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INTRODUCTION

Federal criminal sentencing has recently been subject to considerable public as well as legislative scrutiny. For the third time since 1977, the U.S. Senate Judiciary Committee has approved a comprehensive bill to revise and update the federal criminal code,\(^1\) which includes provisions for restructuring current federal sentencing practices.\(^2\) This bill, along with other proposals currently before both Houses of the Congress, is a legislative response to two perceived social needs. The first of these is the long standing concern with the basic inequities and irregularities present in the federal indeterminate sentencing system.\(^3\) The second is the current public outcry for governmental relief from ever increasing rates of crime and violence.\(^4\)

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1. Cohodas, *Senate Judiciary Approves Criminal Code Bill*, CONG. Q., Nov. 21, 1981, at 2287. The Senate Judiciary Committee gave its approval to S. 1630, 97th Cong., 1st Sess. (1981), on Nov. 18, 1981. *Id.* In 1980, both the House and Senate Judiciary Committees reported criminal code reform bills, but neither the full House nor the Senate considered them. In 1977, the full Senate passed a criminal code reform package, but the measure was tabled in a House subcommittee. *Id.*


   The term "indeterminate sentencing" is used to describe any sentencing procedure where the court does not set a precise term of imprisonment upon conviction, but instead sentences the offender to a range of years (e.g., one to 10 years), with the precise date of release to be determined by a parole board or comparable agency at a later date. Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle*, 1980 DUKE L.J. 1103, 1103 n.1 (hereinafter cited as Gardner).

   Current federal parole practices are governed by Chapter 311 of the U.S. Code of Crimes and Criminal Procedure, 18 U.S.C. §§ 4201-4218 (1976). Under 18 U.S.C. § 4205(a), prisoners sentenced to a definite number of years are eligible for parole after serving one-third of the term, or in cases of imprisonment for life or in excess of 30 years, after serving ten years. Under 18 U.S.C. § 4205(b), all other prisoners sentenced to more than one year in prison are eligible for parole: (1) after serving the minimum sentence in the range set by the court, which may not exceed one-third of the maximum, or (2) at the discretion of the parole commission where the court has so provided.

This article will first review current federal sentencing proposals. It will then examine their design, and the methods proposed to achieve their goals. The article will conclude with an analysis of the potential efficacy of these proposals.

AN OVERVIEW OF PENDING FEDERAL LEGISLATION

Most pending federal sentencing proposals fall into two categories: determinate sentencing legislation and mandatory minimum sentencing legislation. The bills in each of these categories are

1981, U.S. Department of Justice, at 21 [hereinafter cited as Task Force Report]. The Task Force concluded after hearings in seven major cities that “[M]illions of our fellow citizens are being held hostage by their fear of crime and violence.” Id. at 1.

One commentator, however, criticizes the public for its reliance on a governmental remedy to this problem:

The public has been led to expect too much from the criminal justice system, and certainly too much from sentencing. The criminal justice system controls the largest power the government exercises over its citizens and is of essential constitutional importance, but its reform, if consonant with a due respect for human rights, will make no more than relatively small differences to the incidence of crime and delinquency. Those phenomena respond to deeper social, cultural, economic and political currents beyond the substantial influence of the criminal justice system.

Morris, Conceptual Overview and Commentary on the Movement Toward Determinacy, in Determinate Sentencing: Reform or Regression 5 (Nat'l Inst. of Law Enforcement and Criminal Justice 1977) [hereinafter cited as Morris].

5. “Determinate sentencing” generally refers to a sentencing system in which the discretion in fixing the length of the offender's prison stay is removed from the hands of the judge and parole board, and is replaced by narrow guidelines promulgated either by a legislature or some other authority. Gardner, supra note 3, at 1104 n.6.

6. The distinction between determinate and mandatory minimum sentences is critical, as the following excerpt illustrates.

Proposed determinate sentencing schemes have taken two forms: presumptive sentencing and mandatory sentencing. Under presumptive sentencing, statutes classify crimes according to seriousness and assign to each category a fixed, presumptively proper, sentence. That sentence must be imposed upon each convicted offender, except that the sentencing authority is allowed - within specified limits or percentages - to reduce or enhance the presumptive sentence if aggravating or mitigating circumstances are present. Discretionary release through parole or suspension of sentence is abolished, and the offender serves the entire term, subject perhaps to “good time” reductions necessary to maintain prison discipline.

Unlike presumptive systems, pure mandatory models permit no deviation from the fixed penalty even if “aggravating or mitigating” circumstances exist. As with presumptive sentencing, the offender is required to serve the full sentence without the possibility of discretionary parole release, suspension of the sentence, or probation, but with some deviations from the fixed sentences for “good time” permitted. Variants of mandatory sentencing require the offender to serve a minimum statutory term without the possibility of lesser punishment or discretionary release, but permit judicial discretion to impose, up to a statutory maximum, a sentence exceeding the prescribed minimum term.

Gardner, supra note 3, at 1110. Professor Gardner considers presumptive sentencing and
designed to accomplish very different purposes. Determinate sentencing proposals aim at ending gross disparity in sentencing of criminal offenders in two ways. The proposals narrowly circumscribe the range of penalties a judge may administer and limit or eliminate the ability of a parole board to shorten the offender's prison stay. The goal of the determinate sentencing approach is to achieve more uniform and equitable sentencing for all offenders. Conversely, mandatory minimum sentencing bills seek uniformity only in the sense that they call for rigid and unavoidable prison sentences for offenders. Proposals for mandatory minimum sentences are designed not to reform inequities in the sentencing process, but rather to insure terms of imprisonment sufficient to deter specifically the individual offender and to deter generally other offenders. These conceptual differences, therefore, indicate mandatory minimum sentences to be two forms of determinate sentencing. However, Senator Edward Kennedy, who has written many articles in support of a revised federal criminal code, generally refers to the sentencing models prescribed in S. 1630 and its historical predecessors as "determinate," and distinguishes them from mandatory sentences. Kennedy, Toward A New System of Criminal Sentencing: Law With Order, 16 Am. Crim. L. Rev. 353, 369-71 (1979) [hereinafter cited as Kennedy]. As will become clear from the balance of the text, the primary difference between the "presumptive" system and the system Kennedy refers to is that under S. 1630 an independent government agency would set the presumptive sentences, while in the system described by Professor Gardner, the legislature does. Therefore, this article will refer to "determinate" sentencing in a manner synonymous with "presumptive sentencing" and "guideline sentencing." This will be distinguished from the sentencing methods described as mandatory minimum sentencing.

