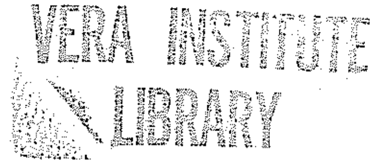
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BOOK REVIEW

O'Donnell, Churgin & Curtis: Toward a Just and Effective Sentencing System: Agenda for Legislative Reform

reviewed by

Michael E. Smith

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BOOK REVIEW

TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM. By Pierce O'Donnell,[1] Michael J. Churgin,[2] and Dennis E. Curtis.[3] New York: Praeger. 1977. Pp. xvi, 137. $16.50.

Reviewed by Michael E. Smith [4]

This slim volume argues for the adoption of a model sentencing statute which is designed to eliminate sentence disparities. The proposed statute,[5] set forth as an appendix (pp. 96–127), would establish "a system in which the sentencing judge must consider certain goals of sentencing articulated by Congress, must follow a prescribed procedure, and must apply guidelines promulgated by a newly created United States Commission on Sentencing and Corrections" (p. 79). The book itself is not as readable as Judge Marvin Frankel's *Criminal Sentences: Law Without Order*,[6] which, as the authors fully acknowledge, argues in the same way for similar, though less fully elaborated proposals. And the authors do not adequately consider the likely effects of the statute they propose. But the book is worthy of attention and respect because, as is more fully discussed below, much of its "agenda for legislative reform" has been adopted by the Senate Judiciary Committee and now appears in the committee draft of S. 1437 (the "Criminal Code Reform Act of 1977").[7]

The authors set the stage for their proposals by a brief analysis of the current federal sentencing "nonsystem" (p. 3), characterized by a "bizarre range" and "chaotic patchwork" of penalties (p. 1),[8] and a lack of legislative standards, which, together, leave

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[5] The proposed statute is the product of a workshop, sponsored at Yale Law School by the Daniel and Florence Guggenheim Foundation, in which the authors played a major role. The participating scholars and students met monthly in 1974–1975 with federal judges and with federal practitioners from the probation and corrections fields until consensus was reached on the draft statute in May 1975. The statute is framed as amendments to chapters 1, 20–23, 25 & 37–38 of S. 1, 94th Cong., 1st Sess. (1975), the bill unsuccessfully introduced as the "Criminal Justice Reform Act of 1975."

[6] M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

[7] S. 1437, 95th Cong., 1st Sess. (1977).

[8] The authors offer only this example: "[A]rmed robbery of a bank is punishable by fine, probation, or a prison sentence of up to 25 years. 18 U.S.C. § 2113(d) . . . . But for armed robbery of a post office, the judge must either grant

"[s]entencing judges . . . free to formulate and apply their own personal theories of punishment" (p. 3). Data are presented to demonstrate that sentences are "grossly disparate" (p. 3). The disparities and the lack of "any rational basis whatsoever" (p. 3) in individual sentencing decisions are said to be "the inevitable result of judicial discretion exercised by 378 federal district judges across the country, unfettered by legislatively established criteria and not subject to the uniform requirements of procedural regularity and prescribed substantive criteria that appellate review lends to almost every other area of the law" (p. 10).

Previous attempts to attack this "national scandal" (p. 13) are characterized as "fingers in the dike" (p. 16) and the authors see a hope for relief in only one — the decisionmaking guidelines now used by the United States Parole Commission.[9] Designed to reduce subjectivity in the parole-granting process and to help moderate sentencing disparities, these guidelines reduce the personal characteristics and prior record of a prisoner to a "salient factor score" which research shows to have some predictive power regarding parole success. This score is then combined with a measure of the severity of the offense for which sentence was imposed, yielding a normal time period to be served before parole release. Thus, for example, twenty-four to thirty months is the range for a prisoner with a "poor" salient factor score who

probation or impose the full 25-year sentence" (p. 14 n.3). There are, however, clearer examples of apparently senseless and inconsistent grading of criminal offenses. Lying to the Department of Housing and Urban Development for the purpose of obtaining a mortgage loan, which carries up to two years' imprisonment under 18 U.S.C. § 1010 (1970), has a term of up to five years under 18 U.S.C. § 1001 (1970). Similarly, an attempt to commit murder on federal land carries a maximum of twenty years under 18 U.S.C. § 113(a) (1970), but only three years under 18 U.S.C. § 1113 (1970).

[9] The original guidelines appeared at 38 Fed. Reg. 31,942 (1973). The current guidelines are found at 41 Fed. Reg. 37,316 (1976), and a subsequent revision of the salient factor list is found at 42 Fed. Reg. 12,043 (1977).

