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Commission Model of Sentencing

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A COMMISSION MODEL OF SENTENCING

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I. Introduction[1]

The United States Senate has recently passed a bill, as part of the latest revision of the proposed Federal Criminal Code, to create a United States Sentencing Commission.[2] This is a sudden departure from previous sentencing recommendations and is not a typical feature of the sentencing apparatus in the states.[3] It seems that the United States Sentencing Commission represents a recognition by the bill's sponsors[4] that an adequate sentencing system cannot be fashioned out of a simple formula or even an *a priori* structure of some complexity. At the present time several ingenious proposals known as presumptive sentencing structures have been put forward as cures for the various problems of sentencing.[5] Despite variations of form, these proposals have in common the assumption that a prior legislative allocation of sentencing power can be so skilfully fashioned as to meet all sentencing contingencies. Opposed to this assumption is the traditional understanding, under the open-ended sentencing structures which are standard in most jurisdictions, that justice requires individualization. An experienced federal judge reflects this view:

> Abstract and philosophical discussion of penal objectives must, of course, be pursued; but judges are daily called upon to apply the tentative consensus of

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2 S. 1437, 95th Cong., 1st Sess., Title II, Part E (1977). The precursor to the most recent revision of the proposed criminal code was THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL CODES, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE (1970). The Brown Commission (after its chairman, Edmund G. Brown, former Governor of California) published three volumes of scholarly analysis to support the Draft: WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1970). *See also Hearings on Reform of the Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 92nd Cong., 1st Sess. (1971). Passage of the Draft code was delayed by the Nixon administration, and a reputedly harsher and more "conservative" draft was submitted: S. 1, 94th Cong., 1st Sess. (1975). This bill raised an unusual storm of controversy for a technical code revision. *See* R. Enstad, *Senate Bill 1: Freedom's Graveyard,* 3 BARRISTER 14 (1976). Among the scholarly comment on S. 1 was criticism of its sentencing provisions, *see* D. Crystal, *The Proposed Federal Criminal Justice Reform Act of 1975: Sentencing—Law and Order With A Vengeance,* 7 SETON HALL L.R. 33 (1975).

3 Maine, for example, has established an ongoing Sentencing Institute "to provide a continuing forum for the regular discussion by criminal judges, prosecutors, law enforcement and correctional personnel of the most appropriate methods of sentencing convicted offenders" 4 ME. R.S.A. § 454, Amended *Me. P.L.* 1975, ch. 610. This language creates a body without any definite power. In 1976 the Sentencing Institute was placed under the control of the State Court Administrator, *Me. P.L.* 1976, ch. 650, but its diffuse nature was not changed.

4 Senators McClellan and Kennedy.

5 The theoretical progenitor of presumptive sentencing proposals is the TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976). Various state proposals are analyzed in The Council of State Governments, *Definite Sentencing: An Examination of Proposals in Four States* (1976).

> these societal deliberations to convicted offenders of almost infinitely variegated temperaments, histories, and economic circumstances. It appears too obvious to require argument that even if we were to agree on the relative priorities to assign to deterrence, rehabilitation, isolation from the community, and retribution, differences among individuals would still present us with the phenomenon of sentencing disparity to which so much attention has recently been devoted.[6]

Although such a statement may be seen as a covert plea for the status quo in sentencing, it also represents a measured consideration of the real complexities of the sentencing process. It would appear that the sponsors of S. 1437 have confronted the complexity of determining what to do with a convicted offender and have sought to avoid a simplistic solution.

This article presents a case for a commission model of sentencing. First, it analyzes the problems of sentencing and possible solutions in a highly abstract fashion. This analysis shows that workable solutions to the basic problems of sentencing must address four fundamental problems: irrationality, disparity, ineffectiveness, and diffusion. A workable, but not perfect, solution has been fashioned in one aspect of sentencing—the parole decision guidelines system. However, to expand a complex guidelines system to the entire sentencing process requires a meshing of different parts of the criminal justice system. This requires an institutional solution. Next, this article sets forth an abstract commission model as such a resolution. This model is considered in the general context of an American state. Peculiarities of local laws and governmental institutions are not considered. Thus, the general model proposed is exactly that, a model which can be used by various jurisdictions for consideration but not for wholesale adoption. The composition, powers, and functions of a sentencing commission are considered, with enough leeway to permit choices in different jurisdictions. The roles of the executive director and staff of the sentencing commission are considered. Next, the model is set into a theoretical base, and earlier proposals are examined. Following this, special problems that a sentencing commission is likely to encounter are considered. The article then turns to the proposed United States Sentencing Commission, outlines its salient provisions, and offers an analysis of them in light of the model presented heretofore.

A. *Preliminary Questions—The Problems of Sentencing*

There are many perceived problems of sentencing.[7] These problems can be

6 Kaufman, *Second Circuit Note—1973 Term; Foreward: The Sentencing Process and Judicial Inscrutability,* 49 ST. JOHN'S L.R. 215, 216 (1975).

7 An interminable list of sentencing problems and controversies can be noted: The propriety, constitutionality and effectiveness of the death penalty (*see, e.g.,* Furman v. Gecrgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Editors, *Statistical Evidence on the Deterrent Effect of Capital Punishment,* 85 YALE L.J. 164 (1975); D. Baldus & J. Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishmet,* 85 YALE L.J. 170 (1975); J. Bowers & G. Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment,* 85 YALE L. J. 187 (1975); J. Ehrlich, *Deterrence: Evidence and Inference,* 85 YALE L.J. 209 (1975)), disparity of judicial sentencing (*see, e.g.,* J. HOGARTH, SENTENCING AS A HUMAN PROCESS (1971); J. D'Esposito, Jr., *Sentencing Disparity: Causes and Cures,* 60 J. CRIM. L., C. & P.S. 182 (1971)), the lack of proportionality (*see, e.g.,* In re Lynch, 8 Cal.3d 410, 503 P.2d 921, 105

summarized at a high level of abstraction in four concepts: irrationality, disparity, ineffectiveness and diffusion. Irrationality is subdivided into irrational criteria and irrational decision-making. Irrational criteria are the problem that sentencing criteria, whether formulated by the legislature, judiciary, or parole authorities, violate some principle or principles deemed by others to be "rational" criteria for sentencing. The enormous amount of controversy in this area results from the fact that there is no universally agreed upon standard of a rational basis for sentencing. Furthermore, there is not likely to be complete agreement on what criteria are "rational" bases for sentencing decisions. At any given time, however, there may be some general agreement among significant decision-makers concerning what is rational in sentencing. Thus, among a specified group of trial court judges there might be general consensus that a defendant's juvenile adjudication record is a rational criterion on which to base a sentence. Or, on a higher level of abstraction, there might be consensus among that group that retribution is, or is not, a rational philosophy of sentencing. The term "rational," as used in this context, does not mean "logically derived," but implies that criteria are accepted and deemed proper. The term "rational" is used to imply that defenders of such criteria seek to justify them by reason and not merely by whim.

The problem of irrational decision-making assumes that there are agreed upon rational criteria, but that specific sentencing decisions violate those criteria. Assume that seriousness of a crime is accepted as a rational criterion, and it is agreed by prosecutors, judges, and parole board members that armed robbery is more serious than unarmed robbery. If this is so, it can be said that it is irrational for prosecutors to reduce both crimes to lesser included offenses carrying the same penalty, and for judges to sentence offenders of both crimes to identical prison terms, and for parole authorities to release both armed and unarmed robbers after identical times are served. Irrational sentencing along one criterion may occur because a decision-maker may be considering other criteria, such as willingness to plead guilty, prior record, or institutional behavior. Thus, the criticism of irrationality leveled against decision-makers might in fact mask a problem of duplicate or confusing criteria.

Disparity is taken to mean that differences in sentencing outcomes among defendants are associated with invidious criteria. There may be some criteria,

Cal. Rptr. 217 (1972), excessively long legislative sentencing structures (*see* P.Low, *Preliminary Memorandum on Sentencing Structure,* 2 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1259-60 (1970)), racial disparity (*see, e.g.,* M. Hindelang, *Equality Under the Law,* 60 J. CRIM. L., C. & P.S. 306 (1968); M. Wolfgang & M. Riedel, *Race, Judicial Discretion, and the Death Penalty,* 407 ANNALS 119 (1973)), the use and accuracy of school, clinical, and juvenile records in making sentencing decisions (*see, e.g.,* J. Coffee, Jr., *Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice,* 73 MICH. L. REV. 1361 (1975)). The lack of due process at the sentencing hearing (*see, e.g.,* F. Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View from Mempa v. Rhay,* 47 TEX. L. REV. 1 (1968)), the rehabilitative effect of sentences (*see, e.g.,* L. WILKINS, EVALUATION OF PENAL MEASURES (1969): R. Martinson, *What Works?—Questions and Answers About Prison Reform,* THE PUBLIC INTEREST 22 (Spring 1974)), the deterrent effect of sentences (*see, e.g.,* F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL (1973)), personal bias among judges (*see,* W. GAYLIN, PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING (1973)), the lack of legislative mandates (*see,* M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972)), and the indeterminate sentence (*see* A. Dershowitz, *Let The Punishment Fit The Crime,* The New York Times Magazine Dec. 28, 1975 at 7; A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976)).

such as race, which are widely agreed to be invidious. Other criteria, such as plea bargaining, may be seen as invidious by some but not by others.

