COMMENT

SENTENCING PROVISIONS IN PROPOSALS FOR A NEW FEDERAL CRIMINAL CODE

NILE STANTON*

I. INTRODUCTION

Among the most important set of statutes any nation has are its penal laws,[1] and it should concern every citizen that America's set is now in the process of being substantially revised. In 1966, Congress created the National Commission on Reform of Federal Criminal Laws and gave it the duty to "make a full and complete review and study of the statutory and case law of the United States which constitutes the federal system of criminal justice" and to "make recommendations for revision and recodification of the criminal laws. . . ."[2] On January 7, 1971, former Governor Edmund G. Brown of California, who served as the Commission's Chairman, transmitted the group's *Final Report*[3] to the President

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*Executive Director, Indianapolis Lawyers Commission. B.S., Ball State University, 1965; M.A., Ball State University, 1969; J.D., Indiana University, 1973. The views expressed herein are the author's and should not be construed to be those of the Lawyers Commission.

[1]Professor Wechsler, who was instrumental in the development of the Model Penal Code, has emphasized that:

> Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal laws govern the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community, for the individual.

Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

[2]Act of Nov. 8, 1966, 80 Stat. 1516.

[3]NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT (1971) [hereinafter cited as BROWN REPORT]. The lineage of, and much

and Congress. The *Report* in turn precipitated the development of two massive proposals to codify the federal criminal law. The first proposal, S. 1,[4] was introduced by Senator John McClellan on January 4, 1973. The second bill, S. 1400,[5] was introduced by Senator Roman Hruska on March 27, 1973. The bills would give Title 18 of the United States Code a complete overhauling.[6]

It should be noted that the United States has never had a true federal criminal "code,"[7] although codifications have more utility than do mere "compilations" or "consolidations."[8] The Crime Act of 1790[9] was our first set of statutory[10] criminal laws, and subsequent additions and revisions to the criminal law were made in such a way that Title 18 has become "a haphazard hodgepodge of conflicting, contradictory, and imprecise laws piled in stopgap

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of the impetus toward, the *Brown Report* can be traced to 1952, the year the American Law Institute began work on the Model Penal Code. *See Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 2, at 552 (1971).

[4]93d Cong., 1st Sess. (1973). *See* 119 CONG. REC. S558 (daily ed. Jan. 12, 1973), in which Senator McClellan succinctly analyzed some of the major provisions of the 538-page bill.

[5]93d Cong., 1st Sess. (1973). *See* 119 CONG. REC. S5777 (daily ed. Mar. 27, 1973), in which Senator Hruska detailed the background to the bill and discussed briefly some of its highlights. The Attorney General's commentary, *id.* at S5782, on S. 1400, elucidates the Nixon Administration's rationale for most major provisos. *See also* H.R. DOC. No. 60, 93d Cong., 1st Sess. (1973).

[6]*See generally* Brown & Schwartz, *New Federal Criminal Code Is Submitted*, 56 A.B.A.J. 844 (1970), in which it is noted that the Brown Commission confined itself to reforming the substantive provisions of Title 18 rather than to covering the entire United States penal law.

[7]*See* 119 CONG. REC. S558 (daily ed. Jan. 12, 1973) (remarks of Senator McClellan); *Hearings*, *supra* note 3, pt. 1, at 11 (memorandum from Mr. Malcolm Hawk to Senator Roman Hruska).

[8]*See* McClellan, *Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L.J. 663. *See also* Brown & Schwartz, *supra* note 6, at 845; *Hearings*, *supra* note 3, pt. 1, at 16-18 (testimony of Attorney General John Mitchell).

[9]Act of April 30, 1790, 1 Stat. 112.