In addition to the guidelines of the United States Parole Commission, the authors discuss the "sentencing institutes" authorized by Congress and the "multijudge sentencing councils" created by the judges in some districts (pp. 16–19). The sentencing institutes bring judges together to discuss their different approaches to sentencing and to demonstrate, through practice sentencing exercises, the disparate results. The institutes are credited with having "some value" (p. 16) but they "do not begin to remedy sentencing disparity" (p. 17). In multijudge sentencing councils, a sentencing judge shares the presentence report with two colleagues from his district, and each judge's choice of sentence is discussed before the sentencing judge settles on a disposition. The councils are credited with reducing the frequency of excessively severe or lenient sentences where they have been tried, but they are thought by the authors to be ineffective against the remaining disparities because a sentencing judge "may heed or ignore the recommendations of his two colleagues," because councils are no more likely to agree than are single judges, and because collaborative sentencing districts "cannot reduce disparity among the 94 federal districts" (p. 18).

was sentenced for an offense of "moderate" severity such as embezzlement of less than $20,000. Reasons are to be given when parole is denied and additional justification is required when a decision is outside the guideline range.

Although the authors approve of the techniques used by the United States Parole Commission, they argue that because guidelines presently are applied after sentence has been imposed, they cannot reach the most important source of sentencing disparity — the decision whether or not to imprison. Equally troubling is the way the parole guidelines even out sentence disparities without regard to whether incapacitation, deterrence, punishment, or rehabilitation was the dominant purpose of the original sentencing decision; by cutting indiscriminately across these purposes, parole guidelines not only frustrate the court's intent in particular cases but also ensure our continued ignorance of the effectiveness with which sentences of various types and duration achieve their purposes with various types of offenders. The authors therefore propose that the parole guidelines be replaced by guidelines indicating to the judge, according to sentencing purpose, the appropriate sentence for each type of offender and each type of offense.

Sentencing guidelines are, however, only part of the reforms advanced by the authors, and they are preceded by a statutory presumption against incarceration. A prison sentence would be permitted under their proposed statute only if a court determined, following a hearing, that probation, conditions of probation, a fine, or a combination of these sanctions could not accomplish the purposes for which sentence was being imposed. Under this scheme, judges would be obliged to consider whether imprisonment was really necessary to serve the permitted purposes of sentencing, which, under section 2302(b) of the proposed statute, are:

> (1) to afford deterrence to criminal conduct;
> (2) to protect the public from further crimes of the defendant by means of incapacitation;
> (3) to provide the defendant with needed educational or vocational training, medical care, or other rehabilitative treatment in the most effective manner;
> (4) to promote respect for law by means of denunciation;
> (5) to provide just punishment for the offense; and/or
> (6) to reflect the relative gravity of the offense.

The authors argue that a statutory presumption against imprisonment "should result in significantly greater resort to probation and fines, particularly since incarceration has become the automatic sentencing response of many judges" (p. 38). They seem

to expect that their presumption will achieve the desired reduction in imprisonment simply by surfacing, in the minds of sentencing judges, the possibility that less drastic measures could satisfy sentencing objectives. But such a result is not obvious: the authors note elsewhere that, by 1972, 45.8% of persons sentenced in the federal system were already receiving terms of probation (p. 25), and they do not suggest that judges are ignorant of whatever virtues probation and fines may have as instruments of the traditional purposes of sentencing.[10]

Nevertheless, the authors' proposal seems likely to discourage prison sentences, not so much because probation would be more frequently seen as suitable if it were more often and more closely examined, but because, when opting for a prison sentence, a judge would incur the heavy burden of considering one by one the six permissible sentencing purposes and stating the amount of prison time, if any, necessary to accomplish each (§ 2302(d)). In assigning a "time value" to each sentencing purpose, the judge is directed to follow a "lockstep progression" of factual findings responsive to each of several specified questions which the statute relates to that purpose.[11] In addition, the judge would have to

[10] Two rather optimistic pages are devoted to outlining the various presumed advantages of probation (pp. 38–39). The authors note, for example, that the average cost of a sentence of probation is less than one-tenth the average cost of a prison term, and they suggest that money would be saved if prison sentences were less often imposed. But the effect would more likely be only to increase the average cost of a year's imprisonment, at least until the prison population was reduced sufficiently to permit closing down a prison; and given the fixed nature of many costs involved in incarceration, total costs would be reduced only marginally by the presumption in favor of probation. Moreover, in considering probation's positive virtues, the authors refer to none of the studies published after 1970, when research began to cast doubt on the power of probation, as we know it, to reintegrate or rehabilitate offenders, *see, e.g.*, J. BANKS, A. PORTER, R. RARDIN, T. SILER & V. UNGER, SUMMARY PHASE ONE EVALUATION OF SPECIAL PROBATION PROJECTS (1977). The weakness of the authors' treatment of these issues is evidenced by their citation to a passage of marginal relevance from a survey by the Attorney General in *1939* (p. 39 & p. 42 n.10) for the proposition that "greater reliance on probation should result in considerable savings to society with no concomitant increase in the risk of crime."

