Determinate Sentencing: The Promises and Perils of Sentence Guidelines

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[T]rial judges in other jurisdictions are making innovative use of sentencing guidelines. These guidelines help judges in their attempts to eliminate disparity. Also, the use of guidelines properly formulated will return to trial judges their discretion in assessing punishment and sentencing defendants which they have lost because of plea bargaining. We should encourage those seeking to eliminate disparity in assessment of punishment and in returning the proper discretion to trial judges.¹

INTRODUCTION

Determinate sentencing has arrived in this nation with the force of an idea whose time has come. From Maine, which passed the first of the new sentencing laws,² to California, with its detailed new Uniform Determinate Sentencing Act,³ more and more jurisdictions are considering, drafting and adopting definite sentencing systems.⁴ There are some commentators who have argued persuasively that sentencing reform of this nature is a constitutional necessity.⁵ But irrespective of the

¹ Morano v. State, 572 S.W.2d 550 (Tex. Crim. App. 1978) (approving sentence guidelines and limitations upon plea bargaining imposed by judges in Bell County, Texas). The Morano decision is an example of both the advantages and disadvantages of determinate sentencing. The benefits mentioned in the opinion seem evident; however, the defendant was sentenced to five years’ imprisonment for possession of marijuana and complained that he should have had the benefit of plea bargaining in the hope that the district attorney would recommend a sentence that was less harsh and more in line with current notions of proper use of the criminal sanction for this offense.


⁴ See notes 96-109 infra and accompanying text for a discussion of the determinate systems of Maine, California, Arizona, Colorado, Illinois and Indiana.

⁵ See, e.g., M. Frankel, Criminal Sentences: Law Without Order 103-04 (1973) [hereinafter cited as M. Frankel]; Comment, Disparity and Discretion in Sentenc-
validity of that argument, the potential advantages of determinate sentencing in producing consistent results are so readily apparent that its widespread legislative adoption in the near future seems a real possibility.\(^6\)

At the same time, there are other authorities who counsel caution. They argue that the benefits of determinate sentencing are offset by the problems it may create, some of which are not obvious at first blush. Determinate sentencing, they say, might transform plea bargaining to undesirable forms or increase its use.\(^7\) Or it may give rise to substantial claims concerning the violation of constitutional provisions.\(^8\) These critics also maintain that determinate sentencing threatens to increase the cost of the adjudicatory process, to change the com-

\(^6\) In my home state of Texas, for example, proposals for determinate sentencing have been advanced by such diverse advocates as the Republican nominee for state Attorney General (J. Baker, Position Paper-Issue Number One: Fighting Crime 9-16 (1978)), the Democratic United States Senator, Lloyd Bentsen (Houston Chronicle, Apr. 7, 1978, §1, at 1, col. 2), and the editor of the popular magazine Texas Monthly (Broyles, Behind the Lines, Texas Monthly, March 1978, at 5). A few Texas counties have adopted local sentencing guidelines, and the concept was sanctioned by the state's highest criminal court in Morano v. State, 572 S.W.2d 550 (Tex. Crim. App. 1978).

Kentucky's General Assembly considered and rejected determinate sentencing legislation during its 1978 regular session. A new section of Kentucky Revised Statutes Chapter 532 would have provided that

the intent of this Act [is] to provide for court sentencing rather than jury sentencing, except in capital prosecutions. And, for those offenders sentenced to a term of imprisonment by the court, it is the intent of this legislation that such offender's date of release from the prison shall not depend upon the offender's participation in rehabilitative programs but rather upon that offender's orderly behavior while in the prison. It is the intent of this Act to provide for a more rational and equitable system of justice.


position of our jails and prisons in unpredictable ways and to deprive inmates of incentives for good behavior. The major change in philosophy that definite sentencing reflects will, they accurately observe, result in challenges to some of our most deeply felt values. Finally, the sheer complexity and cost of some determinate systems are cited by many as serious drawbacks.

This article reflects an effort to relate the promises and perils of determinate sentencing and sentence guidelines in a comprehensive manner. A comprehensive analysis, rather than a dissection of selected issues, is necessary because solutions to any given problem in the sentencing process have an annoying tendency to reappear as new problems elsewhere in the system. The article therefore begins with a study of the elements that may be found in determinate sentencing systems, includ-

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10 See notes 112-232 infra and accompanying text for a discussion of sentencing guidelines and sentencing goals; see also Alschuler, supra note 7, at 577. A striking example of such a challenge is presented by the California Act, which states flatly that the "purposes [sic] of imprisonment for crime is punishment." Cal. Penal Code § 1170(a)(1) (West Supp. 1979). See note 96 infra and accompanying text for a discussion of the California Act.

11 See notes 384-403 infra for a discussion of the administration of sentence guidelines; cf. Uelmen, supra note 8, at 727 (asserting "the possibility of a vast multiplication of the commitment of judicial resources" in California). See generally Cassou & Taugher, Determinate Sentencing in California: The New Numbers Game, 9 Pac. L.J. 1, 5 (1978). Cassou & Taugher observe that the California Act creates "tremendous new complexity," but they state: "Fortunately, however, patient study of the new law forces even the most skeptical to conclude that it is ultimately comprehensible." Id. at 5. Determinate sentencing need not, however, be so complicated. See notes 92-95 infra and accompanying text for a description of the system advocated by Wilkins et al.

12 Alschuler puts this point extremely well: [I]n terms of accomplishing its end, the system of criminal justice is sometimes not much of a system . . . In terms of protecting its bureaucratic methods of processing criminal cases, however, the American system of criminal justice is indeed a system, and the effect of suppressing an injustice at one point in the criminal process may be to cause a comparable injustice to appear elsewhere. Alschuler, supra note 7, at 574-75.
ing the varieties of control that may be asserted over discretionary power, the processes by which the control is affected and the points at which sentencing decisions are influenced. It next examines some particular determinate sentencing statutes and sentence guideline systems, with emphasis on the California Uniform Determinate Sentencing Act of 1976. Against this background, the article considers the effects of definite sentencing upon traditional sentencing goals such as rehabilitation, condemnation, uniformity, deterrence and incapacitation. Questions of legality and constitutionality are then examined, and that examination is followed by a section considering administrative difficulties such as cost, complexity and plea bargaining. A final section summarizes the author's conclusions.

I. PATTERNS OF DETERMINATE SENTENCING

Many who hear the phrase "determinate sentencing" mistakenly assume that it describes a system in which all penalties are mandatory and fixed.\(^\text{13}\) In fact, no sentencing system is either perfectly mandatory or perfectly discretionary. Even those jurisdictions that provide great discretion to sentencing judges put outer limits on the range,\(^\text{14}\) and even jurisdictions with relatively rigid sentencing do not provide across-the-board mandatory sentences.\(^\text{15}\) Various terms such as "fixed,"

\(^{13}\) An attitudinal survey conducted for this article disclosed that many attorneys so understood the term. See notes 183-92 infra and accompanying text for a discussion of the attitudinal poll. Other commentators have observed this lack of understanding of the terminology: "For instance, many people seem to think that flat time sentences mean mandatory prison sentences." McAnany, Merritt & Tromanhauser, Illinois Reconsiders "Flat Time": An Analysis of the Impact of the Justice Model, 52 Chi.-Kent L. Rev. 621 n.2 (1976).

\(^{14}\) For example, Texas affords the trial judge or jury a discretionary range of five to ninety-nine years or life for first-degree felonies, which include aggravated rape, aggravated robbery, aggravated kidnapping, some types of burglary, murder and certain other offenses. Tex. Penal Code Ann. tit. 3, § 12.32 (Vernon 1974). For some of these offenses, probation is available, but for others it is not. Tex. Code Crim. Proc. Ann. art. 42.12 (Vernon 1979). Similar discretionary ranges with maximums and minimums apply to other grades of offenses. See generally Tex. Penal Code Ann. tit. 3, ch. 12 (Vernon 1974).

\(^{15}\) For example, the California system, described at notes 65-91 infra, is a relatively narrow determinate system, but even it leaves wide discretion. "[I]ts net effect on
“presumptive,” “guideline” or “flat-time” sentencing, used to describe different types of determinate systems, have no universal meaning. Nor, for that matter, does the word “determinate;” it is a relative concept. Many systems that are correctly called “determinate” retain wide ranges of discretion. What “determinate sentencing” really describes is a system in which discretion deemed excessive has been removed or controlled in an effort to produce equitable results, but in which that discretion deemed necessary remains.

The issues in determinate sentencing, therefore, boil down to these: How much control over discretion is there to be? Whose discretion is to be controlled? and, How is the control to be effected?

A. The Degree of Control over Discretion

The most determinate sort of sentencing is mandatory sentencing. In this pattern, the determination of certain facts leads inexorably to a prescribed sentence, which cannot be avoided except perhaps by proof of other facts in mitigation or aggravation. The primary drawback of mandatory sentencing time that inmates serve in prison cannot be as readily predicted as proponents and opponents believe." Cassou & Taugher, supra note 11, at 5-6.

"Fixed" may be used to refer to almost any type of determinate sentencing, though it sometimes connotes narrow discretion, mandatory terms or abolition of parole. "Presumptive" sentencing describes a system in which a certain sentence is postulated for given circumstances, with the court having discretion, however, to depart from it. "Guidelines" are similar to presumptive sentencing, though the term connotes looser control over discretion. "Guidelines" may also be used to describe statistical derivation of information to be furnished to sentencing judges, or it may be applied to determinate systems generally. See L. Wilkins, J. Kress, D. Gottfredson, J. Caplin & A. Gelman, Sentencing Guidelines: Structuring Judicial Discretion (1976) [hereinafter cited as L. Wilkins]. "Flat time" refers generally to sentences in which parole discretion has been narrowed or abolished, although it too is used to refer to different types of systems. McAnany, Merritt & Tromanhouser, supra note 13, at 622-23, 627.

The sentencing systems of Maine and Indiana, described at notes 96-106 infra, are examples.


An example is to be found in Tex. Penal Code Ann. tit. 3, § 12.42(d) (Vernon 1974), which provides a sentence of life imprisonment for a third sequential felony conviction. Such "habitual offender" statutes are common among the states. See generally American Bar Ass'n, Sentencing Computation Laws and Practice: A Preliminary Survey (1974). Even such mandatory laws, however, may be interpreted to
is that the varieties of offenses and offenders are infinite; hence, it produces some ill-fitting sentences and leads to judicial "fudging." For these reasons, truly mandatory sentencing has not been extensively adopted and has met constitutional obstacles in some cases.\textsuperscript{20} Mandatory sentencing does, of course, offer the possibility of relatively uniform results if confined to appropriate situations, and it probably also offers increased deterrent effects as well as simplification of, and better control over, the sentencing process.\textsuperscript{21} The use of "quasi-mandatory" systems, employing limited escape valves for the exercise of discretion, is a related option.\textsuperscript{22}

Most of today's sentencing, however, is at the opposite pole from the mandatory model because most jurisdictions vest
virtually uncontrolled discretion in sentencing judges. The hornbook law in the federal courts, for example, is that the sentencing judge has discretion to consider any factor from any source, with the exception of unconstitutional factors. The judge is required to choose a term within limits provided by legislation, but these limits are usually broad: for some offenses, a federal judge has options ranging from less than a year's incarceration to life imprisonment. Lesser ranges of five, ten or twenty-five years are common, and the exercise of discretion within these ranges is virtually unreviewable. The present system thus comes as close as it practicably could to one in which the judge is allowed to choose whatever sentence he pleases for whatever reasons he pleases.