7. Kennedy, supra note 6, at 370. See also infra note 13 and accompanying text for a discussion of sentence disparity.

8. One commentator, however, questions this promise:

The press, and its willing acolytes, the politicians, frequently promise substantial diminution of crime and delinquency through a hardening of sentencing practice. I'm sure you are not deceived but many people are. There is much wrong with the American criminal justice system but its leading defect is not, as the tabloids suggest, the sentimentality of the judiciary. In many days marches through the criminal courts of this country I have found few bleeding-hearted judges. Their tendency in terms of physiognomy is toward the prognathous jaw and the hard nose, Lombrosian stigmata not characteristic of the sentimental softies that the press describe.

Though the allegation of excessive judicial leniency in sentencing is ill-founded, it remains politically important to sentencing reform, influencing the votes of those legislators who share or reflect the public view that the increase in crime over the past decade is in large part attributable to the failure of judges to impose sufficiently severe sentences.

Morris, Conceptual Overview and Commentary on the Movement Toward Determinacy, Special Conference on Determinate Sentencing, University of California, Berkley, 1978, Law Enforcement Assistance Administration, U.S. Department of Justice (1978), at 4-5 [hereinafter cited as Conceptual Overview]. Norval Morris was then Dean of the School of Law of the University of Chicago.
that the sponsors of these two types of legislation are addressing different sentencing problems.

**Determinate Sentencing and Senate Bill 1630**

Senate bill 1630 (S. 1630) presents the ninety-seventh Congress with an opportunity to adopt a system of determinate sentencing. This bill, entitled the Criminal Code Reform Act of 1981, addresses the problem of sentencing disparity, and creates a United States Sentencing Commission. The proposed commission, an independent agency of the judiciary, is charged with formulating sentencing guidelines for use in district courts. The sentencing reform provisions of S. 1630 have been considered previously by the Congress in past criminal code reform packages.

The sentencing provisions of S. 1630 seek to curtail the wide discretion currently allowed federal judges in criminal sentencing. Judicial discretion has been criticized as permitting arbitrary, ad hoc dispensations of justice. Criminal penalties are generally designed to deter potential offenders by making the punishment for the crime outweigh any expected gain. Deterrence theory is commonly divided into "general deterrence," which refers to the ability of a penalty to deter potential offenders as a class, and "specific" or "special" deterrence, which refers to the ability of the penalty to prevent the person punished from committing the crime again. F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 72.


11. Kennedy, supra note 6, at 372. This article contains an excellent discussion by Sen. Kennedy of why the Sentencing Commission is a needed step in reformation of the federal criminal justice system. See also Kennedy, Symposium on Sentencing, Part I — Introduction, 7 Hofstra L. Rev. 1 (1978) [hereinafter cited as Kennedy, Sentencing Symposium].

12. The sentencing reform provisions of S. 1630 are largely taken from the proposed Criminal Code Reform Act of 1979, S. 1722, 96th Cong., 1st Sess. (1979), which in turn, was based on the proposed Criminal Code Reform Act of 1978, S. 1437, 95th Cong., 2d Sess. (1978). These bills were the end result of 25 years of debate in the area of federal criminal sentencing reform. Kennedy, supra note 6, at 355 n.7. Although S. 1630 is a comprehensive criminal code reform bill, the scope of this article is limited to a consideration of the sentencing provisions of the bill.

A parallel bill, S. 1555, 97th Cong., 1st Sess. (1981), containing only the sentencing provisions of S. 1630, was also introduced by Senators Kennedy and Thurmond. This was evidently done to increase the chances of passing these provisions should S. 1630 be defeated. See TASK FORCE REPORT, supra note 4, at 57.

13. Kennedy, Sentencing Symposium, supra note 11, at 1-2. The existence of sentencing disparity in the federal criminal justice system is rarely questioned. See Orland, From Ven-
sons for the sentencing disparity problem: the absence of an articulated philosophy of the purposes of incarceration, and the present nature of the federal indeterminate sentencing system which stresses the rehabilitative aspects of incarceration. Under the indeterminate sentencing system, the trial judge imposes the greatest possible time to be served by the defendant. The actual time served is determined by the United States Parole Commission, which, after service of one-third of the sentence, decides whether the prisoner is rehabilitated and therefore fit to reenter society. With the exception of limitations in certain specialized sentencing statutes, such as those for “dangerous special offenders,” “dangerous special drug offenders,” and certain age-grouped offenders, both the sentencing judge and the Parole Commission have wide discretion in setting sentence maxima and determining release dates. Proponents of S. 1630 assert that, due to the failure of prison rehabilitation programs and the inability of parole boards to assess the effectiveness of rehabilitation efforts, indeterminate

geance to Vengeance: Sentencing Reform and the Demise of Rehabilitation, 7 HOFSTRA L. REV. 29, 32 (1978); Skrivseth, Abolishing Parole: Assuring Fairness and Certainty in Sentencing, 7 HOFSTRA L. REV. 281, 284-94 (1978). In examining sentencing disparity, the U.S. Senate Judiciary Committee found:

For example, in 1974, the average federal sentence for bank robbery was eleven years, but in the Northern District of Illinois it was only five and one-half years. Similar discrepancies in federal sentences for a number of different offenses were found in a landmark study by the United States Attorney’s Office for the Southern District of New York. U.S. Senate, Judiciary Committee, Report on the Criminal Code Reform Act of 1979, S. 1722. S. REP. No. 553, 96th Cong., 2d Sess. at 916-17 (1980).

