

April 1980

## Commentary--The Federal Criminal Code Reform Act and New Sentencing Alternatives

Edward M. Kennedy  
*United States Senate*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

---

### Recommended Citation

Edward M. Kennedy, *Commentary--The Federal Criminal Code Reform Act and New Sentencing Alternatives*, 82 W. Va. L. Rev. (1980).

Available at: <https://researchrepository.wvu.edu/wvlr/vol82/iss3/4>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [researchrepository@mail.wvu.edu](mailto:researchrepository@mail.wvu.edu).

# COMMENTARY-THE FEDERAL CRIMINAL CODE REFORM ACT AND NEW SENTENCING ALTERNATIVES

SENATOR EDWARD M. KENNEDY\*

## INTRODUCTION

The problems surrounding the current sentencing process at the federal, state, and local levels are deeply imbedded in our criminal justice system. The list of ills reads like a recipe designed to assure injustice, unfairness, and uncertainty in society's punishment of the convicted offender. At the federal level, where the sentence imposed on a convicted offender is usually indeterminate and subject to parole, the problems of sentencing unfairness are manifestly evident.<sup>1</sup> Sentencing disparity is commonplace.<sup>2</sup> One

---

\* United States Senator from Massachusetts. Chairman, Committee on the Judiciary. B.A., Harvard College, 1954; LL.B., University of Virginia, 1959.

<sup>1</sup> See, e.g., M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); N. MORRIS, *THE FUTURE OF IMPRISONMENT* 12-20 (1974); A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 14-15 (1976); E. VAN DEN HAAG, *PUNISHING CRIMINALS* (1975); *REPORT ON THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT* (1976).

For testimony given before the United States Senate regarding the inequities of the current sentencing process, see *Reform of the Federal Criminal Laws: Hearings on S. 1437 Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary*, 95th Cong., 1st Sess. 8880 (statement of Norman A. Carlson), 9018 (statement of Curtis C. Crawford), 9042 (statement of Alan Dershowitz) (1977). Mr. Carlson, who is the Director of the Bureau of Prisons, stated that the "present code creates many disparities and inequities in the criminal justice system. It is confusing and frustrating, to both criminal offenders in custody and the public." *Id.* at 8880.

One commentator summed up the current sentencing provisions as follows: "[s]entencing is the one function given to judges on which there is, for all practical purposes, no law. There is not a hint of what the lawmakers want and no guidance as to what sentences they think are generally appropriate." Newman, *A Better Way to Sentence Criminals*, 63 A.B.A. J. 1562, 1564 (1977).

<sup>2</sup> See, e.g., A. PARTRIDGE & W. ELDRIDGE, *THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO THE JUDGES OF THE SECOND CIRCUIT* (1974); Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S.B. J. 163 (1973), reprinted in 119 CONG. REC. 6060 (1973); Kramer, *Different Judges, Different Justice*, WASHINGTON POST, Nov. 14, 1975, § A, at 19, col. 3.

In regard to sentencing disparity, one commentator stated that the current sentencing process operates "in an arbitrary, random, inconsistent, and unspoken fashion. Factors [such as] . . . guilty pleas, prior record, defendant's age and family circumstances are considered every day by sentencing judges, but in accor-

offender may receive a sentence of probation, while another, convicted of the very same crime and possessing a similar criminal history, may be sentenced to a lengthy term of imprisonment. Sentencing uncertainty has become the rule, caused, in large part, by the unfettered discretion of federal judges and the United States Parole Commission.<sup>3</sup> Federal law also arbitrarily specifies the maximum term of imprisonment for each federal offense. However, these maximums are usually prescribed without consideration of the relative seriousness of the crime as compared to similar offenses.<sup>4</sup>

Current law also lacks a full range of effective punishment options from which the judge may choose.<sup>5</sup> In too many cases,

---

dance with uncontrolled and divergent individual views. . . ." Frankel, *Lawlessness In Sentencing*, 41 U. CIN. L. REV. 1, 46 (1972).

<sup>3</sup> See 18 U.S.C. § 4203 (1976) wherein the Parole Commission is provided with the power to "grant or deny an application or recommendation to parole any eligible prisoner. . . ."; 18 U.S.C. § 4206 (1976), which provides a prisoner may be granted parole by the Commission "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner. . . . The Commission may [also] grant or deny release on parole . . . if it determines there is good cause for so doing. . . ."; 18 U.S.C. § 4207 (1976), which directs the Commission to consider reports on the potential parolee prepared by the facility in which the prisoner is confined, along with the prisoner's prior criminal record and the presentence investigation report. This section further provides for the Commission to consider "such additional relevant information concerning the prisoner . . . as may be reasonably available."

