



# **NI SPECIAL CONFERENCE**

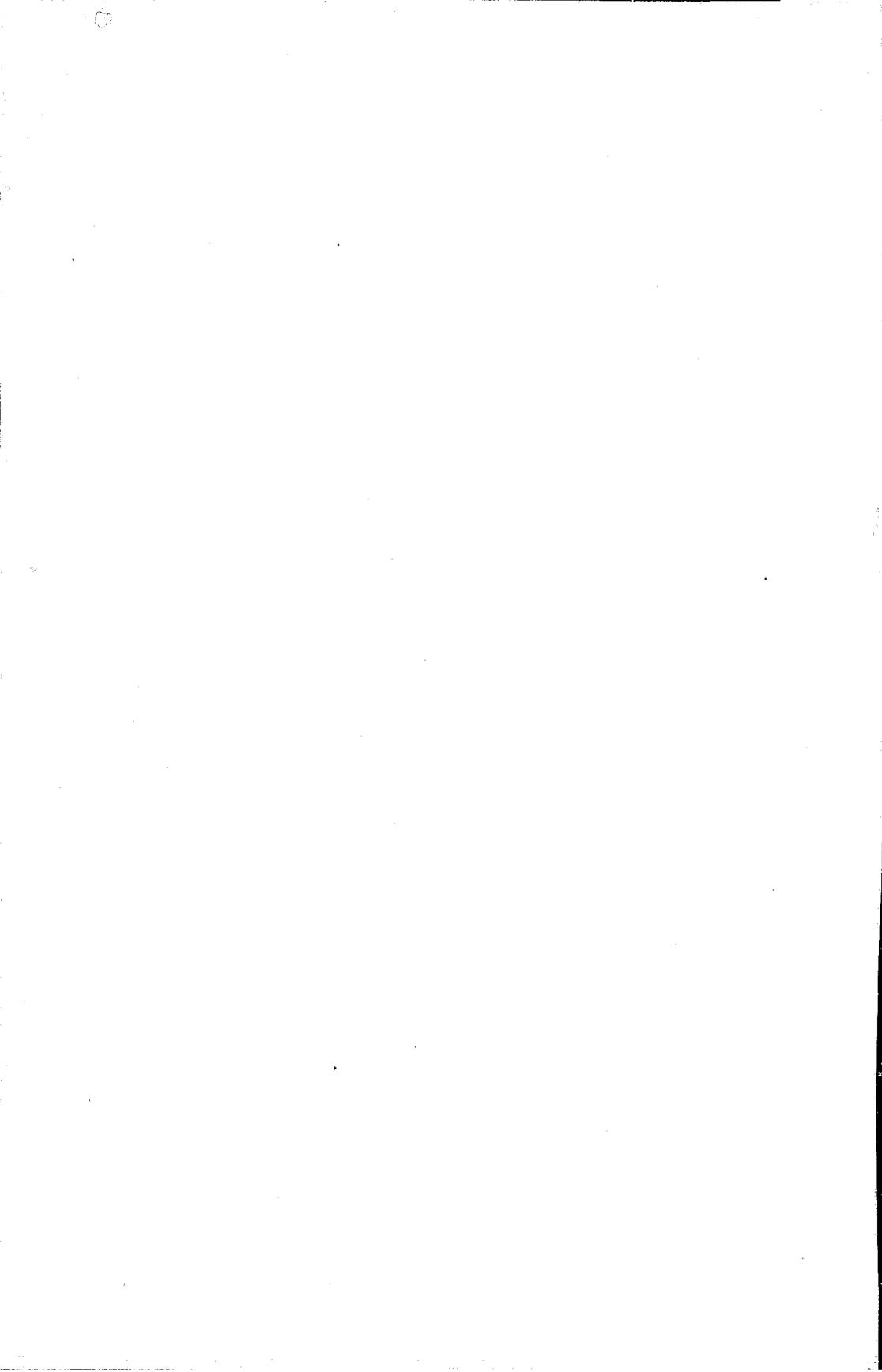
## **DETERMINATE SENTENCING**

**REFORM OR  
REGRESSION?**

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### **SUMMARY REPORT**

NATIONAL INSTITUTE OF LAW ENFORCEMENT  
AND CRIMINAL JUSTICE  
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION  
UNITED STATES DEPARTMENT OF JUSTICE



# DETERMINATE SENTENCING

*Reform or Regression?*

Proceedings of the Special Conference on  
Determinate Sentencing

June 2-3, 1977

Boalt Hall School of Law

University of California, Berkeley

March 1978

National Institute of Law Enforcement and Criminal Justice  
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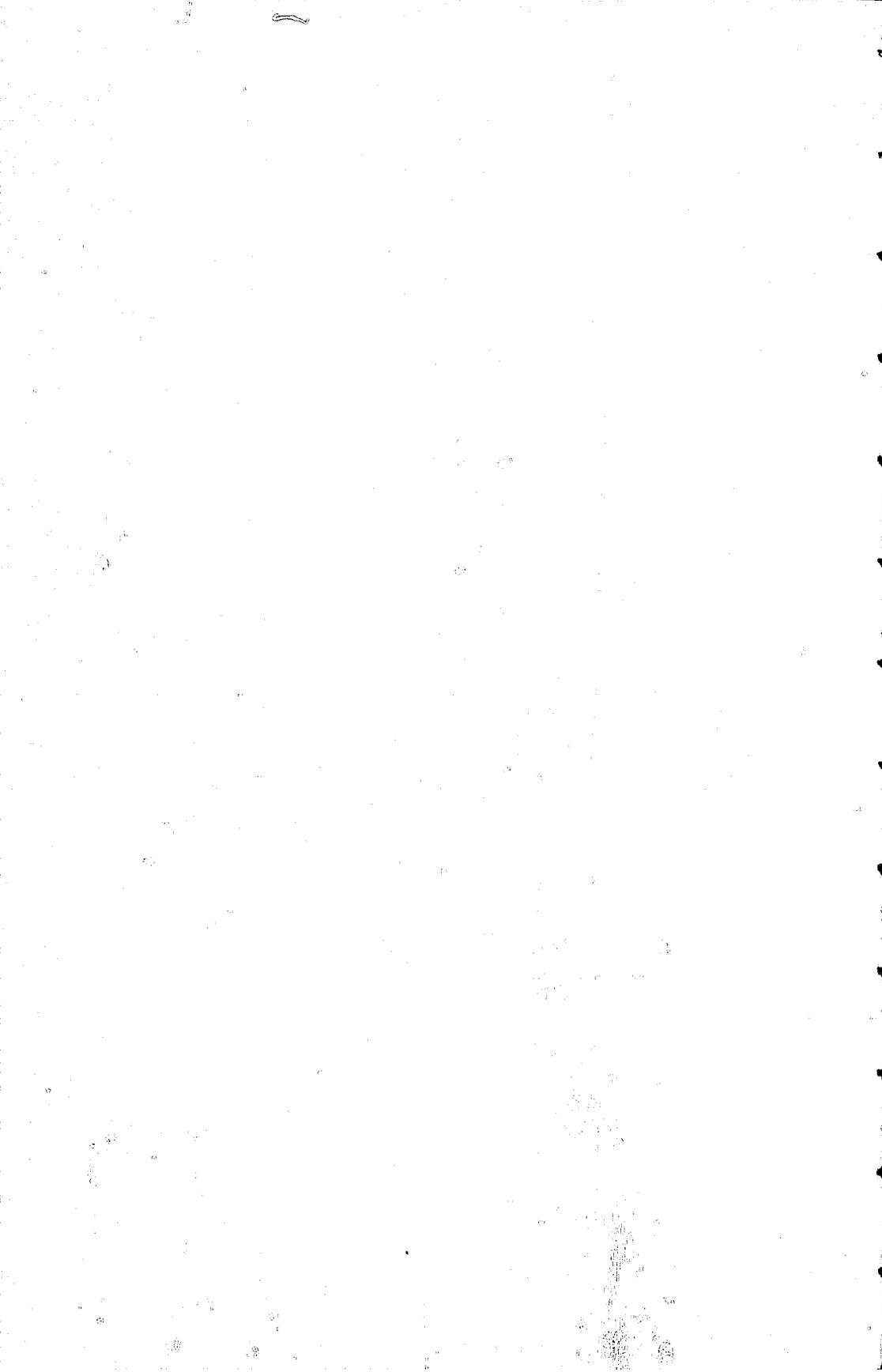
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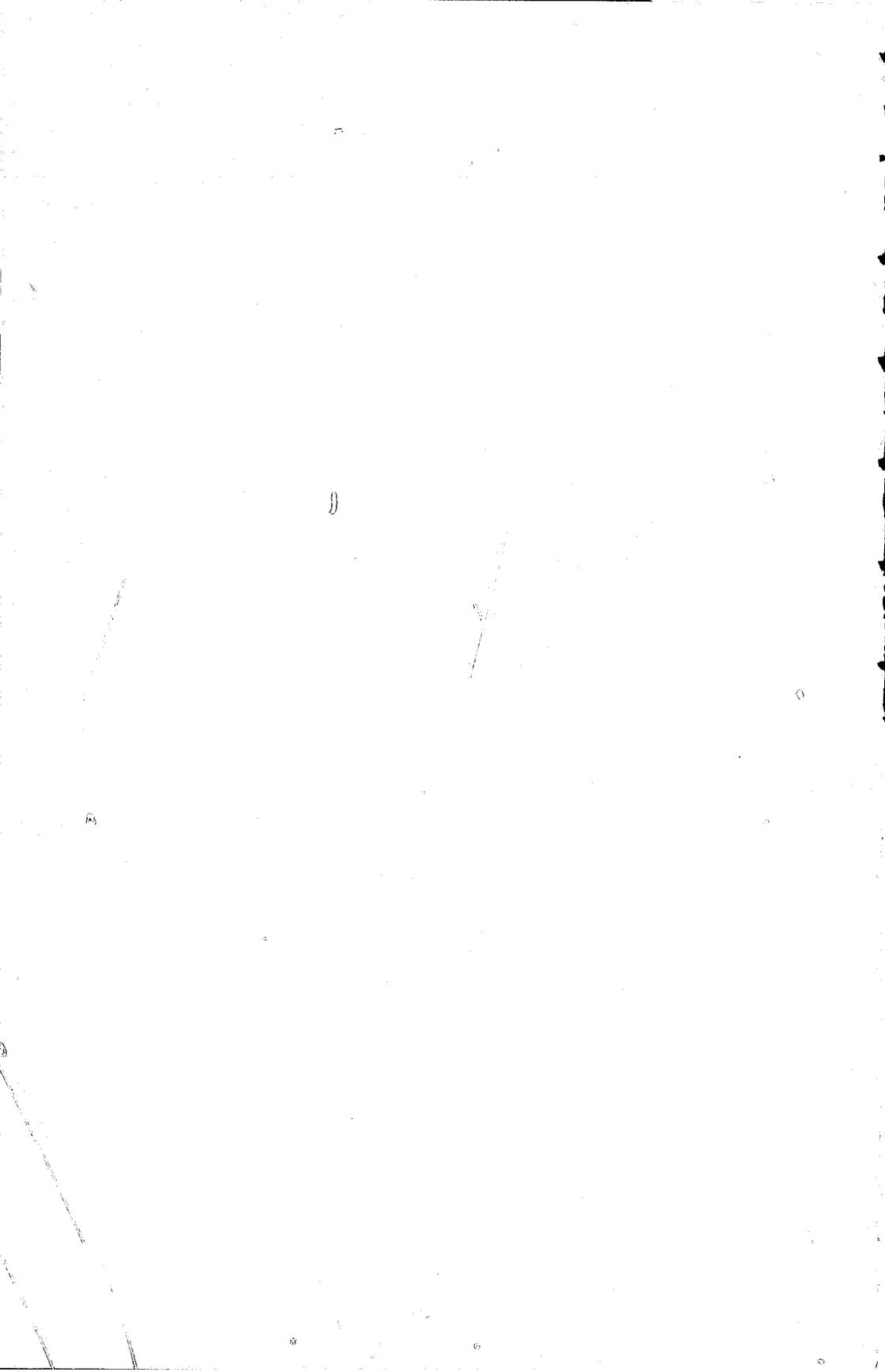
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*Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.*



## CONTENTS

Foreword <i>by Blair G. Ewing</i>	vii
Introduction <i>by Sanford H. Kadish</i>	ix
Conceptual Overview and Commentary on the Movement Toward Determinacy <i>by Norval Morris</i>	1
California's Determinate Sentence Statute: History and Issues <i>by Sheldon L. Messinger and Phillip D. Johnson</i>	13
Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing <i>by Albert W. Alschuler</i>	59
The Law and Its Promises: Flat Terms, Good Time, and Flexible Incarceration <i>by John P. Conrad</i>	89
Issues in the Study of Criminal Code Revision: An Analysis of Reform in Maine and California <i>by Frederick A. Hussey and John H. Kramer</i>	111
Deceptive Determinate Sentencing <i>by Caleb Foote</i>	133
List of Participants in the Special Conference on Determinate Sentencing	143



## Foreword

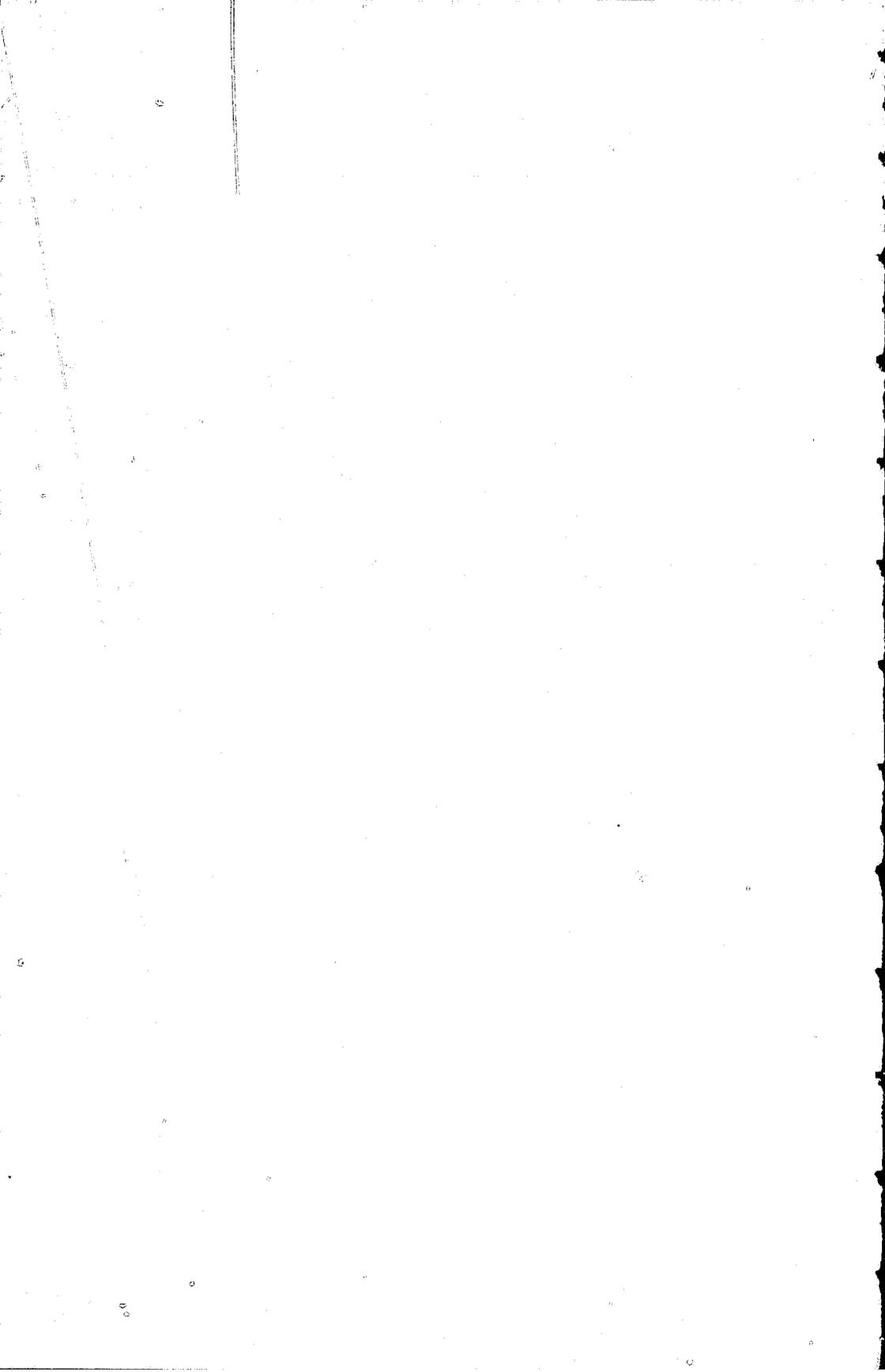
One of the movements we are currently witnessing in the criminal justice field is the trend toward the establishment of determinate or "fixed" sentencing of criminal offenders. Several states have already enacted legislation to provide for this, and a number of others have established study groups or legislative hearings.

In order to examine this trend and its implications, the National Institute and the Boalt Hall School of Law at the University of California, Berkeley, co-sponsored a conference in June, 1977, for more than 70 individuals involved in the current dialogue — judges, legislators, correctional administrators, researchers, and public interest group representatives. Experts in the field wrote position papers and conducted workshops on important aspects of the issue.

It is our belief that these proceedings should receive wide distribution because of their implications. The proceedings include discussions of these issues related to determinate sentencing: the historical roots of the movement; the impact on judges, defense attorneys, prosecutors, and correctional systems; and long-range implications of the trend toward determinancy.

We are hopeful that this conference and the publication of its proceedings will foster an increased understanding of the fixed sentence concept, and its implications for the criminal justice system.

Blair G. Ewing  
Acting Director  
National Institute of  
Law Enforcement and  
Criminal Justice



## Introduction

For decades the theory that shaped our sentencing and correctional laws and held sway among the liberal and the progressive was the theory that sentencing decisions and correctional dispositions should be adjusted to the particular circumstances of the individual. That way the chances of rehabilitating the offender would be maximized, as would the interest of the public in being protected against further criminal acts of the offender. Not that other interests and goals had no part to play in actual dispositional decisions. But individualization and rehabilitation were solidly provided for by the law. Hence the wide range of penalties for particular crimes offered to the judge and the capacious discretion given to administrative agencies to determine when to release on parole, on what conditions and when to revoke. Neither the Model Penal Code of the early 1950s nor the President's Crime Commission Report of the late 1960s, two of the most thoughtful and comprehensive re-examinations of the criminal law in recent times, cast doubt on the continued viability of this theory. The very improvements in practice they recommended only confirmed their basic acceptance of it.

But now, with a precipitousness remarkable in social change, there has been a dramatic turning. Individualization, rehabilitation, sentence indeterminacy all seem on their way down, if not on their way out. The disappointments and resentments generated by the accepted theory seemed to have grown to bursting within a few years — the failure of our correctional machinery to reduce the spiraling crime rate, our increasingly manifest impotency to rehabilitate prisoners or to make predictive judgments about their behavior, the felt injustice of disparity in sentencing among prisoners, the prisoners' despair of an unknown future once imprisoned, the increasing resentment of what was perceived as arbitrary and capricious action by judges and parole agencies, as well as the heightened distrust of authority and official power generally.

The turn toward determinacy in sentencing has already influenced legislation in several states, but nowhere more

dramatically than in the enactment of Senate Bill 42 in California. California pioneered early in the century with as thoroughgoing a scheme of sentencing indeterminacy as anywhere, with nearly open prison terms to be imposed by the judge and administered by an Adult Authority. But having been the first by which the new was tried, California now appears among the first to have laid the old aside. For under the new California law the choice of prison terms is narrowly circumscribed for each offense, parole is relegated to a marginal role and the purpose of sentencing is straight-forwardly declared to be the protection of society and the imposition of punishment. And, of equal significance, the shift represents no defeat for those who march under the liberal and progressive banner, but rather their conversion to a different faith.

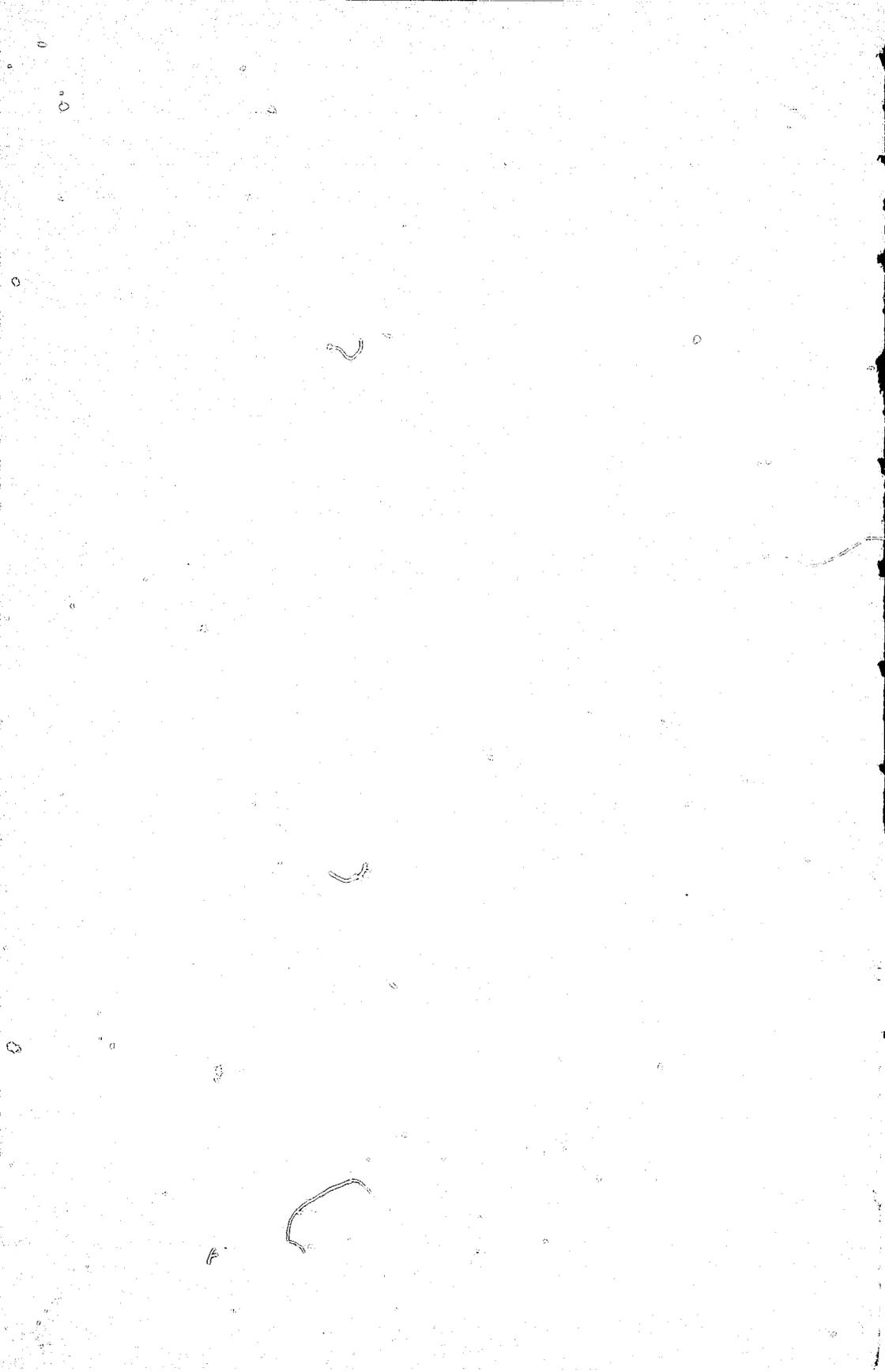
The change is a momentous one for California and no less so for other jurisdictions which have moved or are moving in the same direction. The purpose of the Conference at Berkeley which yielded the papers and discussion contained in this volume was to take due stock of this change by looking backward at how it came to pass and looking forward to what it might produce. What were the forces, concerns and interests that produced this new legislative direction? What are the problems that can be anticipated to arise in working with the new legislation? How may we expect the various agencies of criminal justice to respond to the new system and how, as a consequence, may we expect the new legislation to function in actuality?

These and related issues are dealt with in the papers presented. Dean Morris presents an overview of the movement toward determinacy; Professors Messinger and Johnson inquire into the forces and interests behind determinate sentence legislation; Professor Alschuler addresses the effect determinate sentencing is likely to have on the actions of prosecutors, defense lawyers and judges, and Professor Conrad pursues a similar inquiry for correctional agencies; Professor Foote directs our attention to the possible unintended consequences of sentencing reform; and finally, Professors Kramer and Hussey explore modes of monitoring and evaluating the working of the new legislation.

I believe the papers and the discussions at the Berkeley Conference make a notable beginning in exploring the questions that compel attention as we take this new turn. One hopes that the process will continue. For unless it does we can expect of this legislative innovation what has beset many others in the criminal

area — drift, random actions, dysfunctioning and finally abandonment in favor of some other current of the day that seems appealing if only because it moves in the opposite direction. This may well happen anyway, but without critical attention to what we are doing and what is happening under the new laws, it is almost certain to.

Sanford H. Kadish  
Dean, School of Law, University  
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# CONCEPTUAL OVERVIEW AND COMMENTARY ON THE MOVEMENT TOWARD DETERMINACY

by Norval Morris

*Morris is Dean of the School of Law, University of Chicago. The following is an edited transcript of his keynote address to the Special Conference on Determinate Sentencing.*

Sentencing is at present a fashionable topic, battered by a flurry of legislative proposals, federal and state, and a flood of commentary. It draws together very strange bedfellows. For example, last week's discussions on sentencing in the legislature in Springfield, Illinois, found several sensible sentencing proposals, with which most of you in this audience would agree, being enthusiastically supported by those mindless punishers in the legislature who were interested only in the prolongation of terms of imprisonment and were moved by the simple and silly belief that the crime problem will be substantially solved by a draconic restructuring of sentencing.

There are, as you know, dangers and difficulties in the subject of our conference. Reformers have a history of insufficiently considering the possible abuse of their plans and this risk is certainly great in sentencing reform where there are both intellectual difficulties and political risks aplenty.

Having sounded that rather obvious warning, let me, in the rest of this address, offer some general and probably idiosyncratic ideas on several of the themes to be later pursued with more precision in the papers and discussions at our conference.

The trend to determinacy in sentencing is fairly clear but even here uncertainty remains. What precisely is an indeterminate sentence? Does it, for example, preclude the exercise of discretion by penal administrators about work-release, placement in a halfway house, graduated release procedures? How does it relate to "good time"?

I once set an exam question in Latin, straight out of Prosser, I think. My Latin is poor to the point of absurdity but I believe the

question read: *Res Ipsa Loquitur, vere, sed quid in inferno vult dicere?* The thing speaks for itself, but what the hell does it wish to say? The same point applies exactly to determinacy in sentencing. What does it mean? And who should fix its terms — the legislature, or the judge, or an administrative board, or all or some of the above?

But an even more preliminary point may be of importance. Why the sudden interest in sentencing reform? Why the bills, books, papers, conferences and seminars? Is it because we have at last recognized that unjust disparity characterizes the anarchy of unguided, unreviewed judicial sentencing? Surely not. Twenty-five years ago, when I first approached the literature on sentencing, that point was clear: that sentencing was a lottery. Of course, recent studies have driven the point home, but we have known about unjust disparity for a long while.

Is the answer that sentencing reform is essential to round out our sporadic efforts at reform of the substantive and procedural aspects of the criminal law; that this need is at last recognized; and that disturbed by the rather disappointing reformative exercises of the last decade we are now moved to a larger seriousness of purpose and a more holistic approach? Possibly, possibly, but it sounds unpersuasive to me.

I don't have an answer to the question of why sentencing reform is the current fad. I do have an idea that may be relevant to an answer. The problem of just sentencing has, I think, been long concealed by a false dichotomy in the literature. We too long conducted the debate in polar terms. One was either *for* punishment and deterrence or one was *for* treatment and reform. And those who favored rehabilitative purposes in sentencing tended to explain unjust disparities in judicial and parole board sentences as attributable to the incompetence or the inefficiency of those who imposed sentence, to their failure fairly and wisely to individualize the sentences they imposed on convicted criminals. That explanation will no longer suffice.

Francis Allen's essay in 1964 on the rehabilitative ideal was a turning point in the debate. I find that in that same year I was arguing that power over a criminal's life should not be taken in excess of that which would be taken were his reform *not* considered as one of our purposes. I still happily rest on that proposition.

In 1964 that was not an obvious proposition. Why, even the wise chairman of our meeting today would not accept it then. In an otherwise generous review of the book where that submission

was made, he inquired, brusquely, "Why should the rehabilitative purposes be subordinated to the deterrent, vindictory and incapacitative purposes?" He did not stop to answer his question, indicating rather a free-floating dissent. The fact of the matter is that such gentle uncertainties have been swept away by the intervening years. Many studies and a legion of commentators have forced a recognition of the injustice and ineptness of coerced reformatory processes under the aegis of the criminal law and have compelled a reconsideration of the traditional polar argument between the punishers and the treaters.

But in the result the purposes to be achieved by sentencing are not agreed upon nor are the procedures. A mixture of motives has led us astray: an exaggerated belief by some in the deterrent efficacy of punishment; an excessive belief by others in the reformatory capacity of the criminal law.

The task of devising a fair and efficient sentencing system turns out to be more complex than we previously thought; but still there is a reaching for swift solutions. Currently, suggestions of a simple, legislatively-defined balance between harm encompassed and deserved punishment receive support; it is my submission that they too misleadingly simplify the problem and will not achieve the larger equities we seek.

The web of interrelationships between desert, deterrence, the community educative effects of punishment, a due respect for human rights and minimum dignities, the continuing constraints of clemency and the continuing inadequacies in our understanding of man and his place in society, the whole mesh interwoven with the diversities of crime and criminals and the paucity of resources we allocate to crime control shape problems in punishment insoluble by simple remedies such as mandatory minimum sentences or legislatively fixed sentences.

The task of devising a fair and just system of sentencing becomes more urgent as the serious impact crime has on life in this country is appreciated. And together with this understanding comes the depressing perception that the criminal law is an inept instrument either for coercing men to the good life or for coercing the criminal to social conformity. You can hardly doubt that I have cast a pall of introductory gloom over this conference!

Can contemporary governments deal more rationally with the sentencing of convicted criminals? That, I suppose, is the central question of our conference. Well, I have recently been advised of the three great lies; you may even have used them. The first is: "Thank you for reminding me; the check is in the

mail." The second: "I'm sorry; I gave at the office." The third: "I'm from the Government and I've come to help you." It is a very serious question whether in the political realities of the day we *can* better handle the complexities of sentencing practice than we do now, and this despite clear recognition of present gross injustices.

Your response to the third great lie tells me that you recognize that government is not always beneficent, even when moved by the wish to achieve social good. Nowhere is this truth more evident than in the governmental task of sentencing convicted criminals. So much is expected of the criminal sentence — crime reduction, deterrence coupled with a parsimonious use of great and afflictive powers of punishment, a deserved punishment linked to a just weighing of the social and personal differences between criminals, suffering imposed for the social good but preferably without inhibiting the criminal's capacity for self-regeneration. The sentencing decision is complex, difficult and of fundamental importance, the pivotal point of the criminal law. Yet we lack a Common Law of Sentencing.

I suppose, if I had a message to submit to this conference it would be that there is no shortcut to a Common Law of Sentencing and that the judicial role in achieving the fine-tuning of just sentencing should remain of central importance.

It becomes clear to you by now that I am not going to solve these problems for you. Nor will this conference. But the basic issues are excellently raised in the papers prepared for discussion at our conference and my continuing task is to comment briefly on a few of them.

A trite insight I would offer, unnecessary to submit to this audience but of great significance to the politics of sentencing reform, is that sentencing reform is most unlikely substantially to reduce crime or juvenile delinquency in this country. 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 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 the judges to impose sufficiently severe sentences.

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.

What, then, can properly be expected from sentencing reform? The journey will not be short and there may be unfortunate detours through legislatively fixed sentences, but in the longer run we can reasonably expect a small reduction of crime and juvenile delinquency and, of at least equal importance, we can also reasonably expect the emergence of a principled, even-handed, effective yet merciful Common Law of Sentencing, consistent with human rights and freedoms, competent to the deterrence of crime, the adumbration of minimum standards of behavior and the better protection of society against its in-group predators.

Where do we now stand in that movement? There seems to be agreement in the rejection of open indeterminacy in sentencing on the California Adult or Youth Authority model. All the bills and commentaries move towards determinacy. But ambiguities and uncertainties remain. What is the form of determinacy preferred and who is to prescribe the more precise punishment — the legislature, the judge, the administrative board? You will notice that Senate Bill 1437, the proposed federal criminal code, retains a role for the parole board. And, of course, executive clemency must properly remain. Then there is "good time." Will a residue of parole, the manipulation of good time and a larger use of executive clemency preserve a large measure of discretion in punishment from legislative and judicial control? And is that wise? And there is the further ambiguity in sentencing to prison. What, for this purpose, is a prison? Is placement of the prisoner by the Federal Bureau of Prisons in a

Community Treatment Center, when they believe such a placement appropriate, part of a judicially fixed term of "imprisonment"? At present it is, but is that within the concept of a legislatively and judicially fixed sentence if those agencies do not control it?

Who sentences? When you ask the layman, he replies, "the judge." When you ask the more informed person, the reply is, "the legislature, the judge and the parole board, if a convicted criminal is sent to prison." But then one must add the point forcefully made in the Alschuler paper, that the role of charge and plea bargaining is of great practical importance and that the prosecutor and defense counsel must be included in the sentencing team if sentencing is seen, as it should be, as the larger invocation of state power over the offender or suspected offender. Discretion in sentencing is thus widely distributed. And it is impossible to eliminate and hard to control several of these interlocking discretions.

I disagree with Alschuler's argument that sentencing reform should wait on the achievement of better control of charge and plea bargaining, but I certainly agree with his view that such bargaining may well frustrate reforms in legislative and judicial sentencing. Certainly we should hesitate long before, by legislatively prescribed fixed sentencing, we shift discretion from the judge to the prosecutor, which is the powerful tendency of such sentences — achieving incidentally, neither larger equalities nor more severe sentences.

Should the indeterminacy of the parole discretion be preserved? There is time only to skim over this argument, but let me do so. I hear six points made for parole. Let me offer them in summary form and then comment on each. As regards prison terms, it is said that the parole board rather than the judge should fix the precise release date because the board can:

- 1) Find the optimum moment for release;
- 2) Provide an incentive for rehabilitation;
- 3) Facilitate prison control and discipline;
- 4) Share sentencing responsibility to maximize deterrence while reducing time served;
- 5) Control the size of the prison population; and
- 6) Rectify unjust disparities in sentencing.

The first claimed justification, prediction of the optimum moment of release, fails empirically. Behavior in a cage is not a guide to behavior in a community. You know these data well; I don't have to develop them.

The second justification, to provide an incentive for the prisoner's rehabilitation, has as its net effect the reliance on compulsory rehabilitation in the prison setting. This type of coerced curing of crime is ineffective. It is wasteful of resources. It is silly to fill our limited treatment resources other than with volunteers. We don't know enough to make that second purpose of parole work.

The third justification, to facilitate prison control and discipline, is an important, latent, pragmatic justification of parole. But it is vulnerable to attack on grounds of injustice. I think it unjust to use the parole discretion in relation to disciplinary behavior.

The fourth claimed justification of parole is the sharing of sentencing responsibility between the court and the parole board in order to maximize deterrence. It is a somewhat unreal claim. It is true that parole allows for judicial announcements of larger punishments than are in fact served, but the charade is well known; it is compensated for. One would be gallant to answer the question, with confidence, whether the whole parole experience has increased or reduced time served in America.

The fifth justification, to facilitate the control of the size of the prison population, has occasionally been useful but, generally speaking, in times of community anxiety about crime and of pressures for law and order there has also been great pressure on the parole boards to be more conservative in the grant of parole and thus to tend to compound rather than to solve the problem of prison overcrowding. At all events, pragmatism at this level lays bare our tolerance of unprincipled sentencing; it is surely unjust for the duration of imprisonment of one criminal to turn on the behavior of other criminals.

The last claimed justification of parole, to rectify unjust sentencing disparities, merits somewhat longer consideration. Let me give an example or two. In Illinois, and I believe the same is true in many states, crime for crime and criminal for criminal, sentences imposed by courts in Chicago are substantially less severe than those imposed in downstate, small town and rural areas. The Illinois Parole Board, not incorrectly in my view, exercises its releasing discretion so as to minimize the grosser disparities — it moves towards a regression to the mean. Similar disparities are to be found between judicial circuits in the federal system and the federal parole board also works to minimize unjust sentencing disparities. This exercise of the parole discretion seems sound to me, but the question arises, should we not de-

velop other mechanisms rather than parole for that purpose. I think we should.

Does this analysis lead inexorably to the abolition of parole? In the long run, I think it does; but until we have much better defined and tested relationships between the legislature, the sentencing commission (as recommended in several current reform proposals, including the California legislation and the proposed federal criminal code), and the judge, there is a great deal to be said for the retention of the parole board's releasing discretion to achieve more equitable and just sentences.