If a criterion is assessed as rational, then rational decision-making requires that sentences vary in a specified direction and intensity along that criterion. On the other hand, if a criterion is deemed to be invidious or improper, proper decision-making requires that sentences not vary according to that criterion. In neither case is it necessary that sentencing decision-makers intend to sentence irrationally or invidiously for sentencing to be irrational or disparate. Thus, sentencing disparity which is attributed only to differences between different judges is universally deemed to be invidious although no one argues that judges are motivated to sentence differently from other judges out of feelings of contrariness. Finally, it should be added that even if agreement can be found as to which criteria are rational and proper, the determination of irrationality or disparity is not clear-cut because there is no universal understanding as to the quantity of differences or agreement that can be shown before it can be said that sentencing is irrational or disparate.

Ineffectiveness denotes sentencing practices which have little or no impact on reducing the crime rate, either through deterrence or rehabilitation. Thus, ineffectiveness is a form of irrationality. Ineffectiveness is placed in a separate category for a special reason. The relationship between sentencing practice and the control and reduction of crime in society is tenuous and largely unknown. Sentencing is only one part of the criminal justice process, and to say that it has a direct and large impact on crime is a claim that neither defenders nor critics of specific sentencing practices can substantiate. Therefore, while sentencing decision-makers can directly affect the rationality and propriety of their sentencing decisions, at least as to certain criteria if not to the entire gamut of sentencing-related variables, they cannot directly affect the crime rate. Thus, measures taken to modify sentencing with the aim of reducing crime will be marginally effective at best. The idea that sentencing is inherently ineffective or only marginally effective is based on the criminological idea that crime is a complex social and psychological phenomenon that responds to various social variables. The criminal justice system as a whole has a large (but far from total) impact on crime. The implications for sentencing decisions are as follows: sentencers should be wary of changing their practice for the purpose of crime control without some measurable assurance of effectiveness, especially when such changes could lead to irrationality or disparity. Also, it seems wiser that sentencing practice modifications be made in conjunction with other changes in criminal justice practice, both to insure greater effectiveness and to prevent unwanted side effects. For example, if judges increase sentence lengths in order to deter crime, it may result in prison overcrowding and an increase in parole release activity. To the extent that parole release is constrained by minimum sentences and available prison space, the parole board may be forced to release inmates "irrationally," for example, releasing more "dangerous" inmates simply because they are legally releasable. This may, in turn, tend to lead to an increase in crime.

Diffusion is taken to mean that sentencing power is polycentric, divided among several agencies and among numerous decision-makers. It also implies that

sentencers have legal and factual discretion in making their decisions. This is a problem because it violates the idea of accountability. Of greater importance here is the fact that it is the key to the other problems of sentencing. If there were one sentencer in a jurisdiction with power both to decide authoritatively which criteria were rational and proper and to sentence every offender, then irrationality and disparity would disappear (except for the possibility of internal contradictions). Furthermore, if the sentencer also had authority over all aspects of criminal justice, he could fit sentencing decisions into a framework of criminal justice practice that would be most effective in reducing crime. Of course, no such Leviathan exists, for it would combine into one entity the legislature, judges, prosecutors, correctional, social, and police agencies of a jurisdiction, to say nothing of the Constitution and the popular will. Thus, diffusion is the key to other problems of sentencing. If it can be controlled, then the other problems can be dealt with effectively.

B. *Preliminary Questions—Possible Solutions to the Problems of Sentencing*

The second preliminary matter requires that all the possible solutions to sentencing problems be canvassed and critiqued in order to see why a sentencing commission is a preferable alternative. Again, these solutions will be dealt with at a high level of abstraction in order to avoid creating an endless list. This author perceives four fundamental types of solutions to the problems of sentencing: change the nature of sentencers, limit or eliminate discretion by law, reduce the number of sentencing agencies, and modify the decision-making system by devising control mechanisms.[8]

For many years the idea was current that problems of sentencing could be resolved if judges were replaced with "experts." In this analysis, the indeterminate structure of sentencing was proper, but judges, trained as they were in the law, were not up to the task of selecting the sentencing choice most likely to enhance the rehabilitation of the defendant. One variation on this theme was to replace the single sentencing judge with a panel of experts to be drawn from the social sciences.[9] Another was that determination of lengths of prison terms should be entirely in the hands of parole agencies.[10] While parole authority has grown, the idea that there are any "experts" in sentencing has itself come under attack.[11] Furthermore, it has been asserted that

8 A theoretical solution is an idyllic notion of democratic anarchism, or the dismantling of the nation-state and a return to clan or tribal or communal rule. This idea, popular in some circles, is not believed by this author to be a viable solution. A more elaborate examination of the indeterminate sentence, its decline, and the alternatives that have come to replace it are set forth in Zalman, *The Rise and Fall of the Indeterminate Sentence,* 24 WAYNE L. REV. (in two parts: Nov. 1977 & Mar. 1978).

9 [T]he criminal court should cease with the findings of guilt and innocence and the "procedure thereafter should be guided by a professional treatment tribunal to be composed, say, of a psychiatrist, a psychologist, a sociologist or cultural anthropologist; an educator, and a judge with long experience in criminal trials with special interest in the protection of the legal rights of those charged with the crime." K. MENNINGER, THE CRIME OF PUNISHMENT 139 (1966), *quoting in part* S. GLUECK, LAW AND PSYCHIATRY (1962). *See also* B. WOOTON, CRIME AND THE CRIMINAL LAW 91-93 (1963).

10 H. MANNHEIM, CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION 223-37 (1946) (treatment tribunal); N. Hayner, *Sentencing by an Administrative Board,* 23 L. & CONTEMP. PROBS. 477 (1958).

11 M. FRANKEL, *supra* note 7, at 55-56.

> vital aspects of the sentencing function are peculiarly legal, and peculiarly within the special competence of people legally trained. Granting that psychiatrists and other professionals have much to contribute, the eventual judgments as to criminal responsibility and the penalties for offenses are squarely within the legal order. They are judgements that must turn in the end upon the weighing of values, interests, and choices in the everyday province of legal rather than psychiatric study.[12]

In its most extreme form, proposals for expert sentencing have favored total indeterminacy and a clinical approach in order to make corrections effective to reduce crime through rehabilitation. Generally, the result has been to increase problems of irrationality and disparity without reducing crime.[13] In its crude and extreme form, this solution has been discredited. There may be, however, a residual sense in which certain forms of expertise to aid sentencers may still be deemed necessary. Thus, since sentencing decisions can be measured, judges, prosecutors, and parole board members may wish to have the services of statisticians and systems analysts to measure what is happening within the complex sentencing system. Also, judges and others are becoming more expert in ways formerly unheard of. The growth of court administration has made judges more aware of management and systems science solutions to problems such as caseflow and juror waiting time. While judges, prosecutors, and parole board members may not themselves be experts in these areas, they are becoming more conversant with and reliant on them.

The solution of reducing discretion by law is, at the present time, quite popular. This school of thought, known collectively as the "just deserts" model, grew out of dissatisfaction with the indeterminate sentence.[14] There is much in this approach that is valuable but it is submitted that this approach has several flaws which make it inadequate as an all-encompassing solution to sentencing problems. Just deserts is essentially a reaction to the perceived problems of indeterminate sentencing and an attempt to eliminate sentencing disparity. However, even most proponents of just deserts agree that absolutely fixed prison sentences are intolerable and unjust.[15] To a large extent just deserts thinking focuses on length of prison sentence and avoids the issue of percentage of offenders sent to prison. Also, just deserts writings have avoided the topic of diversion from prosecution, which is a real if low-visibility sentencing option. There is no just deserts position on creative conditions of probation, although the American Friends Service Committee generally favors unsupervised street release.[16] While just deserts' positions may be developed concerning these programs, the emphasis on uniformity may be antithetical to ameliorative but flexible programs. Also, if at a later date informed opinion on punishment in criminal justice swings towards a more flexible approach, an overly rigid legislative scheme may be

12 *Id.* at 56.

