal dispositions, conduct training programs, and have all the general powers of any other federal administrative agency. Unless the commission has full authority and opportunity to call upon existing knowledge, to direct the development of additional knowledge, to call upon the past experience and practices of the federal system of justice, and to monitor ongoing practices, it could not effectively perform its major tasks.

The major task of the sentencing commission will be to develop sentencing rules aimed to achieve regularity and predictability in federal sentencing, and to assure that convicted defendants receive fair consideration and are treated as equals when punished.⁶⁶ Under the optimum context assumption the commission should be charged to establish sentencing guidelines of

65. Proposed 28 U.S.C., *supra* note 2, § 991(a).

66. *See* text following note 17 *supra*.

presumptive force with ranges of authorized punishment centered around a midpoint and subject to rigorous monitoring through both appellate and administrative review.⁶⁷ The remaining paragraphs of this section flesh out the charge just described by contrasting presumptive guidelines with exhortative and prescriptive guidelines, a point guideline system with a free-range system, and a relatively wide, authorized guideline range with a narrow guideline range.⁶⁸

Sentencing guidelines systems can be divided into three types: prescriptive, presumptive, and exhortative. The three guideline types are not based on distinctions between form: Each could be represented by a matrix like the Parole Commission's guidelines,⁶⁹ written rules like the Model Penal Code's capital punishment⁷⁰ or probation⁷¹ criteria or the Twentieth Century Fund's guidelines,⁷² or a point scale measuring the accumulated quantitative significance of defined and weighed aggravating and mitigating circumstances.⁷³

The different guidelines systems vary in legal authority. Notionally, prescriptive guidelines are mandatory and closely monitored. Presumptive guidelines can be disregarded for stated rea-

67. Testimony before the Senate Judiciary Committee split dramatically over the willingness of witnesses to trust a sentencing commission to exercise its authority responsibly. Thus, Circuit Court Judge Gerald B. Tjoflat, testifying on behalf of the Judicial Conference, repeatedly argued that a commission should be given maximum latitude to fashion sentencing policy subject only to the broadest Congressional guidance. See *1977 Hearings, supra* note 9, at 8939, 8948 (statement of Hon. Gerald B. Tjoflat). To the contrary, the ACLU earlier opposed the commission proposal precisely because "The ACLU, of course, cannot properly evaluate this proposal without seeing the guidelines themselves." ACLU, Statement on Kennedy-McClellan Proposed Revision of S. 1 (Apr. 4, 1977), *quoted in 1977 Hearings, supra* note 9, at 9368, 9385 (statement of Daniel Crystal). Note, too, that Judge Zirpoli's proposed changes in the sentencing commission, presented to the House Criminal Justice Subcommittee on behalf of the Judicial Conference, would have made the commission vassal to the Judicial Conference and the Administrative Office of the United States Courts. See note 10 *supra*.

68. This discussion is regrettably both technical and cryptic, dealing with various forms of sentencing guidelines. For a thorough review of the matters here mentioned, see R. SINGER, *JUST DESERTS* (1979).

69. See 28 C.F.R. § 2.20 (1978).

70. MODEL PENAL CODE § 210.6(1) (Proposed Official Draft 1962).

71. *Id.* § 7.01.

72. TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *supra* note 21, at 55 app. (Illustrative List of Crimes and Presumptive Sentences).

73. See, e.g., Kress, Wilkins & Gottfredson, *Is the End of Judicial Sentencing in Sight?*, 60 JUD. 216, 220-21 (1976) (discussion of suggested guidelines for Denver, Colorado).

sons subject to review. Exhortative guidelines merely recommend, and are not subject to formal monitoring.

A prescriptive guideline system, like that envisaged by the Hart-Javits Bill,⁷⁴ would *require* imposition of a particular sentence or of a sentence within a defined range. Mandatory minimum sentences and mandatory death penalties are ostensibly prescriptive. Prescriptive systems are particularly vulnerable to manipulation by prosecutors through charging decisions, and are likely to provoke judicial and prosecutorial circumvention when the prescribed sentence appears unjust or substantially inappropriate. Section 12(a)(1) of the Hart-Javits bill would have established prescriptive sentencing standards:

Each sentencing judge shall impose on any convicted offender the presumptive sentence assigned to the criminal offense of which he was convicted, except if a variation from the presumptive sentence is permitted or required by the Commission's rules under section 7, such judge shall vary such presumptive sentence only as provided in section 7 [section 7 would establish maximum permitted variations for aggravating or mitigating circumstances, increases for aggravation not to increase sentences of imprisonment by more than fifty percent].⁷⁵

The bill would have permitted any convicted offender to appeal sentence "solely on the ground that . . . the sentencing judge imposed such sentence in violation of a rule established by the Commission under this Act or a provision of this Act."⁷⁶

A presumptive sentencing guideline system is one, like that envisaged by S. 1437, in which a specific sentence or range of sentences is established for the consideration of trial judges who retain authority to disregard guidelines⁷⁷ as long as they give reasons why the presumptive sentence is not appropriate.⁷⁸ A sentence imposed outside of applicable guidelines would be presumptively inappropriate; on the defendant's appeal, the persuasiveness of the reasons given would be reviewed by an appellate court.⁷⁹

In an exhortative guideline system, the legislative or other

74. S. 204, 95th Cong., 1st Sess. (1977).

75. *Id.* § 12(a)(1).