[11] Thus, for example, § 2302(d)(1) of the statute provides: "In determining the sentence of imprisonment to be imposed upon the defendant, the court shall first determine what sentence of imprisonment, if any, is justifiable solely on the grounds of deterrence as defined in section 2302(a)(1)." (Section 2302(a)(1) defines deterrence as "the discouragement, by the threat of criminal sanction, of members of the general population, or particular segments thereof, of which the individual defendant being sentenced is a member, from engaging in conduct prohibited by criminal law.") Section 2302(d)(1) continues:

> In making this determination, the court shall consider the following factors . . . :
> (A) whether a reasonable possibility exists that the criminal behavior for which the defendant is being sentenced can be deterred by incarceration;
> (B) whether a reasonable possibility exists that failure to penalize such

consider guidelines, promulgated by a United States Commission on Sentencing and Corrections, that would set a normal sentencing range through a technique similar to that used presently in parole guidelines, as discussed earlier.[12] A prison sentence imposed pursuant to the proposed statute would be as long as the longest term assigned to one of the permissible sentencing purposes (§ 2302(d)(5)).[13]

When the product of the judge's calculus is within the Commission's guideline range for a normal sentence in similar cases, the court would need to give only "a brief statement" of the reasons for the term imposed (§ 2302(d)(6)(A)). A sentence greater or less than the Commission's guideline would require a detailed statement of reasons, reflecting the specific findings reached by the court in its "lockstep" consideration of factors related to each purpose of sentencing. The sentence would be vacated and the offender resentenced if the procedures were not followed (§ 2302(d)(6)(B)).

If these sections of the proposed statute and the authors' explication of them seem elaborate, they nevertheless surface virtually every element of discretionary decisionmaking that sentencing judges might be expected to overlook in the present "nonsystem." The difficulty is that the proposals come disturbingly close to demonstrating rather than removing "the unmanageable character of the sentencing power" that results from its complexity.[14] This difficulty might have been dispelled had the authors offered a hypothetical set of findings and reasons that would in their view satisfy the terms and purposes of the statute's mandatory "lockstep progression"; equally helpful would have been an analysis of the strengths and weaknesses of some analogous effort to render a discretionary decisionmaking process less unconscious and more rational. (A useful starting point might have been an examination of the written reasons given to date by the Parole Commission for decisions falling outside its guideline ranges.) Without something in the way of a practical demonstration of how these proposed sentencing procedures could work, the reader may doubt that the comprehensive listing of

behavior by incarceration will result in a substantial increase in similar criminal behavior on the part of others; and

(C) whether on the basis of the nature and circumstances of the defendant, a substantial probability exists that the defendant will abstain from criminal behavior if not sentenced to a term of imprisonment.

[12] *See* pp. 897–98 *supra*.

[13] In recognition of the prevailing pessimism about rehabilitation in prisons, but in acknowledgment of the possibility that effective rehabilitative programs may yet be found, the statute specifies that the sentencing judge would be barred from assigning more than 24 months of imprisonment to any rehabilitative purpose (§ 2302(d)(3)(D)).

[14] M. Frankel, *supra* note 6, at 54.

purposes and factors would, in the hands of ordinary judges, be more than a checklist — albeit a much better checklist than none at all.

Departing from present federal procedure, the proposed statute would make appellate review of the sentence available to the defendant in all cases and to the prosecution if the sentence were below the recommended normal sentence ranges established by the Commission (§ 3725(a)). The court of appeals would resentence or remand for resentencing if it found a sentence beyond the guidelines "unreasonable" or a sentence within the guidelines "clearly unreasonable" (§ 3725(d)).

The authors argue that appellate review would remain necessary to correct disparities that might arise despite the application of the guidelines and that it is "an ideally suited institutional mechanism to upgrade — through the gradual development of case law — the rationale and rationality of sentencing" (p. 60). The last is not an obvious proposition. The authors find support for it in the American Bar Association's Standards Relating to Appellate Review of Sentences,[15] but the ABA's research in jurisdictions such as England, where appellate review is relied upon to shape sentencing policy, did not turn up more than ambiguous evidence.[16] In addition, it seems unlikely that appellate review of sentences would yield sentencing policy different from or more rational than the Commission, in which the authors would vest the resources and responsibility to issue policy statements on sentencing that would supplement the guidelines.

