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THE SENTENCING PROVISIONS OF THE PROPOSED FEDERAL CODE

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The philosophical basis for imposition of criminal sanctions has been the topic of endless debate. Historically, the aims of sentencing have been described as (1) retribution, (2) deterrence of others, (3) rehabilitation of the defendant, and (4) protection of the public by isolating the offender. At varying times in our history, one or more of these competing theories have been predominant. Thus, for example, the belief in rehabilitation has led to indeterminate sentencing, or the "treatment" of convicted offenders until their anti-social "illness" has been cured. At other times, retribution and deterrence were given paramount importance resulting in lengthy, mandatory prison terms irrespective of the individual offender's characteristics.

Centuries of experimentation with penology has failed to yield an unequivocal conclusion. Nevertheless, the prevailing theme today is that the punishment should reflect both the offender and the offense. In other words, the sentence should be neither more, nor less, than that justified by the nature of the crime and the personal attributes of the criminal.

Unfortunately, this general principle provides little guidance to the sentencing judge. Prior to the proposed federal criminal code, Congress established only the outside limits of judicial authority, leaving the selection of any lesser sanction to the

unconstrained choice of the court. As a result, the individual judge was given sole responsibility for analysis of the factors to be weighed in sentencing decisions. Not unexpectedly, this unstructured judicial discretion has been subject to sharp criticism.[1] Judges frequently disagree concerning the importance of various aggravating and mitigating considerations. Indeed, disagreement exists with respect to the very purpose to be achieved in individual cases.[2] The readily forseeable result of this discord is a disparity in the sentences imposed upon similarly situated offenders.[3]

Such inequality may raise serious doubts in the public mind with regard to the even-handedness of our system. Also, sentencing disparity embitters the defendant who is subject to harsher treatment.[4] Moreover, the policy of individualized sentences may foster a belief by a potential offender that he, unlike his fellow criminal, will be the recipient of a lenient disposition. Thus, to the extent that the certainty of punishment is diminished, its deterrent value may also be reduced.[5]

The proposed federal Code attacks this problem on several levels. As a result, the sentencing scheme established by S.1437 is both complex and innovative. It is intended to accomplish the general purposes of deterrence, protection of the public, punishment and rehabilitation.[6] The essential policy of the proposal is to achieve determinate sentencing. Criminal offenses are divided into three broad categories. These include felonies, misdemeanors and infractions. Felonies are subdivided into five specific classes denominated A to E. (*e.g.*, Class A Felony). A maximum period of incarceration is set forth for each class of felony and ranges from life imprisonment for Class A offenses to three years for Class E crimes. Three categories of misdemeanors are established. The maximum period of incarceration ranges from one year for a Class A misdemeanor to 30 days for a Class C offense. Infractions are punishable by a maximum of five days imprisonment. There are no minimum periods of incarceration specified for any category or class of offense.

Any defendant found guilty of an offense may be fined.[7] An individual may be fined a maximum of $100,000 for a felony, $10,000 for a misdemeanor and $1,000 for an infraction. An organization may be fined a maximum of $500,000 for a felony, $100,000 for a misdemeanor and $10,000 for an infraction.[8] Alternatively, if an offense results in either pecuniary gain or the infliction of bodily injury or property damage, the defendant may be fined up to twice his gross gain or twice the loss caused by him, whichever is greater.[9] No minimum fines are provided.

Provision is made for the discretionary imposition of probation for any offense unless it is punishable by life imprisonment, the crime expressly precludes probation or the defendant is contemporaneously sentenced to a term of incarceration for that or another offense.[10] Maximum periods of probation are one year for infractions, two

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1 See *e.g.*, Frankel, *Criminal Sentences: Law Without Order* (1972) [hereinafter cited as Frankel]; Coburn, Disparity in Sentences and Appellate Review of Sentencing, 25 *Rutgers L. Rev.* 207 (1971); Kadish, Legal Norm in the Police and Sentencing Processes, 75 *Harv. L. Rev.* 904 (1962); Rubin, Disparity and Equality of Sentences, 40 *F.R.D.* 55 (1966); Tappan, Sentencing Under the Model Penal Code, 23 *Law and Contemp. Prob.* 528 (1958); Wechsler, Sentencing Correction and the Model Penal Code, 109 *U.Pa. L. Rev.* 465 (1961).