13 *See* E. Prettyman, Jr., *The Indeterminate Sentence and the Right to Treatment,* 11 AM. CRIM. L. REV. 7 (1972); P. Stanford, *A Model Clockwork Orange Prison,* The New York Times Magazine Sept. 17, 1972 at 9.

14 *See* A. VON HIRSCH, *supra* note 7.

15 *Id.* at 15-18.

16 AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 144 (1971).

difficult to change. Another major flaw with the just deserts model is its focus on controlling judicial disparity, thus avoiding the problems of diffusion. Finally, it is possible to produce variations of just deserts models that in reality are not much different from existing sentencing structures such as a presumptive sentencing scheme where the range is extremely broad.[17]

The solution that calls for increasing control by reducing the number of sentencing agencies directly gets at the problem of diffusion. An extreme example is to eliminate judicial and administrative (parole) sentencing by having legislatively fixed terms. While plea bargaining could probably not be eliminated, it could be reduced by lowering maximum sentences, sharply reducing the number of felony sentence categories (to three, for example), or by reducing bargaining points such as habitual offender laws and consecutive sentence provisions. Such a severe model would eliminate diffusion and disparity but might create problems of irrationality and perhaps even ineffectiveness.

For many years a progressive view of sentencing favored eliminating this judicial function. Today, the elimination of parole release is more popular. Maine has eliminated the parole board but has not, apparently, eliminated its function of releasing inmates prior to a fixed sentence.[18] Whether placing release prior to the fixed sentence in the hands of the correctional department and trial judge will actually reduce disparity and increase rationality remains to be seen. It is true, however, that with one less decision-making body, the Maine sentencing system would be easier to monitor. On the other hand, a strong case has been made to retain parole sentencing because the centralized nature of that agency makes disparity less likely.[19] To conclude the discussion on these three general solutions, it would appear that modifying sentencing personnel, reducing disparity by law, and eliminating some sentencing agencies have strengths but also weaknesses. Above all, the variations on these solutions are almost as numerous as the existing problems of sentencing. Which combination of solutions is best and who is to decide? The legislature may be the obvious decision-maker here, but a legislative mix of solutions, especially where consequences and side effects are so unknown and potentially harmful, may be far too rigid.

The last solution, to modify the decision-making system by devising control mechanisms, is believed by this author to be superior to the above-mentioned solutions because it may incorporate them as needed, and retain sufficient flexibility to make changes where necessary. In the view of this author, this approach has best been implemented in the development of guidelines systems for

17 The Michigan State Bar Association has proposed a presumptive sentencing model where Class A Felonies may range from 2 to 30 years of imprisonment with a 7-year presumptive sentence and Class B Felonies range from 18 months to 20 years with a 5-year presumptive sentence. There is no rigid control on the use of aggravating or mitigating factors. *See* State Bar of Michigan, Press Release: Revisions of Sentencing Provisions of Criminal Code (1976).

18 The Maine Penal Code requires judges to set flat sentences within legislative limits, ME. CRIM. CODE, Title 17-A, §§ 1251-1252, but it is also true that all sentences of imprisonment in excess of one year "shall be deemed tentative," *id.* at § 1154(1). Thus, upon a petition of the department of corrections, the sentencing judge or his successor may "resentence" the inmate, the new sentence not to exceed the original one, *id.* at 1154(2). This is merely a transparent way of shifting the prison release function from the parole board to the corrections department and the judge.

19 A. Heinz, J. Heinz, S. Senderowitz, & M. Vance, *Sentencing By Parole Board: An Evaluation,* 67 J. CRIM. L. & C. 1 (1976).

the reorganized federal parole system, identified herein as the Parole Guidelines system, and a spin-off of this known as Sentencing Guidelines. These new sentencing structures have been described at length elsewhere,[20] and only a brief review is presented here. While such guidelines systems are not essential to a commission model of sentencing, the proposed United States Sentencing Commission is based upon the Federal Parole Commission. It is assumed in this article that a sentencing commission operates most meaningfully when there are sentencing guidelines which provide structure but do not eliminate flexibility.

The Parole Guidelines, put into effect experimentally in the federal parole system in 1972 to 1974, were the successful basis of a reorganization of that system. The reorganization can be analytically divided into two parts: (1) legal-structural changes and (2) changes in the nature of informed decision-making.

The legal-structural changes make the Federal Parole Board (now retitled the Federal Parole Commission) into a policymaking body and an appellate "court" for parole decisons made by hearing officers.[21] The parole-release hearing procedure is structured around the concepts of minimum due process. A prisoner receives written notice of the parole hearing; can have a personal representative present although his role is limited;[22] may submit evidence and reasons for parole; and if parole is denied, receive reasons for denial.[23]

Changes in the decision-making process began by intensively studying the parole process and developing a series of guideline tables (for adult, youth, and narcotics offenders) which, in effect, regularized and made explicit what was implicit Parole Board policy. Each table is structured as a matrix or grid, with the two criteria being offense severity (six categories) and offender characteristics (four categories), the latter being based on a "salient factor score" of nine items predictive of parole outcome. The intersects contain periods of months (e.g., from 6-10 months for the least severe category to 55-65 months for the most severe category) within which the prisoner should be released. Each parole prospect is located in a specific cell of the two-dimensional grid. The grid has been enacted into the *Code of Federal Regulations* and must be used to guide parole hearing examiners although it is not absolutely binding on them.

20 The most complete description of the development of the Parole Guidelines system is found in thirteen supplementary reports of the Parole Decision Making Project published under the aegis of the National Council of Crime and Delinquency Research Center (NCCD) and The National Institute of Law Enforcement and Criminal Justice (NILE & CJ) of the Law Enforcement Assistance Administration (LEAA) in collaboration with the United States Board of Parole in 1973. These reports are summarized in D. GOTTFREDSON, L. WILKINS, P. HOFFMAN, & S. SINGER, THE UTILIZATION OF EXPERIENCE IN PAROLE DECISION-MAKING: SUMMARY REPORT (1974). Several journal articles explain this system, *see* L. DeGostin & P. Hoffman, *Administrative Review of Parole Decisions,* 38 FED. PROB. 24 (June 1974); P. Hoffman & L. DeGostin, *Parole Decision-Making: Structuring Discretion,* 38 FED. PROB. 7 (Dec. 1974); D. Gottfredson, P. Hoffman, M. Sigler, & L. Wilkins, *Making Parole Policy Explicit,* 21 CRIME & DEL. 34 (1975).

21 These structural changes and all rules pertaining to the Parole Board may be found at 28 C.F.R. §§ 0.129-2, 2.1-2.57 (1975). Sections pertaining specifically to the due process hearing are §§ 2.12-2.18.

22 *See* Williams v. United States Board of Parole, 383 F.Supp. 402 (D. Conn., 1974) hearing officer's sarcastic remark to attorney representative and admonishment "not to act in a legal capacity" violated due process.

23 *See* Diaz v. Norton, 376 F.Supp. 112 (D. Conn., 1974) (improper to proffer reason that "release at this time would depreciate the seriousness of the offense" when release is set beyond the time limits of the guidelines, since the guidelines have already taken into consideration the seriousness of the offense).

The advantages of this system are several. It is based on the actual working and experience of the legally authorized decision-makers—the makeup of the decision grid is determined by the parole authority's previous decisions and is not superimposed according to *a priori* notions. The grid provides structure for decision-making and thus largely resolves the problem of disparity since the parole hearing examiners usually follow the grid. Where the typical or expected duration does not seem appropriate for a case, the hearing officer retains the discretion to alter this time period. Any action of this sort, however, must be followed by a written explanation and appeal. This means that while the reduction of disparity is achieved for the most part, in a small number of cases rational decision-making may override concerns about disparity. Rational criteria are enhanced by the creation of the Parole Commission, which has policymaking authority to modify the nature of the values on the axes and within the cells of the grid. Since it is impossible for all persons to completely agree on all rational criteria, it is necessary to have an authoritative body with the final power to decide on the criteria. The problem with statutory enactment of the grid is that if it becomes necessary to modify it, change is extremely cumbersome. It seems entirely appropriate, when canvassing the entire scope of American administrative law, to complement the grid in the *Code of Federal Regulations* with quasi-legislative power in the Parole Commission to make modifications.[24] Proponents of this model wisely refrain from claiming the impossible—that it will reduce crime. However, the Parole Guidelines model does resolve the problem of diffusion within the federal parole system.