Between these two extremes there is a range of alternatives offering varying control over discretion. In presumptive sentencing systems, for example, a fixed sentence is postulated for a given situation, but the judge has discretion to depart from it if he states the reasons for doing so. Such a system gives the promise of consistent results without requiring that individual differences be ignored and without “fudging” by the judge. Guidelines that do not bind the sentencing entity

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23 A sentencing judge in federal court may “appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.” United States v. Tucker, 404 U.S. 443, 446 (1972). Tucker allowed the judge to consider even the conduct underlying constitutionally invalid prior convictions, provided the court was aware of the invalidity and did not use the conviction itself. Id. at 448-49. Williams v. New York, 337 U.S. 241 (1949), is the basic case upon which approval of the discretionary model of sentencing is founded. See also M. Franke, supra note 5, at ch. 1. For a description of discretionary state sentencing, see note 14 supra.

24 E.g., 18 U.S.C. §§ 1111(b), 1201 (1976) (penalties for second degree murder and kidnapping one year to life); 18 U.S.C. § 3651 (1976) (probation). There is, however, some question under the language of § 3651 whether probation can be granted for an offense for which life imprisonment is possible. See United States v. Denson, 588 F.2d 1112 (5th Cir.), rehearing granted, 593 F.2d 3 (5th Cir. 1979).

25 E.g., 18 U.S.C. § 2114 (1976) (armed robbery of person having custody of United States property—probation to 25 years); 18 U.S.C. § 2113(d) (1976) (armed robbery of bank—fine, probation or up to 25 years); 18 U.S.C. § 113(a) (1976) (assault to commit murder or rape—probation to 20 years); 18 U.S.C. § 2315 (1976) (interstate theft of securities—fine, probation or up to 10 years).

26 See notes 49-55 infra and accompanying text for a discussion of appellate review as a method of controlling sentence disparity.

but that merely inform its discretion are a variation on the presumptive model. \(^2\) Similar results may be obtained by narrowing the range of sentence options—by making sentence ranges of three to five years, for example, rather than of one to ten—and by allocating relatively unguided discretion to the judge within this range. \(^2\) Each of these controlled-discretion systems may be extended by the specification of factors adding to, or subtracting from, the sentence and by providing for the effect of each—a system that might be called the "base-plus-enhancement" model. \(^3\)

A good sentencing structure would be neither too mandatory to be inflexible nor too discretionary to produce haphazard results. Each of the different approaches—mandatory, presumptive, guideline, base-plus-enhancement and discretionary—could be incorporated into a single system; for example, mandatory minimum prison terms and denial of probation might be appropriate for serious offenses or habitual offenders, presumptive sentences might be adopted for the majority of dispositions, enhancements might be available for common aggravated situations and guidelines might be provided for the exercise of discretion when a judge considered departing from a presumptive sentence or enhancement.

**B. The Discretion That Is To Be Controlled**

If one is able to decide whether, and how much, to narrow discretion in the system, one is immediately faced with the next question: Whose discretion is to be controlled? The most visible level of discretion is that of the sentencing court, but there are other levels in the criminal justice system to which

\(^2\) E.g., L. Wilkins, *supra* note 16. The Wilkins guidelines, however, partake somewhat of the nature of presumptive sentences, because a departure from them requires statement of reasons and is subject to appeal. There may in practice be little difference between presumptive and guideline sentencing, except as a matter of degree.

\(^3\) A narrowed range may, indeed, be part of a presumptive system. The Twentieth Century Fund proposal, for instance, includes this feature. *Twentieth Century Fund, supra* note 27, at 20-22.

\(^3\) The California Uniform Determinate Sentencing Act of 1976, an example of a complex base-plus-enhancement statute, is discussed at notes 65-91 *infra*. The Federal Dangerous Special Offender Statute, a base-plus-enhancement law of a different sort, is discussed at notes 251-57 *infra*. 
DETERMINATE SENTENCING current law also extends discretion.

The parole board is an important example. In fact, some states, through the indeterminate sentence, have removed sentencing discretion in felony incarcerations from the court and accorded it to a parole board which has become, for all practical purposes, the sentencing entity. Reducing sentencing discretion while leaving parole unaffected would be meaningless in such a system; therefore, most determinate sentencing systems include provisions controlling discretionary power over parole. Another major area in which discretion is exercised is in the actions of attorneys for the prosecution and the defense. This area includes plea bargaining, but it also includes related kinds of discretion involving the initiation of prosecutions, reduction of charges, recommendation of probation, use of programs for diversion or alternative sentences and abandonment of counts. No determinate sentencing statute yet enacted has attempted direct regulation of attorney discretion (probably because it is the riskiest level to control), but local rules governing this conduct have been proposed and in a few instances actually adopted. In any event, the impact of

31 For example, in California before 1977 a court made no decisions at all with respect to prison sentences. It merely committed the defendant to prison "for the term provided by law," which could be as broad a term as one year to life. See CAL. PENAL CODE § 1168 (West 1970). The Adult Authority, California's parole board, then had power to consider parole. Thus the "real" sentence was set by the Adult Authority rather than the court. See Cassou & Taugher, supra note 11, at 8-9.

32 In fact, all states that have thus far adopted determinate sentencing have abolished discretionary parole except Arizona, which has retained it because of concern for the unpredictability of prison populations. See note 107 infra and accompanying text for a discussion of the Arizona system.


36 See note 34 supra and authorities cited therein for an examination of this proposition.

37 E.g., C. VANCE, OPERATIONS MANUAL app. 2, at 1-3, 8-15, (1976) (manual setting forth internal rules promulgated by district attorney of Harris County [Houston, Texas]); J. VAN DE KAMP, SPECIAL DIRECTIVE: FELONY CASES SETTLEMENT POLICY 1-12 (1976) (internal directive promulgated by district attorney of Los Angeles County); cf. K. DAVIS, DISCRETIONARY JUSTICE 188-207 (1969) (arguing that the prosecutor's uncontrolled discretion vests too much power in his office); NATIONAL COLLEGE OF DISTRICT
determinate sentencing upon attorney discretion is an important consideration, because it might be self-defeating to limit sentence discretion only to see that discretion shifted to the defense lawyer and prosecutor.\footnote{See notes 379-98 infra and accompanying text for a discussion of this impact. Indeed, Alschuler argues that the narrowing of judicial discretion is "likely" to enlarge attorney discretion unless the latter is also narrowed. Alschuler, supra note 7, at 550-51.}

Actually, an accurate picture of these three levels—attorneys, court and parole board—must account for the many different kinds of decisions that are made at each level.\footnote{For example, plea bargaining is preceded by a decision whether to bargain. See NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 91 (1977) (suggesting that a prosecutor's office manual should contain a "description of cases in which no plea is to be accepted").} Evidence indicates, for example, that a sentencing court usually makes a decision whether to incarcerate before determining the length of incarceration; the decision between incarceration or probation is qualitatively different from that as to length.\footnote{See L. Wilkins, supra note 16, at 1.} Given the frequency of probation, the difficulty of formulating criteria for it and the disparity it can produce, this decision needs to be a major focus of any effort at determinate sentencing.\footnote{"Judicial discretion is nearly unlimited as to whether or not to incarcerate." Id. For examples of disparity, see notes 49-54 infra and accompanying text. For a description of the manner in which the decision whether to imprison is guided in California, see notes 72-75 infra and accompanying text.}

Creation of a rational system thus requires comprehensive consideration of the exercise of discretion at many different decision points.\footnote{There are, of course, other levels at which criminal justice discretion is exercised. The discretion of police to arrest or charge, of probation officers to recommend revocation and of parole officers to take action on violations is part of the same system. Furthermore, still other agencies may impinge upon the system; legislative investigation may check discretion, for example, or the intervention of an individual politician may influence it. See K. Davis, supra note 18, at 9-12, 24, 80-84, 126-30, 146 (1969).} The problem is further complicated by the differing functions served by the different levels.\footnote{See generally Alschuler, supra note 7.} As a rough approximation, it might be postulated that the parole board is

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Attorneys, Discretionary Authority of the Prosecutor 78-161 (1977) (reproducing arguments of various authorities in favor of rules); Vorenberg, Narrowing the Discretion of Criminal Justice Officials, 1976 DUKE L.J. 651 (a proposal for legislative, administrative and judicial actions designed to reduce official discretion as regards the handling of common law—or "street"—crimes).
\end{flushright}
the proper repository for discretion concerning the defendant's behavior after conviction, including some factors related to the further need to protect the public from him. But the parole board may not be in as good a position as the trial court to determine the deterrent value of the sentence or the need to serve the ends of retributive justice or uniformity. Exercise of discretion at the attorney level, finally, serves the purpose of bringing a rational cost-benefit factor into the process through plea bargaining. It also serves more substantive goals, such as the prevention of unwarranted proceedings.

A good sentencing structure, then, would recognize the function and the limits of beneficial discretion at each level. It would not constrict sentencing power at one level only to cause equivalent power to reappear at another level, absent good reason for doing so. Neither would it destroy the legitimate function of discretion at any of the three levels.

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46 See M. Frankel, supra note 5, at 86-102 (1972) (arguing that while indeterminate sentences with discretionary parole are "usually evil and unwarranted," they may be useful "in specific cases involving (1) demonstrated needs for rehabilitation and incapacitation and (2) rationally organized means for serving those needs"). For arguments upholding the value of discretionary parole, see Burns, Correctional Reform: Britain and the United States Compared and Contrasted, 42 Fed. Probation 21 (1978); Reid, A Rebuttal to the Attack on the Indeterminate Sentence, 51 Wash. L. Rev. 565 (1976).

11 "The 'seriousness of the crime' is a matter of law and policy within the province of judges, best known to the participants in the trial, and properly to be estimated for purposes of voicing the community's condemnation at the time of pronouncement of sentence. It is, more importantly, not a subject on which there is need to 'wait and see' whether the defendant is ready for release."


4 See C. Vance, supra note 37, at 8-15 (estimating that Harris County, Texas, would need "five to twenty times the number of courts and personnel if every case were to go to trial on a contested basis").