For an example of the discretion federal judges possess in relation to sentencing, see FED. R. CRIM. P. 32(c), wherein a judge may forego the use of a presentence investigation and report where "there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record."

See also 18 U.S.C. § 3575 (1976) (permitting a maximum 25 year sentence for "dangerous special offenders"); 18 U.S.C. § 3577 (1976) (placing no limitation "on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may . . . consider for the purpose of imposing an appropriate sentence").

<sup>4</sup> For example, there are approximately 130 theft offenses under current law, with maximum sentences ranging from no imprisonment and a \$500 fine, see 18 U.S.C. § 238 (1976), to ten years or imprisonment and a \$10,000 fine, see 18 U.S.C. § 641 (1976).

<sup>5</sup> Indeed, the imposition of alternative sentences appears to be unknown to current federal criminal law. Existing law speaks in terms of a sentence of imprisonment, the possibility of probation or the exacting of a fine, but there is no lock-step procedure or statutory mandate that such sentences be considered in the alternative by the sentencing judge at the time of the sentencing decision in each

judges are imposing sentences of imprisonment because they lack these statutory alternatives. The sentencing judge, confronted with an archaic criminal fine structure that prohibits imposition of the type of heavy fine that will be perceived by the criminal as something more than a minor cost of doing business, is left with no alternative but imprisonment.<sup>6</sup> The judge who realizes that a constructive community service program cannot be imposed as a condition of probation also opts for sending the defendant to jail. Such a system is perceived to be unfair, arbitrary, and, perhaps most importantly, ineffective in making the punishment fit the crime. Both the community, the victim, and the offender develop a cynical attitude towards the criminal justice system and its ability to mete out fair punishment.

I believe that the type of sentencing provisions absent from current law would be provided by the sentencing reforms of S. 1722, the Federal Criminal Code Reform Act of 1980, which is the focal point of this article.<sup>7</sup> My efforts are directed at sentencing reforms at the federal level. This is not to underestimate or

---

case.

<sup>6</sup> A dramatic exception is the provision of 21 U.S.C. § 848 (1976), which permits a fine of \$100,000 (\$200,000 if the defendant is a recidivist) for the operation of a continuing drug-trafficking enterprise. Under this section, fines of up to \$300,000 have been imposed on individuals charged in multiple-count indictments. See *United States v. Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

See also *NEW YORK TIMES*, March 20, 1973, at 26, col. 1, wherein Judge MacMahon of the Southern District of New York, after imposing the maximum available fines of \$75,000 on each of two millionaire defendants found guilty of evading \$761,000 in taxes, stated that he regretted the tax laws did not permit him to impose a higher fine on each defendant.

<sup>7</sup> S. 1722, 96th Cong., 1st Sess. (1979), is much more than a sentencing reform bill. Rather, it constitutes the most comprehensive and innovative effort yet undertaken by the Congress to draft a completely new federal criminal code. The scope of this article, however, does not go beyond the important sentencing provisions found in S. 1722. See *id.* at §§ 2001-2306.

For a more detailed discussion of the criminal code effort, in general, and my role, in particular, see *e.g.*, *Reform of the Federal Criminal Laws: Hearings on S. 1437 and S. 1722 Before The Subcommittee on Criminal Laws and Procedures of the Committee on The Judiciary*, 91st Cong. - 96th Cong. (1971-1979); Kennedy, *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 49 *FORDHAM L. REV.* 423 (1980); Kennedy, *Reforming the Federal Criminal Code: A Congressional Response*, 8 *N.C. CENT. L.J.* 1 (1977); Kennedy, *Introduction to a Symposium on Criminal Code Reform*, 47 *GEO. WASH. L. REV.* 451 (1979).

ignore similar problems arising in various states,<sup>8</sup> but, rather, reflects my own experience and understanding as a United States Senator. Although this article will stress sentencing reforms involving innovative sentencing alternatives, I do not intentionally slight the importance of reforming other aspects of the sentencing process. Indeed, S. 1722 provides comprehensive reform in these areas as well.<sup>9</sup> However, creative sentencing alternatives, involving various avenues other than the one leading to the federal penitentiary, are a striking illustration of how the current correctional system has failed and where reform is so desperately needed.