It is the contention of this author that the combination of the sentencing and parole guidelines models is the most advanced solution to the problems of sentencing in that it resolves more of the problems and creates fewer adverse side effects than other methods. Furthermore, the guidelines models provide a mechanism for constant or periodic feedback on how the system is actually working. When this information is given to an authoritative body of policymakers, the mechanism exists to make rapid modifications if the system shows signs of creating harmful side effects (such as prison overcrowding) or injustice. It is fairly clear that the Parole Guidelines approach is applicable to the judicial sentencing process.[25] A study of the Parole Guidelines process notes that the judiciary could nullify the Parole Guidelines by modifying its sentencing practices. Also, the philosophy underlying the new system and its use of information largely available at the time of sentencing raises the question of whether the judiciary is the proper agency to apply this system.[26] Without resolving this issue of diffusion, a Sentencing Guidelines Project, similar in many respects to the Parole Guidelines but tailored to the requirements of judges, has been sponsored by the L.E.A.A.[27] This

24 *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT (3d ed. 1972).

25 Hoffman & L. DeGostin, *An Argument for Self-Imposed Explicit Judicial Sentencing Standards,* 3 J. CRIM. JUSTICE 195 (1975).

26 Project, *Parole Release Decisionmaking and the Sentencing Process,* 84 YALE L. J. 810, 877-97 (1975).

27 L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN, & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION-FINAL REPORT OF THE FEASIBILITY STUDY (1976); J. KRESS, L. Wilkins, & D. Gottfredson, *Is the End of Judicial Sentencing In Sight?,* 60 JUDICATURE 216 (1976); *Denver Adopts Sentencing Guide,* The State Journal (Lansing), Dec. 3, 1976, at A-4.

Project has many of the strengths of the Parole reorganization, but where it has been adopted locally, the issues of diffusion, or the relative distribution of power in sentencing, remain unanswered.

It is submitted that in order to deal with the problem of diffusion, a commission must be established which gains its authority from all the agencies primarily responsible for sentencing. This commission should then have authority to make rules to resolve the problems of sentencing. It is not essential that the commission adopt guidelines similar to the parole guidelines system, but this is certainly advocated in light of the benefits of guidelines systems.

II. The Commission Model of Sentencing

It is assumed that at the present time, legislatures are not willing to remove day-to-day charging, sentencing, and parole decisions from prosecutors, judges, and parole boards and place them in the hands of a sentencing superagency. Nor is such a radical move believed to be wise by this author. It is assumed, therefore, that the sentencing commission would be a central policymaking board with legal authority to order modifications in the charging practices of prosecutors, sentencing decisions of judges, and parole decisions, to the extent that those decisions are *discretionary*. Two objections to this scheme are immediately apparent. First, this radical interference with the internal workings of autonomous agencies is such a great departure from the norm that the notion would be politically infeasible. Second, since these decision-makers often include elected officials and judges, this proposal may violate democratic ideals and constitutional concepts of the separation of powers. These are powerful objections and because of them it is suggested that a statewide sentencing commission be composed of representatives from the key agencies concerned with the sentencing function, namely, the prosecutors, judges, and parole board. In a state where prosecutors are appointees of the attorney-general and where courts are constitutionally under the administrative control of the supreme court's chief justice, such representation is clear-cut. In the typical situation it may be necessary for the representatives on the commission to be elected by the group they represent. The commission would be created by the legislature, be subject to statutory and constitutional law, have an advisory group representing a wide variety of expert and public input, and a professional staff headed by an executive director. This is presented schematically in Figure 1. Before discussing the roles, powers, and functions of these parts of the commission model, it is necessary to consider the basic function and powers of the commission, both internally and *vis-à-vis* prosecutors, judges, and parole boards.

The primary rationale for a commission is to resolve problems of diffusion. The decisions of one agency impact on the others. This has resulted in a somewhat haphazard and unplained series of accommodations that may often lead to disparity and irrationality in sentencing. Furthermore, any chance to modify sentencing so as to make it effective is virtually impossible. If this is so, then it follows that the commission can only resolve problems of diffusion by unanimous agreement. Thus, each representative holds a veto over any proposed rule to

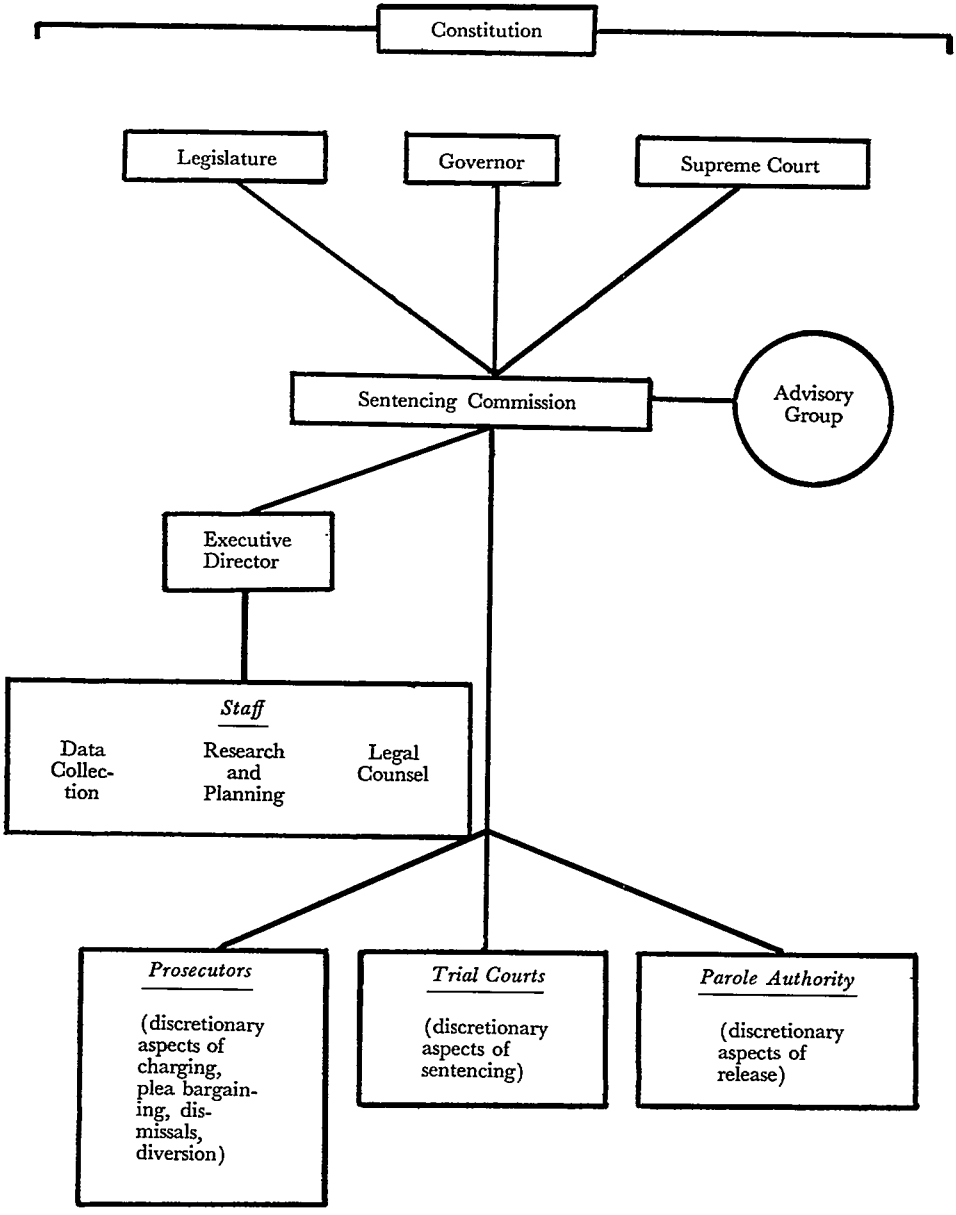

Fig. 1. The Sentencing Commission Model

modify the discretionary aspects of prosecutors, judges, or parole board members.

The existence of an absolute veto is sometimes taken as a sign of ineffectiveness of the United Nations. On the contrary, it is a necessity and a force for the continuing existence of that body. Given the obvious power imbalance between various member nations, it is not feasible for measures believed by the major powers to be detrimental to their national interests to be imposed short of general war. Any attempt to do so would lead to the dissolution of the U.N. Hence, the value of the veto.

