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Recommended Citation

Norval Morris, *Towards Principled Sentencing*, 37 Md. L. Rev. 267 (1977)
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol37/iss2/4>

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TOWARDS PRINCIPLED SENTENCING*

NORVAL MORRIS**

Recently I have been advised of the three great lies: "Thank you for reminding me, the check is in the mail"; "I'm sorry, I gave at the office"; and "I'm from the Government and I have come to help you."

Government is not always beneficent, your response tells me. Nor is the wish to do social good always the immediate prelude to its achievement. Nowhere are these truths more evident than in the governmental task of sentencing convicted criminals, a task to which I wish to direct your attention today. So much seems to be expected of the criminal sentence: crime reduction, deterrence coupled with clemency, a deserved punishment linked to that insightful individualization of punishment which fosters self-regeneration.

The sentencing decision is complex, difficult, and of fundamental importance; yet we lack a common law of sentencing. The purposes to be achieved by sentencing are not agreed upon, nor are our procedures. A mixture of motives has led us astray: on one hand, an exaggerated belief in the deterrent efficacy of punishments; on the other, an excessive faith in the possibility of coercively transforming the criminal into a law-abiding citizen. Both deterrence and reform have failed us: deterrence, because our limited capacity to catch, convict, and sentence the guilty fails to fulfill the threat of punishment; reform, because coercive reform is no business of the criminal law. When the criminal law enters that business it tends to corrupt its legitimate purposes, achieving neither justice nor social protection.

It is obvious that I am not going to solve these mysteries today. Some of man's earliest writings deal with the proper equation between crime and punishment; the subsequent literature is enormous; no transcendent truths will emerge today. But it may be possible, at a time of ferment in sentencing reform, to offer some ideas relevant to legislative, judicial, and academic discussions of the various current proposals for sentencing reform — that, certainly, is my purpose.

* This is, with minor changes, the Morris Ames Soper Lecture for 1977 given at the University of Maryland School of Law on March 10, 1977.

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The first insight I submit for your consideration is that sentencing reform is unlikely substantially to reduce crime or juvenile delinquency. The press and its willing acolytes, the politicians, frequently promise substantial diminution of crime and juvenile delinquency through manipulation of court procedures and a hardening of sentencing practice. Be not deceived. There is much wrong with the American criminal justice system but its leading defect is not, as the tabloids suggest, the sentimentality of the judiciary. In many days' marches through the criminal courts of this country, I have found few bleeding-hearted judges; they tend, in terms of physiognomy, to the prognathous jaw and the hard nose, far from characteristic of the sentimental softies the press describes. The allegation of too lenient sentencing by the judge is an irrelevancy, a distraction from the systemic difficulties that beset sentencing practice, particularly in the crowded urban courts of this country.

The public has been led to expect too much of the criminal justice system generally and grossly too much from sentencing reform. The criminal justice system controls the largest power the government exercises over its citizens and is of central constitutional importance, but its reform, if consonant with a due respect for human rights and fundamental freedoms, will make no more than relatively small differences in the incidence of crime and juvenile delinquency. These phenomena respond to deep social, cultural, and political currents beyond the substantial influence of the criminal justice system. The system cannot itself rectify social inequities; but it certainly should not exacerbate them, as it does now. The system cannot end the poverty that persists amidst conspicuous plenty, it cannot abolish racial discrimination in a country dedicated to the equality of man, it cannot solve the diverse problems of our criminogenic society. Does that mean that sentencing reform is unimportant? Not at all. It is of crucial importance. All that I am struggling to refute are those unrealistic expectations which have long blighted criminal law reform. Let me try to be clear about what can reasonably be expected of sentencing reform: first what cannot and then what can be expected.

The shadow that crime now casts across the face of America is unlikely to be much reduced until, in the 1980's, changes in the age and distribution of our population give us surcease. We have gathered together our minority, ill-educated youth, underemployed and vocationally untrained, in pockets of desolation in our larger cities. Welfare programs have contributed to the breakdown of the families of the poor and have helped make criminals of their

children. A drug culture powers crime in the ghetto. A plague of handguns has turned domestic conflicts into gun battles and has eased the path of the socially pressured towards street crime. Crime in the suites gives moral leadership to crime in the streets. A multiplicity of police forces burdened by excessive minor service and regulatory duties achieves exiguous clearance rates of crime. The jails, the courts, and the prisons are overcrowded: in particular, the prison population swells in its inadequate and ancient premises. It is most unlikely that sentencing reform will make a substantial inroad on these criminogenic realities.

Let me give an example. Van Dine, Dinitz and Conrad have recently conducted an experiment¹ to test statistically whether mandatory incapacitative sentences — as advocated by Wilson, Van den Haag and others² — would substantially reduce violent crimes. The most stringent option they tested, a five year net mandatory term for any adult convicted of a felony, would have reduced crime in the area studied by only four percent. Such a sentencing system would, of course, be nullified and modified in practice, and the payoff would be even less.³ And more realistic, less draconic, mandatory sentences are likely, I shall argue, to have even less effect on the crime rate.