### THE CURRENT PROBLEM

In discussing the availability of sentencing alternatives under present law, one must distinguish at the outset between imprisonment and other available options. My criticism concerning the absence of flexibility in the imposition of probation or a criminal fine is not directed at a sentence of imprisonment. When it comes to the latter, it is ironic, but true, that current law provides not an absence of flexibility, but too much flexibility being placed in the hands of the sentencing judge.<sup>10</sup> As already indicated, however, such is not the case when one considers other options. Maximum fines are generally too low to be used as either effective punishment or as a deterrent.<sup>11</sup> Existing federal probation statutes suggest few possible probationary conditions and fail to provide

---

<sup>8</sup> Indeed, certain states are light years ahead of the federal government in relation to sentencing reform. *See, e.g.*, CAL. PENAL CODE § 1170 (West 1977) (specifying determinate sentences, allowing pre-imposition credit, requiring court's reasons for choice among three permissible sentences per violation); ILL. REV. STAT. ch. 38, §§ 1005-5-1, -5-3, -8-1 (1973) (the permissible range of sentences for each offense are classified); OR. REV. STAT. §§ 161.535, .555, .605, .615 (1977) (classification of offenses and permissible sentences of both determinate and indeterminate nature, depending on offense).

<sup>9</sup> *See supra* note 7.

<sup>10</sup> *See* FED. R. CRIM. P. 32(c); 18 U.S.C. § 3575 (1976); 18 U.S.C. § 3577 (1976).

<sup>11</sup> *See* note 6 *supra*, and accompanying text.

Present federal law suffers from large, inexplicable disparities in fine levels. *Compare* 18 U.S.C. § 371 (1976) (maximum prison term of five years and fine of up to \$10,000) *with* 18 U.S.C. § 372 (1976) (maximum prison term of six years and maximum fine of only \$5,000).

Also *compare* 18 U.S.C. § 1426 (1976) (maximum prison term of five years and a maximum fine of \$5,000) *with* 18 U.S.C. § 1546 (1976) (maximum prison term of five years and a maximum fine of only \$2,000).

wide ranging alternatives to all or part of a prison sentence.<sup>12</sup> Because current federal law limits the imposition of an order of restitution to cases where probation is the sentence,<sup>13</sup> restitution may not be used in conjunction with a sentence of imprisonment or the imposition of a fine. Nor do the present federal laws provide notification to the victims of crime; notification that may encourage these victims to seek civil damages against the offender. The law remains in the dark ages when dealing with the convicted offender who has served time in prison and is now trying to integrate himself back into society.<sup>14</sup> Finally, the sentencing scheme is conspicuously silent in establishing a statutory procedure for judicial consideration of sentencing alternatives. The present federal criminal code lacks provisions mandating that the sentencing judge consider all sentencing alternatives that might be imposed in a particular case.<sup>15</sup>

When it comes to promoting sentencing reform, therefore, emphasis must be placed in two distinguishable but interrelated areas. First, we need substantive sentencing reform to provide additional statutory alternative sentences designed to give the sentencing judge more available options and flexibility in imposing a sentence to meet the needs of the convicted offender. Second, is the necessity of procedural reform, guaranteeing that the court will consider various sentencing alternatives. This reform would help assure that new substantive sentencing options will be incorporated into federal law and that the court will consider these op-

---

<sup>12</sup> See 18 U.S.C. § 3651 (1976), which authorizes the imposition of probation "upon such terms and conditions as the court deems best." The maximum term of probation, including any extension, is five years for any offense.

<sup>13</sup> *Id.* This section also provides that as a condition of probation the defendant "[m]ay be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had. . . ."

<sup>14</sup> Existing civil and employment disabilities imposed on convicted offenders extend widely throughout federal statutes and regulations. See, e.g., 7 U.S.C. § 12a(2)(B) (Secretary of Agriculture authorized to deny convicted felons registration as future commission merchants and floor brokers); 12 U.S.C. § 1785(d) (prohibiting federally insured credit unions from employing, in any capacity whatsoever, any person convicted of an offense involving dishonesty or a breach of trust unless written authorization for the hiring is obtained from the Administrator of the National Credit Union Administration).

<sup>15</sup> Current law is limited to a mere mention of the possibility of suspending the imposition or execution of sentence and placing the defendant on probation in lieu thereof. See 18 U.S.C. § 3651 (1976).

tions in fashioning a fair and effective sentencing decision.