The reasoning behind a veto in the commission is slightly different. The member groups are not in opposition and competition to the extent that sovereign nations are. Yet, although each representative in the commission is bound by the same constitution and is seeking the same general goal of crime control, interagency friction is a continuing reality. Moreover, bureaucracies are notorious for blunting and even thwarting directives from higher authorities that threaten institutional boundaries. Thus, if it comes to the point where all commission representatives save one must force a binding rule on that organization, the efficacy of actual commission control would be threatened. It seems far better to allow the commission rulemaking power only when the constituent groups can agree. This would also seem to meet the objections based on the separation of powers doctrine. There is no rule of constitutional law that says that different branches of government cannot combine their efforts to be more effective.

What specific functions should be placed in the hands of the sentencing commission? First, it should be empowered to order the modification of discretionary parole, sentencing, and prosecution decisions. This is general enough to allow wide latitude in the commission's powers. However, this author believes that parole and sentencing guidelines systems, described above, are the most workable, effective, and least disruptive ways of structuring discretion. Thus, the commission should first act to implement such guidelines. It may not be possible for prosecutorial guidelines for charging or charge reduction to be set up in similar fashion, but they should be developed under the authorization of the sentencing commission. Guidelines for diversion can be modeled on sentencing guidelines. The commission will be responsible for monitoring the guidelines to insure that they are operating satisfactorily in reducing disparity and increasing rationality in sentencing. However, it will also be necessary to insure that the different sets of guidelines are operating harmoniously. Therefore, the commission will be required to make modifications in order to resolve the problems that arise from the distribution of power in sentencing. The commission will also bring a measure of accountability back into sentencing. Finally, the commission should be the appeals body to hear cases where decisions are made which do not fit into the guidelines. If this function becomes onerous, intermediate appellate bodies for each agency could be established. It is important for the commission to retain some appellate role as a way of observing in a direct way how individual cases are being resolved.

The commission model requires that there be an advisory group and a professional support staff. These will provide necessary sources of information to enable the commission to make informed decisions. The role of the advisory

group will be to input the concerns of other criminal justice agencies and the general public. The role of the staff will be to give the commission the most accurate and usable information, both empirical and legal, on which to base its decisions. The staff should also have a planning role to devise new and more effective or efficient methods, or to plan the implementation of innovations developed elsewhere.

The advisory group should include representatives from various police organizations, the corrections department, social agencies concerned with crime, defense attorneys, universities and other persons representing the public.

While the executive director should be a person of high credibility it might be wise not to be too specific about his background or to expect too much from him. In writing of such a commission, Judge Frankel indicated that it "would require prestige and credibility" and this would depend in part on the stature of the executive director.[28] However, given the conciliatory nature of such a commission it would be wrong to seek a "sentencing czar" for this post. Traits that should be obvious include some knowledge of the sentencing and criminal justice system, a reputation for innovative thinking, administrative abilities, some familiarity with legal and with social science thinking, and, of course, the support of the political system. Given the broad range of the sentencing process, this office holder should probably be a joint appointee of the Governor and the legislature.

The professional staff need not be large since it should be expected to work with and draw on the resources of other agencies, universities, and private research units. In fact, it might be preferable for the staff to rely on the judicial data system or the corrections data system (or probably some meshing of the two) for its nonexperimental statistical support. The staff should include a program analyst, an expert in information handling (statistician—computer programmer), and legal counsel. If the commission is to make reasoned decisions it must have an adequate source of information and evaluation.

The accurate monitoring of the sentencing system is a crucial aspect of success to the commission model. While the technical expertise to monitor the criminal justice system now exists, present agencies are too closely tied to their narrow administrative needs to engage in evaluation of other agencies in the criminal justice process. The very existence of a commission will create the necessity for constantly examining the various agencies which interact in the sentencing process. Thus, the commission will need staff members who have skills in systems science and program evaluation. These technical skills are relatively in low supply in the criminal justice system and finding highly qualified people in this area will be arduous although not impossible. It is now acknowledged within criminal justice circles that such skills are vital and this ethic can be expected to grow and attract candidates of high ability.[29]

In addition to the narrower kinds of skills associated with systems science

28 FRANKEL, *supra* note 7, at 119-20.

29 *See* L. Wilkins, SOCIAL DEVIANCE: SOCIAL POLICY, ACTION, AND RESEARCH, 1-44, 105-35 (1964); Adams, EVALUATIVE RESEARCH IN CORRECTIONS: A PRACTICAL GUIDE, 1975; National Advisory Commission on Criminal Justice Standards and Goals, A NATIONAL STRATEGY TO REDUCE CRIME (1973).

and allied fields, the commission staff must be able to evaluate the process in terms of the needs of specific agencies, criminal defendants, and society at large, and to prescribe and enforce rules that maximize the legitimate opportunities of each group. This "softer" ability to size up the main trends in sentencing theory and act on them is a political skill of a sort frequently exercised by regulatory agencies. The merging of these narrower technical skills with broader political abilities is central to the emerging discipline of policy analysis and is necessary in the commission.[30]

This evaluation, planning, and policymaking function may be carried out separately or in conjunction with other planning units. If the research staffs of the corrections department and court administrator are well entrenched, working with or through them may be essential. If the opposite is true, it may be a better strategy to develop an entirely new research capability in the commission. In either case avenues of communication between research staffs must be kept open. Cooperation and sharing benefit all parties in terms of ideas generated and money saved. At the ultimate level of cooperation the total merging of research staffs should be considered. The various agencies share in the ultimate goals of crime reduction, humane treatment of prisoners, efficiency, and the more nebulous category of doing justice. If administrative departments could be assured of having their valid internal needs for information and evaluation met there is no rational purpose in having separate research units. Assuming that this ideal situation cannot soon be realized, at some early stage the commission staff should establish "territorial" protocols of research with other evaluation units in order to determine which shall have priority in sentencing. Thus, while duplication will be avoided areas of cooperation can also be established.

Whether the commission should engage in pre-service or in-service training depends on the availability of such services elsewhere. The training of probation and parole officers is adequately performed in most states and the commission should not try to duplicate such function. Judicial sentencing institutes and similar programs, where not well-established, might be conducted by the commission. A place where the commission could be of special usefulness is in the design of seminars and programs of various types designed to iron out the problems of interaction that are endemic in sentencing.[31]

A. *Administrative Theory and Law as a Foundation for the Commission Model of Sentencing*

Since the term "administrative sentencing" usually connotes sentencing by a parole board, the model put forward here avoids that term both to avoid confusion and to connote a policymaking function separated from operations. However, administrative theory and law underlie this model. Emmette Redford has written about the administrative state:

30 LASSWELL, A PRE-VIEW OF POLICY SCIENCES (1971); *see also* HOROWITZ & KATZ, SOCIAL SCIENCE AND PUBLIC POLICY IN THE UNITED STATES (1975).

31 *See* O'Leary & Newman, *Conflict Resolution in Criminal Justice,* 7 J. RES. CRIME & DEL. 99 (1971).

> Significant also is the extent to which *the continuing business of society is in commission to organizations with program specializations.* The old view that all important policy decisions could be made by legislatures and that specialized organizations would be "administrative" only is no longer tenable, if indeed it ever was. First, specialized organizations have been delegated, or they have assumed responsibility for making policy decisions with respect to their programs. Second, they contain within them program specialists who will inform society about their programs, propose alterations in policy, and influence decisions by voters and their representatives. Finally, they create and aggregate interests clustered around and in the organizations —interests supported by survival and expansion of their functions.[32]

This state of affairs is not a matter of raw necessity but, as practiced, is both in accord with American democratic ideals and sanctioned by law.[33] The attributes and benefits of the administrative state are many. The widespread practice of institutional decision-making, and the multifarious links between agencies and constellations of other power holders and constituencies make the administrative agency a potential conduit for democracy.[34] Another benefit and attribute of the administrative state is professionalization:

> Professionalization in a technical society is a necessary complement to official roles. That is, official roles will not be effective in results unless the action taken is that of men who themselves possess, or are assisted by persons who possess, specialized qualifications and attitudes. . . . At the same time professionalization can—like personal stakes—distort the behavior of those in official positions. It can bring about professional communities of interest and opinion different from interests that sought representation through official positions, and perspectives on policy that reflect the attitudes and interests of these professional communities.[35]

This helps provide a reason both for the expansion of a conscious administrative role in sentencing and for a commission model. One of the problems with sentencing, even with parole sentencing, as can be seen by the Federal Parole Board reorganization, is the lack of professional expertise needed to make the role understandable, effective, and legitimate. In parole board sentencing, paradoxically, the myth of expertise shielded those agencies from the introduction of at least two kinds of professionalism: law and empirical program analysis. The obvious benefits of the reorganization support Professor Redford's views. The dangers of professional close-mindedness in a sentencing commission can be reduced by the inclusion of all interacting roles, community input, client input, and responsiveness to the legislature and appellate courts.

