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The Future of Parole—In Rebuttal of S.1437*

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EARLY this year, S.1437—a bill designed to recodify and reform Federal criminal law—was passed by the Senate and sent to the House of Representatives. I am deeply concerned that the Congress not adopt the Senate version of this legislation without substantial revision to its provisions dealing with the structuring of judicial sentencing discretion and the role of the Parole Commission in making release determinations. The reason for my concern is that this bill, as it now stands, proposes a system that is clearly not adequate to achieve its proffered goals of reducing disparity and uncertainty in criminal sentencing. I intend to offer my criticisms of this bill from a practical, rather than a theoretical viewpoint, and to outline what I believe would be a workable alternative.

I wish to begin by emphasizing that the Parole Commission and Reorganization Act of 1976,[1] which was the product of 3 years of joint study and effort by the U.S. Senate and House, offers a realistic point of reference from which to start in turning S.1437 into a system with a reasonable chance of success. As I will discuss later, it is my opinion that, with a number of amendments combining the best features of the Parole Commission Act and S.1437, a sound and workable system could be established that would avoid the considerable risks which the enactment of an unrevised S.1437 would entail.

Sentencing and Parole Under Current Law

Under current Federal law, it is normally within the power of the trial judge, following a conviction, to decide whether to send a defendant to prison or to impose some other sanction; i.e., a period of probation, a jail term, a fine, or a split sentence (a jail term of not more than 6 months followed by probation). If the decision is to imprison, then the judge decides, within broad statutory limits, what the maximum term of imprisonment will be. If the maximum term is more than 1 year, the judge must also decide when the defendant will become eligible for parole consideration. However, parole eligibility cannot be delayed beyond one-third of the maximum imposed. Prisoners sentenced to less than 1 year are not eligible for parole consideration by the Commission.

In making these determinations, judges are not governed by any explicit standards. Each judge is free to impose (within the statutory limit) whatever sentence he feels is appropriate to suit the offender before him. Moreover, there is no requirement that the judge provide reasons for choosing a particular sentence, and there is no avenue of appeal unless the defendant can argue that the sentence represents a patent abuse of discretion. The effective result is that judicial discretion in imposing sentence is, for practical purposes, unreviewable.

In the case of prisoners eligible for parole (i.e., all prisoners with sentences of more than 1 year), the United States Parole Commission has the authority to determine the actual length of imprisonment. It does this by deciding whether or not a prisoner will be released on parole prior to the expiration of the maximum term imposed, less statutory good time. If parole is denied, statutory good time normally entitles a prisoner to release at about two-thirds of the maximum term imposed.

In making its determinations, the Parole Commission is required to exercise its discretion pursuant to a guideline system taking into account the severity of the prisoner's offense and the probability of future criminal conduct (determined primarily by reference to past criminal history). The system was originally developed by the United States Board of Parole in 1972 and was subsequently mandated by Congress in the Parole Commission and Reorganization Act of 1976.[2] While the guidelines provide a set of explicit norms for decisionmaking, they are not designed to remove the discretion necessary to account for unusual factors in individual cases. In about 20 percent of the cases heard the Commission renders a discretionary decision outside the indicated

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[1] 18 U.S.C. Sec. 4201 et seq.
[2] 18 U.S.C. 4206.

guideline range,[3] and in these cases, the Commission is required to furnish the prisoner with a specific statement of the reasons for departure from the guidelines.

Thus, within the limits of the judicially imposed sentence, the Parole Commission effectively determines the actual duration of imprisonment, pursuant to its guidelines, for all offenders who are sent to prison with terms of more than one year.

Moreover, the legislative history of the Parole Commission Act specifically recognized that the parole guideline system has the practical effect of reducing unwarranted disparity in the sentences of these prisoners.[4] However, the Commission cannot reduce unwarranted disparity in the determination of who goes to prison and who does not, nor does it have jurisdiction over prisoners with sentences of 1 year or less.

What S.1437 Proposes

As presently written, S.1437 would create a Sentencing Commission to promulgate guidelines for judicial sentencing determinations. The Sentencing Commission would set its guidelines within maximum limits established by Congress for various classes of crimes. Judges would be required to apply these guidelines in making the threshhold choice of whether to impose a sentence of imprisonment or some lesser sanction. They would also be required to apply the guidelines in deciding the length of each sentence imposed, including terms of imprisonment and probation, and the amount of fines.