2 See Comment, Discretion in Felony Sentencing – A Study of Influencing Factors, 48 *Wash. L. Rev.* 857 (1973); Gaudet, St. John and Harris, Individual Differences in the Sentencing Tendencies of Judges, 23 *J. Crim. L.C. & P.S.* 81.1 (1933); Green, *Judicial Attitudes in Sentencing* (1961).

3 See *Justice in Sentencing*, Orlando and Tyler, eds. (1974).

4 See Note, Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 *Yale L.J.* 1453 (1960).

5 *Report of the Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment* 3 (1976) [hereinafter cited as Twentieth Century Fund].

6 §101 (b).

7 §2201 (a).

8 §2201 (b).

9 §2201 (c).

10 §2101 (a).

years for misdemeanors and five years for felonies. No minimum period of probation is prescribed except for felonies which require that any probation imposed extend for at least one year.[11] The sole mandatory condition of probation is that a defendant refrain from the commission of any federal, state or local crime.[12] An extensive, although open-ended, series of discretionary conditions of probation, including one year of imprisonment, are set forth.[13] A defendant must be given a written statement of the conditions of probation to which he is subject.[14] Provision is also made for the modification, service and revocation of a period of condition of probation.[15]

The bill provides for the imposition of certain remedies ancillary to the sentencing process. An individual convicted of a racketeering type offense[16] may be required to forfeit any property which constitutes his interest in the unlawful enterprise.[17] Where an offense involves "fraud or other deceptive practices", a sentencing court may require the defendant to acknowledge his guilt to the class of persons that may have been victimized.[18] Finally, a defendant whose criminal activity has resulted in "bodily injury, property damage or other loss," may be ordered to make restitution.[19]

Courts are broadly vested with discretion to fashion sentences from the above-listed sanctions. This manifests a strong policy favoring flexibility. But the proposed legislation also seeks to advance the equally strong policy of eliminating, as far as possible, the unjustified disparity in sentencing. The bill seeks to attain this latter goal through a series of innovations that include legislatively established sentencing criteria, specific sentencing guidelines promulgated by a permanent Sentencing Commission, a mandatory statement of reasons by sentencing courts, and limited appellate review.

The general factors to be considered in fixing sentence are set forth in Section 2003. These focus on the circumstances of the offense as well as the offender, the general purposes of sentencing, any applicable sentencing guidelines and any pertinent policy statement of the Sentencing Commission.[20] Imposition of sentences of incarceration and probation are specifically governed by these factors, as is the determination of whether sentences are to run concurrently or consecutively.[21] Additional criteria are set forth for judicial consideration with respect to the imposition of a fine.[22] The apparent policy is one of restricting fines to those cases in which the financial burden on the defendant or his dependents will not be unduly burdensome or inequitable.

A significant feature of the proposed sentencing scheme is the creation of a permanent Sentencing Commission.[23] This Commission is to consist of seven members, four appointed by the President with the advice and consent of the Senate and three selected by the Judicial Conference. The Commission is charged with the

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11 §2201 (b).

12 §2103 (a).

13 §2103 (b).

14 §2103 (d).

15 §2103 (c); §2104; §2105.

16 See §§1801; 1802; 1803.

17 §2004.

18 §2005.

19 §2006.

20 §2003 (a).

21 The proposal generally mandates that unless otherwise specified by the sentencing court multiple offenses imposed at the same time are to be concurrent, while those imposed at different times are to be consecutive. §2304 (a). In any event, no aggregate or consecutive sentence may exceed the statutory maximum prescribed for an offense one grade higher than the most serious offense of which the defendant is convicted. §2304 (c). §§2102 (a); 2302 (a); 2304 (b).

22 §2202 (a).

23 §991.

responsibility of establishing sentencing policies and practices to reduce "unwarranted disparity while maintaining sufficient flexibility to permit individualized sentences."[24] The Commission is statutorily required to establish guidelines for the use of sentencing courts to determine whether and to what extent probation, fine or a period of incarceration should be imposed in any given case. Guidelines are also to be promulgated concerning whether, and to what extent, a defendant should be subject to early release.[25] In addition, guidelines must be established for the Parole Commission's use in determining the date of release. These guidelines must include a substantial period of imprisonment for certain classes of offenses and offenders.[26]

The guidelines must be in the form of a matrix based on both the category of defendant and the category of offenses.[27] The bill provides a partial listing of criteria for the Commission's guidance in creating categories of offenses and offenders.

