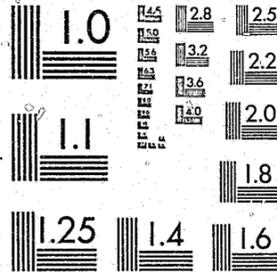


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OFFICE OF POLICY ANALYSIS, RESEARCH & STATISTICAL SERVICES

NEW YORK STATE DIVISION of CRIMINAL JUSTICE SERVICES

THE EFFECTS OF LIMITING
DISCRETION IN SENTENCING

March 26, 1984

NO
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NEW YORK STATE
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✓
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PREFACE

This report is an expanded version of an unpublished review originally prepared for the New York State Director of Criminal Justice in the Spring of 1983. The authors wish to express their appreciation to the many researchers and criminal justice officials in other states who contributed information to this effort, either by telephone or in the form of written materials. Special thanks are extended to Chris Zimmerman, who made important contributions to the conceptual framework around which this report is organized, and to Doug McDonald and Scott Christianson, who provided thoughtful commentary on the original draft.

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I. SUMMARY

This review of sentencing structures adopted in other states was undertaken to assist policy makers involved in the development of a more determinate sentencing structure for New York State. The report clarifies the terminology used to characterize sentencing systems, and provides brief descriptions of current sentencing practices for each of the fifty states. Included are discussions of the potential effects of determinate sentencing and sentencing guidelines on discretion, accountability, disparity, discrimination, proportionality, severity, and prison populations. Information is also provided regarding the reported effects of sentencing reform in eight states: California, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, and Pennsylvania.

The labels used to characterize sentencing systems have been inconsistently defined and applied. The lack of uniform definitions has obscured certain issues that are central to the evaluation of potential sentencing structures. Explicit agreement on a common set of definitions is a prerequisite for meaningful public policy debate about sentencing structures.

The definitions adopted for this report have been selected because they are useful for clarifying the issues and options policy makers must consider. Specifically, they treat the structuring of judicial discretion and the structuring of post-sentencing discretion as separable issues. Features that limit post-sentencing discretion include parole guidelines, min/max sentences, fixed sentences, and determinate sentences. Features that limit judicial discretion include statutory limits, mandatory sentences, presumptive sentences, and sentencing guidelines.

Structures that Limit Post-Sentencing Discretion

Parole guidelines. Parole guidelines are procedures and standardized criteria

to be used by a parole board in determining the length of time that an offender should remain in prison. Criteria typically include measures of offense seriousness, criminal history, and institutional behavior. Parole guidelines can be used in conjunction with min/max sentencing, but are incompatible with determinate sentencing, for which post-sentencing discretion regarding sentence lengths is definitionally excluded.

Min/max sentencing. Min/max sentencing is a system wherein the court specifies a minimum and maximum term of incarceration, but the parole board determines the actual release date within the limits of the court-imposed sentence. The degree to which a min/max sentence limits post-sentencing discretion depends on the specified range. If the minimum is "zero" and the maximum is "life", the sentence is totally indeterminate. If the minimum equals the maximum, the sentence is "determinate" (as defined below). Systems vary as to whether "good time" may be deducted from the minimum, the maximum, or both.

Fixed sentencing. The term "fixed sentencing" is used differently in different states. A definition that encompasses all these usages views fixed sentencing as a special case of min/max sentencing. Only a single term is specified by the court, but it is treated as a maximum period of incarceration for which an associated minimum is automatically implied. The implied minimum is equal to the maximum in determinate systems, but for an indeterminate system it might be "zero" for all sentences, one year for all sentences, or some constant fraction of the maximum (e.g., 1/3). Not all fixed sentences are determinate, but all determinate sentences are fixed.

Determinate sentencing. Determinate sentencing is a system in which the court specifies a fixed term of incarceration that must be served in full (minus good time). The influence of correctional authorities on actual time served in prison is limited to awarding (or revoking) good time credits on the basis of institutional behavior; there is no discretionary parole release.

Structures that Limit Judicial Discretion

Statutory Limits. In most states the legislature has placed constraints on judicial discretion by establishing upper limits, lower limits, or ranges for each offense. The court may not impose terms of incarceration that are shorter than specified by the lower limits or longer than specified by the upper limits. The limits could apply to the fixed terms in a determinate system; they could apply to the fixed terms, maximum terms, or minimum terms in an indeterminate system. Statutory lower limits on terms of incarceration do not necessarily imply mandatory incarceration; the court may have the discretion to impose either a non-incarcerative sentence or an incarcerative sentence within the allowable range.

Mandatory sentences. Mandatory sentencing involves a minimum incarcerative sentence that must be imposed for certain crimes or categories

of offenders, without an option for probation, suspended sentence, or immediate parole eligibility. Mandatory provisions can apply to the "in/out" determination, the minimum term, the maximum term, or some combination of these. Mandatory provisions can be incorporated into both determinate and indeterminate systems.

Presumptive sentencing. In some states, judges' decisions are constrained by a legislatively established "presumptive" sentence. It is presumed that a specific sentence identified by statute (e.g., a determinate sentence of three years minus good time for house burglary) will be the sentence imposed in all unexceptional cases. If mitigating or aggravating circumstances exist, the sentence usually may be lengthened or shortened within specific boundaries, but a judge cannot impose a prison sentence outside the specified range. Presumptive sentencing is similar to mandatory sentencing in that the sentencing prescriptions carry the force of law. It differs from mandatory sentencing in that presumptive sentencing provides explicit procedures for exceptional handling of legitimately exceptional cases.

Sentencing guidelines. Sentencing guidelines can be implemented through legislation, judicial decree, or by voluntary judicial adoption. Guidelines generally specify a narrow range of sentencing options from which a specific sentence is to be selected for unexceptional cases. The range of sentences specified is typically determined by the seriousness of the offense, the offender's criminal history, prevailing sentencing practices, or various combinations of these elements. Compliance with guidelines may be voluntary or presumptive. Descriptive guidelines merely provide empirical information about past practice in the hope that judges will examine more carefully their justification for sentences that depart drastically from the norm. Alternatively, guidelines may be prescriptive and presumptive, holding judges strictly accountable for sentences outside the specified ranges. For example, judges may be required to justify exceptional sentences in writing, or such sentences may be subject to automatic appellate review.

Parole Board Functions

Although determinate sentencing precludes early release at the discretion of the parole board, parole boards or institutional review boards in other states have retained some or all of the following functions: reviewing sentencing disparity, waiving parole supervision, establishing the length of parole supervision, fixing minimum terms for life sentences, reviewing good time credits and disciplinary actions, determining release dates for offenders sentenced before determinate sentencing took effect, or supervising parolees (typically in less populous states).

The Effects of Guidelines and Determinate Sentencing

Recent attempts at sentencing reform have varied considerably in intent and in the mechanisms that states have devised to pursue their objectives. Where their objectives have been explicated, they have tended to emphasize proportional punishment, incapacitation of dangerous offenders, and reduction in disparity and discrimination. Rehabilitative goals typically have been de-emphasized. The specific mechanisms adopted have varied in the degree to which sentences are mandatory, the degree to which sentences are determinate, and the degree to which guidelines or statutory "presumptions" have been used to structure or limit discretion.

According to the definitions adopted in this report, only nine states have implemented determinate sentencing structures: California, Colorado, Connecticut, Illinois, Indiana, Maine, Minnesota, New Mexico, and North Carolina. Information is provided regarding reported effects in five of them: California, Illinois, Indiana, Maine, and Minnesota. Information is also provided regarding the results in three states that have tested or adopted sentencing guidelines within indeterminate systems. They are Maryland, Michigan, and Pennsylvania. The following is a condensed discussion of the theoretical and reported ability of determinate sentencing and sentencing guidelines to further some of the goals of sentencing reform.

Discretion. A change from indeterminate to determinate sentencing transfers control over sentence length from the parole board to the courts and corrections officials. Sentencing guidelines are intended to structure the exercise of judicial discretion, but may be vulnerable to circumvention. Depending on the detailed provisions of the guidelines system and on the control the court exercises over prosecutorial discretion, the combined result of determinate sentencing and sentencing guidelines could be either to concentrate sentence length determinations in the court or to shift control over sentence length to police and prosecutors.

Determinate systems vary greatly in the constraints placed on judicial discretion. Some systems allow judges wide discretion over "in/out" decisions, whereas others tightly structure judges' choices. Some permit a great deal of latitude in deciding sentence length; others do not. Maine, for example, provides no formal standards to guide judge's decisions within the broad statutory alternatives provided. On the other hand, Minnesota's guidelines provide very limited discretion in sentence selection, and impose strict accountability for sentences outside the guidelines.

Accountability. Determinate sentencing can empower judges with most of the responsibility for sentence length. Given that responsibility, sentencing guidelines can be applied in a manner that makes judges accountable for individual sentence length decisions. Guidelines explicate public policy regarding the legitimacy of sentencing criteria and the handling of offenders who are similarly situated with respect to those criteria. Consequently, they provide the means of defining and reviewing exceptional sentences.

Sentencing guidelines also intentionally shift some of the power to establish sentencing policy from the local level to the state level. One of the explicit reasons for establishing sentencing guidelines is to reduce interjurisdictional variations in sentencing patterns. This may pose a dilemma for elected judges, who will find themselves simultaneously accountable for upholding state and local standards.

Disparity and Discrimination. Discrimination in sentencing is a systematic discrepancy that arises from the application of illegitimate sentencing criteria. Disparity is unwarranted variation that results from inconsistent application of criteria, whether legitimate or illegitimate. Sentencing guidelines explicate public policy regarding both the goals of sentencing and the criteria that are to be applied in making sentencing decisions. To the extent public agreement on these issues can be achieved, disparity and discrimination can be more clearly defined and more easily monitored.

The determinate sentencing system in California has substantially reduced the variability in sentence lengths for a number of offenses, and it has virtually eliminated the systematic difference between sentence lengths for males and females convicted of similar crimes. Likewise, the Minnesota guidelines have been credited with reducing disparities among sentences for offenders who are "similarly situated," as defined by conviction offense and criminal history score. However, most of the available literature has examined disparity and discrimination in relation to conviction offense; it is uncertain whether or in which instances disparity and discrimination might have been perpetuated through adjustments in plea bargaining practices.

The net effects of determinate sentencing and sentencing guidelines on disparity and discrimination (and on proportionality more generally) depend in part on whether the structure adopted succeeds in concentrating effective discretion in the courts. If it does, then monitoring compliance with the guidelines and refining the guidelines in the light of experience may eventually effect net reductions in disparity and discrimination. If effective discretion shifts to police and prosecutors, this may reflect concerted efforts to maintain the status quo; under the latter conditions disparity and discrimination may be perpetuated or may even increase.

Severity. The imposition of sentencing guidelines gives the legislature, the judiciary, or a guidelines commission closer control over sentence severity. Depending on their inclinations this could result in generally more severe sentences, generally less severe sentences, or increased severity for some kinds of cases balanced against decreased severity for others. Thus, there is the option to adopt a guidelines system that will keep prison populations within existing capacity or to finance any increases that new sentencing criteria might produce. In any case, the combination of determinate sentencing and sentencing guidelines greatly facilitates forecasting prison populations for planning purposes.

Among the states examined, rates of imprisonment given conviction increased following changes in sentencing structure in California, Illinois, and Maine.

Average sentence lengths and time served increased in California, Indiana, Maine, and (for more serious offenses) in Illinois and Maryland. In most cases, however, these increases continued trends which began prior to the introduction of new systems. In a few states, sentencing guidelines have apparently been successful in altering the sentence mix; that is, incarceration rates and average sentence lengths have increased for more serious offenders and decreased for less serious offenders.

Prison populations. Prison populations have increased in every state reviewed, in most cases continuing trends that began before the adoption of new sentencing structures. However, the increases were especially sharp in two states, Maine and Indiana, where determinate sentencing was adopted without effective constraints on sentencing discretion.

Some states have moved to blunt the trend toward more severe sentences. Minnesota requires continuous monitoring and revision of their guidelines to keep prison populations within 95 percent of rated capacity. Pennsylvania and Maryland have been partially successful in offsetting the impact of increased sentence lengths for more serious offenders. The reforms in these states provided for decreases in sentence lengths imposed on less serious offenders.

Real time. The dramatic difference between symbolic maximum terms and the typical time served under an indeterminate system poses a difficult challenge for policy makers who are designing a determinate sentencing system. Systems that do not produce sentences that are equivalent in net "real time" to current practice will increase prison and jail populations and incur attendant increases in public expenditures. However, determinate sentences that are equivalent to current practice will appear superficially to be "soft on crime". Given the public sentiment for more punitive sanctions, it is difficult for legislators to embrace and defend equivalent real time sentences.