The extreme opposite of this sharing of sentencing discretion between the legislature, the sentencing commission, the judge and the parole board is to be found in current unsound recommendations for mandatory minimum and legislatively fixed term sentencing. Mandatory minima are still to be found, even in the proposed federal criminal code, and there has been extensive experimentation with them in many states. Legislation of this type is, in my view, unprincipled and morally insensitive; it cannot encompass the factual and moral distinctions between crimes essential to a just and rational sentencing policy. Nevertheless, it is politically popular. Whenever mandatory minima are prescribed, the same results follow — they meet with nonenforcement and nullification. This is neither surprising nor deplorable. It is not surprising because the pervasive influence of charge bargaining insures the frequent reduction of charges for offenses carrying severe mandatory penalties. It is not deplorable because persistent confusion about the goals of criminal law enforcement and indefiniteness regarding the purposes of punishment make sentencing discretion essential. The enforcement of arbitrary penal equations is both irrational and inequitable. And in the overcrowded court systems of the cities of America, as in the case of the New York experiment with mandatory minimum sentences for certain drug offenses, nonenforcement and nullification will follow.

Remington recently wrote a nice piece on sentencing in which he reports (29 *Vanderbilt Law Review* 1315) that "in Detroit during the 1950s, state statutes prohibited probation for burglary in the nighttime and imposed a significant, mandatory minimum sentence for armed robbery. In practice, . . . burglaries committed after dark resulted in pleas to daytime burglary, and . . . robberies committed with a gun ended up as pleas of guilty to unarmed robbery. So common was the practice that the Michigan Parole Board would often start the interview with 'I see you were

convicted of unarmed robbery in Detroit. What caliber of gun did you use?' Without even a smile, the inmate would respond 'A .38 caliber revolver.' "

Overall mandatory minima probably tend to an increase in the prison population, bringing larger pressures to bear on the accused to plead guilty to the lesser included offense than that for which the mandatory minimum is prescribed. It is a devious, unprincipled sentencing practice.

The legislatively fixed term will, no doubt, figure prominently in our later discussions. Let me offer only a few comments. In my view, the statute books of the states and certainly current federal crimes are insufficiently graded in their definition adequately to support such a system. Guides to a just and principled sentencing system have to be more principled than can be built on what my colleague Zimring has called "the incoherence of the criminal law." Judicial discretion seems to me essential to the fine-tuning required for morally necessary distinctions between crimes and criminals for just sentencing. I am not, of course, arguing against legislative guidance to the judge in the definition of the crime and its appropriate maximum punishment. And further, the legislature should phrase the purposes the judge is to serve in his sentencing function — the Model Penal Code, limiting the categories of crime and defining the criteria of sentencing purpose, gave a wise lead. But the judge's discretion, legislatively guided and subject to appellate review, will, it seems to me, prove essential to the fashioning of a Common Law of Sentencing if basic principles of justice are to be served.

Legislators are under such political pressures to inflate sentences, a process currently perceptible in the debates surrounding the California Senate Bill 42, that they cannot be expected in the Statute Book of Punishment to encompass the near infinite diversities of crime and criminals, the squalor and miseries of life, necessarily relevant to degrees of guilt and deserved punishments.

In my view, the best present proposal encompassing these difficulties and laying the foundation for a Common Law of Sentencing is Senate Bill 1437, the proposed federal criminal code.

The bill comes under powerful auspices. Much of it was shaped by the previous Department of Justice and it is supported by the present Department of Justice. It was introduced in the Senate by Senators Kennedy and McClellan, which portends broad political support. In its sentencing provisions, S. 1437

strikes, in my view, a wise balance between the overlapping and sometimes conflicting discretions of the legislator, the sentencing commission, the judge, the parole board and the prison administrator. The requirement that the sentencing commission and the sentencing judge give reasons for the sentence imposed will make for more effective appellate review when those reasons are in conflict. Overall, the bill provides for more open and principled sentencing and seems to me capable, over time, of producing a reasoned and just sentencing system. There are, of course, many points of detail to be argued as the legislative processes move forward, but the broad strategy in S. 1437 is sound.

Let me conclude my keynote invocation. The past decade of criminal law reform has been disappointing. Reformers have to learn to be less opportunistic and more long-winded — not perhaps as long-winded as I have been, but they must become steady and determined over time. And the prognosis is not bleak: there is now a reasonable hope for the launching of a sentencing system which could move us towards a more principled criminal justice system.

## DISCUSSION

Conference participant Andrew von Hirsch began the discussion of Dean Morris's presentation by saying that there seemed to be a widely held misconception that those who favor determinate sentencing must favor having the legislature set precise terms. There are other methods available, he said, including the sentencing commission approach of the proposed Kennedy-McClellan federal criminal code, and the parole board reforms recently adopted by Oregon, which require the parole board to set release dates early in the term according to strict guidelines.

In his response, Professor Morris began to try to articulate a consensus position, but he soon hit upon a point where he knew he differed from many in the audience. This key point was whether like cases need always be sentenced alike. Morris felt they need not. "In the last resort," he concluded, "I believe that judicial discretion is necessary for just sentencing."

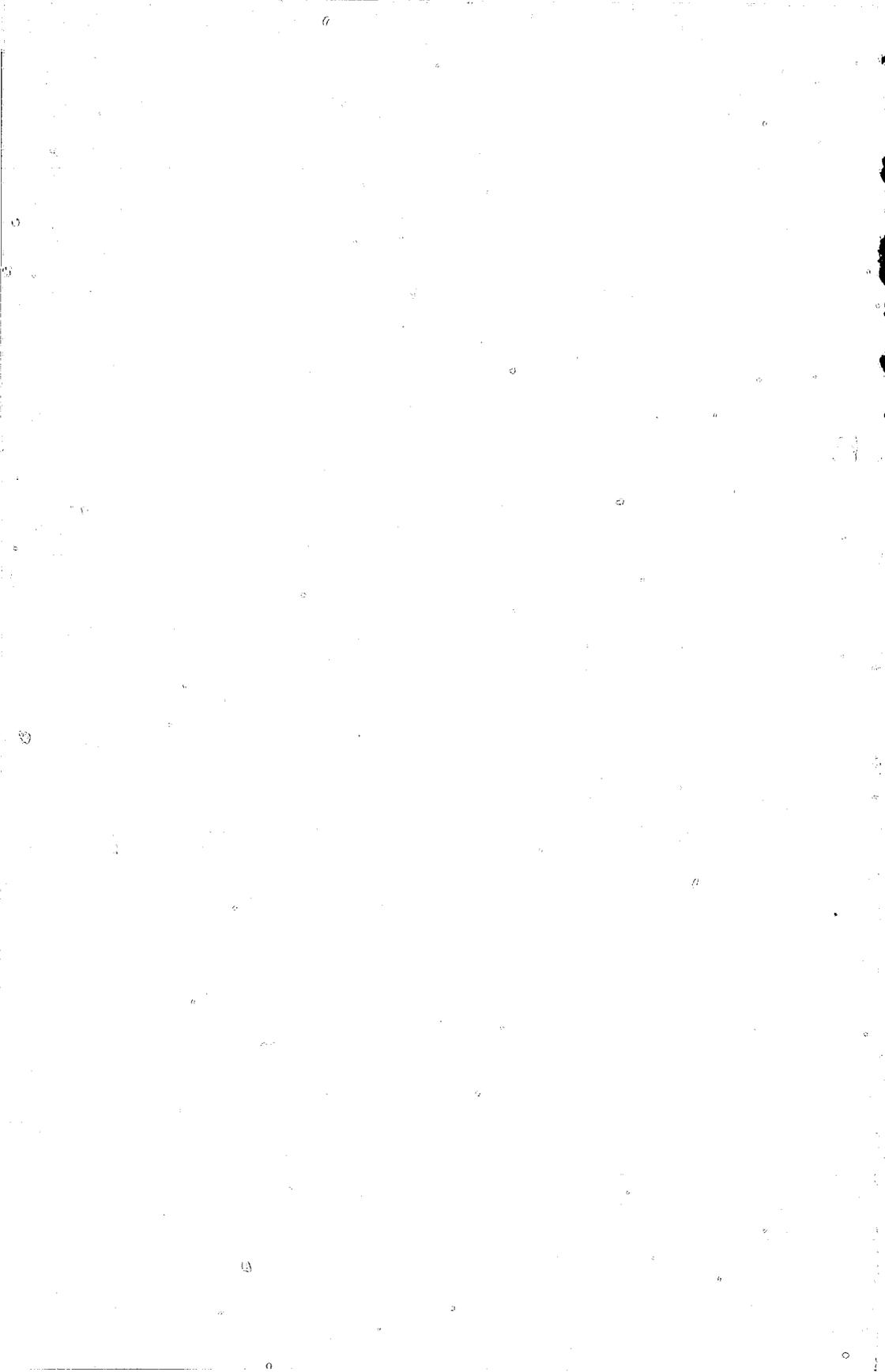
This brought a rebuttal from an ex-prisoner in the audience. Equal crimes must always be sentenced equally, said Prisoner's Union President Willie Holder. Non-legislative approaches, he continued — such as guidelines determined by quasi-judicial bodies — could not be trusted to fulfill this goal.

Another participant said he agreed with most of what he had heard at the conference, but he remained uneasy about some of the absolute positions being taken on the virtues of determinate sentencing. Such certainty, he said, led to the extremes of indeterminacy that the participants were united to redress. Current thinking in the field, he said, showed "uncertainty and flux," and the present time represents "a period of real empirical uncertainty." New laws, he said, should not impose rigid new structures for sentencing as an overreaction against an excessive dependence on rehabilitation as a goal of sentencing.

A legislator took exception to some of Dean Morris's comments about politicians. Academics, he noted, were frequently the despair of legislators. Many legislators, he said, felt they could do as well in formulating sentencing policy as academics who advocate indeterminate sentencing structures one year and denounce them the next. The participant also wondered why scholars so frequently disagreed about predictions of the effects of sentencing proposals on prison populations.

Dean Morris reiterated his reason for opposing legislative term-setting: inevitable "inflation of term lengths." He said predictions of prison populations had to be tentative because "a minority of prisoners are in prisons for what they have done. The majority are in for what they have pleaded to." Thus, he said, the impact of a new sentencing structure depends not so much on term lengths as it does on the attitudes of the judges and prosecutors implementing it.

One participant pointed to the proposed federal criminal code as "a middle ground" between those calling for legislatively fixed sentences and those who fear that route. He also noted that there were currently 61 bills pending before the U.S. Congress calling for mandatory minimum sentences. The new approach represented by the Kennedy-McClellan bill, he said, might well be the only alternative to that kind of legislation. □



# CALIFORNIA'S DETERMINATE SENTENCING STATUTE: HISTORY AND ISSUES\*

by Sheldon L. Messinger and Phillip E. Johnson

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## I

### INTRODUCTION

The law is constantly changing, but the change is usually evolutionary and incremental. Occasionally, a statute or judicial decision breaks abruptly with the past, announcing not only a set of new rules but also a new philosophical approach, indicating a change in the way the opinion leaders of a society are thinking about a longstanding problem. The paradigm of such a change is the opinion of the Supreme Court in *Brown v. Board of Education*, replacing the concept of "separate but equal" with the revolutionary idea that, in racial matters, separate is inherently unequal.

California's determinate sentencing act is in no way comparable to the *Brown* decision in importance, but it too indicates that ideas about a perennial problem are undergoing radical change. Like *Brown*, it may also show it to be one thing to see that fundamental change is necessary: quite another, to make that change come about.

Before 1976, California was famous or notorious as the state whose laws seemed most thoroughly committed to the idea that sentences should be indeterminate. The laws implied or said that the length of imprisonment should depend more on the individual characteristics of the criminal than on the nature of the

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\*A preliminary draft of this paper was prepared in April, 1977. This draft was prepared in July, 1977, after California's Determinate Sentencing Act was amended and, as amended, went into effect. We have left our discussion of the original act, in Parts III and IV, largely unchanged. We have, however, considerably modified the discussion in Part V to take account of those amendments actually made in June, 1977. And we have enlarged the concluding section, Part VI, to include some thoughts generated by dialogue at the conference for which the preliminary draft was prepared. Parts I and II remain substantially as they were in the preliminary draft. Phillip E. Johnson was unable to participate in revision of the preliminary draft. Sheldon L. Messinger made the revisions, and will accept such credit or opprobrium as is due.

crime; maximum discretion over length of sentences should be given to an administrative agency shielded from public accountability; the purpose of imprisonment is to rehabilitate the offender and to protect society from his further misdeeds; and the released prisoner should be subjected to a lengthy period of parole supervision to protect the public and to insure his rehabilitation. The Uniform Determinate Sentencing Act of 1976, commonly known in the state as S.B. (Senate Bill) 42, seems to be based on the opposite assumptions in every respect. As originally passed, it provided a relatively narrow range of fixed penalties for each crime; replaced Adult Authority discretion over release with a complex system of "good time" credits; greatly lessened the period of parole and the importance of parole supervision; and, perhaps most significantly, stated flat out that *the purpose of imprisonment is punishment.*

The California sentencing reform is an event of national significance. If other jurisdictions did not go as far as California in endorsing indeterminacy, they nonetheless went very far indeed. Unchecked discretion is a feature of criminal sentencing law everywhere, whether the discretion is lodged primarily with the courts or the parole boards. Reforms based on the considerations which inspired the California innovations are in the air in many states.

This paper assumes that knowledge of the California experience will be instructive to a national audience. Our disadvantage in writing about that experience is that *our research is in a preliminary state, and our conclusions must therefore be extremely tentative.* We have only begun to understand the complicated history of the attempt to abolish or radically alter the indeterminate sentencing system. The new statute itself only recently went into effect, and before it did it was substantially amended. Even if we knew much more than we do, we could not begin to predict the effect which the new statutory scheme will have as it is put into practice in a system of criminal justice accustomed to applying very different rules. This paper should thus be viewed as a preliminary effort designed to set the stage for discussion, not as a definitive account of the events it relates — or even of our own views.

The paper is divided into sections for the convenience of the reader. Section Two briefly describes the system which the determinate sentence scheme has supplanted. Section Three describes the political and legal situation in 1976 which made it possible and perhaps necessary to replace the Adult Authority system with an entirely different sentencing method. Section

Four describes the principal features of the resulting statute, S.B. 42. Section Five briefly describes the amendment struggle, the forces and issues involved, and the thrust of the amendments finally adopted by the California legislature. Section Six offers some tentative conclusions.

## II

### THE CALIFORNIA INDETERMINATE SENTENCE SYSTEM

First introduced in California in 1917, indeterminate felony sentencing existed until recently in approximately the same form ever since the creation of the Adult Authority in 1944. The system is simple to describe in broad outline, although piecemeal amendments over the years made the specific sections governing such vital matters as parole eligibility incredibly complex and confusing.

Under the indeterminate system, California judges did not fix the sentence for convicted felons committed to prison; instead, they sentenced the offender to "the term prescribed by law." An administrative agency known as the "Adult Authority" determined the amount of time a convict actually served by "fixing" the sentence at some point between the statutory minimum and maximum.

The sentence so fixed was the total amount of time to be served before absolute discharge. Convicts normally served part of this time on parole, a matter also determined by the Adult Authority by setting a parole date to take effect some time before the fixed sentence terminated. With some exceptions, prisoners serving a minimum statutory sentence of more than one year were eligible for release on parole after serving one-third of the minimum term. First-degree murderers and others sentenced to statutory sentence of life imprisonment were eligible for parole after seven years; habitual criminals with three previous convictions were eligible after twelve years. Train wreckers and kidnapers who inflicted bodily harm upon their victims incurred a statutory sentence of life imprisonment without possibility of parole.

Throughout most of its history the Adult Authority followed a practice of delaying fixing a prisoner's sentence until he had been in confinement for a considerable period of time and was considered "ready" or nearly "ready" for parole. Until it acted, the prisoner was considered to be serving the maximum sen-

tence provided by statute, frequently life. Even after a sentence was fixed by the Authority, it could be "refixed" for cause such as violation of prison regulations or of the terms and conditions of parole. The Authority could also refix that portion of the sentence the inmate would serve on parole. Until quite recently the California courts consistently held that the Authority could fix and refix sentences and parole dates, and revoke paroles, without notice or hearing, although the Authority provided hearings as a matter of policy. The decisions of the Adult Authority, finally, were practically immune from judicial review.

To appreciate the full extent of Adult Authority discretion, one must realize that the statutory maxima were extremely long in relation to the time normally served in practice. Such common felonies as second-degree murder, robbery, rape, and burglary of a dwelling each carried a maximum term of life in prison. Yet in 1965, the median time served in prison by prisoners released on parole for these offenses ranged from a high of 5.4 years (second-degree murder) to a low of three years (burglary). Of 522 armed robbers released on parole in that year, 439 had served five years or less and only three had served more than ten years. The situation for less serious felonies was similar. Forgery, for example, carried a maximum sentence of 14 years. Of 432 forgers released on parole in 1965, 337 had served two years or less. Only one had served more than five-and-a-half years.

In short, the California indeterminate sentence system left the determination of the length of imprisonment and the parole period to an appointed board which was given an almost awesome freedom from legislative or judicial control. For years this system was satisfactory to a wide spectrum of opinion, and even when it came under heavy attack it seemed likely to endure because of the difficulty of agreeing on a replacement. The indeterminate sentence appeased liberal sensitivities by purporting to reject such "primitive" notions as retribution and deterrence, and by providing the possibility of speedy release of offenders amenable to rehabilitation. Judges were happy to be relieved of much of the responsibility and pressure inherent in sentencing. Prison administrators considered a flexible date of release an important tool in controlling hostile inmate populations. Politicians were free to be irresponsible: statutory penalties could be raised to grossly unrealistic levels to appease public passions without necessarily affecting the exercise of Adult Authority discretion. Law enforcement officials took comfort because Adult Authority sentences were among the longest in the nation, be-

cause it was possible to confine a "dangerous" prisoner for a very long time even if he could not be proved guilty in court, of an exceptionally serious crime, and because many Adult Authority members came from law enforcement backgrounds.

None of these satisfactions was unalloyed, however, and criticism of the indeterminate sentence system did develop, most visibly at first from groups concerned with civil liberties and prisoners' rights. Such critics charged that the system gave too much unchecked discretion to a board which overrepresented law enforcement interests; was based on false assumptions about the predictability of human behavior; resulted in overlong prison terms on the average and especially for prisoners guilty of displeasing their guardians for failing to conform to middle class behavioral norms; and, above all, was cruel and frustrating for prisoners who had no clear idea of how long they might have to serve or what they could do to shorten their sentences.

These criticisms were sufficiently well-founded so that many legislators and influential members of the legal and correctional professions came to agree with them. Yet in themselves such arguments were not enough to force a change as long as the indeterminate sentence system retained its usefulness in other respects. Furthermore, the legislature could not abolish indeterminacy without general agreement on a replacement. One of the most useful features of delegating sentencing authority to the Adult Authority was that it made it possible for the legislature to avoid making hard decisions about how severely crime should or could be punished. Basic reform could come about only if the desire for change were strong enough to compel groups with very different ideas about the appropriate levels of penalties to compromise their differences.

### III

#### THE POLITICAL AND LEGAL SITUATION PRIOR TO 1975

During 1974, Senator John A. Nejedly, Chairman of the Senate Select Committee on Penal Institutions, hired Michael Salerno, then an aide to another legislator, to work on some juvenile justice matters and, more generally, to survey the justice situation in California in search of matters possibly ripe for legislative remedy. Salerno's observations soon led him to the conclusion that there was considerable dissatisfaction with the indeterminate sentencing system and that some change might be

possible. He consulted with Raymond Parnas, a law professor at Davis, who confirmed his belief and expressed interest in working on the matter. Parnas was hired as a consultant to Nejedly's committee after Salerno and Parnas sought and received the senator's approval to begin more determined inquiry into the area with a view to drawing up legislation.

During October and November 1974, Salerno and Parnas consulted with the legislative lobbyists for the district attorneys, police, correctional officers, and the Department of Corrections, other law professors at Davis, and a Corrections Department researcher, among others. There was a meeting with Raymond Procunier, then Director of Corrections, and his staff, and another with five Los Angeles Superior Court judges. Only the last meeting, apparently, resulted in expressions of opposition to plans to move toward greater determinacy in sentencing, and in Salerno's and Parnas' judgment this opposition was, to say the least, uninstructed.

By late November 1974, a working paper had been prepared suggesting cut-down ranges of penalties for offenses and giving judges discretion to fix a maximum prison term within those ranges; the Adult Authority would continue to decide if and when a prisoner might be paroled. This paper was made the basis for discussion at open hearings held on December 5 and 6. Some two dozen witnesses testified at the hearings, including: representatives of various prison reform groups; Richard McGee, former Director of Corrections in California and a recent proponent of more determinacy in sentencing; a delegation of Superior Court judges; and representatives from the California Correctional Officers Association, the Attorney General's Office, and the District Attorney's Association. The burden of testimony was strongly supportive of more determinacy; indeed, strong sentiment was expressed for legislatively fixed, "flat" sentences. Only the judges' representatives took a strongly negative position.

From that point until passage of S.B. 42 on August 31, 1976, activities became very complicated. In this section we present, first, a tentative outline of some of the main activities and events, with dates, to provide a set of guideposts; and, second, equally tentatively, what we take to be some of the major issues of concern to those forces helping to shape S.B. 42.

### **Main Activities and Events**

After the public hearings in December 1974, the working

paper was abandoned. During the early months of 1975, new drafts were prepared and widely circulated; a version of what was to become the final bill was introduced in the Senate on March 4, 1975. At the same time, Raymond Procnier, who had resigned his post as Director of Corrections, became Chairman of the Adult Authority and instituted by directive a plan for early term-fixing based on the seriousness of a prisoner's offense and past criminal record. This move by Procnier was widely interpreted as an effort to undermine S.B. 42.

Notwithstanding Procnier's gambit, work on S.B. 42 continued. The bill was heard and passed by the Senate Judiciary Committee in April 1975, and by the Senate Finance Committee in May. It was passed by the Senate 36 to 1 on May 15, 1975.

The bill was then considered by relevant Assembly committees. There was great difficulty in getting the Assembly Committee on Criminal Justice, headed by Alan Sieroty who was developing competing legislation, to schedule a hearing. It was heard by this committee on August 6, 1975. No definitive vote was achieved in the face of negative testimony from the ACLU and the District Attorney's Association, whose representatives held, respectively, that the penalty provisions were too harsh and too mild. The bill was tabled to be reheard a year later.

This testimony and action apparently dispirited Senator Nejedly and his staff; the senator announced that he would not push the bill further. But within the next month or two the ACLU changed its position, moving to support the bill, as did portions of the State Bar Association. By the end of 1975, it began to appear as if the bill might have a chance of approval when reconsidered.

Judicial opinions helped change the tide of sentiment. Only two of the most important opinions will be noted here. In *Rodriguez*, 14 C. 3d 639, which appeared in mid-summer 1975, the California Supreme Court found that 22 years of imprisonment, even under a statute providing a possible life sentence, was unconstitutionally excessive given the facts of this particular case of nonviolent fondling of a six-year-old child. In the course of the opinion, the Court made clear that it was prepared to find the Adult Authority responsible to fix all sentences proportionately to the culpability of the individual offender, and that, once fixed, sentences could not be refixed upwards — the routine practice in the past in the case of parole violations. The Court also said that to continue to imprison an offender "solely because he was not competent to care for himself in the free society," once a sen-

tence was fixed, "would thereafter constitute punishment for status which is also constitutionally proscribed." "Adequate non-punitive means of caring for such persons are available," the Court said, under existing civil legislation. This provided the Nejedly staff with grounds for amending out of S.B. 42 a provision for extended terms for "dangerous" offenders, a matter of great concern to prison reform and civil liberties forces.

*In re Stanley* (and *In re Reed*), 54 C.A. 3d 1030, came down in January 1976. Two prisoners challenged the Adult Authority's right, under the Procnier directive noted earlier, to postpone their parole dates on the basis of concurrent sentences imposed for lesser offenses. The California Court of Appeals expanded the issue to include the validity of the whole Procnier directive. Its opinion appeared to many to cut the ground from under the directive by holding that the directive's table of fixed time increments, based primarily on the nature of the offense and prior criminal history, militated against taking adequate account of such matters as acceptable in-prison conduct, reclamation potential, postrelease social safety, and premonitions of danger not revealed by overt misbehavior. According to the Court, all of these matters should form part of the "individualized" consideration due prisoners in the fixing of parole dates under the existing Indeterminate Sentence Law.

Our interviews suggest that these opinions were among the most influential factors moving the Governor and his advisors, and some of the more influential district attorneys, to take a positive interest in changing the sentencing statute. Some district attorneys apparently concluded that the opinions had created a situation in which the courts would take an increasing and unpredictable role in determining "appropriate" sentences; a system more responsive to "public opinion" was wanted. The Governor's office, encouraged by Senator Nejedly's staff, apparently found *Stanley* the last straw in suggesting the unworkability of administrative reform without new legislation. In any event, early in 1976 the Governor and some of his top aides met with Adult Authority Chairman Procnier and Senator Nejedly and his staff. The Governor indicated his readiness to support a reworked version of S.B. 42 more acceptable to "law enforcement." He instructed his aides to spend whatever time was necessary to accomplish this goal.

The bill was reworked during the first months of 1976, resulting in an amended version introduced in April 1976. Law enforcement groups, with some reservations, supported this ver-

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sion which, compared to earlier versions, qualified the retroactive provisions of the bill by making it possible selectively to keep certain offenders in custody notwithstanding what the court had explicitly taken into account when sentencing such offenders under the old law. The April version also inserted a three-year "enhancement" possibility for each violent offense resulting in imprisonment in the record of a person currently convicted of a violent offense. Prison reform groups, on the other hand, had serious objections to these and other specific features of the bill and worked over the summer of 1976 to have them modified. The Department of Corrections entered the fray more actively at this time as well.

The April version of S.B. 42 was amended four times more, but it is clear that it contained the essence of the bill as finally passed; amendments appear to have "softened" some of its penalty provisions. The bill was reheard and passed by the Assembly Committee on Criminal Justice in August 1976. That same month it passed the Assembly Ways and Means Committee and the Assembly as a whole, 60 to 17, and brought concurrence from the Senate. The Governor signed the bill on September 20, 1976.

Too simply, events in 1975 and early 1976, including increasing evidence that under existing legislation continued intervention by the courts could be expected, moved the Governor's office from an officially neutral to an officially supportive position on the bill. All these events moved law enforcement to think some legislation would pass, and law enforcement seized the opportunity to shape that legislation in ways conforming to its notions of what was needed. Prison reform groups, supportive of the bill in principle throughout, worked to modify various aspects of the bill. They particularly tried to insure limited discretion focused on acts, not persons, with terms as short as possible in light of the contending forces. Civil liberties groups were more ambivalent. The correctional bureaucracy, hampered by the Governor's support of the bill, also worked to modify certain provisions.

## **Major Forces and Issues**

### *The Correctional Bureaucracy*

Legislative changes beginning in 1944 had created a bifurcated correctional bureaucracy, with the Director of Corrections

with responsibility for prisons and the parole organization, and the Adult Authority with wide discretion to grant and revoke paroles and to fix and discharge prisoners and parolees from sentence. The Authority's exercise of its discretion was subject to attack from 1944 on, but during the 1970's, particularly, the attacks mounted. It is important to appreciate that such attacks came from *all* segments of the community, not only from prison reform groups as was sometimes supposed, although, as noted, attacks by these groups were the most visible. Police and prosecutors found parole release dates uncertain and frequently too early; civil libertarians found them arbitrary, capricious, biased, and frequently too late; prisoners found them anxiety-inducing and irrational; a whole series of Governors had been embarrassed from time to time by particular decisions. And — a fact seldom appreciated — prison officials were in almost daily battle with the Authority, finding its practice of fixing terms late a block to rational planning, its terms unpredictable, its release and parole revocation actions subject to whim and political influence.

These matters and others had led to a move within the bureaucracy during the early 1970's, headed by Raymond Procunier, then Director of Corrections, to get the Authority to fix parole dates and sentences early on, at the first hearing in most cases, and to a more diffuse pressure for the Authority to articulate and make known to staff and prisoners the bases for its releasing, sentence setting, and parole revocation decisions. At best, this move was only mildly successful, meeting the resistance of Authority members committed to the view that such decisions were very much a matter for case-by-case decision on the basis of factors too complicated to articulate (but heavily influenced by the "expert" views of members about future dangerousness), and that such decisions were best made late rather than early in prisoners' careers. Even the mild success was ended in 1972 when pressure from Governor Reagan's office, responsive to police complaints about "leniency," moved the Authority back to its former ways of acting.

When Governor Brown took office in 1974, the bureaucracy was pervaded by vague feelings that some changes were in store, probably in the direction of more determinacy; the preference was to make such changes as necessary by administrative, rather than judicial, or, especially, legislative action. Raymond Procunier became head of the Adult Authority in early 1975, as noted, and pursued this goal with vigor. He issued orders making sentence- and term-fixing on the basis of articulated stan-

dards, as early as possible, the operating rule for the Authority.

The move, as we know, did not stave off legislative change. Preliminary inquiry suggests several reasons for this fact. First, it appears that Authority members and representatives, especially those carried over from the Reagan administration, were reluctant to follow Procnier's administrative directive. Early term-fixes, guided by the norms also in the directive, rose for a while, then declined. Exceptions were increasingly frequent. And, for reasons unimportant here, in late 1975 Procnier, in the words of one informant, "withdrew from the battle." The acting chairman to follow, Ray Brown, was unable — whatever his willingness — to implement the Procnier directive. To sum it up: it became increasingly apparent that sufficient reform could not be accomplished by administrative directive alone.

Further, the administrative route to change carried its own troubles. The Authority could, but did not have to, fix terms early or at any particular length by law. If an ex-convict who could have been imprisoned longer got into trouble, this could be seen — and was seen — as a matter of undue "leniency" on the part of gubernatorial appointees who might — and should — have acted differently. Some ex-convicts always get into trouble, almost needless to say, and some forces in the state are ever-ready to publicize such trouble. Some "sensational" cases during 1975 clearly affected the sentiments of Adult Authority members and, presumably, the Governor's office.

The final blow seems to have been delivered by the *Stanley* decision in January 1976, which said, in effect, that so long as the indeterminate sentence law remained on the books, the Authority *had to* take "rehabilitative factors" into account in determining release dates. This was directly contradictory to the logic, if not the fact, of the Procnier directive, which had moved to fit actual prison terms to the seriousness of the offense, the prisoner's culpability, and the past criminal record, with little more than glancing attention to "rehabilitation."

### *The Governor's Office*

This complex of factors appears to have changed the position of the Governor and his advisors. Some participants have suggested that there was "panic" in the office following the *Stanley* decision, the assessment being that a sentencing scheme more acceptable to contending forces could not be fashioned without legislative change: (At least three participants, all lawyers, feel

this was an overreaction, and that further administrative adjustments could have produced a satisfactory outcome without legislative intervention.)

We have noted the conferences initiated by the Governor which began in January 1976 and resulted in the amended version of S.B. 42, acceptable to law enforcement, introduced in April. Without more detailed information, it is difficult to be certain of the interest of the Governor's office in the ensuing negotiations — except to say that the office was pervaded with a sense that legislative change was needed, and that a bill was wanted that would, to the extent possible, satisfy contending forces among both law enforcement and prison reform groups. Less attention was given, so far as we can see, to the particular needs being expressed by the correctional bureaucracy. The Adult Authority and Women's Parole Board were apparently considered expendable. At least one conference was held between top prison officials and Senator Nejedly's staff; this resulted in procedures for revoking "good time" more acceptable to prison officials. Other requests from prison officials were mainly filtered through Mario Obledo, head of the larger agency of which corrections is part, and Obledo seems to have differed with prison officials about the advisability of certain changes, e.g., lengthening the proposed parole period. Obledo appears to have prevailed on this issue, although prison officials did get a promise from the Governor's office to introduce further changes for consideration by the Assembly Criminal Justice Committee. This was done, but some or all of the proposals were defeated.

### *Law Enforcement*

At the first hearing of S.B. 42 before the Assembly Criminal Justice Committee, in August 1975, representatives of the district attorneys and the police opposed the bill — although it appears that the district attorneys, at least, were for more determinacy in principle. Proposed prison terms were held to be too short. The Attorney General's Office, on the other hand, supported the bill, even though some officials had reservations about specific provisions.

The Attorney General's supportive position was the outcome of discussion of a position paper prepared in 1975 by Jack Winkler of the office. In that paper, Winkler argued that the indeterminate system had proved to be a failure in controlling recidivism, and he questioned deterrence and isolation as plausible

aims of imprisonment. He suggested that punishment to uphold societal values could be an appropriate aim, and that the sentencing system should be designed to fulfill that aim — without completely abandoning the other aims. He proposed a move to a new system which would mete out penalties based on the seriousness of the offense; mitigating and aggravating circumstances; prior criminal history; and the postconfinement behavior of prisoners, which should affect parole eligibility through a "good time" credit system. It should be remarked that, although the paper does not provide details, the principles pronounced are very close to those embodied in S.B. 42.

We do not know what specific provisions, if any, were proposed by the Attorney General's office, except that the office threatened later to withdraw support if "enhancement" of terms on the basis of facts pleaded and proved with respect to carrying or using arms, great bodily injury, and past criminal record, were made discretionary rather than mandatory. A compromise was reached whereby enhancements were made "presumptive," leaving it to the judge to decide and rationalize not increasing the sentence.

The same issue troubled the district attorneys, who agreed to the same compromise. And it seems clear — although again we do not have full detail — that all law enforcement organizations supported longer terms than those originally provided. It is not clear that the April version of the bill in fact included longer terms than earlier versions — but it is clear that it provided the *possibility* of longer terms, especially for persons convicted of a selected set of "violent" offenses, known as the "dirty eight." And, as noted, law enforcement supported changes limiting the retroactive provisions of the bill, making it possible to hold already-sentenced offenders longer than would have been possible otherwise.

The police, too, seemed to have moved to support the April 1976 version of S.B. 42. Chief Edward Davis of Los Angeles provided a salient exception. His opposition both before and after passage of the bill was variously interpreted as a political gambit to muster conservative support for some future office seeking, and as due to his failure to understand the likely consequences of the legislation. These were not necessarily inconsistent accounts.

Two further comments seem germane. First, many provisions of S.B. 42, presumably sought by prosecutors, appeared to strengthen enormously the say of prosecutors over the sentences

actually to be served by prisoners. S.B. 42 provided that judges could not mitigate or aggravate sentences, nor "enhance" them, without an express motion in court. Defense attorneys were expected seldom to move for aggravation or enhancement. These, among other features of the bill, considerably strengthened the prosecutors' already great powers in plea bargaining.

Second, it was clear when they were expressed, and became clearer later, that the positions outlined for law enforcement (and other groups, for that matter) represented, at best, a tenuous consensus among the members of these groupings. Bureaucracies are not organizations committed to generating consensus among their members; and, in the case of multiple bureaucracies (like prosecutors' offices or police departments), even the means for valid opinion gathering are not present. Bureaucratic leadership, as well as access to legislators and their staffs, appears to play an especially important role in articulating the effective positions of such groupings.

### *Judges*

This last point is especially relevant to a discussion of the role of judges, since they appear to be especially poorly organized for the generation of consensus or concerted expressions of opinion. What we know suggests relatively little input from judges, and what there was generally resisted the move to give them the burden of choosing a determinate sentence for convicted felons. We can only speculate about the variety of reasons that those few judges who expressed opinions had for them, but prominent among these reasons appeared to be the belief that "protection of the community" is better served by a later, rather than an earlier, release decision. Unkinder critics also suggested that judges simply do not want to shoulder responsibility for the kind of decision certain almost always to be unsatisfactory to some.

This matter needs further study, clearly. But the preponderant response of judges was resistance, and this throws some light on the history of the struggle over determinacy generally. It has often been speculated that judges must have opposed the moves toward indeterminacy earlier in this century, since they lost discretion as a result. There is little evidence on record that this was so. The recent experience suggested that judges might have welcomed relief from an unpleasant burden and actively supported these moves. In California, it may be noted, the 1917 indeterminate sentence statute was *written* by a judge.

The court does have some means for organized expressions of opinion. The California Association of Judges — a voluntary association in which most judges hold membership — consistently opposed S.B. 42, but with little effect. The California Judicial Council is an organ of court government, under the State Supreme Court. S.B. 42 charged the Council with developing sentencing standards for application by the courts, and with gathering and analyzing information on sentencing. What we know suggests that the Council did not actively enter the bill-shaping process until late in 1976, and it then had little effect on the bill's provisions.

Generally, and with some salient individual exceptions, judges appear not to have believed that a determinate sentence bill would pass the legislature until it was too late to negotiate provisions in which some or many might have been interested. Having often spent much time working on legislative proposals that came to naught, most judges were apparently not excited by the possibility of legislative change, a possibility they thought slight.

### *Penal Reform Groups*

A wide variety of groups interested in reforming penal law and practice exists in California. We spoke with representatives of only two of those most active in helping shape S.B. 42; the local chapter of the American Civil Liberties Union and the Prisoners Union. The ACLU is well known as a "liberal" group concerned with the protection of civil liberties, broadly construed. The Prisoners Union is a more recently formed group of ex-prisoners, attorneys, and others interested in penal reform; it is based in San Francisco.

What we shall say about the positions of these groups is tentative in two senses. First, we need to know more about their positions, including internal divisions of opinion. Second, it is only a guess that the issues dividing these two specific groups from each other — and they were divided — are representative of the main lines of interest and cleavage among prison reform groups generally.