Objection to the appellate review of sentences might be made on the ground that it would increase burdens on the court of appeals. But the authors, anticipating this argument, suggest that the appellate caseload would not increase because a concomitant reduction should be experienced in appeals from conviction which, at present, are often motivated by hope for relief from harsh penalties. In addition, the proposed statute would block appellate review of any sentence received pursuant to a plea agreement under rule 11(e) of the Federal Rules of Criminal Procedure (§ 3725(a)). This provision, however, seems to undermine both the purposes for which the authors propose appellate review and the power of the guidelines to reduce sentencing disparity; the popularity of plea agreements, already substantial, can only increase if prosecutors and judges are permitted to protect their dispositional decisions from appellate review by securing the defendant's agreement to a term — inside or outside the guidelines — prior to sentencing.

[15] ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences 2–3 (Approved Draft 1968).

[16] *Id.* at 21, 50, 125–30, 149–55.

All sentences imposed under the proposed statute would be for a definite term. Parole and the indeterminate sentence, products of the largely discredited rehabilitative purpose of incarceration, would be abolished. The current complex "good time" provisions, by which desired institutional behavior can reduce a prison term by up to one-third, would be modified; in their place would be a straightforward early release program for well-behaved inmates, to commence after completion of nine-tenths of the sentence (§ 3831). Parole supervision would be abandoned. But if a court, following the "lockstep progression," found that a period of supervision in the community should follow imprisonment, it could impose a "split sentence" consisting of up to a year in prison followed by probation; or, if the conviction were on more than one count, it could impose consecutive sentences — a prison term on one count followed by probation on another (p. 71).

Although it is in the nature of a book launching a series of related proposals at Congress to label one proposal the "core" and the "crux," another "the most crucial first step," and still another the "most promising," the keystone is clearly the creation of a United States Commission on Sentencing and Corrections to formulate, disseminate, and revise on a regular basis "general policies, guidelines, rules, and regulations, including, but not limited to, guidelines with respect to recommended normal sentence ranges" (§ 2502(a)(1)). The proposed statute is elaborate in detailing the powers, duties, and composition of the Commission. Unfortunately, the little more than two pages of text devoted to the Commission's work is not enough to come to grips with some of the obvious questions. Will it be possible, as the authors intend, to marry guidelines governing the decision whether to imprison to the old parole guidelines, which govern only the duration of prison sentences? Is it really feasible to catalog every important category of criminal behavior and to identify for each variant a discrete range of sentences that is normally appropriate for each sentencing purpose and for each type of offender? (Doubts on this score might have been reduced if the authors had offered a hypothetical guideline dealing with just one type of offense and one sentencing purpose.[17]) And if, as the authors suggest, more creative use is to be made of probation conditions,[18] what sort of guidelines can encourage

[17] *See* TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 55–61 (1976) (illustrating an approximate range of "presumptive sentences," for a variety of offenses, as determined by the Task Force's application of a proposed sentencing scheme that is simpler than but similar in some respects to the one proposed here).

[18] In illustrating creative probation conditions, the authors refer to such

such experiments without creating new sentencing disparities?

Answers to these questions are likely to come soon enough, for the authors' major proposals — a Commission, guidelines, the giving of reasons for sentences, and appellate review of sentences — are well on the way to becoming law as a part of the comprehensive "Criminal Code Reform Act of 1977" (S. 1437).[19] As a result of this success, the authors' proposals have been probed extensively in testimony before the Senate Subcommittee on Criminal Laws and Procedure.[20]

The Subcommittee's deliberations did not, however, squarely address what appears to be the major flaw in both the authors' proposals and in the sentencing chapters of S. 1437 — a failure to take fully into account the prosecutor's discretionary powers to determine sentences. That a significant number of convictions are by bargained plea is acknowledged by the authors (p. 79), and the potential importance of plea bargaining in the context of their proposals is discussed briefly in a chapter headed, "Adjourned for Tomorrow" (pp. 79–83). Apparently overlooked is the extent to which plea agreements, and therefore sentences, reflect prosecutors' assessments of factors other than those specified in the authors' proposed model statute. Among the elements considered by prosecutors in plea bargaining are evidentiary obstacles that make conviction at trial less certain, the impact at trial of an unpresentable or uncooperative complainant, the interests of the victim and of the system where there is a prior relationship between defendant and complainant, and a host of other factors that are not often addressed in discussions about sentencing reform, including the need to offer sentence concessions to some defendants in order to get testimony for a prosecution against their similarly situated partners in the same crime.[21]

innovations as requiring the contribution of hours to a local charity or requiring "a pickpocket to wear mittens whenever . . . in a crowd" (p. 39 n.*).