During the past decade, the debate over criminal sentencing reform has intensified in Congress, in state legislatures, and among academicians and corrections experts.<sup>16</sup> Generally, the battle lines have been drawn between those who advocate liberal use of imprisonment (with little or no express encouragement of sentencing alternatives) and those who urge that there be a general presumption against imprisonment and more innovative and imaginative alternatives to a sentence of imprisonment.<sup>17</sup> Having been in the forefront of this debate during the past five Congresses, I am convinced that this argument over whether or not there should be some form of general sentencing presumption is unnecessary, counterproductive, and ultimately self-defeating. It has polarized public opinion and has become an obstacle to the development of more sound and effective proposals.

Advocates of a presumption in favor of imprisonment point out that excessive use of probation and the imposition of short prison sentences have failed to provide the needed deterrent to criminal conduct.<sup>18</sup> Because the problem of crime has become a major concern of the American people, these advocates emphasize the necessity of providing a more effective deterrent to crime.<sup>19</sup> They cite the need to insure swift and fair punishment of convicted offenders in a time of rapidly rising crime rates. In effect, they urge the creation of a presumption against the utilization of probation, especially in cases involving more serious offenses. They also urge the imposition of mandatory prison sentences in certain cases.<sup>20</sup>

Many of those advocating a presumption against imprisonment concede that effective law enforcement may call for the im-

---

<sup>16</sup> See note 1 *supra*.

<sup>17</sup> See generally *Reform of the Federal Criminal Laws: Hearings on S. 1437 and S. 1722 Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary*, 91st Cong. - 96th Cong. (1971-1979).

<sup>18</sup> See e.g., *Reform of the Federal Criminal Laws: Hearings on S. 1437 Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary*, 95th Cong., 1st Sess. 8580 (1977) (statement of Senator Lloyd Bentsen); *Id.* at 8995 (statement of Ronald L. Gainer).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 8583 (statement of Senator Pete V. Domenici).

position of imprisonment in a wide variety of cases.<sup>21</sup> However, they make the argument that the correctional system in our nation has largely been a failure in preventing crime and that archaic prisons hardly hold much hope for the rehabilitation of the convicted offender.<sup>22</sup> Those who emphasize the non-incarcerative presumption also support the view that probation also will be more effective in achieving the rehabilitative purpose of sentencing.<sup>23</sup> These advocates acknowledge that imprisonment is obviously the preferred sentence if one is attempting to develop an effective means of incapacitating the offender. However, these critics note that when the dialogue shifts away from punishment and towards the notion of rehabilitation, such as educational opportunity, vocational training, or other correctional programs, then probation should be considered as preferable to jail.

S. 1722 circumvents this ultimately fruitless debate by establishing a completely new sentencing structure in which general presumptions are absent. Instead, specific sentencing guidelines guarantee more individual consideration by the sentencing judge in each case.<sup>24</sup> S. 1722 reflects the prevailing view of the Senate Judiciary Committee that the wisest course is to avoid general presumptions either for or against imprisonment and, instead, to allow a newly created sentencing commission to fashion guidelines for sentencing. These specific guidelines will be used by the courts in sentencing the convicted offender with the goal of limiting excessive discretion while allowing the full exercise of informed discretion in tailoring sentences to fit the circumstances of individual

---

<sup>21</sup> *Id.* at 9123 (statement of Marilyn Kay Harris); *Id.* at 9079 (statement of Nancy Crisman).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See S. 1722, 96th Cong., 1st Sess. § 2003(b) (1979).

Section 2003(b) provides:

[t]he court shall impose a sentence of the kind, and within the range, described in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.

Subsection (a)(4) provides:

[t]he court, in determining the particular sentence to be imposed, shall consider . . . the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(1) and that are in effect on the date the defendant is sentenced. . . .



cases. Thus, the new criminal code bill, while rejecting the notion of a general sentencing presumption, would, for the first time, integrate new sentencing alternatives into a new sentencing scheme.<sup>25</sup>

Sentencing reform is not a simple matter. True reform requires that a careful balance be struck between the historical need for individual consideration of the characteristics of both offender and offense and the desire to promote a more equitable, rational, and certain approach to sentencing. It is this balance between individual and public interests which S. 1722 attempts to strike.

### S. 1722 INNOVATIVE SENTENCING ALTERNATIVES

#### *Summary*

S. 1722, The Federal Criminal Code Reform Act of 1980, would make long overdue reforms in the federal criminal sentencing process.<sup>26</sup> It is the culmination of a reform effort begun over a decade ago by the National Commission on Reform of Federal Criminal Laws,<sup>27</sup> and championed in recent years by such experts as Marvin E. Frankel, Norval Morris, and Norman Carlson, Director of the Federal Bureau of Prisons.<sup>28</sup>

S. 1722 articulates, for the first time, the philosophical purposes to be served by a sentence: deterrence, incapacitation, punishment, and, to a more limited extent, rehabilitation, and sets

---

<sup>25</sup> *Id.* at § 2003(a)(3) which requires the judge to consider the kinds of sentences available. The provision was added by the Committee in its earlier consideration of S. 1437 to guarantee that the judge would consider all types of sentence that might be imposed in a particular case. In addition, the newly created Sentencing Commission in promulgating its guidelines and the sentencing judge in imposing a sentence are instructed to fashion a sentence that most appropriately suits the characteristics of each offense and offender.