76. *Id.* § 13.

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

78. *E.g.*, *id.* § 2003(b).

79. *E.g.*, *id.* § 3725(a), (d)(2). S. 1437 also provides for prosecutorial appeal of sentences below the guidelines. *Id.* § 3725(b).

rulemaking body establishes general sentencing criteria, application of which is not subject to review. The California Judicial Council's Sentencing Rules are illustrative.⁸⁰ They are general statements of policy to be considered by judges in determining whether to adjust an otherwise appropriate prison sentence by one year to reflect aggravating or mitigating circumstances.⁸¹ The Model Penal Code's statement of criteria to be considered by judges when deciding whether to sentence to probation⁸² or death⁸³ are other exhortative sentencing provisions.

The comparative merits of the three kinds of sentencing guideline systems cannot be discussed here. Rather, peremptorily, the view here offered is that a sentencing commission in optimum context should be charged to promulgate a system of presumptive sentencing guidelines which would be adequately policed by requirements of reasons for sentences outside the guidelines, by appellate sentence review with a meaningful review standard, and, in certain cases, by an administrative early-release consideration. In optimum context, a presumptive guideline system would best permit development of criteria for general application, while allowing departures from the guidelines to meet specific circumstances of individual offenses. Availability of appellate sentence review and the requirement of reasons would permit the gradual evolution of a common law of sentencing in furtherance of the general goals of sentencing reform.⁸⁴

Sentencing guideline systems can be further distinguished as point or range systems. Guidelines might establish a single fixed sentence to be imposed in the ordinary case,⁸⁵ a range of sentences within which sentence can be imposed,⁸⁶ or a specific sentence permitting a defined but limited variation for reasons stated:⁸⁷ fixed-point, range, and fixed-point-range sentencing systems, respectively. In a fixed-point sentencing scheme, the court is required to impose a designated sentence on any defendant falling

80. CAL. R. CT. 401-453.

81. *Id.* 421, 423 & 439.

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

83. *Id.* § 210.6(1).

84. See M. FRANKEL, *supra* note 3, at 84 (1972).

85. *E.g.*, TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *supra* note 21, at 55 app. (Illustrative List of Crimes and Presumptive Sentences).

86. *E.g.*, Proposed 28 U.S.C., *supra* note 2, § 994(b); Proposed 18 U.S.C., *supra* note 2, § 2003(a)(2).

87. *E.g.*, S. 204, 95th Cong., 1st Sess. §§ 6(a)(3), 7(a)-(b), 12(a) (1977).

within a defined category. In a range-guideline sentencing system, the court is permitted to impose any sentence from within a designated range, either without giving a reason or, if reasons are required, the review standard will be solicitous of the judge's discretion. In a fixed-point-range guideline system, the guidelines establish a range of appropriate sentences for categories of offenders convicted of categories of offenses; a specific sentence, the point, is specified as the appropriate sentence for a particular category of defendants. The judge is permitted to impose sentence above or below the point, but must state reasons to support his or her deviation from the point.

The three kinds of sentencing-range systems could be reconciled with exhortative, presumptive, or prescriptive guideline systems. Thus, the Hart-Javits Bill would establish a prescriptive fixed-point-range sentencing system;⁸⁸ S. 1437 and its predecessors, beginning with the Yale proposal,⁸⁹ propose a presumptive-range system, but not a point-range system.

Finally, the width of the applicable range is not determined by whether the guideline system is prescriptive, presumptive, or exhortative. On the contrary, whether the guideline range is prescriptive or presumptive might determine whether wise policymakers would prefer wide or narrow ranges. For example, prosecutorial manipulation and judicial circumvention would be likely under a system of prescriptive guidelines with narrow ranges. The risk of arbitrary categories and formulaic statements of reasons for sentencing would increase. The number of categories of offenses and offenders and the facility with which prosecutors and judges could place a defendant in one category instead of another would also increase. Thus, concern for the integrity of guidelines and for the implementation of the commission's sentencing policy decisions, combined with aversion to foreseeable, blatant evasion of guidelines, argue for wide ranges in a prescriptive guideline system, even in an optimum context. Evasion should not be invited.

Conversely, in a presumptive system, narrower ranges might be appropriate. The guidelines would be supplemented over time by a body of case law standards for determining whether a given sentence is appropriate. The dangers of official evasion of guidelines would not be so great, and policymakers might be in-

88. See S. 204, 95th Cong., 1st Sess. § 7 (1977), which permits modest adjustment of sentence to account for defined mitigating or aggravating circumstances.

89. See P. O'DONNELL, M. CHURGIN & D. CURTIS, *supra* note 3.

clined to structure judicial discretion more closely. The effect should be to push sentences generally toward the mean, while permitting judges to impose presumptively inappropriate sentences on the basis of reasons which can be challenged.