California ACLU executives testified against S.B. 42 in the public hearings during December 1975. In the minds of many observers, this testimony moved or permitted the several "liberal" members of the Assembly Criminal Justice Committee to table the bill for a year, rather than vote for it. The explicit issue

raised by the ACLU was the result of S.B. 42 for lengths of prison terms; its representatives felt terms would be too long, both as the bill then stood and in prospect. ACLU staff attorneys — as well as many others — were fearful that the legislature would continue to raise statutory sentences, and that, under S.B. 42, prisoners would actually have to serve the longer sentences. Another issue — although it is unclear if this was raised in testimony — was preserving administrative discretion to release “deserving” prisoners prior to some fixed date.

The latter point, particularly, troubled — indeed, incensed — Prisoners Union representatives. From their point of view, although briefer prison terms were a legitimate objective, the crucial issue was curbing the discretion of members of the correctional bureaucracy — parole board members or prison officials — to determine or redetermine the period of imprisonment. Prisoners Union representatives preferred legislatively-fixed, “flat” terms geared to the acts, not the persons, of those convicted. Ideally, they wanted to eliminate judicial discretion to grant probation, and they wanted to eliminate parole with its continuing threat of reimprisonment without trial. Indeed, the Union wanted to eliminate “good time,” instead reducing all sentences through the legislative process by the amount now given to “good time.” And, most fervently, they sought to eliminate any provision for the extension of terms for prisoners classified as “dangerous” — a provision of early versions of S.B. 42 that the Prisoners Union, among other forces, helped to remove.

Soon after the ACLU testimony mentioned above, representatives of the Prisoners Union picketed the San Francisco ACLU office and managed to promote a confrontation between ACLU executives and ACLU board members, the latter being “liberals” from a wide spectrum. We have heard that both sides stated their cases verbally and in writing to the board. The board by large majority sided with the Prisoners Union and instructed its executives to take no action henceforth that would impede passage of S.B. 42.

Our impression — and, again, it is only an impression — is that other penal reform forces in California tended to support the Prisoners Union position, not that of the executives of the ACLU. This is not to say that they, or the Prisoners Union, were for the lengthy terms that may and likely will result from S.B. 42; they worked and continue to work to reduce the lengths of terms. It is to say, however, that they seem firmly committed to depriving the correctional bureaucracy of its powers over

lengths of terms; apparently they would rather contest such matters in the legislative arena, or in prosecutors' offices and the courts on a daily basis.

One further matter needs to be mentioned. The "constituency" of the Prisoners Union is often said to be current prisoners; ex-prisoners are conceived to be working in the interest of these inside prisons. In a sense this is correct, although it is difficult to know how much active support the Prisoners Union receives from those in prison. In any case, it has been said by some that the Union traded retroactive provisions in the bill — which called for fixing terms of current prisoners in line with the new norms provided when the bill became effective July 1, 1977 — for possibly much longer terms for future prisoners. We strongly doubt that this kind of thinking informed the actions of Union representatives. They were interested and pushed hard for retroactivity, and partially succeeded in incorporating it into the passed version of the bill. But their willingness to accept potential lengths of prison terms unacceptable to ACLU representatives probably stemmed more from differing judgments of what was politically possible in 1976 than from any excessive concern with retroactivity. That, plus their commitment to dry up the discretion of penal officials to the extent possible, was probably their motivation.

#### IV

#### THE RESULTING STATUTE: S.B. 42

What was the result of all this tugging and hauling? Briefly, in place of prison terms fixed at a time of its choosing by an administrative board from within very wide, statutorily defined ranges, S.B. 42 provides, with few exceptions, that persons sentenced to state prison will receive terms fixed by the courts prior to service of sentence from within relatively narrow ranges set out in the statute for each offense. Such terms can be mitigated or aggravated within these narrow ranges; they can also be "enhanced," i.e., increased, upon motion of counsel for prior terms of imprisonment under certain circumstances: for carrying or using a weapon; for inflicting "great bodily injury;" and for causing a property loss over a certain amount, if these facts are pleaded and proved. Judges retain discretion to treat sentences

for multiple charges concurrently or consecutively. The resultant determinate terms can be reduced by one-third for "good time" and participation in prison programs. The terms also carry a parole period of up to one year in place of formerly very long periods of supervision in the community.

Prisoners sentenced for the very few crimes carrying life penalties (the estimate is fewer than five per cent of admissions) will still be subject to indeterminate terms to be fixed by a newly established board. Such prisoners may be paroled for a period of up to three years.

The main provisions may be examined singly in somewhat more detail and certain ambiguities and problems identified.

### *The Penalty Structure*

A major ambiguity and problem is whether the new statute will result in longer prison terms for most offenders; a related problem is whether it will result in the imprisonment of a greater proportion of convicted felons. The weight of opinion, after passage of the bill, was "yes" on both counts.

It is not difficult to discern the reasons why many believe prison terms will be lengthened. S.B. 42 provides three prison terms for all felonies except those calling for the death penalty or life imprisonment: 16 months, two or three years; two, three or four years; three, four or five years; and five, six and seven years. The judge must select the middle term unless a motion is made and evidence presented to mitigate or aggravate the term. Now, by and large, these ranges encompass the actual terms meted out in recent years to about 80 per cent of the prisoners formerly sentenced by the Adult Authority.

So far, it all seems reasonable, assuming one thinks the Adult Authority issued "reasonable" terms on the average.

The Adult Authority ranges, however, reflected the agency's practice of taking into account such matters as multiple charges, the offender's record even if not pleaded and proved, and whether the prisoner was armed, used a weapon, created great havoc, or stole large amounts of money or property. Put differently, Adult Authority terms routinely included "enhancements" on the basis of the record — not to mention performance in prison — both official and unofficial. This is *not* the case under S.B. 42, at least to the extent formerly possible and practiced. Instead, the judge selects a "base term" on the basis of the instant offense. He *then* adds on to that term, if he so chooses, periods of

imprisonment for multiple charges, prior record, arming, bodily injury, and property loss. Some limits are provided in the statute for these add-ons and for the total sentence, but it is clear enough that if they are added on to many terms, terms, on the average, will increase.

Whether this will happen in fact is problematic, since it is unclear how often prosecutors will feel the need to move for enhancements, or what other pressures may be brought on judges to find reasons not to grant them if requested. One pressure may come from an escalating prison population, for another expectation, as noted, is that henceforth a larger proportion of convicted felons will be committed to prison. And the increase could easily be very large indeed in view of the fact that currently only ten per cent or so of those the court could imprison are sent to state prison!

The reasoning behind the belief that imprisonment will increase is roughly this: judges have been thought to be reluctant to imprison marginal offenders when they could not guarantee a reasonably brief term. Instead, they placed them on probation or, increasingly, in jail and on probation. Now, however, 16-month prison terms, to be reduced through "good time" to about 11 months, will be available, to be followed by a relatively brief period of parole. Judges, it is said, will be more willing to commit marginal offenders for this and other relatively brief periods of time and they may be encouraged to do so by county officials who would rather have the state pay for incarceration and supervision than the county. Additionally, many police and many prosecutors simply believe that too few offenders are imprisoned; they will press for more imprisonment.

If penal reform groups were mainly interested in shortening periods of imprisonment, they probably lost the contest, at least temporarily. They lost, also, if they were mainly interested in reducing imprisonment. But, as noted, this was but one, and not necessarily the main, interest of most such groups.

### *Control of Discretion*

A major aim of many of the bill's proponents was both to limit and to structure discretion in the interest of justice and equity. Justice, it is said, calls for terms proportionate to the present and past criminal activities of those convicted, not to their prospects for "rehabilitation;" equity, for similar terms for those with similar criminal records. Statutory provisions de-

signed to accomplish these ends include a much-narrowed range of possible prison terms; partial articulation of the bases of mitigating or aggravating, or "enhancing," these terms, plus the requirement that judges state reasons for reductions or increases; and a limited parole period with limits on periods of reimprisonment for parole violation. Further, the statute directs the Judicial Council to prepare mandatory guidelines for the exercise of judicial discretion in granting probation, for dealing with multiple charges consecutively rather than concurrently, for mitigating or aggravating "base terms," or for "enhancing" terms. The Council is also called upon to collect, analyze, and disseminate data on the workings of the new law with a view, apparently, to future changes in the interest of justice and equity. Finally, the newly created administrative board is to review the terms meted out and can refer cases back to court for resentencing. The courts may also resentence prisoners during a limited time period, and the Director of Corrections may at any time request resentencing.

Will all this result in a narrower range of sentences, more finely graded by offense and record, and more equitably distributed? We think it will, but we also believe that certain problems are apparent.

The most obvious problem, perhaps, and also the one likely to affect the largest number of defendants, is that the court's discretion to grant probation (or to suspend sentence, fine, or mete out a year or less in jail) shows little sign of having been limited or structured. The guidelines prepared by the Judicial Council probably indicate the character of Council guidelines-to-be, unless there is further legislation. These call upon the court to consider a list of "criteria" which were said to be "non-inclusive," i.e., the court could find still other reasons for granting, or not granting, probation. Further, among these criteria are some directly contrary to the spirit many proponents hoped was built into S.B. 42, namely, criteria which permit the court to decide the issue on the basis of its judgment of the offender's "dangerousness." In a nutshell, the statute does not appear to deal adequately with the propensity of different judges to use probation, and other alternatives to state prison, in widely varying proportions of their felony dispositions.

Nor is that all. Although the new administrative board will not have discretion to fix terms, it can be argued that its discretion has merely been transferred to prosecutors, with the courts having some residual discretion to reject plea bargains. Formerly

an administrative board, the Adult Authority, decided how much weight to give to the crime or crimes pleaded and proved vs. the balance of the record, and to whether an offender was armed, used a weapon, created bodily injury, or stole a great amount. Now it is the prosecutor who will decide, for what he does not spread on the record formally will likely have small effect. It can be argued, of course, that this does in fact limit discretion insofar as it makes deciders more accountable than formerly. We agree with this, but also believe that while ranges will narrow and disparities decrease, there will continue to be a wide range of terms and disparities unacceptable to many.

It is even more difficult to tell what might result from the data gathering and analysis of the Council, or from the power of the new board and the Director of Corrections to refer cases back to court for resentencing. The result might be the reduction of undesirable disparities.

Penal reform groups appear to have been partially successful in reducing discretion and ambiguously successful in structuring it to focus more clearly on acts rather than personal characteristics. Only certain "liberals" among them had any strong reservations about this move, and they did not seem to have lost everything, for, as noted, the discretionary power of the court to take "goodness" into account in granting probation seems to remain entirely unimpeded. Law enforcement also supported some limits on and structuring of discretion, and prosecutors, in particular, seem to have gained discretion as, in a sense, did judges insofar as they will be able to determine the actual time served within the range of choices opened to them by prosecutorial, or defense, motions. The correctional bureaucracy, on the other hand, has clearly lost discretion. But, as noted earlier, prison officials may have lost little that they cared about, and nobody seemed to care much that the Adult Authority faded into the past.

### *"Good Time"*

The bureaucracy did not lose all discretion. Indeed, it may be argued that certain portions of it gained some. Under indeterminate sentencing, "good time" credit provisions fell into disuse and were eventually repealed. This made prison officials heavily dependent on the Adult Authority which, alone, could decide whether to defer a parole hearing or date. Under the new statute, prison officials decide, within limits, when most offenders

are paroled, subject to appeal to the newly created administrative board. The statute provides four months "good time" for each eight months served, and a list of penalties that may be imposed during each eight-month period for groups of prison rule violations. One of the four months is for participating in prison programs; the other three, for refraining from rule violations.

S.B. 42 provided "good time" from the start. There was argument over whether there should be "good time" — with some prison reform groups arguing against it — how much, and provisions for taking it away. Prison officials want "good time" and have argued to increase the amount, to increase allowable penalties for particular rule violations, to increase penalizable violations, to soften vesting provisions, and to reduce the burden of "due process" protections afforded prisoners caught up in disciplinary proceedings. It does not appear that there was ever any argument about who should decide whether the one-month participation credit should be awarded, or who should decide about the imposition of penalties; nor is it clear the prison officials objected to the appeal powers of the new board.

The Prisoners Union, on the other hand, opposed all of these features. It appeared, understandably, to have lost, although the result of this "loss" seemed likely to be reduced terms for most offenders. Over the course of amendments to S.B. 42, "good time" was increased from one-fourth to one-third of the term, the number of penalizable provisions was increased, and procedures for removing "good time" were changed to make them conform more closely to those already in force in the prisons — they were arguably "softened." At the same time, however, allowable penalties for particular violations were reduced, and the provision which effectively vests "good time" each eight months remained unchanged. One consequence of the new provisions seems likely to be a greater readiness on the part of prison officials to press for formal prosecution of crimes committed by prisoners; whether it will reduce prosecutorial reluctance to take such cases to court remains to be seen. Certainly the difficulty of prosecuting such cases will not be reduced.

Historically, "good time" provisions were the first way in which discretion to shorten prison terms was allocated to the correctional bureaucracy; they were seen as an extension of the executive's pardoning power. It is understandable that such provisions reappear with a move to determinacy since, in the judgment of prison officials, they provide the only reliable incentive, with determined sentences, to conformance. Frankly,

we do not know if this is the case — although, historically, the introduction of “good time” appears to have been associated with reduced use of much less acceptable measures for motivating conformance and penalizing deviancy, measures like the strait-jacket and the whip. If we have prisons, presumably we must supply those responsible for managing them with some disciplinary tools. And, on balance, the “good time” tools provided in the new statute will probably prove acceptable to most of those persons exposed to them.

Will “good time” increase variation in actual prison terms? Doubtless. But no more than 50 per cent of the term. Is such variation within the boundaries of reason? That, like the lengths of terms more generally, is debatable.

### *Parole*

Under the indeterminate sentence statute, the Adult Authority decided whether a prisoner would be paroled, when, and for what period. The Authority also set out the conditions of parole, “tried” parole violators, and refixed prison terms for those whose paroles were revoked. Paroles were often for very long periods determined by consideration of the seriousness of the offense, prior record, expectations of renewed criminality plus fear of what the newspapers might make of such new crimes, and parole officers’ assessments of progress toward “rehabilitation.”

All this has been changed under the provisions of S.B. 42. For almost all prisoners, parole is one year or less (the exceptions being the few percent sentenced for life, who may have up to three years parole). Parole occurs when the judicially-fixed prison term, less “good time,” has been served. The parole organization, administered by the Director of Corrections, will set conditions and discharge parolees from sentence. The new board still “tries” parole violators (and this may be expected to lead to conflict, if past experience be a guide), but it can “sentence” a violator to no more than six months further imprisonment. Parole time under S.B. 42 “ran” during any such imprisonment so that, except for periods when a violator has absconded, prisoners are discharged from sentence no later than one year after release on parole. (This was later changed.) The new board, too, will act as an appeals resource relative to conditions of parole and length. Its role in all these respects has been increased relative to life-sentence prisoners.

Some penal reform groups — e.g., the Prisoners Union — object to the whole conception of parole, arguing that it debilitates rather than helps ex-prisoners. Law enforcement appears more ambivalent, partly, perhaps, because some representatives continue to see parole as “leniency” — they would extend prison terms through the period now given over to parole. Other elements of law enforcement appear to endorse the new plan, seeing parole — correctly, we think — as a period of possible close surveillance tacked on to a period of imprisonment potentially as long as morality, or public protection (given our poor predictive powers), or, especially, the fiscal capacities of the state will permit. During that period, the ex-prisoner can be “helped” if resources are available, but in any case he or she can be held to closer account than other citizens. And this, in the view of many, is desirable.

The parole provisions of S.B. 42 are not only of concern to some prison reformers and some members of law enforcement, they are of considerable concern to the parole establishment which envisions, probably realistically, that future years will bring a reduction in its numbers. The establishment moved, unsuccessfully, to extend parole terms for most prisoners to two years, but it did not give up this effort.

### *Retroactivity*

S.B. 42 provided that within a relatively brief period following July 1, 1977, when the bill took effect, the terms of all prisoners committed under the indeterminate sentence law must be fixed or refixed in accordance with the terms that would have been fixed, in the light of court actions, under the provisions of the bill. A large escape clause was provided — and it was provided at the behest of law enforcement, apparently, during the negotiations in early 1976 — whereby, on a vote of the majority of the Board, exceptions can be made, and a prisoner can be sentenced to the term possible under S.B. 42 without respect to the sentence actually imposed by the court under the old law. Arguably, too, if the Board votes to impose a term longer than the one that would be issued under S.B. 42, it may justify its action by citing “facts” in the record whether or not they were pleaded and proved in court.

This provision reflects the features of the indeterminate sentence law and the past practices of the Adult Authority, as well as the response of prosecutors and courts to both. The old law, as

noted, provided lengthy maximum sentences for many offenses, often life "tops." With such maximums, the Authority could hold prisoners as long as it felt justified without respect, for example, to whether multiple convictions had resulted in concurrent or consecutive sentences. As part of the plea bargaining process, or as a result of judicial practice, many offenders received concurrent sentences when consecutive sentences could have been imposed — a small matter under the old law, but large under the new. Presumably, the provision would permit the Board to treat concurrent sentences consecutively, resulting in a longer term than would be the case were concurrent sentences issued under the new law.

Moreover, the Adult Authority was not bound to take into account only matters on the official court record; indeed, it considered its mandate to go beyond these "facts" to the "true facts." Responsively, prosecutors and courts frequently failed to press charges and priors or "enhancing" elements of situations, knowing that the Authority would in any case take them into account. This practice of the Authority was one of those that prisoners and penal reformers found most objectionable since, in their view, it often resulted in imprisonment without fair trial.

Retroactivity was a feature of the bill from the start, apparently motivated by considerations of simple justice and equity. It was not, apparently, a matter of great contention, although the change in the provision, noted above, suggests that there was early interest to see that more "serious" offenders would not receive a windfall shortening of deserved terms due to the shift in the rules.

After passage of the bill, however, retroactivity became an issue of considerable contention, with fuel for dispute being provided mainly by Los Angeles Police Chief Edward Davis who argued that the bill would result in the immediate release to the community of a large number — 7,500 — of dangerous ex-convicts. His numbers, frankly, seem grossly exaggerated; it is difficult to discern the basis for his estimate. And his prediction disregards entirely the escape hatch provided by the bill, as explained above.

A more serious objection came from the correctional bureaucracy, namely, that insufficient time was provided by the bill to do the careful sort of job expected. Providing more time would not only result, presumably (though one may doubt it), in a more careful job of term-fixing; it would also provide a greater period over which to spread such releases as would result from

application of the terms of the bill.

## V

### AMENDMENTS

Criticism began to mount even before S.B. 42 had passed, and it continued to crescendo thereafter; as one informant said, the "fragile coalition" of law enforcement and prison reformers supporting the bill "collapsed" almost immediately. The reasons are complex and further inquiry would be required fully to identify and disentangle them.

But this much can be said: many of the provisions of S.B. 42 were, at best, the result of working agreements between a very few people, "representing" many others, in the interests of getting a new law on the books. Even the "representatives" appear to have considered these agreements temporary, though some felt that the agreement probably included some period during which an effort would be made to implement the provisions of S.B. 42. Even they, however, felt that many provisions were badly written and were proper targets for "technical" amendments before S.B. 42 took effect.

Those they "represented," on the other hand, appear to have felt no such constraints. Many seem to have read or discussed S.B. 42 carefully for the first time after it was passed; this seems to have been particularly the case for judges and district attorneys. Ambiguities led them to fear the worst, and many "clarities," as well, moved them to want to amend S.B. 42. Other interested parties — especially within the correctional bureaucracy — felt that they had not had a sufficient say in S.B. 42, and they now loudly wanted to be heard.

About the only interested parties who did not strongly move for amendments were the prison reform groups. Their efforts between August 1976, when S.B. 42 was passed, and June 1977, when it was amended, appear largely to have consisted of opposition to changes. Not that they agreed with all the provisions of S.B. 42; far from it. Instead, they felt that S.B. 42 probably embodied the best provisions, from their point of view, that could be hoped for in the situation, and that the problem was to preserve them.

In this section, we shall outline the main activities and events

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that took place between passage of S.B. 42 and its amendment, the major forces and issues that seemed to be involved, and the central thrust of the amendments that finally were made by A.B. 476, the "Boatwright bill." This bill was introduced by Assemblyman Daniel Boatwright, passed, and signed into law in late June, 1977. Our discussion will be even more selective and tentative than that presented for S.B. 42; scarcity of time to conduct interviews, read documents, and write dictates such selectivity and uncertainty.

### *Main Activities and Events*

Many believed from the start that, like many complex statutes, S.B. 42 would require some "technical" revisions, possibly before the bill took effect. This seems, indeed, to have been one major reason for its delayed effective date. Ostensibly to consider such "technical" amendments, as well as to consider what to do to prepare for the transition to the new law, the Department of Corrections and the Adult Authority formed a "task force" almost as soon as the bill was passed.

A broader committee — mainly representatives of law enforcement and correctional bureaucracy, but also including a representative from the State Public Defender's Office and one from the State Bar Association — was set up for apparently similar purposes in the late fall of 1976, under the aegis of Mario Obledo, head of the state's Health and Welfare Agency. Representatives of prison reform groups, while permitted to attend, did not have a vote.

Interviews suggest that both the task force and the Obledo committee quickly began to discuss possible amendments that went beyond the "technical," and that both soon became aware that the Governor's office might support such amendments. It also became apparent to at least one participant on the Obledo committee that a coalition to support amendments largely confined to "technical" changes could not be formed; too many prosecutors and judges, particularly, as well as the Attorney General, wanted more substantial changes, and prison reformers, almost needless to say, were committed to opposing them. The Obledo committee appears to have ceased to function even as a discussion group after December 1976.

A third group composed of law enforcement representatives from Los Angeles and certain state correctional officials, which had been meeting informally since 1973 to compose differences.

before they became public issues, also discussed possible amendments. It is reported that Governor Jerry Brown attended a meeting of this group in late 1976 and let it be known that he would support amendments that would "mollify law enforcement."

A fourth group composed of district attorneys, mainly from California's southern counties, appears to have been important once Boatwright was introduced; this group helped to shape its final provisions. And further inquiry would certainly reveal still other groupings that formed, if only briefly, to press for changes in S.B. 42 before it went into effect.

In a nutshell, within a few months after passage of S.B. 42, several groups had formed to consider "technical" or other changes to be made in S.B. 42 before it went into effect on July 1, 1977. It was quite clear by Christmas 1976, at the latest, that some changes would be made, probably substantial changes, and the remaining question was which ones.

During the latter part of 1976 and the early days of 1977, Brian Taugher, a Deputy Attorney General assigned to the Adult Authority, and Nelson Kempsey, a lawyer then working in the Department of Corrections, working closely with one or more of the Governor's top aides, were busy preparing amending legislation. Taugher and Kempsey were members of or had access to the Corrections/Authority task force, the Obledo committee, and the Los Angeles group, and they appear to have tried to take account of what they had heard in these groups in shaping what became Boatwright. They also appear to have considered what the Assembly Criminal Justice Committee might "buy," reasoning, according to one informant, that "whatever we can get from them we can get through the legislature." For this reason, perhaps, among others, Michael Ullman, consultant to the committee, was also heavily involved in early drafts and revisions. (Taugher and Ullman remained principal architects of Boatwright to the end. Kempsey changed jobs during the amending period and apparently became less involved.)

During January 1977, the initial version of Boatwright was being drafted, and the Governor's office was seeking a legislative sponsor. Senator Nejedly was first approached, but in the face of his hesitance (reportedly engendered by the efforts of the prison reform groups), Assemblyman Boatwright was asked to sponsor the bill. This may have been partly a tactical decision, so that the bill would first be considered by the Assembly Criminal Justice Committee (rather than a Senate committee) for the reason im-

plied above; in recent years, this committee has been reputed to be a "liberal" stronghold.

The first version of Boatwright — called the "negotiating version" by one informant — was introduced in the state Assembly February 7, 1977. Other bills that would have affected S.B. 42 were also introduced or threatened. These bills would, among other things, simply have repealed S.B. 42 or delayed its effective date considerably, revised penalty ranges directly or, by removing all limits on "enhancements," made "enhancements" mandatory, and made it possible to extend the prison terms of selected inmates on the grounds that they are "mentally disordered violent offenders" (MDVOs). We shall not discuss these bills since they did not pass, although some of the provisions of certain alternative bills were eventually incorporated into Boatwright. Neither shall we discuss the bill embodying "technical" changes introduced by Senator Nejedly, although some of its provisions, too, were apparently embodied in Boatwright.

Nor, finally, shall we attempt to describe the vicissitudes of Boatwright in any detail, for the reason stated above. Suffice it to say here that the Boatwright bill suffered — or benefited from — many changes between February 7 and June 24, 1977, when it was put into final shape by a conference committee of the Assembly and Senate; it then easily passed into law. During this period, the effective date of S.B. 42 was preserved; amendments that would have radically increased penalties were adopted but then removed; court discretion to "enhance" base term penalties was preserved, even increased; changes in the "good time" and parole provisions of S.B. 42, a part of the "negotiating version" of Boatwright, were largely eliminated; and the move to permit extended terms for "MDVOs" was delayed for consideration in 1978.

These and other proposed and actual changes both to S.B. 42 and the initial and ensuing versions of Boatwright (there were seven versions, including the one finally adopted) deserve extended analysis, for they reveal much about the wants of those who operate the criminal justice system, particularly, and what legislators will and will not support. For our purposes, it seems fair to say that, with some "softening" of the penalty provisions and some other give and take on "good time," parole and judicial discretion, some of which will be noted below, the initial, "negotiating version" of Boatwright survived to the end. Boatwright may be summarized as a bill embodying changes wanted mainly by prosecutors, judges, and the correctional bureaucracy,

filtered through what it was believed or known the Assembly Criminal Justice Committee and the Governor would accept.

### *Main Forces and Issues*

*The Governor's Office* — As indicated, clearly by December 1976, and probably earlier, key participants understood that the Governor was prepared to support more than "technical" amendments to S.B. 42 prior to its effective date. Apparently, he personally spent many hours considering the implications of the various provisions of S.B. 42 and the amendments being proposed.

By mid-January at the latest, he was prepared to support changes in the provisions for "good time" to increase the penalties for violations of prison rules and parole conditions and add to the grounds for imposing such penalties; to convert time spent in prison for a parole violation to "dead time," thereby increasing the period an offender might have to serve on parole; and to "clarify" the retroactive provisions of S.B. 42, to make certain that the Community Release Board would not be bound by sentences imposed by the courts under the Indeterminate Sentence Law. He was also ready to support changes to make it easier administratively to impose such exceptional sentences by reducing the number of Board members that could initiate such an exception, and by extending the time for a final determination of such exceptional sentences. He apparently was also ready to support legislation to permit the new Board to commit "MDVOs" to a mental institution for an observation period at the end of their determinate prison terms, after which a one-year renewable commitment could be ordered by a jury.

On the other hand, at this point at least, the Governor appears to have been opposed to changes which would have increased penalties. Within days or weeks, however, he appeared to have shifted ground somewhat, indicating that he would support some changes in the various "enhancement" provisions of S.B. 42, changes that would make much longer terms possible for some and possibly many defendants. This shift of position resulted in a burst of drafting activity just prior to the introduction of the "negotiating version" of Boatwright.

In sum, the Governor's office appears to have supported "technical" amendments from the start, and quickly to have indicated readiness to support more substantial amendments, particularly those of interest to the correctional bureaucracy. At

first, he opposed changes that would increase penalties for those convicted of "violent" offenses who were about to be released from prison and then were held to be "mentally disordered." Taugher and Kempsey, at any rate, seem to have worked with this understanding. As it became clear that many in law enforcement and judges wanted greater possible penalties, however, the office seems to have become ready to accommodate them. Most or all of the changes the Governor's office wanted or supported were made. The one exception, apparently a matter of considerable importance to the Governor and his aides, was the provision to extend the terms of "mentally disordered violent offenders."

*Law Enforcement* — Generally speaking, law enforcement was dissatisfied with the penalty provisions of S.B. 42; it wanted higher possible penalties. The most radical change would have been to increase the base term penalty ranges, e.g., to increase the unenhanced penalties for burglary in the first degree from S.B. 42's two, three or four years, to three, five or seven years. This kind of change would mean increased prison terms across the board, which, as one informant said, would quickly "bankrupt" the state by increasing its prison population enormously. Although, as noted, such a change was amended into Boatwright at one point, it was promptly removed. It is not clear whether many law enforcement people (or judges, some of whom also wanted this kind of change) feel they lost much.

A more effective concern of law enforcement, especially prosecutors, was to increase possible penalties for particular offenders, especially those possessing or using weapons, and those with long criminal histories. S.B. 42 placed certain "caps" or limits on the amounts of time that might be added to base terms for armed offenders who also inflicted physical injuries, or had prior prison sentences, or were convicted of multiple current offenses. Law enforcement — particularly prosecutors — moved selectively to remove or raise such "caps." They also wanted certain language changes that would change the application of many enhancement provisions, making the definitions of certain matters, like a "violent" felony, "deadly" weapons, and "great bodily injury," broader and more consistent with past case law. Some wanted to make enhancements mandatory for the court, but it is not clear how strongly this was supported. There was general support for making certain that the new Board would have time and resources to apply the retroactive provisions of

S.B. 42 in a way that would permit all justified exceptions. Finally, law enforcement appears strongly to have supported some legislation to permit extended terms for "MDVOs."

Prosecutors had an important hand in shaping S.B. 42; they had an equal or more important hand in shaping its amendments. Interviews suggest that many more prosecutors participated in the amendment process, and that the composition of the active prosecutors' group was more heavily weighted to the "right" than earlier. The explanation seems to be that, after S.B. 42 passed, many prosecutors read it carefully since they shortly would have to be guided by its provisions; no use, one might say, carefully to consider a statute that might not become law. Those on the "right" appear to have been more concerned with these provisions and determined to do what they could about them.

The Attorney General's office seems to have been quite active from start to finish, though perhaps less effectively so relative to amendments. We do not know what specific effects the police had in either case, except that part of the intent behind the Governor's moves, and perhaps the moves of others, was to head off or modify provisions Chief Edward Davis and his colleagues would have built into S.B. 42 or its amendments.

*Judges* — Judges, generally, appear to have supported greater penalties, both across the board and for selected offenders; they also supported "clarification" of the provisions for retroactive application of the new law. How judges felt or what they did specifically about the move for extended terms for "MDVOs," we do not know. But the brunt of their sentiments and activities was clearly supportive of more severe penalties for, or "protections" against, those convicted of "violent" crimes and repeaters.

More especially, however, judges appear to have been concerned that S.B. 42 be amended in ways that would increase their discretion to mitigate or aggravate the base term penalty, i.e., to impose the lower or upper base term, by removing the requirement that a motion to mitigate or aggravate be made, and by explicitly freeing judges to consider a wider range of sources for "facts" justifying mitigation or aggravation than S.B. 42 seemed to permit. Most of all, judges wanted to eliminate the requirement for a separate sentencing hearing, arguably imposed by S.B. 42, many holding that such hearings would further clog the courts.

It seems clear that judges in particular were more active in trying to amend S.B. 42 than they were in fashioning it; many

more became involved. It is reported that the judges' annual sentencing seminar, held in February 1977, was much more heavily attended than usual (one informant said, "they were *all* there!"), and that at this seminar they applauded a presentation of the main outlines of the first version of Boatwright. The increase in interest on the part of judges probably occurred for the same reason as the increased interest of prosecutors: becoming more familiar with S.B. 42 in preparation to being governed by, and with it, many found parts unsatisfactory and moved to change them. So far as we can tell, their support of harsher possible penalties for certain offenders; for more discretion for themselves, given their responsibilities under a determinate sentence law; and for court procedures that would continue to permit relatively rapid disposition of cases, represents no change in the sentiments of many or most judges. They were only a bit late in effectively proclaiming them.

*The Correctional Bureaucracy* — The correctional administrators responsible for prisons and parole apparently wanted a long list of changes in S.B. 42, many of which, if not all, were embodied in the first version of Boatwright. Prominent among their concerns was "good time," particularly provisions limiting the conditions under which it could be revoked, the time available for revocation, and the amount of "good time" that could be denied for particular offenses. They wanted to loosen the first, increase the second and third. They also wanted to increase the parole period, if not directly and for all parolees, then by increasing the period of parole for those who violated parole conditions and were reimprisoned. It does not appear that correctional administrators were concerned to modify the penalty structure, although it is known that many employees — especially prison guards — wanted more severe penalties. Nor do we know whether correctional administrators took a position on "MDVOs," but it can be guessed that they would not have opposed such a change.

The Adult Authority — some of whose members would soon become members of the new Community Release Board — was among the many groups supporting changes in S.B. 42's retroactivity provisions. More time was wanted to apply them, at least in the case of exceptions; they also sought a procedure that would require fewer hands, and a broader mandate to consider a prisoner's record without respect to what judges may have explicitly taken into account in sentencing under the old law.

Corrections, but particularly the Adult Authority/Community Release Board, was more effectively active in the amendment process than it was in shaping S.B. 42, especially through the work of Brian Taugher and, temporarily, Nelson Kempsey, as noted earlier. There also appears to have been, for a while at least, a greater willingness on the part of the Governor's office to consider the Corrections "want list" (so named by some) — though in the end Corrections got only a small fraction of what it wanted, as a result, it seems, of "bargains" struck with members of the Assembly Criminal Justice Committee, in particular. Clearly, neither S.B. 42 nor Boatwright represent Corrections in an ascendant phase; this is quite a change from the situation that existed when indeterminate sentence laws were adopted.

*Penal Reform Groups* — We have already noted that the penal reform groups, this time around, were mainly engaged in a holding action. This should not be taken to imply that they were inactive; some representatives of the Prisoners Union and others worked night and day for long stretches of time. Nor should it be taken to suggest that they were ineffective, although it is inherently difficult to measure the extent of success in preventing change: what is the measure — a change that might have taken place but for one's activities? Who can tell?

What we know, however, tentatively supports the view that the prison reformers were successful in some measure in fending off changes that others seriously wanted. Base term penalty ranges remain intact; although the "caps" on enhancements were selectively raised or eliminated, some remain; though some definitions changed, making enhancements possible for more defendants, they changed less drastically than proposed by some; and, perhaps most of all, "good time" provisions, including those which vest the earned "good time" each eight months, remain relatively untouched. The parole period for most offenders (and parole is not revoked for most, notwithstanding some belief otherwise) remains the same as under S.B. 42 — a hard-won initial change in the indeterminate sentence law. And the retroactive provisions still seem likely to mean shorter terms for many prisoners sentenced under the old law. It also appears that the prison reformers were very important in killing action on "MDVOs" during 1977, at least, though the full battle on this issue has yet to be joined.

On the other hand, as we shall discuss a bit more fully below, more defendants seem likely to get longer terms under the

amended law; more and greater disparity among the sentences issued to similarly situated defendants is possible and seems likely; more prisoners sentenced under the indeterminate sentence law seem likely to receive "exceptional" terms from the Community Release Board. At best, the defensive action of the prison reformers had a modest success.

*The Result: Some Changes Made by Boatwright*

In summary, Boatwright left the sentencing scheme adopted through S.B. 42 intact: with few exceptions, persons sentenced to state prison will receive terms fixed by the courts prior to service of sentence from within a relatively narrow range set out in the amended statute for each offense. Such terms can be mitigated or aggravated at the discretion of the court after Boatwright; a motion by counsel is no longer required. Further, the "facts" used to mitigate or aggravate can arguably be drawn from a larger variety of sources, including, specifically, the probation report. "Enhancements," i.e., increases for carrying or using a weapon, for inflicting physical injury, or for causing a property loss over certain amounts, continue to require a motion from counsel, as do enhancements for prior prison terms, and the amount of increased penalty for each of these matters remains roughly the same as under S.B. 42. On the other hand, definitions have been reworked to permit wider applicability, in some cases clearly much wider. And limits on the aggregate increases for particular kinds of enhancements, as well as limits on the total sentence that may be imposed under certain conditions, have been removed or raised.

Judges retain discretion to treat sentences for multiple charges concurrently or consecutively. Should they decide on consecutive sentences, however, they can "stack" them higher in more cases. Terms continue to be reducible by one-third for "good time" and participation in prison programs, but prison officials will have some greater freedom to deny such "credits." The parole term remains one year for most offenders, but under Boatwright time spent in prison for parole violation no longer "counts," and one year paroles can be extended to 18 months from the date of release on parole.

Prisoners sentenced for those crimes carrying life penalties will continue to receive indeterminate terms to be fixed by the new board. Their parole period remains three years, but can become four if enough "dead time" for parole violation accumulates.

The main changes made by Boatwright may be examined in some detail.

*The Penalty Structure* — Despite a vigorous campaign to increase base term penalties, they remain intact. But other changes make it possible and even likely that a significant proportion of defendants will receive longer prison terms. There is no reason to believe, however, that more defendants will be imprisoned after Boatwright than before.