For an outstanding empirical study of sentencing disparity, see Clancy, Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity, 72 J. CRIM. L. 524 (1981).

14. See TASK FORCE REPORT, supra note 4, at 56; S. REP. No. 553, 96th Cong., 2d Sess. at 915-16; and Kennedy, supra note 6, at 364-67.

15. Id.

16. Id. See also supra note 4.


sentencing has lost all justification and should be eliminated.\footnote{21}

The sentencing provisions of the Criminal Code Reform Act reflect these concerns and attempt to solve the perceived indeterminate sentencing problems. The bill would create a United States Sentencing Commission consisting of seven voting members.\footnote{22} The President, with the advice and consent of the Senate, would appoint four members.\footnote{23} No more than three of these four could belong to the same political party.\footnote{24} The bill requires the President to select the other three members of the commission from a list of at least ten judges provided by the U.S. Judicial Conference.\footnote{25} The Attorney General, or his designee, would be an ex officio, nonvoting eighth member.\footnote{26} The bill requires the commission to create sentencing guidelines for district courts to eliminate unwarranted sentencing disparity, provide certainty and fairness, and promote the purposes of incarceration.\footnote{27} The purposes of incarceration are articulated as deterrence, public protection, just punishment, and rehabilitation.\footnote{28} Rehabilitation, however, is considered an appropriate goal only for those not sentenced to prison terms.\footnote{29}

The commission would be responsible as well for defining categories of offenses and determining a sentencing range for each category.\footnote{30} When imposing a sentence, a district judge would set a

\begin{footnotes}
\item[21] Id. at 912. Accord Task Force Report, supra note 4, at 56, which quotes the Judiciary Committee's language.
\item[22] S. 1630, 97th Cong., 1st Sess. § 991.
\item[23] Id. at 320-21.
\item[24] Id.
\item[25] Id.
\item[26] Id. at 321.
\item[27] Id.
\item[28] The purposes for sentencing are set out in § 101(b) of S. 1630, which provides that sanctions should:
\begin{itemize}
  \item (1) deter such [criminal] conduct; (2) protect the public from persons who engage in such conduct; (3) assure just punishment for such conduct; and (4) promote the correction and rehabilitation of persons who engage in such conduct.
\end{itemize}
\item[29] See S. 1630, 97th Cong., 1st Sess. § 994(j) (1981), which provides:
The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.
The Attorney General's Task Force concisely stated the reason why rehabilitation is inappropriate:
[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting and is now quite certain that no one can really detect when a prisoner does become rehabilitated.
\item[30] S. 1630, 97th Cong., 1st Sess. § 994 (1981). The Commission is charged with the
\end{footnotes}
sentence within the range set by the commission, unless a different result would be warranted by the presence of aggravating or mitigating circumstances which, in the court’s opinion, were not considered by the commission in formulating its policy statements and guidelines.\textsuperscript{31} The legislation further requires the court to specifically state its reasons for awarding whatever sentence it concludes is proper.\textsuperscript{32}

In cases where the sentence imposed is not the result of a plea bargain arrangement and is more severe than the commission’s guidelines, the defendant may appeal an otherwise final sentence on this basis.\textsuperscript{33} If the sentence is less harsh than that recommended in the commission’s guidelines and is not the result of a plea bargain, the government, after approval by either the Attorney General or the Solicitor General, may also appeal.\textsuperscript{34} In either case, after a court of appeals considers the district court’s reasons for imposing the sentence, it may in its discretion either affirm, remand for further proceedings, remand for imposition of an adjusted sentence, or simply impose a new sentence.\textsuperscript{35} Following any appellate review, the defendant would serve the entire sentence, less any good behavior allowances given at the rate of thirty-six days per each year of acceptable performance as determined by the Bureau of Prisons.\textsuperscript{36} Parole, as it exists now, would be phased out

\textsuperscript{31} S. 1630, 97th Cong., 1st Sess. § 994(c)-(e) (1981).
\textsuperscript{32} Id.
\textsuperscript{33} S. 1630, 97th Cong., 1st Sess. § 2003(b) (1981).
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} S. 1630, 97th Cong., 1st Sess. § 3824 (1981). The Bureau of Prisons is currently governed by chapter 303 of the present Federal Criminal Code. 18 U.S.C. §§ 4041 & 4042 (1976). The Bureau of Prisons controls the operation of all federal correctional facilities. 18 U.S.C. § 4042(1) (1976). Under the new criminal code proposed by S. 1630, the Bureau of Prisons would be governed by a new chapter 37, to be added to Title 28 of the United States Code. Under S. 1630, the rules of good behavior for prison inmates would be issued to the prisoner by the Bureau, subject to their approval by the Attorney General. Id.
over a five year period.\textsuperscript{37}

S. 1630 rejects rehabilitation as a purpose for incarceration.\textsuperscript{38} Nonetheless, the bill is not intended to increase the federal prison population or to increase sentencing harshness.\textsuperscript{39} Instead, S. 1630 provides that the commission should not formulate guidelines which would flood the correctional system,\textsuperscript{40} and that the guidelines should reflect the time now actually being served by most offenders.\textsuperscript{41}