Significantly, sentencing judges are required to state on the record the reasons for the sentence imposed. If the sentence is outside the range established in the guidelines, then the court must make a specific statement of its reason for this deviation.[28]

Adherence or deviation from the guidelines is extremely important. A defendant may appeal from any sentence that imposes a greater fine or term of incarceration or longer portion of a custodial sentence subject to early release, than set forth in the guidelines. Similarly, the Government is permitted to appeal if the sentencing court imposes a lesser fine or period of incarceration, or a shorter portion of a period of incarceration subject to early release, than established in the guidelines. Neither a defendant nor the Government may appeal a sentence that is within the terms of a plea agreement.[29] The appellate courts must affirm any sentence which is not "clearly unreasonable."[30] If the reviewing court determines that the sentence is clearly unreasonable it must set aside the sentence and either impose a proper penalty or remand for appropriate disposition.[31]

The proposed Code thus attacks irrationality in sentencing through several basic innovations. Initially, the greater emphasis placed on determinate sentences reflects a fundamental legislative judgment regarding the purpose of incarceration.

In recent years, indeterminate sentencing, has been criticized as resting upon an erroneous premise. Indeterminate sentencing resulted from a change in corrections philosophy. Penological theories disputed the basic hypotheses of the criminal law, *i.e.*, that citizens are responsible and, hence, accountable for their conduct. Many social scientists attacked the notion, accepted by the common law, that a distinction exists between the bad and the sick and that the ill are to be cured and the evil to be punished. The original hypothesis of the open-ended term was that the criminal offender is to some extent "sick and therefore should be confined only until he is "cured" or rehabilitated.[32] No definite period was required to be served since the goal was the immediate release of the prisoner upon effectuating his redemption. Thus, the prospect of regaining his liberty was postulated as providing a powerful incentive for the offender to participate in rehabilitative programs.[33]

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24 §991 *et seq.*

25 One of the most novel aspects of the bill is its parole provisions. A sentence in excess of one year automatically includes a separate term of parole and a period of incarceration. A court may designate a period of incarceration in excess of one year as subject to the defendant's "early release" on parole. §2301 (c). Parole on early release by the Parole Commission is required if it is consistent with the Parole Commission's applicable guidelines and police statements. §2831.

26 §994 (f).

27 §994 (c) and (d).

28 §2003 (b).

29 §3725 (a) and (b).

30 §3725 (c) (2).

31 §3725 (e).

32 See Clark, *Crime in America* 204-5 (1970).

33 *Ibid.*

These optimistic views, however, have fallen into disfavor. It has been persuasively argued that a criminal's antisocial behavior in many instances is incapable of diagnosis and treatment as assumed by proponents of the indeterminate sentence.[34] Moreover, even if such treatment were possible in some cases, most penal institutions presently have neither the staff nor the funding to undertake this action. The inmate is told in effect, that he will be released when he has been administratively determined to have been reformed. Yet little, if anything, is done to accomplish this goal. Accordingly, frustration and bitterness are prevalant among prisoners who are understandably anxious about what is expected of them and when they will be released.[35]

Since the efficacy of the treatment of the criminal "disease" may be doubted, it follows that judgments concerning the "cure" are similarly suspect. Given this questionable foundation, release decisions may well be motivated by factors unrelated to the offender's reformation, *e.g.*, the need to relieve overcrowded conditions within the institution or to maintain prison discipline. It has also been suggested that the unstructured nature of the parole decision may benefit the cunning inmate who is able to feign repentance.[36]

In sum, the indeterminate sentence has not achieved the purpose for which it was designed. Indeed, several counter-productive results have been observed, largely owing to standardless, discretionary judgments involved in determining the offender's release date. Adoption of determinate sentencing will therefore tend to promote both certaintly of punishment and uniformity.

The second major improvement rests in the articulation by Congress of the goals of sentencing. The statement of the four basic purposes underlying the criminal sanction will assure that the sentencing court does not achieve one at the expense of another equally important goal. Judges thus need no longer grapple with the perplexing and divisive question of the rationale for sentencing. Instead, the offender and the offense may be evaluated with a view towards accomplishing the stated Congressional goals.