What, then, can sentencing reform achieve? The journey will not be short nor the results easy of achievement but, in my view, we can reasonably expect a small but measurable reduction of crime and juvenile delinquency and, at least equally important, the emergence of a principled, evenhanded, effective yet merciful common law of sentencing, consistent with human rights and just freedoms, competent to deter crime, outline minimum behavioral standards, and better protect society against its ingroup predators.

I hope, by what the diplomats affectedly call a tour d'horizon, to throw some light on certain key issues in the emergence of such a common law of sentencing. But there yet remain a few necessary preliminary points.

There are at least two aspects to the emergence of a principled jurisprudence of sentencing: purposive and procedural. The purposes of punishment are too often considered apart from the machinery of their achievement, and the awkward squalor of reality thus banished. Though artificial isolation of a topic is often necessary for its elucidation, in this instance principle and procedure

1. Van Dine, Dinitz & Conrad, *The Incapacitation of the Dangerous Offender: A Statistical Experiment*, 14 J. RESEARCH IN CRIME & DELINQ. 22 (1977).

2. See, e.g., E. VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION (1975); A. WILSON, THINKING ABOUT CRIME 198-209 (1975).

3. The deterrent efficacy of such sentences was, of course, not measured.

are so deeply intertwined that our only hope of moving towards principled sentencing lies in new procedures and, in particular, in the better control of charge and plea bargaining and the wiser distribution and control of sentencing discretion between the legislature, the judge, and the administrator than now obtain. A new procedural synthesis is essential to principled sentencing. I know this is an opaque affirmation; I hope to move towards some clarity as this lecture grinds relentlessly on.

In a relatively recent book,⁴ I tried to isolate sentencing purposes from sentencing procedures and offered an answer to the question "Why should a convicted criminal be imprisoned?"; this seemed to me a practical way to contribute to a jurisprudence of sentencing. I suggested two guiding principles: the principle of parsimony, whereby the least restrictive (punitive) sanction necessary to achieve defined social purposes should be imposed; and the principle of desert, whereby no sanction should be imposed greater than that which is "deserved" by the crime, or series of crimes, for which the offender is being sentenced. And I advanced dogmatic views on the proper application of special and general deterrence and on predictions of future dangerousness in the imposition of punishments. These issues are important and relevant to the emergence of a common law of sentencing, but I prefer not further to discuss them with you today; I shall instead focus on their relationship to sentencing procedures and, in particular, to the questions of who should impose sentence on the criminal and under what legislative, judicial, and administrative limitations.

One of the compelling reasons for this necessary synthesis of purpose and procedure is the diversity of crime. Punitive purposes appropriate to homicide are less relevant to petty larceny; certainly the mixes of purposes to be achieved are different. Incest, drunken driving, bank robbery, and embezzlement present substantially different social problems which are unlikely to be effectively addressed by any simple hierarchy of punishment aims. The necessary operative complexity will have to be found in sentencing processes capable of mediating those differences.

And further, discretion in punishment, an inevitably necessary element as we shall see,⁵ may properly be differently exercised at different levels of the criminal justice system. Given that a prosecutor exercises a sentencing discretion in his decision to accept a plea of guilty to a lesser charge than that for which he might

4. N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974).

5. See, e.g., p. 282-83 *infra*.

possibly obtain a conviction, his discretion to do so is properly less circumscribed than that of a judge imposing sentence after a jury trial and conviction. The latter is more public: the deterrent and educative functions of the criminal law weigh more heavily. Hence we face problems not only of the proper ends of punishment but also of the appropriate distribution of punitive discretion.

Finally, before a series of current sentencing problems is listed and commented upon, let me address the question why sentencing has now caught the public eye. The books on sentencing⁶ flow to such an extent that my brilliant colleague, Franklin Zimring, has been moved to publish "A Consumers' Guide to Sentencing Reform."⁷ The legislative proposals and reforms multiply, from California⁸ to Maine.⁹ Statutory sentencing reform is in the wind, and Congress now girds itself for the consideration of at least two important reform initiatives, the Kennedy Bill¹⁰ and the Hart-Javits Bill.¹¹ Why the flurry? Why the present ferment? Many reasons, I suppose, but one in particular merits present comment.

A false dichotomy long concealed the tensions in sentencing policy which have now become manifest. We long conducted the debate in polar terms. One was either for punishment and deterrence or one was for treatment and reform. In those simplistic days, before we recognized the inadequacies in our rehabilitative and reform models of the criminal process, the diversity in sentencing, the disparities in the treatment of apparently like cases, was explained either by the incompetence or inefficiency of the judiciary in properly individualizing punishment to adjust the needs of social defense to the rehabilitation of the offender. Francis Allen's essay on the rehabilitative ideal¹² attracted enormous support. In the same year that Allen's book of essays was published, 1964, I found that I was arguing that "power over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes."¹³ In 1964 that was not an obvious

6. *E.g.*, D. FOGEL, *WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS* (1975); M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); A. VON HIRSCH, *DOING JUSTICE, THE CHOICE OF PUNISHMENTS*, REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION (1976).