<sup>26</sup> See S. 1722, 96th Cong., 1st Sess. (1979).

The principle sentencing provisions are set forth in chapters 20-23. Some of the important sentencing changes are contained in § 2301, which provides a new mechanism for the consistent grading of all offenses and in the course of doing so, generally lowers the maximum terms that can be imposed. In addition, § 2006 provides for new and innovative provisions regarding restitution from the defendant to the victim.

See also § 2201 (increased use of fines); § 2005 (defendant must give notice to victims of widespread fraud).

<sup>27</sup> See note 7 *supra*.

<sup>28</sup> See note 1 *supra*.

out the factors that a court should consider in exercising its sentencing discretion.<sup>29</sup> The bill creates a United States Sentencing Commission to develop a system of guidelines and policy statements designed to reduce sentencing disparity and to provide more rational and determinate sentencing practices.<sup>30</sup>

Necessary flexibility would be retained, however, by permitting a sentence to be imposed outside of the guidelines in an appropriate case.<sup>31</sup> S. 1722 would, however, encourage adherence to the guidelines by requiring that all sentences imposed outside the guidelines be accompanied by judicial statements specifically justifying the deviations.<sup>32</sup> In addition, sentences would be subject to appellate review,<sup>33</sup> providing a further check against unreasonable punishment.

S. 1722 also provides for determinate prison sentences.<sup>34</sup> Judges would be instructed to sentence defendants to terms that represent their best estimates, in light of the applicable guidelines, as to how long the offender should actually remain in prison.<sup>35</sup> Thus, the bill would eliminate the common judicial practice of imposing inordinately long sentences designed to ensure that the defendants remain incarcerated for at least one third of their sentences, as required by current law.<sup>36</sup>

The bill, therefore, preserves flexibility in sentencing while simultaneously proposing a procedure for the reduction of disparity through the development of more standardized procedures. In

---

<sup>29</sup> See S. 1722, 96th Cong., 1st Sess. §§ 2003, 2302(a) (1979).

<sup>30</sup> The father of the Sentencing Commission concept and its most articulate proponent is Judge Marvin Frankel. See M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 118-24 (1973).

<sup>31</sup> See S. 1722, 96th Cong., 1st Sess. § 2003(b) (1979).

<sup>32</sup> *Id.* at § 2003(c). A statement of reasons would be required whenever a sentence is imposed, but special detail would be mandated when the sentence falls outside the guidelines.

<sup>33</sup> *Id.* at § 3725.

<sup>34</sup> This issue has been debated at length. Some preferred to see the indeterminate sentence completely struck from S. 1722; others felt that such a step would go too far. Eventually, complete elimination of indeterminate sentences won out.

<sup>35</sup> See S. 1722, 96th Cong., 1st Sess. § 2302(a) (1979).

<sup>36</sup> 18 U.S.C. § 4205(a) (1976) reads as follows: "Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law."

most cases, the offender, the victim, and society all will know at the time of the initial sentencing decision what the prison release date will be. This increased fairness, and, just as importantly, the appearance of fairness, should reduce the widespread cynicism concerning the penal system.

Complementing this new sentencing framework in S. 1722 are numerous provisions designed to encourage the use of sentencing alternatives. Maximum fines have generally been substantially increased, with higher maximums provided for corporations and other organizational offenders than for individuals.<sup>37</sup> Offenders convicted of a misdemeanor resulting in death would face felony level maximum fines. Probation will be treated as a sentence for the first time rather than as a suspension of sentence, which is its present designation.<sup>38</sup> Numerous probationary conditions are suggested for the first time in order to encourage judges to use probation rather than imprisonment whenever appropriate.<sup>39</sup> Two inno-

---

<sup>37</sup> See S. 1722, 96th Cong., 1st Sess. § 2201 (1979), which establishes the general statutory authority for the imposition of a fine as a penal sanction. The maximum amount of the fine that may be imposed in a particular case depends: (1) on whether the offense is classified as a felony, misdemeanor, or infraction; (2) whether the offender is an individual or an organization; and (3) in the case of a misdemeanor, whether the offense resulted in the loss of human life. The authorized maximum fines are as follows:

- (1) if the defendant is an individual
  - (A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than \$250,000;
  - (B) for any other misdemeanor, not more than \$25,000; and
  - (C) for an infraction, not more than \$1,000, and
- (2) If the defendant is an organization
  - (A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than \$1,000,000;
  - (B) for any other misdemeanor, not more than \$100,000; and
  - (C) for an infraction, not more than \$10,000.