In conjunction with this innovation, the proposed Code creates a Sentencing Commission to provide detailed standards for sentencing. Through this action, several less desirable modes of reform have been rejected. The multi-judge panel, is one of these. In 1960, the United States District Court for the Eastern District of Michigan initiated a system of panel sentencing.[37] While a single judge retains exclusive responsibility for imposing sentence, consultation with two fellow judges is undertaken before a final decision is made. Presentence reports are distributed to members of the panel in advance of scheduled meetings and each judge considers the sentence most appropriate for the offender and his offense. At the meeting, which is conducted without the participation of defense counsel or the prosecution, each panel member discusses his views and the reasoning for the sentence he recommends. These opinions are not binding upon the sentence judge, who is to announce his final decision only after a hearing in the presence of counsel.

In practice, the sentencing panels probably eliminate some of the wide disparity present when judges act independently. The Eastern District of Michigan has found that the sentencing judge often modifies his preliminary views to conform to those of

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34 Frankel, *supra* note 1 at 86-102; Mitford, *Kind and Usual Punishment: The Prisoner Business* 87 (1973); Twentieth Century Fund *supra* note 5 at 98-100 (1976); Prettyman, *The Indeterminate Sentence and The Right to Treatment*, 11 *Am. Crim. L. Rev.* 7 (1972) [hereinafter cited as Prettyman]; Note, *The Collective Sentencing Decision in Judicial and Administrative Contexts; A Comparative Analysis of Two Approaches to Correctional Disparity*, 11 *Am. Crim. L. Rev.* 695, (1973) [hereinafter cited as Collective Sentencing]; Comment, *Criminal Sentencing: An Overview of Procedures and Alternatives*, 45 *Miss L.J.* 782 (1974).

35 See note 9, *supra.*

36 See *Prettyman, supra* note 9, at 25-29.

37 Subsequently, the Eastern District of New York (1962) and the Northern District of Illinois (1963) adopted similar procedures. In the state courts, panel sentencing is employed by the New York Supreme Court, Bronx County (1972) and the Superior Court of the District of Columbia (1972). See Collective Sentencing, *supra* note 34 at 697.

the advisory judges.[38] However, critics point out that the process is both time-consuming and perhaps unfair to the defendant. Due process may be offended by the court deciding the accused's fate behind closed doors and in the absence of counsel.[39] Moreover, despite its advantages over the present system, panel sentencing cannot remedy statewide or nationwide disparity. The best possible result to be achieved will be relative uniformity within the county or district from which the panel is drawn. To illustrate, the Eastern District of New York, which sentences by panel, doles out terms which are shorter in some cases and longer in others, than the surrounding districts.[40] The limited efficacy of this system suggests the wisdom of broader reform.

The maximum degree of uniformity would obviously result if sentences were to be imposed by a single tribunal. Indeed, in order to incorporate the expertise of all fields of study, a tribunal comprised of sociologists, psychologists, and other behavioral scientists could be empowered to consider sentencing decisions. Members of law enforcement, former judges, former inmates, and others having pertinent knowledge or experience could also be included to broaden the viewpoint of such a body.[41]

Like the multi-judge panel, however, this tribunal could not function throughout the nation on an individualized basis. Thus, either a series of local tribunals or a single correctional agency would have to be created. In the absence of specific, nationwide standards, local tribunals might not completely resolve sentencing disparities. Variations among the local agencies may certainly be anticipated, particularly in view of the diverse backgrounds required of the members.

If, on the other hand, a single body were established it is clear that the immense volume of work involved in assessing every convicted offender would entail inordinate delays. To divide responsibility between the trial court and the agency would only increase the likelihood of disparity. The solution in California and Washington[42] was to allow the trial judge to decide between probation and incarceration while reserving to the agency the determination of the length of the prison term. This course necessitates the imposition by the court of the maximum period of imprisonment, subject to subsequent modification by the agency. In view of the volume of commitments to be considered, both of these states permit the terms to be fixed by panels consisting of a fraction of the entire agency.[43] The sentence is then reviewed periodically and may be revised upward or downward.[44]

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38 See *Collective Sentencing, supra* note 34 at 699; Frankel, *Criminal Sentences* 70-71 (1973).