[10]In 1812, the United States Supreme Court declared that there were no federal common law crimes. United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812). Writing for the Court, Justice Johnson maintained that "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare that the court shall have jurisdiction of the offence." *Id.* at 34. *Accord*, United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820); United States v. Bevans, 16 U.S. (3 Wheat.) 336 (1818); United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816).

fashion one upon another with little relevance to each other or to the state of the criminal law as a whole."[11] S. 1 and S. 1400, the first comprehensive efforts to reform the federal criminal law since 1948,[12] represent monumental efforts to bring Title 18 into the twentieth century. The limited purpose of this Comment, however, is to analyze and compare only a few of the changes for which these bills provide—the proposals pertaining to sentencing. These proposals will be analyzed with particular reference to the American Bar Association's Minimum Standards for Criminal Justice[13] and the 1973 Working Papers of the National Advisory Commission on Criminal Justice Standards and Goals.[14]

II. The Classification of Crimes

Existing sentencing categories in the federal law are, as the Brown Commission emphasized in 1971, "chaotic and inconsistent."[15] The Commission concluded that there is no apparent rational basis for having approximately seventy sentencing categories: several categories provide widely disparate sentences for very similar offenses, while others allow comparable sentences for grossly diverse crimes. Accordingly, it was recommended that, for purposes of sentencing, six categories for all federal offenses be

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[11] *Hearings*, *supra* note 3, pt. 1, at 102 (testimony of Representative Poff). For example, the scope of federal jurisdiction is unclear; the system of fines is in hopeless disarray; definitions of crimes are frequently inconsistent; similar offenses are widely scattered in Title 18; length of prison sentences are too infrequently related to the severity of the offenses; and antiquated offenses (such as detaining a United States carrier pigeon) are retained while loopholes for newer crimes still exist.

[12] *See* McClellan, *supra* note 8, at 677, 683 (succinctly discussing the so-called Penal Code of 1909 and the 1948 revisions).

[13] ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures (Approved Draft 1968) [hereinafter cited as ABA Sentencing Standards]. For convenience, references to S. 1 and S. 1400 will occasionally be by section number only. References to S. 1 begin with a single digit and include a letter, for example "section 1-4B5." References to S. 1400 have four digits, for example "section 2301." References to sections developed by the Brown Commission will be prefaced with the letters "BC," for example "BC section 3202."

[14] Hereinafter cited as Peterson Commission Working Papers.

[15] Brown Report 272. *See* Alexander, *A Hopeful View of the Sentencing Process*, 3 Am. Crim. L.Q. 189 (1965). The former Director of Prisons opined that Title 18 is "so inconsistent in its penalty structure as to be almost incoherent." *Id.* at 190. *See also* Beckett, *Criminal Penalties in Oregon*, 40 Ore. L. Rev. 1, 71 (1960); Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 56 (1966).

established.[16] The Brown Commission recommendation conforms to ABA Standards[17] and has been substantially incorporated into S. 1 and S. 1400.[18]

III. Length of Prison Terms

In spite of the fact that S. 1 and S. 1400 would drastically cut the categories of sentences, in the same breath both proposals call for terms of imprisonment far in excess of terms which have received the imprimatur of ABA Standards and the Peterson Commission recommendations. S. 1 authorizes, for a "Class A" felony, an upper-range term of thirty years and a lower-range term of twenty years and, for a "Class B" felony, an upper-range term of twenty years and a lower-range term of ten years.[19] On the other

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[16] *See* BC § 3002.

[17] ABA Sentencing Standard 2.1(a):

> All crimes should be classified for the purpose of sentencing into categories which reflect substantial differences in gravity. The categories should be very few in number. Each should specify the sentencing alternatives available for offenses which fall within it. The penal codes for each jurisdiction should be revised where necessary to accomplish this result.

[18] *See* S. 1, § 1-4B1 & S. 1400, § 2301, cited in part notes 19 & 20 *infra*.