Compliance. Formal compliance with sentencing guidelines and other presumptive provisions depends on legal authority and credible enforcement mechanisms. Even where there has been substantial formal compliance (notably in California and Minnesota) court room participants have to some extent been able to use the new structures as instruments for the exercise of discretion. Aggravating and mitigating circumstances, enhancements for weapons use and victim injury, probation disqualifiers, and the elements of criminal history scores have all become "bargaining chips" in plea negotiations.

Nevertheless, there does not appear to have been an automatic shift of control over plea bargaining from judges to prosecutors. Rather, the influence patterns that exist in a given jurisdiction prior to a change in structure seem likely to persist within a new structure. For example, jurisdictions in which plea bargaining has previously been judge-dominated are likely to continue to be judge-dominated.

Feedback. If both sentencing and post-sentencing discretion are minimized, the justice system loses much of its ability to adjust informally to changes in crime patterns, system resources, or pre-sentence processing. To compensate for this loss, and to adjust to efforts to circumvent the system, it is necessary to provide formal feedback mechanisms. For example, Minnesota has provisions for revising its sentencing guidelines if prison populations exceed 95 percent of prison capacity; Michigan makes inmates eligible for parole consideration 90 days early when prisons are overcrowded; and the California Board of Prison Terms reviews sentence disparity and good time credits.

The Minnesota Guidelines Commission has been especially diligent in monitoring compliance with the guidelines and evaluating changes in case processing that may circumvent the intent of the guidelines. As a result the Commission has been able to modify the guidelines to keep prison populations within capacity and to prevent "inflation" of criminal history scores. Explicit feedback mechanisms permit adjustments in system operation while increasing the likelihood that such

adjustments will be consistent with the public policy embodied in the formal sentencing structure.



II. BACKGROUND

Corrections in the United States has experienced a shift away from rehabilitation as an organizing principle.¹ This shift was accompanied by renewed emphasis on deterrence, incapacitation, and a "just deserts" philosophy,² which emphasizes retribution proportional to the seriousness of criminal behavior. At the same time, there has been increasing concern about disparity in sentencing and about inconsistent application of post-sentence discretion (by parole boards or other "resentencing" authorities).³ During the past decade, the concern over disparity, the shift away from rehabilitative ideals, and the public's desire for more punitive sanctions have been reflected in revisions of the sentencing structures in nearly every state.⁴

A number of specific objectives have been articulated as the basis for such changes in sentencing structure. These objectives have included:

1. making a clear statement that punishment is the primary purpose of prison sentences;
2. insuring proportionality in sentencing (wherein more serious offenses result in more serious sanctions);
3. reducing disparity and discrimination;
4. increasing judicial accountability in sentencing;
5. providing more severe penalties for violent crimes and repeat offenders.

As an additional objective, the Minnesota Sentencing Guidelines Commission explicitly sought to avoid exceeding current prison capacity. However, most states either have ignored the potential effects of sentencing reform on prison populations, or they have opted to finance any projected increases.⁵

The specific sentencing structures adopted in pursuit of these objectives have varied considerably in the degree to which sentences are determinate, the degree to

which sentences are mandatory, and the degree to which guidelines or statutory "presumptions" have been used to structure or limit discretion.⁶ Summaries of the sentencing structures in each of the fifty states are given in the Appendix to this report. Generally speaking, there has been a trend toward mandatory incarceration,⁷ longer periods of incarceration, and more determinate sentences, accompanied by reductions in the discretion entrusted to judges and parole boards.

The potential effects of such changes on disparity, discrimination, proportionality, severity, accountability, and prison populations are discussed in Section IV. Section VI summarizes the results of modifying sentencing structures in eight states: California, Illinois, Indiana, Maine, Maryland, Michigan, Minnesota, and Pennsylvania.

III. DEFINITIONS

The labels used to characterize sentencing systems have been inconsistently defined and applied. In a 1981 survey of sentencing practices,⁸ the Pennsylvania Commission on Crime and Delinquency classified sentencing structures as "determinate" in 24 of the 35 states reviewed. In 1982, The New York State Department of Correctional Services classified sentencing systems in 13 states as either "presumptive determinate", "determinate discretionary," or "judicial determinate."⁹ One report published by the Bureau of Justice Statistics (BJS) in 1983¹⁰ classified sentencing structures as "determinate" in 25 of the 50 states, while another report published by BJS in the same year¹¹ listed only 9 of the 50 states in the "determinate sentencing" category.

The lack of uniform definitions has obscured certain issues that are central to the evaluation of potential sentencing structures. For example, some authors have included the possibility of discretionary parole release in their definitions of "determinate sentencing"; others have specifically excluded it. Some have assumed that "determinate sentencing" includes mandatory sentences or sentencing guidelines; others have not. Because the terms used to characterize sentencing systems have not yet acquired a consistent set of meanings, the debate regarding potential sentencing structures has often been muddled and laborious. A first order of business for meaningful public policy debate about sentencing structures is arriving at an explicit agreement on a common set of definitions.

The definitions adopted for this report have not been selected arbitrarily. Our review of sentencing systems suggests that some definitions are more useful than others for clarifying the issues and options policy makers must consider. Specifically, we recommend a set of narrow definitions similar to those adopted in the BJS Bulletin entitled "Setting Prison Terms."¹² These definitions treat "determinateness" and "mandatoriness" as separable issues. They are preferable to the more inclusive interpretations adopted by some reviewers because they highlight the distinction between judicial discretion and post-sentencing discretion. The

distinction also makes it more obvious that judicial discretion and post-sentencing discretion can be structured independently.

Structures that Limit Post-Sentencing Discretion

Sentencing structures vary considerably in the degree to which sentence length is fixed at the time of sentencing. The more tightly the sentence imposed by a judge constrains post-sentencing discretion, the more "determinate" the sentence. A sentence is less "determinate" to the extent that the length of time under state control can subsequently be established or altered by resentencing authorities (parole board or other corrections officials). A totally indeterminate system is one in which the sentence specifies whether a defendant is to be incarcerated, but the term of incarceration and the length of time under parole supervision are left totally to the discretion of corrections officials. A totally determinate system would be one in which the sentence imposed by the judge specifies whether a defendant is to be incarcerated, the precise length of incarceration, and the time under parole supervision. Prior to 1977, California's sentencing system had been almost totally indeterminate. At the other extreme, Maine's present sentencing system is almost totally determinate. However, most states have adopted systems that allow intermediate degrees of post-sentencing discretion. Figure 1 depicts the constraints on post-sentencing discretion associated with parole guidelines, min/max sentencing, and determinate sentencing. These are defined as follows:

Parole guidelines. Parole guidelines are procedures and standardized criteria to be used by a parole board in determining the length of time that an offender should remain in prison. Criteria typically include measures of offense seriousness, criminal history, and institutional behavior. Parole guidelines can generally be used in conjunction with min/max sentencing, but are incompatible with determinate sentencing, for which post-sentencing discretion regarding sentence lengths is definitionally excluded.

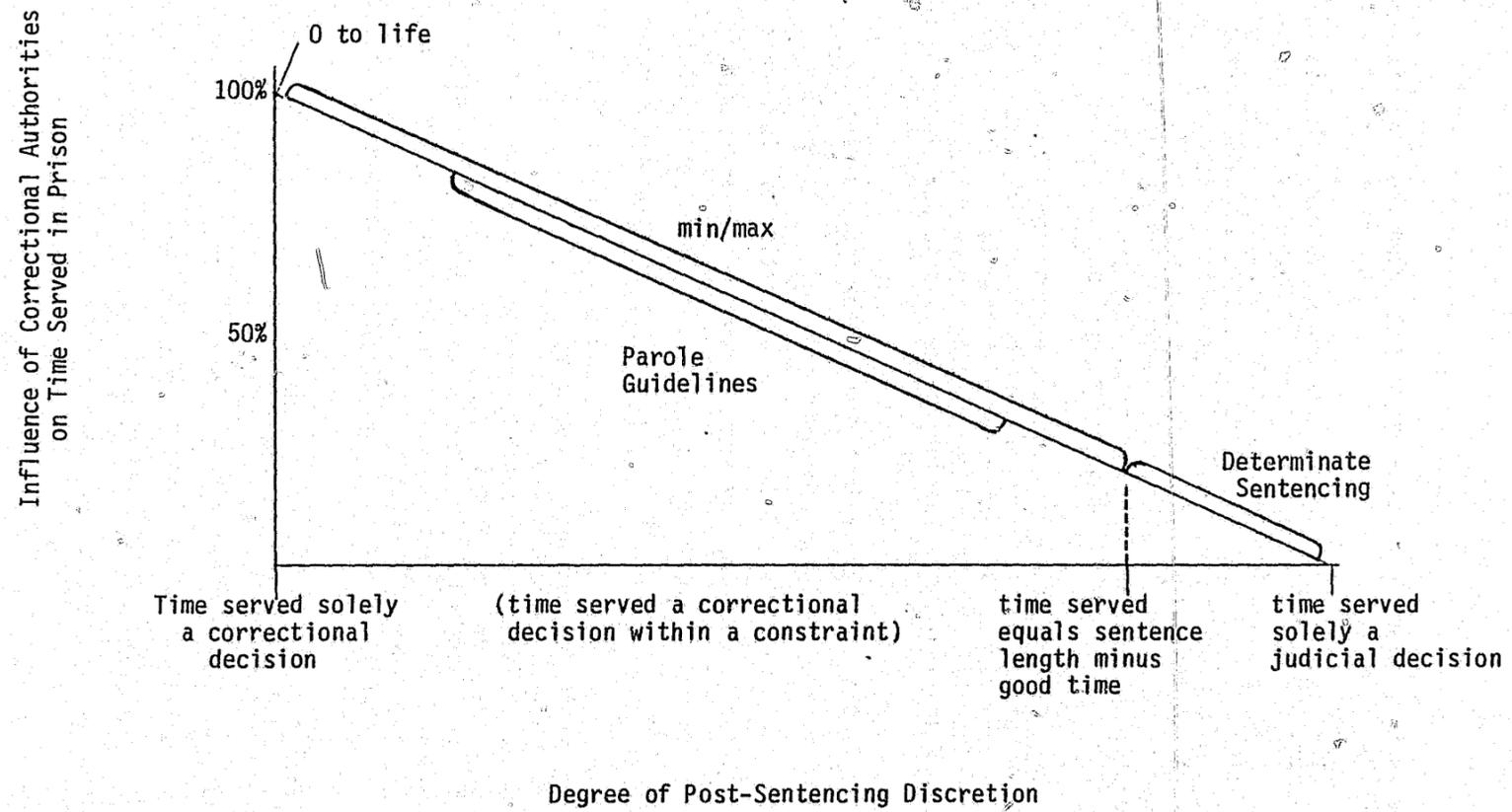
Min/max sentencing. Min/max sentencing is a system wherein the court specifies a minimum and maximum term of incarceration, but the parole board determines the actual release date, within the limits of the court-imposed sentence. The degree to which a min/max sentence limits post-sentencing discretion depends on the specified range. If the minimum is "zero" and the maximum is "life", the sentence is totally indeterminate. If the minimum equals the maximum, the sentence is "determinate" (as defined below). Systems





FIGURE 1

THE RANGE OF POST-SENTENCING DISCRETION IN DETERMINING SENTENCE LENGTH
[The Indeterminate/Determinate Issue]



vary as to whether "good time" may be deducted from the minimum, the maximum, or both.

Fixed sentencing. The term "fixed sentencing" is used differently in different states. A definition that encompasses all these usages views fixed sentencing as a special case of min/max sentencing. Only a single term is specified by the court, but it is treated as a maximum period of incarceration for which an associated minimum is automatically implied. The implied minimum is equal to the maximum in determinate systems, but for an indeterminate system it might be "zero" for all sentences, one year for all sentences, or some constant fraction of the maximum (e.g., 1/3). Not all fixed sentences are determinate, but all determinate sentences are fixed.

Determinate Sentencing. Determinate sentencing is a system in which the court specifies a fixed term of incarceration that must be served in full (minus good time). The influence of correctional authorities on actual time served in prison is limited to awarding (or revoking) good time credits on the basis of institutional behavior; there is no discretionary parole release.

In states that have truly instituted determinate sentencing, parole boards have been eliminated or their functions modified.¹³ Although determinate sentencing precludes early release at the discretion of the parole board, other functions typically performed by parole boards remain important. Each of the following functions is performed in one or more states by a parole board or an institutional review board within a determinate sentencing structure:

1. reviewing sentencing disparity;
2. waiving parole supervision;
3. establishing the length of parole supervision;
4. fixing prison terms for life sentences;
5. reviewing good time credits and disciplinary actions;
6. determining release dates for offenders sentenced before a determinate structure took effect;
7. supervising parolees (typically in less populous states).