To specify fully the many ways in which Boatwright makes increased penalties possible would require a more detailed analysis of both S.B. 42 and the amendments than seems warranted for our purpose here. Several changes that seem particularly important may be noted, however. S.B. 42 provided that, except upon conviction of a "violent" felony, or for a felony involving arming, use of a firearm, or "great bodily injury," the total term could not exceed twice the base term imposed by the court. Boatwright lifts this "cap" for those convicted of a felony involving certain amounts of property loss, and for prisoners and escapees convicted of a new felony. The definitions of "violent" felony, arming, use of a firearm, and bodily injury have all been changed, greatly extending their applicability. Perhaps particularly significantly, the "dirty eight" "violent" felonies have now become the "dirty nine" — or even "dirty all" — since conviction of *any* felony can now result in its classification as "violent" if it is also pleaded and proved that the defendant used a firearm. And the dollar amount of property loss required to trigger enhancement has been drastically lowered, as well as now qualifying the defendant for a longer total prison term.

These are only a few of the changes. Others include lifting the "cap" on the aggregate increase that may be made for prior prison sentences, and for consecutive sentences, in the case of multiple offenses; apparently increasing the number of prior prison sentences that may result in additional penalties by changing the rules to "wash" them out; and permitting enhancement for both possession and use of weapons *and* bodily injury in some cases, instead of only one.

Prior to passage of S.B. 42, many "liberals" among the prison reformers, as well as many others, greatly feared that the legislature would quickly agree to increase penalties when brought under "public" pressure to do so. There is no sure sign that the "public" brought pressure on the legislature, unless prosecutors and judges are that "public." There is plenty of evidence, on the

other hand, that enough legislators are ready to increase penalties, and some of the fears, if not the worst fears, of the "liberals" have been realized. Neither they nor the other prison reformers (who call them "liberals") are very happy. But neither do they appear to have any good idea — if one exists — of what to do about it.

One other group appears ambivalent about the increases in possible penalties: those responsible for administering the prisons. Although there is no reason to think that the changes will result in more persons being committed to prison after Boatwright, there is an obvious reason to think that many prisoners will be even more unhappy with their terms, and that the prison population will increase because turnover will be reduced. And given the new sentencing provisions, severely curtailing administrative capacity to shorten terms and release prisoners, there are no obvious mechanisms for dealing with such problems. One suggestion heard is that a larger proportion will be sent to camps and other non-institutional facilities. Another is that the Director of Corrections and the Community Release Board will send more prisoners back to court for resentencing. Whether either will happen, or work if they do, remains to be seen.

*Discretion* — The penalty modifications necessarily increase official discretion by making a wider range of prison terms possible. Other changes increased discretion by making offenders potentially subject to penalties in a greater variety of circumstances. Both kinds of changes clearly further increased prosecutorial discretion — enormous before S.B. 42 and enhanced, as it were, by S.B. 42 itself. And both kinds of changes not only make it likely that longer terms will issue in a greater number of cases, they also make it likely that "disparities" will increase. The sentencing rules to be prepared by the Judicial Council will, in any case, do little to curb prosecutorial discretion to press or drop charges, plead enhancing circumstances, or more for enhancement. And the rules, as so far promulgated, do not seem very likely to affect judicial discretion either.

The court also gained a modicum of discretion from Boatwright, insofar as it can now mitigate or aggravate a base term without motion from counsel and can, as mentioned above, seek mitigating and aggravating circumstances in a greater variety of sources. Also, as noted, the court is arguably freer after Boatwright to deal with sentencing summarily, or at least as summarily as it has done during the past few years.

Boatwright also increases discretion in other ways to be mentioned below. Here it seems worth noting, again, that although the correctional bureaucracy clearly lost discretion under S.B. 42, and gained but little back under Boatwright, its members do not appear to have lost anything they greatly care about. The exception is the capacity to accommodate intake by adjusting outgo. And, as said above, this problem is only now, apparently, getting any serious consideration.

*"Good Time"* — As mentioned, the first version of Boatwright included a number of changes which would have added up to increasing the penalties available for sanctioning fractious inmates, and the likelihood and ease with which they could be penalized. All such changes were dropped in the end, except one giving prison officials more time to request a prosecutor to press charges for inmate crimes. How hard prison officials fought for the changes they wanted is unclear, just as their importance is unclear since "good time" has not been used in California since the 1940's (and then under the indeterminate sentence law, which made it redundant). If the current provisions fail to "work," the changes will almost certainly be pursued again. And if past experience be a guide, they will fail to "work" in the measure some prison officials hope.

*Parole* — We have already mentioned the main change in provisions for parole; the parole period may "run" to 18 months for most prisoners if they are reimprisoned for parole violations, and to 48 months for the few who will still receive indeterminate sentences. Clearly parole officers wanted greater changes, but they were unable to effect them. It is not difficult to infer the objectives of the change that was made, as well as those that failed: it will increase the possible penalties for parolees proving troublesome, without requiring reprocessing by the courts. The parole organization's discretion is obviously increased.

And, almost without question, the change will provide more employment for parole officers by increasing the number of persons on parole at any given time, and by providing a stronger rationale for "supervising" them. Another change made by Boatwright makes the importance of the latter point for parole officers rather apparent. Introduced by Timothy Fitzharris, Executive Director of the California Probation, Parole and Correctional Association, an organization of parole officers, the final version of this change warrants quotation (it was watered down a

bit in the last version of Boatwright). The law now says that: The Legislature finds and declares that the period immediate (sic) following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the supervision and surveillance of parolees and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge.

The order of purposes alleged to be served by parole perhaps deserves special notice as a sign that parole officers will not be left out of the move toward punishment and control, and away from "treatment." Many parolees, of course, have held all along that this is where most parole officers always were.

*Retroactivity* — Within 90 days of the effective date of the law (or of the receipt of the prisoner), the Community Release Board is to calculate the terms of all prisoners committed under the indeterminate sentence law in accordance with the provisions of the new statute. In doing so, it is to rely on the court record of matters pleaded and proved, and the sentence imposed by the court. It may fix the prisoner's term as the result of this calculation, not taking "good time" into account for time served before July 1, 1977. So much was to be the case under S.B. 42.

The Board may decide not to fix the term at the figure reached by this calculation, however, determining that due to the number of convictions, priors, or the character of the offense, a longer term is justified. Boatwright explicitly provides that the Board is to be "guided by, *but not limited to*, the term which reasonably could be imposed on a person convicted after July 1, 1977" (our emphasis). Most informed observers feel that this was already implicitly the case under S.B. 42. The relevance of the addition, as well as certain related changes, as explained above, appears to be to make it absolutely clear that the new Board, like the Adult Authority before it, need not be bound by the sentence imposed by the court or, arguably, by charges or evidence pleaded and proved in court.

Assuming that this was already true under S.B. 42, it is more important to note that Boatwright gives the Board more time to fix a sentence different from that reached through its initial calculation, and it can do so more easily. S.B. 42 required a majority of the Board to decide to make an exception; Boatwright permits

two members to do so. And in the event of such a decision, S.B. 42 required both a hearing and a term-fix still within 90 days of the effective date of the bill; Boatwright still requires the hearing, but the prisoner need only be notified within 90 days that it will take place. The hearing and term-fix can be delayed until April 28, 1978 — nine months after the bill is effective — and then extended by administrative action for another 90 days, unless either house of the legislature vetoes such action.

It appears that the Board can take little if anything into account under Boatwright that, arguably, it could not consider under S.B. 42, but making the matter explicit seems to have quieted the fears — or, at least, complaints — of some of those who predicted the immediate release of a hoard of violent and dangerous criminals. It will also be possible to spread such releases over a greater period of time, indeed into 1978, which will affect the statistical report on numbers released during 1977, and reduce the number of ex-prisoners entering the community at any given time. Having more hands and time to do the work, too, it is said, will make the Board less willing and likely to settle for the term suggested by the initial calculation. As a result, a greater proportion of prisoners will receive some other term than that "which reasonably could be imposed" on those convicted under the new law. The only countervailing factor would seem to be the longer terms that will be calculated as a result of the changes made by Boatwright in the penalty structure; perhaps these will be thought "reasonable" in more cases.

## VI

### CONCLUSION

One of the authors of this paper confidently used to predict that a bill like S.B. 42 would never pass in the California legislature. His reasoning was the legislature would never agree on a range of definite penalties to replace indeterminate sentences, and that political pressures would keep statutory penalties at unrealistic levels, thus necessitating administrative discretion to keep the prison system from being overwhelmed with large numbers of long-term prisoners.

The legislature did pass S.B. 42 and thus appears decisively

to have refuted the prediction. At the same time, it did so without reaching a firm consensus on appropriate penalty levels, and through Boatwright may already have made possible penalties for many defendants unrealistic. Basing the penalty levels in the first go-around on the sentences actually imposed in the past by the Adult Authority was an expedient but arbitrary decision. It facilitated a temporary working agreement permitting passage of S.B. 42, but avoided the very hard question of just how heavily crimes should be punished in view of prevailing moral standards, and how heavily they can be punished in view of prevailing demands on the public budget. Considering the almost universal dissatisfaction with the performance of the Adult Authority, it is ironic that its sentencing levels were even temporarily considered appropriate for a new statutory scheme based on what is purported to be a new public policy endorsing "punishment" as the purpose of imprisonment. Boatwright appears to compound the irony.

But the irony may be less than first appears. Has the new scheme imposed by S.B. 42 and Boatwright imported a new public policy? Will California now have "determinate sentences" justified by "terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances," in place of "indeterminate sentences" fitted to the prospect that the prisoner will commit further crimes, especially violent or notorious ones? We think the answer is not so clear, although clearly the length of prison and parole terms, once fixed, will be less amenable to manipulation by the correctional bureaucracy on the grounds of potential recidivism, and almost all will be fixed prior to, and most will stay fixed after starting, service of the prison term.

But before they are fixed, even after the court has decided to impose imprisonment, considerable discretion is left to issue terms of quite different lengths, assuming only that the prosecutor moves for enhancement and places relevant facts in the record — likely events in a substantial portion of cases. And nothing in the new law appears to prevent prosecutors and judges from taking the possibility of recidivism, as they see it, into account when they decide what charges to make and drop, what evidence to put forward, what motions to make, and what penalties to apply. Moreover, after Boatwright, the court need not wait for a motion to enhance prison sentences a year — and it is mainly those who need not serve time in prison, apparently,

who consider a year (or eight months, if reduced by "good time") a trivial matter.

And before the judge decides on imprisonment, in most cases the court will retain the option of probation and related alternatives. This has not changed at all, and Judicial Council standards so far show no sign of changing it. Indeed these standards appear to make it likely that potential recidivism will be an important consideration in granting probation.

In sum, in a number of important ways, sentences after S.B. 42 and Boatwright remain almost as "indeterminate" as ever, in both the sense that a defendant, until sentence is fixed, will not be able to know the penalty for his or her crime or crimes until it is actually imposed, and in the sense that considerations of future recidivism — gleaned, one supposes, from his or her personal characteristics in some part — will remain important. Timing will change, and the defendant will know the term within firmer and narrower limits than earlier, before imprisonment begins in most cases. But after imprisonment, the correctional bureaucracy will still be able to extend the term by one-half if a prisoner violates rules and fails properly to participate in programs; shorten the parole period, or lengthen it by six months or one year if a parolee violates rules; and recommend resentencing to shorten some terms. And, as always in California history, the Governor will be able to commute sentences or pardon offenders, and can be encouraged to do so by the bureaucracy.

Even so much "determinacy," "proportionateness" based on seriousness, and "uniformity" seem almost certain to be reduced in coming months. There is considerable concern in the Governor's office and elsewhere that some means be found to extend legally the prison terms of offenders believed likely to commit "violent" crimes in the future. Persons coming to be classified as "MDVOs" — and they may be many — will face roughly the same uncertainty, justified by roughly the same rationale, as they have in the past.

One lesson is, perhaps, that the struggle between "just deserts" and "social defense" as means to provide public satisfaction and protection through sentencing is far from over. The move toward "indeterminacy" in the earlier part of this century was widely interpreted, after the fact, as a move toward "social defense:" reformed inmates would be quickly released, unreformed inmates retained, both by a board of "experts." To be sure, "just deserts," both as proportionate and as uniform sentences, was also to be served, though it was never clear just how

— except as “proportionate” came to mean in accordance with the degree of rehabilitation and risk. The move toward “determinacy” is being interpreted as a move toward “just deserts:” defendants will be punished equally in accordance with the moral and material damage they have wrought. But the “indeterminate sentence” never worked as advertised, the “experts” continuing mainly to issue terms consonant with their vision of “just deserts,” although leavened, to a degree, by their fears about what prisoners might do if released. Under the new California law, prosecutors and judges will be able to follow the same logic. And if “social defense” has been weakened a bit — which is arguable — impending legislation on “MDVOs” promises fully to rectify the balance.

Nor are the differing implications of “just deserts” and “social defense” all that are involved; each contains its own difficulties. There is little sign that the various interested parties agree what “deserts” are “just” for different offenses or, above all, different offenders. Nor is there any sign that agreement can be reached about which offenders truly represent a serious future risk, without making more mistakes than many find acceptable. And even if the number of mistakes could be reduced, there are many who would still hold that preventive detention is immoral if not unconstitutional, and should not be practiced.

None of these controversies will go away as a result of the new law; the legislature’s hope, if members seriously thought about it, can only be to have defused them temporarily. This seems to have been a main hope earlier, when California adopted a parole law and later, when it placed responsibility for fixing the overall term in an administrative board. These changes helped shield the courts from the “just deserts” and “social defense” controversies of the time, and relieved the Governor as well of the intense pressures and work associated with pleas for commutations and pardons. They also helped the correctional bureaucracy maintain discipline, or so it said, and more certainly to deal with population pressures when the legislature was reluctant to expand the prison system. The changes did not resolve the controversies over just and expedient sentences, but they did, for a long time as human events go, bury them under a rhetoric of both justice (the boards would cure “disparities”) and expediency (the boards would selectively retain the “dangerous” on the basis of their “expert” opinions). Equally important, the changes also served partially to hide both decisions and their results from any but the most powerless of those affected by them.

— the prisoners.

In recent years, for a variety of reasons, this "solution" to what is probably a permanent problem has gradually ceased to work. For one thing, the rhetoric has been undermined; for another, the decision process and its results have become more visible due to the efforts of prisoners, ex-prisoners, interested lawyers, some courts, and some newspapers. The pressure to give more weight to "just deserts" has increased, and not just with respect to sentences for crime; and the new "solution" appears to do so. Whether this appearance will serve to make legitimate the new arrangements for long remains to be seen. At the same time, as the impending "MDVO" legislation makes clear, new arrangements will be sought to make the system appear better able to accord "social defense." Whether this will satisfy anyone for long remains to be seen, too.

In an odd way as well, the decision process and its results may be less visible under the new law than the old. The parole and indeterminate sentence arrangements served to centralize that portion of the sentencing process that fixed the terms of those committed to prison. Under the new law, it will be decentralized and, perhaps, a less easy target for criticism and concerted action, even though the Judicial Council is ordered to report results. Even more of the most significant decisions will be made in the generally invisible halls of prosecutors; judges will be able to plead "not guilty" on grounds of "constraint" should there develop any considerable dissatisfaction with the length of prison terms. Judges will have less defense about probation, but no less than they have had in the past. We cannot be certain — though we doubt — that this "solution" will have the lengthy life of its predecessor. We are more certain that prosecutorial discretion, and judicial discretion to grant probation, will, in a relatively brief time, become the subject of the same kind of intense concern and criticism recently visited on the Adult Authority.

Finally: We have not undertaken to "explain" the advent of the move toward more determinacy — in California, much less elsewhere. The reason is simple if painful to state: we have no "explanation" that satisfies us. It does seem clear that, broadly, the move was initiated from "beneath" by prisoners and ex-prisoners who felt oppressed by the indeterminate sentencing system. They moved to abolish it. One way was through the courts, but it can be argued that the result of this effort — like their other efforts — at best worked to "reform" the system. Seeing this to be the case, they negotiated the most far-reaching re-

forms that seemed possible.

We have argued, in effect, that these reforms do not reach very far; indeed, it is not entirely evident that many prisoners and prospective prisoners are not worse off now than before. However this may be, it seems clear, too, that a major reason the reforms in the end were so modest is that criminal justice functionaries, particularly prosecutors, came to feel that the old form of indeterminate sentencing had become more burden than benefit, and worked hard — very hard — to see that the reforms made would permit their agencies to continue to function in ways not too different from the past. They reached out to contain, and to shape in ways consistent with their purposes, the strivings of those “below.” This phenomenon — a form of “cooptation” in the term made well known by our colleague Philip Selznick — is probably inevitable so long as the supporting structures, which procedures like sentencing serve, are left intact. And understandably, those “below” were unable — and did not try, by and large — to affect these structures: the police, prosecutors, public defenders, courts, and most of the correctional bureaucracy. To consider changing these structures is to consider changing government more generally, for these are important components of it. To understand the move toward more determinacy in California — and we think elsewhere — nothing less is required than a theory about the forces moving persons to change the institutions that govern them. To understand the modest results usually achieved, one must grasp the forces that limit both their abilities to do so — and their vision of what is required.

## DISCUSSION

As a prelude to the discussion of their paper, Professors Johnson and Messinger invited to the podium two people who, as staff aides to the state legislature, had been primarily responsible for writing the California sentencing law. Raymond Parnas, who has since returned to his post as professor of law at the University of California at Davis, began his remarks with the observation: “I used to consider myself an academician; now I consider myself a politician.” He went on to say that the authors of new sentencing legislation should recognize the inevitability of political compromise, and should prepare for it by determining their priorities among various features of proposed legislation.

Michael Salerno made a few comments about the amendment process then going on in the state legislature. The mood of the legislature, he said, could only be described as "hysterical." Conservative political forces, he said, were threatening to weaken many reforms included in S.B. 42.

A conference participant in the audience agreed, saying that political expediency had overwhelmed the spirit in which the bill had first been conceived. He said that in its present form, the bill could be better characterized as one calling for the "warehousing" of prisoners than as a determinate sentencing bill.

Another participant said that he was "troubled" by the assertion that legislatures cannot be trusted to enact reasonable terms. Any attempt to short-circuit legislative authority in term-setting, he said, was doomed to failure.

Judge David L. Bazelon, chief judge for the U.S. Circuit Court of Appeals for Washington, D.C., then made a few comments. "I've heard nothing here about individualizing justice," he said. "Nowhere do I hear any word about understanding the individual. If we're giving up on that, then we're giving up on one of the most important concepts of democracy. The greatest inequality is equal treatment of unequals — and people are unequal."

This last point was disputed by a member of the audience, who responded: "You treat a man more unequally under a discretionary system." He went on to say that the underlying cause of disparity in the criminal justice system is economic disparity. This, in turn, prompted someone else to propose that "perhaps the best thing you can do for the individual is not to treat him as an individual."

Returning to the question of whether legislatures would invariably make sentences too long, a participant said that from his experience, it would be a mistake to assume that the public was unanimously in favor of more punitive sentences. Even the corrections department of his own state, he said, was sharply divided over proposed sentence lengths.

Perhaps it is too soon to adopt a rigid new sentencing structure, said another participant. In viewing sentencing over the perspective of the last several decades, he said it was clear that while faith in the theories that provided the basis for the current sentencing system had been severely shaken, there did not seem to be any consensus on what new system should replace them. □

# SENTENCING REFORM AND PROSECUTORIAL POWER: A CRITIQUE OF RECENT PROPOSALS FOR "FIXED" AND "PRESUMPTIVE" SENTENCING

by Albert W. Alschuler

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In the American system of criminal justice, power over punishment is allocated primarily among four types of governmental decision-makers — legislatures, prosecutors' offices, courts, and correctional agencies (including, most notably, parole boards).<sup>1</sup> The thrust of many recent proposals for sentencing reform has been to reduce or eliminate the discretion of both courts and correctional agencies and to increase the extent to which legislatures specify criminal penalties in advance.<sup>2</sup> In "fixed" sentencing schemes, statutes specify the exact penalty that will follow conviction for each offense; in systems of "presumptive" sentencing, statutes specify a "normal" sentence for each offense but permit limited departures from the norm in atypical cases. Although prosecutors' offices have in practice probably had a greater influence on sentencing than any of the other agencies (not excluding state legislatures), the call for sentencing reform has largely ignored this extensive prosecutorial power. In my view, fixed and presumptive sentencing schemes of the sort commonly advocated today (and of the sort enacted in California<sup>3</sup>) 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 only to defendants who sacrifice their constitutional rights.

Before turning to this thesis, I want to set the stage by analyzing the problem of sentencing reform in more traditional terms and by trying to separate a number of issues from one another.

The central concern of most recent discussion of sentencing issues has been how much sentencing discretion criminal justice officials should have, but an equally important question may be where sentencing discretion should reside. This paper will consider three separate decision points in the criminal justice system — parole, the judicial determination of sentence, and prosecutorial plea negotiation. It will briefly examine the different purposes, both legitimate and illegitimate, that are likely to be served by vesting discretion at these distinct points, and it will explore some functional interrelationships among them. Because a number of recent reform proposals have apparently disregarded obvious features of our criminal justice system, the emphasis of many of these remarks will be on the simple rather than the sophisticated.

## I

### THE DISCRETION OF PAROLE BOARDS

Of the various components of the call for sentencing reform, academic observers have probably been most receptive to proposals for the drastic restriction or elimination of the powers of parole boards. These extensive powers reflect a reformatory jurisprudence implemented, for the most part, in the early Twentieth Century as a concomitant of the Progressive Movement.<sup>4</sup> The asserted justification for the parole board's sentencing powers is essentially that expert penologists, who can evaluate an offender's conduct and his response to treatment in prison, can best determine the appropriate moment for his release.

That I and many other academics adhered in large part to this reformatory viewpoint only a decade or so ago seems almost incredible to most of us today. To probe a person's psyche and to predict his future behavior is always an awesome task, and the optimistic belief that one can discern a person's general propensity for law observance from his regimented conduct in a prison now seems remarkably naive. Although not all of us are ready simply to abandon rehabilitation as one objective of the criminal process (at least not in every circumstance), we have become far less ambitious in pursuing this goal than we were a few years ago

when we encouraged our state legislatures to adopt some variation of the Model Penal Code's sentencing scheme. Our general disillusionment stems from both jurisprudential and pragmatic considerations. Even if the state could achieve its rehabilitative objectives far more often than it does, we have become doubtful that an offender's wrongdoing justifies a broad assumption of governmental power over his personality. Moreover, we have tried almost everything, and almost nothing seems to work.<sup>5</sup> The sad fact is that, so far as we can tell, most prisoners are not perfectable victims of social ills who will respond to one kind of treatment or another. Some — an undetermined number — may draw a lesson from the unpleasant experience of being arrested, convicted and punished; but apart from this "specific deterrence," only two personal experiences, aging and religious conversion, seem likely to work dramatic changes.

The principal practical effect of our emphasis on "cure" has been to encourage convicts to view their time in prison as an exercise in theatre.<sup>6</sup> They "volunteer" for group therapy and other rehabilitative programs, say the right things about the help that they have received, and even find Christ and become guinea pigs for medical experimentation in hypocritical efforts to curry favor with parole boards. In addition, we have become increasingly aware that the very indeterminacy of indeterminate sentences is a form of psychological torture.<sup>7</sup>

Even if parole boards do not effectively serve their intended function, they are probably not utterly useless. As a statewide agency, a parole board can sometimes exercise its power in such a manner as to reduce the disparities in sentencing created by the varying outlooks of local judges and prosecutors. In addition, as an agency somewhat removed from local pressures and emotions and as an agency whose decisions are removed in time from the adjudication of guilt, a parole board can sometimes counteract the untoward vindictiveness of local sentencing officials.<sup>8</sup> (It seems worth noting that the concept of parole as a period of supervised release halfway between confinement and freedom can be retained even if the sentencing powers of parole boards are eliminated. Parole release has been criticised on the ground that it constitutes merely a gratuitous "hold" over former prisoners rather than a meaningful aid to reintegration or a worthwhile form of policing,<sup>9</sup> but if a supervised period of transition from prison to the streets does seem desirable, it can become a regular feature of every prison sentence rather than<sup>8</sup>a subject of the parole board's discretion.<sup>10</sup>)

In America's regime of guilty plea bargaining, an offender who has exercised the right to trial is likely to receive a much more severe sentence than an otherwise identical offender who has pleaded guilty.<sup>11</sup> The available evidence suggests that parole boards have used their sentencing powers to reduce this disparity, albeit to a limited extent.<sup>12</sup> Reduction of the sentence differential between guilty plea and trial defendants may be another worthwhile "incidental" function of parole boards, and when the ability of parole boards to perform this function is reduced or eliminated, the power of bargaining prosecutors is likely to be increased. With the restriction of the parole board's discretion, a defendant who is considering whether to accept a proposed plea agreement need not fear that parole practices may, to some extent, deprive him of the apparent benefit of his bargain. Equally, a defendant who is considering whether to stand trial cannot hope that parole practices will ameliorate the penalty that our system of criminal justice threatens for this exercise of a constitutional right.

Nevertheless, the desirability of restricting the powers of parole boards is not necessarily much affected by the institution of plea bargaining, for a great deal depends on what happens next. The powers currently exercised by parole boards can be assumed by legislatures or transferred to judges to be exercised following an offender's conviction, or they can be transformed into additional levers for prosecutors to use in inducing pleas of guilty. In California, the sentencing power of the Adult Authority has been so extensive that most practitioners have seen little point in plea bargaining when an offender seemed certain to be sentenced to state prison in any event.<sup>13</sup> With the recent elimination of the Adult Authority as part of California's sentencing reform, bargains affecting the length of an offender's stay in state prison will undoubtedly become commonplace.<sup>14</sup> Much of the Adult Authority's power will, in other words, be transferred to the prosecutor's office.<sup>15</sup> Moreover, when the benefits of discretion become available *only* through the plea bargaining process, the concentration of abusive power in the hands of a single agency is especially to be feared. I therefore turn to proposals to restrict the discretion of trial judges.

## II

### JUDICIAL SENTENCING DISCRETION

The advocates of fixed and presumptive sentencing commonly argue that judicial sentencing discretion stands on about the same discredited footing as the discretion of parole boards. For example, Andrew von Hirsch has written, "Wide discretion in sentencing has been sustained by the traditional assumptions about rehabilitation and predictive restraint. Once these assumptions are abandoned, the basis for such broad discretion crumbles."<sup>16</sup> Unlike the discretion of parole boards, however, judicial sentencing discretion is not an outgrowth of the optimism of the Progressive Era.<sup>17</sup> Judges have had broad sentencing powers for as long as prisons have been used to punish, and indeed longer. I recently discovered an old volume of Tennessee and North Carolina statutes that contains some illustrations, including the following provision on horse stealing enacted by the Tennessee General Assembly in 1807:

Be it enacted, that every person who shall feloniously steal, take and carry away, any horse, mare or gelding, the property of another person, the person so offending, shall, for the first offense be adjudged and sentenced by the court before whom convicted, to receive on his or her bare back, a number of lashes, *not exceeding thirty-nine*, be imprisoned *at the discretion of the court, not less than six months, and not exceeding two years*, shall sit in the pillory two hours on three different days, and shall be rendered infamous . . . and shall be branded with the letters H. T. *in such manner and on such part of his person as the court shall direct*; and on the second conviction shall suffer death without benefit of clergy.  
[Emphasis added]<sup>18</sup>

Still more interesting, from my perspective, is a North Carolina statute on suborning perjury that was enacted in 1777 — 13 years before the establishment of the Walnut Street Jail in Philadelphia, the event commonly viewed as inaugurating the use of imprisonment as a penal sanction in America. This statute provided that a convicted offender should "stand in the pillory one hour, have his or her right ear nailed thereunto, and be further punished by fine and imprisonment at the discretion of the court."<sup>19</sup>

The North Carolina Legislature of 1777 would probably have agreed with the position adopted by the California Legislature 200 years later: "[T]he purpose of imprisonment for crime is punishment."<sup>20</sup> Rather than establish a system of fixed sentences, however, the North Carolina Legislature chose the opposite extreme; it imposed no limitations whatever upon the trial judge's power to determine the length of an offender's confinement. This bit of history suggests that the medical model of rehabilitation has not been the exclusive or the primary impetus for the grant of judicial sentencing discretion in America.

Simply in terms of blameworthiness or desert, criminal cases are different from one another in ways that legislatures cannot anticipate, and limitations of language prevent the precise description of differences that can be anticipated. One need not adopt grandiose rehabilitative goals to think that it should sometimes make a difference whether an armed robbery was committed with a machine gun, a revolver, a baseball bat, a toy gun or a finger-in-the-pocket. Perhaps it should also make a difference whether the crime was motivated by a desperate family financial situation or merely a desire for excitement, whether the robber wielded a firearm himself or simply drove the getaway car, whether the victim of the crime was a blind newsstand operator whom the robber did not know or a person against whom the robber had legitimate grievances, whether the robber took five cents, \$100,000 or a treasured keepsake that the victim begged to retain, whether the crime occurred at noon on a crowded streetcorner or at 1:00 a.m. in an alley, whether the robber walked voluntarily into a police station to confess or desperately resisted capture, and whether the robber was emotionally disturbed and or a calculating member of an ongoing criminal organization.

The principal function of judicial sentencing discretion has probably been to permit a detailed consideration of differences of this sort in culpability — a consideration that legislatures have historically recognized their own inability to provide. When, in recent years, a judge has sentenced one of several co-felons to a term of probation and the others to imprisonment, he was likely to remark that the defendant placed on probation had exhibited greater rehabilitative potential than the others. The judge may have meant nothing more, however, than that the favored defendant was young, had participated in the crime in a relatively minor way, had been induced to participate through some beguilement on the part of his confederates, and therefore seemed

substantially less blameworthy than his fellows. Even when our rhetoric has emphasized reformation, the dominant reality may have been "just deserts."

The varieties of human behavior are, in short, so great that a legislative definition of crime must usually encompass acts of substantially differing culpability. Even more importantly, the personal characteristics of offenders may remain as important in a sentencing regime based on desert as in a regime based in part on the goals of rehabilitation and predictive restraint. Our past optimism concerning criminal justice issues apparently accorded with our view of history as progress and of America as the new-found land: "Did someone rob a bank? If so, this person must never have had a chance. We will give him that chance. We will teach him how to be a welder, and he will not rob banks any more." Recently, however, America has experienced Vietnam, Watergate and, in the criminal justice area, a series of studies that seem to demonstrate the naivete of our earlier rehabilitative ambitions. Some Americans have apparently become weary and disillusioned in general and tired of thinking of offenders as individuals in particular. Although a corrective for the undue optimism of the past was undoubtedly in order, the corrective may be carried too far. We may find ourselves thinking, "Don't tell us that a robber was retarded. We don't care about his problems. We don't know what to *do* about his problems, and we are no longer interested in listening to a criminal's sob stories. The most important thing about this robber is simply that he *is* a robber. He committed the same crime as Bonnie and Clyde." Should this sort of sentiment prevail, I believe that we will have lost something, not in terms of the effectiveness of the criminal justice system, but as human beings. One need not know what to do about an offender's problems to regard those problems as highly relevant to the punishment that he should receive.

Sentencing reformers typically object to the instrumental use of human beings to accomplish generalized social objectives. It seems to them more consistent with individual dignity to punish an offender because he "deserves" it than to punish him for the sake of society at large. Nevertheless, treating defendants of differing culpability alike for the sake of certainty in sentencing seems to involve greater instrumentalism than our current sentencing regime. In a system of fixed or presumptive sentencing, cases may arise in which the legislative "tariff" will prove unjust, but the reformers do not seem to worry very much about the problem. Their apparent attitude is that one who commits a

crime must always expect to pay the price. This punishment may be deserved only in the sense that it was specified in advance. Nevertheless, "the law must keep its promises."<sup>21</sup>

The intellectual progenitor of today's fixed-sentencing movement, Cesare Beccaria, wrote in 1764, "[C]rimes are only to be measured by the injury done to society. They err, therefore, who imagine that a crime is greater or less according to the intention of the person by whom it is committed."<sup>22</sup> If we were to adhere to Beccaria's remarkably primitive concept of blame, the formulation of a workable fixed-sentencing scheme might not be too difficult a task. Nevertheless, reformers in the last quarter of the Twentieth Century are not in fact so inhumane. As von Hirsch has observed, "[The seriousness of a crime] depends both on the harm done (or risked) by the act and on the degree of the actor's culpability."<sup>23</sup> It seems noteworthy that Beccaria himself recognized that a consideration of factors other than social harm would require individualized sentencing: "[I]t would be necessary to form, not only a particular code for every individual, but a new penal law for every crime."<sup>24</sup>

Most of today's reformers recognize the need for some small amount of judicial discretion to take account of variations in culpability within single offense categories. Their proposals typically provide for variations of plus-or-minus 20 percent or plus-or-minus one year in the presumptive prison sentence for each offense. A basic question, of course, is whether this limited degree of flexibility is enough.<sup>25</sup> In addition, California's recently revised penal code, like the Fogel-Walker proposal in Illinois, leaves the most important component of the sentencing decision — the choice between prison and probation — to the same lawless discretion as in the past.<sup>26</sup> The seemingly ludicrous result is that a judge may have an unfettered choice between probation and a specified prison term but no power to reach an intermediate judgment. Whatever the logic of their demands for certainty, some liberal reformers seem unwilling to advocate the "mandatory minimum sentences" that they have previously condemned and unwilling to take any step that will obviously be disadvantageous to defendants. Hence their retention of probation on the same discretionary terms as in the past.

Some of today's reformers also recognize that a more precise definition of substantive crimes will be necessary before a scheme of presumptive sentencing can be fair, and the Twentieth Century Fund Task Force on Criminal Sentencing has drafted an "illustrative presumptive sentencing statute for armed robbery" to

demonstrate the feasibility of the task. The statute seems, however, to demonstrate the opposite. It divides the crime of armed robbery into six degrees and yet takes account of only two variables, the sort of weapon used and the amount of physical violence threatened. Even the attempt to rationalize these two variables is somewhat crude; for example, robbery with a Tommy gun is treated no differently from robbery with a .22 target pistol. More importantly, variables such as the amount of money taken, the number and character of the victims, the motivation for the crime, and any special disabilities of the offender are relegated to a list of aggravating and mitigating circumstances that may sometimes justify a departure from the presumptive sentence.

The Task Force's effort to provide an "exclusive" list of aggravating and mitigating factors itself seems troublesome. For example, under the Task Force proposal, a judge would apparently be expected to disregard the fact that a particular offender was seized with remorse, turned himself in, and provided information that led to the arrest and conviction of a half-dozen violent criminals. Perhaps the Task Force did not make a focused decision that this sort of post-crime conduct is irrelevant to the punishment that an offender should receive. The authors may instead not have thought very much about the issue, and therein lies the danger of attempting to specify all relevant sentencing factors in advance.<sup>27</sup> More importantly, a general, unweighted list of aggravating and mitigating factors does not do much to confine discretion. If every significant variable were domesticated in the same manner that the draft domesticates a few, and if each variable were then cross-tabulated with every other variable, the resulting armed robbery statute would probably exhibit about the same prolixity as an entire penal code today. Armed robbery in the 161st degree might be the taking of property worth between ten and 50 dollars from a single victim without special vulnerabilities by a mentally retarded offender acting alone and using a loaded firearm.<sup>28</sup>

A more promising approach is currently being developed by Leslie Wilkins, Jack Kress and their associates in the city of Denver and state of Vermont,<sup>29</sup> and by Judge Sam Callan and the other criminal district court judges in El Paso, Texas.<sup>30</sup> In essence, these scholars and court officials have been working to evolve a "point system" under which a sentencing judge assigns values to a number of recurring sentencing factors in the cases that come before him. When an offender has been convicted of a

Class 2 felony under the local penal code, for example, the judge might start with a base score of six points. Then he might add two points because the offender carried a firearm during the crime, add another two points because he fired this weapon, add still another point because the offender was convicted of a serious misdemeanor within the past year, subtract two points because the offender cooperated in the prosecution of other offenders, and so on. The final score is translated into a presumptive sentence which the judge may disregard (and not just within a limited range of plus-or-minus 20 percent or plus-or-minus one year), provided he articulates his reasons for doing so.<sup>31</sup>

The development of judicial guidelines of this sort seems worthwhile but is probably not enough. A narrowing of the range of statutory penalties, coupled in some instances with a more precise definition of substantive offenses, does seem desirable in virtually every American jurisdiction. I have emphasized that discretion has its uses even in a sentencing regime based on just desert, but of course discretion also has a darker side. Whenever discretion is granted, it will be abused. In some instances, individual differences in culpability will be less important than differences in race, class, lifestyle and other irrelevancies. Even when officials consider only what they should, moreover, they will do so in differing ways, and troublesome inequalities will result. Despite my criticism of fixed sentencing proposals, the question today is probably how much we should move in the direction of fixed sentences, not whether we should do so.

### III

#### PROSECUTORIAL PLEA BARGAINING

Any sentencing reform, whether great or small and whether in the form of fixed sentences, presumptive sentences or sentencing guidelines, can be undercut by the practice of plea bargaining, and the advocates of dramatic change in our system of criminal punishment have dutifully noted that prosecutors do, in effect, make sentencing decisions in formulating charges<sup>32</sup> and in negotiating pleas of guilty. They have even proclaimed, "There can be no practical understanding of any sentencing sys-

tem without an appreciation of the role played by plea bargaining."<sup>33</sup> Sometimes after these brief glances in the direction of reality, however, and sometimes without them,<sup>34</sup> the reformers have for the most part ignored the dominant reality of prosecutorial sentencing power. They have usually sought to leave this power as they have found it, and they have not paused to consider what effect a still-unchecked power to bargain might have on the achievement of their objectives.