39 See *Collective Sentencing, supra* note 34 at 700-04.

40 The following table was compiled by the United States Attorney for the Southern District of New York and is reprinted in *Justice in Sentencing*, Orland and Tyler, eds., p. 175 (1974).
Disparity in average length of prison sentences for selected offenses within the Second Circuit during fiscal year ended June 30, 1970 (from Federal Bureau of Prisons Statistical Report, Table B-9) (in months).

District	Forgery	Stolen Motor Vehicles	Selective Service	Robbery
Connecticut	18.8	44.4	40.0	142.3
NDNY	15.0	20.9	48.0	68.0
EDNY	37.4	51.0	40.7	152.3
SDNY	32.9	30.7	14.0	100.0
WDNY	21.0	43.2	20.8	66.0
Vermont	24.0	40.0	48.0	--
Circuit Average	31.6	35.9	33.7	122.2

41 See Frankel, *Criminal Sentences* 74-5 (1973); Percy, The Federal Corrections Reorginization Act: Blueprint For A Criminal Justice System, 11 *Am. Crim. L. Rev.* 65 (1972).

42 See *Calif. Penal Code* §5075, *et seq.*; *Wash. Rev. Stat. Ann.* §9.95.010.

43 *Calif. Penal Code* §§3020, 3023 (hearings may be conducted by only one of the nine members of the Adult Authority); *Wash. Rev. Stat. Ann* §9.94.007 (hearings may be conducted by only two of the nine members of the Board of Prison Terms and Paroles).

44 *Calif. Penal Code* §3040, 3060 (both minimum and maximum may be revised); *Wash. Rev. Stat. Ann.* §§9.95.050,.080, .110 (only the minimum may be modified).

Both of these systems are subject to the criticisms previously discussed in connection with indeterminacy. Additionally, the monumental task of fixing and reviewing sentences as well as granting parole inevitably results in cursory attention to individual cases.[45] The fragmentation of the agency also contributes to the unequal treatment of prisoners by different subgroups. As a result, the Code quite properly rejects this alternative.

One further possibility is mandatory legislative sentencing. A maximum amount of predictability could be achieved by the expedient of enacting a mandatory, fixed sentence for various crimes. This approach would mean abandonment of the individualized treatment now accorded convicted offenders. Primary emphasis is placed on deterrence under this scheme and, for a few crimes, this may be appropriate. Massachusetts, for example, requires an automatic minimum of a one year term of imprisonment for weapons offenses. To enhance the intended deterrent effect, public announcements have declared the inexorable nature of the penalty.[46]

Such mandatory sentencing has been widely rejected.[47] Critics argue that mandatory sentencing goes too far in eliminating all flexibility. By requiring every single defendant convicted under the same statute to serve the identical sentence, it threatens to create a system so automatic that "it may operate in practice like a poorly programmed robot. This is especially true if statutory definitions remain as broad and inclusive as they are today."[48] Moreover, the harshness of a rigid penalty in individual cases may erode public support and lead to refusals by jurys to convict or compromise verdicts on lesser crimes not shown by the proofs.

This system is the polar opposite of the "rehabilitative" model. Characteristics of the offender are not reflected in the eventual sentence. While the sentences of those convicted of the same crime would be identical, most critics would rightfully insist that actual disparity in sentencing would continue. The hardened recidivist and the marginal, first offender are treated the same, despite obvious differences in culpability and personal potential for reform. The Code's rejection of mandatory sentencing as a general solution is thus well warranted.

One final alternative is jury sentencing. A few states permit the trial jury to fix the defendant's punishment in capital and noncapital cases alike.[49] This system has been justifiably criticized as being arbitrary and overly subject to popular whim. Indeed, it is difficult to envision a more capricious mode of sentencing, since each offender's fate rests with a different group of randomly selected laymen. Consequently, as recommended by the American Bar Association,[50] the National Advisory Commission on Criminal Justice Standards and Goals,[51] and the President's Commission on Law Enforcement and Administration of Justice,[52] the jury should not have authority to impose sentence in noncapital cases.