New York is among the 41 states that currently impose indeterminate sentences. Sentences to prison in these states typically specify a minimum and a maximum term of incarceration (or a fixed term with an implied minimum) within which a parole board or institutional review board has the discretion to set actual release dates. In New York State, the exercise of that discretion is structured to some degree by

parole guidelines, but the guidelines are "descriptive, rather than prescriptive."¹⁴

An example of a highly determinate sentencing structure is the one instituted in Maine in 1976. The Maine statutes specify six classes of offenses, each carrying a statutory maximum penalty. The judge may impose probation or a determinate sentence of any length up to the statutorily defined maximum. Time served may be reduced by statutory good time credits, but there is no discretionary parole release or post-release supervision.¹⁵

Maine's highly determinate sentencing structure has no provision for mandatory minimum sentences; neither does it incorporate explicit guidelines to structure or limit judges' discretion. Determinacy refers to the extent to which sentences, once imposed, limit post-sentencing discretion; it is conceptually independent of whether the imposition of a particular sentence is mandatory.

Structures that Limit Judicial Discretion

The degree to which sentences are mandatory ranges from unfettered discretion, with sentencing decisions made solely by a judge, to sentences that are totally fixed by statute. In practice, most states have mandatory provisions for some categories of offenses or offenders and permit judges to exercise greater discretion in cases outside the targeted categories.¹⁶ Where discretion is permitted, it may be constrained by normative pressures, case law, legislation, or formally structured guidelines. (See Figure 2.)

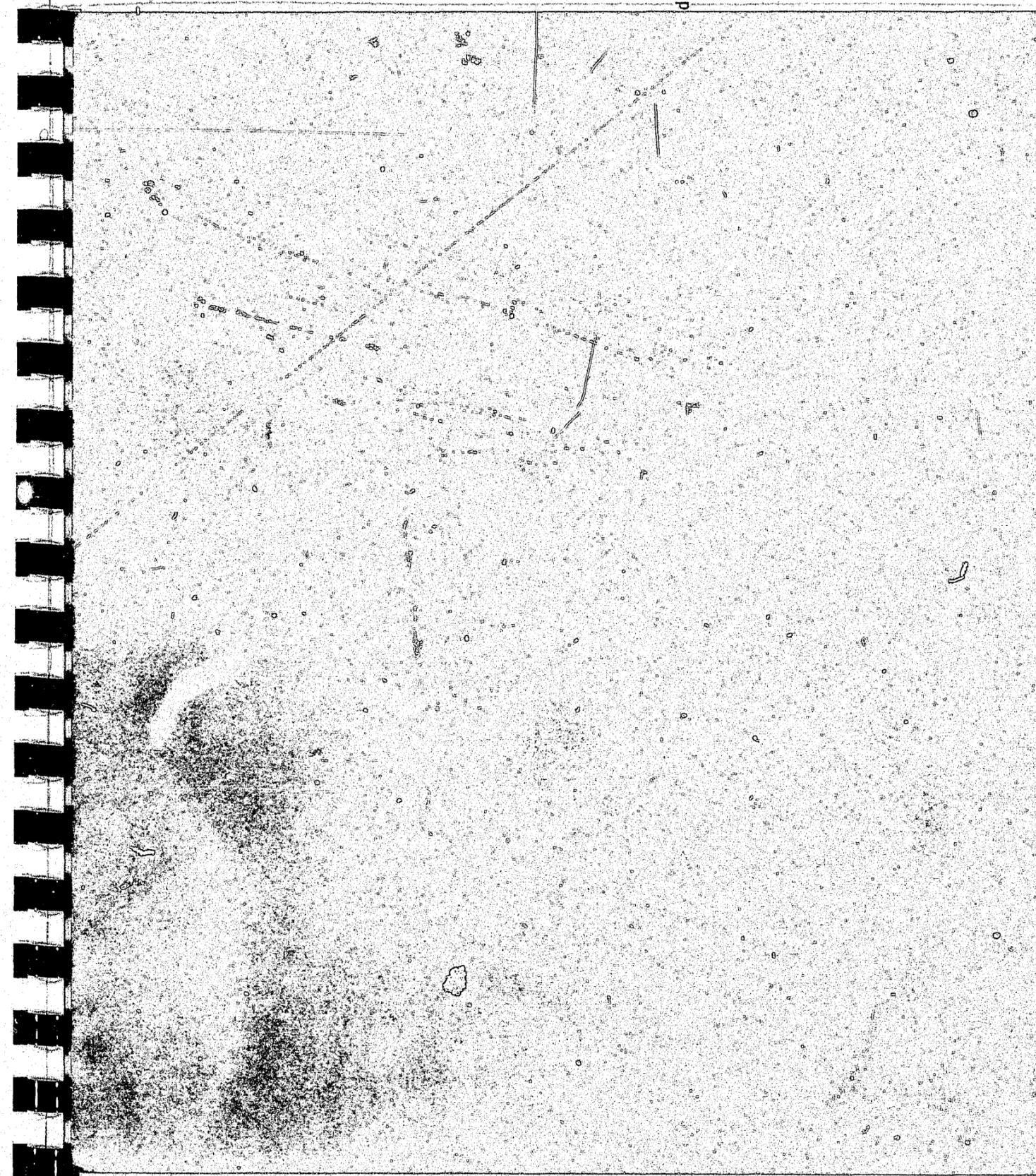
Statutory Limits. In most states the legislature has placed constraints on judicial discretion by establishing upper limits, lower limits, or ranges for each offense. The court may not impose terms of incarceration that are shorter than specified by the lower limits or longer than specified by the upper limits. The limits could apply to the fixed terms, maximum terms, or minimum terms in an indeterminate system. Statutory lower limits on terms of incarceration do not necessarily imply mandatory incarceration; the court may have the discretion to impose either a non-incarcerative sentence or an incarcerative sentence within the allowable range.

Mandatory Sentences. Mandatory sentencing involves a minimum incarcerative sentence that must be imposed for certain crimes or categories of offenders, without an option for probation, suspended sentence, or immediate parole eligibility. Mandatory provisions can apply to the "in/out" determination, the minimum term, the maximum term, or some combination of these. Mandatory provisions can be incorporated into both determinate and indeterminate systems.

Presumptive Sentencing. In some states, judges' decisions are constrained by a legislatively established "presumptive" sentence. It is presumed that a specific sentence identified by statute (e.g., a determinate sentence of three years minus good time for house burglary) will be the sentence imposed in all unexceptional cases. If mitigating or aggravating circumstances exist, the sentence usually may be lengthened or shortened within specific boundaries, but a judge cannot impose a prison sentence outside the specified range. Presumptive sentencing is similar to mandatory sentencing in that the sentencing prescriptions carry the force of law. It differs from mandatory sentencing in that presumptive sentencing provides explicit procedures for exceptional handling of legitimately exceptional cases.

Sentencing Guidelines. Sentencing guidelines can be implemented through legislation, judicial decree or by voluntary judicial adoption. Guidelines generally specify a narrow range of sentencing options from which a specific sentence is to be selected for unexceptional cases. The range of sentences specified is typically determined by the seriousness of the offense, the offender's criminal history, prevailing sentencing practices, or various combinations of these elements. Compliance with guidelines may be voluntary or presumptive. "Descriptive guidelines" merely provide empirical information about past practice in the hope that judges will examine more carefully their justification for sentences that depart drastically from the norm. Alternatively, guidelines may be prescriptive and presumptive, holding judges strictly accountable for sentences outside the specified ranges. For example, judges may be required to justify exceptional sentences in writing, or such sentences may be subject to automatic appellate review.

California has adopted a sentencing structure that combines presumptive guidelines with determinate sentencing. The California Legislature has defined lower, middle, and upper prison terms for specified offenses. For house burglary, for example, the permissible terms of incarceration are 2 years, 3 years, or 4 years. If probation is not imposed, the defendant must be sentenced to the middle term, unless aggravating or mitigating circumstances justify the upper or lower term. Legislatively authorized enhancements for weapons use, prior record, or bodily harm may be added to the base term.¹⁷



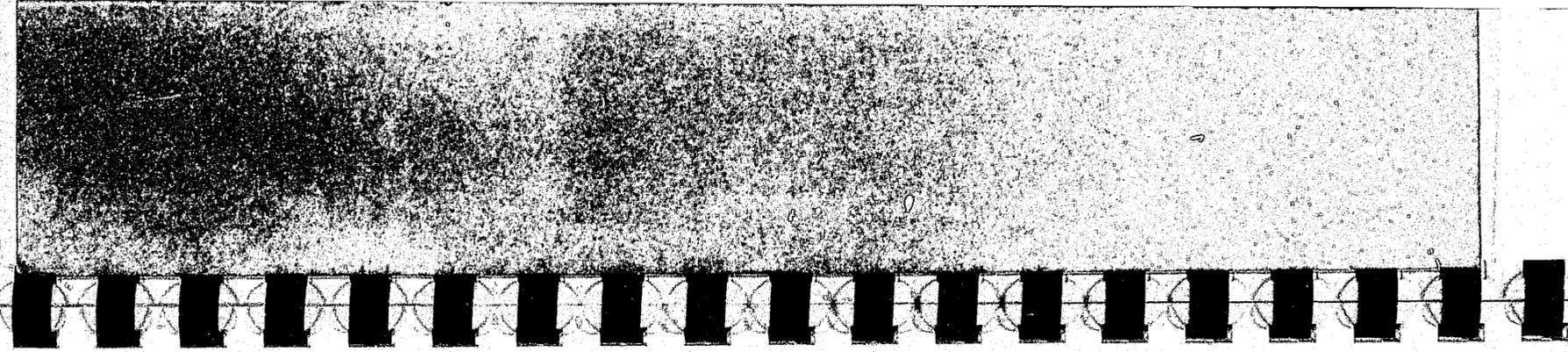
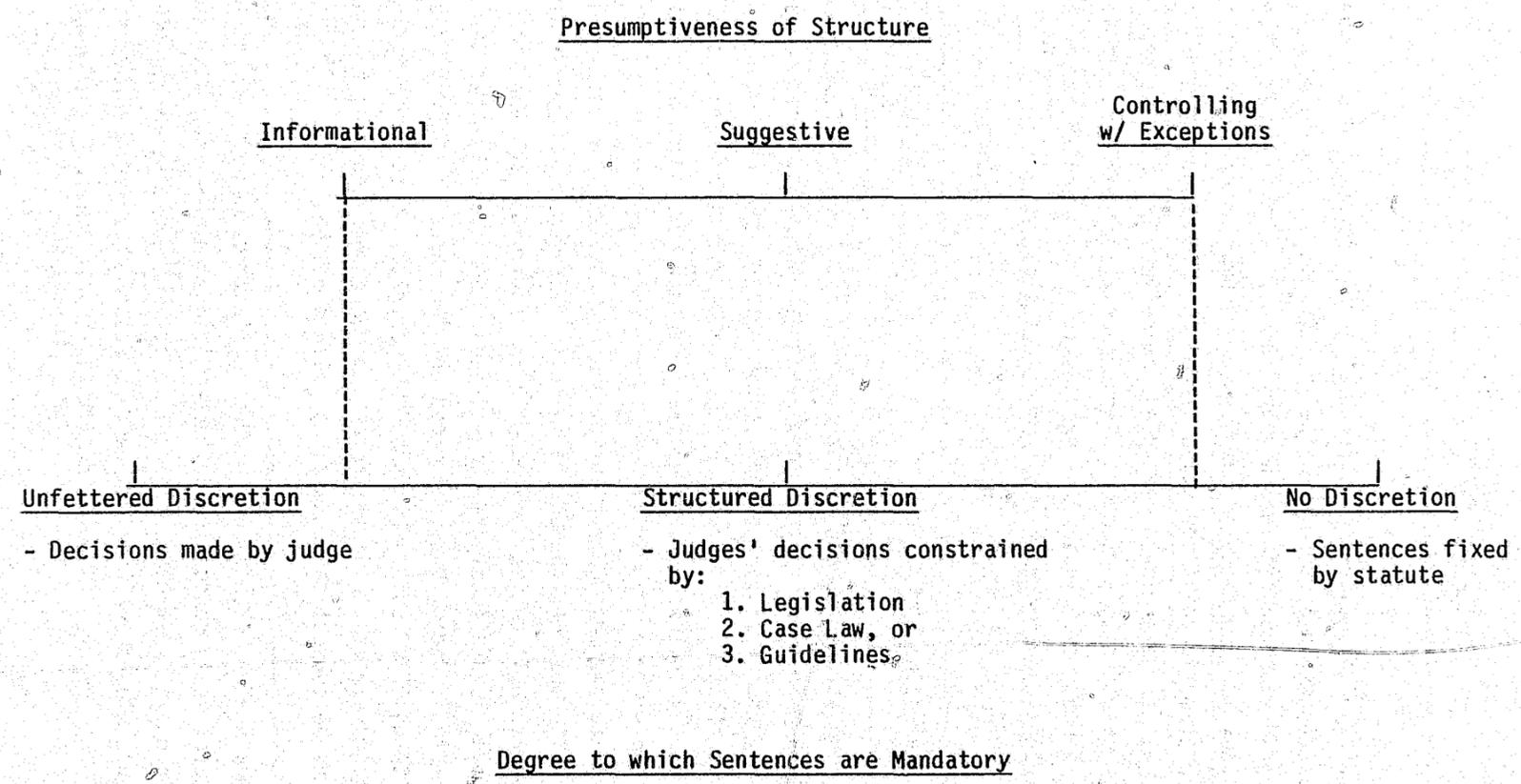


FIGURE 2
THE RANGE OF JUDICIAL DISCRETION



The prototypical guidelines structure is the one adopted by Minnesota in 1980.¹⁸ The Minnesota Sentencing Guidelines Commission developed a sentencing guidelines grid based on criminal history and offense seriousness (see Figure 3). Below the heavy line on the grid there is a presumption of incarceration; above it there is a presumption of alternative sanctions. Although the Minnesota guidelines specify ranges for determinate sentences, guidelines can also be overlaid on an indeterminate sentencing structure. Pennsylvania, for example, applies guidelines (based on offense gravity and prior record) to minimum sentences for all misdemeanors and felonies within an indeterminate system.