7. F. ZIMRING, *MAKING THE PUNISHMENT FIT THE CRIME: A CONSUMERS' GUIDE TO SENTENCING REFORM* (1977).

8. CAL. PENAL CODE §§ 1170.0-1170.6 (West Cum. Supp. 1977).

9. ME. REV. STAT. ANN. tit. 17-A, §§ 1151-1156, 1201-1206, 1251-1254, 1301-1305 (Supp. 1975).

10. S. 181, 95th Cong., 1st Sess., 123 CONG. REC. 406 (daily ed. Jan. 11, 1977).

11. S. 204, 95th Cong., 1st Sess., 123 CONG. REC. 556 (daily ed. Jan. 12, 1977).

12. F. ALLEN, *Legal Values and the Rehabilitative Ideal*, in *THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY* 25 (1964).

13. N. MORRIS & C. HOWARD, *STUDIES IN CRIMINAL LAW* 175 (1964).

proposition. It can hardly be argued against now. Many studies and a legion of commentators, culminating perhaps in the overstatement of Martinson's swiftly accepted view that "nothing works"¹⁴ have forced reconsideration of the traditional polar argument between the punishers and the treaters.

The problems of just sentencing are now seen to be more complex; the pervasive unjust disparity of sentencing more difficult of remedy. Suggestions of a simple balance between encompassed harm and deserved punishment receive widespread support, though they too, as I shall argue, misleadingly simplify the problem and will not achieve the larger equities at which we aim. The balance between desert, deterrence, the educative effects of punishment on the community, a due respect for human rights and minimum dignities, the lasting constraints of clemency and charity, and the existing and likely continuing inadequacies of our understanding of man and his place in society, the whole compounded by the great diversity of crime and the paucity of resources we allocate to its just control, make up a problem insoluble by simplistic solutions like mandatory minimum sentences or legislatively fixed sentences. And all this complexity is, in my view, pressing on us now for two reasons: an increasing recognition of the serious impact crime has on life in this country, and a clearer perception that the criminal law is an unlikely engine for coercing man to the good life or for coercing the criminal to social conformity.

Certain key issues in sentencing reform which I now wish to list and then briefly comment upon are:

1. Disparity, Individualization, and Equality;
2. Parole and its Doubtful Future;
3. Legislatively Fixed Terms
 - a. Mandatory Minimum Sentences,
 - b. The Fogel Plan,
 - c. Presumptive Sentences: The Hart-Javits Bill;
4. Distributing Sentencing Discretion: The Kennedy Bill.

1. Disparity, Individualization, and Equality

I find myself in a retrospective mood. Twenty-five years ago I presented a paper at a law convention in which I argued that there were gross and unjust variations in sentences imposed on convicted criminals, variations explicable neither by the severity of the crime

14. Martinson, *What Works? Questions and Answers About Prison Reform*, 35 THE PUBLIC INTEREST 22 (1974). See also D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975).

nor by the criminal record or personality of the criminal.¹⁵ The astonishingly swift passage of the years has not shaken my faith in this conclusion; the data on unjust sentencing disparity have indeed become quite overwhelming and will, I submit, convince anyone who will take the time to study them. Let me draw your attention to just a few recent studies illustrative of both judicial and parole board disparity in sentencing.

In a recent experiment in the Federal Second Circuit,¹⁶ all forty-three of the active federal trial judges in that circuit and seven senior trial judges rendered sentences on twenty identical cases set forth in presentence reports.¹⁷ There was a wide range of disagreement among the judges regarding appropriate sentences for identical cases. For example, in one case the sentences varied from three to twenty years, and in another from probation to seven and one-half years. Furthermore, even after eliminating the extremes of the distribution, substantial disagreement persisted. Absence of consensus was found to be the norm.

In a study of sentencing councils, Diamond and Zeisel found that such councils have a relatively small effect on the very large disparity present in the system.¹⁸ Sentencing councils attempt to reduce sentencing disparity by requiring each judge to discuss with his fellow judges the cases on which he is to pass sentence. Before the council discussion, disparity averaged around forty-five percent of the mean severity of sentence in the Eastern District of New York and about thirty-seven percent in the Northern District of Illinois; the disparity reduction effected by the councils was only about four percent.

In a recent study of sentences in federal courts throughout the country, Tiffany, Avichai and Peters found substantial variation in sentences that related to such apparently unprincipled factors as:

- type of trial — whether by bench or jury;
- type of counsel — whether retained or appointed (but only in bench trials);
- race of defendant (but only where defendant had no prior record).¹⁹

15. Morris, *Sentencing Convicted Criminals*, 27 AUSTL. L. J. 186 (1953).

16. A. PARTRIDGE & W. ELDRIDGE, *THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT* (1974).

17. Each presentence report contained information regarding the crime, whether the guilty verdict followed a plea or trial, prior record, age, narcotic history, family background, etc.

18. Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U. CHI. L. REV. 109 (1975).

19. Tiffany, Avichai & Peters, *A Statistical Analysis of Sentencing in Federal Courts: Defendants Convicted After Trial, 1967-68*, 4 J. LEGAL STUD. 369 (1975).