The sentencing commission should be charged to promulgate fixed-point-range sentencing guidelines of presumptive force with only modestly wide ranges. In optimum context, this should incur the smallest number of foreseeable institutional accommodations and manipulations and, with requirements for reasons and establishment of meaningful review procedures, might facilitate achievement of a predictable, regular, and just sentencing system.

CONCLUSION

This Article proposes the establishment of an elite, not necessarily representative, federal sentencing commission, appointed by the President with the advice and consent of the Senate. A significant minority of the commissioners should be judges. The commission would be charged to promulgate fixed-point-range presumptive guidelines with modestly wide ranges. A morally coherent substantive law and a rational system of offense classification would provide a structure within which justice, principle, and system can meaningfully be discussed. Established and monitored prosecutorial guidelines would tend to assure a rough and known correlation between underlying conduct and offenses of conviction.⁹⁰ Meaningful appellate sentence review and parole release procedures for sentences in excess of those authorized by guidelines would encourage judicial consistency or operate as a fail-safe if the system just doesn't work.

S. 1437 shared many features with the sentencing commission model proposed here. It would have established a reasonably coherent substantive law,⁹¹ a rational system of offense classification,⁹² and a sentencing commission charged to promulgate presumptive sentencing guidelines.⁹³ The significance of parole release would have been greatly reduced⁹⁴ and limited appellate review of sentencing would have come into existence.⁹⁵

90. See text following note 31 *supra*.

91. Proposed 18 U.S.C., *supra* note 2, §§ 101-512.

92. *Id.* §§ 2101, 2201, 2301(b).

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

94. *Id.* § 994(b)(2), (j); Proposed 18 U.S.C., *supra* note 2, § 2302.

95. Proposed 18 U.S.C., *supra* note 2, § 3725.

However, S. 1437 fell short of the commission model in important respects. Prosecutorial discretion was not addressed; many argue that sentencing reform that ignores the prosecutor is delusory.⁹⁶ The authorized maximum sentences⁹⁷ were too long. There were potential problems with the provisions for membership selection.⁹⁸ The appellate sentence review provisions⁹⁹ were niggardly and would have reached too few defendants.¹⁰⁰ Parole release was not retained to act as a fail-safe for harsh sentences. Thus, the sentencing provisions of S. 1437 could have been improved. Reasonable people, however, differ on the practical limits of reform, on the reform tactics, and on the importance of S. 1437's deficiencies. My purpose here is primarily to present a model, and not to judge S. 1437.

Even in the best of circumstances, a sentencing commission will have to walk a narrow path through serious perils. It must obtain and retain the support of the federal judiciary and the functionaries who preside over the federal system of justice. It must adopt policy decisions that are enlightened, reformist, and principled, but cautious, sensitive to bureaucratic and political ramifications, and always informed by awareness of the likely sources and nature of opposition to commission action.

Caution will be in order when all of the problems of principle and self-interest have been identified and addressed. A new regime could have major beneficent effects on the character and operations of the federal criminal justice system. Perhaps the most idealistic goals of its creators will be realized.

Unforeseen consequences will inevitably result. Two decades ago, when the Model Penal Code's sentencing provisions were new, Lloyd Ohlin and Frank Remington wrote a chastening article discussing the likely effects of these provisions on the administration of criminal justice.¹⁰¹ They observed:

96. See, e.g., Alschuler, *supra* note 27, at 550-51, 563-76; Bazelon, *supra* note 26, at 68.

97. Proposed 18 U.S.C., *supra* note 2, § 2301(b).

98. See note 12 *supra* and accompanying text.

99. Proposed 18 U.S.C., *supra* note 2, § 3725.

100. S. 1437 permits appeal of sentence only if the sentence falls outside the guidelines, *id.*, thereby precluding defendant appeal of sentences within or below the guidelines. Appeal of sentences imposed on bargained pleas is specifically forbidden. *Id.* § 3725(a)(1)-(2).

101. Ohlin & Remington, *Sentencing Structure: Its Effect upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495 (1958).

Typical analyses of proposals for change in sentencing structure have been preoccupied with objectives and have consistently failed to produce a basis for predicting the impact of the sentencing proposal upon the day-to-day administration of criminal justice. As a consequence, administrative distortions occur which are unanticipated and, therefore, not controlled.¹⁰²

All of the actors and institutions in the criminal justice system will “engage in various kinds of accommodative responses to a changed sentencing structure, so that they may continue to perform their customary tasks—of arrest and conviction, for example—with the usual expenditure of time, effort, and money.”¹⁰³

The draftsmen of the next generation of sentencing commission legislation should attempt to anticipate structural and institutional accommodations and reactions. A sentencing commission must do likewise. Some reactions will be predicted. Other reactions and accommodations will occur unforeseen and, for a while, unrecognized. One of the sentencing commission’s strengths may be its ability to respond to such accommodations more quickly than can a legislature. But, of course, new unforeseen consequences would occur. The process will be endless.

The sentencing commission model proposed here would sensibly reflect the complexity of the federal criminal justice system. Most importantly, it offers hope for achieving a reasonably regular and predictable sentencing system which imposes punishment on defendants fairly in a process that treats them as equals.

102. *Id.* at 495.

103. *Id.* at 496.