It seems unlikely that today's reformers are truly content with the regime of prosecutorial power as it is. There is hardly any objection to judicial sentencing discretion that does not apply in full measure to prosecutorial sentencing discretion — a discretion which has been, in practice, every bit as broad and broader.<sup>35</sup> As much as judicial discretion, the discretion of American prosecutors lends itself to inequalities and disparities based on disagreements concerning issues of sentencing policy; it permits at least the occasional dominance of illegitimate considerations such as race and personal or political influence; and it may lead to a general perception of arbitrariness and uncertainty, contribute to a sense of unfairness, and even undercut the deterrent force of the criminal law.

There are additional objections to prosecutorial sentencing discretion that do not apply with nearly so much force to judicial discretion. The exercise of prosecutorial discretion is more frequently made contingent upon a waiver of constitutional rights; it is generally exercised less openly; it is more likely to be influenced by considerations of friendship and by reciprocal favors of a dubious character; it is commonly exercised for the purpose of obtaining convictions in cases in which guilt could not be proven at trial; it is usually exercised by people of less experience and less objectivity than judges; it is commonly exercised on the basis of less information than judges possess; and, indeed, its exercise may depend less upon considerations of desert, deterrence and reformation than upon a desire to avoid the hard work of preparing and trying cases. The discretion of American prosecutors, in short, has the same faults as the discretion of American judges and more.

The *laissez faire* attitude of sentencing reformers toward this concentration of governmental power in prosecutors' offices is probably not the product of blindness or indifference. It is probably best explained by a pervasive sense that, for one reason or another, the institution of plea bargaining is impregnable. The reformers may have accepted the claim that trial courts would be

swamped if the power to bargain for guilty pleas were substantially restricted, or they may have nodded at assurances that efforts to restrict the bargaining process would merely drive it underground. Moreover, the reformers probably have little desire to engage in what they see as a fruitless political battle. They may sense that sentencing reform will have a rough enough time in the political arena without a hopeless charge at the prosecutor's well-entrenched — and very comfortable — ways of doing business. The Twentieth Century Fund Task Force has put it this way: "The propriety of plea bargaining — whether it is desirable to eliminate it, if this is a practical possibility — will continue to be debated. But sentencing reform cannot be held in abeyance until the debate is resolved, if it ever is."<sup>36</sup> In other words, discussions of plea bargaining may be interesting, but we have the world's work to do.

I am not at all persuaded that our society is too impoverished to give its criminal defendants their day in court. Most nations of the world, including many far poorer than ours, do manage to resolve their criminal cases without bargaining. Nor do I accept the "boys-will-be-boys" theory that plea bargaining is inevitable, a theory that depends on the cynical view that prosecutors and defense attorneys will work to undercut even a clear and authoritative legal condemnation of bargaining in its various forms. Moreover, I believe that the political battle could be won if those who recognize the injustice of our current regime of prosecutorial power would simply fight the fight. The only public opinion poll on plea bargaining of which I am aware reports that an overwhelming and growing majority of Americans oppose the practice.<sup>37</sup> Nevertheless, I shall not pursue these issues in this paper. I shall merely contend that if the reformers are correct — if the practice of plea bargaining is indeed invulnerable — this circumstance argues strongly against the reformers' proposals. The asserted resiliency of plea bargaining militates as forcefully against the various changes that the reformers have sought as it does against the changes that they have foregone. Indeed, from my perspective, the worthwhile goal of sentencing reform might almost as well be forgotten if plea bargaining cannot be restricted.

The reformers themselves, of course, do not see it this way. They vaguely argue that their proposals would rationalize the plea bargaining process, and some of them also suggest — usually in private — that these proposals might constitute the first step toward an eventually more substantial restriction of prose-

ctorial sentencing power. One must always start somewhere, they maintain, and not necessarily with the most pernicious manifestation of the evil.

Consider, however, a criminal code in which offenses have been defined in great detail and in which the legislature has attached a single fixed sentence to each offense. Suppose, in other words, that not an ounce of discretion remains in the hands of trial judges and parole boards — and then suppose that prosecutors retain an unchecked power to substitute one charge for another in the plea bargaining process. It seems doubtful that even Ray Bradbury or Franz Kafka could devise a more bizarre system of criminal justice than this one. Despite the reformers' talk of certainty, the lawlessness of our system of criminal justice would probably not be reduced in this new regime. The persistence of plea bargaining would yield the same disparity of outcomes, the same racism and classism, the same gamesmanship, and the same uncertainty. The unchecked discretion over sentencing that has apparently distinguished our nation from all others would continue, but it would reside, not just predominantly, but exclusively in the prosecutor's office. The benefits of this discretion would, moreover, usually be available only to defendants who sacrificed the right to trial, and the pressure to plead guilty would therefore be likely to increase. We would have abandoned our old discretionary regime — a regime in which mercy could be given — and substituted a new discretionary regime in which mercy would only be sold.

The defenders of plea bargaining sometimes debate whether the bargaining process should focus on the number and level of the charges against a defendant or instead on specific sentence recommendations. Plea bargaining in a world of fixed sentencing, however, would combine the worst features of both forms of negotiation. In our current system of criminal justice, the principal advantage of charge bargaining is that it involves a measure of shared discretion and tends to intrude less dramatically upon the judicial sentencing function. Even after a charge-reduction bargain has been fully effected, a trial judge is likely to retain a significant choice in the sentence to be imposed, and he may exercise this choice without undercutting the credibility of the prosecutor who struck the bargain. When plea negotiations focus on prosecutorial sentence recommendations, by contrast, judges usually follow the course of least resistance and simply ratify the prosecutors' sentencing decisions.<sup>38</sup> The advantage that charge bargaining exhibits in our current system of criminal

justice would plainly disappear in a system of fixed sentences. In such a system, bargaining about the charge would *be* bargaining about the sentence. A nonjudicial officer would determine the exact outcome of every guilty plea case, and every defendant who secured an offer from a prosecutor in the plea bargaining process would be informed that his conviction at trial would yield a sentence of precisely X years while his conviction by plea would yield a sentence of precisely Y.<sup>39</sup>

Although plea negotiation in a system of fixed sentencing would not have the same advantages as charge bargaining today, it would retain the same defects. The principal virtue of sentence-recommendation bargaining in our current system of justice is that it permits a reasonably precise adjustment of the concessions that a guilty-plea defendant will receive. Charge bargaining, by contrast, must proceed by leaps from one charge to another. In one case, replacing the offense that has been charged with the next available offense may result only in the substitution of a slightly less serious felony. In another case, "going down to count 2" may result in a misdemeanor conviction. In still another case, there may be no lesser offense that seems at all related to the defendant's conduct. A prosecutor may often be forced to choose between withholding any concession and granting one that seems too generous, and he may sometimes find that penal code draftsmen have failed to provide a lesser offense that he can properly substitute for the offense initially charged. Because plea bargaining in a system of fixed sentencing would similarly require the substitution of one charge for another, accidents of spacing in the drafting of penal codes would assume substantial importance. In addition, prosecutors would face the same temptations for overcharging that they face in systems of charge bargaining today, and criminal conduct would be mislabeled as defendants pleaded guilty to offenses less serious than those that they apparently committed.<sup>40</sup>

In short, a system of fixed sentencing would not "rationalize" the plea bargaining process. Not only would plea negotiation assume a greater importance in this system than in our current sentencing regime, but this negotiation would take an even less desirable form — a form that would exhibit neither the shared discretion of today's charge bargaining nor the flexibility and honesty in the labeling of offenses of today's sentence bargaining. Plea bargaining would probably be more frequent; its effect would be more conclusive; and it would be bargaining of the least desirable type.

Of course I have spoken in terms of a simplified model — a “pure” fixed-sentencing system that none of today’s reformers, to my knowledge, have advocated. The evaluation of detailed “real world” proposals becomes more complicated and the prediction of results more perilous. For one thing, many of today’s reformers couple their proposals for increased certainty in sentencing with proposals for a substantial reduction in the severity of criminal punishments.<sup>41</sup> To the extent that the reformers accomplish this second objective, the plea bargaining leverage of prosecutors is likely to be reduced. A prosecutor who can threaten only a penalty of three years following a defendant’s conviction at trial plainly has less bargaining power than a prosecutor who can threaten a sentence of twenty-five years.<sup>42</sup> Nevertheless, a caveat of Professor Franklin Zimring is worth repeating: “Once a determinate sentencing bill is before a legislative body, it takes only an eraser and pencil to make a one-year ‘presumptive sentence’ into a six-year sentence for the same offense.”<sup>43</sup> Political forces may push sentencing reform away from the humanitarian objectives of its authors and toward a sterner model. Even when liberal reformers succeed initially in securing a reduction in penalties, cases in which a legislatively specified penalty seems too lenient will probably attract more attention than cases in which the penalty seems too severe. Politicians who cannot find any other issue on which to campaign can always propose an increase in the penalty for whatever crime is currently in the public eye.<sup>44</sup>

Individual prosecutors may, of course, respond to legislative reform in differing ways. Even when their bargaining powers are unrestricted, some prosecutors may sense that the exercise of these powers would be inconsistent with the legislature’s desire for certainty. These prosecutors might try to “play it straight;” if the legislature thought that a person with one prior felony conviction who stabbed another person in the shoulder deserved four years’ imprisonment, they might refuse to undercut this democratic judgment by “omitting the prior conviction” in exchange for a plea of guilty. Other prosecutors, however, might take a more flexible view, and county-by-county variations (or disparities) might result.

In the main, the new California sentencing statute seems to create a bargainer’s paradise. The statute authorizes extended prison terms for offenders who have been previously sentenced to prison for other crimes, for offenders who were armed or who used firearms during the commission of their crimes, for of-

fenders who deprived their victims of extraordinarily large amounts of property, and for offenders who inflicted personal injury while committing their crimes. In each instance, a prosecutor can apparently foreclose the additional punishment simply by failing to allege the relevant aggravating circumstance, and the prosecutor's decision can, of course, become the subject of a trade. The principal practical use of habitual offender and other statutory provisions for enhanced punishment in most states has, in fact, been to provide plea bargaining leverage; these provisions have been very rarely invoked except when defendants have asserted the right to trial. In addition, although the authorized sentences for felonies are commonly stated in terms of a three-year range — three, four or five years, for example — the trial judge is not authorized to select the most severe of these options unless the prosecutor has filed a motion alleging some aggravating circumstance (not a circumstance specified by the statute — *any* aggravating circumstance that strikes the prosecutor's fancy). Whether such a motion will be filed seems likely to become a frequent topic of discussion during plea negotiations, and of course a prosecutor can also agree not to oppose a defense attorney's efforts to obtain the least severe of the authorized terms. (A prosecutor might, indeed, add some sweetener to a bargain by agreeing to file a motion in mitigation of the defendant's punishment himself.) As I have noted, bargains for an award of probation are not limited by the new California statute. Finally and perhaps most importantly, the statute does not restrict the prosecutor's ability to substitute one charge for another in the plea bargaining process. Under this statute, some of the powers formerly exercised by the California Adult Authority will have been assumed by the legislature through its narrowing of the range of authorized penalties, and judges will also have slightly greater powers than in the past. The big winners, however, are the prosecutors.

The California statute does exhibit some countervailing tendencies. Formerly, the reduction of a first-degree murder charge to second-degree murder in California did not deprive the Adult Authority of the power to hold an offender in prison for the rest of his life. Under the new statute, a reduction to second-degree murder will make the difference between a sentence of death or life imprisonment (with or without the possibility of parole) and a term of five, six or seven years. In this offense area, the prosecutor's plea bargaining leverage — the value of a charge-reduction to second-degree murder — may have been increased.

Under the old code, however, a prosecutor could threaten an armed robber with a potential life sentence if he were convicted at trial. The offer of a probated sentence conditioned upon serving a county jail term of one year or less was therefore a very powerful lever. Under the new code, the maximum sentence for armed robbery when no injury has been inflicted and when a weapon has not been fired is five years (two, three or four years for the crime of robbery itself plus an additional year for being armed). In this offense area, although an offer of probation remains remarkably coercive, the prosecutor's bargaining leverage may have been reduced.<sup>45</sup> (Note, however, that a prosecutor can restore the prospect of life sentence if he can charge the defendant with kidnapping for the purpose of committing a robbery.)

As I have suggested, one consequence of the California Adult Authority's broad sentencing powers was that defense attorneys usually saw little point in plea bargaining when acceptance of the prosecutor's best offer would lead to a state prison sentence. Because prosecutors will now be able to bargain more specifically about the length of an offender's penitentiary confinement, the guilty-plea rate is very serious — or "automatic prison" — cases seems likely to increase. A second consequence of the Adult Authority's broad powers, however, was that prosecutors usually sought ways to avoid prison sentences when felony defendants were willing to plead guilty. Even in a relatively aggravated case, a prosecutor was likely to offer a charge-reduction to a misdemeanor or a "wobbler" (an offense that the court could treat either as a felony or as a misdemeanor) or to recommend an award of probation on the condition that the defendant serve a county jail term.

Bargaining patterns established in response to California's distinctive regime of indeterminate sentences may not change dramatically with the implementation of the new sentencing law. Perhaps the offer of county jail sentences even in rape and armed robbery cases became common because of the perceived necessities of the plea bargaining process when the Adult Authority reigned supreme. Nevertheless, the view that this sort of offer is appropriate may now have become internalized. Prosecutors may have persuaded themselves that their offers of county jail time in serious felony cases are just, or they may simply not pause to reconsider this established way of inducing guilty pleas merely because the new statute has been enacted. Under the new law, however, prosecutors will gain the power to make "intermediate" offers of relatively short prison sentences.

With this newfound power, the extraordinarily favorable (and extraordinarily coercive) offers of the past may gradually become less frequent. Of course a defendant who would have pleaded guilty in exchange for a county jail sentence followed by a term of probation may refuse to plead guilty in exchange for a two-year reduction in his prison term. Thus, although the guilty-plea rate in "automatic prison" cases may increase, the guilty-plea rate in other sorts of cases may decline. Prosecutors may, in other words, begin to offer only prison sentences in cases in which, for the sake of obtaining what was formerly the only available sort of bargain, they would have agreed to non-prison sentences in the past. One consequence may be an increase — perhaps even a dramatic increase — in the population of California's state prisons.

Although Chief Justice Burger has suggested that legislation affecting the work of the courts ought to be accompanied by a "judicial impact statement,"<sup>46</sup> the preparation of such a statement for California's new sentencing law is beyond my competence. There will be pulls in different directions, and much will depend upon the idiosyncratic responses of individual prosecutors in what will remain a highly discretionary regime. The persistence of unchecked prosecutorial power itself, however, is a dominant and probably fatal aspect of the California reform. In California as elsewhere, the proponents of sweeping change in our sentencing laws have ignored the ways in which our system of criminal justice is a system.<sup>47</sup>

Of course, in terms of doing its job, the machinery of criminal justice is sometimes not much of a system at all; the allegation that ours is a non-system whose left hand does not know or care what its right hand is doing may very often be accurate.<sup>48</sup> In terms of protecting its bureaucratic ways of processing criminal cases, however, the American system of criminal justice is indeed a system, and the effect of suppressing an injustice at one point in the criminal process may be to cause a comparable injustice to appear at some other point.<sup>49</sup> Reform of our amorphous regime of criminal justice is not impossible, but it is feasible only when one begins with a will to see it through. Without this commitment, the principal effect of sentencing reform will be to push the evils of excessive discretion toward an easy instrument of accommodation, the practice of plea bargaining.

Plea bargaining can be retained in a system of fixed or presumptive sentencing without undercutting the reformers' objectives, but only if its form is substantially altered. In place of

the prosecutor's sentencing power, the legislature must specify the reward that will follow the entry of a plea of guilty. Just as a sentencing statute can treat the carrying of a firearm as an aggravating factor leading to an additional year's imprisonment, it can treat the entry of a plea of guilty as a mitigating factor leading to a specified reduction in penalty. Under such a statute — coupled, of course, with the elimination of plea bargaining by prosecutors — the "break" that follows the entry of a guilty plea would not depend upon the prosecutor's whim. It would not be affected by a prosecutor's feelings of friendship for particular defense attorneys, by his desire to go home early on an especially busy day, by his apparent inability to establish a defendant's guilt at trial, by his (or the trial judge's) unusually vindictive attitude toward a defendant's exercise of the right to trial, by the race, wealth or bail status of the defendant, by a defense attorney's success in threatening the court's or the prosecutor's time with dilatory motions, by the publicity that a case has generated, or by any of a number of other factors — irrelevant to the goals of the criminal process — that commonly influence plea bargaining today.<sup>50</sup>

The principal objection to a legislative regularization of the sentence differential between guilty-plea and trial defendants is probably that it would make the penalty that our system imposes for the exercise of a constitutional right so painfully apparent. Open articulation of the principle that makes our system of plea bargaining effective should indeed cause us to blush. Nevertheless, if sentencing reformers are unwilling to go this far toward channeling and controlling the plea bargaining process, perhaps they should abandon the reform effort. Determinate sentencing statutes may not always make things worse, but without a major restriction of prosecutorial power, the reformers plainly will not accomplish the goal of more certain sentencing that they have sought so earnestly and, to a considerable extent, so rightly.

Some sentencing reformers may believe that prosecutorial discretion is more valuable than judicial discretion, and if so, they have things topsy-turvy. The reformers have levelled their attack — a basically well-founded if somewhat one-sided attack — on the form of discretion that is most frequently exercised "on the merits" of criminal cases for the purpose of taking differences in culpability into account. They have disregarded the form of discretion that is most frequently bent, manipulated, twisted and perverted in order to gain convictions when guilt cannot be proven, make the work of participants in the criminal

justice system more comfortable, and save the money that might otherwise be required to implement the right to trial. If the reformers hope to do more than reallocate today's lawless sentencing power in such a way as to give prosecutors an even heavier club, they must exhibit greater courage. They must view the criminal justice system as a system, recognize that their belief in equal justice is currently challenged more by the practices of prosecutors than by those of trial judges, and bite the bullet on the question of plea bargaining.

## DISCUSSION

U.S. Circuit Court Judge David Bazelon was invited to the podium to make a few remarks.

Bazelon opened with the reminder that one type of crime, street crimes of violence, had prompted the current interest in sentencing. "That's why we're here," he said. "Yet in this conference, and in most conferences, we don't talk about the kinds of crimes that brought us here."

He went on to remind the audience that such street crimes almost invariably were tied to the disadvantaged in society. "Let's not kid ourselves: there is social injustice," he said. "And we'd better start looking to see how that social injustice is connected to the crimes that frighten us."

"It's said that like crimes should be treated with like sentences," he continued. "Yet I must, I will, I still cling to the ideal of individualized justice. Others have recognized that in abandoning individualization here we make it progressively easier to abandon it elsewhere. I fear that if we shift from concern with the individual to mechanical principles of fairness, we may cease trying to learn as much as possible about the circumstances of life that may have brought the particular offender to the bar of justice."

A member of the audience then made several points. First, he said, he did not agree that the idea of determinate sentencing had swept the country as extensively as some speakers had implied. Secondly, he said that while rehabilitation was a central purpose of imprisonment in the rhetoric of the last 50 years, it had not been carried out in practice. Also, the purpose of a central sentencing authority such as a parole board could be to modify disparity, rather than to increase it.

Professor Alschuler replied that a centralized sentencing

agency might well be desirable. But he said centralization was a distinct issue from the timing of the sentencing decision. Current parole practices could be justified, he added, only if a prisoner's adjustment to institutional life and response to treatment programs were genuinely relevant to the amount of time he should be required to serve.

A prosecutor objected to Professor Alschuler's characterization of the prosecutor's role. Increased power for prosecutors was not a bad thing, he said. In California, he thought it necessary because in recent years imprisonment rates had been too low for violent crimes.

Another participant observed that there was evidence indicating that appellate review of sentencing had been avoided in the past by appellate courts because judges preferred to rely upon parole boards to reduce inequities.

One member of the audience asked Professor Alschuler what specific suggestions he had for controlling plea bargaining. What, he asked, about setting standards?

Professor Alschuler replied that he could not advocate standards for a process he would like to see eliminated. □

## FOOTNOTES

1. In addition, governors exercise the power of executive clemency, and police officers sometimes make "stationhouse adjustments" that effectively impose penal sanctions.

2. See A. von Hirsch, *Doing Justice: The Choice of Punishments* (1976); *Fair and Certain Punishment: Report of the Twentieth Century Fund Task Force on Criminal Sentencing* (1976); D. Fogel, "... We Are The Living Proof ...": *The Justice Model For Corrections* (1975); M. Frankel, *Criminal Sentences: Law Without Order* (1972). See also *Struggle For Justice: A Report on Crime and Punishment in America*, prepared for the American Friends Service Committee (1971); J. Mitford, *Kind and Usual Punishment: The Prison Business* (Vintage ed. 1974); *New York Times*, Dec. 6, 1975, p. 29, col. 1 (Senator Kennedy); *New York Times*, Feb. 3, 1976, p. 18, col. 1 (Attorney General Levi); *New York Times*, April 26, 1976, p. 1, col. 1 (President Ford).

3. See California Senate Bill No. 42, approved by the Governor, Sept. 20, 1976, filed with the Secretary of State, Sept. 21, 1976.

4. D. Rothman, Address to the Advisory Committee of the National Institute of Law Enforcement and Criminal Justice, Washington, D.C., Feb. 1976 (unpublished). Professor Alan M. Dershowitz prepared a short history of sentencing reform in America for the Twentieth Century Fund Task Force on Criminal Sentencing. He noted that as early as 1787 Dr. Benjamin Rush proposed a system of indeterminate sentencing in which an offender's release from prison would depend upon his progress toward rehabilitation. In 1847, S. J. May argued against judicial sentencing on the ground that every offender should be held in prison "until the evil disposition is removed from his heart." The first indeterminate sentencing law in the United States, providing a three-year sentence for "common prostitutes" which could be terminated at any time by the inspectors of the Detroit House of Correction, was enacted at the behest of Zebulon R. Brockway in 1869. The following year, the National Prison Congress endorsed indeterminate sentencing with a religious fervor that persisted among prison officials in the decades that followed. Dershowitz, Background Paper, in *Fair and Certain Punishment*, *supra* note 2; see D. Fogel, *supra* note 2, at 1-64. Despite some noteworthy intellectual precursors dating back at least to Dr. Rush's proposal in the Eighteenth Century, the flowering of indeterminate sentencing has been a relatively recent phenomenon.

5. See, e.g., Martinson, "What Works? — Questions and Answers About Prison Reform," *The Public Interest*, Spring 1974, p. 22.

6. See N. Morris, *The Future of Imprisonment* (1974).

7. See, e.g., Ramsey, Book Review, 24 *Stanford Law Review* 965 (1972).

8. See, e.g., N. Morris, *supra* note 6, at 48.

9. J. Mitford, *supra* note 2, at 236-48.

10. See Calif. Penal Code §3000(a) (at the expiration of an inmate's determinate sentence less whatever "good time" credit he has earned, he "shall be released on parole for a period not exceeding one year, unless the board for good cause waives parole and discharges the inmate from custody. . .").

11. E.g., Administrative Office of the United States Courts, "Federal Offenders in the United States District Courts 1971," Exhibit VII, at 13; Alschuler, "The Trial Judge's Role in Plea Bargaining, Part I," 76 *Columbia Law Review* 1059, 1085-86 n. 89 (1976).

12. See, Shin, "Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Processes," 1 *Journal of Criminal Justice* 27 (1973).

13. Alschuler, "The Prosecutor's Role in Plea Bargaining," 36 *University of Chicago Law Review* 50, 101-03 & n. 29 (1968).

14. See pp. 20-24 *infra*.

15. Professor Phillip E. Johnson read a draft of this paper and commented that it was somewhat misleading to speak of the transfer of power to the prosecutor's office. Because defense attorneys are active participants in the negotiating process; Professor Johnson suggested that one might better refer to the enhanced power of *both* the prosecutor and his adversary. Of course defense attorneys do have a significant voice in the formulation of plea agreements. Nevertheless, after a defense attorney has made his arguments and exercised whatever plea bargaining leverage he can, a prosecutor must still determine what punishment is acceptable to the state before entering a plea agreement. In this sense, the input provided by the defense attorney can be viewed as one important influence on an official sentencing decision made by the prosecutor. Professor Johnson is certainly correct that a prosecutor's sentencing power is likely to be constrained by a variety of circumstances, and although I have continued to refer to prosecutorial power, I hope that my language does not convey too imperial an image.

16. A. von Hirsch, *supra* note 2, at 98.

17. Professor Dershowitz wrote that penal code revisions between 1790 and 1830 "reflected the views that certainty of punishment is more important than severity of punishment," yet the statute that he cited to illustrate this proposition, a Massachusetts statute on maiming enacted in 1804, gave trial judges discretion to select any term of solitary imprisonment not exceeding ten years. Dershowitz, Background Paper, in *Fair and Certain Punishment*, *supra* note 2, at 85 & 134 n.6. Professor Dershowitz also quoted a 1750 Massachusetts statute which provided "that where there shall appear any circumstances to mitigate or alleviate any of the offenses against this act . . . it shall and may be lawful for the judges . . . to abate the whole of the punishment of whipping or such part thereof as they shall judge proper," and a 1676 Pennsylvania law which empowered judges to sentence offenders who were unable to pay a fine to "Corporal punishment not exceeding twenty Stripes, or do Service to Expiate the Crime." *Id.* at 133 n.2 & 134 n.5.

18. An Act Defining the Punishment to be Inflicted on Persons Guilty of the Crimes and Offenses Therein Mentioned, §4, Tenn., Dec. 3, 1807, in 1 E. Scott, "Laws of the State of Tennessee Including Those of North Carolina" 1056 (1821).

19. "An Act for the Punishment of Such Persons as Shall Procure or Commit Any Wilful Perjury," N. Car., April 8, 1777, in 1 E. Scott, *supra* note 20, at 155-56 (emphasis added). Many of the early Nineteenth Century statutes included in Scott's interesting volume provided for punishments such as a fine of not less than 50 or more than 1,000 dollars, imprisonment for not less than one nor more than 12 months, and whipping "on the bare back with a whip or cow-skin, with not less than ten nor more than 39 lashes." Later in the Nineteenth Century, terms of imprisonment became longer as state penitentiaries replaced local jails and as both capital and corporal punishment fell into disfavor, yet broad judicial sentencing discretion remained the norm. See e.g., "Revised Statutes of the Territory of Colorado," ch. 22, §44 (1868) ("Every person convicted of the crime of rape, shall be punished by confinement in the penitentiary for a term not less than one year, and such imprisonment may extend to life").

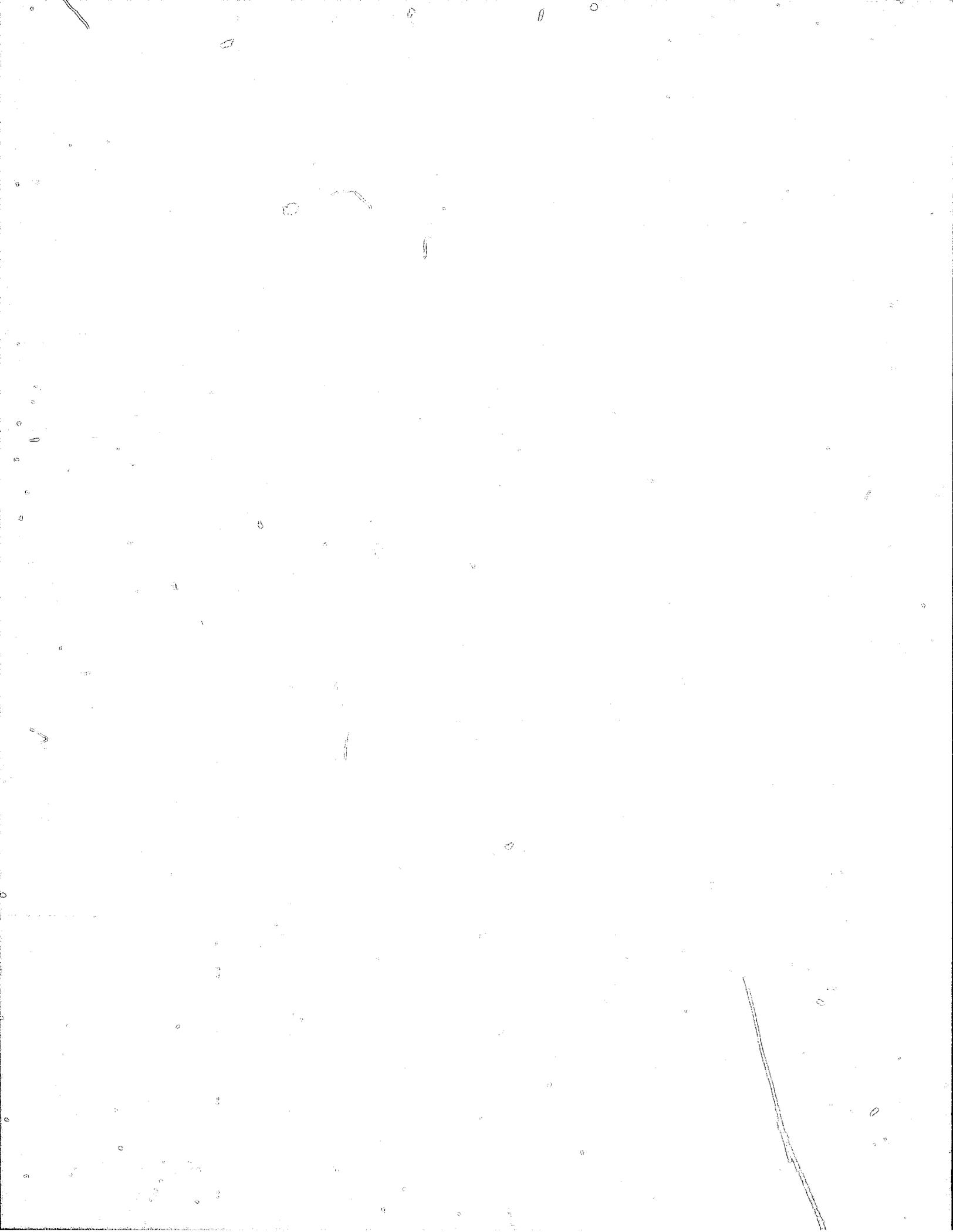
20. Calif. Penal Code §1170 (a) (1).

21. See Holmes-Laski Letters 806 (Howe ed. 1953).

22. C. Beccaria-Bonesana, "An Essay on Crimes and Punishment" 33 (Academic Reprints ed. 1953).

23. A. von Hirsch, *supra* note 2, at 69.

24. C. Beccaria-Bonesana, *supra* note 22, at 33.



**CONTINUED**

**1 OF 2**

25. Fixed and presumptive sentencing schemes have focused primarily on the sentence to be imposed for a single crime. Before being apprehended, however, an offender commonly will have committed five armed robberies, or will have made 150 fraudulent entries in his employer's books, or will have sold 1,000 counterfeit lottery tickets. To multiply a legislatively fixed or presumptive sentence five or 150 or 1,000 times in this situation seems manifestly unjust, yet simply to disregard the defendant's "additional" crimes seems at least equally improper. None of today's reformers have devised a non-discretionary formula for weighing multiple crimes that seems equitable in all situations.

The approach of the new California statute toward this problem is better than most. When a judge imposes consecutive sentences for multiple felonies, the aggregate sentence is limited to "the greatest term of imprisonment imposed by the judge for any of the crimes, including any enhancements . . . plus one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed without such enhancements." Calif. Penal Code §1170.1a (a). In addition, the aggregate sentence imposed for crimes other than the "base" offense cannot exceed five years. Id. §1170.1a(e). The decision whether to impose consecutive sentences, however, is left to the judge's discretion. In multiple-crime situations, this discretion seems necessary, and indeed, more discretion might well be desirable.

Of course, under the new California statute, additional crimes can lead to additional punishment only when they are alleged and proven; neither the trial judge nor correctional authorities can take additional crimes into account informally to any great extent in determining the sentence for a single offense. Although this reform will promote procedural fairness in sentencing, it may, in some instances, lead to more complicated trials. In the past, a prosecutor might have decided to charge only a few offenses in a particular case, knowing that conviction of these offenses would give the sentencing authority sufficient power to punish uncharged offenses as well.

26. The new statute does direct the California Judicial Council to adopt rules to promote uniformity in the grant or denial of probation as well as to promote uniformity in resolving other sentencing problems, such as whether to impose consecutive or concurrent sentences. Calif. Penal Code §1170.3.

27. Additional illustrations are provided by the "guided discretion" capital punishment statutes favored by the Supreme Court in *Greg v. Georgia*, 428 U.S. 153 (1976), and its companion cases. A defendant convicted of capital murder might wish to make the following speech to the jury about to consider whether capital punishment should be imposed: "I am deeply sorry for my crime, which I recognize was about as bad as any that can be imagined. I did, in fact, go to the police station shortly after the killing to surrender and make a full confession. Although I have done some terrible things in my life, you may wish to know, before deciding whether I should live or die, that I have also done some good. I once risked my life in combat to save five comrades — an action for which I was awarded the Silver Star — and for the last 10 years I have personally cared for my invalid mother while supporting five younger brothers and sisters." The mitigating factors listed in today's capital punishment statutes are sometimes quite general, but none that I have seen in any statute would permit a jury to consider any of the circumstances mentioned in this defendant's speech (or, for that matter, any other evidence of pre-crime virtue or post-crime remorse). Apparently the Florida statute upheld in *Proffitt v. Florida*, 428 U.S. 242 (1976), would not; yet the Supreme Court pluarlity, seemingly oblivious to the statute's limitations, declared in a companion case, "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek v. Texas*, 428 U.S. 262, 271 (1976).

28. In addition to its illustrative armed robbery statute, the Twentieth Century Fund Task Force provided a brief description of how it might treat a number of other crimes. This description is forcefully dissected in Zimring, "Making the Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform," *Hastings Center Report*, Dec. 1976, p. 13.

29. See L. Wilkins, J. Kress, D. Gottfredson, J. Calpin & A. Gelman, *Sentencing Guidelines: Structuring Judicial Discretion: Final Report of the Feasibility Study* (1976).

30. See "Memorandum to Members of the El Paso County Bar From Judges of the Criminal District Courts," Dec. 16, 1975 (unpublished). The El Paso "point system for sentencing" is substantially less sophisticated than that which Wilkins, Kress and their associates are developing. Without the aid of a computer, an LEAA grant, or a detailed study of past sentencing practices, Judge Callan devised it one day while sitting in a bathtub. El Paso's sentencing reform is especially interesting, however, because the district court judges coupled it with a prohibition of prosecutorial plea bargaining (a prohibition that seems to have been entirely effective). I intend to describe and evaluate the El Paso experiment in a forthcoming article.

31. A similarly promising approach is incorporated in S. 1437, the compromise proposal for a revised federal criminal code introduced by Senators McClellan and Kennedy. This bill would establish a United States Sentencing Commission and direct it to prescribe a "suggested sentencing range . . . for each category of offense involving each category of defendant." A federal judge who imposed a sentence outside the suggested range would be required to state his reasons, and the sentence that he imposed would ordinarily be subject to appellate review. S. 1437, 95th Cong., 1st Sess. (1977).

32. In practice, the initial formulation of charges by a prosecutor's office is a substantially less important component of the sentencing process than plea bargaining. Indeed, prosecutors may generally exercise too little sentencing discretion at the charge-formulation stage rather than too much. One vice of the plea bargaining system is that it encourages prosecutors mechanically to charge "the highest and the most" at the outset and to withhold the exercise of any equitable discretion until they can receive something in return. (Of course this analysis refers only to the formulation of charges in cases that prosecutors have tentatively decided to pursue to conviction. Prosecutorial "diversion," like plea bargaining, is commonly a device for securing a restriction of liberty without the bother and expense of trial, and this form of prosecutorial sentencing should be analyzed in similar terms.)

33. Dershowitz, Background Paper, in *Fair and Certain Punishment*, *supra* note 2, at 81.

34. Judge Frankel, for example, briefly mentioned that "the great majority (ranging in some jurisdictions to around 90 percent) of those formally charged with crimes plead guilty," but Judge Frankel did not consider the bargaining process that lies behind this lopsided figure and its substantial impact on sentencing. See M. Frankel, *supra* note 2, at vii.

35. A trial judge's sentencing discretion is ordinarily limited by the range of penalties that the legislature has provided for a particular offense, but a prosecutor who is dissatisfied with the range of penalties authorized for one offense can frequently use his charging power to substitute another.

36. *Fair and Certain Punishment*, *supra* note 2, at 26-27.

37. D. Fogel, *supra* note 2, app. III at 300 (70 per cent disapproval; 21 per cent approval; 9 per cent "don't know").

38. Alschuler, *supra* note 11, at 1063-67.

39. This form of bargaining would be even more explicit, and even less subject to judicial review, than today's sentence bargaining. A defendant who is

offered a specific sentence recommendation today in exchange for a plea of guilty can usually be almost certain that the recommended sentence will be imposed, but there remains some chance that the trial judge will reject the prosecutor's proposal. Moreover, the sentence that would follow a conviction at trial is rarely made explicit in sentence bargaining today. The greater explicitness of the plea bargaining process in a system of fixed sentencing would, of course, have its advantages, particularly in terms of letting each defendant know the consequences of his choice of plea, but it would make the coercive character of the guilty plea system all the more apparent.