\begin{itemize}
\item \textsuperscript{37} S. 1630, 97th Cong., 1st Sess., tit. IV, § 134(b)(1) (1981). This section provides that chapter 311 of Title 18, United States Code, which governs parole release, see supra note 3, will remain in effect for five years after the effective date of the legislation for individuals convicted of an offense prior to the effective date of S. 1630.
\item \textsuperscript{38} See supra note 29. It must be noted that although Kennedy and the other proponents of S. 1630 believe that an offender should not be sentenced to a term of imprisonment for the purpose of rehabilitation, this does not necessarily mean that prison rehabilitation programs must end. Sentencing an individual to prison for rehabilitation is conceptually distinct from attempting to rehabilitate him once he is already there. S. 1630 still directs the Bureau of Prisons to provide rehabilitative programs for inmates. S. 1630, 97th Cong., 1st Sess. § 571(c)(4) (1981). Nevertheless, rehabilitation is a much lower priority under S. 1630.
\item \textsuperscript{39} Consider the remarks of Prof. Henry Glick:
\begin{quote}
The new criminal sentencing policies seem to reflect fundamental changes in elite attitudes about the purposes and performance of the criminal justice system, indicating a shift in support from the rehabilitation and treatment models of sentencing to explicit public endorsement of punishment, retribution and deterrence. Increasingly, lawmakers (with perceived support from their constituents) are becoming suspicious of the criminal justice system’s ability to rehabilitate and frustrated over the value of probation and lenient sentencing. Their new open endorsement of punishment-as-policy is an important transformation, for it sheds completely the goal of rehabilitation, obliterating any expectation, however small, that criminals can be reformed. If rehabilitation had little chance for success in the past due to lack of resources and genuine commitment, then it has practically none in the foreseeable future since it rapidly is becoming legitimate to explicitly opt for retribution.
\end{quote}
\item \textsuperscript{40} Kennedy, supra note 6, at 378.
\item \textsuperscript{41} S. 1630, 97th Cong., 1st Sess. § 994(g) (1981), provides that the commission shall take into account:
\begin{quote}
[T]he nature and capacity of the penal . . . facilities and services available in order not only to assure that the most appropriate facilities and services are utilized to fulfill the applicable purposes but also to assure that the available capacities of such facilities and services will not be exceeded.
\end{quote}
\item \textsuperscript{41} S. 1630, 97th Cong., 1st Sess. § 994(1) (1981), provides:
\begin{quote}
The Commission in initially promulgating guidelines for particular categories of cases, shall be guided by the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served, unless the Commission determines that such a length of term of imprisonment does not adequately reflect a basis for a sentencing range that is consistent with the purposes of sentencing described in subsection 101(b) of title 18, United States Code.
\end{quote}
\end{itemize}
Mandatory Minimum Sentencing Legislation

In contrast to S. 1630, a large amount of pending federal legislation is designed specifically to incarcerate more defendants for longer periods of time. These bills seek to create stiff, mandatory minimum prison sentences for certain federal felonies.\footnote{It is unclear, in fact, whether this would increase or decrease the average prison stay. A study conducted by the Library of Congress on S. 1437, a predecessor of S. 1630, showed an actual decrease in prison terms. Sen. Kennedy noted:}

Mandatory minimum sentencing proposals are designed to enhance the severity of existing sentencing provisions, as well as to limit the ability of the district courts to place defendants on probation, suspend sentences, or order the defendant's multiple sentences to run concurrently. In addition, the elimination of parole is often advocated.\footnote{As of the December, 1981 recess, at least 39 pieces of legislation dealing specifically with criminal sentencing were before Congress. Of these 39 bills, 36 were designed, in some way, to enhance the certainty and severity of current sentencing provisions. This does not include bills designed to create new offenses, e.g., H.R. 1906, 97th Cong., 1st Sess. (1981) (Fish, R., N.Y. 25D), a bill designed to create a new federal offense for the robbery of a pharmacy.}

Mandatory minimum sentencing has been proposed for a number of different offenses. The proposals range from bills to enhance penalties for violations of the Controlled Substances Act,\footnote{For specific examples of these proposals, see infra text accompanying notes 59-79.} to legislation creating a mandatory death penalty for the assassination of the President or the Vice President and for the murder of any federal officer or employee.\footnote{H.R. 3312, 97th Cong., 1st Sess. (1981) (Smith, R., Ala. 6D) seeks a mandatory death penalty for the offenses described in the text.} The majority of the bills, however, focus on drug offenses.

\footnote{It appears as though the only limitation upon the legislature's ability to pass increasingly harsh sentences is the prohibition against "cruel and unusual punishments" contained in the eighth and fourteenth amendments. However, the argument that a particular term of imprisonment is unconstitutionally disproportionate to the crime is not likely to be favorably received by the courts in light of Rummel v. Estelle, 445 U.S. 263 (1980). In Rummel, the Supreme Court upheld a Texas recidivist statute under which the petitioner was sentenced to life imprisonment for his third felony conviction, even though the three felonies
on federal felonies committed with firearms. In particular, virtually all of these bills are designed to alter or amend section 924(c) of Title 18 of the United States Code, which already enhances sentences for crimes committed with firearms. These modifications in the mandatory minimum sentencing bills seek to insure imprisonment for the convicted offender. Because of its almost

were fraudulent use of a credit card, false pretenses, and check forgery, which netted the offender a total of only $229.11 in proceeds. After distinguishing capital punishment cases, Justice Rehnquist stated that for crimes classified as felonies, "[T]he length of the sentence actually imposed is purely a matter of legislative prerogative." 445 U.S. at 274. Justice Rehnquist qualified this statement somewhat in a footnote, but the import of the opinion as a whole is that decisions relating to the length and appropriateness of imprisonment are legislative, not judicial. 445 U.S. at 274 n.11.

46. Of the 36 sentencing bills referred to in note 42 supra, 31 were designed to increase penalties for federal gun crimes. See infra note 47 for a listing of these proposals.

The Reagan Administration has voiced its support for mandatory penalties for gun crimes, and has also voiced tentative support for a package of bills designed to provide sentences of life imprisonment for crimes committed with a gun if the defendant has two prior state convictions for armed robberies or burglaries. Coates, Armed Habitual Criminals Targets of Sentencing Bill, Chicago Tribune, Oct. 25, 1981, § 1, at 2 [hereinafter cited as Coates].

Mandatory life sentences for three-time burglary/robbery offenders would be governed by S. 1688, S. 1689, and S. 1690, 97th Cong., 1st Sess. (1981), and all are sponsored by Sen. Arlen Specter (R., Pa.). S. 1688 would create a federal statute providing a penalty of life imprisonment for a felony committed with a gun if the defendant had two previous state convictions for armed burglaries or robberies. S. 1689 would allow federal prisons to assume custody of individuals sentenced to terms of life imprisonment under state habitual criminal statutes. S. 1690 would deny parole to federal prisoners who could not demonstrate both literacy and a marketable job skill.