<sup>38</sup> Compare S. 1722, 96th Cong., 1st Sess. § 2101 (1979) with 18 U.S.C. § 3651 (1976) (providing for imposition and suspension of sentence as a necessary condition for probation).

<sup>39</sup> *Id.* at § 2103(b) sets forth a nonexclusive list of 19 discretionary conditions which the court may impose upon the defendant during the term of probation. Section 2103 (b)(20) expands the discretionary power of the court by providing that the defendant may be required to "satisfy such other conditions as the court may impose." Most of the conditions set out in this section have been used with approval in appropriate cases under current law. See, e.g., *United States v. Velasco-Hernandez*, 565 F.2d 583 (9th Cir. 1977) (detention for a period of time in a treatment facility as a condition of probation); *United States v. Wilson*, 469 F.2d 368 (2d Cir.

vative sanctions are also added to the new federal criminal code: an order of notice to victims of a fraudulent offense<sup>40</sup> and an order of restitution to victims of a federal crime who have suffered bodily injury, property damage, or some loss resulting from the offense.<sup>41</sup>

How will these sentencing alternatives work in practice? S. 1722 permits, as a condition of probation, that nights or weekends be spent in a correctional facility.<sup>42</sup> The bill also encourages use of community service as a viable alternative to jail in certain cases.<sup>43</sup> It permits the imposition of probationary conditions which are designed to prevent the reoccurrence of a specific offense, especially where the offense is job related,<sup>44</sup> and it continues the current law allowing a court to impose not only a fine, but also an order of restitution as a condition of probation.<sup>45</sup>

In addition to the creation of these new substantive sentencing alternatives, S. 1722 also provides for the first time a statutory procedure requiring the sentencing judge to consider all alternative sentencing possibilities.<sup>46</sup> For example, the bill expressly specifies that an individual offender must either be placed on probation, fined, or imprisoned as provided in those sections of the bill governing the imposition of such sentences.<sup>47</sup> It further states that a fine may be imposed in addition to any other sentence.<sup>48</sup> This is also true with regard to criminal forfeiture,<sup>49</sup> notice to vic-

---

1972) (support dependents and meet family obligations); *Bernal-Zazueta v. United States*, 225 F.2d 64 (1955) (no commission of crime during term of probation); *Stone v. United States*, 153 F.2d 331 (9th Cir. 1946) (payment of fine, refrain from specified employment).

<sup>40</sup> S. 1722, 96th Cong., 1st Sess. § 2005 (1979).

<sup>41</sup> *Id.* at § 2006; see note 51 *infra*.

<sup>42</sup> *Id.* at § 2103(b)(11).

<sup>43</sup> *Id.* at § 2103(b)(13).

<sup>44</sup> *Id.* at § 2103(b)(6). The condition may be imposed only if the occupation, business, or profession bears a reasonably direct relationship to the nature of the offense. The constitutional permissibility of such a condition has been recognized. See *Whaley v. United States*, 324 F.2d 356 (9th Cir. 1963), *cert. denied*, 376 U.S. 911 (1964).

<sup>45</sup> *Id.* at § 2103(b)(3). Such restitution may be ordered both as a separate sentence and as a condition of probation. See also note 51 *infra*.

<sup>46</sup> *Id.* at § 2003(a)(3). See text accompanying note 25 *supra*.

<sup>47</sup> *Id.* at § 2001(b).

<sup>48</sup> *Id.*

<sup>49</sup> S. 1722, 96th Cong., 1st Sess. § 2004 (1979) provides that a defendant found guilty of a racketeering related offense shall forfeit to the Government any

tims,<sup>50</sup> and restitution.<sup>51</sup>

Because section 2003(a)(3) requires the sentencing court expressly to consider all alternative sentences,<sup>52</sup> it would for the first time place the court on notice that a prison sentence need not be imposed in a case in which equally effective punishment alternatives would serve the same purposes as imprisonment while involving less restraints on liberty. This is not to say that incarceration could not be imposed, as one sentence to be considered by the judge. Furthermore, nothing in this section requires the judge to give a priority to nonincarcerative sentences.<sup>53</sup> Although section 2003(a)(3) treats all sentences equally, it reminds judges that imprisonment alternatives are readily available if appropriate. This section, coupled with the substantive reforms already discussed, will promote a more rational, deliberative, and fair sentencing procedure whereby judges would be required to consider not only the traditional sentence of imprisonment, but other alternatives as well.