[19] S. 1, at § 1-4B1, provides, in part:

> (a) Authorized Upper-Range Terms for Felonies.—The authorized upper-range terms of imprisonment for felonies are:
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> (1) for a Class A felony, a term of years not to exceed 30 years;
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> (2) for a Class B felony, a term of years not to exceed 20 years;
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> (3) for a Class C felony, a term of years not to exceed 10 years; or
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> (4) for a Class D felony, a term of years not to exceed 6 years.
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> (b) Authorized Lower-Range Terms for Felonies.—The authorized lower-range terms of imprisonment for felonies are:
>
> (1) for a Class A felony, a term of years not to exceed 20 years;
>
> (2) for a Class B felony, a term of years not to exceed 10 years;
>
> (3) for a Class C felony, a term of years not to exceed 5 years; or
>
> (4) for a Class D felony, a term of years not to exceed 3 years.

hand, S. 1400 would simply establish a maximum term of life imprisonment or any term of years for a "Class A" felony and would sanction a term of thirty years for a "Class B" felony.[20]

It must be stressed that the "upper-range terms" of section 1-4B1 are to be imposed only on the worst offenders. The Brown Commission indicated that "[s]uch long term sentences mainly perform an incapacitative function and should therefore be imposed only on defendants who are exceptionally dangerous."[21] And, as the United States Supreme Court held in *Jackson v. Indiana*,[22] the due process clause requires that both the "nature and *duration* of commitment bear some reasonable relation to the *purpose* for which the individual is committed."[23] Admittedly, the Court was specifically

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(c) OTHER AUTHORIZED TERMS.—The authorized terms of imprisonment for other offenses are:

(1) for a Class E felony, a term not to exceed 1 year;

(2) for a misdemeanor, a term not to exceed 6 months; or

(3) for a violation, a term not to exceed 30 days.

[20]S. 1400, at § 2301, contains, in part, the following:

(a) IN GENERAL.—A person who has been found guilty of an offense may be sentenced to a term of imprisonment.

(b) AUTHORIZED TERMS.—The authorized maximum terms of imprisonment are, in addition to the automatic contingent term specified in section 2302:

(1) in the case of a Class A felony, life imprisonment or any term of years;

(2) in the case of a Class B felony, not more than thirty years;

(3) in the case of a Class C felony, not more than fifteen years;

(4) in the case of a Class D felony, not more than seven years;

(5) in the case of a Class E felony, not more than three years;

(6) in the case of a Class A misdemeanor, not more than one year;

(7) in the case of a Class B misdemeanor, not more than six months;

(8) in the case of a Class C misdemeanor, not more than thirty days;

(9) in the case of an infraction, not more than five days.

[21]BROWN REPORT 443.

[22]406 U.S. 715 (1972), *rev'g* 253 Ind. 487, 255 N.E.2d 515 (1970).

[23]406 U.S. at 738 (emphasis added).

alluding to commitments to mental institutions. There is, however, little reason to believe that due process should not also require a reasonable relation between the duration of confinement to the purpose for confinement in criminal cases as well since the crux of the right in both civil and criminal commitments centers about deprivation of liberty, not the label of the proceeding.[24]

The duration of confinement and the purpose for confinement must, at least with respect to the longest prison terms sanctioned,[25] bear some reasonable relationship under S. 1. The upper-range terms of section 1-4B1 are not to be imposed unless the convicted person is a "dangerous special offender" as determined pursuant to section 1-4B2.[26] However, section 2301 of S. 1400 contains no limitations or additional penalties vis-a-vis "dangerous" persons. Hence, S. 1400 would sanction much longer terms of imprisonment for every class of offense than would S. 1. For example, persons convicted of a "Class B" felony would normally be sentenced to a term not to exceed ten years under S. 1, but sentenced to a term of not more than thirty years under S. 1400.

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[24]United States v. Dickerson, 168 F. Supp. 899 (D.D.C. 1958), *rev'd on other grounds*, 271 F.2d 487 (D.C. Cir. 1959).

> Precious constitutional rights cannot be diminished or whittled away by the device of changing names of tribunals or modifying the nomenclature of legal proceedings. The test must be the nature and essence of the proceeding rather than its title. If the result may be a loss of personal liberty, the constitutional safeguards apply.

Id. at 902. *See* Jackson v. Indiana, 406 U.S. 715 (1972); *In re* Gault, 387 U.S. 1 (1967). *See also* Wilson v. State, 287 N.E.2d 875 (Ind. 1972).