Summary of Sentencing Structures

Sentencing structures can be characterized in terms of the kinds of constraints they impose on discretion. Features that limit post-sentencing discretion include parole guidelines, min/max sentences, fixed sentences, and determinate sentences. Features that limit judicial discretion include statutory limits, mandatory sentences, presumptive sentences, and sentencing guidelines.

Determinate sentencing is a system in which the court specifies a fixed term of incarceration that must be served in full (minus good time). Within determinate systems, judicial discretion to impose incarceration and set sentence lengths ranges from very broad to tightly constrained. Sentencing guidelines generally specify a narrow range of sentencing options for cases of a given type, usually defined in terms of offense seriousness and criminal history. Judges may be required to provide written justification for sentences outside the range, or such sentences may be subject to automatic appellate review.

New York State currently has an indeterminate sentencing system in which release discretion is constrained by court imposed minimum and maximum terms, statutory good time provisions, and "descriptive" parole release guidelines. Judicial sentencing discretion in New York State is constrained by statutory ranges and by a variety of provisions through which the legislature has required mandatory

Minnesota Sentencing Guidelines Grid

Presumptive Sentence Lengths in Months^a

Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure.

SEVERITY LEVELS OF CONVICTION OFFENSE	CRIMINAL HISTORY SCORE ^b						
	0	1	2	3	4	5	6 or more
<i>Unauthorized Use of Motor Vehicle</i> <i>Possession of Marijuana</i> I	12*	12*	12*	15	18	21	24
<i>Theft Related Crimes (\$150-\$2500)</i> <i>Sale of Marijuana</i> II	12*	12*	14	17	20	23	27 25-29
<i>Theft Crimes (\$150-\$2500)</i> III	12*	13	16	19	22 21-23	27 25-29	32 30-34
<i>Burglary - Felony Intent</i> <i>Receiving Stolen Goods (\$150-\$2500)</i> IV	12*	15	18	21	25 24-26	32 30-34	41 37-45
<i>Simple Robbery</i> V	18	23	27	30 29-31	33 36-40	46 43-49	54 50-58
<i>Assault, 2nd Degree</i> VI	21	26	30	34 33-35	44 42-46	54 50-58	65 60-70
<i>Aggravated Robbery</i> VII	24 23-25	32 30-34	41 38-44	49 45-53	65 60-70	81 75-87	97 90-104
<i>Assault, 1st Degree</i> <i>Criminal Sexual Conduct, VIII</i> <i>1st Degree</i>	43 41-45	54 50-58	65 60-70	76 71-81	95 89-101	113 106-120	132 124-140
<i>Murder, 3rd Degree</i> IX	97 94-100	119 116-122	127 124-130	149 143-155	176 168-184	205 195-215	230 218-242
<i>Murder, 2nd Degree</i> X	116 111-121	140 133-147	162 153-171	203 192-214	243 231-255	284 270-298	324 309-339

1st Degree Murder is excluded from the guidelines by law and continues to have a mandatory life sentence.

*one year and one day

Notes: ^aThe grid presented here reflects the original guidelines. Significant revisions have occurred since this grid was published.

^bThe criminal history score is computed according to complex criteria involving prior felony record, prior misdemeanor record, prior juvenile record, and custody status at the time of the offense.

Source: Minnesota Sentencing Guidelines Commission, Report to the Legislature, January 1, 1980.

periods of incarceration for certain classes of offenses and offenders. Sentence types, post-sentence release options, and legislative constraints on judicial discretion are summarized for all 50 states and the District of Columbia in Tables 1 and 2. Additional detail is provided in the Appendix.

TABLE 1

STATES WITH DETERMINATE SENTENCING STRUCTURES

State	Legislative Constraints on Judicial Discretion	Post Sentence Discretion		
		Sentence Length	Parole Release	Good Time
California	Presumptive	Fixed	No	Yes
Colorado	Presumptive	Fixed	No	Yes
Connecticut	Range	Fixed	No	Yes
Illinois	Range	Fixed	No	Yes
Indiana	Presumptive	Fixed	No	Yes
Maine	Upper Limit	Fixed	No	Yes
Minnesota	Guidelines ^a	Fixed	No ^b	Yes
New Mexico	Presumptive	Fixed	No ^b	Yes
North Carolina	Presumptive	Fixed	No ^c	Yes

- NOTES: a. Minnesota - The guidelines indicate which defendants should be incarcerated and the presumptive range of sentence lengths for those incarcerated. If a judge imposes a sentence that departs from the guidelines, a written justification for the sentence must be provided.
- b. New Mexico - Parole release available for lifers after 30 years.
- c. North Carolina - There is a mandatory 90 day parole release prior to expiration of term (less good time). Parole release function retained for prisoners sentenced prior to 1982 and for some youthful offenders.

TABLE 2

STATES WITH INDETERMINATE SENTENCING STRUCTURES

State	Legislative Constraints on Judicial Discretion	Post Sentence Discretion		
		Sentence Length	Parole Release	Good Time
Alabama	Range	Fixed	Yes	Yes
Alaska	Range ^a	Fixed	Yes	Yes
Arizona	Presumptive	Fixed	Yes	Yes
Arkansas	Range	Fixed ^b	Yes	Yes
Delaware	Upper Limit	Fixed	Yes	Yes
District of Columbia	Range	Min/Max	Yes	Yes
Florida	Upper Limit	Fixed ^c	Yes	Yes
Georgia	Range	Fixed	Yes	Yes
Hawaii	Upper Limit	Fixed ^c	Yes	Yes
Idaho	Upper Limit	Fixed ^c	Yes	Yes
Iowa	Upper Limit	Fixed	Yes	Yes
Kansas	Range	Min/Max	Yes	Yes
Kentucky	Range ^d	Fixed	Yes	Yes
Louisiana	Range	Fixed	Yes	No
Maryland	Upper Limit ^e	Fixed ^e	Yes	Yes
Massachusetts	Range	Min/Max	Yes	Yes
Michigan	Upper Limit	Min/Max	Yes	Yes
Mississippi	Upper Limit	Fixed	Yes	Yes

- NOTES: a. Alaska - Presumptive for Repeat Offenders.
 b. Arkansas - Minimum and Maximum Sentences are Set for Repeat Offenders.
 c. Florida, Hawaii, Idaho, North Dakota, Washington - Parole Board Sets Minimum.
 d. Kentucky - Judge may Sentence Outside Range.
 e. Maryland - Some offenses carry statutory ranges for minimum/maximum lengths. Experimenting with sentencing guidelines in four jurisdictions which cover the bulk of its criminal activity.

TABLE 2 (Cont'd)

State	Legislative Constraints on Judicial Discretion	Post Sentence Discretion		
		Sentence Length	Parole Release	Good Time
Missouri	Upper Limit ^f	Fixed	Yes	Yes
Montana	Upper Limit	Fixed	Yes	Yes
Nebraska	Range	Min/Max	Yes	Yes
Nevada	Range	Fixed	Yes	Yes
New Hampshire	Range	Min/Max	Yes	Yes
New Jersey	Presumptive	Fixed ^g	Yes	Yes
New York	Range	Min/Max	Yes	Yes
North Dakota	Upper Limit	Fixed ^c	Yes	Yes
Ohio	Range	Min/Max	Yes	Yes
Oklahoma	Upper Limit	Fixed ^h	Yes	Yes
Oregon	Upper Limit	Fixed	Yes	Yes
Pennsylvania	Guidelines	Min/Max	Yes	No
Rhode Island	Upper Limit	Fixed	Yes	No
South Carolina	Upper Limit	Fixed ⁱ	Yes	Yes
South Dakota	Upper Limit	Fixed ⁱ	Yes	Yes
Tennessee	Lower Limit	Min/Max ^j	Yes	Yes
Texas	Range	Min/Max	Yes	Yes
Utah	Range	Min/Max	Yes	No
Vermont	Range	Min/Max ^k	Yes	Yes
Virginia	Range	Min/Max	Yes	Yes
Washington	Upper Limit	Fixed ^c	Yes	Yes
West Virginia	Range	Min/Max	Yes	Yes
Wisconsin	Upper Limit	Fixed	Yes	Yes
Wyoming	Range	Min/Max	Yes	Yes

- f. Missouri - There is a statutorily set range for Class A and B felonies. There is no good time. However, there is a system of conditional release which serves the same end as early release.
 g. New Jersey - Judge may establish mandatory minimums for first and second degree crimes.
 h. Oklahoma - Judge is allowed to establish a minimum and maximum sentence if so desired.
 i. South Dakota - At discretion of Governor and Parole Board.
 j. Tennessee - Certain offenses (Class X) do not allow reductions based on good time.
 k. Vermont - Some sentences are fixed by statute.

IV. POTENTIAL EFFECTS OF DETERMINATE
SENTENCING AND SENTENCING GUIDELINES

On Discretion

Discretion in the handling of alleged and convicted offenders may be exercised by many different participants at any of several stages in case processing.

... to restrict attention only to what judges do would fail to acknowledge other processes and participants that influence whether convicted offenders go to prison and how long they stay there. Witnesses and victims do or do not cooperate with authorities. Police officers decide whether to arrest and book, and for what offense. Prosecutors decide whether to prosecute and for what charge and often negotiate with the defense counsels about charge dismissals and sentencing concessions in exchange for guilty pleas. In some cases a judge or a jury determines guilt; more often a judge accepts a guilty plea. After conviction the judge announces the sentence. Prison officials decide whether an individual prisoner will be awarded "good time," and parole boards decide when and under what conditions an individual will be released and when parole status will be revoked.¹⁹

Sentencing guidelines and determinate sentencing directly affect only two of the many stages in case processing - the imposition of a sentence given conviction and the determination of a release date given incarceration. However, knowledge of the constraints placed on sentencing and release decisions can also influence the decisions of participants at other stages. Thus, rather than limiting the total amount of discretion in the system, such constraints could merely shift the exercise of discretion to different participants in case processing.

A change from indeterminate sentencing to determinate sentencing transfers responsibility for sentence length from the parole board to the sentencing judge, thus effectively increasing the importance of judicial discretion. However, determinate sentencing does not eliminate post-sentencing discretion. Depending on the rules for awarding good time, the net influence of corrections officials on actual time served might also increase. In addition, the parole board may or may

not retain the authority to establish the period of post-release supervision, or to reincarcerate supervises releases because of a violation.

The imposition of sentencing guidelines is explicitly intended to limit judicial discretion. How narrowly sentencing is actually constrained by guidelines will depend on a number of factors. The most important of these is whether the guidelines are voluntary or presumptive. Even if they are presumptive, the actual effect on discretion will depend on the procedures for handling those cases that judges believe warrant exceptional sentences. The more closely sentencing is monitored, and the more difficult it is to justify and sustain exceptional sentences, the more selective the court must be in the exercise of discretion.

Guidelines can be used to structure both the decision to incarcerate and subsequent sentence length determinations. Thus, they can be designed to serve the same objectives as statutes that mandate minimum periods of incarceration in specified cases. However, guidelines can provide the flexibility to accommodate legitimately exceptional cases explicitly within the sentencing procedures; with mandatory provisions, such accommodations can be accomplished only by subverting the determinations of guilt.

To the extent there is compliance with sentencing guidelines, the effects on judicial discretion then depend chiefly on characteristics of the guidelines themselves. It is obvious that judicial discretion in a given case depends directly on the range of sentences specified for the associated classification category. It is perhaps less obvious that constraining effective discretion depends to an even greater extent on limiting the opportunities for manipulating the calculation of guidelines scores. Judges can retain considerable discretion to the extent they can influence charge bargaining, validation of criminal histories, or handling of aggravating and mitigating circumstances.

In summary, a change from indeterminate to determinate sentencing transfers control over sentence length from the parole board to the courts and corrections officials. Sentencing guidelines are intended to structure the exercise of

judicial discretion, but may be vulnerable to circumvention. Depending on the detailed provisions of the guidelines system and on the control the court exercises over prosecutorial discretion, the combined result of determinate sentencing and sentencing guidelines could be either to concentrate sentence length determinations in the court or to shift control over sentence length to police and prosecutors.