### *Conditions of Probation*

S. 1722 specifies that probation may be imposed as a sentence in all but three instances: cases involving offenders who have committed the most heinous crimes,<sup>54</sup> special cases in which the

---

property:

- (1) constituting his interest in the racketeering syndicate or enterprise involved;
- (2) constituting a means by which he has exerted influence over the racketeering syndicate or enterprise involved;
- (3) constituting, or derived from, his proceeds from the racketeering syndicate or enterprise involved; and
- (4) if all of the property constituting, or derived from, the interest, means, or proceeds described in paragraphs (1), (2), and (3) cannot be located or identified, any other property of the defendant to the extent of the value of such unlocated or unidentified property.

<sup>50</sup> *Id.* at § 2005. The court may order a defendant convicted of an offense involving fraud or other "intentionally deceptive practices" to provide notice and explanation of the conviction to the victims of the offense.

<sup>51</sup> *Id.* at § 2006. In general, restitution may be ordered by the court to compensate the victim for actual expenses or losses resulting from bodily injury or property damage.

<sup>52</sup> *Id.* at § 2003(a)(3). See text accompanying note 25, *supra*.

<sup>53</sup> *Id.* at § 2003. See text accompanying note 24, *supra*.

<sup>54</sup> *Id.* at § 2101(a)(1) (precluding probation for a defendant found guilty of a class A felony).

statute specifically precludes probation as an alternative sentence<sup>55</sup> and, since probation is an alternative to imprisonment, cases in which a defendant has been sentenced to prison.<sup>56</sup> S. 1722 specifies that the only mandatory condition of probation is that the defendant not commit another federal, state, or local offense during his probationary term.<sup>57</sup>

In evaluating the new sentencing scheme found in S. 1722, one should compare it with current federal law. Today the federal code authorizes the imposition of probation "upon such terms and conditions as the court deems best."<sup>58</sup> The current code does not mandate the imposition of any probationary condition but only lists several specific conditions that may be imposed by the court.<sup>59</sup> These discretionary conditions are expanded in S. 1722. Additional conditions are listed for consideration by the court in individual cases. Thus, for example, the new code permits the judge to order the defendant to give notice of his conviction to victims of his offense in accord with the provisions of section 2005.<sup>60</sup> This gives the court the power to revoke probation if the offender fails to comply with this condition. The requirement of notice, a new substantive provision of S. 1722, becomes an enforcement tool of the court when it takes on the guise of a probationary condition.<sup>61</sup>

The code also permits the judge to impose, as a probationary condition, requirements relating to employment, schooling, and vocational training.<sup>62</sup> S. 1722 also includes a probationary condition that an individual defendant refrain from engaging in a specific occupation or profession, but it should be noted that this condition only applies in those cases where the stated occupation or profession bears a reasonably direct relationship to the nature of the offense.<sup>63</sup> Community service is also listed for the first time

---

<sup>55</sup> *Id.* at § 2101(a)(2).

<sup>56</sup> *Id.* at § 2101(a)(3).

<sup>57</sup> *Id.* at § 2103(a).

<sup>58</sup> 18 U.S.C. 3651 (1976).

<sup>59</sup> *Id.* Among the conditions which may be imposed at the discretion of the court are orders of restitution, fines, support of legal dependents, or participation in a community treatment center program.

<sup>60</sup> S. 1722, 96th Cong., 1st Sess. § 2103(b)(4) (1979). *See also* note 50 *supra*.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at § 2103(b)(5).

<sup>63</sup> *See* note 44 *supra*.

as a specific condition of probation.<sup>64</sup> This condition encourages continued experimentation involving community service in appropriate cases.

Whenever a decision is made by the sentencing court to impose probationary conditions, the bill mandates that the condition imposed must be "reasonably related to the factors set forth in section 2003(a) and (b) and [may] involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in Section 2003(b)."<sup>65</sup> Thus, the court cannot restrict a defendant's liberty unless such restricted probationary conditions are deemed necessary in a particular case.