17 Id. at 1-3. Vance requires that prosecutors considering charge initiation consider as primary criteria (1) whether there is probable cause and (2) whether a conviction is likely to be obtained and upheld. Other criteria that should also be considered, he indicates, include improper motives of the complainant, costs and benefits of prosecution, prolonged nonenforcement, convictions or other deprivation of liberty which the accused has already suffered, existence of other greater or lesser charges and cooperation rendered to law enforcement. Similar criteria are provided for bail and charge or sentence reduction. Id. at 8-15. Limits on plea bargaining would inevitably affect these areas of discretion as well.
C. Methods for Controlling Discretion

The most straightforward method through which to control discretion is to set forth a determinate sentencing system and direct the court (or attorneys or parole authority) to follow it. But what is to be done if the court does not follow it? And specifically, what is to be done in the instance of presumptive results if the court is faced with the decision whether to depart from them? Some cases cannot be controlled by specific guidelines; they tend to be cases in which consistent sentencing is most difficult and most important. Accordingly, a rational determinate sentencing system might well include mechanisms for the structuring of necessary discretion remaining in the system.

One obvious solution to sentencing disparity, with or without the prior drafting of guidelines, is appellate review. In fact, one attractive feature of determinate sentencing is that it creates better prospects for the success of sentence review. To date, sentences have been effectively reviewable only in extraordinary situations in most jurisdictions: when they have been heavily disproportionate to the offense, when they have been outside legislative ranges or when the trial judge has made the tactical mistake of recording his reliance on a factor that the appellate court considered improper. Appellate review in a determinate sentencing system would allow for the briefing, argument and shared decision of difficult cases, and

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48 See notes 218-26 infra and accompanying text for a discussion of the level of discretion most appropriately accorded the sentencing judge.


50 If sentence review is undertaken without advance statement of guidelines, the result is likely to be the mere substitution of the "judgment of an appellate court . . . for that of the lower court . . . on an ad hoc basis without . . . a considered overreaching policy." Because appellate evolution is slow, a "common law of sentencing may well take several decades to develop." L. WILKINS, supra note 16, at 2.

51 E.g., In re Lynch, 503 P.2d 921 (Cal. 1972) (life imprisonment for second offense of indecent exposure held cruel and unusual).

52 E.g., People v. McClendon, 265 N.E.2d 207 (Ill. App. Ct. 1970) (probation held required by statute in all but certain kinds of cases).

53 E.g., United States v. Tucker, 404 U.S. 443 (1972) (sentencing judge may consider facts underlying invalid prior conviction but not conviction itself).

54 For example, Maine has long had statutory authority for sentence review, but
it might clarify standards so as to produce greater consist-

ey.\footnote{55} A sentencing court might also be required to state the
reasons for its discretionary decisions.\footnote{56} This process would
serve at least four separate purposes: (1) it would force the
judge to explain his reasons to himself (and thus reduce un-
principled decisions); (2) it would serve as a basis for appellate
review; (3) it would increase understanding and acceptance of
decisions; and (4) it would create a body of precedent that
might aid other judges.\footnote{57} To perform these functions, a state-
ment of reasons need not be in the form of a full-fledged opin-
ion.\footnote{58} It could be similar to findings of fact made by trial judges
in civil cases or to findings that are currently made for certain
types of criminal sentencing.

There are many other mechanisms for ensuring rational
exercise of residual discretion in a determinate system. One
such method is to disseminate information about sentences to
judges on a regular basis. Respectable evidence indicates that
such information, even without other control, leads to more
consistent sentencing.\footnote{59} Diffusion of the decision among several

\footnote{55} It might have this effect. A respectable argument can also be made that \textit{ad hoc}
intervention by appellate courts will obfuscate rather than clarify and will cause dis-
parity rather than uniformity. Notes 367-78 \textit{infra} and accompanying text provide a
discussion of the distortion of legislative intent that occurs in the application of deter-
minate sentencing laws. \textit{See also} L. \textsc{Wilkins}, \textit{supra} note 16, at 2.

\footnote{56} \textit{See}, e.g., Frankel, \textit{supra} note 45, at 9-16; Zeisel \& Diamond, \textit{Search for Sentenc-
ing Equity: Sentence Review in Massachusetts and Connecticut}, 1977 Am. B. Founda-
tion Research J. 881, 928-34.

\footnote{57} \textit{See also} M. \textsc{Frankel}, \textit{supra} note 5, at 39-49; L. \textsc{Wilkins}, \textit{supra} note 16, at 29.

\footnote{58} \textit{E.g.}, "[T]he judge shall state in simple language the primary factor or factors
that support the exercise of discretion . . . . The statement need not be in the lan-
guage of these rules. It shall be delivered orally on the record." \textsc{Cal. Rules of Court}
443.

\footnote{59} \textit{See}, e.g., L. \textsc{Wilkins}, \textit{supra} note 16, at 25 (reporting that 85 percent of decisions
fell within statistically derived, but nonbinding, guidelines furnished judges in one
sample jurisdiction and period); Strauss \& Baskir, \textit{Controlling Discretion in Sentenc-
ing: The Clemency Board as a Working Model}, 51 \textsc{Notre Dame Law.} 919, 932-34 (1976)
(promulgation of a \textit{Clemency Law Reporter} resulted in "key cases being debated and
decided very strictly according to the rules" and in panel decisions that "rarely wan-
dered far from what precedent dictated"). The sentencing institute, at which judges
exchange views on hypothetical cases, is a method of information dissemination. It
individuals is another technique; for instance, the sentence might be formulated by a panel of judges, or by a single judge whose discretion is guided by the consultation of two "advisory" judges who give non-binding opinions. Finally, a judicial council might be charged with the responsibility of drawing loosely worded guidelines that would operate in areas where discretion is necessary. For example, such guidelines might direct the court as to the kinds of considerations that could be legitimate factors in a decision, without mandating their weight or the result. Here, too, there is evidence that more consistent sentencing will result.

These alternatives to direct control might be considered as alternatives to determinate sentencing. That is to say, a given jurisdiction might reasonably decide that an articulation-of-reasons requirement, together with general guidelines for sentencing and appellate review, is preferable to determinate sentencing. But one of the most important benefits of determinate sentencing is that it will enable these other mechanisms for structuring discretion to work properly. If no uniform criteria are provided, the statement and evaluation of reasons for decisions will be less meaningful. The requirement also might

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results in the tempering of extremes of lenience or severity and in most individual judges being influenced more closely toward a kind of "average" of all their colleagues. See Frankel, supra note 45, at 20-22. In an effort to take advantage of these effects, CAL. PENAL CODE § 1170.4 (West Supp. 1979) requires the California Judicial Council to "collect, analyze and quarterly distribute . . . relevant information to trial judges and other interested persons relating to sentencing practices in this state and other jurisdictions."

E.g., Strauss & Baskir, supra note 59, at 931 n.61 (reporting that the Clemency Board's use of three-member panels, each balanced by the inclusion of "one conservative, one moderate and one liberal," met "unanimous approval," resulted in a few sharp divisions, promoted compromise and avoided previous "very uneven" adjudication). Cf. Chamberlain, A New Look at Sentencing from a Court that Doesn't Exist, 37 Tex. B.J. 235 (1974) (arguing that sentencing should be handled by a distinct state court established solely for that purpose). See also Frankel, supra note 45, at 22-23 (discussing sentencing panels composed of the judge, "a psychiatrist or psychologist," and "a sociologist or educator." This tribunal "would bring to the task attitudes, modes of thought, and values that could usefully broaden and temper the lawyer's view.")


This phenomenon is persuasively documented by Zeisel & Diamond, Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut, 1977 Am. B. FOUNDATION RESEARCH J. 881, 931. The authors demonstrate that a reason-statement
be unduly burdensome if imposed in every case, and could become trivialized.\(^3\) In contrast, the preliminary formulation of guidelines would make not only reason statements but also appellate review, advisory sentences and data dissemination more effective mechanisms for the control of discretion.\(^4\)

D. Specific Determinate Sentencing Systems

1. The California Uniform Determinate Sentencing Act of 1976

California has a new determinate sentencing law\(^5\) that took effect in mid-1977. It combines several discrete ingredients to determine the length of prison sentences in a way that severely limits discretion, and it cannot be regarded as anything less than a revolutionary change from California's past.

A judge in California computing a prison sentence today begins by choosing one of three "base terms" provided by law for the category of offense for which the defendant has been convicted.\(^6\) The court makes this choice by considering...
whether circumstances in "aggravation" or "mitigation" require that the "upper" or "lower" term be chosen; if not, the court must select the "middle" term, which is thus analogous to a presumptive sentence.\footnote{CAL. PENAL CODE § 1170(b) (West Supp. 1979).} The crime of second-degree murder, for example, carried base terms of five, six or seven years under the Act as adopted;\footnote{This set of base-term options would apply to offenses committed after the effective date of the California Act but before January 1, 1978, when amendments increasing base terms became effective. The principle here illustrated remains unchanged by the amendments. See note 221 infra for a discussion of the Act.} thus the first step in computing a prison sentence for this offense would be to decide whether circumstances in mitigation or aggravation required a five year or seven year base term. If not, the presumptive middle term of six years would apply. The California Act also provides for "enhancements" of one to three years.\footnote{"Specific" enhancements include one year for personally possessing a firearm or using a deadly or dangerous weapon during the felony (known colloquially as the "arming clause"); two years for personally using a firearm (the "use" clause); one year for taking, damaging or destroying property worth more than $25,000 (or two years for more than $100,000); and three years for personally inflicting great bodily injury during a felony other than murder, manslaughter or assault. CAL. PENAL CODE §§ 12022, 12022.5-.7 (West Supp. 1979). "General" enhancements include one year for a prior felony conviction and three years if both the present crime and the prior were violent felonies and certain other circumstances are present. CAL. PENAL CODE § 667.5 (West Supp. 1979). See also note 100 infra for a description of the simpler Maine system. Cf. People v. Caudillo, 580 P.2d 274 (Cal. 1978) (holding evidence insufficient to support great bodily injury enhancement).} For instance, if the second-degree murderer referred to above had been convicted of another violent felony within the last ten years, his sentence would be subject to an enhancement of three years under the Act. The addition of this enhancement to the base term would yield a total sentence of nine years. This system of base terms, aggravation, mitigation and enhancements is the core of the California Act, although the act is far more complex than this example would indicate.\footnote{One important complication is that enhancements are sometimes inapplicable because of provisions called limitations. For example, in certain cases the total sentence may not exceed twice the base term. CAL. PENAL CODE § 1170.1(f) (West Supp.}
from California's prior system of indeterminate sentences, in which the Adult Authority had wide discretion to determine release dates within a range that sometimes stretched from one year to life imprisonment.