The discovery of such unprincipled disparity took many students of the criminal justice system by surprise, but, in retrospect, it should not have. Sentencing in America has not been guided by any apparent principles, and certainly not by legislatively enunciated principles. It has been left to the caprices of judges with various characters and training, working under pressures of crowded court dockets, and to the vagaries of changing judicial and public attitudes towards crime and punishment. No considered or routine procedure guides the imposition of sentence, nor have generally accepted criteria been established. The judge need not give reasons for his decision nor explain it to the convicted criminal.

Because disparity flows from lack of principle and absence of modulating procedures, one wonders if perhaps the individualized attentions of parole boards can achieve a larger equity. But parole boards are even less constrained than judges by controlling principles or procedures. Studies similar to the judicial sentencing studies discussed above have found unjust disparity also in the decision to release on parole.²⁰

It is important to understand that these sentencing studies try to hold constant those individual qualities, both in the criminal and his social setting, which are thought to justify individualization of punishment and thus to explain its variation from the norm. Several decades of research seem to me to have clearly demonstrated not the existence of sentencing disparity possibly justified by the needs of individualized sentencing, but rather the existence of gross sentencing disparity not capable of being so justified.

The currently fashionable leap to the automatic equality of fixed term sentencing, the sentence determined by the severity of the crime and modulated only slightly by defined aggravating and mitigating circumstances found by the judge to influence the deserved punishment, is clearly understandable as a pendulum reaction to our long-prevailing sentencing anarchy. But it is, I believe, a mistake; and for two reasons. First, as will be seen when we discuss legislatively fixed term sentencing, such systems are incapable of encompassing the subtleties of crime-to-criminal relationships essential to just sentencing. Secondly, equality in punishment is not an absolute principle; it is a value to be weighed and considered among other values, no more; and there can be just sentences in which like criminals are not treated alike.²¹

20. *E.g.*, Heinz, Heinz, Senderowitz & Vance, *Sentencing by Parole Board: An Evaluation*, 67 J. CRIM. L. & CRIMINOLOGY 1 (1976).

21. This is a long argument which I have developed elsewhere at burdensome length, N. Morris, *Punishment, Desert and Rehabilitation*, in (7) EQUAL JUSTICE

What it comes to is this: the fine tuning of just and efficient sentencing cannot be done by the legislature. The judge is the inevitably appropriate sentencing figure in the drama of crime and punishment.

What remain to be considered for the rest of this lecture are the sentencing judge's relationships with the legislature, the parole board, the proposed Commission on Sentencing, and the appellate court.

In my view, the rational division of power between legislature and judge was laid out in the mid-1950's by the American Law Institute in its Model Penal Code:²² it defines the path to a common law of sentencing. The several proposals for a Federal Criminal Code,²³ the American Bar Association's Committee on Sentencing in its Standards Project,²⁴ and a number of recently proposed and legislatively accepted state criminal codes²⁵ are building on the American Law Institute's initiative and can increasingly give a rational frame of reference to the judge in his difficult task of punishing the convicted criminal. These codes reduce the number of categories of felonies and misdemeanors,²⁶ set the maximum punishment applicable to each, and guide the judge in the criteria that he is to apply in fixing the proper term of imprisonment within the discretion statutorily given to him. To continue this evolution towards a common law of sentencing, it should increasingly be required that the judge give reasons for his choice of sentence and that his sentences, and thus his reasons, be subject to appellate review. Principled sentencing lies at the heart of an effective criminal justice system. It is obvious that sentencing involves a heavy responsibility and raises issues of difficulty; it thus requires

UNDER LAW, U.S. DEPARTMENT OF JUSTICE BICENTENNIAL LECTURE SERIES 136 (1977), and which I will only summarize dogmatically now.

22. MODEL PENAL CODE §§ 6.01 to .13, 7.01 to .09 (Tent. Draft No. 2, 1954), later incorporated in MODEL PENAL CODE §§ 6.01 to .13, 7.01 to .09 (Proposed Official Draft, 1962).

23. S. 1437, 95th Cong., 1st Sess., 123 CONG. REC. 6833 (daily ed. May 2, 1977); S. 1, 94th Cong., 1st Sess., 121 CONG. REC. 211 (1975); S. 1400, 93d Cong., 1st Sess., 119 CONG. REC. 9634 (1973); S. 1, 93d Cong., 1st Sess., 119 CONG. REC. 92 (1973); H.R. 10047, 93d Cong., 1st Sess., 119 CONG. REC. 28464 (1973).

24. ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (Tent. Draft 1967).

25. CAL. PENAL CODE §§ 1170.0-1170.6 (West Cum. Supp. 1977); ME. REV. STAT. ANN. tit. 17-A, §§ 1151-1156, 1201-1206, 1251-1254, 1301-1305 (Supp. 1975); OR. REV. STAT. §§ 161.605 to .685, 161.705 to .735.

26. A discussion of the different systems of offense classification adopted by states as well as those contained in proposed state criminal codes, the MODEL PENAL CODE, and the MODEL SENTENCING ACT can be found in Low, *Preliminary Memorandum on Sentencing Structure* in 2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS, 1245, 1258-65 (1970).

reasons given, critical public consideration of those reasons, critical appellate review of those reasons: in short, a system of precedent leading to principled justice under law.