The discussions in the remainder of this section are predicated on the assumption that the availability of time off for good behavior remains essentially constant. It is assumed that good time is contingent only on institutional behavior, and that it is awarded or revoked in accordance with strict rules and procedures that are subject to external review. In other words, it is assumed that good time is not permitted to evolve into the equivalent of parole release.

On Accountability

Indeterminate sentencing is characterized by a diffusion of responsibility. Determinate sentencing places the responsibility for sentencing squarely with the court. Doing so significantly alters the possibilities for establishing accountability in sentencing.

Judges are generally accountable to local constituencies and professional associations; they are also specifically accountable to higher courts for decisions in individual cases. Accountability to the public for specific sentencing decisions is somewhat diluted, however, because judges do not have exclusive responsibility for sentence length and, in New York State, they often do not have discretion about whether to incarcerate defendants. One who believes that an offender was imprisoned for too long could fault either the parole board for not releasing the offender soon enough or the judge for imposing an excessive term.

Determinate sentencing can empower judges with most of the responsibility for sentence length. Given that responsibility, sentencing guidelines can be applied in a manner that makes judges accountable for individual sentence length decisions. Guidelines explicate public policy regarding the legitimacy of sentencing criteria

and the handling of offenders who are similarly situated with respect to those criteria. Consequently, they provide the means of defining and reviewing exceptional sentences. Guidelines do not eliminate judicial sentencing discretion. However, to the extent that guidelines require judges to justify exceptional sentences, guidelines can make judges accountable in the exercise of that discretion.

Sentencing guidelines also intentionally shift some of the power to establish sentencing policy from the local level to the state level. The judges who handle criminal proceedings in New York State are primarily responsible to local electorates; therefore, one can expect judges' sentencing decisions to reflect local standards. Sentencing guidelines establish statewide standards and make judges accountable to the legislature (and/or a guidelines commission). One of the explicit reasons for establishing sentencing guidelines is to reduce interjurisdictional variations in sentencing patterns. This may pose a dilemma for elected judges, who will find themselves simultaneously accountable for upholding state and local standards.

On Disparity and Discrimination

Disparity and discrimination are terms - like determinate sentencing - for which there are no universally accepted definitions. Again, however, the definitions adopted in this report were chosen because they help clarify certain issues and options that need to be considered. The following definitions are taken verbatim from the 1983 report by the National Academy of Sciences Panel on Sentencing Research.²⁰

Discrimination exists when some case attribute that is objectionable - typically on moral or legal grounds - can be shown to be associated with sentence outcomes after all other relevant variables are adequately controlled.

Disparity exists when "like cases" with respect to case attributes - regardless of their legitimacy - are sentenced differently.

As defined by the Panel, discrimination is a systematic bias that arises from the application of illegitimate sentencing criteria. Criteria that might be considered illegitimate include race, sex, socio-economic status, bail status and type of attorney. Disparity is unwarranted variation that results from inconsistent application of sentencing criteria. Examples include inconsistent application of criteria from one case to another by a single judge and differences in the choice or weighting of criteria across judges or jurisdictions. The relationships among these considerations are displayed in Table 3.

TABLE 3
Sentence Outcomes Characterized
in Terms of Disparity and Discrimination

Legitimacy of Sentencing Criteria	Application of Sentencing Criteria	
	Consistent	Inconsistent
Legitimate	No disparity and no discrimination	Disparity
Illegitimate	Discrimination	Disparity and discrimination

Source: Blumstein et al. Research on Sentencing, the Search for Reform (Volume 1)
Washington D.C.: National Academy Press, 1983. p. 9.

Discussions of the influence of sentencing structures on disparity and discrimination are complicated by disagreements regarding what criteria are legitimate, the resulting definitions of "like cases," and the amount of variation among like cases that is considered tolerable. Agreement regarding legitimate criteria depends, in turn, on agreement regarding the goals of sentencing. For example, if it is agreed that optimizing public protection through selective incapacitation is to be the primary goal of sentencing, then chronic unemployment

might be viewed as a legitimate sentencing criterion to the extent chronic unemployment is found to predict recidivism. On the other hand, if the only goal is to effect retribution that is proportional to personal culpability, then chronic unemployment would not be considered a legitimate criterion.

Sentencing guidelines should explicate public policy regarding both the goals of sentencing and the criteria that are to be applied in making sentencing decisions. To the extent public agreement on these issues can be achieved, disparity and discrimination can be more clearly defined and more easily monitored. Of course, those who disagree with the established public policy may also disagree with any conclusions about disparity and discrimination that are rooted in that policy.

Whether sentencing guidelines are perceived as reducing or perpetuating disparity and discrimination depends in part on whether the criteria incorporated in the guidelines are consistent with the criteria by which disparity and discrimination are evaluated. For example, if guidelines criteria are naively derived from empirical studies of factors that have influenced past practice, but some of those factors are considered illegitimate within the framework of current sentencing goals, the guidelines may institutionalize discrimination as it is currently defined.²¹

The impact of sentencing guidelines also depends on whether sentencing is currently the predominate source of disparity and discrimination. For example, if a major source of discrimination happened to be systematic bias in the ability to negotiate a "good deal" with prosecutors, the imposition of sentencing guidelines may actually increase net discrimination by reducing the flexibility to compensate at the time of sentencing. Likewise, if disparity happened to be due to random variation in the quality of evidence (affecting what charges are prosecuted or what bargains are offered), then sentencing guidelines would be unlikely to affect the resulting disparity. Nevertheless, guidelines facilitate the study of such issues; and to the extent that the sources of such problems can be illuminated, the

likelihood of devising effective strategies for dealing with them will be increased.

Similar arguments apply to the potential effects of determinate sentencing. A change from indeterminate to determinate sentencing will reduce disparities in sentence length only to the extent that parole release decisions have previously been inconsistent (among like cases). The change will reduce discrimination only to the extent that parole release decisions have previously been based on illegitimate criteria. In New York State, the present parole release guidelines focus exclusively on indicators of personal culpability. Consequently, release decisions that are within the guidelines are not likely to be viewed as discriminatory, at least from a "just deserts" perspective. However, in 1979 and 1980 nearly half of the parole release decisions departed from the guidelines. Thus, it remains uncertain whether in New York State there has existed any significant degree of "unwarranted" disparity or discrimination in the exercise of post-sentencing discretion. If there has, it may be reduced by a change to determinate sentencing. However, a shift to determinate sentencing may also be accompanied by a relative increase in the importance of any disparity or discrimination that may exist in awarding good time.

Determinate sentencing makes judges fully responsible and openly accountable for sentencing; if unwarranted random or systematic variations are observed, there can be little question of whom to hold accountable. This is true even if discrepancies arise from plea bargaining practices, which are ultimately under judicial control. Even granting that resource constraints and normative traditions create considerable pressure to engage in plea bargaining, judges have the responsibility and the influence to promote consistency and fairness in that process.

The net effects of determinate sentencing and sentencing guidelines depend in part on whether the structure adopted succeeds in concentrating effective discretion in the courts. If it does, then monitoring compliance with the guidelines and refining the guidelines in the light of experience may eventually

effect net reductions in disparity and discrimination. If effective discretion shifts to police and prosecutors, this may reflect concerted efforts to maintain the status quo; under the latter conditions disparity and discrimination may be perpetuated or may even increase.

On Proportionality

The potential influences of determinate sentencing and sentencing guidelines on proportionality in punishment depend on many of the same considerations discussed in connection with disparity and discrimination. Key among these is agreement regarding the characteristics that reflect personal culpability. Proportionality will be enhanced only if there is agreement regarding the measurement of culpability, if the agreed upon measures are incorporated in the guidelines, if there is substantial compliance with the guidelines, and if the courts are able to prevent "disproportional" processing by police and prosecutors.

On Severity

The effect of determinate sentencing on severity of punishment is unpredictable. It will depend in part on the relationship between the statutory limits on sentence lengths under a prior indeterminate structure and the statutory limits established for the determinate structure. Because determinate sentencing shifts responsibility for sentence length from the parole board to the court, the outcome will also depend on whether judges are generally more or less inclined than the parole board to impose harsh sentences.

The imposition of sentencing guidelines gives the legislature, or the judiciary and/or the guidelines commission closer control over sentence severity. Depending on their inclinations this could result in generally more severe sentences, generally less severe sentences, or increased severity for some kinds of cases balanced against decreased severity for others.

On Prison Population

As with severity, the effects of introducing determinate sentencing and sentencing guidelines are unpredictable. Any changes in prison population that result from a change in sentencing structure may simply reflect general policy changes in sentencing goals and criteria, or the interaction of such changes with changes in crime patterns. As noted in the previous section, sentencing guidelines can be structured to produce generally more severe sentences, generally less severe sentences, or increased severity for some kinds of cases balanced against decreased severity for others. Thus, there is the option to adopt a guidelines system that will keep prison populations within existing capacity or to finance any increases that new sentencing criteria might produce. In any case, the combination of determinate sentencing and sentencing guidelines greatly facilitates forecasting prison populations for planning purposes.

V. IMPLEMENTATION ISSUES

Real time. Maximum terms imposed under an indeterminate system are largely symbolic. Offenders rarely serve their maximum terms, and the time they actually serve is typically much less than one might suppose. Of the inmates discharged from New York State prisons in 1981, only 6.7% had served their maximum terms. Only 28.6% served their maximum terms minus good time (conditional releases), while 56.4% were paroled. Among male inmates paroled for the first time, the median time actually served was 15.5 months for 3-year maximums, 27.1 months for 5-year maximums, 78.0 months for maximums of 20 years or greater, and only 33.2 months for "life" maximums.

The dramatic difference between symbolic maximum terms and the typical time served under an indeterminate system poses a difficult challenge for policy makers who are designing a determinate sentencing system. Unless statutory limits or sentencing guidelines produce "real time" sentences that result in a net equivalence to current practice, the change in structure is likely to produce dramatic changes in prison populations and discrepancies between sentences imposed before and after the change. However, determinate sentences that are equivalent to current practice will appear superficially to be "soft on crime." Given the public sentiment for more punitive sanctions, it will be difficult for legislators to embrace and defend such a system.²² Systems that are not in this sense "soft on crime" will result in increased prison and jail populations and attendant increases in public expenditures. A real problem in designing determinate sentencing systems is forecasting how much "justice" the public is willing to pay for.

Feedback. Another potential problem follows directly from the very effort to limit discretion that motivates many efforts at sentencing reform. Discretion in post-sentencing decisionmaking can be reduced by adopting determinate sentencing. Discretion in sentencing can be reduced or structured by adopting sentencing guidelines. Yet, if both sentencing and post-sentencing discretion are minimized,

the justice system loses much of its ability to adjust informally to changes in crime patterns, system resources, or pre-sentence processing.

To compensate for this loss it is necessary to provide formal feedback mechanisms. For example, Minnesota has provisions for revising its sentencing guidelines if prison populations exceed 95 percent of prison capacity;²³ Michigan makes inmates eligible for parole consideration 90 days early when prisons are overcrowded;²⁴ and the California Board of Prison Terms reviews sentence disparity and good time credits. Other examples include routine review of sentences that depart from established guidelines (and evaluation of the justifications for departures), and continual monitoring of charging patterns. Consistent departures from the guidelines or substantial changes in charging patterns may signal either an effort to circumvent the intent of a sentencing reform, or a legitimate need for revision. In either case, explicit feedback provisions permit necessary adjustments in system operation.

Key policy decisions. In order to develop a coherent system of sentencing guidelines it is necessary to adopt an explicit position on the goals of sentencing and to agree upon the criteria that are to be applied in making sentencing decisions. Establishing workable criteria is complicated by the fact that prosecutors and defense attorneys may be able to use guidelines criteria to manipulate sentencing. The National Panel on Sentencing Research identified the following key policy decisions related to sentencing criteria:²⁵

- "1. Whether to base new decisions on conviction offenses, thereby tying sentences to the outcomes of counsels' negotiations over charges, or on actual offense behavior as determined at a sentencing hearing."
- "2. Whether to establish explicit sentence concessions for guilty pleas."
- "3. Whether to exclude from consideration in new sentencing standards variables that are ethically or normatively suspect: e.g., prior arrests may explain some variation in sentencing practices independently of other prior record factors, yet punishment for prior alleged conduct not resulting in conviction offends important legal values."

- "4. Whether to authorize intercourt disparity within the same jurisdiction: e.g., the differences between rural and urban regions within a state might be perpetuated by providing local courts with a sufficiently broad range of sentences to choose from or suppressed by trying to force them all into a more narrow range."