The Reagan Administration has also voiced support for mandatory minimum sentences for the use of a firearm in the commission of a federal felony. Coates, supra this note. This position is consistent with Recommendation 17 of the Attorney General's Task Force Report on Violent Crime. Task Force Report, supra note 4, at 29-33.

47. Of the 39 bills discussed in note 46, 28 are specifically designed to affect 18 U.S.C. § 924(c) (1976). They are: S. 903 (Quayle, R., Ind.), S. 909 (Thurmond, R., S.C., and Zorinsky, D., Neb.), S. 964 (Heflin, D., Ala.), S. 1185 (Mitchell, D., Maine), H.R. 27 (Anderson, D., Cal. 32D), H.R. 35 (Annunzio, D., Ill. 11D), H.R. 199 (Duncan, R., Tenn. 2D), H.R. 328 (Holt, R., Md. 4D), H.R. 526 (Roe, D., N.J. 8D), H.R. 527 (also by Roe), H.R. 843 (Oberstar, D., Minn. 8D), H.R. 871 (Gradison, R., Ohio 1D), H.R. 1076 (Hinson, R., Miss. 4D), H.R. 1110 (Hollenbeck, R., N.J. 9D), H.R. 1117 (Lagomarsino, R., Cal. 19D), H.R. 1444 (Sawyer, R., Mich. 5D, and Lungren, R., Cal. 34D), H.R. 1533 (Mottl, D., Ohio 23D), H.R. 1587 (Hillis, R., Ind. 5D), H.R. 1803 (Collins, R., Tex. 3D), H.R. 2061 (Traxler, D., Mich. 8D), H.R. 2127 (Goodling, R., Penn. 19D), H.R. 2388 (also by Collins), H.R. 3096 (Michel, R., Ill. 18D), H.R. 3200 (Rodino, D., N.J. 10D, et al.), H.R. 3623 (Hertel, D., Mich. 14D), H.R. 4076 (St. Germain, D., R.I. 1D), H.R. 4245 (Cotter, D., Conn. 1D), and H.R. 4874 (also by Sawyer), all 97th Cong., 1st Sess. (1981). H.R. 3200 should be distinguished as including its proposed amendments to 18 U.S.C. § 924(c) as part of a comprehensive reform of the federal gun control laws.

48. The actual provisions of these bills are discussed extensively in text accompanying notes 59-80 infra.
uniform presence in current legislation, the specific proposals for amending section 924(c) provide a useful model for examining some of the more general features of mandatory minimum sentencing bills.49

History of Section 924(c)

Section 924(c) of Title 18 was created by the Omnibus Crime Control and Safe Streets Act of 1968.50 Subsection (c) was added to section 924 by the Gun Control Act of 1968.51 Section 924(c) is an enhancement statute and creates an offense separate and distinct from the underlying felony. It provides that, in addition to the base penalty prescribed for a federal felony, an additional term of imprisonment is to be imposed if the defendant used or carried a firearm during the commission of the felony. For the first offense under section 924(c), the additional term of imprisonment is from one to ten years. For a second or subsequent offense, the additional sentence is from two to twenty-five years. The court may not impose a suspended or probationary sentence for the second or subsequent offense, nor may it impose a penalty under section 924(c) to run concurrently with another sentence in such a case.52

Section 924(c) in its present form is frequently criticized as failing to provide a strong deterrent to the use of a firearm in a federal felony.53 Since the court may allow suspended, probationary, or

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49. 18 U.S.C. § 924(c) (1976).
52. 18 U.S.C. § 924(c) (1976) provides as follows:

Whoever —
(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States
shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment imposed for the commission of such felony.
53. E.g., the remarks of Rep. Annunzio (D., Ill. 11D) in support of his proposal, H.R. 35, to amend § 924(c), in which he stated:

As we have discovered through experience, leaving the length of the prison sen-
concurrent sentences for the first offense, imprisonment under section 924(c) is not certain. In addition, prosecutorial plea bargaining and opportunities for parole further reduce the likelihood of a substantial prison stay for the offender, regardless of whether the offense is the first or second. Proponents of bills to amend section 924(c) argue that it does not currently provide the certainty of a substantial prison sentence needed to deter potential offenders and to protect society.

The group of bills proposed to revise section 924(c) are similar in form and effect. The proposals all seek to eliminate or sharply reduce any exercise of discretion which might prevent the imposition of a mandatory minimum prison term under section 924(c) by abolishing various combinations of suspended sentences, concurrent sentences, probationary sentences, parole, and plea bargaining. The only major difference in the bills is the length of the minimum prison term they prescribe. The bills range from a proposal which retains the current penalties of one to ten years for the first offense and two to twenty-five for the second, to one proposal which calls for a five to ten year penalty for the first offense and sentence to the discretion of the court often allows offenders to return to society after having received few, if any, penalties for their crimes, free to resume their criminal activity. Because of the uncertainty of imprisonment, the offender knows the chances are great that even if convicted he will spend little time in prison, and once again he will be out on the streets victimizing innocent, hardworking, productive members of society.

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54. See supra note 52.
55. In support of H.R. 4874, Rep. Sawyer stated in his Extension of Remarks:

[I]t has come to my attention that prosecutors can trade off the criminal penalties of Section 924(c) in order to obtain a plea of guilty on the felony committed with the firearm . . . I feel this practice totally defeats the deterrent effect of Section 924(c). The whole point of the statute is to punish a criminal for a felonious act and for using a gun during the act. If the use of a gun is not punished because the charge is bargained away, then there is nothing to inhibit criminals from using guns.