Sentences of imprisonment in nearly all cases would be imposed to be served in full, without possibility of release on parole and with very limited statutory time off for good behavior. (The most a prisoner could earn would reduce his term by only 10 percent.) Eligibility for release on parole would be permissible only in cases in which incarceration was deemed necessary to provide needed correctional treatment.

Judges would also be required to provide reasons for any sentence outside the guidelines. A sentence below the guidelines could be appealed by the prosecutor, and a sentence above the guidelines could be appealed by the defendant. However, there would be no appeal of right if the sentence were within the guidelines. Interpretation and application of the guidelines would be left largely to the discretion of the individual judge, guided only by statements of general policy issued by the Sentencing Commission.

In sum, the bill transposes to the judiciary the basic guideline concept as developed by the Parole Commission, and effectively eliminates the participation of the Parole Commission in determining how long Federal prisoners will be confined. The Sentencing Commission is established as a policy-setter, but is not given any means of reviewing individual decisions or ensuring compliance with its policy.

The Assumptions Behind S.1437

The proposed elimination of the Parole Commission's role in determining actual duration of confinement is based upon three critical assumptions:

First: that the U.S. Parole Commission's guidelines can be administered by more than 500 district court judges[5] (under limited appellate review by 11 different courts of appeal) with as much success in controlling unwarranted disparity in the service of criminal sentences as is presently achieved under the administration of the Parole Commission (a single, small agency);

Second: that once a sentence of imprisonment is imposed pursuant to these guidelines, there will be no need for periodic review, regardless of the length of sentence; and

Third: that prison terms (and prison population) will not be in danger of substantially increasing under a system of "flat-time" sentences.

I will address these concerns in the order I have just stated them.

Can We Do Without the Parole Release Function and Still Reduce Unwarranted Disparity?

The transfer of the U.S. Parole Commission's guidelines to more than 500 Federal district judges, and the proposed abolition of the Federal parole release function in nearly all cases, is, in my opinion, not likely to be successful if measured by the criterion of achieving a real reduction of unwarranted disparity in criminal sentences.[6]

To be sure, giving the district judges a guide-

[3] This figure refers to decisions in which the Commission exercises discretion to go either above or below the guideline range. Cases in which the Commission's discretion is limited by a minimum sentence above the guideline range (approximately 5 percent of the cases before the Commission), or a sentence with a mandatory release date below the guideline range (approximately 25 percent of the cases before the Commission) are not counted as discretionary departures from the guidelines.

[4] The Report of the Joint Committee states that ". . . In the first instance parole has the practical effect of balancing differences in sentencing policies and practices in a system that is as wide and diverse as the Federal criminal justice system." 2 U.S. Code Cong. and Admin. News 352 (1976).

[5] This figure includes the judgeships in proposed legislation presently before the Congress.

[6] There is really no other criterion available, since the proponents of S.1437 do not claim any benefit in terms of deterring or reducing crime, and their declared goal of "determinacy" can be met by a paroling authority setting presumptive release dates shortly after sentencing.

line system (whether obligatory or merely advisory) could be a successful method of bringing some measure of consistency into the critical determination of whether to send an offender to prison or not (the "in-out" decision). I am in favor of that. Also, such standards could meet much of the public's concern for certainty of punishment (e.g., whether white collar offenders should be sent to prison).

However, there would be serious obstacles preventing a judicial guideline system from effectively controlling unwarranted disparity in actual length of imprisonment served, under a system of "flat-time" sentences without possibility of parole.

The relevant considerations are the following:

1. Inconsistent application of guidelines by the district judges.—(A) Disparity of interpretation: S.1437 proposes that a highly complicated system of sentencing guidelines be applied by officials for whom sentencing is only a small part of an extremely busy and demanding schedule. (A district judge, on the average, imposes annually fewer than 30 sentences of imprisonment exceeding 1 year.) We can hardly expect that a widely divergent group of more than 500 of these officials will apply the guidelines with any notable degree of consistency of interpretation, when they have so little time to devote to the task or to develop familiarity with it, and when each judge is applying the guidelines individually. There is also the problem of the extremely narrow sampling in the type of cases seen by the average Federal judge. Judges certainly have no inherent tendency to conform their sentencing decisions, even when faced with precisely identical circumstances. In fact, the disparity study conducted several years ago in the Second Circuit by the Federal Judicial Center[7] showed just the opposite tendency.*

As for the complexity of the guidelines, I can only testify from my own experience that the Parole Commission's guidelines are complex enough to give rise to continual questions of interpretation. I expect that guidelines covering all the sentencing possibilities (not just the durational determinations for the 25 percent of defendants serving terms of more than 1 year) would be even more complex and subject to interpretation than the Parole Commission's guidelines now are. It is certainly ingenuous in the extreme to assert (as the proponents of this bill have asserted) that the Sentencing Commission's guidelines could be made so fully "determinate" that more than 500 Federal judges sitting individually would have no problems in achieving a coherent sentencing practice.