In keeping with its stated goal of uniformity, and in a further departure from the indeterminate sentence, the new California Act deals with parole release by all but abolishing it. An inmate serving a determinate sentence can reduce it by up to one third through "good time," but no further reduction is allowed. Furthermore, the reduction is mandatory; it can only be limited by the denial of good time in specified amounts under specified procedures. This treatment of parole, which is characteristic of most determinate sentencing systems throughout the nation, will make sentences served in California more closely similar to sentences actually assessed than ever before.

But the California Act is also notable for the discretionary options that it retains. Discretion in the granting of probation, for instance, is unchanged by the Act itself, although it is restricted to "unusual" cases for some crimes and denied for certain others. The ability to impose conditions of probation,
including jail terms, also remains discretionary. Misdemeanor sentences, alternative drug commitments and mentally disordered sex offender dispositions are unaffected by the Act. Extraordinary sentences such as life imprisonment and death remain, and the discretion inherent in them is preserved. In addition, the California Act creates new discretionary decisions. There is a power on the part of the sentencing judge, for example, to strike the additional punishments required by enhancements when mitigating circumstances so require, and the Act itself does not provide significant guidance in the exercise of this power. The kinds of aggravation or mitigation that justify deviation from the presumptive middle term are not specified by the Act.

To structure this remaining discretion, the California Act designates an agency called the California Judicial Council to draft rules for the uniform decision of questions regarding aggravation, mitigation, probation, striking of enhancements

“unusual” cases are enumerated by Cal. Penal Code § 1203(d) (West Supp. 1979), including those involving use of a deadly weapon, arming with a deadly weapon, infliction of great bodily injury or torture and offenders with certain prior records. Cal. Penal Code § 1203(a) (West Supp. 1979), however, provides that all eligible defendants must first be considered for probation.

For example, life imprisonment is still the penalty for six crimes, including first-degree murder and kidnapping for ransom. Cal. Penal Code §§ 190, 209 (West Supp. 1978); see also Cassou & Taugher, supra note 11, at 29. The life sentence may be with or without possibility of parole. For murder (§ 190), the death penalty is also available in California. Cal. Penal Code § 190 (West Supp. 1978). Retention of some indeterminate sentences, such as parole life sentences, are a feature which California shares with other determinate systems.

Certain other indeterminate sentences are retained in California for various reasons, including offenses kept as low-grade felonies for ease of extradition. E.g., Cal. Penal Code § 270 (West Supp. 1979) (failure to provide for children). See Cassou & Taugher, supra note 11, at 29 n.182.

In effect, enhancements are presumptive; they must be imposed unless the court finds mitigating circumstances on the record.


Circumstances in aggravation and mitigation are set forth in Cal. Rules of Court 421, 423. Examples are discussed in notes 193-209 infra and accompanying text.

Criteria affecting probation generally are set forth in Cal. Rules of Court 414 and include such factors as
DETERMINATE SENTENCING and similar matters. The Council has responded by drafting lists of factors to be considered in the exercise of this discretion. The Act also guides discretion by requiring articulation of reasons, providing for sentence review and setting procedures for the sentencing hearing.  

The California Act is thus both comprehensive and ambitious. It is the most rigid of the new definite sentencing laws,

(b) The likelihood that if not imprisoned the defendant will be a danger to others.

c) Facts relating to the crime, including:
   (1) The nature, seriousness and circumstances of the crime.
   (2) The vulnerability of the victim and the degree of harm or loss to the victim.

(d) Facts relating to the defendant, including:
   (1) Prior record of criminal conduct, including the recency and frequency of prior crimes . . . .

It can readily be observed that many of the circumstances are very general, but others are more specific—such as subsections (c)(6)-(c)(8), which refer to provocation, professionalism or breach of trust. These latter factors, if actually applied, may have very discernible and concrete effects such as decreasing the availability of probation in white collar cases.

Probation for some kinds of crimes is denied altogether and for others is restricted to “unusual” cases (see note 73 supra). CAL. RULES OF COURT 416 sets forth criteria for determining the existence of an unusual case.

For example, the rules also cover striking of punishment for enhancements. See CAL. RULES OF COURT 441, 445, 447; Advisory Committee Comment, CAL. RULES OF COURT 441.

The rules, in other words, are not “rules” in the ordinary sense; rather, they consist of factors to be weighed against each other. As the council explains, “A single criterion will rarely be determinative; in most cases, the sentencing judge will have to balance favorable and unfavorable facts.” Advisory Committee Comment, CAL. RULES OF COURT 416. Such rules may nevertheless be useful in structuring necessary discretion.

CAL. PENAL CODE § 1170(c) (West Supp. 1979). See also CAL. RULES OF COURT 443.

There are several ways, including appeal, in which the sentence may be reviewed. See generally Cassou & Taugher, supra note 11, at 70-73. The court may recall the defendant within 120 days and resentence, either on the court’s own motion or on that of the Director of Corrections or Community Release Board. The purpose is to use the information gained in the first three months to eliminate disparity. CAL. PENAL CODE § 1170(d) (West Supp. 1979). The Community Release Board must also review the sentence within one year after its commencement and may then recommend resentencing. CAL. PENAL CODE § 1170(f) (West Supp. 1979). It is unclear whether an increase in sentence is allowed by this provision, but there is no express prohibition. See notes 30-38 supra and accompanying text for discussion of multiple jeopardy considerations related to such resentencing.

using a mix of presumptive and guideline approaches, as well as existing mandatory laws, to limit discretion. It seems likely to produce consistent results, and its treatment of parole makes it likely that effects at that level will not cancel the uniformity produced in sentencing. But the criticisms of the Act are also legion: it may be the object of voluminous litigation, it will probably increase the cost of sentencing, and its complexity creates a danger that general practitioners will have difficulty practicing under it. An alleged failure to take the attorney's level of discretion into account has caused one commentator to call it a "bargainer's paradise." A further problem is that no one knows what the new Act's ultimate effects will be; it has been called both a "mass jail break" and a law to send "more felons . . . to prison for more time." Finally, the Act may depreciate the seriousness of some offenses and, in some instances, may produce longer sentences for conduct that seems less blameworthy than crimes treated less severely. Most of these criticisms await experience to prove or disprove them.

2. A Different Kind of Determinate Model: The Wilkins System

A system proposed by Leslie Wilkins and others presents an interesting counterpart to the California Act. The Wilkins model produces sentence guidelines by evolution rather than by legislation. The system begins in a given jurisdiction with the use of multiple regression analysis or similar techniques to

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87 See notes 374-78 infra and accompanying text for a discussion of the impact that adoption of a determinate system will have on cost.
88 Alschuler, supra note 7, at 571. For reasons set forth in text accompanying notes 379-98, however, this article does not share Professor Alschuler's conclusion.
89 Cassou & Taughen, supra note 11, at 30. Cassou & Taughen's own tentative prediction is that median sentences may drop slightly while the number of prison sentences may increase slightly, the latter because judges will be provided with realistic intermediate sentences rather than with the choice between a long indeterminate sentence and one year in county jail as a condition of probation; hence, they may sentence more marginal offenders to prison without appreciable increase in their incarceration.
90 See notes 174-79 infra and accompanying text for examples of offenses which the Act depreciates in seriousness.
91 See Cassou & Taughen, supra note 11, at 30.
92 L. Wilkins, supra note 16.
ascertain the criteria that judges are "really" using to assess sentences. These criteria are then used to formulate guidelines that reflect the sentence that should ordinarily be assessed for a given crime and a given offender. The heart of the system is the furnishing of these guidelines to judges and the voluntary use of them in the computation of sentences. Variations from the guidelines are permitted (indeed, they are encouraged), but must be accompanied by a statement of reasons which serves as the basis for appellate review and for the formulation of additional guidelines by a judicial panel. The setting of sentences by legislation is not involved, nor need sentencing ranges be changed.

The Wilkins system has its disadvantages. It offers little or no democratic control over the absolute level of sentences and it offers little satisfactory direction outside the guidelines it produces. It does not identify the ingredients of the sentence as clearly as does California's Act. But the Wilkins proposal achieves many of the objectives of determinate sentencing, and it has an elegant simplicity that is its chief asset. No new laws are needed. If it fails, judges can correct the problem by ceasing to use it. The system would neither depreciate the seriousness of offenses, stimulate plea bargaining, ignore individual cases nor produce distortion (at least, none that is not already present in criminal sentencing). In addition, it would not result in dramatic increases in cost.

The Wilkins model is thus a kind of poor man's determinate sentencing act. This fact alone may mean that it will be workable in more places than the more ambitious California model. Critics point out that the system is a half-way measure

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93 The categorization of penalties is thus crime-by-crime and offender-by-offender rather than in the kind of across-the-board provisions used in California. A grid expressing the offense score plotted against the offender score is used. See, e.g., id. at xv. At least one commentator implies that this difference may make a determinate sentencing system more likely to be upheld as constitutional. Uelmen, supra note 8, at 734.

94 The lack of democratic control is intentional. Wilkins and his co-workers regard sentencing as "primarily a judicial concern." They reject legislative action because it is likely to ignore judicial experience, result in judicial hostility, transfer discretion to prosecutors or police and add an "additional bureaucratic layer." For reasons set forth in the text accompanying notes 399-412 infra, this article reaches a different conclusion.
that may become a permanent solution if adopted; however, one might as easily argue that a more ambitious system will be difficult to remove if enacted. In any event, the significance of the Wilkins system is great. The proposed federal criminal code revision, for instance, would create a United States Sentencing Commission that would derive sentence guidelines, and that proposal has a great deal in common with the Wilkins model.

3. Determinate Sentencing in Other States

Determinate sentencing systems have been adopted in several states other than California, among them Maine, Illinois, Indiana, Arizona and Colorado. The only pattern to these new laws, however, is that each is different from the others. The differences, as one commentator has observed, may be a happy coincidence because they increase the likelihood that the best approaches will be identified.

The Maine law was the first of these new statutes. If the California Act exemplifies rigid determinate sentencing, the Maine law is barely deserving of the label. As a rural state, Maine had fewer difficulties with sentence disparity than others; consequently, reform concentrated on the parole system. The law that emerged abolished parole, allowing for fixed good-time credits in a manner similar to the California Act and enabling the department of corrections to petition the trial court to reduce sentences. Judicial discretion was left virtually absolute, but it was structured into five felony ranges.


The spirit of the Wilkins system may even be imposed without the mathematics by judges who conceive of a point system for offenses and offenders and agree to follow it. See Alschuler, supra note 7, at 561 n.37.


Halperin, supra note 54, at 13, 15.


The ranges are defined by maximums of 20 years for Class A felonies, 10 years for Class B, 5 years for Class C, one year for Class D and 6 months for Class E.