VI. THE RESULTS IN OTHER STATES

Previous sections have defined the terminology used to characterize sentencing systems, and discussed the potential effects of determinate sentencing and sentencing guidelines on discretion, accountability, disparity and discrimination, proportionality, severity, and prison populations. This section presents information about the reported effects of the structures implemented in five of the nine determinate sentencing states. Similar information is also provided for three states that have tested or adopted sentencing guidelines within indeterminate systems. Unless otherwise noted, information about sentencing structures was compiled from three principal sources: A Survey of Mandatory Sentencing in the U.S. published by the Pennsylvania Commission on Crime and Delinquency,²⁶ a report on Judicial and Executive Discretion in the Sentencing Process²⁷ prepared at the Institute for Advanced Studies in Justice at American University, and direct telephone conversations with criminal justice officials in other states.

California (Determinate/Presumptive)

California's Uniform Determinate Sentencing Law (DSL) became effective July 1, 1977, replacing an indeterminate model (ISL). The ISL was based on a rehabilitative model.²⁸ The stated objective of the new system is punishment, with procedures to promote fairness and uniformity. For each felony offense, the law prescribes a "middle term," which is the presumptive term of incarceration for unexceptional cases. The law also specifies "lower" and "upper" terms that may be applied when justified by a preponderance of the evidence (aggravating or mitigating). The "lower" and "upper" terms are not limits to a range, but prescribed sentences. A sentence can be lengthened if (a) a deadly weapon was used or carried, (b) great bodily injury was inflicted, or (c) the defendant had served a prior prison term. Each enhancement adds one year, two years, or three years to the prescribed term. Judges are generally free to choose incarceration, probation, or a suspended sentence, but criteria to be considered are included in the law, and certain offenders are not eligible for probation. Probation disqualifiers and

grounds for enhancement must be alleged and proved explicitly, and reasons for all sentences must be formally recorded.

Plea bargaining. It was widely assumed that the DSL would result in an increase in plea bargaining activity. The law shifts effective responsibility for sentence length from the parole board to the courts, thereby providing an incentive for court room participants to engage in sentence bargaining. The law also invites charge bargaining, because it is so explicit about what sentences should be imposed for particular crimes and about the circumstances that justify enhancements or preclude probation. In effect, the law provides court room participants with "bargaining chips" that have unambiguous consequences for defendants. If grounds for enhancement are alleged and proved, a predictable amount of time will be added to the base term. If a prosecutor offers to drop an allegation in exchange for a guilty plea, the benefits to the defendant are easily understood. Therefore, many expected the DSL to result in a higher rate of guilty pleas, earlier guilty pleas, and a transfer of effective control over sentence length to police and prosecutors.

As compelling as this rationale seems, the empirical evidence regarding plea bargaining is inconclusive. "Interviews with court room participants ...[did reveal] a widespread belief that the DSL had caused an increase in the rate of guilty pleas."²⁹ In fact, a study that focussed on Santa Clara, San Francisco, and San Bernardino Counties found post-DSL increases in both the overall rates of guilty pleas and the proportion of guilty pleas entered at initial appearance. These increases were noted in all three of the counties studied. The increases were especially strong for robbery cases, which carry potentially severe sentences. However, from a long term perspective, the data for those three counties exhibit an unexplained decrease in plea bargaining beginning in 1974 or 1975, followed by a return to pre-1975 levels following the introduction of the new system. Therefore, the recent increases in plea bargaining may be attributable to the influence of the DSL, or may simply reflect normal fluctuations in case processing.

There does not appear to have been any dramatic shift in influence from judges to prosecuting attorneys in Santa Clara, San Francisco, or San Bernardino County. Direct observations of plea-bargaining discussions and the results of numerous interviews indicated that plea bargaining had been dominated by judges in San Francisco County prior to the DSL, and continued to be judge-dominated afterward. Likewise, plea bargaining in Santa Clara County and San Bernardino County had been dominated by prosecuting attorneys prior to the DSL, and continued to be prosecutor-dominated afterward.

Moreover, to the extent that the DSL appears to have changed prosecutor/judge influence, it may have increased the influence of the judge. In Santa Clara, for example, ... there appears to be a good deal of explicit sentence bargaining, in which the judge has become an active participant. Such bargaining was much less possible under the ISL, for there was little to discuss about sentence length. As a result, in the two prosecutor-dominated jurisdictions there has been some increase in influence by the judge, at least in prison cases.³⁰

Prison terms. The DSL was explicitly intended to establish a system wherein punishment is the primary purpose of sentences to incarceration, punishment is proportional to the seriousness of conviction offenses, and variations among terms for similar offenses is reduced (relative to time served under the ISL). By that standard, the DSL has been successful in reducing variability. Under the ISL there had been a considerable discrepancy between average time served by men and average time served by women for similar offenses. Since the introduction of presumptive determinate sentencing, that discrepancy has been nearly eliminated.³¹ One study found that overall variations in sentence length decreased from 20 to 50 percent for a number of different crime types.³² However, there remains considerable variation among sentences for burglary and robbery because of inconsistency in the application of sentence enhancements.³³ Also, the findings that appear to demonstrate reductions in variability may be misleading, because the studies cited only controlled for conviction offense. Disparity and discrimination - even as defined from a "just deserts" perspective - could still arise from pre-conviction bargaining; such variations would not have been detected in studies that focussed solely on conviction offense.

The presumptive terms specified in the DSL were originally selected to approximate the average "real time" served under the indeterminate system. However, the legislature subsequently increased the presumptive terms and added provisions for mandatory incarceration for certain cases. Sentencing under the Determinate Sentencing Law has been accompanied by a rise in prison populations, an increase in the rate of imprisonment per 100,000 population, an increase in the rate of imprisonment given conviction, and a decrease in average time served. However, all of these changes continued trends that began prior to the DSL.

Evidence from at least one study suggests that observed changes in incarceration rates may be just one aspect of an across-the-board increase in the inclination to impose more punitive sentences.³⁴ Under the ISL there was a reluctance to sentence offenders to prison in "marginal" cases, because of the possibility they might be held for longer terms than judges thought appropriate. It was anticipated that under the DSL judges might impose short or moderate prison terms on offenders who previously would have been sentenced to local jail. However, if this were the case, one would expect the increase in the rate of imprisonment to be offset by a decrease (or attenuation of the increase) in sentences to jail. Instead, there appears to have been an across-the-board shift in which the types of cases that formerly resulted in probation now result in jail sentences, and marginal cases that formerly resulted in jail sentences now result in imprisonment.

Illinois (Determinate/Range)

Illinois courts impose determinate sentences within ranges legislatively prescribed for all classes of offenses. More severe penalties may be selected from an extended range if the court determines that aggravating factors justify such a sentence. Incarceration is mandatory for habitual offenders and for certain violent crimes (designated Class X offenses). Probation is authorized for all but Class X offenses. The court must articulate its reasons for imposing each sentence.

Illinois adopted its determinate sentencing system on February 1, 1978. One year later, the Illinois Department of Corrections issued a report concerning the impact of the new law.³⁵ Data compiled by the Department showed that the rate of imprisonment had increased three percent during 1978 over 1977. However, the report noted that this increase continued a trend which had begun five years prior to the inception of the new law.³⁶ The use of probation decreased over the previous year.

The Department found that longer prison terms were being imposed for serious offenses such as robbery. Lengths of incarcerative sentences imposed for other crimes "... apparently [did] not represent an increase over previous averages."³⁷

Finally, the average length of stay was calculated for adult felons. Prior to the new law, time served averaged 2.4 years; after the new law, average time served increased 4.8 months to 2.9 years.³⁸

Indiana (Determinate/Presumptive)

Indiana courts must impose determinate sentences within broad legislatively prescribed sentencing ranges. Although presumptive terms are statutorily recommended for each of four separate offense categories, the court may impose a higher or lower sentence to reflect mitigating or aggravating circumstances. For example, a ten year presumptive term for Class B Felony could be raised by ten years or lowered by four years.

Indiana's prison population increased 73.2 percent from the end of 1978 through mid-1981.³⁹ Some suggest that this increase is directly related to the introduction of determinate sentencing and more severe sentencing provisions.⁴⁰

Indiana markedly increased the severity of penalties when it adopted determinate sentencing in October, 1977. Some sentences were "... almost 50 percent longer than under the indeterminate system."⁴¹ For example, Indiana now

prescribes four years imprisonment for burglary compared to an average time served of 1.8 years under the old law.⁴²

Indiana's wide presumptive ranges give little guidance to judicial decision-making. Without meaningful appellate review or the possibility of adjustment by a parole board, there is little reason to expect sentences for a given offense to be uniform.

Maine (Determinate/Upper Limit)

Maine statutes entail legislatively prescribed maximum sentences for six classes of crimes. All felonies and misdemeanors fall into one of these classes; no minimum sentences are prescribed. A judge must impose a determinate sentence, ranging from probation to life imprisonment. Although good-time credits are available to reduce sentence length, Maine provides no parole release or parole supervision.

Since the advent of determinate sentencing on May 1, 1976, the rate of incarceration and the average length of sentences have increased.⁴³ These circumstances, coupled with the elimination of early release through the abolition of parole were accompanied by a rapid increase in Maine's prison population. From the end of 1976 through mid-1981, the prison population increased 39.6 percent.⁴⁴ However, Maine officials are reluctant to single out determinate sentencing as the direct cause of this increase, as prison overcrowding has been a continuing problem pre-dating determinate sentencing.⁴⁵ Finally, it should be noted that judges are "...sentencing felons more severely," which has resulted in an "...increase in the median length of imposed sentences."⁴⁶

Maryland (Indeterminate/Upper Limit)

Maryland law sets maximum penalties for each offense. Some offenses also have recommended minimum terms. The court must impose a fixed sentence within the

statutory limits. Unless the sentence is mandatory, the court may fix the sentence below the recommended minimum term.

Sentencing guidelines were developed and implemented on an experimental basis in four Maryland jurisdictions. These guidelines are based on the seriousness of the offense and the criminal history of the offender. However, computation of the guideline sentence has been hampered by the unreliability of the state's criminal history records and by confusion as to which agency is responsible for developing the guideline sentence.

Jurisdictions participating in the guideline project reported that the average length of incarceration for major crimes increased to 88 months following the implementation of guideline sentences from an average of 52 months prior to the experiment. The average length of incarceration for minor crimes, however, dropped to 19 months for guideline sentences compared to 29 months under the former system. Information was not available concerning the impact of the guidelines on sentencing disparity or on the size of the prison population.⁴⁷

Michigan (Indeterminate/Upper Limit)

Michigan law prescribes a legislatively defined maximum sentence for every offense. The court sets the minimum term, up to two-thirds of the maximum.

In 1981, a three-month pilot project, implemented under the auspices of Michigan's Administrative Office of the Courts, introduced guideline sentencing in three courts. The system combined criminal history and offense severity in a guideline grid. Judges set the minimum term within ranges computed by using the grid. Statutory maximums remained in effect.

According to the Administrative Office of the Court, judges who used the guideline system complied with the recommended ranges in four-fifths of the cases examined.⁴⁸ In the remaining cases, one-third of the sentences were below the recommended or presumptive range and two-thirds were above the range.⁴⁹ Judges who

did not use the guidelines were reported to have viewed the guidelines as an unwarranted or unnecessary attempt to limit judicial discretion in the sentencing process.

Minnesota (Determinate/Guidelines)

On May 1, 1980, Minnesota adopted guideline sentencing that was designed to eliminate sentencing disparity without exceeding current prison capacity. The former sentencing system was indeterminate. The Minnesota guidelines consist of a grid that utilizes information about the type of offense (seriousness) and the type of offender (criminal history). Each cell of the guideline grid indicates the presumptive sentences for defendants who are similar with respect to the instant offense and prior criminal history. The guidelines indicate which defendants should be incarcerated, and the presumptive range of sentence lengths. If the judge imposes a different type of sentence from that prescribed, or a sentence outside the presumptive range, the reasons for the sentence must be provided in writing. Minnesota abolished parole release decisionmaking but retained the availability of good time credit. Post incarceration community supervision is required for all persons sentenced to prison.

Following the imposition of guideline sentencing in Minnesota, the rate of incarceration decreased four to five percent.⁵⁰ This decrease may be attributable to the guidelines' restrictions concerning who should and who should not be incarcerated. For example, prior to the new system, property offenders composed approximately 62 percent of all prison commitments. Following the enactment of the guidelines, approximately 49 percent of all prison commitments were for property offenses.⁵¹

While the rate of incarceration was decreasing, the prison population was slightly increasing.⁵² The increase may be due to the effect of the guideline system on two categories of offenders. First, repeat offenders convicted of serious crimes were being imprisoned more consistently and for longer periods of time; second, a larger proportion of offenders were being incarcerated for person

offenses. Prior to guidelines, approximately 32 percent of prison commitments were for person offenses. Following the use of the guidelines, this number jumped to 46 percent.⁵³ Although more person offenders were being imprisoned under the guideline system, they were serving shorter sentences than they would have under the previous system,⁵⁴ provided they had limited criminal histories.