(B) The traditional independence of judges: The traditional independence of our judiciary is also a factor which has historically protected against governmental abuse of private freedoms, but which has made judges, as a body, difficult to coordinate and direct. Given this background, it seems to be more than likely that many judges will tend to interpret the guidelines to suit strongly held individual concepts of justice, rather than follow the policies which the Sentencing Commission would be dictating to them. The frequency of sentencing outside the guidelines would also reflect differing judicial personalities, and this factor would certainly increase the overall degree of disparity.

2. Problems with the Sentencing Commission.—While the Sentencing Commission is responsible for establishing the guidelines to be applied by the judiciary, it is given no means of ensuring compliance by the judges in interpreting its policies. The Sentencing Commission would be restricted to issuing statements of general policy only, and it could not review particular cases except for purposes of research and monitoring after the sentence became final. It would also have no say in the direction taken by the various courts of appeal in interpreting the guidelines which it would promulgate.

Since the Sentencing Commission could probably not be given any effective enforcement powers because of the Constitutional problems that such a proposal would entail, we are left with an agency that would have a tremendous task, but no real means of seeing it accomplished.

This is not to say that some form of Sentencing Commission should not be enacted. As I will later propose, an advisory body setting guiding standards for the judicial decision as to prison versus lesser sanctions could serve an invaluable role in the criminal justice system.

3. Problems with appellate review as a compliance mechanism for judicial guidelines.—(A) Sentences outside the guidelines: While the review function lacking in the Sentencing Commission has been entrusted to the courts of appeal, these already overburdened courts have been historically reluctant to review the merits of crimi-

[7] Anthony Partridge and William B. Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit*, Washington, D.C.: Federal Judicial Center, August, 1974.

* The foregoing is not intended as a criticism of judges. I only refer to the difficulty any large number of individuals would experience in attempting to achieve consistency in the performance of a complex task by working at it on a parttime basis.

nal sentences other than for a clear abuse of discretion. Under section 2003(a)(2) of S.1437, sentencing outside the guidelines would be virtually committed to the district court's discretion provided only that the judge finds that "an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . ." This is hardly any change from the broad discretion presently exercised by district judges and traditionally respected by the courts of appeal. There would be no rule of law to apply or error to correct, and the very remoteness of the appellate courts would make them reluctant to second-guess the trial judge in a matter that is not, by nature, a part of normal appellate business. Thus, most sentences outside the guidelines would be likely to be upheld, regardless of sentence length or the disparity from sentence to sentence.

(B) Lack of adequate appellate rights: Compounding the above problem is the fact that under section 3725(a) of the bill, there would be no appeal of right in cases where the sentence imposed is deemed within the guidelines. This limitation raises two serious problems. First, a misapplication of the guidelines by the sentencing judge could not be reviewed.[8] Second, a frequent ground of appeal in the Parole Commission's experience is that "good cause" exists for a decision below an otherwise properly calculated guideline range. This common (and very reasonable) form of argument would not be permissible under S.1437.

(C) Would total appellate review solve the problem? The answer to this question is clearly "No." In the first place, the increased burden on the appellate courts, judging by the volume and variety of appeals before the Parole Commission, would be enormous.

In the second place, it is inconceivable to me how the 11 separate courts of appeal will achieve the desired degree of consistency in their interpretation of the many complex questions that application of the guidelines will raise. The courts of appeal themselves are frequently in disagreement on substantive questions of law, and there is no indication in this bill that appellate interpretation of the guidelines will not follow the same pattern.

[8] The defendant's right to challenge such a sentence as illegal under Rule 35 of the Federal Rules of Criminal Procedure is of dubious value, since a miscalculation of the guidelines will not always be such an obvious error as to amount to clear illegality. Rule 35 would not comprehend errors of interpretative inconsistency—the more frequent and difficult problem experienced.