40. See Alschuler, *supra* note 11, at 1136-46.

41. Von Hirsch, for example, recommends adoption of "a [sentencing] scale whose highest penalty (save, perhaps, for the offense of murder) is five years — with sparing use made of sentences of imprisonment for more than three years." A. von Hirsch, *supra* note 2, at 136: At least in an aggravated murder case involving an Eichmann, a Speck, or a Manson, the public will undoubtedly insist — as I confess that I think it should — on the power to hold the offender in prison for the rest of his life; and if life sentences have an appropriate place in a scheme of penalties for murder, it may attach too much importance to the results of criminal conduct (for example, whether an offender has killed or has merely turned his victim into a comatose "vegetable") to limit the penalty for all other crimes to five years' imprisonment.

Consider a not very unusual case that recently arose in my jurisdiction. Two young men entered a small liquor store owned by an elderly couple. One of the men took a bottle of Scotch from the shelf and brought it down hard on the head of the male store owner. He then gouged and twisted the jagged neck of the bottle into the store owner's neck, causing several deep wounds. At this point, the woman store owner emerged from a back room. The second robber hit her in the face with his fist and then administered a brutal and disfiguring beating while she lay helpless on the floor. Police photographs of the victims' wounds were more than enough to inflame even relatively hardened passions.

Von Hirsch proposes a two-dimensional sentencing "grid" with 20 different penalty levels determined by (1) the seriousness of the crime and (2) the offender's prior criminal record. If one assumes that the robbers in this case had no significant prior records, they would not be eligible for the "top," five-year penalty but only for some unspecified penalty four or five notches down the scale. This penalty — apparently "somewhere between 18 months and three years" — seems to me inadequate. I have read about "false positives" and the dangers of prediction, but I would not want to meet these violent offenders on the street or in a liquor store until they were at least a decade older than they are today. If past experience is any guide, moreover, my orientation is probably less punitive than that of most state legislators. The chance that the von Hirsch proposal would prove politically acceptable may therefore be small, and an evaluation of the likely effects of sentencing reform should probably not proceed on the assumption that this kind of change in penalty levels can be effected.

Von Hirsch's proposal suggests another possible defect of fixed-sentencing schemes, for it would make warning and unconditional release "the prescribed penalty for the least serious offenses." So minimal penalty may be appropriate in many cases, but whether it should be advertised in advance as the *only* possible sanction for certain crimes is a somewhat different question. Presumably behavior should not be made criminal at all unless it involves a significant departure from community standards of morality, and when an offender knows that he does not risk even so much as a fine if apprehended, he may conclude that he has a "license" to engage in criminal behavior. (Forgive me if I sound like the former prosecutor I am.) A degree of uncertainty con-

cerning the community's response to crime may have deterrent virtue, and although the sanctions that we threaten as well as those that we impose should be limited by considerations of just desert, it does not seem inconsistent with this principle to bark a bit harder than we will probably want to bite in the "typical" case.

42. See A. von Hirsch, *supra* note 2, at 104-05. In one sense, prosecutorial power may also be restricted when a fixed or presumptive sentencing scheme does not reduce the aggregate severity of criminal penalties but merely "evens out disparities" by limiting departures from a previously established "norm." This sort of sentencing scheme can best be viewed as having two countervailing components. First, it limits the ability of prosecutors to threaten unusually harsh, "exemplary" penalties for defendants who stand trial and in that sense reduces prosecutorial bargaining power. Second, this scheme effectively establishes mandatory minimum sentences for offenses and thus gives prosecutors the kind of bargaining leverage commonly observed today when mandatory penalties have been enacted.

43. Zimring, *supra* note 28, at 17.

44. This danger cannot necessarily be eliminated by assigning the task of setting presumptive sentences to a commission or other nonlegislative body. Once a commission has established a seemingly lenient presumptive sentence for a particular offense, the pressure for legislative revision is likely to be much greater than when the legislature has established a broad range of sentences for that offense and when judges have imposed a variety of sentences within this range (even if the average judicial sentence is every bit as lenient as the presumptive sentence that a commission would approve).

Of course our system of discretionary sentencing cannot reasonably be defended on the ground that it enables criminal justice officials to fool most of the people most of the time. If the popular will favors more severe sentences than judges in fact impose, the popular will should probably prevail. Nevertheless, the imperfections of the democratic process seem especially pronounced in the criminal justice area, and I suspect that the popular will is sometimes misperceived. In the course of working on a state penal code revision, for example, I was struck by the manner in which "liberal" proposals were abandoned or defeated although almost no one seemed to oppose them on the merits. The first modification of a proposal was likely to occur when it was presented to a reporters' group composed primarily of academics. Some reporters would explain that they favored the proposal as drafted but that the state bar committee on the revision of the penal code would not and that it was necessary to be "realistic." The proposal would be further modified by the state bar committee on the ground that, although most committee members favored it, the board of directors of the state bar would not. Then the board of directors would repeat the process, noting that the proposal could not be "sold" to the legislature in its current form. Finally, individual legislators would explain that they had no personal quarrel with the draft submitted by the state bar but that it would be unacceptable to their constituents. In talking with a constituent or two on the next seat of the Greyhound Bus, however, I usually found that they were not the yahoos that had been depicted and that they favored the proposal as it had first been presented to the reporters' group.

Apart from the general tendency to perceive the rest of the world as less progressive than oneself, there is a difference between making sentencing decisions "in the large" and making them "in the specific." People may sound vindictive in conversations about criminal justice issues with pollsters (a phenomenon that may be attributable in part to the kind of leadership that politicians often provide in this area), yet the same people may be decent and humane when confronted with specific cases. In El Paso, Texas, a few years

ago, District Attorney Steve Simmons announced a policy of opposing probated sentences in burglary cases, even those involving first offenders. Simmons had apparently concluded that this policy would be popular, and indeed it probably was. After some resistance, El Paso's district judges decided that they could not withstand the political pressure exerted by the District Attorney's office, and as a result, virtually all burglary defendants exercised the option of being sentenced by juries. In at least 90 percent of all first-offense burglary cases, juries — composed of people who may well have nodded their general approval of the District Attorney's policy when they read about it in the newspapers — awarded probated sentences. Similarly, Governor James R. Thompson of Illinois recently proposed that fondling should be included in a group of "X-rated felonies" carrying severe mandatory penalties. Governor Thompson is an astute political leader, and his proposal probably did not run counter to the sentiment of the times. In observing the treatment of a number of fondling cases in court and in the plea bargaining process, however, I have been impressed by the magnanimity that the families of the victims generally seem to exhibit. Typically, a defendant has inflicted substantial psychic injury upon a young child, and the child's parents appear in court in a distraught condition. More often than not, however, these parents agree that the appropriate social response to the crime is merely to provide psychiatric assistance to the offender, and with the parents' consent many fondling cases are "diverted" from the criminal justice system prior to conviction.

This analysis does not suggest that if popular sentiment truly favors tougher sentences, that sentiment should be defeated through manipulation or deception. It does suggest that "the people" themselves and their representatives should consider whether sentencing decisions cannot best be made "in the specific." It is consistent with democratic values for popularly elected legislatures and for the public to recognize the dangers of excessive severity that are likely to arise when sentencing decisions are made on too abstract a basis.

45. The authors of the new California statute apparently determined the presumptive penalties for particular felonies primarily by examining the amount of time that the Adult Authority had required offenders to serve for those felonies in the past. It might therefore seem that a reduction of one charge to another should have about the same effect under the new statute as under the old. Under the old statute, however, defendants and defense attorneys undoubtedly have less complete knowledge of the Adult Authority's sentencing practices than they did of the range of legislatively authorized penalties, and they probably responded more to the latter than to the former. In addition, even a defendant with detailed knowledge of the Adult Authority's practices was likely to be a "risk-avertter" and concerned about the danger that he might receive a more severe sentence than the norm. Most importantly, a defendant who had been charged initially with a more serious crime than that to which he had pleaded guilty was very likely to be treated more severely by the Adult Authority than other defendants in the same conviction category. See Alschuler, *supra* note 16, at 96 ("San Francisco defense attorney Benjamin M. Davis adds, 'All the charges against a defendant may be dismissed except one. But if the defendant is sentenced to the penitentiary and comes before the Adult Authority, those super-judges will want to know all about the ten robberies'"); J. Mitford, *supra* note 5, at 101 ("The Adult Authority's official orientation booklet states: 'The offense for which a man is committed is only one of the factors that the AA considers when making a decision.' Other factors may be (and often are) crimes for which the prisoner was arrested but never brought to trial. . .").

46. Burger, "The State of the Federal Judiciary — 1972," 58 A.B.A.J. 1049, 1050 (1972); see Chief Justice Burger's 1977 report to the American Bar As-

sociation, 63 A.B.A.J. 504 (1977).

47. At the conference at which this paper was initially presented, Professor Raymond I. Parnas, one of the principal authors of the new California statute, protested that he and his colleagues had indeed considered the relationship between this statute and prosecutorial sentencing power. Professor Parnas did not, however, deny that the California statute would substantially augment the bargaining power of prosecutors, nor did he argue that this enhanced prosecutorial power was either desirable or consistent with the professed objectives of the statute. By contrast, D. Lowell Jensen, the District Attorney of Alameda County, did argue that enhanced prosecutorial discretion was desirable. He observed that many prosecutors had supported enactment of the California statute for exactly this reason.

48. Consider, for example, the case of a friend of mine who recently received a ticket for careless driving and who was convinced that she was innocent. With some indignation, she went to the courthouse to tell her story to the judge. Prior to trial, a city prosecutor approached and offered various concessions in exchange for a plea of guilty, but my friend resisted his efforts. The prosecutor finally said, "What about a dismissal? Would you agree to take a defensive driving course if I dropped the charge?" My friend, still reluctant, was willing at least to consider the possibility. "Is it a good course," she asked, "or just some sanctimonious Mickey Mouse?" "Lady," the prosecutor said, "I don't know anything about the course. Do you want the dismissal or don't you?" In this incident, the prosecutor used the powers of his office to pressure a possibly innocent defendant into a program whose content he did not know and whose utility he had never considered.

49. See D. Oaks & W. Lehman, *A Criminal Justice System and the Indigent* 178-96 (1968).

50. The use of administrative rule-making procedures and the formulation of internal guidelines for prosecutorial decision making might help to reduce the influence of these extraneous factors. See, e.g., Vorenberg, "Narrowing the Discretion of Criminal Justice Officials," 1976 *Duke Law Journal* 651, 681-83. I am not convinced, however, that guidelines could domesticate prosecutorial sentencing power to such an extent that plea bargaining by prosecutors would become compatible with the objectives of today's sentencing reformers.

First, just as it is difficult or impossible for legislatures to specify all relevant sentencing factors in advance, it is difficult or impossible for prosecutors to do so. Guidelines may tend to be so general as to provide only minimal constraints on a prosecutor's discretion. Of course it is hard to quarrel in the abstract with the ideal of the rule of law. When a governmental decision-making process can be reduced to a formula that will yield justice in a substantial majority of cases, the development of rules and guidelines usually does seem worthwhile. Nevertheless, the test of the pudding is in the eating; the problem of balancing justice in the individual case against the desirability of legal rules cannot be resolved without regard to the specific problem at hand; and rather than call for less discretion and more rules in an abstract way, it would be desirable for the scholars currently enamored of this approach actually to try their hands at drafting some useful guidelines.

Second, even reasonably specific guidelines may prove delusive in practice. Prosecutorial guidelines seem to be frequently honored in the breach, see, e.g., Georgetown University Law Center Institute of Criminal Law and Procedure, "Plea Bargaining in the United States: Phase I Report" 33, 124 (1977), and indeed these guidelines may sometimes be intended more for show than for implementation. In Houston, Texas, the District Attorney once announced a policy against recommending less than a ten-year sentence in any case of robbery by firearm, yet a number of Houston defense attorneys told me of cases in

which their skillful bargaining had led to less severe prosecutorial sentence recommendations for their clients. Most of these defense attorneys seemed unaware that other attorneys were achieving the same success, and it gradually became apparent that the District Attorney's announced policy serviced in practice as a sales device comparable to that of some Maxwell Street clothing merchants: "Our usual price in a case of robbery by firearm is ten years, but for you . . ." Partly because plea bargaining policies are usually subject to ill-defined exceptions for "weak cases," this sort of evasion does seem common. In addition, prosecutors frequently subvert office policies by taking "unofficial" positions "off the record" and by agreeing "not to oppose" actions that they cannot affirmatively recommend. Dale Tooley, the District Attorney in Denver, commented that his office had developed guidelines for a variety of prosecutorial decisions and had generally found them useful. He added, however, "I have yet to see the policy that an assistant district attorney couldn't get around when he wanted to." Personal interview, July 11, 1977. Although one might of course provide for judicial review at the behest of disgruntled citizens (or perhaps some other device for enforcing prosecutorial rules at least on occasion), it is far from clear that this mechanism would yield beneficial results as often as it proved burdensome and oppressive.

## THE LAW AND ITS PROMISES

### Flat Terms, Good Time, and Flexible Incarceration

by John P. Conrad

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The greatness of a debate is to be measured by the importance of the change it produces. On this scale, the protracted controversy about the abolition of indeterminacy in sentencing qualifies only as a medium debate, despite the heat it has generated in the minds and hearts of those most affected. We shall soon enjoy the benefits of the flat term throughout the nation, but we shall find, I think, that among those benefits there will be little significant change in the incidence of crime. The criminal justice system is not likely to become much more just, even though redundant structures and the invalid assumptions on which they were based will be pruned away.

Nevertheless, it is a victory for my side. For many years I have been one of a swelling band of malcontents who have agitated to rid the law of the indeterminate sentencing structure and its contaminating pretensions. Now that Maine, California, and Indiana have discarded the old system, with several other states evidently intending to legislate to the same effect, it is not too much to hope that the indeterminate sentence will soon be as extinct as it should be. Change is in the air, but it is piecemeal change, not a revolution in criminal justice, or even in the administration of corrections. A free society thrives on high hopes and great expectations, but a statutory adjustment should not be seen as the fruition of either. The aspirations of Americans should be directed at the less tangible and more important objectives of virtue and compassion in a just and orderly society. To the extent that the indeterminate sentence was an obstacle in our effort to reach these goals, the victory is significant. It is also a victory which can be turned into a new loss for the cause of justice in a free society.

Many bright pages in the history of criminal justice reform

have been blotted by the ill-considered application of sound concepts. The new determinate sentence structure may be faithfully carried out while the condition of justice deteriorates in every other respect. For if there is one lesson which our society should learn from the sorry annals of penology, it is that those who manage prisons must never be left to their own devices. Good intentions will mask oppression. Indolence will suffocate effort, and meanness will suppress decency in the name of "realism." At this juncture, when changes for the better can be made, we must bear in mind that it is far from certain that they will be made.

In a consideration of the potential impact of the flat term on a correctional system inured to indeterminacy, it is proper to begin with a definition of what we wish the prison to be like in the late 20th Century. This exercise has been in abeyance for the last decade. The neo-classical criminologists, who have been writing with such assurance of late, argue that there should be more prisons with more felons in them, but they are generally indifferent to the specification of the desirable characteristics of the prison. With no less assurance, a school of revolutionary criminology holds that prisons are cruel futilities which should be abolished. In this disquisition I shall adhere to my opinion that American society will continue to use prisons as elements in the administration of retributive justice. In spite of vociferous arguments to the contrary by radical critics of the system, I continue to believe that prisons can be much improved in order, safety, and decency. I shall try to indicate how these improvements can be made under the conditions imposed by the flat-term sentence structure. Most of the considerations I shall advance are obvious to the point of truism. I shall labor them for a moment or two in the interest of getting on record the nature of a decent prison. To get what we want, we must know what we want. I shall specify here what is desirable in the least desirable, the least perfectible of human institutions.

First, the prison must be safe. Eventually the American mega-prison must go the way of the indeterminate sentence. No prison can be safe when it is built to house men or women like ants in an ant hill. Ants thrive in such conditions; for human beings the tensions imposed by living in large crowds are sufficient to generate disorders in which neither guards nor prisoners can be safe. Let us not over-simplify this simple principle. It is not enough for a prison to be small to assure safety. Conflict is inevitable in the necessarily oppressive regime of incarceration. Where there are no forces to resolve it, conflict must become se-

vere, even in a small prison. Incentives to order and good behavior must exist. It is not enough to rely on the self-interest of those concerned to prevent disorder. It is for this reason that all the proposals for determinate sentencing provide for remission of a part of the term to be served in return for compliance with the requirements of prison discipline. I shall return presently to a consideration of this perplexing topic.

The second desideratum is that prisoners should work for their living. Long ago, when I was a fledgling parole officer, I was instructed on the ontological status of hard labor in prison by a young man who had done a lot of time at San Quentin. I wanted to know what his prison employment had prepared him to do. He flatly asserted that in spite of entries on his record to the contrary, neither he nor anyone else *really* worked while in prison. I soon found that he was right and that this state of affairs constituted a great deal of what was wrong with the American prison. The idle gang, by whatever euphemism it is known, is a menace to the order of cellblock and yard and to the security of the society to which prisoners are eventually released. Only the working prisoner can be expected to become a working citizen when incarceration ends. Under the indeterminate sentence, some unobservant administrators have fancied that the prospect of earlier release for the industrious might induce prisoners to work productively. That never happened. The notion persists that the indeterminate sentence might motivate prisoners to work hard, and the question is raised as to how they will be inspired to any effort at all in the absence of possible rewards in the coinage of time. One answer might be money, of course, but prison reformers have made little progress in campaigning for realistic wages for prisoners. There may be other answers, again using the coinage of time, but relying on a system less capricious than the judgment of a parole board. Further attention must be given to this problem, and I shall address it in this paper.

Third, prisoners must see around them a range of credible opportunities to better themselves. The public has heard so much about the futility of coerced rehabilitation that the belief prevails that it is not possible for the prisoner to do more with his incarceration than merely to accept his punishment. Clearly this is untrue. Self-improvement depends on initiative, but initiative depends on opportunity. Advocates of the determinate sentence have rightly derided the charade of correctional rehabilitation, but no one should suppose that the despair which would result if education and training were to be denied the prisoner would be

in any way beneficial. Few people would be educated if the necessary exertion were not inspired by the belief that education leads to better life. Like citizens outside the walls, prisoners will respond to incentives, which must be provided for those who seriously engage in purposeful self-improvement.

Fourth and last, the prison must be a part of the outside community to the greatest extent possible. Everyone has heard that prisoners need to be visited and that family ties should be maintained even in the face of the enormous strains of enforced separation. Deploring the ugly process and consequences of "prisonization," reformers wish to encourage prisoners to adopt the conventional life of the working citizen as desirable and natural. That requires the discipline of interaction among people of all kinds working together and learning together. If prisoners are to accept this discipline they must emerge from confinement to work and study in the community at the same time that representatives of the community, members of prisoners' families, and friends and neighbors make their way into prisons to keep the social bond between prisoner and citizen strong and positive.

All citizens expect to be safe, to work constructively, to enjoy opportunities to improve themselves, and to play a meaningful part in the lives of their families, friends, neighbors, work-mates and strangers. When prisoners are needlessly denied these expectations they are unjustly and unwisely treated. To replace the indeterminate sentence with the flat term is to remove an artificial source of injustice against which both prisoners and prison reformers have long inveighed. It will be a bitter irony if in legislating an end to the pointless parole system the state allows conditions to be created which reduce a prisoner's ability to function as a person living under the constraints of limited citizenship. There is the potentiality of just that outcome in the flat-term legislation. Lawyers and administrators must take careful thought to prevent this ironic defeat of the best intentions. In the interest of preserving a modest victory I shall now proceed to a consideration of what must be done if the determinate sentencing model is not to become a mere exercise for academicians and legislators, without meaning for the city streets, the crowded courtrooms, or the prison yards.

## THE ARITHMETIC OF PENOLOGY

The horrifying congestion of American prisons this year will

not be relieved by the adoption of the determinate sentence. With good reason, most administrators fear that legislation to remove the flexibility offered by the indeterminate sentence will make a dangerous situation much worse. It is not apparent that the schedules of sentences usually proposed have been designed to fit the capacity of our prisons. The neat progression of penalties in the new California law, from one year for the lesser felonies to five, six or seven years to the more serious, and life without possibility of parole for murder is logical and symmetrical. It is beyond my scope to calculate the numerical impact of these sentences on the California prison population, but my initial impression is that probably the new sentences will not exceed those formerly imposed by the Adult Authority. At the distance at which my impressions are formed, it seems apparent that the long and exhaustive statistical experience of the Department of Corrections has been used to assure that no foreseeable population explosion will occur. This is a precaution which California is almost uniquely capable of taking because of its long and meticulous maintenance of a system of criminal statistics. It will be difficult for most other states to make the projections which will assure that the number of prisoners will not eventually exceed the available space for confining them.

It is anomalous to design a sentencing structure in terms of the space available for incarceration. To the theorist of justice, such a consideration must seem irrelevant. Penalties should be established to match the seriousness of the crimes for which punishment is to be imposed. In this matter, however, legislators must be pragmatic. By the most austere standards, the costs of prisoner upkeep and prison construction are now so high that in most states future accretions of capacity are likely to be small. The restraint to be discerned in the California schedule of penalties is an example to be followed by other states.

This pragmatic adulteration of justice has impressive precedent in the behavior of the Adult Authority, and, I suspect, most other parole boards. I do not like to credit the parole system with many accomplishments, but I do concede that it allows adequate flexibility to reduce population by reducing time in prison. No one can feel that such adjustments have much to do with the ends of justice, but administrators must honor the considerations of expediency. From the beginning they have been attracted to the indeterminate sentence because of its great value in the maintenance of control. In his account of the development of control mechanisms in the California prisons, Professor Mes-

singer has impressively shown that from the first all concerned were aware that the sanctions in the hands of the Adult Authority were by far the most effective means of assuring compliance with the requirements of prison order.<sup>1</sup> To prolong a term as a penalty for infractions of the rules has always been a necessary adjustment to the sentence of the court. I do not think that objections to this practice have been frequent.

Although I maintain that the flat term is more just than the indeterminate alternative, it cannot be equitably modified to provide relief from the injustice of the congested cellblock. It will be an obvious absurdity if the legislature reduces sentences to balance the prison population with available cells whenever overcrowding threatens the system with loss of control. Clearly the reduction of sentences is not indicated when crime is increasing. Nor can the legislature lightly increase sentences for a class of crime about which there is mounting public alarm. A decision to add to the deterrent or incapacitating effect of the law for any of the major crime categories can only serve to add to the population. For these reasons the legislature must adopt a self-denying policy. Only for the most compelling reasons should the arithmetic of penology be modified to increase the numbers of those confined and then only when means are provided to add to the available space.

### GOOD TIME

Instead of the parole board's power to adjust sentences to meet the requirements of discipline the prison will now have to rely on the device of good time. To those who can remember the days when good time was in effect, the reinstatement of this device causes some uneasiness. In California good time accumulated at different rates for different lengths of term. It was a complex system requiring numerous inmate clerks in those days before the advent of the computer. Few inmates really understood its operation; its functions were redundant in a system in which the parole board had the power to fix terms and grant paroles as well as to rescind its actions. Quite properly the mechanism of good time was abolished as an unnecessary complexity.

Its revival is an essential element of the new dispensation. Various models have been proposed. The California legislation recognizes the need for scrupulous fairness and simplicity. Mistrusting the ability of the system to achieve these goals without

prescriptive guidance, it requires that every inmate must be clearly informed as to how good time is administered and the terms by which it can be lost. Once the period for which a remission is accumulated has been completed, it is vested and cannot be cancelled.<sup>2</sup> But when an inmate's conduct calls for its loss, this action must be taken as a result of a hearing in which provisions for due process have been made. An appeal to a review procedure is provided and if the outcome of that appeal is negative, a further appeal may be addressed to the Community Release Board. These elaborate procedures will require the creation of a new bureaucracy for their administration. They are so complex that some may argue that they will fall of their own weight. The volume of documentation, stenographic transcripts, and written decisions may be too expensive a commitment to penological due process. Nevertheless, in a system in which caprice and prejudice may prevail so easily, these precautions are understandable and praiseworthy evidence of the legislature's intention to be fair.

A prisoner who serves eight months without misbehavior will earn three months which are to be deducted from the sentence of the court. Mindful that incentives are required to spur the best of us to voluntary effort, the authors of Senate Bill 42 have written into the legislation an allowance of an additional month of good time for participation in "work, educational, vocational, therapeutic or other prison activities." (Sec. 2931 (c)) The Department is required to inform the prisoner in writing of the opportunities available at the prison at which he is confined, and a prisoner so recalcitrant as to refuse to participate would forfeit this good time. It is hard to see how he could lose it for any other reason; failure to succeed in the program and isolation because of choice or because of "behavior problems" specifically do not constitute cause for denial of credit.

Certainly provision should be made for incentives to participate in the programs the prison has to offer, but the language of this subsection transforms the incentive which seems to have been intended into insignificance. For some years the American Correctional Association and various other leaders in this field have experimented with Mutual Agreement Programming, a concept which introduces the idea of a contract in which specific performance by the prisoner results in a reward by the system in the form of early release or time off.<sup>3</sup> I see no reason why such a plan could not be incorporated in this legislation and many reasons why it should.<sup>4</sup> The society to which prisoners must return is animated by incentives; indeed, most Americans can be

seen as more or less successful participants in a vast behavior modification system which is at least supposed to reward us for effort by money, promotion, and honors. Sometimes these rewards are fairly and purposefully administered for the benefit not only of the recipient but also of the system in which his efforts take place; sometimes corruption and inequity occur and rewards go to the undeserving. Our system is designed to promote equity and to discourage its violation. It should be replicated so far as possible in the prison. A prisoner who is going to get a month off his sentence for participation should sweat for it, at least metaphorically. On this issue, the legislature should have encouraged the Department to experiment, and I hope that the law will be amended to provide for innovation.

Such an innovation might provide for the drafting of a contract in which satisfactory completion by the prisoner would require positive effort on his part. That might be the completion of course work in school with a passing grade, the qualification in specific units of vocational training, or a minimum number of hours worked at a regular work assignment. Fairly objective measures can be developed for each of these kinds of participation, and provision should be made for ombudsman review of denial of credits on account of unsatisfactory participation. I would even go so far as to suggest a trial at the award of extra good time credits for those who exceed the minimum requirements for satisfactory completion of a contract.

Surely the principle on which a plan like this would be based cannot be objectionable except to those suffering from complete paranoia about the inability of prison employees to be fair about anything. However, I concede that there are problems in application of the principle which may not be apparent to those who have not been engaged in the administration of prison affairs. First, there are seldom enough assignments to go around. Shall we award a month of good time to a man whose effort has unavoidably been limited to assignment as a "cell-tender," in which he stretches one hour of light mopping and sweeping to cover eight hours of nominal work? I think not. Such a man may not be to blame for his idleness, but he should be aware that a fairly administered waiting list will get him into a more profitable assignment in due course. Prison officials in turn will be motivated to use a combination of initiative and ingenuity to create genuine work assignments which can qualify for contract programming.

The second problem has to do with participation in therapeutic activities. Here ingenuity falters. Having myself been re-

sponsible in years past for the conduct of group therapy, I am not willing to concede — as some of my contemporaries are only too happy to do — that such activities are without value. I am quite certain that for some they are crucially beneficial. However, I have never thought that I could verify the benefits at the time they were administered. I would not wish to be in the position of reporting to anyone that such and such a prisoner had derived some level of minimum benefits from treatment which I had conducted, or, an even more unattractive option, from treatment administered by some other therapist. Here is a case where psychological improvement must be its own reward. We cannot in good conscience, after all these years of derision of parole board psychotherapy, settle on another system of rewarding prisoners for successful treatment. Ingenuity must address itself to the real issue. Some prisoners can indeed benefit from treatment, and it is the professional therapist's task to demonstrate the value of what he has to offer for its own sake, not for the sake of a month or two remitted from the original sentence. In the outside society, people who decide they need treatment have to pay for it; possibly some kind of voucher system can be devised whereby this choice can be made by the prisoner as a modest charge against his own resources. Under no circumstances should he be rewarded for attendance or, even worse, for having persuaded someone to report that he has become the better for the therapy he has received.

The third problem has to do with those whose peculiar problems require them to be segregated from the rest of the prison for their own safety or for the safety of others. The numbers of prisoners requiring such separation from the general population of the prison has risen sharply in recent years. The reasons are too many and too diverse to be within the scope of this discussion, but it is incorrect to assume that the segregation of violent prisoners is to be attributed to the prejudice, incompetence, or wrong-headedness of prison officials. It may not be the fault of a prisoner that he is sometimes a murderous thug when not under constant supervision in segregated housing, but it certainly is not the fault of the prison officials, either. Such a man will have little or no opportunity to participate in programs, and he should not be treated as though he were the helpless victim of some mysterious disease. Determinism cannot be carried so far in a society which is to make any sense at all. The thug will never help himself unless he receives powerful incentives; one such incentive is the opportunity to reduce his sentence if he complies with the

minimum requirements of life in the unrestricted general population. I must argue for a rule that no good time can be allowed to the prisoner who is segregated on account of his demonstrated propensity for violence. Again, we should rely on an independent grievance system to assure that there is no abuse of the power of the prison authorities to segregate prisoners on account of violence.

There is a somewhat different problem to be faced with respect to the prisoner who asks for protective custody because of real or fancied fears that persons known or unknown to him may do him harm. Such fears have to be honored. I have no patience with the prison official who grandly insists that it is up to the prisoner to solve his own problems and a disservice to him to remove him from the setting in which his problems become manifest. Too often the solution turns out to be some horrifying act of violence committed by stealth and cowardice, and with impunity because of the sanctions of the prisoners' code. The special difficulty with protective custody is that under the terms of its administration the need for it does not have to be proved. Sometimes, it becomes a haven for the indolent, and also for those who simply prefer not to mix with common criminals. The number of prisoners who for reasons valid or invalid ask for protective custody is now so great as to constitute a serious problem in penal management. Last month in a visit to several Illinois prisons I discovered that at Stateville, in a population of a little over 2,700, over 400 were segregated, most of them at their own request. These large numbers of men in solitary confinement are becoming common in the large prisons in the industrial states. The situation is without precedent in the history of our prisons, but there is no indication that the trend will abate. Prisoners come from a more violent society, and they bring with them the habits and customs of the streets where they were reared. When they are confined, their violence can only be controlled by isolating them. Their potential victims can only be protected in the same way, by allowing them cells from which they need not emerge.

It defeats the purpose of good time to award it to anyone who does not make the effort for which it is supposed to be an incentive. Worse, it gives the prisoner with a choice no reason not to choose protective custody. Prison officials must be sufficiently inventive to devise realistic programming for the segregated prisoner. A correspondence course is a practical program for most. Many can be induced to attend classes and they should

have incentives for doing so.<sup>5</sup> For those whose need for protective custody is the spurious product of indolence there should be no incentive at all to enjoy the total inertia of round-the-clock cell time.

I have dwelt on the problem of good time as an inducement for program participation at such length for two reasons. First, this is one provision of the otherwise admirable California legislation which is seriously wrong and should be corrected. Second, this increasingly difficult problem of segregation should be recognized for what it is, an immobilizing debasement of the prisoners caught in it. Their identities are reduced to aggressor and victim; other attributes are stripped from them. It is probably not possible to avoid some segregation for these purposes, the human material having been so grievously damaged before arrival at the prison gate. We can and must limit the damage. When 15 or 20 per cent of the residents of the prison community must be separated from the rest, the unnatural experience of incarceration becomes even more unnatural. Those who emerge from it are peculiarly unfitted for survival in the free community. At least the old indeterminate sentence provided some motivation for avoiding segregation if it was possible to do so. The new system should and can do the same, but not if good time is awarded to those who choose to remain in their cells.

### FLEXIBLE INCARCERATION

By this point, it should be evident that I regard the competent administration of a prison as the consequence of foresighted planning and the provision of realistic incentives to good citizenship. These are old-fashioned, perhaps platitudinous foundations on which to organize and build, but we have been led into trouble by the more sophisticated notions on which we have attempted to reform the correctional apparatus. I have in mind some exceedingly simple precepts for managing the system. If they are understood by those who must play a part in their application, we should be about to enter an era of relative tranquility in penal administration. If they are violated, the difficulties in store for the unfortunate people on the firing line will be dangerous and unmanageable.

Planning requires the administrator of a prison system to balance population and capacities both now and in the medium range of the future. I contend that preoccupation with a master

plan for the distant future of corrections is an invitation to irrelevant conjecture, but it is essential that administrators accustom themselves to the exercise of forecasting the immediate future — the week ahead, the month ahead, the year ahead. At five years ahead the crystal ball will be seriously clouded, but the planner should be able to forecast the contingencies which will produce the worst possible imbalance between population and capacity.

Most speculation about the future of corrections inclines toward an optimism nurtured by demography. An aging population is likely to produce fewer criminals and therefore it is reasonable to expect that prison populations will diminish. It is a pleasant prospect, and I hope it is confirmed by events. Nevertheless, I am haunted by a plausible but much less encouraging forecast. As our population ages, structural poverty will become more rigid. The formidable sector of the population from which our street criminals are recruited will be even more immobilized in the cruelly limited range of choices allowed to the American underclass. Dope, booze, casual labor, the hopeless stringencies of welfare, and the opportunities afforded by criminal activity constitute an unattractive horizon, so unattractive that the choice of a criminal career seems almost a healthy response to the surrounding miseries. It is not fanciful to foresee that underclass youth five years hence will be numerous enough to fill our existing prisons and more. If we allow the system to be constrained by the flat sentence, we shall be in trouble from which we cannot easily extricate ourselves.

But the year 1982 may find the country rather comfortable about its criminal justice system. There may be empty cells, empty cellblocks, and perhaps the demolition of some of our fatally obsolete facilities. The worst case, by contrast, will find the system still struggling with overcrowded prisons and jails. If that prospect becomes a reality, the situation may well be worsened by demands for harsh treatment by a public which will be fed up with the chronicity of the crime problem and the absence of any solution. Whichever the case may be, the plan I have in mind will be appropriate and necessary.

What is needed is a re-definition of the prison term. We think of the prison term as a unit of time spent in a total institution at the order of the court. A prisoner enters the prison, and his time begins. It ends on the day when he trudges out to the streets. Necessity has already mothered a number of improvements in this pattern. Several states have fiddled with the rigidity of the

idea of incarceration. For at least 60 years, California prisons have mitigated their rigors by sending men to forest and road camps. The halfway house has been seized on by hopeful innovators as an instrument of resocialization. Work-release programs have enjoyed a similar flush of enthusiasm. If experience in corrections has taught me nothing else, it has at least compelled me to assume a sceptical stance with respect to the rehabilitative qualities of any kind of correctional program. However that may be, (and I do not deny that men sometimes leave prison the better for the experience), the evidence we have suggests that the new community-based programs are not less successful than incarceration in the control of crime. Good management principles call for much bolder use of this kind of programming. A prisoner entering San Quentin will know that with good behavior and application to available self-improvement programs his three-year term can be reduced to two. He might also have in prospect a future transfer, maybe at the end of his first year, to a community facility in which he would still suffer the indignities of official control but from which he could emerge at stated times to work in a factory, study at a college, or attend a vocational training school. Such a facility might well provide for furloughs to his home or visits by his wife in his quarters. Passage through it should be the normal order of events for all but the most disturbed prisoners. Even these severely damaged people can be successfully housed in such conditions with the direction of a well-trained and versatile staff.

The foundation was laid in California with the enactment of the Probation Subsidy law in 1965. The state is now accustomed to subventions to the counties for the support of special caseloads for the supervision of felon probationers who would otherwise be committed to prison. There are doubts in many quarters about the consequences of this system, and I am well aware of the argument that its benefits have been greatly exaggerated. I am also impressed with the formidable difficulties to be encountered in extending the idea of the halfway house. But the probation subsidy idea can be effectively administered to lessen the rigors of conventional incarceration. Imaginative administration can also facilitate community acceptance of these hostels which must initially be received with foreboding and anxiety in any conventional neighborhood.

It is unnecessary to prescribe here the administrative model for financing and managing facilities for reduced correctional control. Although I lean to local management within a

framework of state standards and inspection, it may well be that the system will function more efficiently if kept under state operation. But I am stubbornly in favor of extending the probation subsidy model to provide that the state will remunerate the counties for taking prisoners off its hands and into county-operated facilities, just as the state pays the counties not to send offenders to the state prisons in the first place. The correction of offenders should be a municipal function. It should be managed in the cities and counties where the police make arrests and the judges pronounce sentences. In the rare cases where the offense is such that the convict must be banished for most of the rest of his life, it is proper to keep him at a distance from the community in which his crime was committed. But where the criminal must be restored to citizenship, it is foolish to exile him and necessary to keep him as close to the community as the requirements of custody will allow. In California and in most other states in which the mega-prison prevails, at least some of the term of incarceration will have to be spent in the obsolescent cellblocks that are all that is now available. Eventually, I hope, most states will gradually follow the plans which have been developed in Washington State for small community-based prisons. That will take time and a demonstration that this attractive concept is as effective in practice as it looks on the drawing boards.