In a recent proposal by the Department of Justice, the abolition of the Parole Board was recommended, its place to be taken by a Commission on Sentencing operating before, not after, the judicial imposition of sentence.²⁷ The Commission on Sentencing would function between the legislative promulgation of maximum and minimum punishments for each category of offense and the judicial imposition of sentence on each offender. The Commission would gather data on the efficacy of sentencing, provide information services to the judiciary, define recommended ranges of punishment for the diverse categories of offense-offender relationships, publish guidelines to sentencing, and enunciate principles of sentencing. The various proposals for such a Commission on Sentencing differ in their division of power between the Commission, the legislature, and the judiciary; the broad plan seems highly promising.

2. *Parole and Its Doubtful Future*

An important current division of sentencing power, in the federal system and in most states, is the division of power between the judge and the parole board in fixing the prison term which is in fact served. There is, at present, a strong movement for the abolition of the parole system. This would not necessarily mean the abolition of aftercare control and support of the released prisoner, which can be imposed and provided whether or not the parole board is retained; but it would put a stop to the sharing of power between the judiciary and the parole board in the determination of the date of the prisoner's release.

I favor the abolition of parole. Let me summarize my reasons by criticizing each of the six grounds which have been offered in support of a releasing discretion exercised by a parole board. It has been suggested that the parole board rather than the judge should fix the release date because the board can:

1. find the optimum moment for release;
2. provide an incentive for the prisoner's rehabilitation;
3. facilitate prison control and discipline;
4. share sentencing responsibility to maximize deterrence while reducing time served;
5. control the size of the prison population; and
6. rectify unjust disparities in sentencing.

27. *Reform of the Federal Criminal Laws: Hearings on S. 1437, S. 31, S. 45, S. 181, S. 204, S. 260, S. 888, S. 979, and S. 1221 Before the Subcomm. on Criminal Laws and*

Again, the refutation of each of these suggestions is long, and in this lecture dogmatic rejections will have to suffice; but all six fail.

The first claimed justification of parole, prediction of the optimum moment for release, fails empirically. Protracted empirical analysis has demonstrated that predictions of recidivism are no more likely to be accurate when made on the date of release than when made early in the prison term. Behavior in the cage is no guide at all to behavior in the community.

The second justification for the parole discretion — to provide an incentive for the prisoner's rehabilitation — has as its net effect the reliance on compulsory rehabilitation in the prison setting. The problem is that this type of coerced curing of crime does not work, except in turning prisons into schools of drama and hypocrisy. In practice, this parole incentive results in a waste of limited resources which could be far better used to provide treatment opportunities for prisoners who volunteer for them, uncoerced by the overwhelming pressure to try to induce a favorable parole decision. It is ludicrous to fill our limited prison treatment resources with other than volunteers.

The third justification — to facilitate prison control and discipline — is in fact an important latent pragmatic justification for parole. But it is vulnerable to attack on grounds of injustice. If the prisoner commits a crime while in prison, there are no grounds for excluding the writ of the criminal law from the prison: the prisoner should be charged and further punished. For disciplinary control of misbehavior in prison short of crime, or where the invocation of the criminal sanction would be excessive or inappropriate, disciplinary sanctions are appropriate under the control of whatever due process administrative hearings the prison authorities may provide. The deprivation of "good time" — time off for conformity to prison rules — may be a power necessary for such an administrative tribunal to possess, but it is certainly irrelevant to the parole decision. Depriving a prisoner of "good time" as punishment for a disciplinary breach and then adding the further punishment of deferment of parole release because of the same misbehavior is an unjust double penalty. Prison misbehavior does not predict misbehavior in the community and achieving conformity to prison discipline is no business of the parole board.

The fourth claimed justification for parole discretion — that sharing sentencing responsibility between the court and the parole board maximizes deterrence — reflects the tendency in our criminal

justice system to prefer words to deeds in sentencing. Parole allows for judicial announcement of punishments larger than are in fact carried out. The thought is, apparently, thus to maximize deterrence while reducing the suffering from the punishment actually applied. For a few years this charade may have gone unnoticed, but by now every judge knows the practice, as does the public. Judges who wish to punish severely simply inflate their sentences to counteract anticipated deflation by the parole board. No one is deceived, but under the vagaries of parole decisions subject to diffuse political and public pressures some prisoners will suffer randomly, or worse, discriminatorily, to no social gain.

The fifth justification sometimes offered for the retention of the parole discretion is that it facilitates control of the size of the prison population: if the prisons are overcrowded, more prisoners can be paroled to make room for the influx. Pragmatism at this level lays bare our tolerance of unprincipled sentencing; it is clearly unjust for the duration of detention of one criminal to turn on the behavior of other criminals. And, in fact, parole boards are very reluctant to act in this way; they often tend to defer release at times of prison overcrowding. Parole boards are sensitive to public and political attitudes. They aim to achieve high "success rates" where success is measured by their definition of a "failure": the commission of a crime while the ex-prisoner is on parole. Hence the longer they defer the prisoner's release the less their risk of a failure. The result is that, in times of increasing crime, increasing public and political anxieties about crime, and expanding prison populations — such as we have been experiencing in recent years — the strong tendency of parole boards is to minimize risks on parole, to defer release, to compound and not to cure the problem of prison overcrowding.