[25]*See* note 19 *supra*.

[26]This section, which is similar to BC § 3202, provides in pertinent part that an offender is "dangerous" if a "period of confinement longer than that otherwise provided is required for the protection of the public." And section 1-4B2(b)(2) stipulates that he is a "special offender" if (1) he has been convicted of two felonies arising from occasions different from the current felony and from one another and has been imprisoned for at least one of these prior to the commission of the current felony, without regard to pardoned and invalid crimes, (2) he committed the current felony as a pattern of criminal conduct which constitutes a substantial source of his income or which manifested special skills or expertise, (3) his mental condition is abnormal and makes him a serious danger to others and the current felony was an instance of aggressive conduct done in heedless disregard for the consequences, (4) he used a firearm or destructive device in the crime or flight from it, or (5) the current felony was, or committed in furtherance of, a conspiracy with at least three other co-conspirators to engage in a pattern of criminal conduct in which he did, or agreed to, plan or supervise or give or receive a bribe or use of force for such conduct. *See generally* S. Rep. No. 617, 91st Cong., 1st Sess. 83-100, 162-67 (1969).

The long prison terms provided by S. 1 and particularly those provided by S. 1400 are directly in conflict with ABA Standards and recommendations of the Peterson Commission, though S. 1 largely conforms to the Brown Commission's suggested terms. Specifically, the ABA Standards state that the maximum prison term normally authorized should be five years, rarely ten years, and twenty-five years or longer only under very exceptional circumstances.[27] In comments to the ABA Standards it is reasoned that sentences in excess of five years are impractical, under most circumstances, (a) since well over ninety per cent of prisoners are released from custody in less than five years (most being released in less than *two* years), and (b) since studies, such as the post-*Gideon v. Wainright*[28] one,[29] indicate that, in general, prisoners released early do not recidivate any more frequently than those

[27]ABA SENTENCING STANDARD 2.1(d).

[28]372 U.S. 335 (1963).

[29]*See generally* ABA SENTENCING STANDARD 2.1(f), Comment. *See also* Peterson Commission Working Papers at C-104, where the following chart is presented:

MEDIAN NUMBER OF MONTHS SERVED PRIOR TO FIRST RELEASE

	All State Prisoners (1964)	Mass. (1966)	Calif. (1971)	N.Y. (1970)	Ohio (1971)	Me. (1970)
Crimes against Property:						
Burglary	20.1	13.5	45.0* 27.0**	20.1	19.8	27.9
Forgery	17.1	14.5	23.0	20.4	17.5	
Auto Theft	17.9	14.5	24.0	21.6	27.6	22.0
Other Larceny	16.5	14.5	....	22.3	19.0	22.0
Crimes against the Person:						
Homicide	48.5	65.0	....	207.3 murder 31.8 homocide	46.2	***
Robbery (armed)	36.1	20.0	46.0	22.4	42.1	51.0
Unarmed robbery		15.0	37.0			43.9
Assault w/deadly weapon			39.0	23.6	32.5	32.5
Other	....	17.0	....	....	....	....

*1st degree burglary
**2d degree burglary
***2d degree murder—102.0
3d degree murder—144.0
1st degree manslaughter—64.5
2d degree manslaughter—49.0

kept to mandatory release dates. On similar rationale,[30] the Peterson Commission stated, "[T]he maximum sentence for any offender not specifically found to represent a substantial danger to others should not exceed 5 years for felonies other than murder."[31] The prison terms allowed by S. 1 and S. 1400 are unduly harsh and, on their face, can morally—though not legally—be viewed as cruel and unusual punishment.[32]

IV. Mandatory Minimum Prison Terms

While stipulating that mandatory minimum terms are not allowed unless set by affirmative action of the court, S. 1400 sets forth no guidelines which must be taken into account in imposing such terms.[33] On the other hand, S. 1 allows the imposition of mandatory minimum terms by affirmative court action only if the court takes into consideration features "such as those which warrant imposition of a term [in the upper-range under section 1-4B1(a)]."[34]

S. 1 and S. 1400, in requiring affirmative action for the imposition of minimum mandatory terms, are in this respect both improvements on existing law. At present, federal law makes a minimum term mandatory and automatic, absent court action to negate it. S. 1 provides that the mandatory minimum term can be set *if* the court makes a finding that this is necessary for specific reasons, but S. 1400 contains no such requirement—as indicated earlier. In this respect, S. 1400 flies in the face of the ABA Standards and the recommendations of the Brown Commission and the Peterson Commission.