To sum up the idea of flexible incarceration, I argue that to keep the correctional system from choking on its intake under the provisions of flat-term legislation, allowance must be made for radically increased use of community-based corrections as a humane and hopeful phase of incarceration. The facilities in which community programs are administered should be managed by the cities or counties under provisions somewhat like the present probation subsidy laws. Programs of this kind cannot be relied on to rehabilitate anyone, but they can be powerful incentives to compliance with the requirements of the prison regime while the offender is in close custody. During the phase of his term when he is assigned to diminished control he is more likely to experience the events and relationships with others which will make citizenship more likely. Finally, the probation subsidy law should be seen as a further limit on the flow of humanity into the prisons. To the extent that it makes possible a more credible degree of social control of the offender it can effectively reduce the numbers of men and women who must experience the ultimate indignity which American society can inflict on a citizen: his relegation to the routines of cellblocks,

corridors, and prison yards.

## TRANSITION

Flat-term legislation constitutes a fundamental upheaval in a major sector of government. It is a different kind of upheaval from those to which Americans are accustomed. We have a lot of experience in the design and organization of new governmental structures to cope with new problems. I do not know of a comparable case of an agency of government which has been dismantled and reconstructed to the extent that we are contemplating for the correctional apparatus. The administrative and human costs will be considerable, and it is reasonable to suppose that we cannot foresee all of them. In this phase of my discussion I want to identify some of these losses and ways in which they can be minimized.

The new California law abolishes the Adult Authority. Surely no one can regret the demise of the euphemism, if that is what it was in the first place. The locution seemed to hint the authority of adults over non-adults, which was not the function of the parole board, and suggested that there was something discreditable about the parole process which could be rectified by a loftier designation. In the place of the Adult Authority, California will now have a Community Release Board which will have three functions under the new law. It will fix terms and grant paroles for all prisoners serving time under the old law, in this way carrying out the functions of the Adult Authority. It will administer a curtailed version of parole, limited to a year for most prisoners except for lifers, which will include the possibility of revocation of parole for violation of the conditions on which it was granted. Finally, it will serve as the last appellate review of administrative decisions on the loss of good time.

My first reaction on encountering this reincarnation of the Adult Authority was one of regretful ambivalence. Surely, I thought, a clean break with an uninspiring past should have been possible. Even though the severe limitations imposed on the Board by the nature of the flat-term sentence will make impossible the pretensions of its predecessor, any Board with any discretion over the lives of men and women under its control will find ways of inflating its importance to justify its existence and increase its prestige. I still think this is the case, but I am willing to concede the necessity of the Community Release Board as a

necessary device for the period of transition. The unfinished business of the Adult Authority had to be settled in an orderly fashion. Evidently the legislature was not ready to abolish the supervision of released prisoners by parole agents, in spite of fairly convincing arguments that this kind of control is not very productive. And certainly some agency independent of the Department is needed to assure that abuses of the good time system do not creep into acceptance.

My doubts about the value of parole supervision are central to my view that the Community Release Board should be seen as an agency of transition from the old system which was so heavily encrusted with useless, if not oppressive controls, to a new corrections which is directed at the goal of reducing incarceration to a minimum while at the same time maintaining the confidence of the community. If the Board and its legislative patrons can keep their vision fixed on this transition, the upheaval of the flat-term may become much more exciting than painful. Let me sketch here a strategy which will get corrections from a dreary here to a much brighter there.

First, the finishing of the Adult Authority's business should be expedited. Once all the terms are set and the paroles granted as required under the old system, a victory should be declared. I see no good reason why this occasion should not take place some time in 1977. Everyone involved in the system and the general public should be put on notice that the old system has been finally liquidated, and henceforth the Community Release Board is fixing its attention on the equities of parole under the new system and on the assurance that good time provisions of the law are fairly administered.

That assurance should contain explicit plans to come to a reasoned judgment on the value of the new parole system. The Community Release Board should take the public position that the parole system is now an experiment in which quantitative evaluation of results will play an important part in deciding its eventual fate. The California correctional services are in an admirable situation to conduct such an experiment. Data of great variety and complexity have been collected and evaluated over the last 30 years. A full-scale study of the new system can draw not only on the experience and skill of statisticians and researchers who are intimately familiar with all phases of correctional operations, but such a study can also be related to the statistics of the past. My opinion is that this study will reveal that the parole system will have an exceedingly modest impact on its subjects by

any scale that we can devise, but that's an opinion which cannot be confirmed until several years of evidence are in.

While this work is under way, the Community Release Board will have responsibilities for developing and making decisions about the various extramural programs which are embraced in the idea of flexible incarceration. Some agency has to make the decisions about which prisoners are transferred to such facilities under what policies and for how long. These are decisions which the Community Release Board is admirably fitted to make and for which it should be held accountable. No one should need to be reminded about the damage which a stupid decision can do to a good program. In Ohio we still suffer from the damage done to the excellent program of "shock parole" by someone's decision to release under these lenient terms a large scale and wealthy narcotics dealer who was technically eligible for the program but whose unsuitability should have been evident to the rawest tyro at correctional decision-making. Where a program must at the same time be liberal in policy but conservative in management, those who administer it must be people of imagination but capable of intelligent attention to detail. The risks are great, but the potential gains are greater.

I have not concealed my prediction that it will probably be found that the parole supervision concept will be finally proved redundant. If I am correct, no one should be sorry to see the present parole operations discontinued for good. It is appropriate to be concerned about the future of men and women whose careers have been predicated on the assumption that parole is a lasting and necessary public service. Some will be transferrable to probation, which may well be needed for a few decades more. Others are natural police officers and should go into a service to which their talents are better adapted. But for most parole agents a significant future lies in the administration of flexible incarceration. The administration of any prison, especially the large prisons in California, requires the maintenance of rigid routines of control and security by the prison guard, whose difficult role should not be obscured by the standard euphemism of "correctional officer." But any routine bears unevenly on its subjects, especially the coercive routine of prison. For this reason, the prison counselor is a necessity, partly to make the judgments necessary for advance from one phase to the next, partly to assure that unnecessary hardships are relieved by justified exceptions to the routine, and partly to interpret the regime to the prisoner and the prisoner to the decision-makers.

The California correctional system has always recognized the necessity of this role, and generally it has been well-conceived but carried out by a numerically inadequate staff. The existing structure of correctional counseling will be strained by the necessities imposed by the management of community correctional facilities. We can be confident that if the existing practice of parole must be folded up, there will be more than enough work for parole officers to do in managing these small but essential facilities.

Returning to the Community Release Board, I will advocate that its powers and scope should be extended once the transition is complete. There are two important areas in which it could assume additional responsibilities. First, the Department of Corrections should integrate a full-scale inmate grievance procedure with the administration of good time. The present hearing officers of the Adult Authority enjoy the prestige and experience which would make it possible for them to become institutional inspectors-general, or "ombudsmen," to use a word I would rather not naturalize. Their adjudications of inmate complaints and grievances should be reviewable by the Community Release Board, including the review of actions taken by disciplinary committees relative to rule infractions.

The second new responsibility I would like to wish onto the Community Release Board is the setting and maintenance of standards for all incarcerative facilities in the state. The Board of Corrections has had a nominal, "jaw-bone" responsibility for jail inspection for many years. The time has surely arrived when this kind of permissiveness should be replaced by authoritative standards maintained by rigorous inspection. Both state and county facilities should be included under this rule, and the Board should be explicitly empowered to close facilities which it finds to be in violation of its standards.

When this transition is complete, the Community Release Board should be entitled to a more dignified and comprehensive designation. It will be a Commission of Corrections responsible to the people for the firm and fair administration of sentences to incarceration under conditions which do not demean the individual offender beyond necessity, nor degrade the state by maintaining public squalor in its prisons and jails.

### **KEEPING PROMISES**

In a letter to Harold Laski, Justice Oliver Wendell Holmes

came very close to defining the basic responsibility of the correctional system:

"... the law establishes certain minima of social conduct that a man must conform to at his peril. Of course ... it bears most hardly on those least prepared for it, but that is what it is for. I am entirely impatient of any but broad distinctions. Otherwise we are lost in a maze of determinism. If I were having a philosophical talk with a man I was going to have hanged ... I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you for the common good. You may consider yourself a soldier dying for your country if you like. But the law must keep its promises."<sup>6</sup>

Holmes was a tough-minded judge, and in these times we are not sure that the law must promise a hanging to anyone. But *mutatis mutandis*, the principle holds good. The law must keep its promises. The promise that the state will punish wrong-doers is an essential clause in the social contract. Over the centuries we have modified the variables of punishment and wrong-doing. It is and should be the responsibility of the correctional apparatus to make known to the public the consequences of retributive justice and the conditions under which this awful responsibility can be administered consistently with the standards of the prevailing civilization. The convict in his cell is no longer a soldier dying for his country, nor is he a civil cadaver who has suffered civil death. He is a citizen to be restrained under the broad distinctions for which the law provides and to be restored to full citizenship when the punishment is complete. These are the terms of a promise to the public complemented by a promise to the prisoner. The new California law relieves the criminal justice system of the burden of unrealistic promises and substitutes principles of rationality and simplicity. The test is experience which, as Justice Holmes said elsewhere, is the life of the law.

## DISCUSSION

One member of the audience contested Professor Conrad's advocacy of contract agreements between prisoners and parole authorities. Such contracts, he said, were between inherently unequal parties, and thus were not fair.

A participant pointed out that conditions of confinement can make a sentence more or less severe. Perhaps, another partici-

pant said, sentences in overcrowded prisons should be shorter than those in less unpleasant conditions. A judge in the audience, however, said this was not a just basis for sentencing.

In reference to prison overcrowding, University of Chicago Law School Dean Norval Morris warned: "Don't underestimate the capacity of all of us to not be moved by the suffering of others." Parole boards, he went on to say, often do not respond to overcrowded conditions by increasing releases.

A participant from California said that that state was on the brink of returning to work as the principal activity for prisoners. This could be coupled with an increased emphasis on restitution, he said. And if work could be placed on a sound economic footing, perhaps prisoners could be eligible for unemployment benefits upon release, he added.

A corrections official from another state responded that it was very difficult to find industries suitable for prisoners that were economically viable.

A paradox was posed by one member of the group. Why is it, he asked, that "coerced rehabilitation" is considered to be immoral, while "recognizing individual effort" is generally viewed as a kind and humane thing to do? □

## REFERENCES

1. Sheldon D. Messinger, *Strategies of Control* (University of California at Los Angeles, Unpublished Doctoral Dissertation 1969).

2. Why should good time be vested? The question from traditional prison administrators deserves an answer. It is argued that if good time cannot be lost as a result of an infraction subsequent to vesting, then a useful deterrent to misconduct will be lost and the incentive to compliance in the later stages of incarceration will be accordingly diminished. The answer is complex and should be stated. First, the prison administrator will continue to have at his disposal the sanctions of isolation, loss of privileges, and fines. The loss of good time is hardly necessary as an additional penalty. Second, good time is a powerful incentive to compliance during the early phases of incarceration, and it is made more attractive by the knowledge that this is currency which, once earned, cannot be lost. This is the way that the habit of conforming behavior can be most effectively inculcated. Third, the loss of good time accumulated would be a demoralizing experience for the offender which would not contribute to his restoration as a co-operative member of the prison community. Fourth, the loss of good time as a sanction conflicts with the equity on which the concept is based. Good time is awarded for good behavior during a specific time period; bad time is a penalty for misbehavior. The period of good behavior for which good time was awarded did not become less good because of the subsequent bad behavior. In short, the administrator has nothing to lose from vesting, and nothing to gain from not vesting which would offset the appearance of unfairness.

3. Stephen D. Minnich, "The Planned Implementation of Mutual Agreement Programming in a Correctional System," (Mutual Agreement Program Publication, College Park, Maryland, American Correctional Association 1976).

4. Against the notion of Mutual Agreement Programming it has been argued that there is no real mutuality between the prison administration and the prisoner. It is obviously impossible for the inmate to hold the prison authorities to their part of the bargain. I do not see this objection as a serious flaw. The Agreement can be specific about the minimum program participation required and the amount of good time to be allowed. If the prison officials do not honor their part of the Agreement, the prisoner can and should file a complaint with the Community Release Board. Equality of the parties to a contract is rarely achieved; the lack of such equality is one of the reasons why contracts sometimes have to be enforced in court.

5. It is pleasant to report that the problem of programming for prisoners in protective custody is beginning to receive serious attention. At the Minnesota State Prison at Stillwater, prisoners in this status are offered full educational facilities in their unit and even opportunities at employment in a prison industry. This unit is the exception. Most prisons have only correspondence courses and television round the clock for men requiring this degree of protection.

6. Holmes-Laski Letters (Cambridge, The Harvard University Press, 1953), p. 806.



# ISSUES IN THE STUDY OF CRIMINAL CODE REVISION AN ANALYSIS OF REFORM IN MAINE AND CALIFORNIA

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## INTRODUCTION<sup>1</sup>

In the early part of this century the movement to abandon the ancient practices of retributive justice in favor of scientific penology based on the rehabilitative ideal was hailed as one of the great humanitarian advances of modern civilization.<sup>2</sup> The burgeoning social sciences, mimicking the methods and assumptions of the established disciplines (such as biology and physics) in which empiricism and positivism were combining to unravel ancient mysteries of the universe,<sup>3</sup> advertised that human behavior could also be scientifically examined — and controlled.<sup>4</sup> Therapeutic justice was the darling of a sizable and influential group of intellectual, humanitarian, philanthropic, social-activist, utopian reformers<sup>5</sup> who crusaded against vengeance and retribution. Between 1899 and 1925, courts and administrative agencies in every state were vested with broad discretionary powers so that sentences could be tailored to fit the needs of each offender.<sup>6</sup> As recently as 1962, the American Law Institute's prestigious *Model Penal Code* reflected an unambivalent commitment to individualized sentences and the rehabilitative ideal.<sup>7</sup>

Now, rather suddenly, the great advances of modern criminology are being reconsidered. A new generation of reformers has arrived on the scene and they are cynical about the possibility that rehabilitation programs can ever succeed,<sup>8</sup> and are angry about the inequities which individualization has generated.<sup>9</sup> Until mid-1976, the influence of these "justice-model" proponents was limited to advisory commissions,<sup>10</sup> and to the realm of professional and scholarly literature which has been all but inundated with studies concluding that treatment does not work,<sup>11</sup>

and by treatises calling for more equitable forms of justice.

Against this backdrop of debate over issues that affect a significant portion of the criminal justice system, Maine and California have forged new criminal codes that are of interest both locally and nationally. The efforts in these two pioneer states are comprehensive in scope, but the sentencing options of each are attracting the lion's share of attention nationally. Several other states are presently considering legislatively changing their criminal codes and they will be able to benefit from the evaluative efforts underway in Maine and California. From a research and planning perspective, it is particularly fortuitous that Maine has chosen a definite sentencing scheme which is controlled by the judiciary and California has chosen a presumptive scheme structured by the legislature and implemented by judges. Evaluation of sentencing in these two states provides the unusual opportunity of seeing two quite different models in action at the same time.

Since the decade of the 1960s, we have witnessed an increased emphasis on evaluating the impact of large scale social programs as a way of determining effectiveness. Given a wide variety of social problems to be ameliorated as well as a wide variety of approaches to problem solution, evaluation was seen as a rational approach to making informed choices among alternatives which competed for common resources.

At about the same time in our history, the institutions of the law and the courts were increasingly relied upon as agents of social change. The law and the courts have played a significant role in the civil rights arena involving the rights of minorities including blacks, women, and the aged; right-to-life questions involving abortion as well as questions about the right to die; and in advancing the condition of the institutionalized, including the mentally ill as well as juvenile and adult offenders.

Given the preeminence of the role of the law and courts as a solution to society's problems, and an interest in assessing and evaluating the impact of all social policies, it is only natural that we find an interest in the application of social science techniques to studying the impact of new sentencing codes. It is also expected that an organization such as the Law Enforcement Assistance Administration (LEAA) with its broad, national focus would be interested in assessing the impact of new criminal codes so that others may benefit from the knowledge gained from these endeavors. However, the application of social science methodology to the study of law, with its emphasis on theory,

hypotheses, measurement, and the quantitative analysis of data, is something different from the traditional approach to the study of law which stresses the researching of cases and the principle of precedence. The fact that social scientists adopt a particular approach to research, and that lawyers also adopt a particular, and quite different approach to research, may lead to confusion when they undertake to work collaboratively to examine change in the law.

The analysis of the criminal code revision in Maine involves both legal and behavioral science approaches and our intent in the present paper is to share several concerns which will enhance the efficacy of similar efforts. More specifically, the goals of the paper are:

- (1) To articulate some of the fundamental problems likely to be encountered when approaching the study of law through the application of social science methods.
- (2) To summarize the changes in the Maine criminal code and specify the ways in which we are examining it from a social science research perspective.
- (3) To discuss the application of evaluative research methodology to several components of the California code.

## I

### EVALUATIVE RESEARCH ISSUES

One of the most important problems with research on the implementation of criminal codes is that it is likely to be difficult to pin down exactly what is to be investigated. Research in general is not conducted unless there is a clear and objectifiable understanding of what is to be examined. As one thinks about assessing criminal codes *per se*, it becomes clear that it is very difficult to specify exactly what is under investigation. The difficulty arises because the law as specified in a body of code may be quite different than the law as it is implemented by those in the criminal justice system. Discussions of the sociology of jurisprudence have recognized that a body of statutes do not adequately define law because as law is implemented, it becomes altered by practice. Therefore, when one assesses the implementation of criminal codes, it is not the code *per se* that will be eval-

uated, but rather, the code plus whatever changes accrue to it as it is put into practice.

In addition to the frustration caused by the interaction of the criminal code as written and the criminal law as practiced, the philosophy that guided the construction of the code is frequently not specified. Hence, it is possible that two codes which are similar in structure could have been written from different philosophical perspectives. Perhaps one of the reasons that one does not find a statement of philosophy is that the political legislative process which involves negotiation and compromise cannot tolerate a high degree of specificity. At a recent session that was devoted to discussing a sentencing bill in Pennsylvania, the chief architect of the bill declined to put into the proposed legislation a statement of purpose because doing so would render it less politically acceptable. Unless there is a statement of purpose or the philosophy/ideology behind a bill, researchers are at a disadvantage in developing benchmarks against which legislation can be assessed. This is a serious problem because researchers must be concerned about the utility of their results. It is quite possible for research to be methodologically elegant, valid, and so forth and to still not be as useful as it could be if there were indications of the purpose or intent of legislation.

A second issue we want to mention is of particular relevance to social scientists as they conduct funded research in the criminal justice system. With agency-sponsored research, it is important to focus on the role of paradigms and the ways they can influence the theory selection phase of a research project. Our usage of paradigm is like that of H. W. Smith, who says that, "Paradigms are the assumptions or conceptualizations — either explicit or implicit — underlying any data, theory, or method."<sup>12</sup> Paradigm preferences influence most social science endeavors. For instance, paradigm preferences may lead criminologists to focus attention on rehabilitation rather than incapacitation or deterrence, economists to view problems with a Marxian rather than a capitalist perspective, or psychologists to focus on behavior modification rather than clinical strategies. The problem may be particularly acute with research funded by a federal or state agency if one must accept the agencies' interpretation of the nature of a problem. Paradigms are also important in the theory selection phase of research. Once a general area of study has been identified, scientists usually search for theories which help to explain the phenomena, or which lead them to ask certain questions in the course of their investigation. Theories essen-

tially serve the social scientist as an organizing concept around which the scientist can formulate his activities. For example, Glaser, a luminary in criminal justice research, recently reiterated that "... research that neglects theory has little long-run impact."<sup>13</sup> Paradigms are important because criminal codes are not inherently theoretical. One who attempts to interpret a code will do so from a particular paradigmatic stance, which in turn influences which theories are selected to serve as organizing concepts.

Since the beginning of this century, a general interpretation of the criminal law has been that the correctional response was to focus on individualization of treatment and rehabilitation. This has in turn led to research focused on questions that were reflective of the rehabilitative ideal. The rehabilitative ideal has acted as a paradigm, and perhaps has come close to operating as a theory in determining the direction of criminal justice research. There are several notions fundamental to the rehabilitative ideal and perhaps the most basic is that behavior is the product of antecedent causes. Furthermore, the role of the scientist is to discover these causes using the scientific method. Having assessed the causes, the scientific control of human behavior was seen as appropriate, particularly since the measures designed to treat the offender were to be therapeutic in nature. If in fact, we can perceive the system, and more particularly the sentencing function, as having adopted the rehabilitative ideal as its organizing theory or paradigm, then like any other theory, the rehabilitative ideal would guide and direct researchers to ask certain questions and to ignore others. The influence of the rehabilitative ideal was highlighted by Francis Allen, who asserted that "... the rise of the rehabilitative ideal has dictated what questions are to be investigated, with the result that many matters of equal importance have been ignored or cursorily examined."<sup>14</sup>

Are we to conclude that the criminal justice system has operated under the rehabilitative ideal? It would hold that prisons are organized along the stream of action concept in which "... the criminals, like raw material, pass through the organization and have various rehabilitative operations performed on them, each according to his needs."<sup>15</sup> The ground swell of concern in the criminal justice system generated by Martinson's work which concluded that "nothing works" clearly and unequivocally was based on the assumption that rehabilitation was the business (theory) of the criminal justice system. However, neither Martinson's research nor the reactions to it can be taken as clear and

conclusive evidence that the criminal justice system has operated under the theory of individualized justice or rehabilitation.

Wrestling with rehabilitation as an organizing paradigm or theory has at least two implications for us as we contemplate the assessment of new criminal codes. The first, and perhaps less important concern, is that there seems to be a tendency to indicate that the judicial model adopted in Maine and the legislative (presumptive) model adopted in California represents a shift from the rehabilitative ideal to a punitive approach to sentencing. We do not believe that such conclusions are warranted and urge that this kind of judgment not be uncritically accepted. Secondly, whatever paradigm one utilizes in understanding codes, it is going to guide the development of questions thought to be appropriate to a research project. It is important that those who conduct the research recognize their own world view and the implications it has for defining the research question, developing a research methodology, and analyzing empirical data. The need to determine which paradigms and theories are operative is heightened by the realization that the same research area, such as the assessment of criminal code legislation, can be approached in several ways which are not always consistent.

## II

### THE SUBSTANCE OF REFORM IN MAINE

The centrality of the judiciary is perhaps the most unique characteristic of the sentencing scheme established by Maine's new code. In jurisdictions with traditional indeterminate sentencing, judges have great discretion in imposing punishments. In such jurisdictions, time served is controlled to a considerable extent by administrative agencies such as a parole board, or an adult authority.<sup>16</sup> In states where the abolition of indeterminate sentencing has been seriously proposed, (such as Illinois, Indiana, California, and Minnesota) attention has focused on a legislative model in which the code prescribes specific sentences for each offense.<sup>17</sup> Maine is unique in that its judges are empowered to impose fixed sentences limited only by statutory maxima with no external review. The code establishes six categories of crime and prescribes the upper limits of the criminal sanction for each.<sup>18</sup> Class A crimes for example, can result in a fixed period of

imprisonment not to exceed 20 years; in a Class B crime, the penalty is to be fixed at a period not to exceed 10 years; Class C crimes can result in imprisonment for a fixed period not to exceed five years; Class D crimes call for a definite period of less than one year; and Class E crimes call for a definite period not to exceed six months. Prior to the revision, there were more than 60 sentencing provisions representing *ad hoc* judgments "... expressing the mood of the legislature at the time."<sup>19</sup> Other salient changes brought about by the new code include:

- (1) Minimum, unsuspendable sentences are established only for Class A-D crimes against the person involving the use of a firearm.<sup>20</sup> Under any sentence in excess of six months, good time can be earned at the rate of ten days per month and gain time at two days per month.<sup>21</sup>
- (2) Probation may be granted for any classified crime, unless one or more of the conditions limiting granting of probation obtains in the instant case.<sup>22</sup> Eligible offenders shall be sentenced to probation if they are in need of supervision, guidance, assistance or direction that probation can provide.<sup>23</sup>
- (3) Sentences in excess of one year are deemed to be tentative and the Bureau of Corrections can ask that an inmate be resentenced as a result of the "department's evaluation of such person's progress toward a noncriminal way of life."<sup>24</sup> In such cases the department must be "... satisfied that the sentence of the court may have been based upon a misapprehension as to the history, character or physical or mental conditions of the offender, or as to the amount of time that would be necessary to provide for protection of the public from such offenders."<sup>25</sup>
- (4) Persons receiving probation may serve any portion of their probation in a designated institution, except if the offender is sent to the Maine State Prison for an initial period, it can only be for 90 days. (Also referred to as a "split sentence.")<sup>26</sup>
- (5) The code eliminates the parole board as well as parole supervision.<sup>27</sup>
- (6) Persons sentenced to more than 20 years, or to life, may petition to be released after serving four-fifths of the sentence.<sup>28</sup>

The concepts of certainty of punishment and disparity in sentencing are central to most discussions on new sentencing schemes. In the context of the Maine system, certitude of

punishment seems assured only in the sense that once sentence is pronounced, an offender knows how long he or she will spend in an institution and that the time spent will be lessened only by good time considerations. Clearly, the Maine system increases certitude when a sentence is rendered, but it does little to lessen disparity in sentencing. In fact, the nature of the sentencing system invites disparity, which, of course, is counter to most current proposals calling for flat-time or presumptive sentencing. Furthermore, it is important to point out that there seems to be little or no discussion taking place in Maine about "informal presumptive sentencing" or of the concomitant notions of aggravating and mitigating factors in criminal cases. At this point, there seems to be little concern around the issue of equity in sentencing. The lack of attention to the issue of disparity, coupled with the investment of all sentencing power to judges and the abolition of the parole board which may have acted to somewhat equalize disparate sentences, leads one to hypothesize that disparity in sentences may be a considerable problem.

### *The Context for Evaluation*

The Maine code is bold and innovative, and one cannot hope to understand all its ramifications for the system without specifying the context of, and the environment for, major legislative change. For example, the report of the state's Task Force on Corrections submitted to Governor Curtis on August 16, 1974, called for a flat-sentencing system with a maximum sentence of five years, except in the case of murder, and in three other cases. The revised code is congruent with the Task Force's suggestion to institute a flat-sentencing structure, but the penalties established allow for more severe sanctions than those suggested in the Commission's report. A focus of our evaluative effort will be to determine the conditions that fostered change; to delineate goals, objectives and types of changes suggested; and to determine the congruence of the resultant code and earlier deliberations. The historical context of reform will be ascertained by examining documents, reviewing Revision Commission notes, and interviewing those who have been instrumental in reshaping the criminal code, and implementing it (judges).

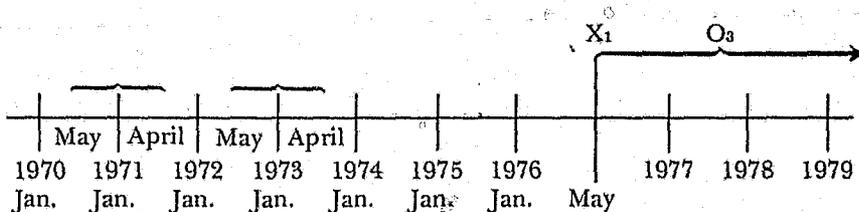
The historical analysis is analogous to that of Messinger and Johnson's effort in California with the important difference that our analysis is retrospective in nature and theirs is prospective.<sup>29</sup> That is, our analysis follows code implementation by 11 months,

whereas Messinger and Johnson have been able to initiate their analysis several months before the code goes into effect. Because of the timing, our analysis is subject to the sharpening and leveling of recall that accompanies the passage of time.

### *Design Considerations*

In assessing the impact of the new code, we must examine data from several levels (i.e., state, region, and county) which cut across various components of the system such as prisons, probation/parole, courts, and others. The data quality, quantity, and utility vary from level to level and function to function. They also vary over time. Several people who are directly involved in data-gathering efforts have indicated that there is little or no sense in attempting to go back more than five years because record-keeping systems simply are inadequate beyond such time.

Whenever possible, we have adopted a quasi "time series design," with no control group, to enable us to determine if there are changes in sentencing or correctional practices. More specifically, we are gathering data for the fifth year, (May 1970, April 1971) and for the third year before code implementation (May 1972, April 1973), and *at least* one year following code implementation. The design is portrayed schematically below.



Conceptually, what we are doing is to compare post-code data with other data gathered at two points prior to code implementation. The length of time for which we gather post-code data will not always be the same due to the nature of the data. For instance, it is more difficult to gather, code, and mount data related to sentence length than it is to do the same with data representing executive commutations and pardons. Some data is being collected for 18 months post-code, and other data will be collected for shorter or longer periods. Ideally, we should collect data over equal periods of time both pre-and post- the new code; however, the exigencies of research in an ongoing setting as well as the limited duration of the project make this impossible.

Although we will generally gather data according to the above design, we are limiting some data collection to four representative counties. Data which must be manually and laboriously collected (such as the data on split sentences), will be gathered for four counties while other data (such as that on sentence length) will be collected for all prison inmates covering the years specified. Since jails, the court structure (both Superior and District Courts), and probation offices are organized along county lines, it is logical that we select representative counties for the study of court and probation records. We have selected two counties that are urban in character (relative to Maine) and two that represent rural Maine. In selecting the counties, we considered the number of court cases at both District Court and Superior Court, as well as their political and rural-urban representativeness. We have also limited the range of offenses for which we are collecting data.

Since we are primarily concerned with judicial use of sentencing alternatives, and length of incarceration sentences given and time served for these sentences, we have limited our collection efforts to Class A, B, and C offenses (felony offenses in the traditional conceptualization). In order to assess sentencing practices for these offenses, data are being collected from Superior Court, probation, and institutional files. Superior Court records are being searched in the sample counties for all cases tried in the two pre-code time frames and the post-code time period. From these files we are able to obtain data on the verdict of the court, and if guilt is affirmed we record the disposition of the case.

In addition to traditional sentencing alternatives, the court files include the information on sentences involving restitution and split sentences. However, this record does not indicate socio-economic variables which are of some interest to this research project. Therefore, the second phase of the data search involves searching probation files for socio-economic characteristics such as age, race, sex, and occupation for cases which have been placed on probation or for whom a presentence investigation has been conducted.

The third phase of data collection for sentencing involves collecting an array of information from individual files at each of the two adult correctional institutions (there are only approximately 10 women housed in adult institutions and they are at the Maine Correctional Center which is one of the two institutions noted above). Through the court, probation, and correctional

institution data we will be in a position to assess how Maine's sentencing provisions will affect the use of split sentences and restitution, and the disparity of sentences given, and time served within offense categories.

However, because of the far reaching impact of sentencing, our data collection efforts cover numerous other areas of possible significance. For example, it is possible that the sentences under the new code may be ameliorated by the governor's use of commutations and pardons. Therefore, we are developing extensive data on all applications for commutation or pardon, the response to the application, and other relevant pieces of information for each year beginning in 1965.

Other areas of concern relate directly to the institutions. It has been hypothesized that determinate and flat-sentencing systems such as that implemented in Maine will reduce the motivation (pressure) for inmates to participate in prison programs. Furthermore, increased use of restitution may pressure institutions to provide broader access to work release where the offender can more readily pay off his restitution order. In other words, both prison programming and program participation may play a key role to adjustments within the justice system to a new sentencing system. In order to examine this possibility, we are observing the proceedings of the work release board, and we are collecting information on participation in work and educational release, both pre- and post-code.

Other issues that may be of concern to those in other states considering similar sentencing legislation are potential impacts on personnel, including hiring, firing, or change in occupational classification. We are watching this area in Maine, however; it must be noted that Maine only had six fulltime parole officers who now apparently are going to be absorbed into the probation system. It is also of some concern to our project that we scrutinize closely attitudes toward, and problems with, the new code. Consequently, we have administered a questionnaire to a large sample of Supreme, Superior and District Court judges, prosecutors, and others, including a few police officers, correctional officials and defense attorneys. In addition, we have administered a sentencing decision simulation to prosecutors to test for their understanding of the new code and the factors that they use in arriving at a particular sentencing recommendation. Furthermore, we are conducting ongoing interviews with judges, prosecutors, and correctional officials to keep up on policy formulation as it emerges under the new code and to keep abreast

of difficulties with the code. Finally, we keep in touch with new and proposed developments in the code by maintaining contact with the legislature and in particular the Judiciary Committee, a joint committee of the House and Senate that considers proposed legislation pertaining to the criminal code.

### III

## EVALUATING THE CALIFORNIA EXPERIENCE

Examination of the provisions of the Maine code and those of California leads one to the conclusion that the two codes are very different in the role they prescribe for the judiciary and in the ways they delimit the discretion of the judiciary. In Maine, the judge, at the time of sentencing, has complete discretion to sentence an offender to anything up to the maximum specified for the particular class of crime within which the criminal act is found. Therefore, in the case of a Class B crime, such as burglary of a dwelling place, the judge may choose any criminal penalty up to sentencing the offender to an institution for a maximum of ten years. In essence, the judge has a band of flexibility which is ten years wide. In California, on the contrary, judges are limited in the discretion they may exercise, and their band of flexibility is generally only three years wide, and the usage of the upper and lower limits of sentencing for a crime must be justified by a judge in writing. The most obvious difference, then, is that judges in Maine seem to have lost little if any discretion while judges in California have well-defined discretion.

### *Provisions of the California Code*

In preparation for specifying what we feel to be issues that can and should be evaluated, we will offer a list of themes that we see within the new California code.

- (1) The aim of imprisonment is not ambiguous, even though it may be a little difficult to define. Essentially, the purpose of imprisonment is punishment or, perhaps more specifically, the purpose of imprisonment is the denial of freedom and the reduction of choices that individuals can make.

- (2) Prison sentences are to be dealt out equitably, with individuals who are charged with similar offenses and who have similar offense histories receiving essentially similar sentences.
- (3) Prison sentences will be determinate in nature and dealt out on the basis of seriousness of the offense. A presumed sentence is to be given in each case unless the judge decides to lower or raise the presumed sentence and he must justify a sentence deviating from the presumptive sentence in writing.
- (4) Disparity in sentencing is to be eliminated and a resentencing option is supplied which is to function to reduce disparity and induce sentence equity.
- (5) Aggravating and mitigating circumstances may be examined by a judge at the time of sentencing. A deviation from the presumed sentence may be made on the basis of these. Aggravating and mitigating circumstances are not defined in the code and await definition by the Judicial Council.
- (6) Parole supervision is retained although the case review function, but not the decision function, of a parole board has been turned over to the Community Release Board. Offenders will be "on parole" for one year after their sentences have expired.
- (7) Provisions for enhancing sentences are made in cases in which there is a prior felony history for which prison time has been served within the recent past as defined in the code. Sentences can also be enhanced for being armed with a deadly weapon, using a firearm, or stealing large amounts of money.
- (8) The law views harshly certain violent crimes committed against the person. For instance, Section 1170.16 states in fixing terms for those sentenced before the new code that the Community Release Board shall be guided by the "... necessity to protect the public from repetition of such extraordinary crimes of violence against the person ..." as a paramount consideration.
- (9) One of every four months of good time will be granted on the basis of work, educational, vocational, therapeutic, or other prison activities.
- (10) The degree to which the law addresses violent crimes against the person is emphasized in the provision that allows a three year add-on in cases where committing a

crime resulted in great bodily injury.

- (11) The new code attests to a belief in due process rights in the manner in which it specifies procedures to be used in settling disputes.

### *Assessment Possibilities in the California Legislation*

The California code includes several provisions that can be assessed, and creates certain areas of research that will be most fascinating to investigate. In the first category, the degree to which sentencing disparity is reduced by the new code is quite readily measurable. Although the statistical analysis of disparity is relatively easily completed, the whole disparity issue is confounded by the legislative attempt to define judicial discretion in California. The California code has consciously attempted to circumscribe discretion as exercised by judges, but has perhaps unconsciously failed to attend to the discretion that can be exercised by others even before the judge becomes involved with an offender. For instance, even though the code may limit judicial discretion, it has not attempted to limit police or prosecutorial discretion. The determination of whether or not to look into prosecutorial behavior as part of an analysis of criminal codes is one that must be made on the basis of cost, ease of conducting the research, and perhaps most importantly on the value-laden question of whether or not it is of sufficient concern to warrant attention. Examining the behavior of prosecutors before and after a code change is one of the fascinating areas of research that should be part of the entire process.

A second area that is ripe for research in light of S.B. 42 is the implementation of the good time provisions. The good time provisions in both Maine and California have special conditions or provisions attached which may have an interesting impact on their implementation. The unique provision attached to the California code is that one of each four months' good time is to be awarded for participation in what are deemed to be rehabilitative programs. Undoubtedly, the legislature intended to provide an incentive to those who were predisposed to want to improve themselves,<sup>30</sup> but it may have unintended and undesirable effects on prison management. The problem may entail determining who is participating in work, educational or vocational programs and determining over what period of time one would be considered in assessing participation. Because 25 per cent of the good time is to be allocated on this basis, one may expect a

certain segment of the prison population to engage marginally in programs in order to acquire extra good time.

A third area that will be interesting to observe is the specification of aggravating and mitigating circumstances. In addition to assessing their development, their use by the judiciary is a central, researchable question. Although sets of aggravating and mitigating circumstances already have been developed by Dershowitz,<sup>31</sup> how they may be operationalized has been less well developed. Discussion thus far have not indicated who will assess the case at hand to determine what factors will be used to aggravate or mitigate the sentence. It would seem reasonable to assume that the prosecuting attorney will want to set forth aggravating circumstances while the defense attorney may want to establish mitigating factors. If such an arrangement were adopted, however, one could predict court challenges to the evidence presented for aggravation or mitigation. An alternative solution, and one on which there is already domain consensus, will be that of having probation officers develop aggravating and mitigating circumstances in a presentence investigation report, along with a recommendation for diminution or enhancement of the presumptive sentence. Since California is the first state to pass a presumptive sentencing law, others will be interested in knowing how this provision is implemented and with what success.