The sixth and last claimed justification of the parole discretion is that it can be used to rectify unjust disparities in judicial sentencing. Let me give some examples. Crime for crime and criminal for criminal, sentences imposed by courts in Chiago tend to be substantially less severe than those imposed in the rural southern regions of Illinois. The Illinois Parole Board sees itself, in the exercise of its parole discretion, as having a duty to apply its release decisions so as to minimize these disparities. Similar disparities are to be readily found between different federal judicial circuits and the Federal Parole Board likewise sees one of its functions as achieving a regression towards the mean.

Given the need to minimize this disparity, the question is whether parole boards are the best mechanisms with which to do so. If there is a significantly more effective and sensible way to deal

with sentencing disparity, as I believe there is, this last justification fails: parole boards are not needed.

We see, therefore, that the case for preservation of the parole release discretion fails, but sometimes institutions outlive their rationales. And if this is so in the case of parole boards, there is much to be said for all parole boards following the path now being tentatively pursued by the Federal Parole Board and deciding release dates, subject to the prisoner's good behavior, quite soon after the prison sentence begins.²⁸ The federal board's use of a "salient factor" score and of more open criteria to guide its discretion also tend in the right direction towards principled sentencing.²⁹

3. *Legislatively Fixed Terms:*

a) *Mandatory Minimum Sentences*

One simplistic response to the alleged sentimental leniency of the judiciary and the anarchy of sentencing disparity is the advocacy of mandatory minimum sentences. There is, indeed, little doubt of the political attractiveness of such proposals, and politicians seem even more susceptible than the rest of us to earning a cheap popularity.

Mandatory minimum sentences, fixed terms or fixed minimum terms for defined crimes, are the most extreme form of legislative limitation of judicial discretion. A popular example is the minimum five year sentence for anyone convicted of carrying a gun at the time of the commission of a felony. Legislation of this kind is unprincipled and morally insensible: it cannot encompass the factual and moral distinctions between crimes essential to a just and rational sentencing policy.

Nevertheless, recently it has become politically fashionable to demand the imposition of such stringent limits upon sentencing discretion, and in many jurisdictions statutory provisions for mandatory sentencing have already been adopted. In practice, such provisions have always met with non-enforcement and nullification. This is neither surprising nor deplorable. It is not surprising because the pervasive influence of plea bargaining inevitably ensures the reduction of charges for offenses carrying severe mandatory penalties. It is not deplorable because persistent confusion about the goals of criminal law enforcement and indefiniteness regarding the purposes of punishment make sentencing discretion essential. The

28. See N. MORRIS, *supra* note 4, at 31-50.

29. L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION — FINAL REPORT OF THE FEASIBILITY STUDY 13-19 (1976).

enforcement of arbitrary penal equations is both irrational and inequitable.

In fact, the attempt to eliminate sentencing discretion results in its being transferred from the judge to the prosecutor, who exercises such discretion in the process of charge and plea negotiation. In an overcrowded court system, it is as though discretion were like matter, the quantity of which Helmholtz described as "eternal and unalterable": it cannot be destroyed, it can only be displaced.

Professor Remington reports:

In Detroit during the 1950's, state statutes prohibited probation for burglary in the nighttime and imposed a significant, mandatory minimum sentence for armed robbery. In practice, . . . burglaries committed after dark resulted in pleas to daytime burglary, and . . . robberies committed with a gun ended up as pleas of guilty to unarmed robbery. So common was the practice that the Michigan parole board would often start the interview with "I see you were convicted of unarmed robbery in Detroit. What caliber of gun did you use?" Without even a smile, the inmate would respond "a .38 caliber revolver."³⁰

b) *The Fogel Plan*

One group of reformers, of whom David Fogel is a principal spokesman, advocates legislatively fixed term sentences, the legislature prescribing precisely what sentence the judge must impose for any given offense proved before him, allowing him only a relatively small margin to vary the sentence because of mitigating or aggravating circumstances of the offense or of the offender.³¹ In several states, legislation of this nature is under consideration.³² It has thus far been adopted in none and I have come to the view that it should be adopted in none. It is impossible for legislatures to define in advance, at least in relation to any existing definitions of crimes, sentences that are just and appropriate. The best that can be done is to phrase the range from the least socially tolerable sanction to the maximum deserved punishment. Legislatively fixed terms preclude that fine tuning of punishment to relate it to the severity of

30. Remington, Book Review, 29 VAND. L. REV. 1309, 1315 (1976).

31. See D. FOGEL, *supra* note 6; McAnany, Merritt & Tromanhauser, *Illinois Reconsiders "Flat Time": An Analysis of the Impact of the Justice Model*, 52 CHI.-KENT L. REV. 621 (1976).

32. This was true at the time these words were spoken; subsequently, at least two states passed legislation that may be thought of as modified Fogel Plans. See Ill. Pub. Act 80-1099, 1977 Ill. Laws; IND. CODE ANN. tit. 35, art. 50 (Burns Cum. Supp. 1977). The sentencing hierarchies established by these codes, however, still leave more discretion in the judge than would a true Fogel Plan.

the offense and the moral gravity of the crime which is essential to justice and which can be achieved only by the judge.