The novel solution that the Code does adopt is the creation of a Sentencing Commission. This judicial agency, presumably comprised of members of different disciplines, is charged with a responsibility that has, until now, been relegated by default to each individual sentencing judge. Specifically, the Commission will

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45 The Washington Board allocates 15 to 30 minutes for preparation and 20 minutes for each hearing. *Collective Sentencing, supra* note 34 at 706 n.55. The average hearing in California lasts only 10 minutes. *Id.* at 714.

46 *Twentieth Century Fund, supra* note 5, at 17.

47 *E.g., Twentieth Century Fund, supra* note 5, at 15-18; *ABA Sentencing Standards* §2.1(c); President's Commission *The Challenge of Crime in a Free Society*, 142-43 (1968); *Proposed New Jersey Penal Code*, A-3228, §§2C:1-14; 2C:43-2; 2C:44-1(d).

48 *Twentieth Century Fund, supra* note 5, at 17.

49 See, *e.g.*, Comment, Jury Sentencing in Virginia, 53 *Va.L. Rev.* 968 (1967); Comment, Consideration of Punishment by Juries, 17 *U.Chi. L. Rev.* 400 (1950).

50 *ABA Sentencing Standards* §1.1.

51 *National Advisory Commission on Criminal Justice Standards and Goals, The Courts*, standard 5.1.

52 *The Challenge of Crime in A Free Society, supra* note 5, at 145.

undertake a codification of the various factors surrounding the offender and the offense. A correlation of these factors will then produce a "suggested sentencing range" which will serve as a guide to the sentencing court. The Commission will also publish guidelines and general policy statements to assist the court in selecting the appropriate disposition and to aid the Parole Commission in determining the date and conditions of early release.

These guidelines, divided into offender and offense categories, encompass many of the factors currently weighed in sentencing decisions.[53] Nevertheless, the weight attributed to various factors by different judges is presently widely divergent.[54] By providing suggested sentencing ranges the Commission will eliminate such disparate evaluations of the pertinent criteria.[55] Further, by fully articulating for the first time the factual components for sentencing decisions, the guidelines will maximize predictability and certainty. Any proposal which serves the ends of fairness in this fashion merits serious consideration for enactment.

As a further safeguard against arbitrariness, the Code provides that the sentencing court must state its general rationale for the term imposed and, when deviating from the suggested sentencing range, the specific reason for the deviation. Many

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53 The Code lists the following factors which the Commission should weigh, in conjunction with any other considerations deemed pertinent.

(c) In establishing categories of offenses for use in the guidelines, the Commission shall consider, but shall not limit its considerations to:
(1) the grade of the offense;
(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;
(4) the community view of the gravity of the offense;
(5) the public concern generated by the offense;
(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
(7) the current incidence of the offense in the community and in the nation as a whole.

(d) In establishing categories of defendants for use in the guidelines, the Commission shall consider, but shall not limit its consideration to, a defendant's:
(1) age;
(2) education;
(3) vocational skills;
(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
(5) physical condition, including drug dependence;
(6) previous employment record;
(7) family ties and responsibilities;
(8) community ties;
(9) role in the offense;
(10) criminal history, including prior criminal activity not resulting in convictions, prior convictions, and prior sentences; and
(11) degree of dependence upon criminal activity for a livelihood.

54 See Comment, Discretion in Felony Sentencing, 48 *Wash. L. Rev.* 857 (1973); Gaudet, *et. al.* Individual Differences in the Sentencing of Judges, 23 *J. Crim. L.C. & P.S.* 81 (1933); *Green, Judicial Attitudes in Sentencing* (1961).

55 New Jersey is presently engaged in a similar project. The Administrative Office of the Courts is studying the sentences actually imposed by judges for selected offenses. In this fashion, a norm for various categories may be compiled for the guidance of trial and appellate courts. *Cf.* Kim *et al.*, A Proposal To Facilitate the Uniform Administration of Justice in Korea Through the Use of Mathematical Model, 4 *Rutgers J. of Computers & The Law* 284 (1974) [hereinafter referred to as Mathematical Models]. This article outlines a computer program for use in sentencing traffic offenders involved in accidents. Included are such variables as the extent of the victim's injuries, traffic, road and weather conditions at the time of the accident, and characteristics of the offender. These factors are assigned numerical weights which are tabulated and converted into an appropriate punishment. See also Jacobs, "American Implications of Sentencing by Computer," 4 *Rutgers J. of Computers & the Law* 302 (1974); *Twentieth Century Fund, supra* note 5,; Glueck, The Sentencing Problem 20 *Fed. Prob.* 16 (December 1956) in which the author advocates predictive tables based upon criminological, sociological, and psychological factors to estimate the future behavior of the offender. These statistical records have been compiled through studies of prisoners and their recidivism rates. See also Glueck, Presentence Examination of Offiders to Aid in Choosing a Method of Treatment, 41 *J. Crim. L. & Criminology* 717 (1951).