56. For example, in support of H.R. 35, Rep. Annunzio remarked:

I do not regard my bill as the solution to our society's problems with crime. I do believe, however, that my proposal will be more effective in putting those who are a danger to our society in prison than our present system. Under my proposal, the risk of imprisonment is increased by the certainty of punishment, whereas, under the present law the chance exists that the person convicted of a crime will not have to serve any time at all. There is no certainty of punishment and very little risk which might serve to deter unlawful behavior.

ten years to life for the second.\textsuperscript{57} A representative sample of these bills will next be examined in order to illustrate the various devices proposed to increase the likelihood of imprisonment under this criminal statute.\textsuperscript{58}

**Examples of Proposed Amendments**

S. 909, sponsored by Senators Thurmond and Zorinsky,\textsuperscript{69} is one of the less revolutionary proposed amendments of section 924(c). While S. 909 does not change the sentencing range currently provided in section 924(c), it does attempt to increase the likelihood of imprisonment by eliminating suspended and concurrent sentences for all offenses under the section.\textsuperscript{60} The bill makes no provision for eliminating the possibility of parole or probation, thus allowing district courts and the parole board to exercise some measure of discretion in cases where they believe it is warranted.\textsuperscript{61}

House of Representatives bill (H.R.) 2061, sponsored by Representative Bob Traxler, suggests further modification to section 924(c).\textsuperscript{62} H.R. 2061 raises the minimum sentencing ranges provided in section 924(c) by requiring a two to ten year sentence in the case of a first offense and a five to twenty-five year sentence in the case of a second offense.\textsuperscript{63} H.R. 2061 also prohibits district courts from

\textsuperscript{57} S. 909, 97th Cong., 1st Sess. (1981) (Thurmond, R., S.C., and Zorinsky, D., Neb.), would retain the current one to 10 and two to 25 year penalties, but seeks to improve the likelihood of an actual prison stay. H.R. 1117, 97th Cong., 1st Sess. (1981) (Lagomarsino, R., Cal. 19D), on the other hand, would not only eliminate suspended, probationary, and concurrent sentences for all § 924(c) violations, but also calls for five to 10 years for the first offense and 10 years to life for the second.

\textsuperscript{58} It is beyond the scope of this article to discuss in detail all of the legislative proposals bearing on § 924(c). The following bills are included only because they are typical of pending legislation in this area.


\textsuperscript{60} In describing its penalties for a violation of § 924(c), it provides in pertinent part as follows:

\textsuperscript{61} Id.


granting a probationary, suspended, or concurrent sentence in the case of any violation of section 924(c). The bill does not, however, restrict parole in any way.

H.R. 35, proposed by Representative Annunzio, and H.R. 4245, sponsored by Representative Cotter, are very similar. Both proposals leave the sentencing range of one to ten years for the first offense under section 924(c) intact. For a second offense, however, both bills change the sentencing range to five to twenty-five years. These proposals also proscribe suspended, probationary, and concurrent sentences for first and second offenses. More important, however, is that H.R. 35 and H.R. 4245 take the additional step of providing that a defendant sentenced under section 924(c) may not be considered eligible for parole. Thus, both bills seek to eliminate the most commonly used devices by which judicial or parole board discretion is used to prevent or reduce a prison stay for the defendant.

In contrast to the bills discussed above, H.R. 527, sponsored by Representative Robert Roe, takes a somewhat different approach. Although the bill does not prohibit a probationary sentence, it directs the court not to suspend a sentence under section 924(c), nor to allow it to run concurrently with another. H.R. 527 also pro-

64. Id.
66. Id.
67. H.R. 35 and H.R. 4245 both describe the penalty for the second offense as follows:
   In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five nor more than twenty-five years.
68. Id. See also infra note 69.
69. The proposed amendments to § 924(c) in both H.R. 35 and H.R. 4245 provide that:
   The execution of any term of imprisonment imposed under this subsection may not be suspended, and probation or parole may not be granted. Any term of imprisonment imposed under this subsection may not be imposed to run concurrently with any term of imprisonment imposed for the commission of such felony.
   The major difference between these two proposals is that while H.R. 4245, by its terms, continues to apply § 924(c) only to federal felonies committed with a "firearm," H.R. 35 extends the scope of § 924(c) to any federal felony in which the defendant uses or carries, "a firearm, destructive devices, or any other dangerous or deadly weapon . . . ." H.R. 35, 97th Cong., 1st Sess. § 924(c)(1) (1981).
71. Id.
scribes parole for anyone sentenced under section 924(c). Yet the most important feature of H.R. 527, distinguishing it from other section 924(c) proposals, is that it eliminates the court's discretionary sentencing range altogether, instead of merely altering the existing ranges of imprisonment. For a first offense, the bill imposes an automatic five year sentence, and for any subsequent offense, an eight year sentence is imposed.

The bill which goes the furthest in insuring actual imprisonment for defendants convicted under section 924(c) is H.R. 4874, sponsored by Representative Harold Sawyer, ranking Republican on the House Subcommittee on Crime. H.R. 4874 incorporates all of the proposed amendments to section 924(c) previously discussed. It replaces the one to ten and two to twenty-five year sentencing ranges with sentences of two years for the first offense and five years for the second or subsequent offense. H.R. 4874 further requires that a defendant convicted of an offense under section 924(c) not be given a suspended, probationary, or concurrent sentence for the violation. The bill also provides that anyone sentenced under its version of section 924(c) may not be granted parole. Moreover, H.R. 4874 differs markedly from other section 924(c) proposals because it narrows the prosecutor's ability to plea bargain. The bill provides that "[t]he attorney for the Government shall not enter into any plea agreement with respect to an offense under this section." Although the prosecutor could still plea bargain on the underlying felony, he or she could not do so with respect to the section 924(c) charge. This legislation thereby closes off what many believe to be the last route of escape from a prison term under section 924(c).
The bills discussed above are representative of the pending congressional amendments to section 924(c). The goals of these amendments are to deter crimes involving firearms through sure and severe sentencing and to insure that violent or potentially violent criminals are incarcerated.\textsuperscript{80} Through these proposed amendments, legislators are seeking to close the perceived "loopholes" which allegedly help an armed felon to avoid the penitentiary. Suspended sentences, broad sentencing ranges, probation, concurrent sentencing, parole, and plea bargaining each act, according to sentencing change proponents, to make imprisonment less certain, or at least less lengthy. Virtually all proposed amendments to section 924(c) seek to eliminate the ability of either the judge, parole board, or prosecutor to exercise their discretion in the sentencing process.