The Fogel-type plan suffers from the same problem as besets mandatory minimum sentencing. It presupposes that if judicial sentencing discretion is limited, all sentencing discretion will be limited, whereas, in practice, there is likely to be little effect on the prosecutor's discretion concerning charge setting, charge bargaining, and plea bargaining which give life to sentencing practice. Few are in prison for what they have done: most are in for what they have pleaded guilty to, which is substantially less. Legislatively fixed terms will not change this.

c) Presumptive Sentences: The Hart-Javits Bill

Recommendations somewhat similar to the legislatively fixed sentences we have considered are offered by Andrew von Hirsch;³³ a more sophisticated plan is developed in the Report of the Twentieth Century Fund,³⁴ in which Professor Dershowitz has been influential. Their recommendations have similar thrusts, seeking to control judicial discretion by precise legislative statements of the appropriate or "presumptive" sentence.

Senators Hart and Javits have introduced to Congress a complex bill called "The Federal Sentencing Standards Act,"³⁵ which seeks to restructure sentencing procedures in the federal system on the basis of the recommendations of von Hirsch and Dershowitz.³⁶ The bill would require the sentencing judge to impose on any convict the presumptive sentence, a "definite and specific penalty" assigned to his offense by the Federal Sentencing Commission created by the bill. Variation from the presumptive sentence based on aggravating and mitigating circumstances would also be allowed, but only as provided for by the rules of the Commission.³⁷

The Hart-Javits Bill thus introduces a new power into the sentencing process, an administrative tribunal to mediate between the legislature and the judiciary. Given the difficulty of legislative definition of sentences there is much to be said for this proposal which is further and, in my view, better developed in the Kennedy Bill considered hereunder.

33. See A. VON HIRSCH, *supra* note 6.

34. THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976).

35. S. 204, 95th Cong., 1st Sess., 123 CONG. REC. 556 (daily ed. Jan. 12, 1977).

36. See 123 CONG. REC. 554-55 (daily ed. Jan. 12, 1977) (remarks of Sen. Hart).

37. S. 204, 95th Cong., 1st Sess. § 12(a)(1), 123 CONG. REC. 557 (daily ed. Jan. 12, 1977).

The Hart-Javits Bill makes detailed provisions concerning the work of the Sentencing Commission and how it should define and express presumptive sentences.³⁸ The sentencing judge would have only a small role in developing sentencing doctrine, but the judge would have the power to vary the presumptive sentence to the extent allowed by the relevant Commission rules. Any such variation from the presumptive sentence must be justified by the judge on the record, including a description of any aggravating or mitigating circumstances and other information, evidence, or factors upon which he relied.³⁹ The bill also provides that the United States Parole Board shall have no power to grant parole to prisoners sentenced under these presumptive sentence processes.⁴⁰

It is an interesting proposal, striking a different balance between legislature and judiciary than at present exists and having the potential, depending on the quality of the work of the Commission, to reduce somewhat the present sentencing disparity and inequity; but it also has stunning defects. It leaves, I suggest, too little discretion in the hands of the sentencing judge, and I am extremely skeptical of the ability of any sentencing commission to minimize this defect.

My colleague, Franklin Zimring, in the consumer survey to which I earlier made reference,⁴¹ cogently developed a criticism of presumptive sentencing under four headings, the most compelling of which he called "The Incoherence of the Criminal Law." A few extracts from his argument will make the point:—

Any system of punishment that attaches a single sanction to a particular offense must define offenses with a morally persuasive precision that present laws do not possess. . . . [W]e lack the capacity to define into formal law the nuances of situation, intent and social harm that condition the seriousness of particular criminal acts.⁴²

What it amounts to is that if justice is to be achieved, these nuances must not be systematically ignored. Only the sentencing judge can, in the last resort, give them proper weight. He must be given greater flexibility for principled variation of sentence than any list of aggravating and mitigating circumstances varying a presumptive sentence can provide. The world of rational and just sentencing is

38. See *id.* §§ 6-10.

39. *Id.* § 12(a)(2).

40. *Id.* § 11(b).

41. F. ZIMRING, *supra* note 7, at 10-15.

42. *Id.* at 10.

too complicated for such rigid and simple methods of assessing moral gravity and social utility.

4. *Distributing Sentencing Discretion: The Kennedy Bill*

To oppose mandatory minimum sentences, legislatively fixed sentences, and administratively defined presumptive sentences is not to oppose a new distribution of sentencing discretion between the legislature, an administrative board, and the judiciary. Nor is it to oppose new controls and guides to the exercise of the judicial sentencing discretion. Important proposals to these ends have recently been advanced by Senator Kennedy in his bill introduced to Congress early this year.⁴³ This bill, which has attracted wide Congressional support and, it is believed, the support of the Department of Justice as well, relies heavily on the work of Judge Marvin E. Frankel of the United States District Court for the Southern District of New York and on his important book, *Criminal Sentences: Law Without Order*.⁴⁴ It also reflects some suggestions I made in *The Future of Imprisonment*.⁴⁵ In presenting the bill to Congress, Senator Kennedy referred to the compelling data on sentencing disparity in the federal system and to Chief Justice Warren E. Burger's comment in his annual year-end report on the state of the nation's judicial system that "[s]ome form of review procedure is needed to deal with this dilemma [of sentencing disparity]."⁴⁶