The ABA Committee on Standards for Sentencing Alternatives and Procedures could not agree that judicially imposed minima

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[30]The Commission's Operational Task Force for Corrections remarked:

> Lowering the authorized maximum term will not unduly restrict the court's discretion as it affects the length of time *actually served* in prisons. It will, however, reduce the excessively long sentences served by some offenders for whom such sentences are inappropriate. It will also diminish disparate treatment of similarly situated offenders.

Peterson Commission Working Papers at C-105.

[31]*Id.* at C-102.

[32]*See generally* K. Menninger, The Crime of Punishment (1969).

[33]*See* § 2301(c).

[34]§ 1-4B1(c). *See* note 26 *supra*.

should be sanctioned, although the Committee did agree that required minimal terms should not be set by legislatures—a view also shared by the two commissions. In its Comment to Standard 3.2(c), the ABA Committee indicated that a minority opposed any minimum terms. However, the majority opined that judicially imposed minima should be allowed because, "[i]rrational as it is," the climate of public opinion demands it, and sentencing courts are in the best position to ascertain when such sentences should be imposed. The Comment further indicates that the minimal terms should be imposed only if the dangerousness of the offender to the community, in the court's judgment, requires such a sentence.[35]

V. Appellate Review of Sentences

S. 1 and S. 1400 differ with respect to sentencing provisions in many ways in addition to the variances regarding the length of prison terms. S. 1, at section 3-11E3, allows for appellate review of sentences; but S. 1400 contains no such proviso. Here, S. 1400 is like current federal law: presently, all aspects of a criminal case *except* the sentence are subject to appellate review. However, S. 1400, in adhering to current law, has failed to conform to unanimous judgments expressed in the ABA Standards and the recommendations of the Brown Commission and the Peterson Commission.[36]

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[35]ABA Sentencing Standard 3.2(c), Comment. *Accord*, Brown Report 285-86; Peterson Commission Working Papers at C-107 & C-110, which sanction mandatory minimum terms only after special findings of dangerousness.

[36]*See generally* ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences (Approved Draft 1968). Standard 1.2 provides:

> The general objectives of sentence review are:
>
> (i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;
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> (ii) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;
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> (iii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and
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> (iv) to promote the development and application of criteria for sentencing which are both rational and just.

Standard 2.1 provides, in part: "In general, each court which is empowered to review the conviction should also be empowered to review the disposition following conviction. . . ."

The Indiana Constitution allows judicial review and revision of a sentence imposed in a criminal case.[37] In the federal system, however, a sentence may only be either reduced by the trial court within 120 days after it is imposed, if no appeal is taken, or corrected at any time if it is illegal or imposed in an illegal manner.[38] If a sentence is excessive or unjustifiably disparate when compared with sentences meted out for offenses of a similar nature, the sentence will nevertheless stand unreviewable unless the trial court exceeded its "sound discretion." But any sentence imposed in a lawful manner which is within the statutory limits meets the test.[39] It is incongruous that S. 1400 would continue

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The Brown Commission proposed that 28 U.S.C. § 1291 (1970) be revised by adding the following language to the end of the section: "Such review shall in criminal cases include the power to review the sentence and to modify or set it aside for further proceedings." BROWN REPORT 317.