Guideline sentencing seems to have reduced disparity in Minnesota. Of the first 5,500 sentences imposed under the new system, only 6.2 percent were departures from the grid.⁵⁵ Less than one percent of the presumptive sentences have been appealed.⁵⁶ It should also be noted that the number of trials has not increased, nor has court processing time changed appreciably.

The decrease in rate of State incarceration occurred simultaneously with an "... increase in the rate of offenders serving time in local jails or workhouses....This rate has increased from approximately 35 percent in fiscal year 1978 to approximately 46 percent in 1980-1981."⁵⁷

In general, the use of guidelines has made it more difficult to incarcerate property offenders and has reduced the time that certain offenders who commit person offenses must serve in prison. As a result, some Minnesota prosecutors have attempted to circumvent the system by engaging in a practice known as "making book." This occurs when prosecutors pursue multiple convictions in a case for which normal practice would be to seek conviction on the top charge only. The objective is to increase an offender's criminal history score so as to increase the severity of sentences for any future convictions.

At the same time the prosecutors began to "make book" on offenders, a decision by the Minnesota State Supreme Court indirectly pressured the Minnesota Sentencing Guidelines Commission into changing the mechanism used to score criminal histories. The change which the Commission made allowed the first conviction obtained in a multiple conviction case to be counted as a prior criminal offense when computing the criminal score for the remaining charges.⁵⁸ There was no connection between

this change and the actions of the prosecutors, but it resulted in compounding the effect of "making book."

The Commission viewed the combination of the new scoring mechanism and the practice of "making book" as a serious threat to the objectives of the guidelines. Addressing this problem, the Commission modified the sentencing guidelines on November 1, 1983. The dispositional line was revised so that offenders are not subject to presumptive sentences to state prison for severity level I, II, and III offenses, unless they have had multiple prior placements with community corrections.

Minnesota's state prison population has begun to reach full capacity. This was predicted at the onset of the guideline system and provisions were built into the system to address the problem. As a result, the Sentencing Guideline Commission made the following two changes: first, effective November 1, 1983 presumptive sentences for severity level I, II, and III offenses were reduced; second, good time could now be applied to the mandatory minimum sentence.

The Commission also plans to consider further modifications to the sentencing guidelines. They will consider revising the criminal history score so that prior property offenses receive less weight than prior person offenses and they will consider modifications in the sentence lengths for severity level IV, V, and VI offenses.⁵⁹

Pennsylvania (Indeterminate/Guidelines)

Sentencing guidelines took effect July 22, 1982, and provide minimum ranges for all misdemeanors and felonies. The guidelines are used to determine both whether to incarcerate, and for how long. The underlying sentencing structure is indeterminate, with judges setting both the minimum suggested by the guidelines and the maximum. The parole release function was maintained. There are no provisions for good time credit. Guideline computation is performed for the court by the local probation department. If a suggested sentence is determined to be

inappropriate, the judge may impose a sentence outside the guideline, and must specify the reasons in a written statement. Mandatory minimum sentencing provisions went into effect June 6, 1982, and apply to selected serious offenses when committed either (a) with a firearm, (b) within seven years of another conviction, or (c) in or near public transportation facilities.

The newness of the Pennsylvania guideline system has precluded any definitive impact analysis. However, it has been reported that non-compliance most frequently occurred in cases for which the guidelines provided only a narrow range of sentencing possibilities.⁶⁰ Initial non-compliance was so problematic that the ranges were widened. After revision, the increased compliance was attributed to courts being allowed input as to how the guideline system would be implemented in their jurisdiction.⁶¹

Summary

Sentencing structures vary widely in the amount of discretion allowed; they also vary with respect to the diffusion of influence among the various persons and institutions that determine the penalties actually incurred by convicted offenders. The exercise of relatively unconstrained discretion has been blamed for disparities among similar cases, systematic discrimination against minorities, and inappropriate release of dangerous offenders.

Determinate sentencing can be viewed as a device for concentrating sentencing discretion in the courts. Sentencing guidelines and presumptive sentencing represent efforts to structure the exercise of that discretion and to make the courts more accountable for sentencing decisions.

Determinate sentencing has been implemented in some states without effective constraints on judicial discretion. In Indiana, the legislatively prescribed ranges are broad, and the courts can vary sentence length drastically through their handling of aggravating and mitigating circumstances. In Maine, there are no legislatively prescribed mandatory sentences or lower limits; judges may specify

any determinate sentence up to a relatively unconstraining upper limit. In both states, the introduction of determinate sentencing has been accompanied by increases in the rate of imprisonment, increases in the average time served, and dramatic increases in prison populations. However, it is unclear whether the introduction of determinate sentencing produced the increases or merely permitted the continuation of pre-existing trends.

Perhaps the most important effect of a change from indeterminate to determinate sentencing is that it makes sentencing easier to understand. Both the public and convicted offenders can more readily determine how much "real time" is likely to be served in particular cases. Moreover, concentrating the bulk of responsibility for sentence length in a single authority - the court - facilitates the study of sentencing patterns, increases the potential for accountability, and makes it easier to structure the exercise of discretion.

Of the nine states that have adopted determinate sentencing, six have adopted presumptive sentencing or sentencing guidelines in an attempt to structure the exercise of judicial discretion. In addition, several states have adopted or experimented with sentencing guidelines within indeterminate systems. The most tightly structured and most thoroughly studied systems are the presumptive sentencing system operating in California and the sentencing guidelines system operating in Minnesota.

Compliance. Sentencing guidelines and other presumptive sentencing structures embody public policy regarding the goals of sentencing and the legitimacy of specific criteria. Formal compliance with such structures "appears to depend on the legal authority of an innovation and whether it is subject to credible enforcement mechanisms."⁶² For example, compliance was inconsistent in three Michigan jurisdictions experimenting with guidelines; indeed, some judges openly refused to use the guidelines, claiming they constituted an unwarranted restriction on judicial discretion. In contrast, the rate of formal compliance has been very high in California and Minnesota, where exceptional sentences require explicit justification.

Circumvention. Even in Minnesota and California, court room participants have to some extent been able to use the new structures as instruments for the exercise of discretion. In Minnesota, some prosecutors have engaged in a practice known as "making book"; multiple convictions are sought for single arrests in order to increase the criminal history scores that would be applicable to future convictions. In California, aggravating and mitigating circumstances, sentence enhancements, and probation disqualifiers have become "bargaining chips" in plea negotiations; if a prosecutor agrees to drop an allegation in exchange for a guilty plea, the benefits to the defendant are easily understood. This appears to have resulted in a higher rate of guilty pleas and earlier guilty pleas in California. However, there does not appear to have been any systematic shift of control over plea bargaining from judges to prosecutors. Instead, jurisdictions in which plea bargaining had previously been dominated by judges continued to be judge-dominated. Moreover, the increased importance of sentence bargaining (under determinate sentencing) appears to have increased the influence of judges somewhat, even in prosecutor-dominated jurisdictions.

Disparity and discrimination. Because guidelines and other presumptive systems incorporate the sentencing criteria officially considered legitimate, formal compliance definitionally precludes unwarranted disparity and discrimination. The determinate sentencing law in California has substantially reduced the variability in sentence lengths for a number of offenses (relative to time served under the indeterminate system), and it has virtually eliminated the systematic difference between sentence lengths for males and females convicted of similar crimes. Likewise, the Minnesota guidelines have been credited with reducing disparities among sentences for offenders who are "similarly situated," as defined by conviction offense and criminal history score. However, most of the available literature has examined disparity and discrimination in relation to conviction offense (sometimes in combination with other factors); it is uncertain whether or in which instances disparity and discrimination might have been perpetuated through adjustments in plea bargaining practices.⁶³

Severity. There has been a nationwide trend toward mandatory incarceration and longer periods of incarceration. Comparable trends have been observed in most of the states that have adopted determinate sentencing and/or sentencing guidelines. Among the states reviewed in this section, rates of imprisonment given conviction increased following changes in sentencing structure in California, Illinois, and Maine. Average sentence lengths and time served increased in California, Indiana, Maine, and for more serious offenses in Illinois and Maryland. In most cases, however, these increases continued trends which began prior to the introduction of new systems. In Minnesota, sentencing guidelines have apparently been successful in altering the sentence mix; overall rates of imprisonment given conviction have decreased slightly, while incarceration rates and average sentence lengths have increase for more serious offenders and decreased for less serious offenders.

Prison populations. Prison populations have increased in every state reviewed, in most cases continuing trends that began before the adoption of new sentencing structures. However, the increases were especially sharp in two states, Maine and Indiana, where determinate sentencing was adopted without effective constraints on sentencing discretion.

Feedback. As noted in Section V, it is important to provide formal feedback mechanisms to compensate for the loss of flexibility accompanying the introduction of determinate sentencing and presumptive sentencing structures. For example, Minnesota has provisions for revising its sentencing guidelines if prison populations exceed 95 percent of prison capacity; Michigan makes inmates eligible for parole consideration 90 days early when prisons are overcrowded; and the California Board of Prison Terms reviews sentence disparity and good time credits. The Minnesota Guidelines Commission has been especially diligent in monitoring compliance with the guidelines and evaluating changes in case processing that may circumvent the intent of the guidelines. As a result, the Commission has been able to modify the guidelines to keep prison populations within capacity and to prevent "inflation" of criminal history scores. Explicit feedback mechanisms permit adjustments in system operation while increasing the likelihood that such

adjustments will be consistent with the public policy embodied in the formal sentencing structure.

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APPENDIX

SUMMARIES OF SENTENCING STRUCTURES
IN EACH OF THE FIFTY STATES

APPENDIX

SUMMARIES OF SENTENCING STRUCTURES
IN EACH OF THE FIFTY STATES

Most of the materials in this Appendix has been extracted with minor editing from a report entitled, "Judicial and Executive Discretion in the Sentencing Process: Analysis of State Felony Code Provisions," published in 1982 by the Institute for Advanced Studies in Justice at American University. (Quotation marks have been omitted to improve readability.) The reader should refer directly to the original report for more detailed descriptions of sentencing structures in each state.

ALABAMA (Indeterminate/Range)

The court is authorized to set a fixed term of years within a broad sentencing range provided by statute for each offense class. The sentence imposed by the court becomes the maximum amount of time for which an offender can be incarcerated. The paroling authority may release the offender following service of one-third of the sentence imposed, less good conduct reductions, or following service of ten years, whichever is less. An earlier release may take place with a unanimous affirmative vote of the Parole Board.

ALASKA (Indeterminate/Range)

The court sets a fixed term of years within a broad sentencing range provided statutorily for each offense class. This sentence becomes the maximum amount of time an offender can remain in prison. The paroling authority may release an offender after one-third of the term is served.

ARIZONA (Indeterminate/Presumptive)

The court sets a fixed term of years on the basis of statutorily prescribed presumptive sentences for each offense class. The sentence imposed becomes the maximum amount of time for which an offender can be incarcerated, with the actual release date determined by the parole authority.

ARKANSAS (Indeterminate/Range)

The judge sets a fixed term of years within a broad sentencing range prescribed by statute for each offense class. This fixed term becomes the maximum term for which an offender can be incarcerated. The paroling authority has discretion to set the actual release date before the full sentence is served.

CALIFORNIA (Determinate/Presumptive)

The court sets a fixed term on the basis of specific, legislatively suggested presumptive sentences for each offense class. The presumptive "mid" term must be imposed unless mitigating and/or aggravating circumstances exist. The sentence imposed must be served in full minus

good time reductions. The possibility of an early parole release decision has been eliminated, and the offender undergoes a parole term after completing his sentence, minus good time.

COLORADO (Determinate/Presumptive)

The sentencing authority sets a fixed term of imprisonment within very narrow statutorily suggested penalty ranges for each offense class. The sentence imposed must be served in full minus good-time and other sentence reductions permitted by statute. A one year parole term must be served in addition to the sentence imposed. The possibility for an early parole release decision has been eliminated.

CONNECTICUT (Determinate/Range)

Pursuant to legislation effective July 1, 1981, the court must order a definite term of imprisonment within broad statutorily prescribed limits established for each offense class. Parole is no longer available and the offender must serve in full the sentence imposed minus applicable good time reductions.

DELAWARE (Indeterminate/Upper Limit)

Certain offenses carry a mandatory minimum prison term and, in such cases, the Parole Board does not have the authority to release an offender prior to expiration of the mandatory minimum period. In all other cases, the court sets a fixed term of imprisonment within limits prescribed by statute for each class of offenses. This term becomes the maximum amount of time an offender can be incarcerated. The release date is determined by the Board of Parole, and can occur after an offender has served one-third of his sentence, minus good time, unless a mandatory minimum term has been imposed by the court.

DISTRICT OF COLUMBIA (Indeterminate/Range)

The court sets the minimum-maximum terms within the limits defined by statute. The paroling authority sets the actual release date within this indefinite term of years. An offender is usually released following the expiration of the minimum term; it is within the discretion of the Parole Board, however, to release the offender prior to the expiration of the minimum term.