Let me describe the broad outline of the Kennedy Bill in language used by its sponsor:—

The bill does the following: First, it establishes for the first time certain uniform general criteria which all Federal courts must consider in formulating a sentence for a convicted defendant. These criteria refer the court generally to the nature of the offense, the history and characteristics of the defendant, the need for the sentence imposed to reflect the seriousness of the offense, the need for just punishment, the need to protect the public from further crimes of the defendant, and the requirement that the sentence imposed act as a deterrent. These criteria, uniformly applied, assure that all Federal courts will consider the same general factors and goals of sentencing.

Second, the bill requires that the court, in sentencing the defendant to a term of imprisonment, give its reasons for the

43. S. 181, 95th Cong., 1st Sess., 123 CONG. REC. 406 (daily ed. Jan. 11, 1977).

44. See M. FRANKEL, *supra* note 6.

45. See N. MORRIS, *supra* note 4.

46. Chief Justice Warren E. Burger, *Year-End Report* 7 (Jan. 2, 1977).

sentence imposed in open court so that the justifications and reasons underlying the sentence become part of the public record and can be reviewed by an appellate court.

Third, it marks an important break with tradition by providing for limited appellate review of sentences. No longer will the trial court act unilaterally without the possibility of a judicial check on the exercise of discretion.

Finally, and most importantly, the bill establishes an independent Federal sentencing commission with a mandate to promulgate and distribute to all Federal courts suggested sentencing ranges for specific offenses, guidelines to aid judges in the sentencing process, and general policy statements relating to sentencing. The bill also lists various factors to be considered by the Commission in determining appropriate sentencing ranges. These factors include such matters as the grade and circumstances of the offense, the nature and degree of the harm inflicted, the gravity of the offense, the public concern generated by the offense, the deterrent effect of the particular sentence, the current incidence of the offense, the age and mental and physical condition of the defendant, the criminal history of the defendant, the defendant's role in the commission of the offense, and the defendant's degree of dependence upon criminal activity for livelihood.⁴⁷

The Kennedy Bill thus avoids the central error in the von Hirsch and Dershowitz proposals, incorporated in the Hart-Javits Bill, of trying to phrase, in relation to the existing statute book, presumptive sentences which are morally and socially defensible and which would not be subject to nullification in practice. Judges, quite properly, will not impose sentences they think are unjust, and they have ample means of nullifying legislative efforts to coerce them to do so. Principled sentencing requires a different balance between the legislature, the administrative board, and the judge than is framed by the Hart-Javits proposals. The "sentencing ranges," "guidelines," and "policy statements" which are the business of the Commission on Sentencing under the Kennedy Bill are much to be preferred to the presumptive sentences of the Hart-Javits Bill.

One contentious issue raised by the Kennedy Bill is the extent of appellate review it will provide. There are those, amongst whom I count myself, who see sentencing as so central to justice under law, defining as it does the largest power the State ever assumes over the citizen, that appellate review seems an obvious necessity and an obvious precondition of the evolutionary and principled development of a common law of sentencing. By contrast, there are those who,

47. 123 CONG. REC. 405 (daily ed. Jan. 11, 1977) (remarks of Sen. Kennedy).

seeing the courts, federal and state, grossly overburdened by criminal matters, regard as irresponsible any suggestion of adding to the burden and yet further delaying settlement of criminal trials. Perhaps there is a middle way. One suggestion attracting considerable support is when the judge sentences within the range and guidelines propounded by the United States Commission on Sentencing, the sentence should not be subject to appellate review, other than on the issue whether the case did indeed fall within the appropriate range and guidelines. On the other hand, if within his statutory discretion, the judge thinks the recommended range and guidelines provide an imprecise or insufficient direction to justice and he therefore sentences either more leniently or more severely than the range and guidelines provide, that sentence will be subject to appellate review. If the sentence the judge imposes is more severe than the range and guidelines provide, the appeal against it may be taken by the convicted prisoner; if the sentence is on the lenient side of the range and guidelines, an appeal may be taken by the United States Attorney.

A system such as this would allow the sentencing commission to have a long-term formative and unifying effect on criminal sentences and yet preserve flexibility and provide an incentive for the essential process of judicial development of common law of sentencing.

The Kennedy Bill and the Hart-Javits Bill could well come together in their legislative consideration. The Kennedy Bill is clearly preferable, since it provides a sounder legislative mandate to the Commission on Sentencing and the judiciary for their difficult task of imposing a just sentence on a convicted criminal; the defect of the Hart-Javits Bill is that it oversimplifies and therefore would impede the task of moving towards rational and just sentencing.

What is heartening is that both bills at last take seriously and wrestle responsibly with the proper balance between legislative, administrative, and judicial discretion in sentencing and struggle to develop procedures which, over the years, may at last bring principle, coherence, predicability, and justice to sentencing criminal offenders.