The Peterson Commission recommended the following:

> Procedures for implementing the review of sentences on appeal should contain the following precepts:
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> 1. Appeal of a sentence should be a matter of right.
> 2. Appeal of a sentence of longer than 5 years under an extended-term provision should be automatic.
> 3. A statement of issues for which review is available should be made public. The issues should include:
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> a. Whether the sentence imposed is consistent with statutory criteria.
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> b. Whether the sentence is unjustifiably disparate in comparison with cases of similar nature.
>
> c. Whether the sentence is excessive or inappropriate.
>
> d. Whether the manner in which the sentence is imposed is consistent with statutory and constitutional requirements.

Peterson Commission Working Papers at C-120. *See also* Sobeloff, *The Sentence of the Court: Should There Be Appellate Review?*, 41 A.B.A.J. 13 (1955).

[37]IND. CONST. art. 7, § 4: "The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed."

[38]FED. R. CRIM. P. 35. *See, e.g.*, United States v. Gorman, 431 F.2d 632 (5th Cir. 1970) (district court lacks jurisdiction to consider untimely motion to reduce sentence and court of appeals has no jurisdiction over appeal from denial of such a motion); Marshall v. United States, 431 F.2d 355 (7th Cir. 1970) (illegal sentence can be corrected at any time).

[39]*See, e.g.*, Gilinsky v. United States, 430 F.2d 1292 (9th Cir. 1970); Pependrea v. United States, 275 F.2d 325 (9th Cir. 1960); Granger v. United States, 275 F.2d 127 (5th Cir. 1960).

to make a sentence the sole feature of a criminal case which cannot be subjected to appellate review, particularly in view of the fact that the bill would sanction prison terms which are designed to be very harsh.

VI. Resentencing to Longer Terms

Section 1-4A2 of S. 1 provides that if the conviction of one or more, but not all, of the offenses for which a sentence is imposed is set aside on appeal or collateral attack, the case shall be remanded for resentencing. The section further allows the court to impose any sentence which it might originally have imposed for the offense as to which the offender's conviction has not been set aside. The effect of section 1-4A2 is to permit the possible imposition of a longer prison term upon resentencing. S. 1400 does not contain any similar proviso and, presumptively, would allow the same effect through *North Carolina v. Pearce.*[40] There the United States Supreme Court permitted the imposition of a higher sentence upon reconviction subsequent to the reversal of an original conviction.

The Brown Commission, taking the middle-ground of *Pearce,* adopted a position which allowed neither absolute court discretion to resentence to a higher term nor an absolute bar to such sentences. The Brown Commission would (1) allow a higher sentence only on the basis of conduct subsequent to the original conviction and (2) require the court to set forth reasons for the imposition of a more severe sentence.[41] However, a substantial minority of the Brown Commission[42] preferred the ABA position.

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[40]395 U.S. 711 (1969). *Pearce* did, of course, require that time served under the first sentence must be subtracted from whatever new sentence is imposed. *Id.* at 718-19. *But cf.* McDowell v. State, 225 Ind. 495, 498-500, 76 N.E.2d 249, 250-51 (1947). In Michigan v. Payne, 412 U.S. 47 (1973), it was held that the prophylactic limitations *Pearce* established to guard against vindictiveness in the resentencing process were not retroactively applicable.

[41]BC § 3005 states:

> (1) Increased Sentences. Where a conviction has been set aside on direct review or collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously satisfied, unless the court concludes that a more severe sentence is warranted by conduct of the defendant occurring subsequent to the prior sentence.
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> (2) Reasons. The court shall set forth in detail the reasons for its action whenever a more severe sentence is imposed on resentencing.

[42]*See* Brown Report 275.