**THE EFFICACY OF PROPOSED SENTENCING LEGISLATION**

In order to assess the effectiveness of determinate and mandatory minimum sentencing proposals, if adopted by the ninety-seventh Congress, it is essential to keep sight of the conceptual differences between these two lines of proposed change. Mandatory minimum sentencing seeks to incarcerate more offenders for longer periods of time. The section 924(c) bills, by eliminating non-detentional sentencing, implement their goal to reduce crime and deter criminals through stiff and unavoidable prison sentences.

In contrast, the avowed purpose of determinate sentencing, as demonstrated by S. 1630, is to provide more uniform sentencing patterns throughout the federal system by eliminating what has been criticized as unfettered discretion vested in the court and the parole board.\textsuperscript{81} Supporters of S. 1630 criticize mandatory minimum sentencing as failing to take into account the individual qualities of the criminal and the crime, which are essential considerations in devising a fair and appropriate penalty.\textsuperscript{82} Although S. 1630 sets out

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\textsuperscript{80} See supra notes 53, 55-56 and accompanying text.

\textsuperscript{81} Kennedy, supra note 6, at 353-54.

\textsuperscript{82} Sen. Kennedy has remarked:

[\textit{P}]roposals for harsh, statutorily mandated sentences are certainly not in the
presumptive guidelines, these guidelines are not to be applied in a mechanical fashion, and the court may deviate from these guidelines in appropriate cases.

Determinate sentencing bills and mandatory minimum sentencing bills do, however, share the common premise that the proper purposes of imprisonment are deterrence, protective incarceration, and just punishment. Prisoner rehabilitation, once the primary goal of imprisonment, has been rejected in these proposals.

The Unknown Variable of Plea Bargaining

The ability of the prosecutor to exercise complete discretion in bringing charges and negotiating pleas in criminal proceedings is a critical element in determining the sanctions imposed on the convicted offender. It is feared that the prosecutor's plea bargaining ability may circumvent the directives of any determinate or mandatory minimum sentencing system by allowing defendants to plead guilty to lesser offenses and thereby incur milder penalties.

S. 1630, the proposed determinate sentencing bill, does not ad-

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83. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender as compared to similarly situated offenders, not to eliminate the imposition of thoughtful and individualized sentences.

84. See supra note 32 and accompanying text.

85. Plea bargaining in federal courts is currently governed by Fed. R. Crim. P. 11(e).

86. The classic statement of the problem is made by Professor Albert Alschuler:

In my view, fixed and presumptive sentencing schemes of the sort commonly advocated today . . . are unlikely to achieve their objectives so long as they leave the prosecutor's power to formulate charges and to bargain for guilty pleas unchecked. Indeed, this sort of reform is likely to produce its antithesis — to yield a system every bit as lawless as the current sentencing regime but one in which discretion is concentrated in an inappropriate agency and in which the benefits of this discretion are made available to defendants who sacrifice their constitutional rights.

dress the problem of prosecutorial discretion. Its proponents do not see any need to do so within the context of the bill itself. Senator Kennedy has argued that the creation of the sentencing commission should not be condemned because it cannot eliminate discretion everywhere it is found. Although reform of the current plea bargaining system is a necessary corollary to determinate sentencing, Kennedy argues that reform should begin at the sentencing stage of the criminal process where the authority of the state is most visible. The sentencing commission created by S. 1630 would lay the foundation for further reforms in the area of plea bargaining.

The practice of plea bargaining is not only inconsistent with the goals of determinate sentencing, but completely subverts the goals of mandatory minimum sentencing. A successful mandatory minimum sentencing plan depends upon eliminating the ability of the offender to evade imprisonment. Where a mandatory sentencing statute reduces only the court’s discretion, the discretion will simply be assumed by the prosecutor. Experience has shown that mandatory sentencing provisions are indeed significantly eroded by plea bargaining practices.

The question then arises whether plea bargaining is so damaging that the determinate sentencing and mandatory minimum sentencing proposals should prohibit its exercise so as to achieve the goal of standardized and more certain prison terms. As an example, H.R. 4874 attempts to solve this problem in section 924(c) cases by prohibiting plea bargaining. It is unclear, however, whether a simple statutory prohibition on plea bargaining would eliminate the practice of negotiating pleas altogether.

An excellent example of an unsuccessful attempt to abolish plea

87. Kennedy, supra note 6, at 381.
88. Id.
89. Id.
90. Id.
92. See U.S. DEP’T OF JUSTICE, 4 AMERICAN PRISONS AND JAILS 46-49 (1980), in which the effectiveness of a Florida felony firearm statute designed to require mandatory minimum prison sentences but not to regulate plea bargaining is analyzed in chapter 3. The study found that due to extensive plea bargaining (occurring in almost 85-95% of all felony cases in Dade County) and judicial aversion to applying an inflexible rule to widely varying fact situations, the mandatory minimum sentencing statute had little or no effect.
93. See supra notes 80-85 and accompanying text.
bargaining is shown in the history of the 1977 Michigan Felony Firearm Statute, which was the subject of a study by Milton Heumann and Colin Loftin. The Michigan statute, much like the current section 924(c), provided an additional sentence for any offender carrying a gun during a felony. The statute imposed a two year sentence for the first violation, and a five year term for a second or subsequent offense. It also prohibited probation, parole, concurrent sentencing, and suspended sentences. The statute itself did not address the problem of plea bargaining, but in Michigan’s Wayne County, which includes the Detroit metropolitan area, the prosecutor’s office followed a strict policy of not allowing plea bargaining in gun crime cases.