FLORIDA (Indeterminate/Upper Limit)

The court sets a fixed term of years limited only by the legislatively prescribed maximum. The Parole Board determines the actual release date at some point before the expiration of the term set by the court. Release decisions are guided by presumptive parole guidelines.

GEORGIA (Indeterminate/Range)

The judge, limited by the statutorily prescribed ranges, sets a fixed term of imprisonment. The Parole Board sets the actual release date, the term set by the judge becoming the maximum term for which an offender can

be imprisoned. Most offenders serve one-third of their sentence before parole consideration. Some are paroled earlier, provided a hearing is held and the district attorney and sentencing judge are notified.

HAWAII (Indeterminate/Upper Limit)

The court imposes a fixed term of incarceration which is the legislatively prescribed maximum term. The paroling authority sets the minimum term within six months of conviction.

IDAHO (Indeterminate/Upper Limit)

The court fixes the sentence term at the maximum permitted by statute for each offense, a period not less than two years. The actual date of release and the minimum term are decided by the paroling authority.

ILLINOIS (Determinate/Range)

The judge sets a fixed term of years, based upon legislatively prescribed sentence ranges for each class of offense. For classes 2-4 the range of permissible sentences is significantly less than that prescribed for the other offense classes which involve more severe crimes. There is no parole release function.

INDIANA (Determinate/Presumptive)

The judge has broad discretion to fix a term of incarceration within presumptive ranges established by statute. A presumptive term for any class of offenses may be increased or decreased due to aggravating or mitigating circumstances. The offender must serve the sentence imposed in full less good time.

IOWA (Indeterminate/Upper Limit)

The court sets a fixed term of imprisonment within the limits prescribed by statute for each offense class. The actual date of release is within the discretion of the Parole Board, limited only by the term imposed by the court, which becomes the maximum period for which an offender can be incarcerated.

KANSAS (Indeterminate/Range)

The court fixes the minimum and maximum terms of imprisonment within statutorily provided minimum-maximum sentence ranges for each offense class. The paroling authority sets the actual date of release within the sentence range imposed by the court.

KENTUCKY (Indeterminate/Range)

The court imposes a flat, single term of years according to the permissible sentence ranges established by statute for each offense class. The term imposed by the court becomes the maximum term that can

be served by the offender. The paroling authority sets the actual date of release, limited only by the maximum imposed by the court.

LOUISIANA (Indeterminate/Range)

The court sentences an offender to a fixed term of years which is within the range provided by statute for the offense. The sentence imposed by the court is the maximum time the offender must serve. The actual release date is set by the Parole Board.

MAINE (Determinate/Upper Limit)

The court sets a fixed term of years to be served in full. In imposing the sentence, the court is limited only by a legislatively prescribed maximum for each offense class and may set the penalty anywhere up to that maximum. The sentence imposed may be reduced only by good-time and other statutorily permitted sentence reductions. Parole has been abolished.

MARYLAND (Indeterminate/Upper Limit)

The maximum penalty for each offense is provided by statute and the court sets a fixed term of years which does not exceed the statutory maximum for those offenses for which a minimum and maximum sentence range is statutorily prescribed. The court may set the penalty below the statutory minimum unless it is mandatory. The actual date of release is within the discretion of the Parole Board which considers the offender for parole following service of one-fifth of the term imposed, and in certain cases, prior to service of one-fifth of the definite term. There is no parole function.

MASSACHUSETTS (Indeterminate/Range)

The court sets a minimum and maximum term of imprisonment within the limits established by law. The Parole Board sets the actual date of release. In all cases, deductions can reduce the minimum or maximum time to be served and the time an offender must serve before becoming eligible for parole.

MICHIGAN (Indeterminate/Upper Limit)

The court sets the minimum term of incarceration and imposes a maximum term prescribed by law. The offender can be eligible for parole after serving the minimum term, minus good-time, except where the minimum must be served in full.

MINNESOTA (Determinate/Guidelines)

The trial judge sets a fixed term of imprisonment based on sentencing guidelines. The guidelines consist of a grid that utilizes information about the type of offense (seriousness) and the type of offender (criminal history). Each cell of the guideline grid indicates the presumptive sentences for defendants who are similar with respect to the

NORTH DAKOTA (Indeterminate/Upper Limit)

The court imposes a fixed term of years prescribed by law for each offense class. This term becomes the maximum term for incarceration. Unless specifically authorized the court does not impose a minimum term but leaves the actual date of release (or minimum term) to the paroling authority.

OHIO (Indeterminate/Range)

The maximum sentence must not exceed that prescribed by statute and the minimum term must not exceed one-half of the maximum. The court sets the minimum-maximum limits for the offender's sentence in accordance with the fixed maximum sentence and choice of four possible minimum sentences provided by statute for each offense class. Within this term imposed by the court, the Parole Board sets the actual release date.

OKLAHOMA (Indeterminate/Upper Limit)

Maximum sentence terms are provided by statute for each offense. The court imposes a fixed number of years which becomes the maximum amount of time for which an offender can be incarcerated. The actual date of release is within the discretion of the Parole Board, which considers an offender for parole following service of one-third of the definite term imposed. In rare cases, the court may, as an alternative, impose an indeterminate sentence.

OREGON (Indeterminate/Upper Limit)

The court imposes a fixed term of years which is within the maximum permitted by statute for the applicable offense class. This sentence becomes the maximum amount of time for which an offender can be incarcerated; the actual date of release is within the discretion of the Parole Board which uses guidelines that it has developed to determine the release date for each offender.

PENNSYLVANIA (Indeterminate/Guidelines)

The court sets the minimum and maximum terms for imprisonment. The actual date of release is within the discretion of the Parole Board, which generally releases offenders at the expiration of the minimum term, for those serving a minimum term of more than two years. Offenders who are serving a minimum term of less than two years may be released prior to serving the minimum term.

RHODE ISLAND (Indeterminate/Upper Limit)

The court sets a maximum sentence within the penalty prescribed by statute for each offense. This term becomes the maximum time for which an offender can be incarcerated. The actual date of release is within the discretion of the Parole Board, which can release the offender after one-third of the term imposed by the court has been served.

instant offense and prior criminal history. The guidelines indicate those defendants who should and those that should not be incarcerated, and the presumptive range of sentence lengths for those incarcerated. If the judge imposes a different type of sentence from that prescribed, or a sentence outside the presumptive range, the reasons for the sentence must be given in writing. Minnesota abolished parole release decision making but retained the availability of good time credit. Post incarceration community supervision is required for all persons sentenced to prison.

MISSISSIPPI (Indeterminate/Upper Limit)

Penalties are defined by statute for each offense rather than by class of offense, with a maximum prescribed for each. In all but capital cases the trial judge sets a fixed, single term of years, up to the maximum prescribed by law, which becomes the maximum term which the offender must serve. Offenders are eligible for parole consideration after one year.

MISSOURI (Indeterminate/Upper Limit)

There are four classes of felonies, each carrying a broad range of years from which a single term can be chosen. Upon conviction, the jury recommends the term. The judge, who makes the final decision can not increase the recommended term (except for "dangerous and/or "persistent" offenders). There are mandatory minimum terms for "armed criminal action" and mandatory incarcerations for "persistent" or "dangerous" offenders.

The term set becomes the maximum period for which the offender can be held prior to conditional release, but the Parole Board may order release before the maximum is served.

MONTANA (Indeterminate/Upper Limit)

The court sets a flat term of years on the basis of suggested penalties, specified by statute, for each offense. This term becomes the maximum amount of time an offender can be incarcerated. The Parole Board can determine the actual date of release at any time within the maximum term imposed by the court. An offender becomes eligible for parole when he has served either one-third or one-half of his sentence, depending upon whether he has been designated by the sentencing court as a "non-dangerous" or "dangerous" offender, as defined by statute.

NEBRASKA (Indeterminate/Range)

A minimum-maximum sentence range for each offense is provided by statute. Within this range, the court sets either the minimum and maximum period of incarceration, or simply the maximum term, thereby allowing the statutorily prescribed minimum term to apply. The Parole Board sets the actual release date at some time before the maximum term expires. Good time reductions may reduce the minimum term.

NEVADA (Indeterminate/Range)

The court sentences offenders to fixed terms of imprisonment within the limits prescribed by statute for each offense. The paroling authority has discretion to release offenders after they serve one-third of their definite sentence.

NEW HAMPSHIRE (Indeterminate/Range)

The court sets both a minimum and maximum term within the limits prescribed by statute for each class of offenses. The Parole Board sets the actual date of release within this sentence range. Release on parole usually occurs following service of the minimum term imposed less any applicable deductions for good conduct.

NEW JERSEY (Indeterminate/Presumptive)

The court imposes a statutorily prescribed fixed sentence unless mitigating or aggravating circumstances exist. In such cases, the term may be decreased or increased within the limits set by statute. The actual release date is determined by the Parole Board. The court has the authority to impose a minimum term which must be served before an offender can be eligible for parole.

NEW MEXICO (Determinate/Presumptive)

The court must impose the appropriate fixed term provided by statute for each offense degree unless mitigating or aggravating circumstances exist, in which case the sentence is increased or decreased accordingly. The term imposed is a fixed term of years to be served in full, minus good-time. The possibility of an early parole release decision has been eliminated. The judge includes in the sentence a period of parole to be served after completion of the prison term.

NEW YORK (Indeterminate/Range)

For most felonies the court sets both the minimum and the maximum sentence term within the limits provided by statute for each offense class. The minimum term must be at least one year and not more than one third of the maximum term imposed. The maximum term must be at least three years. The offender is eligible for parole after serving the minimum term imposed by the court.

NORTH CAROLINA (Determinate/Presumptive)

The court must impose a specific presumptive sentence, based on fixed sentence terms provided by statute for each offense, unless aggravating and/or mitigating circumstances exist, in which case the sentence may be increased or decreased. All felons convicted after July 1, 1981 are paroled ninety days before expiration of their term, minus good time, and are unconditionally released at the end of the ninety day period unless they have violated parole conditions.

SOUTH CAROLINA (Indeterminate/Range)

The court imposes a fixed term of years within the limits fixed by statute for the specific offense. This sentence becomes the maximum amount of time for which an offender can be incarcerated. The paroling authority may release the offender prior to serving the full term imposed. In most cases, an offender must serve at least one-third of the sentence imposed to become eligible for parole consideration.

SOUTH DAKOTA (Indeterminate/Upper Limit)

Felonies are divided by statute into eight classes, each of which has a maximum penalty attached. The court imposes a fixed term of years, which becomes the maximum term an offender can be incarcerated. The parole authority has discretion to determine the actual release date. First offenders are eligible for parole after serving one-fourth of their sentence.

TENNESSEE (Indeterminate/Lower Limit)

For Class X offenses, (a total of eleven are specified by statute), the court imposes a fixed term of years to be served in full by the offender. For all other offenses, a minimum-maximum term is set. The paroling authority determines the actual release date, in accordance with statutory provisions.

TEXAS (Indeterminate/Range)

Sentence ranges are prescribed by statute for each offense degree. The jury, when imposing sentence, fixes a term of years which becomes the maximum sentence. If the sentence is imposed by the judge, however, a minimum-maximum range is set. In both cases, the Parole Board determines the actual date of release.

UTAH (Indeterminate/Range)

The court sets the minimum-maximum terms of imprisonment within the limits defined by statute for each class of offenses. The actual date of release is within the discretion of the Parole Board.

VERMONT (Indeterminate/Range)

Specific permissible sentence ranges are provided by statute for each offense. The court sets the maximum and minimum terms of imprisonment within the sentence range provided by statute. Parole can be granted only after the expiration of the minimum term imposed.

VIRGINIA (Indeterminate/Range)

The court is required by statute to impose a minimum and maximum term of confinement within the limits set by statute for each offense class. The Parole Board determines the actual date of release in accordance with statutory provisions.

WASHINGTON (Indeterminate/Upper Limit)

Three classes of felonies, each with a prescribed maximum sentence limit, are established by statute. The court imposes a flat, single term of years, which is the maximum amount of time during which an offender can be incarcerated. Within this maximum period, the paroling authority determines the actual length of sentence and release date.

WEST VIRGINIA (Indeterminate/Range)

The court imposes an indefinite term, setting the minimum and maximum terms within the limits defined by statute for the applicable offense. The Parole Board considers an offender for parole after the offender has served the minimum period of the sentence imposed.

WISCONSIN (Indeterminate/Upper Limit)

The court imposes a fixed term of years within the maximum term prescribed by statute for the applicable offense class. This term becomes the maximum term for which an offender can be incarcerated. The paroling authority may parole an offender at any time after he has served one-half of the term imposed.

WYOMING (Indeterminate/Range)

The court fixes an indefinite term of imprisonment, setting both a minimum and a maximum term within the limits set by statute for each offense. The Parole Board sets the actual date of release within the sentence range imposed by the Court.

END