Thus sentences in Maine are "determinate" in the sense that once assessed they must be substantially served, but there is little control (other than the corrections department petition procedure) over their assessment.\footnote{However, Maine has appellate sentence review. Me. Rev. Stat. Ann. tit. 15, § 2141 (1978). It is possible, as Halperin suggests, that the abolition of parole may make review more frequent and successful. Halperin, supra note 54, at 13-14. If that happens, the combination of centralized appellate review, narrowed ranges, reconsideration at the insistence of a centralized prison director and no parole may make Maine's sentencing system nearly as consistent as a more determinate scheme.}

In a quite different vein, Indiana's new law (which bears a basic resemblance to a proposal by a public interest group known as the Twentieth Century Fund\footnote{Both Indiana's statute and the Fund proposal provide for presumptive sentences within broad ranges; Indiana's law differs from the Fund proposal in that the ranges are broader and the presumptive sentences more severe. See Twentieth Century Fund, supra note 27, and notes 103-06 infra and accompanying text for a discussion of the Indiana statute.}) provides presumptive sentences within broad ranges of judicial discretion. For example, the presumptive term for a "class D felony" in Indiana is two years, but the judge may deviate from that result and assess a sentence of any length between zero and four years by consulting and applying a statutory list of aggravating and mitigating circumstances.\footnote{Ind. Code § 35-50-2-7 (Supp. 1978). See Halperin, supra note 54, at 14. Actually, the ranges themselves do not tell the whole story since the statute gives the judge authority to suspend any part of most felony sentences, so the de facto minimum in most cases is probably zero. Id.} For more serious offenses, presumptive sentences are higher and ranges wider. Murder, for example, carries a presumptive sentence of thirty years within an effective range\footnote{Ind. Code § 35-50-2-3 (Supp. 1978).} of twenty to fifty years.\footnote{Ind. Code § 35-50-2-2 (Supp. 1978). See also Halperin, supra note 54, at 14.} Parole, as in California, is abolished in favor of nondiscretionary good time.\footnote{Good time will ordinarily be one-half the sentence.} The Indiana system is thus simpler than the California one, but not so simple as the Wilkins proposal.

The Arizona,\footnote{Ariz. Rev. Stat. Ann. § 13-701-709 (1978). Presumptive sentences in Arizona range from one and one-half years for Class 6 felonies up to seven years for Class 2. Ranges for non-presumptive sentences are also included, in that the court may decrease a sentence by 25 percent or increase it by 50 percent (100 percent increases are authorized for Class 2 and 3 felonies).} Illinois\footnote{Ind. Code § 35-50-6-1 (Supp. 1978).} and Colorado\footnote{Ind. Code § 35-50-6-1 (Supp. 1978).} statutes represent...
variations on these basic themes. Arizona is especially noteworthy as the only determinate-sentencing state that has retained discretionary parole. The Illinois statute, like the proposed federal code, creates a sentencing commission that has the duty of deriving guidelines from statistics in a manner similar to that suggested by Wilkins. All of these systems, in spite of their differences, present common advantages and disadvantages.

The Arizona statute also retains discretionary parole after one-half the sentence is served. And in an interesting response to the unpredictability of prison populations, Arizona makes low-grade felons eligible for parole after three months if facilities are inadequate. ARIZ. REV. STAT. ANN. § 31-411 (1978). See also Halperin, supra note 54, at 14.

The Arizona system is thus similar to the California one, but with slightly higher presumptive sentences and correspondingly increased discretion at both the court and parole levels.

Illinois' system is a cross between the system of California and the system of Maine. It retains wide ranges of judicial discretion without presumptive sentences; the penalty for non-capital murder without special circumstances, for example, is 20 to 40 years, and the penalty for low-grade felonies is one to three years. This feature resembles the Maine system. But the Illinois statute also provides express aggravating and mitigating factors that must be consulted to determine the length of incarceration (or probation), and it provides enhanced ranges of discretion for specific circumstances (e.g., prior convictions). In this respect, the Illinois system bears some relation to California's. ILL. REV. STAT. 38 §§ 1005-5-3-1005-5-3.2; 1005-6-1-1005-6-4 (1979). See generally, McAnany, Merrit & Tromanhauser, supra note 13.

The Illinois system also creates a Criminal Sentencing Commission which is required to create guidelines for sentencing within the statutory ranges. In this respect, the Illinois system resembles the Wilkins model.

The Colorado Act requires the maintenance of records by the state court administrator, which must contain specified information concerning each felony defendant relevant to sentence. Felonies are divided into five classes with presumptive sentences established for each, ranging from life imprisonment or death for a class 1 felony to eighteen months plus one year of parole for a class 5 felony. If aggravating or mitigating circumstances are found, the court may impose a definite sentence varying not more than 20 percent from the presumptive sentence, unless the defendant has been previously convicted of a felony, in which case an increase of up to 50 percent is authorized. The statute abolishes discretionary parole in favor of "good time" deductions of ten days per month. If the court grants probation, it must impose the condition that the defendant make restitution to the victim in an amount determined by actual pecuniary damages and the defendant's ability to pay. COL. REV. STAT. §§ 16-11-105, 16-11-201-16-11-212 (1978).

See note 107 supra for a discussion of the Arizona statutory system.

See note 108 supra for a discussion of the Illinois statutory system. See also Halperin, supra note 54, at 15.
II. SENTENCING GUIDELINES AND SENTENCING GOALS

Whichever of these models one considers, determinate sentencing is likely to affect achievement of the goals of criminal justice in a fundamental way. It is not completely clear, however, what direction this change will take. As the arguments over the California Act show, the effects of determinate sentencing are outside the range of precise prediction; but more importantly, there is no consensus on the goals of sentencing that sufficiently allows us to evaluate their achievement. After centuries of debate, the proper significance of rehabilitation, retribution, uniformity, deterrence and incapacitation is still the subject of vigorous disagreement; furthermore, these goals are in unavoidable and constant conflict. A sentence that is consistent with a policy of deterrence, for example, is likely to be inconsistent with a policy of rehabilitation.

Discretionary sentencing “solves” this problem by ignoring it. The traditional view allows one judge to sentence for rehabilitation, another for retributive justice, and still others

112 Most advocates of sentence guidelines acknowledge that fundamental change is the aim. See, e.g., Bayley, Good Intentions Gone Awry—a Proposal for Fundamental Change in Criminal Sentencing, 51 WASH. L. REV. 529 (1976).

113 See, e.g., Gregg v. Georgia, 428 U.S. 153 (1976). In this decision upholding the Georgia death penalty statute, the plurality opinion of Justice Stewart examines several philosophical goals of sentencing. Deterrence, Justice Stewart states, is a “complex factual issue the resolution of which properly rests with the legislatures.” Id. at 185. Retribution, he also says, may not be a dominant feature of the criminal law but is an “essential” one, although that view “may be unappealing to many.” Id. at 183. Incapacitation is relegated to a footnote, with Justice Stewart concluding that it “may” be a proper function. Id. at 183-84. Justice Marshall, however, maintains that the Georgia statute will not deter, that it is not necessary for incapacitation, and that retribution is not a proper consideration. Id. at 233-41 (Marshall, J., dissenting).

For conflicting policy statements, compare CAL. PENAL CODE § 1170(a)(1) (West Supp. 1978) (“the purpose of imprisonment is punishment”) with Criminal Justice Reform Act of 1973, S. 1, 93rd Cong., 1st Sess. § 1-1A2 (1973) (foremost purpose of the Code is “deterrence”; “rehabilitation” and “incapacitation” are purposes when deterrence “proves ineffective”), In re Minnis, 428 P.2d 997 (Cal. 1972) (California’s indeterminate sentence laws “place emphasis on reformation”), and NATIONAL CONFERENCE ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT 1 (2d ed. 1972) (“[p]ublic protection” is the only valid basis, though “persons convicted of crime shall be dealt with in accordance with their potential for rehabilitation;” “retribution and revenge” are disapproved).

114 See, e.g., J. WILSON, supra note 21, at 162-82 (1977). Professor Wilson examines the differing effects of rehabilitative, incapacitative, deterrent and retributive philosophies upon sentencing a given offender, showing that the results may range from a policy of sending no offenders to prison to a policy of incarcerating every “non-trivial” offender. Id. at 193, 202.
for deterrence or incapacitation, without demanding an accounting of reasons or consistency from any of them. Determinate sentencing, however, requires that at least some of these hard choices be incorporated into the system from the beginning and followed by all. Therefore, one of its by-products may be that it will force us, at long last, to formulate a careful sentencing philosophy. The discussion that follows focuses chiefly on the California Act, but it is an effort to identify the philosophical changes that determinate or guideline sentencing of any type may reflect.

A. Rehabilitation

1. The Decline of the Medical Model

For years, sentencing philosophy has been dominated by the rehabilitative ideal. This concept, which has also been referred to as the "medical model," regards criminal acts as analogous to "symptoms" of a "disease" that correctional "experts" may "treat" and "cure." As a consequence of this

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118 See notes 227-32 infra and accompanying text for a consideration of the weight to be given the goal of uniformity when the absence of rehabilitative or deterrent purposes is the only basis for severity; see Frankel, supra note 45, at 5, and notes 391-94 infra and accompanying text for a consideration of the weight to be given a bargained plea of guilty; and see notes 193-209 infra and accompanying text for a consideration of the weight to be given the mental capacity, attitudes or church attendance of the defendant. It is important to remember, however, that even the most determinate systems in practice leave wide ranges of discretion, and so only some, and by no means all, of these choices must be made in advance; furthermore, the choices need not be absolute but may admit of exceptions.

119 See M. Frankel, supra note 5, at 62.


121 See Bayley, supra note 112, at 530; see also notes 119-31 infra and accompanying text for a discussion of the "medical model."

122 "The offender is 'sick,' runs the humanitarian thought . . . . He needs to be
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view, rehabilitation has been seen as the dominant (some have suggested the only) permissible theme in much sentencing philosophy.\textsuperscript{120} The rehabilitative ideal reached its ultimate expression in the indeterminate sentence, in which the court sentenced the convict to a broad range of years so that the parole board could evaluate his treatment and readiness for release.\textsuperscript{121}

There were a number of difficulties with both the medical model and the indeterminate sentence. By its insistence that retributive justice had no place in the assessment of sentences, the rehabilitative philosophy both ignored a necessary function of the criminal law\textsuperscript{122} and made proportional sentencing unlikely. For without consideration of moral blameworthiness, rational grading of sentences and equal justice were lost as goals and as results.\textsuperscript{123} At the same time, many questioned whether the medical model worked. Its assumption that the disease of crime could be treated and cured was too facile;\textsuperscript{124}

treated and cured . . . [T]hose charged with treating and observing him must be left to decide the time for release.” Frankel, supra note 45, at 31. See also K. MENNINGER, THE CRIME OF PUNISHMENT 17-18 (1968).

\textsuperscript{120} E.g., R. CLARK, CRIME IN AMERICA 220 (1970).