The study concluded that when plea bargaining is eliminated, other procedures and devices become the functional equivalents of plea bargaining. Judges were able to find a variety of ways to circumvent the Michigan gun statute in cases where they believed that the totality of circumstances made a mandatory prison sentence unduly harsh. Surrogate plea bargaining frequently occurred in cases where the offense was a felonious assault. Such assaults often arose out of domestic disturbances and were not generally the predatory kind of violent street crime at which the sentencing bills are aimed. Many defendants opted for a bench trial where the judge often dismissed one or both of the charges, or found the defendant guilty of a lesser included misdemeanor offense, defeating the felony firearm charge and leaving the prosecutor with no way to appeal the judgment.

95. See supra note 91.
96. See supra note 94.
97. Id.
98. Huemann & Loftin, supra note 91, at 397-98.
99. Id. at 425.
100. Id. at 425-26.
101. Id. at 412.
102. Id. at 417-21. Huemann and Loftin interviewed a trial prosecutor who illustrated this phenomenon:

But if he's gone to the judge, I mean what would happen if I were to draw a model of that case it would be as follows: the defense attorney would go to (the trial prosecutor) at pretrial and try to get him to dismiss the felony firearm charge. (The trial prosecutor) would say no, can't do it. Okay, go to the pretrial judge. The judge would put pressure on his trial prosecutor to dismiss the felony firearm. The trial prosecutor would say I can't do it. Then there would be a private communication between the defense attorney and the judge, waive the jury, I'll find the guy guilty of A and B (assault and battery), that will be a misdemeanor, the felony firearm charge drops by the wayside.
The study concludes that in cases involving more serious offenses, such as armed robbery, judges and defense counsel frequently engaged in sentence bargaining. That is, a judge would consult with a defense attorney about the circumstances of the case, arrive at what was thought to be a proper sentence, and then adjust the prison term for the underlying felony to accommodate the firearm law.\textsuperscript{103} For example, for an offense normally carrying a penalty of seven and one-half to fifteen years imprisonment, the judge would frequently reduce the seven and one-half year base sentence to five and one-half years in order to account for the additional two year term which had been added into the penalty by the firearm statute.\textsuperscript{104}

There are two important lessons to be learned from this study of the Michigan gun law. The first is that judges will continue to exercise discretion in sentencing, despite the most clearly drafted statutes constraining their discretion.\textsuperscript{105} The second lesson is that mandatory sentencing statutes which do not allow flexibility in dealing with each case and its equities only increase sentencing confusion by forcing the judge, prosecutor, or parole board to creatively exercise their discretion in sentencing individual defendants.\textsuperscript{106}

The critical variable of plea bargaining must be dealt with by proponents of sentencing reform if their proposals are to have the

\textsuperscript{Id. at 418. A defense attorney commented:}

Waiver trials, that's the way he beat it (Gun Law). The judge doesn't have to give a reason when he dismisses it, and the prosecutor can't appeal. I go talk to him and tell him it's a ridiculous case. I'll talk to the judge.

\textsuperscript{Id.}

\textsuperscript{103. Id. at 422-23.}

\textsuperscript{104. A Wayne County prosecutor described the effect of sentence bargaining on the felony firearm statute:}

I think the application of the felony firearm rule is a complete failure in this building. The judges use it in sentence bargaining. They're normally gonna give a guy seven and a half to fifteen, for example, and they give them five and a half to fifteen and two for the gun. So they get absolutely no more time for the gun. And if they were gonna get, on offenses where they were gonna get, two years let's say, let's say on an attempt with great bodily harm, the judge would normally have given two to ten, they've given probation on the felony and two years on the gun, so it comes out the same thing. And it happens all the time in this building. I've yet to hear of an instance where the judge looked at a case and said, "this guy deserves seven and a half to fifteen, that's what I'm giving him. And then I'm giving him two in addition to that because he has a gun." Never heard it yet.

\textsuperscript{Id. at 423.}

\textsuperscript{105. Id. at 424-29.}

\textsuperscript{106. Id.}
desired effect. Indeed, it is questionable if the criminal sentencing system could operate without this element. If Congress seeks to eliminate plea bargaining, however, other functional equivalents will likely replace it as the Michigan experience demonstrates. Criminal justice system actors will continue to balance uniformity with the desire to individualize sentencing.

**Conclusion**

The ninety-seventh Congress has now been presented with two alternative types of sentencing reform. The first is determinate sentencing, which seeks to standardize sentencing and end what is believed to be the arbitrary fashion in which federal criminals are sentenced, while still retaining sufficient flexibility to tailor each sentence to the needs of the individual case. The second is mandatory minimum sentencing, as exemplified by proposals to amend section 924(c) of Title 18. These bills are designed to reduce crime and deter offenders by providing for harsh and unavoidable prison sentences for criminals using firearms. Thus, these two lines of prospective changes are designed to accomplish divergent goals.

In analyzing any legislative proposal, the ultimate question is whether the legislation will be able to accomplish the goals set out for it. Plea bargaining and its impact on the sentencing process will profoundly affect the efficacy of such proposals. In determinate sentencing, the impact of plea bargaining will not be so severe, because the system is designed to retain enough flexibility to promote individualized sentencing and because the proposal is designed to lay a foundation for later reform in the plea bargaining area. In mandatory minimum sentencing, however, which is designed to eliminate flexibility in the sentencing process, plea bargaining or its functional equivalents will operate to circumvent the statutes and allow actors in the criminal sentencing process to pursue the goal of individualized sentencing. Even if the theory that the incarceration of more offenders will reduce crime is valid, this goal will never be achieved because the individuals charged with executing the statute, judges and attorneys, cannot and will not adhere to inflexible rules.

Notwithstanding these particular problems, the issue remains whether criminal sentencing, in isolation, can have any substantial impact in reducing crime, especially violent street crime, which is
believed by many to be rooted in the very structure of society. In such a situation, the valuable resource of public interest in reducing crime could be potentially squandered if public and legislative attention remains narrowly focused on criminal sentencing alone.

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