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32 E. REDFORD, DEMOCRACY IN THE ADMINISTRATIVE STATE 40-41, 179-204 (1969).

33 Although administrative policy is made by minorities in strategic positions, workable democracy is "achieved in public affairs through the interaction of leaders of different types in strategic positions of influence, who are forced by the interaction process, the complexity of interests involved in a decision-making situation, and the access of nonleaders to their positions to give attention to all the interests in the society." *Id.*, at 199-200 (italics omitted). The legality of the administrative state can be seen in the failure of the nondelegation doctrine, see DAVIS, *supra* note 24, at 34-51.

34 "[T]he attainment of the democratic ideal in the world of administration depends much less on majority votes than on the inclusiveness of the representation of interests in the interaction process among decision makers." REDFORD, *supra* note 32, at 44, 70-82 (italics omitted); K. DAVIS, *supra* note 24, at 226-43.

35 REDFORD, *supra* note 32, at 52-53.

The development in administrative law of the idea of discretionary justice by Professor Kenneth Culp Davis has been applied by him to sentencing. The need for a rational sentencing structure such as the Model Penal Code's and for interaction devices such as sentencing institutes were seen by Davis as necessary but not sufficient means of reducing disparity. In addition he suggested that policy statements and precedents linked to a system of appellate review would go far to bring rationality, consistency, and justice to sentencing.[36] These ideas have been implemented by the Federal Parole Board reorganization and are consistent with the commission model proposed herein.

B. *Prior Acknowledgement of a Commission Model*

The clearest call for a commission model for sentencing is made by Judge Marvin Frankel at the conclusion of *Criminal Sentences*:

> 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. The third is emphasized, not because of a claim to novelty, but because it is thought to be especially important if the commission is to be an effective instrument of reform rather than a storage place.[37]

Judge Frankel was moved to such a position by an acknowledgement of the inability of Congress to carry through the complex series of analyses needed to plan adequate sentencing reform, the long-range scope of such an effort, and the inadequacy of any single proposed reform. His sketch was meant to be suggestive and the shape of such a commission "would itself be a matter for study, debate, and, like the rest, improvements with experience."[38]

A well-conceived and detailed proposal to rationalize the Federal sentencing system has been put forward by Senator Charles Percy. His proposal, in the form of a federal bill, would create several new structures: a Federal Corrections Advisory Council to "assure the coordination and integration of policies respecting the disposition, treatment, and correction" of persons convicted in federal courts by acting as a central clearinghouse for study of the system; a Federal Circuit Offender Disposition Board of eleven members, each representing a Federal circuit, to "set national guidelines for the imposition of sentences," as well as bail, diversion, probation, parole, and incarceration, and to hear appeals from lower tier decisions; and District Court Offender Disposition Boards which would consider each case on the merits and make recommendations to the responsible officials.[39] The scheme proposed by Senator Percy has the benefits of central control and coordination, decentralization of operation—essential in the sprawling federal system—and the introduction of professional services and systematic

36 DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 133-141 (1969).
37 FRANKEL, *supra* note 7, at 119.
38 *Id.* at 122-23.
39 C. Percy, *The Federal Corrections Reorganization Act: Blueprint for a Criminal Justice System,* 11 AMER. CRIM. L. REV. 65 (1972).

oversight at the line level. The need to coordinate diverse decisions such as bail, sentencing, and parole shows sensitivity to the matter of power distribution but it is noteworthy that the prosecution role is ignored. This proposal is based on the notion that structural change is necessary and gears the change toward the accomplishment of certain substantive aims such as the reduction of disparity.

> There has been quite a bit of discussion as to whether we might not solve the problem by grafting new procedures and rights on the old system. This approach, however, would further tax an already overburdened system and only increase the already intolerable inefficiency. The only way to resolve the problem is to scrap the unworkable system and replace it with one designed to meet the needs of both offender and society.[40]

Despite this rhetoric the District Court Offender Disposition Boards would only be advisory. Perhaps Senator Percy contemplated that a functioning Board responsible to examine and recommend on every case would gain actual responsibility by default, a not unreasonable supposition. On the other hand, a thorough empirical study of sentencing councils reports their impact on reducing disparity to be small although obviously more effective when mandatory.[41] The Percy administrative model thus failed to remove the duplication of services—a politically unfeasible and perhaps unwise measure—needed, if his District Boards would function with complete efficiency. This is taken as evidence that it may not be best to remove existing agency functioning but that other ways of coordinating and rationalizing sentencing should be sought.

C. *The Special Problem of Linkage*

The central aspect of the commission is that it links diverse agencies which now separately conduct parts of the sentencing process with partial regard to the needs of other agencies, justice, or the overall working of the criminal justice system. Attention must be given to other linkage problems. What is the proper relationship between the commission and (1) the State Planning Agency (SPA), and (2) the operational parts of the agencies which are concerned with sentencing?

The SPA's must be established before a state can receive Law Enforcement Assistance Administration [LEAA] funds and are usually made up of representatives from the political and criminal justice spheres with professional staffs of program analysts who evaluate and stimulate grant applications. While SPA's are not responsible for running specific criminal justice agencies, they have become an important factor in this field, especially in new programs. The SPA is a source of funds and expertise which the commission cannot afford to overlook. If it can be assumed that the commission will begin its life with a grant of funds through the LEAA, then what other services can the SPA provide? The profes-

40 *Id.* at 76.

41 Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction,* 43 U. CHI. L. REV. 109 (1975), report: "In each court the council removed about 10 percent of the existing disparity, thus reducing disparity in New York from 45 to 41 percent, in Chicago from 37 to 33 percent." *Id.* at 137.

sional staff can provide the knowledge of persons who are totally involved in and concerned with sentencing related problems and yet far enough removed to offer objective criticism. Through its annual reports and revisions of federally required Standards and Goals documents, the SPA can provide authoritative documents, concerned with the entire spectrum of criminal justice, for the desirability of a commission model. At the present time the Standards and Goals documents for the Federal Government and the State of Michigan, for example, do not advocate a commission model.[42] Indeed, the Michigan report does not acknowledge that such a model has ever been proposed. It is sometimes a defect in official compendia of standards, even purportedly progressive ones, that unique and especially workable ideas may not be included. But the very process of public hearings and political compromise which go into such reports legitimizes ideas which are adopted. Each state has issued at least one set of standards and goals. In a field characterized by organizational innovation more of such debates and documents can be expected and this seems as good a forum for acceptance of the commission idea as any.

The SPA's are usually comprised of a cross section of political and criminal justice leadership that is recommended in the commission model. Thus many of the same people who gather with the executive director of the state SPA to evaluate and ratify staff decisions are also likely candidates for the commission. The existence of such bodies in every state should be taken as a great opportunity for advancing cooperation and furthering trans-criminal justice goals. If the two bodies are close enough in membership, scheduling meetings of the two in close proximity might prove effective and time saving.

The most likely source of friction between the two bodies would be an attempt of the SPA to dominate the commission through the purse. Yet, once the commission is established it should be no more subject to SPA manipulation than other agencies. On the contrary, the promise for cooperation between these two bodies may be brighter than that between the commission and the operational side of the agencies.

The idea that the agencies which jointly share responsibility for sentencing have competing interests is what prompted the development of the commission idea; however, these agencies do more than engage in sentencing decision-making. Prosecutors must try cases, judges adjudicate civil cases in greater numbers than criminal, and corrections, including parole, is rightly concerned with the care of and programs for its clients. So long as the criminal justice system remains fragmented the commission will have to deal with the operating concerns of each part. Thus, staff members must be well versed not only in the particular needs and theories of sentencing but also of adjudication and corrections. The development of sentencing policies will have to account for the operational needs of

42 The two documents diverge on this point. The National Standards and Goals are in favor of greater judicial involvement in sentencing, *National Advisory Commission on Criminal Justice Standards and Goals,* CORRECTIONS (1973) *Standard* 5.9, "Continuing Jurisdiction of Sentencing Court." Michigan, on the other hand, seeks a reduction of judicial discretion below present levels and an augmenting of the discretion of the Corrections Department and Parole Board under the indeterminate sentence, MICHIGAN ADVISORY COMMISSION ON CRIMINAL JUSTICE, CRIMINAL JUSTICE STANDARDS AND GOALS FOR THE STATE OF MICHIGAN, Standard 64.15 and p. 105.

those agencies and yet not allow those needs to overwhelm the basic requirements of an adequate sentencing system. The commission staff will not only need to know of these needs in the abstract but will have to keep up contacts with each operational agency concerned with adjudication, sentencing, and corrections. A way to ease the problem—correctional unification—has been advocated.[43] This reform is put forward "in the name of greater efficiency, clearer accountability, higher performance standards, more flexible programming and better allocation of resources." Designed to include adult and juvenile institutions and probation, jails, parole, and juvenile detention and aftercare, it nevertheless omits the sentencing function. However, the proposal that a unified correctional system be placed in a "justice superagency" rather than a "human services' superagency" is a positive contribution to the commission idea. Nothing in the commission model requires cabinet level separateness. A sentencing commission within a "Ministry of Justice" that contains a unified correctional system should find a more efficient and congenial atmosphere within which to work.