commentators[56] have suggested that a brief explanation of the trial judge's reasoning would serve several useful purposes. Initially, an articulation of reasons compels a rational consideration of the pertinent factors:

> The danger of sentences based on an immediate emotional reaction to some particular feature of the offense would be avoided. The imposition of the intellectual discipline of formulating reasons, a discipline to which the judge is accustomed, would assist the judge to ignore factors which are irrelevant but which might otherwise, perhaps unconsciously influence the choice of sentence . . . . To require a judge to formulate reasons for a sentencing decision is to do no more than to require them to apply the normal process of judicial decision to the process of sentencing: and where reasons are formulated, there can be no objection to a requirement that they should be stated.[57]

Additionally, such a formulation of reasons would tend to create an impression with the defendant that he is being fairly treated. This, of course, would aid in the process of rehabilitation[58] as well as serve to notify prison officials of the purposes of confinement.[59]

Perhaps even more significantly, the statement of reasons will help implement another of the Code's major innovations, appellate review of certain sentencing decisions. In order to give effect to the ranges set by the Sentencing Commission, either the Government or the defendant may appeal from any deviation by the court. The sentencing judge, while not bound by the Commission's guidelines, must nevertheless offer a specific rationale for his or her disagreement. The appellate tribunal will then evaluate these reasons and weigh them against the factors which have or should have been considered by the lower court.

This potential review will in all likelihood compel sentencing judges to accord substantial deference to the Commission's guidelines. Moreover, the right of appeal given to both the Government and the accused should protect the public from undue leniency as well as the individual from excessive harshness.[60] Appellate precedents in sentencing cases will also aid the Commission and the trial courts in refining and applying the guidelines. In this fashion, the Code will eliminate unstructured and unreviewable discretion in all phases of the sentencing process.

In accomplishing this laudable goal the proposals of the Code have struck a balance between the often competing theories of rehabilitation and deterrence or restraint. Flexibility is maintained without losing sight of the paramount demands of protection of the public. Uniformity has been promoted at the same time without ignoring the equities of the individual case. Rationality with an accompanying articulation of reasons is the touchstone of these reforms. The result promises to achieve justice for both society and the induvidual.

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56 See, *e.g.* Coburn, *supra* note 1, at 232-33; Doub, *Recent Trends in the Criminal Law*, 46 *A.B.A.J.* 139, 140-42 (1960); Frankel, *supra* note 1, at 9-14; Robinson, *The Defendant Needs to Know*, 26 *Fed. Prob.* 3 (December 1962). See also *A.B.A. Sentencing Standards* §5.6 and comments.

57 Thomas, *Stating Reasons for Decisions*, reprinted in 2 Radzinowicz and Wolfgang, *Crime and Justice* 671, 674 (1971).

58 Compare *Monks v. New Jersey State Parole Board*, 58 *N.J.* 238 (1971) where the New Jersey Supreme Court observed that a statement of reasons for denial of parole would further the goal of rehabilitation. *See also* Kadish, *supra* note 1, at 928. at 9

59. See Frankel, *supra* note 34, at 9-14. *Compare N.Y. Penal Law* §65.05, 65.20 (McKinney, 1967) requiring trial judges to give reasons if a suspended sentence is imposed on a felony conviction.

60 New Jersey has had appellate review of sentences since 1961. There is however, no provision for either an appeal by the prosecution or an increase of an appealing defendant's sentence. Our appellate courts also do not have the benefit of a detailed expression of legislative sentencing policy. Improvements in both respects are currently being studied, with our proposed Penal Code enumerating pertinent aggravating and mitigating factors.

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