In short, the proponents of S.1437 have sought to achieve inconsistent goals. On the one hand, the bill recognizes the need to protect the already overburdened courts of appeals from a drastic increase in workload, and on the other hand, the bill relies upon the courts of appeals to police the application of the sentencing guidelines with enough rigor to ensure that unwarranted disparity is kept under control. In my opinion, neither goal would be met.

4. Expansion of prosecutorial discretion.—The subject of prosecutorial discretion and its potential for causing unjustifiable disparity in the treatment of criminal defendants is a very serious one. We do not know what effect the bill would have on this factor. (Approximately 85 percent of all sentences are now the result of a plea.) I cannot recommend any legislation that might have the effect of increasing the degree of disparity for which prosecutorial decisions might be responsible. There is certainly reason to assume that with specific sentencing guidelines, a good deal of discretion will be shifted to the prosecutor, who, in bringing or dropping charges, will be much more important in determining the ultimate sentence that he is at present. (Under current law, prosecutorial decisions are made in the context of broad legislative sentencing limits, and no prosecutorial agreement is permitted to bind the Parole Commission's decision.) Instead of bringing the excercise of discretion back into the courtroom, as the proponents of this bill assert it will do, the bill seems likely instead only to shift discretion away from the Parole Commission and place it in the hands of the prosecutor, rather than the sentencing judge.

5. Contrasting advantages offered by the Parole Commission.—In contrast to the enormous problems that I think the system proposed in S.1437 would create, I believe that the Parole Commission's present system offers a very simple, workable alternative for bringing sense and order into the setting of prison terms, if combined with the development of appropriate standards for the critical judicial decision as to who goes to prison and who does not (and the consequent reduction of unwarranted disparity in this decision).

The Parole Commission (unlike a group of more than 500 district judges) offers a small, collegial body of nine commissioners and a corps of thirty-six hearing examiners. It is both policy-setter as well as decisionmaker, permitting the ongoing examination of its policies and its guidelines against

the reality of the results achieved. The Commissioners and staff are also full-time parole decisionmakers, devoting constant attention to the complexities of criminal behavior and interpretation of the guidelines. (The large number of cases seen each year by the Parole Commission can be contrasted with the relatively narrow sampling available to any single district judge.) Moreover, training and instruction in a consistent approach is more feasible with a small group of hearing examiners than with either the large numbers of judges or the even larger number of probation officers who would be involved in making guideline assessments in the preparation of their presentence reports.

As a collegial body, the Commission's decisions are produced by panels of staff and Commissioners acting in concert, with numerous checks and balances offered by a structured system of group decisionmaking. The Commission's method of decisionmaking by consensus can be contrasted with the amount of responsibility that S.1437 would thrust upon the single trial judge, with only limited appellate review.

The parole guideline evaluation is initially made by a panel of hearing examiners after an in-person hearing, and the initial decision is produced by this panel upon the concurrence of the Regional Commissioner. If the Regional Commissioner wishes to override a panel recommendation by more than 6 months, he must seek the concurring vote of a second Commissioner. A prisoner can ask that any adverse decision be first reconsidered by the Regional Commissioner, and then (if not satisfied) can have it reviewed by the National Appeals Board, a permanent body of three Commissioners in Washington, D.C.

In addition, the Commission can closely monitor compliance with its own rules, permitting timely response in the case of unexplained deviations from policy. It can also monitor the percentage of decisions outside the guidelines and take appropriate action to revise or clarify the guidelines if that percentage should deviate to an unacceptable degree.

It is therefore incomprehensible to me why this efficient and workable model is proposed to be discarded in favor of dealing with the morass of problems that this bill would cause. I am especially concerned in view of the fact that the proponents of S.1437 have failed to offer any evidence that the abolition of the parole release function would not lead to an increase in unwarranted sentencing disparity, rather than a reduction.

Can We Eliminate Periodic Review by the Parole Commission?

The fact that these "flat-time" sentences would be imposed under guidelines does not eliminate the need for periodic review by the Parole Commission, particularly in cases with substantial prison terms.

I agree with the proponents of S.1437 that certainty on the part of prisoners as to their ultimate release dates is a generally desirable factor, psychologically for the prisoner, as well as for the public and prison administrators. The Parole Commission itself follows a system of informing most prisoners of their presumptive release dates (contingent upon continued obedience to prison rules) within 120 days after their sentences have begun.[9] However, the pursuit of "certainty" becomes excessive when it proposes to set sentences in concrete and eliminate the possibility of parole release altogether.