\textsuperscript{121} “[T]he legislature has abandoned the ancient notion of categorical punishment, the infliction of fixed terms for certain crimes, and substituted the indeterminate sentence, leaving to the Adult Authority the judgment of the period of incarceration. The Authority does not fix that period pursuant to a formula of punishment, but in accordance with the adjustment and social rehabilitation of the individual . . . .” People v. Morse, 388 P.2d 33, 39-40 (Cal. 1964). See also In re Minnis, 498 P.2d 997 (Cal. 1972) (holding Adult Authority’s setting of maximum term for narcotics dealers, apparently for deterrent purposes, illegal). But see note 124 infra and authorities cited therein for the position that rehabilitation is often a difficult, if not an impossible, goal.

\textsuperscript{122} See notes 163-70 infra and accompanying text for a discussion of the theory of retributive justice.

\textsuperscript{123} “Consistency,” “equality,” “uniformity,” “proportionality,” “rational grading” and similar terms are all based on notions of retributive justice. When one says that the sentence given offender A is “consistent” with that given offender B, one probably means that the relationship between the severities of the two sentences is roughly the same as the relationship between the degree of moral blameworthiness of the two offenses under the circumstances of each.

\textsuperscript{124} “It is assumed [by proponents of the rehabilitative ideal] . . . that human behavior is the product of antecedent causes, [that] [t]hese causes can be identified . . . [and that] [k]nowledge of the antecedents of human behavior makes possible an approach to the scientific control of human behavior.” Allen, Criminal Justice, Legal Values and the Rehabilitative Ideal, 50 J. CRIM. L.C. & P.S. 228 (1959). But the psychiatric data refute these assumptions. Even presently existing phenomena affecting “causes” cannot in fact be identified with agreement; estimates as to mental illness in the inmate population “vary from 10 to 20 percent to well over 50 to 75 percent.”
worse yet, this scientific terminology gave an impression of accuracy that was unrealistic, and it probably led to the unnecessary incarceration of persons diagnosed as dangerous when in fact they were not (as well as to the premature release of others mistakenly considered harmless). Furthermore, the medical model implied no logical limits on the power of government to tamper with the personalities of individuals within its care. Bizarre terminology adopted by the corrections industry sought to legitimize every coercive device in terms of benevolence to the inmate, and from this rationalization, it was a short step to behavior modification through psychological or even physical means. Above all, however, the indeterminate sentence produced haphazard and sometimes cruel results that weakened respect for the entire criminal justice system. In some

A. Freedman, H. Kaplan & B. Sadock, Modern Synopsis of Comprehensive Textbook of Psychiatry II 1220 (1972) [hereinafter cited as Textbook of Psychiatry]. As for drug dependency, "[t]here seems to be no unified theory to explain opiate addiction" or alcoholism. Id. at 654, 681. Furthermore, "[m]any prisons offer inmates an emotional climate that is destructive of rehabilitation." Id. at 220. For the "antisocial personality," which is present in a "substantial number of criminal and violent people," "the evidence is insufficient to support any conclusions about treatment," except, ironically, "punishment." Id. at 651.

None of this is to suggest that rehabilitation is impossible in all cases, or that hope for the future is in vain. But the process should not be conceptualized as a simple one, "as though it involved a simple medicine that could be poured into a killer's head to make him refrain permanently from his conduct." D. Crump & G. Jacobs, Capital Murder 276 (1977). See also Textbook of Psychiatry at 1221-22.

122 For a case illustrating excessive incarceration, see Bayley, supra note 112, at 534 n.18 (16-year-old held nine years for single offense of riding in stolen vehicle). For a case illustrating misdiagnosis of a dangerous offender, see D. Crump & G. Jacobs, Capital Murder 112 (1977) (five-time ex-convict escaped and committed three rape-robery murders in two states after being transferred to minimum security facility and evaluated as "definitely [having] the ability to remain in the community without violating the law"). This inaccuracy is consistent with psychiatrists' own evaluation of their science: "[T]he psychiatrist's ability to predict dangerous behavior . . . is not as reliable as one might hope." Textbook of Psychiatry, supra note 124, at 1219.

123 See also J. Mitford, Kind and Usual Punishment (1973); American Friends Serv. Comm., Struggle for Justice (1971). Cf. Bayley, supra note 112 ("[T]he treatment model is inappropriate because it fails to consider fundamental principles of justice and the purposes of the criminal law . . . .") Id. at 530. Bayley concludes that "coercion intrinsically involves an element of punishment." Id. at 532.

124 "Until or unless we have some reasonable hope of effective treatment, it is a cruel fraud to have parole boards solemnly order men back to their cages because cures that do not exist are found not to have been achieved." Frankel, supra note 45, at 34. See also Reid, A Rebuttal to the Attack on the Indeterminate Sentence, 51 Wash. L. Rev. 565, 573-82 (1976).
states, wardens have placed greater blame for prison violence
upon dissatisfaction with the indeterminate sentence than
upon food, overcrowding or conditions of incarceration.128

The medical model, the rehabilitative ideal and the inde-
terminate sentence thus came under attack from both ends of
the political spectrum. Those who emphasized crime control
argued that it was not working, and those concerned with pris-
oners' rights protested that it was unfair. Arguments such as
these were major forces behind the movement toward determi-
nate sentencing.

With these arguments came a major shift in philosophy
from rehabilitation to retribution. The California Uniform De-
terminate Sentencing Act, for example, begins with a startling
and frank statement of policy: "The legislature finds and de-
clares that the purpose of imprisonment for crime is punish-
ment."129 Suddenly and completely, rehabilitation is no longer
the law in California's prisons; at least in the language of the
law, the medical model has been finally and completely aban-
doned.130 Even in a state known for rapid swings of the pendu-
lum, the abruptness of the change wrought by determinate
sentencing is impressive.131

123 COUNCIL OF STATE GOVERNMENTS, DEFINITE SENTENCING: AN EXAMINATION OF
PROPOSALS IN FOUR STATES 10 (1976) [hereinafter cited as COUNCIL ON STATE
GOVERNMENTS].


130 "The now taboo word 'rehabilitation' has been dropped from the lexicon of
sentencing language, even though the concept apparently remains a goal." Cassou &
Taugher, supra note 11, at 27.

The shift was actually not as abrupt as the statutory change alone would
indicate. The California Supreme Court had long since shown concern for the potential
disproportionality of indeterminate sentences, holding some such sentences unconsti-
tutional. E.g., In re Lynch, 503 P.2d 921 (Cal. 1972) (one-year-to-life for indecent
exposure). The court later set forth a three-part test for proportionality in In re Fons,
519 P.2d 1073 (Cal. 1974). In In re Rodriguez, 537 P.2d 384 (Cal. 1976), the court
required the Adult Authority to set definite, final parole release dates ("Rodriguez
terms") for each offender proportional to his offense. A mass of individual challenges
to allegedly disproportionate sentences followed. Cassou & Taugher, supra note 11, at
15. The California Supreme Court responded to this flood of cases by refusing review
until the Adult Authority had had a reasonable opportunity to set a proportionate term

In the meantime, the Adult Authority, having decided that rehabilitation was
neither a measurable nor a proper guide for parole, was initiating administrative re-
forms. In Adult Authority Chairman's Directive 75/20 (April 15, 1975) and Adult
Authority Chairman's Directive 75/30 (September 2, 1975), the Authority created
2. Is Determinate Sentencing Inconsistent with Rehabilitation?

Many observers may question whether California has not sacrificed something of significance with this change of objectives. There are still supporters of indeterminate sentencing who argue that it has failed only because it has not been properly adopted, administered or evaluated.\(^\text{132}\) Even those who reject the indeterminate sentence may not accept a wholesale abolition of rehabilitation and a turn to retributive justice as the sole purpose of prison sentences. Does determinate sentencing have to imply this change? Is it inconsistent with rehabilitation?

The answer is that it need not be. First, the factors determining the sentence will invariably include those associated with susceptibility to rehabilitation, such as criminal record, mental state and nature of the crime.\(^\text{133}\) Furthermore, decisions respecting sentencing and parole do not necessarily imply unavailability of services for self-improvement or restrictions on the rights of inmates to use them; determinate sentencing simply means that the length of time served will not be subject to the unfettered discretion of a person or agency interested in coercing the appearance of rehabilitation. Counseling, education, work release, community facilities and half-way houses are not inconsistent with determinate sentencing. Most importantly, the California statement of policy encourages release or probation.\(^\text{134}\) The "punishment" policy does not extend beyond rudimentary determinate systems for setting both parole dates and Rodriguez terms. The systems were of a base-plus-enhancement nature, dependent on the kind and gravity of the offense. They eliminated consideration of the ability to rehabilitate. But 75/20 was struck down on the ground that the indeterminate sentence law imposed a statutory requirement that rehabilitative potential be considered. In re Stanley, 126 Cal. Rptr. 524 (1976).

Thus the Lynch-Foss principle, the Rodriguez term and 75/20 were all precursors to the California Uniform Determinate Sentence Act of 1976 and Stanley, in turn, was the straw that broke the camel's back. See generally Comment, supra note 65.

\(^\text{132}\) E.g., Reid, supra note 128.

\(^\text{133}\) See notes 193-209 infra and accompanying text for a discussion of the factors favoring limitations on an individualized sentencing system, and notes 222-26 infra and accompanying text for a discussion of "the right level of discretion" to be accorded a judge in a workable determinate system. See also, e.g., CAL. RULES OF COURT 414-25.

\(^\text{134}\) Cf. J. Wilson, supra note 21, at 202 ("deprivation of liberty" under Wilson's
prisons, and by forthrightly recognizing that prisons are not benevolent, the Act strikes a blow against their overuse.

Thus it is possible—though by no means clear—that the greater equality and freedom from unproductive coercion that determinate sentencing may bring will engender greater respect for the legitimate purposes of sentencing and make rehabilitation a limited reality rather than an unattainable dream.\(^\text{135}\) Indeed, the drafters of the California Act premised it, in part, upon this hope.\(^\text{138}\) It is paradoxical, but nonetheless probably true, that by using rehabilitation as the only factor in sentencing decisions in the past, we have interfered with the rehabilitative process. It remains to be seen whether sentence guidelines are the corrective that is needed.

B. Deterrence

It is possible that determinate sentencing will also affect another traditional goal of sentencing—deterrence—although it is difficult to predict the direction of the effect. The debate that preceded enactment of the California law, for example, included both assertions that it was too harsh and assertions that it was too lenient.\(^\text{137}\) Some of the arguments seem to cancel each other. For example, supporters of definite sentencing may argue that the statement of explicit terms of imprisonment will give the public greater awareness of them and hence increase their deterrent value,\(^\text{138}\) but opponents could suggest just as strongly that because determinate sentences tend to be shorter than maximums authorized by indeterminate systems, the

\(^{\text{135}}\) This view appears to be shared by the majority of commentators. E.g., Bayley, supra note 12, at 561-62; McGee, supra note 9, at 9; Cf. M. FRANKEL, supra note 5, at 101-02 (“[F]or the great majority of cases, sentences ought to be stated with maximum certainty, based almost entirely upon factors known on the day of sentencing, and determined with the nearest approach we can make to objective, equal, and ‘impersonal’ evaluation of the relevant qualities of both the criminal and the crime.”) But see Reid, supra note 127, at 601-06.

