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Edward Levi, on his recent retirement from the U.S. attorney generalship, expressed "wonder at the anomaly of a modern country which seems to be unable to agree upon a federal code of criminal law." He doubted, too, that "faith in the administration of criminal justice can be restored if our present sentencing system continues."

Criminal law governs the greatest power that the state exercises over a citizen; punishment for crime is the strongest expression of that power. Thus, it is indeed extraordinary that for nearly 25 years the effort to bring order and principle to federal criminal law has been a failure, especially since this is a country dedicated more than any other to the rule of law.

But at last a gleam of light has appeared at the end of this long tunnel—a gleam other than the lights of an approaching train. The proposed Federal Criminal Code, Senate Bill 1437, has been accepted by the Senate Judiciary Committee, and has since been passed by the Senate. Similar legislation pending in the House lapsed in the 95th Congress and will be reconsidered in the 96th Congress.

S 1437, like many other legislative proposals, is not free from compromise. Its joint sponsorship by Sen. Edward M. Kennedy (D-Mass.) and the late Sen. John L. McClellan (D-Ark.) speaks clearly to the reality of compromise. But it would provide a mechanism by which the present anarchy in federal sentencing could be reformed, over time, into a principled and just common law of sentencing.

That mechanism is the Sentencing Commission, an idea conceived by then Judge Marvin Frankel of the U.S. District Court for the Southern District of New York, which he offered in a 1973 book, *Criminal Sentences: Law Without Order*. Sen. Kennedy liked the idea, and has vigorously brought it to the threshold of legislative acceptance. This is no minor achievement. Sentencing reform of this type, though of central importance to criminal justice, is hardly a popular task.

What, then, is the basic problem, and how does a Sentencing Commission promise a remedy?

Compelling evidence exists that America's

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disposition of convicted criminal offenders is capricious and inconsistent. Decisions about the nature and duration of punishment flow from a complex and unprincipled network of legislatively authorized sentences and an even more complex division of sentencing power between prosecutors, defense counsel, judges, parole authorities and correctional administrators.

Thirty years of careful research has demonstrated that the federal sentencing system, like those of the states, is characterized by unjust disparities.

Each judge may well have his own consistent and orderly views on fair and effective sentencing. But no agreed-on principles exist to guide him, no controlling mechanisms relate his views to those of his brother judges, and no established system provides one judge with the considered views of his colleagues. As a result, appeals against criminal sentences where available—and they are not available in the federal system—cannot be decided in the frame of reference of formulated and published principles.

The empirical literature on sentencing disparities is extensive and reliable. Put curtly, like cases are not treated alike; sentencing is a random lottery.

As of this writing, four states—California, Indiana, Maine and Oregon—have adopted determinate-sentencing laws, and many other states are considering doing so. There is a strong national movement away from indeterminate sentencing, away from the hypocrisy of parole decisions in which it is pretended against the evidence that behavior in the cage is a reliable guide to behavior in the community.

But to shift from the indeterminate to the determinate sentence—and California’s recent change is the most dramatic—does not in itself provide a remedy for the current anarchy of sentencing. It leaves open the difficult issue of who should fix the determinate sentence, and how it should be fixed.

Can we rely on legislatures? I think not. Every pressure on the legislator is to inflate punishment, to protract prison terms, because no votes are lost by the forceful advocacy of severity. Our already-overcrowded prisons would almost surely burgeon further. Certainly we do not want a mindless severity that, in any event, is likely to be nullified by the realities of charge and plea bargaining in our cluttered courts of first instance.

Rather, we need a discriminating sentencing practice, graduated carefully to social harm and to social need—a just and orderly system, severe where it should be, lenient where it should be.

The proposed Federal Criminal Code would go about that task as follows. As stipulated in the Kennedy-McClellan bill, it would divide all federal crimes into nine levels of gravity: five of felony, three of misdemeanor, one of infractions. The maximum sentences for felonies would be: Class A, life; Class B, 25 years; Class C, 12 years; Class D, 6 years; Class E, 3 years. The three classes of misdemeanors would have as maximums 1 year, 6 months and 30 days, respectively. An infraction would be a petty offense punishable at most by a 5-day term, but normally by a fine or probation. These would be the defined maximums; within their limits, the judge would set the term to be served.

The bill would establish a Sentencing Com-
mission to promulgate sentencing guidelines and policy statements to assist the judge in imposing sentence. The commission would be charged with taking the legislative categories of crime and the legislative criteria of sentencing offered by Congress and then shaping them into an extensive, reasoned, probably lengthy and complex, system of offense-offender-punishment categories, giving reasons for each. From the congressional signals and within the legislative maximums of punishment, the commission would have to fashion a reasoned Code of Sentencing.

Would the sentencing judge be bound by the commission? No, he would be only guided. If the judge disagreed with a guideline or policy statement in a case before him, he could impose whatever legislatively authorized sentence he thought appropriate—but he would have to set out his reasons in the record.

If the judge were more severe than the Sentencing Commission recommended, the convicted criminal could appeal; if more lenient, the U.S. attorney could appeal. An appeal by either party would result in a properly justifiable issue: the published reasons of the Sentencing Commission would confront those in the record offered by the trial judge. The appeal decision would feed back into the work of the Sentencing Commission, and in this way legal principles, now lacking in sentencing, could emerge under the Kennedy-McClellan bill. Thus could a compass to justice in punishment be designed—at last.

Of course, the measure could conceivably make the present chaos worse. It could increase sentences. The Sentencing Commission could be inept or excessively punitive—much would depend on the qualities of mind and ranges of knowledge of the seven commissioners. But the bill contains a couple of built-in safeguards. For one thing, it would set up a two-year lead time between its signing by the President and the implementation of its sentencing provisions. Also, the emerging guidelines and policy statements would have to be published, and would inevitably be subject to the closest criticism of Congress, judges, practitioners, academics and concerned citizens—to say nothing of prison administrators and their understandably interested flock, the prisoners.

So there is a good chance that the Sentencing Commission could—indeed, I hope it will—gradually bring order to judicial sentencing. Further, if its work attracted the support of U.S. attorneys, it might even in time bring justice to that other area of sentencing anarchy—charge and plea bargaining.