In addition, S. 1722 enhances the power of courts to fashion effective fines by providing new maximum fine levels that are more realistic than those found in existing law.<sup>66</sup> These increased fines are aimed especially at white collar crime. The bill also gives judges more flexibility in fashioning sentencing options such as payment of large fines by installments in cases involving offenders who are simply unable to afford a lump sum fine.<sup>67</sup>

#### CIVIL DISABILITIES

Any discussion of creative sentencing alternatives must focus on the new provisions of S. 1722 which, for the first time, limit the current tendency to impose civil disabilities on the convicted offender. All too often the offender who has served time in jail and has been released finds that his conviction acts as a bar to obtaining employment or exercising other civil rights.<sup>68</sup> Such a bar inhibits reintegration of the offender back into society and undercuts whatever rehabilitation may have been effective while the offender was in prison. In a very real sense, the imposition of civil disabilities on those convicted of crime is ultimately self-defeating from society's point of view as well as the defendant's.

S. 1722 would change all of this. It would for the first time

---

<sup>64</sup> S. 1722, 96th Cong., 1st Sess. § 2103(b)(13) (1979).

<sup>65</sup> *Id.* at § 2103(b).

<sup>66</sup> See note 39 *supra*, and accompanying text.

<sup>67</sup> *Id.* at § 2202(c). It should be noted further that the court retains jurisdiction over the sentences of a fine and may modify or remit the sentence upon petition by the defendant. For the purposes of appeal, the sentence of a fine constitutes a final judgment. *Id.* at § 2202(b).

<sup>68</sup> See note 14 *supra*.

place a general restriction on the imposition of civil disabilities under color of federal law.<sup>69</sup> In regard to employment, the new code goes even further, prohibiting employment disabilities arising out of a federal conviction *whether the employment sought is at the federal, state or local level*.<sup>70</sup> The new code provides that, although certain civil disabilities still may be imposed in particular cases, there is a heavy burden against the imposition of such disabilities.<sup>71</sup> The code emphasizes that they may not be applied without specific justification and that a reasonable relationship must exist between the disability and the offense for which the offender was convicted.<sup>72</sup>

### CONCLUSION

The inequities and arbitrariness of current criminal sentencing practices constitute major flaws in the existing criminal justice system. Correcting the capriciousness of sentencing and developing new statutory sentencing alternatives are not panaceas for all of the problems which today confront the administration of criminal justice at the federal, state, and local levels. The system continues to strain under the weight of overloaded courts, archaic prisons, and outdated and confusing criminal codes.

However, S. 1722 meets the critical challenge of comprehen-

---

<sup>69</sup> S. 1722, 96th Cong., 1st Sess. § 4031 (1979) provides that an imposition of civil disabilities will be allowed only if:

- (a) the offense occurred in connection with the particular right, privilege, or opportunity withheld by reason of that disability; or
- (b) there is a substantial probability, in light of the offense and other relevant circumstances, that the person so convicted will abuse the right, privilege, or opportunity withheld by reason of that disability.

<sup>70</sup> *Id.* at § 4032(a).

<sup>71</sup> *Id.* Denial of employment or of a professional or occupational license will be countenanced only if:

- (1) there is a reasonable relationship between the conduct constituting the offense and the employment, and the appropriateness of considering the relationship has not been mitigated by the passage of time; or
- (2) there are other circumstances that, in combination with the conduct constituting the offense, suggest convincingly that the person is unsuitable to engage in the employment, or that others may be more suitable.

<sup>72</sup> *Id.* at § 4032(b) provides that a denial of employment or access to employment must be accompanied with a statement to the applicant of the reasons for the denial.



sive sentencing reform. The bill's provisions are designed to curb judicial sentencing discretion, eliminate the indeterminate sentences, phase out parole release, and make criminal sentencing fairer and more certain. S. 1722 provides, for the first time, a system of creative, alternative sentencing; along with a ready-made blueprint for judges to follow which enhances the use of the criminal fine and probation and encourages the innovative use of restitution, forfeiture, and notice to victims. This current reform effort constitutes the most important attempt in two hundred years to fashion a truly effective sentencing scheme.

Our agenda remains a large one in this area. An enormous challenge confronts us in determining the appropriate sentence to be imposed on the convicted offender. We must no longer think in terms of simplistic solutions. We must replace the unacceptable, present sentencing law with more practical and workable alternatives. S. 1722 elevates the quality of debate surrounding the central issue of sentencing in our society and sets new standards by which to judge future efforts. The healthy debate surrounding S. 1722 will go a long way to assure a final product that constitutes a major reform in the punishment of the convicted offender.