\(^{\text{137}}\) Interview with Raymond I. Parnas, Professor of Law, University of California, Davis, and Counsel to the California Senate Select Committee on Penal Institutions, in Davis, California, Oct. 4, 1978 (interview conducted by telephone from Houston).

\(^{\text{138}}\) Cassou & Taugher, supra note 11, at 18-22; McGee, supra note 9, at 4.

\(^{\text{139}}\) See TWENTIETH CENTURY FUND, supra note 27, at 33 n.1.
public perception of sentence lengths and hence deterrent effects will be diluted.\textsuperscript{139} The first argument is undercut by the greater complexity of determinate sentencing and the second by public awareness that sentences served are usually less than authorized maximums.

There are, however, reasons to believe that a well-written determinate sentence law can increase deterrence. Severity of sentences is undoubtedly a factor in deterrence, but certainty is also important.\textsuperscript{140} While no one knows the reason, it appears that human beings, if they are influenced by consideration of the consequences at all, tend to discount those consequences in a haphazard system more than logic alone would dictate; thus the certainty that a sentence of moderate severity will be imposed is probably a greater deterrent than the less likely possibility of a more severe one. Of course, a determinate sentencing system is only as good as its certainty, and discretionary probation, avoidable enhancements and the unpredictable rewriting of the law by appellate courts all detract from it.\textsuperscript{141} But the net effect of sentencing guidelines is likely to be increased certainty and thus, if severity remains constant, increased deterrence.

Enhancements directed at particular elements of the offense or offender provide another means by which it is possible that deterrence will be increased. The addition of relatively severe enhancements for circumstances that the society particularly feels the need to discourage serves to identify that societal purpose in a highly visible way and to put a quantifiable price upon it.\textsuperscript{142} For example, the California Act contains a two-year enhancement for the use of a firearm. Although the complexities of the Act may not be generally understood, the message that California intends to deal more severely with offenses committed by firearm is likely to be clear to most affected of-

\textsuperscript{139} See id. at 55-56 and unnumbered footnote contained therein.
\textsuperscript{140} See J. Wilson, supra note 21, at 179-80; Dershowitz, Background Paper, \textit{Twentieth Century Fund}, supra note 27, at 72.
\textsuperscript{141} See notes 362-73 infra and accompanying text for a discussion of the problems in interpreting determinate sentencing laws and the concomitant distortions of such laws.
\textsuperscript{142} See J. Wilson, supra note 21, at 162-63 (advocating that recidivism "invariably" be the subject of enhancement—small if the offense is small, grave if it is serious).
fenders. Thus if the theory of general deterrence is valid, such enhancements should serve better than ad hoc sentencing in discouraging the criminal use of firearms. Determinate sentencing also enables the use of severe, highly visible enhancements based on recidivism; again, examples are to be found in the California Act. These provisions may act as specific deterrents against those for whom discouragement is most necessary.

However, determinate sentences can also be set so that they undermine the possibility of deterrence. For example, a definite sentencing proposal by the Twentieth Century Fund creates a presumptive sentence of probation not only for the first but also for the second offense of shoplifting, and it further provides a presumptive probated sentence for a person shown to have "occasionally" received stolen property, irrespective of the amount involved—a proposal that is tantamount to a Fence's Relief Act. As James Q. Wilson points out, there is no basis for assuming that property criminals are so different from ordinary humans that their activities remain uninfluenced by rational consideration of the balance of costs and benefits. Probation (perhaps with minor deprivation of liberty or fine as a condition) should be an available, perhaps even a typical, disposition of some of these offenses, but a

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143 Specific deterrence operates on the convicted individual, while general deterrence operates on the population at large through its perception of the treatment of the convicted individual.

144 See J. Wilson, supra note 21, at 162-63.

145 Twentieth Century Fund, supra note 27, at 61. The terms of probation are one year; the amount limit is $100 for the offense. The Fund even proposes that if the second offense occurs during the one-year period of probation for the first, revocation on that ground be prohibited. Only after the third conviction for shoplifting up to $100 does the Fund recommend incarceration—for one month.

146 "Occasionally" is said to mean "one or two instances." Twentieth Century Fund, supra note 27, at 59. The recommended presumptive sentence upon a second conviction for "occasional" receiving is one month. The Fund also establishes an offense of "fencing," which presumably consists of professionally receiving stolen goods, and creates a presumptive sentence of one year. Id. The sentencing structure overlooks the difficulty of convicting fences for receiving even once, let alone "occasionally" or "professionally."

147 J. Wilson, supra note 21, at 202-03.

148 [A minimal] penalty may be appropriate in many cases, but whether it should be advertised in advance as the only possible sanction for certain crimes is another question . . . . A degree of uncertainty . . . may
sentencing structure should not be designed so as to ensure deterrable offenders that they will suffer no significant ill effects at all if apprehended.

C. Incapacitation

Incapacitation refers to imprisonment for the sake of protecting the public from further crimes by the same individual. It is probably the most important single purpose for sentencing the dangerous offender, and it requires the ability to impose very severe sentences in a few cases. Determinate sentencing tends to compress permissible sentence ranges, and hence it may be expected to result in decreased achievement of the incapacitative function in some cases unless other dispositions are available. A provision allowing for disregard of presumptive sentences, as in Indiana, or dangerous special offender statutes, such as the federal government has adopted, may be the answer. Some commentators have suggested that indeterminate sentences be retained for those cases in which incapacitation is a major goal. It is also possible to include a category

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have deterrent value, and it does not seem inconsistent with [the principle of just desert] to bark a bit harder than we will probably want to bite. . . .

Alschuler, supra note 7, at 568 n.50.

149 The Fund report contains a vigorous dissent on this point. Twentieth Century Fund, supra note 27, at 55-56 and unnumbered footnote.

150 The California Uniform Determinate Sentencing Act, for instance, avoids the difficulties encountered by the Fund proposal in that it does not apply to misdemeanors and does not affect probation except by requiring the California Judicial Council to formulate general criteria. Thus it does not insure absence of punishment even for minor offenses. See notes 65-91 supra and accompanying text for a discussion of the California Act.

151 Such sentences should be available for a Charles Manson, for example, or a Richard Speck. See D. Crump & G. Jacobs, Capital Murder 274-76 (1977). But cf. Twentieth Century Fund, supra note 27, at 57 (advocating presumptive 10-year sentence for first-degree murder).

152 See notes 102-06 supra and accompanying text for a discussion of the Indiana system which permits sentences of up to fifty years by allowing variation from the presumptive twenty-year sentence for murder.

153 See notes 251-56 infra and accompanying text for a discussion of 18 U.S.C. § 3575 (1970), which allows an increase in sentence to a maximum of twenty-five years for certain dangerous offenders.

154 E.g., Frankel, supra note 45, at 35. While recognizing that “[w]e may have to hold him [the dangerous offender] for an uncertain and long time,” Judge Frankel argues that it should be done under an indeterminate sentence allowing for release:
of very severe determinate sentences—life imprisonment, life imprisonment without possibility of pardon or parole or capital punishment—for very serious offenses by dangerous offenders, and some jurisdictions adopting determinate sentencing have done so.\textsuperscript{155}

Nowhere has the incapacitative function been more the subject of debate than in California, where a very few serious offenses are dealt with by lengthy terms, but where the majority of crimes, even if committed by persons who appear to be dangerous, are not. Drafters of the California Uniform Determinate Sentencing Act explain the omission of a dangerous offender or extended confinement law by pointing out that it would interfere with the primary purpose of the California Act—that of consistency—and by the argument that prediction of dangerousness is unreliable.\textsuperscript{156} A collateral concern is that such prediction often involves the use of evidence that many find distasteful, such as psychiatric testimony or evidence of criminal transactions not involving conviction.\textsuperscript{157} A dilemma arises, however, in that the rigidity of the California Act sometimes mandates virtually identical treatment of the extraordinary crime and the run-of-the-mill one, and, more specifically, does not allow for a difference of more than a few years in sentence terms (absent enhancements) for most offenses even if it appears that public safety requires a more lengthy incarceration. The choice made by the California drafters is supportable by rational arguments, but it is an uneasy compromise. The opposing argument is rational too, and public desires may ultimately lead California to the adoption of a dangerous

\textquote["we ought to be willing to forego certainty and absolute security, remembering that freedom and risk are inseparable." Id.]{\textquote[see note 75 supra and accompanying text for descriptions of these sentences in California. Death sentences, for example, must always be "determinate" in the sense that they must be produced by a system of guided discretion, although they apparently cannot be mandatory. Cf. Ind. CODE \S 35-50-2-9 (Supp. 1978) (providing for death penalty for certain murders).]{A dilemma arises, however, in that the rigidity of the California Act sometimes mandates virtually identical treatment of the extraordinary crime and the run-of-the-mill one, and, more specifically, does not allow for a difference of more than a few years in sentence terms (absent enhancements) for most offenses even if it appears that public safety requires a more lengthy incarceration. The choice made by the California drafters is supportable by rational arguments, but it is an uneasy compromise. The opposing argument is rational too, and public desires may ultimately lead California to the adoption of a dangerous

\textquote[Id.]{Id.}

\textquote[Id.]{Interview with Raymond I. Parnas, Professor of Law, University of California, Davis, and Counsel to the California Senate Select Committee on Penal Institutions, in Davis, California (Oct. 4, 1978). Professor Parnas was one of the principal architects of the California Act. The interview was conducted by telephone from Houston.}{Id.}
offender law, wider ranges of discretion or other means for extended confinement. For lesser offenses—crimes against property in particular—a system of fixed or presumptive sentencing could, if properly executed, have significant incapacitative effects. If it resulted in increased detention of recidivists through enhancements, it would better incapacitate a class of offenders responsible for a disproportionate share of property crimes. There is some evidence that even relatively slight increases in the detention of these offenders can be significant in reducing crime by the mechanism of incapacitation. A discretionary system, while it would undoubtedly result in increased sentences for recidivists, would not do so with the accuracy of guidelines based directly on recidivism.

158 Id. Professor Parnas observes that proposals in California for wider ranges between base terms—up to five years, rather than two, for example—would create disparity. They might, but they might also serve other rational purposes of the criminal law, such as incapacitation, and they might allow for gradations according to the nature of offenses and offenders greater than is possible today. The compromise is an unpleasant one whichever alternative is chosen.