D. *The Special Problem of Resistance*

This proposal, like any suggestion for large-scale change, must be carefully subjected to scrutiny by all concerned parties. In the process it will be improved and made to fit the particular needs of different sentencing systems. Criticism on any and all reasoned ground is welcome. Even inertia has its place as a reasonable ground of general application, since unnecessary or too frequent change in laws or governmental systems is disruptive of the good in them.[44] The time has come, however, for a change.

What of resistance to change based on irrational or selfish grounds? Irrational objections can only be met by reasonable answers founded on an accurate picture of sentencing and informed by valid policy choices. "Selfishness," or a normal desire to preserve personal and professional standing, is another matter. Such defensive reactions are psychologically "normal" and predictable; a change of the magnitude of the implementation of a sentencing commission must take this into account. A speculative article has postulated that judges will resist the significant structural change of giving reasons for sentences because this raises the visibility of sentencing and creates greater opportunity for appellate reversal and public criticism.

> Such change is intrinsically threatening and anxiety-producing to those most directly involved in it, for several reasons that may be particularly applicable to the reform of the administration of the criminal justice system. It is most often imposed by those at the top upon those lowest and most vulnerable in the organization, frequently with minimal explanation. It often requires a relinquishing of previous styles of interaction and areas of authority, a learning of new skills and roles that are perceived as restraining, or a reduction in occupational performance opportunities. The security and stability of professional expectations and performance criteria are disrupted, old and

43 D. Skoler, *Correctional Unification: Rhetoric, Reality and Potential,* 40 FED. PROB. 14 (Mar. 1976).

44 L. FULLER, THE MORALITY OF LAW 39, 79-81 (1964).

> comfortable alliances may be weakened or no longer available, and norms governing the social relations and social distance between superiors and subordinates are altered.[45]

While this theme can be overdone there is much in it that is true. Since the commission model arises out of an analysis that power is shared in sentencing and a desire to bring that power and that sharing into a rational system of control, these psychologically threatening concerns are brought into the open. They must be dealt with by several strategies. First, the rational elements in the plan must be stressed: accountability, efficiency, reduction of sentencing disparity, and the doing of justice are totally mocked only by a small and unusual minority of criminal justice personnel. These are the main reasons for reform proposals and the adoption of workable reforms enlarges the personalities of public servants. Next, the professional status of sentencing personnel can be enhanced by a movement toward democratic management. This is inherent in the commission model, as opposed to a replacement of present sentencing agencies by a monolithic bureaucracy. Third, superior leadership within the commission and the judiciary concerned with sentencing must be forthcoming. It has been argued that:

> The pivotal conflict throughout the entire criminal justice system in relation to reform hinges upon the extent and types of opportunities that different personnel have for employing personal, private, unencumbered, unsupervised discretion—i.e., acting with independence and autonomy—and the importance to them of the exercise of such unregulated, unmonitored, unevaluated, free decisionmaking in the performance of their work and as an integrally satisfying part of it.[46]

This is clearly overdone—it treats people as atomistic, programmed entities constantly struggling to avoid supervision. This does not square with man's social nature, with the continued existence of authority, and with the ability of dynamic leaders not only to control but stimulate productivity and excellence. Finally, personnel affected by structural change must at the very least be protected from job loss and if possible from loss of status. Ways of upgrading job functions should be found. The above points can be subsumed within strategies for planned change of organizations.[47] The problem of resistance is real, but not insurmountable.

E. *The Proposed United States Sentencing Commission*

S. 1437 proposes an independent Commission of nine members, designated by the Judicial Conference, and "in the judicial branch."[48] Section 991, establishing the Commission, lays down two broad purposes: "establishing sentencing policies and practices for the federal criminal justice system" and "developing means of measuring the degree to which the sentencing, penal, and correctional

45 G. Robin, *Judicial Resistance to Sentencing Accountability,* 21 CRIME AND DEL. 201, 202 (1975).
46 *Id.* at 211 (italics omitted).
47 W. BENNIS, CHANGING ORGANIZATIONS (1966).
48 S. 1437, *supra* note 2, at § 991. The relevant portion, Title II, Part E. proposes a new

practices are effective in meeting the purposes of sentencing." These purposes contain several dilemmas. Using the terminology established at the beginning of this article, does S. 1437 adequately deal with the problems of irrationality, disparity, ineffectiveness, and diffusion? It is submitted that the legislative proposal resolves all issues satisfactorily except diffusion. In the first purpose the Commission is charged with oversight of the "federal Criminal Justice system." It is well established that real sentencing power—the ability to effect sentencing outcomes—is shared by at least three key actors, the prosecutor, the judge, and parole board member.[49] Yet, the authority of the Sentencing Commission runs only to the United States Courts and the United States Probation Commission.[50] The plea bargaining activity of United States Attorneys is avoided by the proposal. As for the parole authority, the bill seems to give the Sentencing Commission authority to affect the operation of the Parole Commission.[51] This raises several unanswered questions concerning diffusion. This matter is held in abeyance until the next and concluding section of this article in order to review less problematic aspects of the bill.

Section 991 of S. 1437 is quite general. The Commission's policies and practices must "provide certainty and fairness," and must "avoid unwarranted disparity while maintaining sufficient flexibility to permit individualized sentences." Individualization is warranted when "mitigating or aggravating factors" are present. While this phrase reflects the rhetoric of the presumptive sentencing

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Chapter 58 be added to title 28, United States Code, §§ 991-998. § 992 provides for terms of office and compensation of sentencing Commissioners. Except for the first appointees, who are appointed to two-, four-, and six-year staggered terms, Commissioners' appointments shall be six years. § 993 provides for designation of the chairman of the Commission. § 996 establishes the role of staff director. § 997 requires that an annual report be published and § 998 contains definitions. The sections outlining the substantive powers and duties, §§ 991, 994, 995 are analyzed in the text.

49 *See* Comment, *The Influence of the Defendant's Plea On Judicial Determination of Sentence*, 66 YALE L.J. 205 (1956); C. Foote, *The Sentencing Function* in A PROGRAM FOR PRISON REFORM 17 (1972). Of course, other participants such as probation officers and defense attorneys play important roles in determining sentences, A. ROSSETT & D. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE (1976). However, it is clear that the three main actors have the greatest authority and power. Thus, attempts to modify sentencing practice should focus on them.

50 S. 1437, *supra* note 2, at § 994 (a).

51 *Id.* at § 994(f) provides that the Sentencing Commission "shall promulgate and distribute to the United States Parole Commission: (1) guidelines consistent with those promulgated pursuant to subsection (a) (1) of this section for use of [*sic*] the United States Parole Commission in determining whether to parole a prisoner and in determining the length of the term and conditions of parole; and (2) general policy statements regarding application of the guidelines or any other aspect of parole that in the view of the Commission would further the purposes set forth in the revised Criminal Code.

Under the proposed act the Parole Commission still has authority to release inmates prior to the expiration of the maximum term (the judge may set a term of parole ineligibility pursuant to S. 1437, Title I, proposed 18 U.S.C. § 2302 (b)), but such release must be consistent with Sentencing Commission guidelines and policy statements. *Id.* at Title I, proposed 18 U.S.C. § 3831(c).