Another researchable question in regard to the aggravation/mitigation issue is the degree to which judges are willing to impose a sentence which differs from the presumptive sentence. The code generally requires a judge to record reasons for giving a lesser or more severe penalty than called for, and to do so whenever he or she chooses not to enhance a sentence for such things as possession or use of weapons.

Given that we have no experience with the need for judges to state their reasons for "deviant" actions, we have no basis for developing expected judicial behavior. It will be interesting to note the percentage of cases in which sentence aggravation is requested *and* granted, compared to the percentage of times mitigation is requested *and* granted. If the California code were written in response to public pressure to become harsher, then one might expect a greater percentage of the requests for aggravation to be granted, and over time for an informal norm to develop acting to reduce the number of requests for mitigation. In relation to the discussion above on the role of the prosecutor and the charging function, if district attorneys perceive judges as

granting mitigation requests too frequently, one might find district attorneys far less inclined to charge less severely or to accept guilty pleas in exchange for a lesser charge.

#### IV

### PARADIGMS/THEORIES AND S.B. 42

As we stated in the beginning of this paper, the institution of individualized justice and the theory of rehabilitation are currently under serious scrutiny. The hopeful fervor of past reformers with their faith that science can help to understand and control human behavior seems to have been replaced by doubts about the validity of these concepts, and in some quarters one senses an outright mockery of them. It is our judgment that the reforms in Maine, and more recently in California, have been seen by some as evidence that a new day is dawning in not only sentencing but also in the orientation and purpose of the criminal justice system.

As early as 1975, *Corrections Magazine* indicated that Maine had "... discarded two concepts that once had been considered great reforms of the penal system. A new criminal code ... abolished the indeterminate sentence and parole ... judges must sentence offenders to flat sentences."<sup>32</sup> The great penal reforms (parole and the indeterminate sentence) that Maine ostensibly rejected were supporting bedrock for individualized justice, which, of course, was operationalized through indeterminate sentences and the rehabilitative ideal. Achievement of rehabilitation was judged through parole board review.

In essence, prior to code revision in Maine, individualized justice and the rehabilitative ideal provided the paradigm with which social scientists and others could analyze the past and predict the future. If social scientists or legal scholars are convinced that Maine has abandoned the rehabilitative ideal and individualized justice, (and we have offered no evidence that jettisoning the parole board and abandoning indeterminate sentences are sufficient cause to believe that a fundamental paradigm shift has occurred), it is incumbent on them not to assume that a new paradigm has been enthroned.

If we cannot conclude that a new paradigm or theory is justified in understanding what has happened in Maine, is there

reason to be more optimistic in looking to California? Because we are so geographically and psychologically distant from the changes in California, we cannot, of course, respond with authority to this question. However, while the evidence is somewhat less ambiguous in California, it too is not conclusive. The emphasis in California seems to be on limiting sentencing disparity, assuring sentencing equity, and defining judicial discretion. Furthermore, absent undefined aggravating and mitigating circumstances, the instant offense plus a variety of enhancing factors (past offense/incarceration history, the use of a firearm, possession of a dangerous weapon, theft of large amounts of money, and infliction of great bodily harm) are to determine the sentence length.

One could argue, perhaps very effectively, that the emphasis on sentence equity based on offense and incarceration history, and absent offender related characteristics, is clear evidence of the rejection of the rehabilitative ideal. And so it may be! But, if the old paradigm is an anachronism, what new paradigm or theory can we look to? For instance, is rehabilitation out, and deterrence and incapacitation in? Again, while the evidence in California seems more clear, the conclusions that can be drawn by analyzing the evidence are not so clear. For those who would argue that retributive punishment provides the new paradigm, we must, however, tenuously point out that one of every four months (25 per cent) good time is allocated on the basis of rehabilitative efforts. As we grapple with predicting the future, it is vestiges such as these that cause concern. Again, the mere fact of organizational inertia argues against the idea that the rehabilitators have packed their bags and gone in search of new challenges.

## SUMMARY

This paper has offered the major changes that have taken place in Maine, and an attempt has been made to indicate research strategies that can be useful in assessing the impact of change. Our goal was to impart a sense of evaluation strategy and therefore, we have not attempted to share the findings as they are evolving in the research project. Such results will be set forth in other appropriate forums, but it is important to indicate that at this point the preliminary findings support our assertion that one must be cautious in characterizing actual change with-

out a data base to support such claims.

Another issue that has been raised in the present paper is the role of theory and paradigms as they operate to influence the research process. The level of analysis at which a theory is most applicable gives us special problems. The problem of deciding what level is appropriate for theory testing and development has led sociologists from thinking in terms of "grand theories" to explain phenomena, to talking in terms of grounded theory or theories of the middle range which are designed to be relevant at a lower level and explain perhaps modest portions or segments of a phenomena. At issue is the contribution of paradigms and theories — grand theories in reality — to the conduct of criminal code research. The difficulty in defining a criminal code and the interaction of code definition and paradigms have been identified as particularly problematical to code research.

The last area we have tried to develop was establishing reasonable and appropriate research goals for those interested in the California code. Our approach to this task has been to discover what is of particular significance in the code and to indicate some strategies that can be used in evaluating the significant issues. The items we have identified may, or may not be particularly useful, but we believe they are representative of what an outsider might deem appropriate for research. In addition to those discussed, we thought of other areas, but concluded we had too little information to develop them as thoroughly as they must be if they are to be assessed. Without doubt, people within the system who have a variety of agency perspectives and concerns will identify other areas that deserve research attention. We look forward to seeing how those who will examine the code define the research situation. We also hope they can benefit from our observations.

## DISCUSSION

In response to a comment from the audience, Professor Hussey said that in most cases he disagreed with the proposition that probation can be considered a true "punishment."

A participant observed that perhaps discretion was being shifted to the prosecutor because that agency often had the best information — much of which was not admissible in court. This drew a rebuttal from another participant, who called that proposition "bizarre." Whatever information the prosecution had

should be available to the judge and the parole board, along with reports from other sources, he said. "At least the parole board has the advantage of knowing whether he did it or not," he concluded. □

## FOOTNOTES

1. Pages 1-2 & 7-10 of the present paper draw heavily upon a proposal by F. Hussey, J. Kramer, D. Katkin, and S. Lagoy — "Determining the Impact of Fundamental Changes in the Law and Implications for the Future: The Evaluation of the Maine Experience," Mimeo, 1977.

2. See, for example, Dean Roscoe Pound's statement to the National Council of Juvenile Court Judges in 1950, cited in P. W. Alexander, "Constitutional Rights in the Juvenile Court," in M. K. Rosenbeim (ed.) *Justice for the Child* (New York: Free Press, 1962) p. 92.

3. See D. Katkin, D. Hyman, and J. Kramer, *Delinquency and the Juvenile Justice System* (North Scituate, Mass.: Duxbury Press, 1976) pp. 33-34.

4. *Ibid.*, pp. 33-56.

5. See, for example, O. W. Holmes, *The Common Law*, (ed.) M. Howe (Cambridge, Mass.: Belknap Press of Harvard University Press, 1963) p. 39.

6. By 1927 Felix Frankfurter and James Landis were able to conclude that individualized punishment had become the central element of American Justice; see, F. Frankfurter and J. Landis, *The Business of the Supreme Court* (New York: Macmillan, 1927) p. 249.

7. American Law Institute, Model Penal Code, Proposed Official Draft, 1962.

8. See, for example, American Friends Service Committee, *Struggle for Justice* (New York: Hill & Wang, 1971).

9. New York State Commission on Attica, *Attica* (New York: Bantam Books, 1972).

10. The President's Commission on Law Enforcement and Administration of Justice, "Task Force Report: Corrections," Washington, D.C.: U.S. GPO., 1967. Also, "National Advisory Commission on Criminal Justice Standards and Goals: Corrections" (Washington, D.C., U.S. GPO, 1973).

11. Martinson, Robert, "What Works? — Questions and Answers about Prison Reform," *The Public Interest*, 22, Spring, 1974.

12. Smith, Herman, *Strategies of Social Research* (Englewood Cliffs: Prentice-Hall, Inc., 1975) p. 24.

13. D. Glaser, "Routinizing Evaluation" (Washington, D.C.: NIMH, 1973) p. 2.

14. F. Allen, "Criminal Justice, Legal Values and the Rehabilitative Ideal," in Goldstein and Goldstein, *Crime, Law and Society* (New York Free Press, 1971) p. 274.

15. D. Cressey, "Limitations on Organization of Treatment in the Modern Prison," in R. Quinney, *Crime and Justice in Society* (Boston: Little, Brown and Company, 1969) p. 469.

16. See, for example, H. Wechsler, "Sentencing, Correction, and the Model Penal Code," 109 U. Pa. L. Rev. 465, 476 (1961).

17. See, for example, Council of State Governments, *Definite Sentencing: An Examination of Proposals in Four States* (Lexington, Kentucky: The Council of State Governments, 1976).

18. Class A through E are used to cover felonies and traditional misdemeanors; murder and manslaughter are dealt with separately.

19. Zarr, M. "Sentencing," *Maine Law Review*, 28, Special Issue, 1976, p. 118.

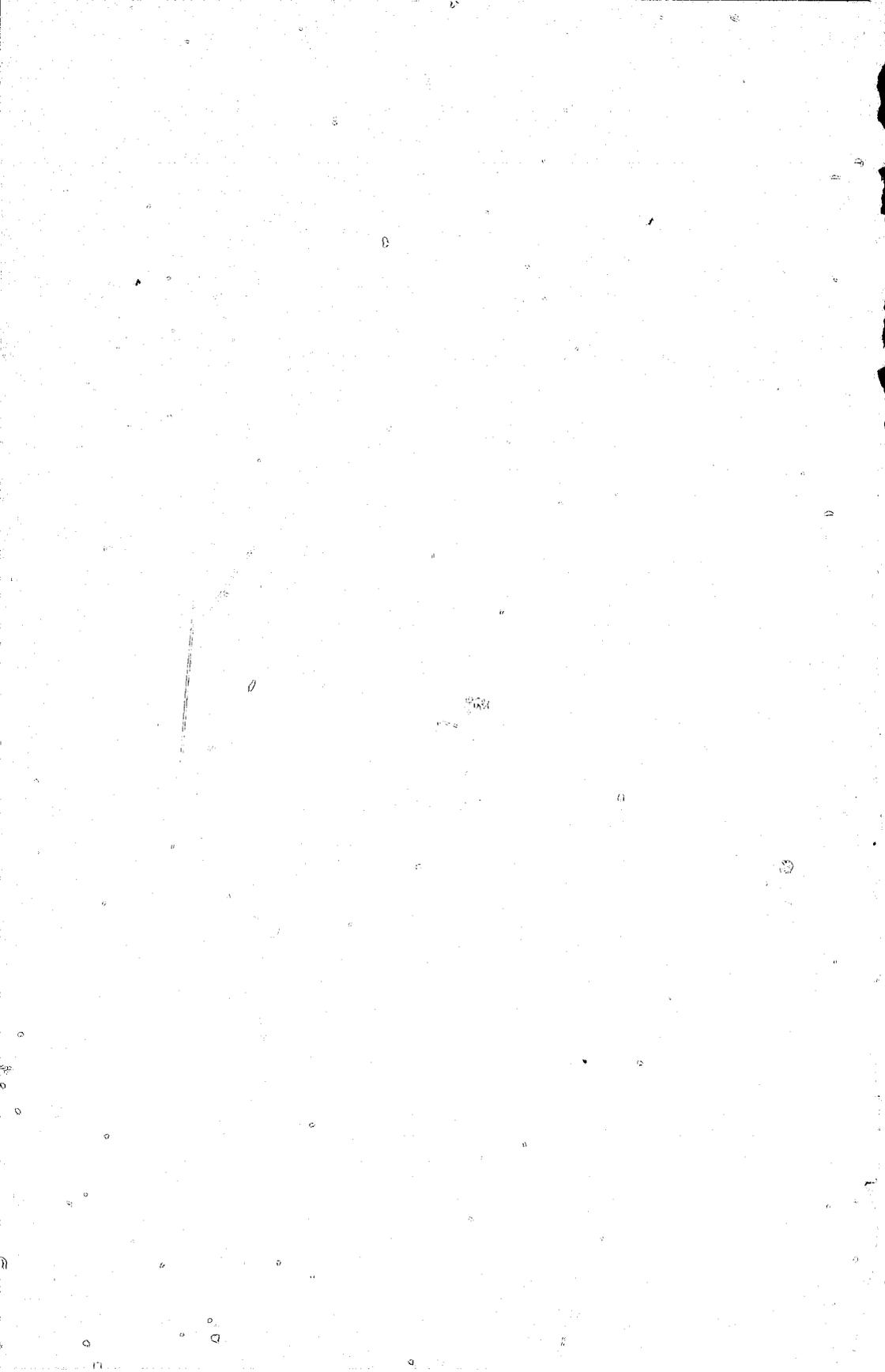
20. 17-A M.R.S.A. Section 1252 (5).

21. 17-A M.R.S.A. Section 1253 (3).

22. 17-A M.R.S.A. Section 1201 (1).

23. 17-A M.R.S.A. Section 1201 (2).

24. 17-A M.R.S.A. Section 1154.
25. Resentencing provides a mechanism for review and evaluation of sentence, a central feature of a system of individualized justice.
26. 17-A M.R.S.A. Section 1203.
27. 17-A M.R.S.A. Section 1254 (1) effectively eliminates the parole function by indicating that "An imprisoned person shall be unconditionally released and discharged upon the expiration of his sentence. . . ."
28. 17-A M.R.S.A. Section 1254 (2).
29. P. E. Johnson and S. L. Messinger, "California Determinate Sentencing Statute: History and Issues," paper presented at Determinate Sentencing Conference, June 2-3, 1977, Berkeley, California, sponsored by Office of Technology Transfer, National Institute of Law Enforcement and Criminal Justice.
30. See, W. Barkdull, "Comments on 'Determinate Sentencing'", *Crime and Delinquency*, April, 1977, p. 214.
31. A. M. Dershowitz, *Fair and Certain Punishment* (New York: McGraw-Hill Book Company, 1976) p. 3.
32. *Corrections Magazine*, July/August, 1975, pp. 16 and 23.



# DECEPTIVE DETERMINATE SENTENCING

by Caleb Foote

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If there is one implication which runs through the discussions of this conference, it is that sentencing is not amenable to piecemeal reform, that we are dealing with a problem, or rather a series of tightly interrelated problems, in which tinkering or half-baked reform is the enemy of comprehensive reform.

I have found myself here thinking of the fable of Medusa, when, according to Greek mythology, Perseus sought to destroy her evil force by beheading her, only to find that the decapitated head retained its petrifying power and that Pegasus and Chrysaor sprang full grown from her blood.

That is likely to be the fate of reform movements under even the best of circumstances, and there is nothing favorable about the circumstances under which the current rash of mislabeled determinate sentencing bills are being enacted. I happen to be in favor of determinate sentencing by rule; I was the principal author of the American Friends Service Committee's report, *Struggle for Justice*, which was one of the first statements advocating this policy. But present legislation, proposed or recently enacted, bears almost no resemblance to the position we advanced. Some of the legislation, like that of Maine, under no stretch of the imagination can be called determinate sentencing; all of it ignores or glosses over critical problems which must be faced before determinate sentencing can be fair or even feasible.

The one hint of significant change which runs through the current proposals is the elimination or downgrading of parole. But much of our discussion has confused the two quite separate functions allegedly served by parole: discretionary release and supervision of paroled inmates. I agree with Norval Morris and many others who regard the parole system's supervision of conditionally released inmates as ineffective and a waste of money. This aspect of parole, however, is not relevant to the subject matter of this conference. It is parole as a discretionary release mechanism which is being eliminated or severely restricted by the so-called determinate sentencing legislation.

To eliminate discretionary release without doing anything significant about discretionary intake is likely to produce more injustice, not less. I am no friend of parole, with its arbitrary and capricious decision-making masked by the myth of parole readiness, and the slow Chinese torture of indeterminacy which is its concomitant. In 1971-72 I observed hundreds of hearings of the California Adult Authority and for weeks at a time virtually lived with its decision-makers. It was an appalling experience in many ways, but the Authority had at least some redeeming virtues.

The Authority's more obvious abuses, moreover, and the only ones that California's S.B. 42 may partially correct, could have been easily corrected by simple legislation. The Authority had the power, which it exercised in a small percentage of the cases coming before it, to hold prisoners almost indefinitely; this could have been cured by the simple expedient of establishing reasonable maximum terms. Another source of much discontent with the Authority was its habit of indefinite postponement in making the decision of when to release; this could have been eliminated by a one paragraph directive requiring prompt hearing and determination of the inmate's release date.

It became obvious during my study that if disparity, capriciousness and arbitrariness were the enemies, the paroling function was only one cog in the machinery that produced them. Moreover, what has been overlooked in the decisions to eliminate discretionary release is that parole boards, for all their shortcomings, are able to mitigate some of the abuses of discretionary sentencing. The Authority was at least dimly aware of the gross disparities which characterized the initial sentencing decisions made by judges and prosecutors. They knew, for example, that in some counties less than five percent of convicted felons were sent to state prison, while in others that figure was six times larger. These figures understate the disparity, for they are simply county averages and the range of disparity between individual judges is probably greater. When, for example, an Authority member noticed that a particular case came from Stanislaus or some other county known for its high rate of commitment, or from a judge whose disproportionate severity was known to him, he would tend to cushion the disparity, recognizing that it was highly probable that the inmate would not have been sent to state prison at all had his case been processed in Los Angeles or Alameda counties. Not infrequently one would hear a member of a decision-making panel say things like, "This case doesn't belong in state prison," or, "What could have possessed

Judge X to send this guy to San Quentin?" The members also probed behind the curtain of plea bargaining, where there is likewise great disparity between counties, and made some attempt to equalize treatment on the basis of actual facts of each case rather than the fiction of the offense category to which a plea had been entered.

I don't want to exaggerate. This process of rectification of abuse was itself capricious and uncertain. Whether a particular inmate who was a victim of a grossly disparate commitment would obtain any relief depended on a host of other variables: e.g., the identity of the particular decision-maker drawn by lot to hear his case; the factors that a particular panel happened to be emphasizing at the moment it heard his case; the state of the political climate at the time; or whether the panel members had recently been burned by a release decision that backfired. But many corrections to reduce disparity were made; moreover, an inmate passed over one year could hope for better luck in next year's lottery when his case would almost certainly be heard under different circumstances by a different panel.

The problem of initial disparity is not only of importance to academic purists who are old fashioned enough to believe that equal treatment of similar offenders is an important value in a system allegedly concerned about equal justice under law. It has more immediate practical impact for penal administrators, who find their inmates sometimes strangely restive when a man serving ten years finds that his cellmate with a similar record but from a different judge or jurisdiction is carrying only two years. The autobiographical reminiscences of ex-wardens are full of discussions of this problem, and it was a persistent theme in the speeches of James V. Bennett and in the reports of the Bureau of Prisons under his direction. It is said that Bennett had two collections of judicial sentencing horror stories, those perpetrated by Eastern judges, which he used to illustrate his speeches on the West Coast, and vice versa. It is clear that he viewed parole as at least one means of dealing with the problem.

Restriction or abolition of parole discretionary release, therefore, removes this avenue for redress from initial sentencing disparity, and the new [California] legislation does not provide any viable substitute remedy. The methods which the new legislation utilizes to control this initial disparity are certain to be ineffective. As we have already seen earlier in the conference, the disparity abuses associated with plea bargaining are going to be aggravated. The new legislation would channel and equalize ju-

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dicial discretion by the promulgation of administrative standards which the judge is supposed to apply. But the standards are vague and unworkable; in both the California and proposed federal legislation the underlying theory behind many of the standards is the same rehabilitative and incapacitative rationale which a hundred years of parole board experience has proved to be unworkable. Parole release has been discredited because the standards of rehabilitation and prediction of future dangerousness required determinations which are impossible to make with present or foreseeable knowledge. The new legislation does not abolish reliance upon these treacherous uncertainties; it merely transfers their administration from parole boards to prosecutors and judges. There is every reason to believe that disparity abuse will be still greater with decentralized discretionary sentencing than it was under parole administration, and by the restriction or elimination of parole the possibility of post-sentence correction has been virtually eliminated.

Given the state of current sentencing law, with its grossly inflated penalty schedule, population control is another essential function performed by a releasing agency with broad discretionary power. I was amazed to hear Norval Morris downgrade this function as not a significant factor in deciding whether or not to retain parole. All the historical evidence is to the contrary. Concern over prison overcrowding dominates Nineteenth Century American penal literature and provided major impetus for the development and rapid expansion of parole. As for current practice, the only firsthand data I have is for California, which I cannot believe is wholly atypical. The Adult Authority seldom talked directly about prison population but the question dominated much of their thinking. They were cajoled, manipulated, begged by the Department of Corrections, one of whose central concerns, of course, is to have enough prisoners but not too many. Told to cut prison population by the governor's office, the Authority complied. Told to reverse the process, they complied again. The members eagerly perused the monthly statistical projections with which they were provided, which extrapolated from their current practice what the prison population was predicted to be one, three, or five years hence. They spent most of their working hours in penal institutions, absorbing the values of the correctional world — and those values center on population control. Indeed, it could be argued that they had been effectively captured by Corrections, for 13 of the 18 decision-makers whom I observed when I was doing my research were former correc-

tional officials.

As a release mechanism parole is absolutely critical if one despairs of reforming and regularizing the work of prosecutors and judges. It is parole release discretion that makes tolerable from a management standpoint, if not from a moral or principled perspective, the uncontrolled discretion of prosecutors and judges. If this safety-valve is abolished or severely restricted, I would predict rocky times ahead until the system develops new devices which can regulate supply to demand or, much more likely, until discretionary release is reestablished in another swing of the policy pendulum.

The concern over prison population is one facet of underlying economic realities affecting sentencing policy which is almost entirely masked in current discussions of sentencing. These economic constraints are products of an imbalance between supply and demand. Institutional capacity to impose punishment is severely limited, but legislative proscription of conduct that is punishable is prodigal. Legislatures constantly tend to meet public crisis or private complaint by enacting new criminal laws or by increasing the severity of punishment for existing ones. This typical legislative response to any social malaise has built-in attractions for politicians. The enactment of criminal legislation creates the illusion of decisive political action at minimal risk of provoking organized or effective opposition and, as implementation by budget appropriation is not required, with no political cost in higher taxes.

Contrasting sharply with this flexible expansionism are police and court structures which can only process so many cases and penal establishments whose inelasticity is literally defined by concrete and steel. While there is some flexibility in prison capacity, it is strictly limited. Of course the number of prisoners in cells can be doubled up, or corridors, workshops or day rooms can be converted into dormitories — until at some point a series of Attica-like riots remind us that even human degradation has its limits. In many states, although not yet in California, these limits are being approached. Typically all sectors of the enforcement and correctional machinery operate at full capacity, with crowded jails, courts that are perpetually understaffed and behind in their dockets, and professional workers crushed under heavy case loads.

Any significant increase in the number of available punishment slots in a correctional system is likely to take a minimum of ten years in politicking, planning and construction and, for each

new inmate bed, to cost at least \$30,000 in capital outlay and thereafter \$2,000 or up in annual upkeep. To talk, therefore, about substantial increases in both the proportion of criminals sent to prison and in the severity of terms is to engage in fantasy. One could do one or the other; one could send more felons to prison for shorter terms, or fewer felons for longer terms, but one cannot do both.

In California, only ten to 15 percent, varying somewhat from year to year, of felons convicted in Superior Courts are sentenced to state prison. Only about 20 percent of robbery convictions end up with a prison sentence. Both figures understate the actual disparity, for many felons, including many robbers, are plea-bargained to lesser offenses. If these proportions were increased by more than a few percentage points, and there was no discretionary release mechanism, over a period of a few years something approaching chaos would be occurring in the correctional world. Unless accompanied by massive increases in the correctional budget, political measures which would have the effect of sharply increasing prison populations are divorced from reality.

If the masks of individualization and rehabilitation are stripped away, the basic function of discretion in paroling and sentencing practice is revealed: to adjust an impossible penal code to the reality of severe limitations in punishment resources. By an impossible penal code I refer to the fact that, given economic constraints, full or equal enforcement is totally out of the question. By necessity, from the masses of convicted persons legislatively declared to be eligible for imprisonment, most must be diverted and only a small proportion winnowed out for actual imprisonment. What we have evolved is a system of symbolic punishment in which each San Quentin inmate stands for half a dozen or a dozen other convicted felons who are by any standards equally eligible to be there but for whom there are no beds. This system is efficient in court administration, for the threat of being the symbol keeps the guilty pleas flowing smoothly. It is economical by cost-benefit standards, for it probably maximizes the return in general deterrence for dollars expended. It is politically expedient, at least in the short run, because it dupes and passifies an otherwise potentially rebellious public. It is also, in my opinion, profoundly immoral, violates the spirit of due process and equal protection, turns our criminal courts into sausage factories and breeds disrespect for law in most of those whom it touches. But I'm not going to pursue these

factors, both because I don't have the time and because I think the points are obvious.

Faced with these economic realities we have three alternative courses of action. The first is to multiply by five or ten times the size of correctional budgets to make possible implementation of the draconian thirst for punishment which characterizes the majority of the public and which is so popular in the legislatures. However, once the public got a taste of what this alternative would do to their tax bills, I assume it would not be pursued.

Second would be a comprehensive attempt to introduce equal justice to sentencing by adjusting penalties to the limited supply of punishment resources. This would involve control of prosecutors, perhaps using German criminal procedure as a model to start from; sentencing by rule and precedent; massive decriminalization spurred by a recognition that imprisonment was a costly resource to be used only in extreme circumstances; and extensive and imaginative use of non-incarcerative punishments. The key factor would be rules which sharply limited the criteria which could be taken into account in determining the seriousness of an offender's punishment. The seriousness of the offense category, the seriousness of the circumstances of the particular offense, and the extent of the offender's prior conviction record are criteria that are both relevant to the offender's just deserts and that, being objective, could be administered fairly and evenly. The myriad of other criteria which cominate past and present practice are relevant only to improper or unachievable goals, e.g., the discredited concept of rehabilitation, discriminatory class or race bias, or the capricious game of guessing about an offender's future dangerousness in the absence of any scientific or validated basis for such predictions.

Such an approach could achieve determinate sentencing in reality rather than only in fiction. It would require, however, a substantial reduction of our present level of severity in order to bring punishment resources into line with the output of the criminal courts. The fact that real determinate sentencing consistent with the principle of equal justice has zero political chance of adoption or serious attention gives emphasis to the principal obstacles to meaningful reform of criminal law and its administration: (1) the unrealizable expectations and ignorance of the public, aggravated by (2) the biased and deliberately misleading reporting of a media concerned with reaping profits from sensationalism; (3) the entrenched power of self-interested pressure groups able to block almost any change (a problem by no means

unique to criminal law but one for which a democratic polity appears to have no solution); (4) irresponsible legislators who exploit public fear of crime for narrow political benefits and whose cheap tricks (e.g., creating new crimes or increasing penalties for existing crimes without budgeting funds necessary for any implementation) merely aggravate our sorry state of affairs; and (5) a society not unlike ancient Rome which uses the politics of crime as its Colosseum spectacle to divert attention from more fundamental and pressing problems.

Given the political impossibility of treating all like offenders with either equal severity or equal moderation, this leaves the third alternative as the likely outcome: to continue as at present with symbolic punishment, combining excessively severe prison sentences for the few with excessively lenient dispositions for the many, using broad grants of discretionary power at all levels as the mechanism to keep the system in balance. Given this direction, one would not be far off the mark by predicting that, from an historical perspective, the current flurry of so-called determinate sentiment will turn out to have been a fad, a minor and temporary irritant to a system whose politics irrevocably wed it to discretion.

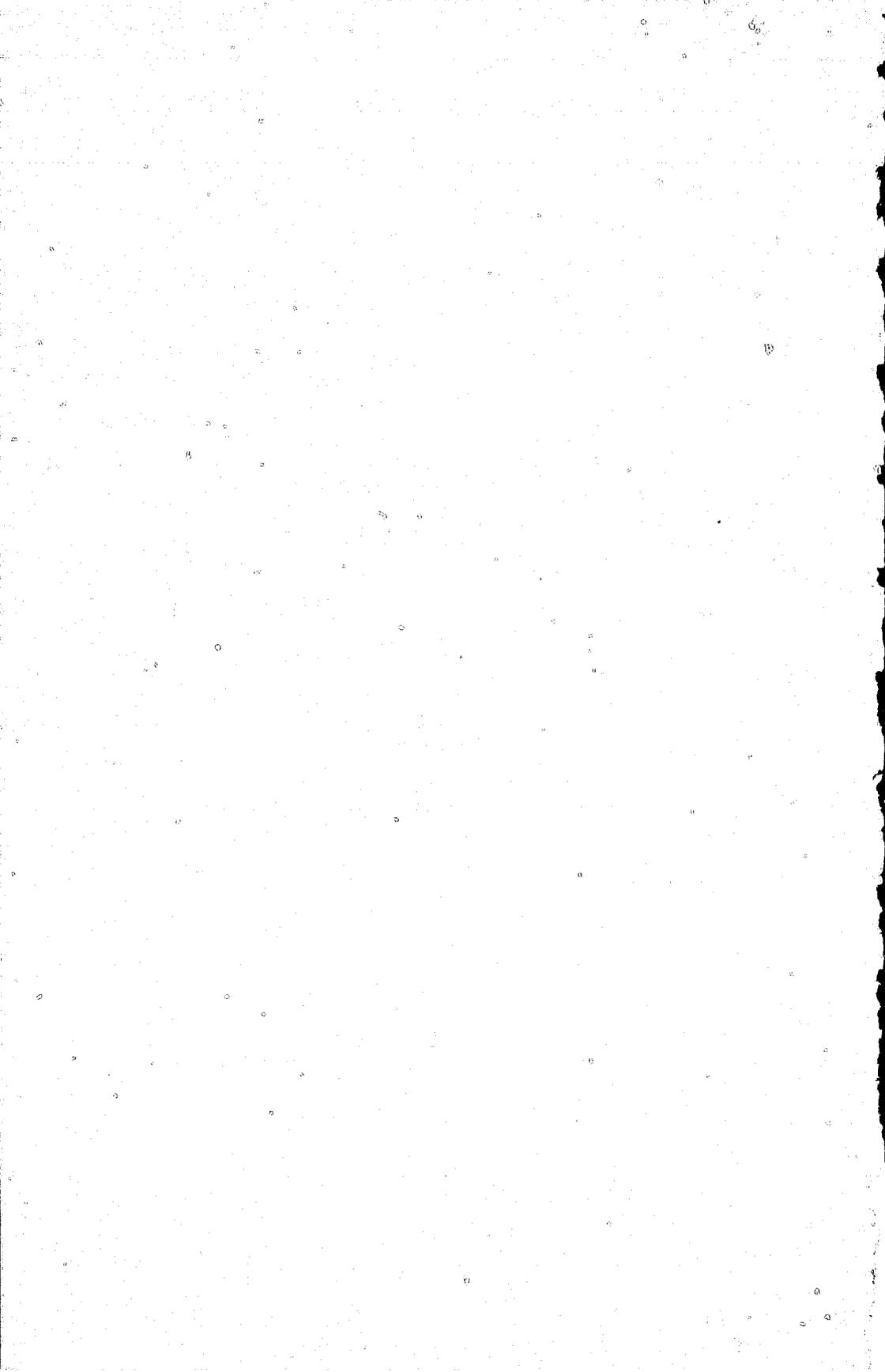
## DISCUSSION

While he agreed with most of the criticisms that had been made of current parole board practices, one participant said, perhaps a strong argument could still be made for retaining the parole board purely as an agency to set precise release dates. Professor Foote responded that, indeed, he thought it "absolutely essential" to retain parole boards if untrammelled discretion continued to be exercised by various agencies at the initial stages of the criminal justice process.

In response to a comment about the advantages of the "guideline" approach of the proposed federal criminal code, Professor Foote said that studies of decision-making show that only a very few variables — three, four or five — can be considered at one time. Proposals for guidelines he had seen, he said, contained too many variables. Professor Foote went on to observe that while as a lawyer he was trained to find extreme cases and point out how they were improperly treated under simple guidelines, perhaps this was not the best basis for formulating public policy.

A member of the audience contended that most guidelines he had seen in the criminal justice system — such as those used to determine “release on recognizance” — “have buried in them inherently discriminatory factors based on racial and economic differences.” Professor Foote replied that the guidelines he was proposing should concern only the characteristics of the offense and the prior record of the offender — not circumstances such as employment or roots in the community. While it might be true that ghetto residents would fare disproportionately worse under guidelines considering prior record, Professor Foote noted that “one should not expect the sentencing system to rectify social inequality.”

A juvenile corrections administrator asked whether the points made in favor of determinate sentencing had the same validity for juveniles as for adults. Professor Foote responded with an unqualified “yes.” □



## **SPECIAL CONFERENCE ON DETERMINATE SENTENCING**

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Judge Gilbert Bettman, Court of Appeals, Hamilton County, Ohio

Milton Burdman, Deputy Secretary, Department of Social and Health Services, State of Washington

David L. Chambers, Vice Chairman, California Youth Authority Board

Stephen Chinlund, Chairman, New York State Corrections Commission

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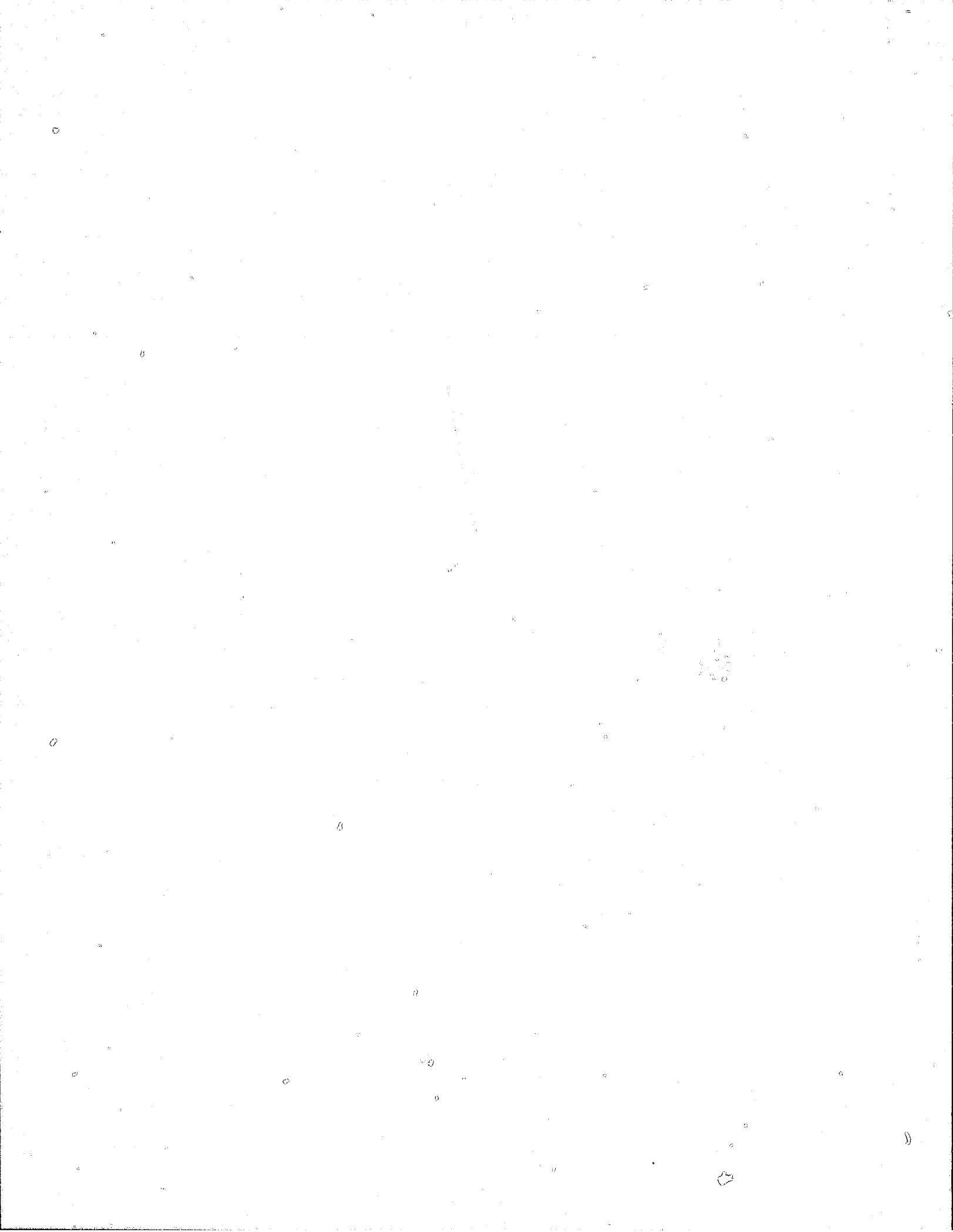
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