[19] The effort to secure passage of a comprehensive revision of federal criminal laws was taken up in S. 1437, *see* note 7 *supra*, following the demise of S. 1, *see* note 5 *supra*. Prior to publication, the authors' proposals found their way into S. 1437 via Senator Kennedy's "Sentencing Guidelines Bill," S. 2699, 94th Cong., 1st Sess., 121 CONG. REC. S20,514–16 (1975), where they had been directly incorporated from a manuscript distributed in September 1975.

[20] *See Hearings on S. 1437 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. pt. XIII (1977) [hereinafter cited as *Hearings*].

[21] For an extensive discussion of the ways that sentences reached through plea bargaining — even unstructured plea bargaining in an overstressed state system — tend to reflect rather well such underlying differences between apparently similar cases, see VERA INSTITUTE OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS (1977). It might be that the prosecutor's role in determining sentences and the underlying differences mentioned here are peculiar to state systems or are less important in the federal context. But the

The importance of variable factors such as these, in the prosecution and disposition of apparently similar cases, is not likely to diminish with the introduction of sentencing guidelines. Aimed at eliminating sentencing disparities, the guidelines seem likely to increase disparities in the charges prosecutors press, and the greater certainty about what sentence ordinarily will follow from conviction on each of the charges in an indictment is likely to enhance rather than diminish the ability of prosecutors to get guilty pleas in exchange for charge reductions. Indeed, the proposals advanced in this book and in S. 1437 would be particularly helpful to plea bargainers in jurisdictions where indictment usually precedes arrest. Overall, the proposed reforms seem certain to increase the discretionary power of prosecutors by restricting judicial discretion and eliminating parole discretion. Differential charging and charge-reducing practices, which are less visible and probably less manageable than sentencing practices, are likely to thrive in such a system.[22] Whether the net effect will be an increase or a decrease in the sort of dispositional differences that the authors call "disparate," it is clear that such disparities will remain.

For those committed to the principle that like cases should be treated alike, prosecutorial discretion is at least as ripe a candidate for structuring and review as judicial discretion. The authors do not come to grips with this, but the predictable solution was offered, rather indirectly, to the Senate subcommittee considering S. 1437. In a footnote to its prepared testimony, the Justice Department's Office for Improvements in the Administration of Justice announced plans for guidelines to control prosecutorial discretion, pointing out that "[i]n order for the sentencing guidelines system to achieve its goal of eliminating or reducing *unwarranted* disparity in sentencing, it will be necessary to assure that exercises of prosecutorial discretion during the charging and plea bargaining stages of prosecution do not undermine that goal." [23]

But would dispositional disparities finally vanish if prosecutors and sentencing judges, adhering to identical mandatory guidelines, were to make their decisions in a "lockstep progression" from arrest to disposition? For the answer, we might look to the

authors (and Senator Kennedy, who has furnished an Introduction to their book) believe that their analysis of the causes of sentencing disparities, and the remedies they propose, apply with equal force to most state systems (pp. ix, xiii).

[22] Franklin Zimring has therefore pointed out that if reducing the total amount of sentencing disparity is the goal, "logically three discretions may be better than one." Zimring, *A Consumer's Guide to Sentencing Reform — Making the Punishment Fit the Crime*, in *Hearings, supra* note 20, at 9423, 9427.

[23] *Hearings, supra* note 20, at 9221 n.167 (emphasis added).

European systems for which some affirmative claims have been made in this regard but which, according to the most recent American examination of them, appear to have pushed unfettered discretion (and thus disparities) still further away from the surface — to the police.[24]

With such a prospect in view, it is hard not to find applicable to parts of this book Norval Morris's observation about proposals that attempt to control judicial discretion by fixing in advance the sentences for various categories of offender and offense: "I regard [them] as steps in the right direction, but in my view they fail sufficiently to address the complexity of the subject. They are shortcuts to rational sentencing, having the defect of most shortcuts — they quickly get you into rough terrain best avoided." [25]

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[24] *See* Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977).

[25] Morris, *Punishment, Desert and Rehabilitation*, in *Hearings*, *supra* note 20, at 9321.