The proposed act is silent as to the continued existence of the Parole Commission's guidelines, *see* 28 C.F.R. 2.20 (1975). It seems that the burden will be on the Parole Commission to make its guidelines consistent with those of the Sentencing Commission. Furthermore, revised Title 18 seems to give judges the power to override both sets of guidelines, although appellate review can be expected to curb such activity. *Id.* at Title I, proposed 18 U.S.C. § 2007, 3725. Thus, whether by design or default, S. 1437 appears to deal with diffusion by placing the primary power for sentencing in the hands of the judiciary.

approach,[52] the method is not adopted by the Commission. The Commission is also required to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." The open-ended nature of this language is intriguing. Under the older indeterminate sentence-medical model ideology of crime control such a phrase would connote knowledge about criminal offenders and how they could be rehabilitated. The language is sufficiently flexible, however, to allow for study of the human behavior of official decision-makers within the criminal justice system. This is simply an acknowledgment that such information may be as important as information about criminals in understanding and in devising a fair and rational system.[53]

How are these laudable goals to be achieved? The prime method proposed by S. 1437 are *guidelines,* which establish categories of offense and categories of defendant and a "suggested sentencing range."[54] These guidelines are clearly modeled on the Parole and Sentencing Guidelines systems briefly described above.[55] The only statutory interference with Commission promulgation of guidelines is first, that organized crime figures should receive substantial prison terms,[56] and that one House of Congress has the power to veto guidelines within a specified period of time.[57] Since it is assumed in this article that the guidelines methodology and approach are the best available way to resolve problems of irrationality and disparity it is submitted that the adoption of guidelines in S. 1437 is a real advance in the development of a fair and workable sentencing system for the federal government. In addition to guidelines the Sentencing Commission may promulgate "general policy statements regarding application of the guidelines or any other aspect of sentencing that in the view of the Commission would further" the general sanctioning purposes of the proposed criminal code.[58] It appears from this text and from general sentencing provisions of S. 1437 that policy statements can be used to create exceptions to the guidelines and other binding rules regarding sentencing.

The bill's approach to the problem of ineffectiveness is a sound one. It makes no claims that some sentencing formula or approach will reduce recidivism or increase deterrence. Despite various strident claims for lengthier and mandatory prison terms on the one hand, or more community corrections on the other, there is at best limited knowledge at the present time concerning effectiveness.[59] In this light the second broad purpose of measuring effectiveness seems the wisest course. This mandate is backed up by more specific directives that would ensure an adequate research effort in this area: establishing a research and development program, serving as a clearinghouse and information center for sentencing in-

52 FAIR & CERTAIN, *supra* note 5, at 20-21, 42-47.

53 J. HOGARTH, SENTENCING AS A HUMAN PROCESS (1970); reports of the Parole Decision-Making Project, *supra* note 20: L. Wilkins, D. Gottfredson, J. Robison, & C. Sadowsky, Information Selection and Use in Parole Decision-Making (Supp. Report Five, 1973), P. Hoffman, Paroling Policy Feedback (Supp. Report Eight, 1973), L. Wilkins, Information Overload: Peace or War With The Computer (Supp. Report Eleven, 1973).

54 S. 1437, *supra* note 2, at § 994 (a)-(d).

55 *See* text accompanying notes 20-24 *supra.*

56 S. 1437, *supra* note 2 at § 994 (3).

57 *Id.* at § 994 (g).

58 *Id.* at § 994 (a) (2).

59 *See, e.g.,* ZIMRING & HAWKINS, *supra* note 7; R. MARTINSON, T. PALMER, & S. ADAMS, REHABILITATION, RECIDIVISM, AND RESEARCH (1976).

formation, acting in a consulting capacity for courts and agencies, collecting and publishing sentencing data, and collecting and disseminating information regarding effectiveness of sentences.[60] In order to accomplish this and other purposes the Commission is empowered to make contracts, request data from other Federal agencies or judicial officers, and accept voluntary services.[61]

Other functions recommended in the general commission model are found in S. 1437. For example, the Commission is given power to engage in training programs "of short-term instruction in sentencing techniques for judicial and probation personnel" and to conduct sentencing seminars and workshops.[62] The Commission is also empowered to "make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy."[63] It was noted in the discussion of the general commission model that a sentencing commission must be subject to statutory and constitutional law. This advisory function is a valuable aid to rational lawmaking and should be incorporated into any state sentencing commission. While commission input into the deliberations of appellate courts is not so clear, such input could be made through the solicitor general or in appropriate cases through amicus curiae briefs. Such activities would be authorized, in any event, by section 995 (b) which grants to the Commission "such other powers and duties . . . as may be necessary to carry out the purposes of this chapter."

On the whole, the proposal for the United States Sentencing Commission offers great promise for devising a workable and just sentencing system. S. 1437 shows great legislative restraint in sentencing. While the judiciary is given fairly wide sentencing latitude, if one examines solely the penalty provisions of the bill,[64] the Sentencing Commission provides the necessary control over wide variations of discretion that result in disparity. No *a priori* system can answer all the problems of sentencing for all time. The Commission, with its power to devise guidelines and policy statements, provides the necessary flexibility.

III. Conclusion—The Sentencing Commission and the Distribution of Power

The proposed United States Sentencing Commission does not entirely resolve the problem of diffusion. This may create problems in its operation, but measures can be taken which may reduce or eliminate them. To briefly recapitulate: sentencing is a polycentric process; each decision-maker (especially prosecutor, judge, and parole board member) has the power to affect others, to the extent of possibly subverting their policies; the proposed Sentencing Commission

60 S. 1437, *supra* note 2, at § 995 (a) (10)-(14). A recently enacted sentencing reform law in California requires that the Judicial Council of that state "collect, analyze, and quarterly distribute and publish in the official reporter relevant information to trial judges relating to sentencing practices. . . . Such information shall be taken into consideration by the Judicial Council in the adoption of rules. . . ." Cal. Penal Code § 1170.4.

61 S. 1437, *supra* note 2, at § 995 (a) (4)-(9).

62 *Id.* at § 995 (a) (15)-(16).

63 *Id.* at § 995 (a) (17).

64 *Id.* at Title I, proposed 18 U.S.C. §§ 2001, 2101-2103, 2201-2203, 2301-2304.

bill avoids the issue of prosecutorial discretion; the bill seems to place the Commission, which is in the judicial branch, in a position of authority over the Parole Commission, which is in the executive branch. In the federal government, these "loose ends" may not be as problematic as in state government, given the relatively greater central control over prosecution and the highly professional nature of the Parole Commission. However, if a situation of interagency conflict arises, there is no clear structural mechanism to resolve it. One possible solution lies in modifying the proposed Commission in accordance with the model provided above. This model, with its veto power, is designed to make explicit the distribution of power in sentencing. Without modifying one word of S. 1437 there are two measures that can be taken which can reduce potential diffusion problems.

The first measure is the introduction into the guidelines of explicit recognition of the effect of plea bargaining on judicial sentencing. Without taking the plea bargaining factor into account, it is possible for prosecutors to avoid the apparent mandate of the Sentencing Commission. One way of doing this was suggested by Hoffman and DeGostin:

> That is, each guideline category could contain a sentencing range for conviction by plea as well as a sentencing range for conviction by trial. . . . In this manner, the acceptable range of leniency for a guilty plea for any particular category in the sentencing calculus could be specified in advance. In addition to increasing sentencing consistency, such explicit policy could be used to define and prohibit improper (i.e., overly coercive) bargains. . . . This is not to argue that plea bargaining "ought" to continue, but rather that if it does continue such steps might be taken to minimize its negative effects.[65]

In some states, it might be necessary to develop modified guidelines for local jurisdictions where prosecutors engage in sharply different plea bargaining practices. This might not be a problem in the federal system, but if local variations exist in different districts, they should at least be taken into account in guideline tables.

The other measure, not presently required by S. 1437, is for the Judicial Conference to designate Sentencing Commissioners who represent the prosecution, the judiciary, and the corrections/parole system. According to the commission model propounded in this article, the optimum distribution would be for three commissioners to represent each component. As a matter of policy it can be argued that the Sentencing Commission should represent the judiciary. In this case judicial representatives could be named to five of the seats. It is submitted that even in this case the remaining four seats should be reserved for representatives of the other components of the sentencing system. A nine-person Commission representing only one facet of the sentencing decision network is a shortsighted view of the system. Input and votes representing prosecution and corrections heighten the legitimacy of the panel.

This policy approach is strengthened when it is noted that the Sentencing

65 HOFFMAN & DEGOSTIN, *supra* note 25, at 201.

Commission has power to affect decisions of the Parole Commission.[66] Since S. 1437 specifically places the Sentencing Commission in the judicial branch, a separation-of-powers conflict is possible. This is also a likelihood if the Commission makes explicit the plea bargaining factor in the sentencing guidelines. There appears to be no restriction in S. 1437 to the naming of nonjudicial personnel to the Commission. The intent of the bill is to create a fair and workable sentencing system. A workable system requires that the problem of diffusion be resolved. The prestige and legitimacy of the sentencing commission model are increased to the extent that it represents the real decision-makers. Therefore, it is strongly recommended that the Sentencing Commission be enacted into law, and that it be composed of those who are, in the last analysis, responsible for the major decisions of sentencing.[67]

66 *See* note 51 *supra.*

67 In the federal system at least one member of the Parole Commission should sit on the Sentencing Commission.