There are a number of important reasons to retain the reviewing function of a parole release authority.

1. Balancing attitudes toward the offender and his crime.—In some cases, a judge may impose a sentence under pressure of personal or community feeling toward a defendant that, from a more objective point of view, may be seen as clearly excessive. In this regard, one valid function of review by a paroling authority is to provide a separate (and national) view of the offense to balance that of the individual trial judge. I strongly disagree with the proposition that a concern for satisfying local attitudes should outweigh the concern for a consistent Federal approach to the imprisonment of Federal offenders,[10] particularly when offenders from different geographic areas are confined together in the same institutions.

I should also point out that an excessive concern for satisfying community attitudes in Federal sentencing could lead to some inextricable problems. For example, how do we analyze the case of a marihuana smuggler arrested in State X (where public condemnation of the drug is severe), whose illicit goods were actually in transit for intended sale in State Y (where public condemnation is less than in State X), other than by treating the matter strictly as a Federal offense?

[9] 28 C.F.R. 2.12, 2.14.

[10] Section 994(c)(4) of the bill requires the "Sentencing Commission" to consider "the community view of the gravity of the offense" in formulating its guidelines.

2. The need for review in the case of changed circumstances.—I think most judges would agree with me that they are not gifted with prophecy, and cannot be expected to fashion a sentence based on an assessment of the offender's circumstances that will remain valid regardless of any changes that might take place. Many events can, and do occur during the service of a sentence (particularly a lengthy one) that would reasonably constitute a change in circumstances significant enough to render further incarceration wasteful and unjust. For example, illness, the effects of aging and maturity, or exceptional efforts at self-improvement that are clearly meaningful in terms of the prisoner's chances for future success, would fall into this category. (The architects of the Parole Commission and Reorganization Act of 1976 recognized the importance of this concern, and provided for periodic review of each case in which parole is denied.) While our methods of predicting future behavior are nowhere near perfect, I am convinced that no sensible person would willingly forgo the opportunity to review such a sentence at suitable intervals.

Therefore, requiring an offender to serve to the expiration of his sentence, when he could at some point be safely and appropriately released after review by a paroling authority, represents a misapplication of our tax dollars and a waste of human resources. Yet, the proponents of S.1437 would remove from our criminal justice system any systematic means whereby even the most lengthy sentences could be reviewed.

3. The shift of discretion to prison staff.—Leaving such cases to the attention of sentencing judges upon the urging of prison staff (as this bill does) would be a haphazard and inequitable way of providing relief. It would also be an ironic regression to the 19th century and the conditions that engendered the creation of independent parole boards in the first instance.

Without a paroling authority, there is also the distinct possibility of frequent (and uneven) use of furloughs and other release programs as a substitute measure. What is likely to arise is a situation in which the misuse of extended furloughs and half-way house placements becomes so commonplace that reformers will call for a centralized authority, i.e., a parole board, to shield the prison staff from improper pressure and reduce disparity in release decisions. It is simply unrealistic to think that "flat-time" sentences can, or will be, carried out to the letter by any prison system (especially one that is overcrowded).

4. Preventing the abandonment or rehabilitative programs and research.—Another major factor is the prospect that this bill would encourage the abandonment of the search for demonstrably successful rehabilitative programs. While it is true that present techniques of institutional training are uncertain in their ultimate effectiveness, even the proponents of S.1437 agree that continued research and development may well change our perception of these programs in 5 or 10 years. I cannot imagine that educative programs accomplish so little for prisoners that we can afford to abandon the endeavor to identify specific programs that represent a better way of spending tax dollars than others. Without a parole authority possessing the necessary degree of flexibility over release decisions, the impetus for this research will be seriously diminished, and reversion to wholesale warehousing of large numbers of prisoners will be the likely result.

5. Changes in societal attitude toward the offense.—Without a paroling authority, no adjustment could be made over a period of years for reduced social perceptions of crimes that were once viewed more severely. We may well be seeing this kind of evolution particularly with regard to certain drug offenses. For a past example, when Congress in 1974 retroactively repealed the provision that prohibited parole consideration for prisoners serving sentences imposed under the Narcotic Control Act of 1956, the Commission was able to respond equitably and efficiently in the processing of individual cases. (The history of past Federal "flat-time" sentencing experiments should also offer a sober reflection to the proponents of "determinate" sentencing.)