The Comments of the ABA Committee on Sentencing Standards and Procedures reveal that Standard 3.8[43] was adopted because the only class of persons who are vulnerable to increased sentences are those who have exercised their right to challenge their convictions. The ABA Committee opined that there was no basis for believing that this group of offenders deserved increased sentences any more than some other group, and the Committee further suggested that the possibility of a higher sentence was an impermissible[44] price-tag attached to a constitutional right. Moreover, it was emphasized that "greater punishment should not be inflicted *because* [one] has asserted his right to appeal."[45] Accordingly, the ABA Standards would strictly forbid more severe terms upon resentencing.[46]

That federal courts frequently apply strict constitutional standards in resentencing cases and have a distinct proclivity to disallow more severe sentences than originally imposed[47] does not obviate the fact that *Pearce,* while well-intentioned, is wholly unreasonable. In attempting to free a defendant from the fear of "vindictiveness" and "retaliatory motivation" on the part of the sentencing judge, *Pearce,* in order to "assure the absence of such

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[43]ABA SENTENCING STANDARD 3.8:

> Where a conviction or sentence has been set aside on direct or collateral attack, the legislature should prohibit a new sentence for the same offense or a different offense based on the same conduct which is more severe than the prior sentence less time already served.

See Green v. United States, 355 U.S. 184 (1954). *See also* North Carolina v. Pearce, 395 U.S. 711, 744 (1969) (Harlan, J., concurring in part and dissenting in part); United States v. Benz, 282 U.S. 304, 306-07 (1931).

[44]"[P]enalizing those who chose to exercise [constitutional rights] should be patently unconstitutional." United States v. Jackson, 390 U.S. 570, 581 (1968).

[45]ABA SENTENCING STANDARD 3.8, Comment.

[46]Note 43 *supra. See* ABA SENTENCING STANDARD 3.8, Comment. *See also* Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant,* 74 YALE L.J. 606 (1965).

The Indiana appellate courts are to be commended for adopting a position which conforms closely to the sound judgment of the ABA Committee. *See* Whited v. State, 256 Ind. 618, 271 N.E.2d 513 (1971); Eldridge v. State, 256 Ind. 113, 267 N.E.2d 48 (1971); Anderson v. State, 293 N.E.2d 222 (Ind. Ct. App. 1973). While not expressly approving Standard 3.8, the courts have definitely stressed the language in *Pearce* which places great importance on the right to appeal without fear of losing liberty for doing so.

[47]*See, e.g.,* United States v. Bell, 457 F.2d 1231 (5th Cir. 1972). *But cf.* 1965 DUKE L.J. 395.

a motivation," required that reasons for increased sentences be affirmatively set forth.[48] Without any explanation of its reasoning, the Court then required that the reasons be based on "objective information concerning identifiable conduct on the part of the defendant *occurring after the time of the original sentencing proceeding.*"[49] If, as Justice Black opined, the language emphasized above was set as a constitutional requirement[50] by the majority, it is submitted that the majority badly erred[51] and should be overruled. In view of *Chaffin v. Stynchcombe*,[52] however, it appears that the Court has no inclination to modify the *Pearce* holding: the *Chaffin* Court found that a jury-imposed second sentence to a harsher term was not objectionable on either double jeopardy or due process grounds, a position almost squarely supported by *Pearce*. Congress should attempt to remedy this problem, hopefully by adopting ABA Sentencing Standard 3.8 and, at the very minimum, requiring a criminal sentence to be based upon conduct *prior* to sentencing.

VII. Conclusion

This brief Comment has illustrated only a few of the provisos of S. 1 and S. 1400 which should be reevaluated and, perhaps, altered. Both proposed codifications of the federal criminal law contain sections which would greatly improve existing law; however, it is respectfully submitted that there should be a stronger effort to bring the measures, particularly S. 1400, more nearly into conformity with the carefully developed ABA Minimum Standards for Criminal Justice.

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[48] 395 U.S. at 725, 726.

[49] *Id.* at 726 (emphasis added). *See* BC § 3005, *supra* note 41.

[50] 395 U.S. at 741 (concurring opinion).

[51] As Justice Black suggested, the Court engaged in making legislation. *Id.* Moreover, it was *ex post facto* legislation and offered no guidance as to what conduct a convicted person must avoid in order to prevent subsequent punishment which could be retroactively determined and without trial for such conduct. Justices Douglas, Marshall, and Harlan correctly indicated that the holding of *Pearce* also violated the double jeopardy clause. *Id.* at 726, 744.

[52] 412 U.S. 17 (1973).