6. Maintaining institutional discipline.—While earlier drafts of S.1437 eliminated institutional good time, the bill as passed by the Senate reintroduces good time reductions of up to 10 percent, and provides a complex process for awarding this good time. However, the most good time that appears to be subject to forfeiture for even the worst misconduct is three days. This feature places prison officials in a plainly untenable position in dealing with the prisoner who turns out to be a serious discipline problem.

In contrast to this, a paroling authority can discipline serious prison misconduct by deferring the date of release for an appropriate period of time, without the need for a cumbersome (and

unevenly administered) system of good time awards.

Would Enactment of S.1437 Lead to an Increase in Prison Population, and What Are the Consequences if It Does?

In my opinion, the enactment of S.1437 as it now stands would probably lead to increasingly lengthy prison terms. If that happens, Congress should be prepared for a corresponding (and expensive) increase in prison population (which is presently severely overcrowded with nearly 30,000 prisoners).

1. The consequences in terms of Federal expenditures.—According to Bureau of Prisons' statistics, Federal prisoners eligible for parole (prisoners with sentences of more than 1 year) now serve an average of 41.8 percent of their sentences. This is an estimated cumulative time in custody of 264 thousand months for prisoners sentenced each year. Even if this percentage were increased to only 50 percent of present sentences under the flat-time provisions of this bill, this would add an extra 52 thousand cumulative months in custody at an estimated annual cost of $33 million just for operational expenditures, with an estimated capital construction cost of $180 million to build the prisons to house these additional prisoners. If prisoners served 90 percent of sentences imposed today, this would add an additional 305 thousand cumulative months in custody, at an estimated yearly cost increase of $193 million in operational expenditures, and an estimated capital construction cost increase of over one billion dollars. All these estimates are based on the Bureau of Prisons' own figures of $7,592 per bed for operational costs and $39,000 per bed for construction costs, and do not take inflation into account.

With such consequences in mind, even for relatively slight increases in actual sentence length, it should be clear that a number of features in this bill present very serious problems.

2. Factors pointing to increased prison population.—The Sentencing Commission, as well as the judges who would implement the guidelines, would have no opportunity to assess the real effects of the sentences they impose in terms of the actual conditions of incarceration. Thus, sentences are likely to be seen in the traditional way as symbolic time abstractly related to the offense, and not as a realistic reflection of the resources and costs of our prison system. This factor might certainly increase both the guideline ranges as well as individual sentences to the point where prison population would reach unacceptable (and dangerous) levels.

In addition, while the parole release function is almost entirely eliminated, and statutory good time is severely reduced, there is no incentive for judges to switch from thinking in terms of the lengthy sentences they are used to dealing out, to the "real time" they would now be dispensing. It is to be noted that the statutory maxima authorized in the bill do not appear to be reduced by an amount sufficient to encourage judges to think in terms of this "real time," nor is there any guarantee that the guidelines themselves will prevent unrealistic sentences.

3. The Sentencing Commission's inability to respond to overcrowding.—Although the bill mandates the Sentencing Commission to consider overcrowding,[11] it does not provide the safety valve mechanism available to a paroling authority. If the prison population climbed to unacceptable levels, the Sentencing Commission could only reduce the guideline ranges for future cases (although even this would involve a substantial time lag). However, this method would only create disparity between those sentenced before and after the change. In contrast, the Parole Commission could make immediate but smaller changes equally throughout the prison population in order to produce the desired result. This is not to argue that the parole authority should be used routinely to control institutional populations; it only acknowledges the unique ability of the paroling system to take into account an important reality that the Sentencing Commission could not should the need arise.

An Alternative

In contrast to the total package proposed in S.1437, I think that the establishment of a policy-making body to promulgate guidelines for the structuring of judicial discretion in making the critical "in-out" choice between sanctions involving a year or less of imprisonment (e.g., fines, probation, jail terms) and the sanction of imprisonment of more than one year, would be a major step forward. It would also be an undertaking of major proportions for the agency charged with that responsibility.

[11] Section 994(1) of the bill requires the Sentencing Commission to be guided by the length of terms actually served in initially promulgating its guidelines, unless the commission determines that such a term "does not adequately reflect a basis for a sentencing range" that is consistent with the overall purposes of the bill.

END