159 For example, James Q. Wilson says of the failure to use imprisonment generally:

It is no defense of this policy of deprivoniculation to say that criminals, if sent to prison, would, on their release, merely resume the commission of crimes. Many no doubt would, but the gains to society from crimes not committed while they were in prison would be real and substantial, and if the policy of prison sentences were consistently followed, even with the relatively short (one or two years) sentences, the gains would be enduring.”

J. WILSON, supra note 21, at 173 (emphasis added).

This observation applies to sentencing generally. As for the recidivist, Wilson concludes that “separating repeaters from the rest of society, even for relatively short periods of time, may produce major reductions in crime rates.” Id. (emphasis added). Wilson also argues persuasively that recidivists are responsible for the majority of serious crimes—and, what is more interesting, that they are all virtually certain to be apprehended, at one time or another, because of the large number of offenses each commits. Id. at 162-63. “These gains,” he adds, “would exist even if the prospect of going to prison deterred no one from committing a crime.” Id. at 173.

160 Wilson states that, because of discretionary sentencing, “we have pursued virtually the opposite policy.” Id. at 173. It should be added, however, that a determinate sentencing system may also be so written as to defeat these goals. See notes 145-46 supra and accompanying text for a discussion of the system set forth in TWENTIETH CENTURY FUND, which establishes a sentencing structure for repeated offenses.
D. Retribution

It is difficult to assess the effect of determinate sentencing upon a goal so poorly understood as retribution. Some sentencing philosophers have rejected retributive justice altogether,\(^{161}\) and, although it seems clear today that this view is no longer dominant,\(^{162}\) the historical view has left us with less understanding of the reasons why we accept retribution than of the reasons why we accept any other sentencing goal.\(^{163}\) But it is important to assess the impact of determinate sentencing upon retributive justice, because it has been an important battleground for the politics of sentence reform,\(^{164}\) and it seems likely to be an important battleground for the courts as well.

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\(^{161}\) "Sentences should not be based on revenge and retribution." NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT § 1 (2d ed. 1972). In Commonwealth v. Ritter, 13 D. & C. 285 (Ct. Oy. & Term. Phila. 1930) the court concluded that "[t]he entire course... of the refinement and humanizing of society has been in the direction of dispelling from penology any such theory" as retribution, and it supported the conclusion with quotations from Plato, Seneca, Beccaria and Hobbes. Id. at 290-91. See also S. Rubin, THE LAW OF CRIMINAL CORRECTION 409 (1973).

\(^{162}\) See, e.g., Gregg v. Georgia, 428 U.S. 153 (1976). "Retribution is no longer the dominant objective of the criminal law... but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men." Id. at 183 (plurality opinion of Justice Stewart). See also United States v. Bergman, 416 F. Supp. 496 (S.D.N.Y. 1976) (four-month sentence of incarceration for several white-collar offenses held justified in part on the ground that it should not depreciate the seriousness of the offense).

\(^{163}\) See generally N. Walker, SENTENCING IN A RATIONAL SOCIETY (1971). To complicate matters further, it has been persuasively argued that many supposed retributivist theories "are in spite of their protestations disguised forms of Utilitarianism." H. Hart, PUNISHMENT AND RESPONSIBILITY 8-9 (1968).

Much of the debate on the propriety of retributivism, furthermore, has consisted of name-calling, with detractors denouncing it as "revenge" and supporters praising it as "justice." See note 161 supra and authorities cited therein for arguments that penology and retribution are philosophically and socially incompatible.

\(^{164}\) See, e.g., Derashowitz, Background Paper, in TWENTIETH CENTURY FUND, supra note 27, at 73. The battle erupted in the Fund task force's own deliberations. Id. at 55-56 and unnumbered footnote. For examples of the debate in California, see authorities cited note 137 supra.
Retributive justice implies that there is, or ought to be, a connection between the moral blameworthiness of a criminal act and the consequences that follow it. It is a shorthand rendition of a principle that carries out a number of disparate purposes. Retribution is an expression of condemnation for the criminal act, and it teaches the shared system of values that is the glue holding a society together. In a civilized society, it serves the additional function of preventing private revenge. Retribution also arguably makes penitence or expiation by the offender possible; that is, it provides a measure by which he can expect society to recognize that he has paid his debt and is fit for reacceptance. It additionally provides a method by which people as a group can express solicitude for, and solidarity with, victims of crime. Finally, there have been a number of other purposes that commentators suggest are served by retributive justice. Current sentencing philosophy does not

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165 The listing of “purposes” makes retributive justice appear utilitarian, and perhaps it is. See note 163 supra and authorities cited therein for more information on retributive philosophies.


167 “When people begin to believe that organized society is unable or unwilling to impose upon criminal offenders the punishment they ‘deserve,’ then there are sown the seeds of anarchy—of self-help, vigilante justice and lynch law.” Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring). “This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.” Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion of Stewart, J.). See also R. HOFSTADTER, VIOLENCE IN AMERICA (1975).


169 This purpose has been more widely recognized by the popular press than by philosophers, but has sometimes been advanced by them as well. See, e.g., Van den Haag, The Collapse of the Case Against Capital Punishment, National Review, March 31, 1978, at 406. It has occasionally, but only occasionally, found its way into the written decisions of courts. E.g., State v. Chaney, 477 P.2d 441, 446 (Alaska 1970), disapproving the trial court’s one-year sentence in part because “[s]eemingly all but forgotten in the sentencing proceedings is the victim of appellee’s rapes and robbery.”

170 As examples, retributive justice serves the purposes of the mitigation of punish-
say much about the relative weights of these considerations, but it tends to indicate that most of them are respectable goals and that it is relevant to consider whether a particular sentencing system is treating them in an appropriate manner.

Determinate sentencing holds some promise that offense types for which retributive considerations have traditionally been neglected—white collar offenses, for example—will be addressed in a manner more consistent with the purpose of condemnation. A process of case-by-case adjudication produces sentences that belie the seriousness of such offenses because highly visible mitigating factors tend to overcome substantial aggravating ones. It also appears likely that the identification of specific factors in aggravation or mitigation of the offense, or the use of enhancements, can highlight the purpose of condemning conduct or results that are particularly harmful. The California Act, for example, provides enhancements in the event that great bodily injury is caused to the victim or in the event of large monetary loss. In specific kinds of cases, these

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171 The “high loss” enhancement in California specifically calls upon the court to sentence persons more severely who steal large amounts. The abuse of a “position of trust” and the exercise of “planning, sophistication or professionalism” are circumstances in aggravation; they are also set forth as criteria affecting probation. Cal. Penal Code § 12022.6 (West Supp. 1978); Cal. Rules of Court 414 (c)(7)-(8), 421 (a)(8) & (13) (1979). These criteria, if actually applied, could mean more severe sentences for white-collar offenders than for street criminals committing property offenses. Ill. Rev. Stat. 38 § 1005-5-3.2 (1979) sets forth nearly identical factors in aggravation.

172 See note 70 supra for the enhancement system of the California Act.
enhancements may result in more severe sentences than would result from discretionary adjudication. In any event, enhancements may serve the purpose of identifying that portion of the sentence that expresses societal denunciation, increased burden of expiation or solidarity with the victim.\textsuperscript{173}

Ironically, however, determinate sentencing seems likely to decrease the achievement of retributive justice in some serious cases. The five-, six- or seven-year penalty for second-degree murder initially adopted\textsuperscript{174} in California is an example.\textsuperscript{175} Second-degree murder requires the taking of human life with malice aforethought,\textsuperscript{176} and published opinions show that, in California, it covers the most repugnant kind of criminal conduct.\textsuperscript{177} Although supporters of the new Act might correctly

\textsuperscript{172} It might be argued that these enhancements are deterrent in purpose. However, they focus on the result rather than on the offender's conduct. The California provisions related to firearms are an example of deterrent enhancements, since they are aimed at an aspect of the defendant's conduct within his control. \textit{Cal. Penal Code} §§ 12022, 12022.5 (West Supp. 1978). The loss and injury enhancements do not depend on control by the defendant. The accidental causing of serious injury during a crime, for instance, or the taking of property with greater value than the offender believed, would be as effective in triggering the enhancement as the intentional causing of these results. There may arguably be some deterrent value to these principles in that they may, for example, be surmised to make robbers more careful to avoid even accidental injury, but it is submitted that the main concern supporting them is retributive.

\textsuperscript{173} See text accompanying notes 65-91 \textit{supra} for a discussion of the California Act.

\textsuperscript{174} The Act has been amended to increase these terms. See note 221 \textit{infra} for a discussion of this amendment.


\textsuperscript{176} People \textit{v.} Anderson, 447 P.2d 942 (Cal. 1968), is an example. The defendant murdered a ten-year-old girl left in his care by stabbing her so that more than sixty wounds appeared on her corpse. He left her body nude, with postmortem vaginal lacerations, and undertook elaborate (if unsuccessful) efforts to conceal his culpability. Blood, including bloody footprints of the victim, was found in every room of the house and on the defendant's undershorts. There was no issue of mental deficiency. Nevertheless, the court found that these facts would support only second-degree murder. It reasoned that the premeditation and deliberation elements of first-degree murder in California required some evidence of planning, of motive or of a method of killing displaying conscious forethought. \textit{Id.} at 954.

The consequence of \textit{Anderson} and similar decisions is that a killing for a comprehensible reason is treated more severely than a senseless one. It may not be too much to say that the more bizarre, wanton and grotesque the offense, the better the chance that it will qualify in California for the presumptive seven-year term for second-degree murder rather than the life term for first degree. For precisely this reason, the Model Penal Code rejects the homicide formulation used in California and provides for a single category of murder. "As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown
note that the new base term approximates the average time served by second-degree murderers in California under the indeterminate sentence, the open advertisement of this base term seems to trivialize rather than condemn the taking of human life. It does not deliver the right message to victims or their families, and there is danger that many citizens will scoff at the notion that the penal system setting such a penalty for such a crime is capable of expiating any offender's debt to society. Nor is the California law the only proposal to exhibit this phenomenon. The irony is that the condemnation inherent in an indeterminate sentence with greater maximums would be more in keeping with the harm done in serious cases even if parole were to reduce the sentence. Condemnation is above all a symbolic function, and the phenomenon of discretionary parole, for all its evils, keeps alive the fiction that the early release of a serious homicidal offender is due to his rehabilitative progress rather than to a low valuation of human life. One of the drafters of the California Act, while stating that this retributive aspect was not considered in drafting the Act itself, points out that the new law did not change life imprisonment sentences and retained the parole concept with respect to them. The retribu-

by sudden as by premeditated murders." ABA - ALI MODEL PENAL CODE, Tent. Draft No. 9, Comments to § 201.6 at 70 (1959).

178 Adult Authority Chairman's Directive 75/20 (April 15, 1975) sets forth the typical confinement of second-degree murderers as 42 to 66 months, a range quite similar to probable results under the new law with its good time provisions. See Comment, 17 SANTA CLARA L. REV. 133, 160. See also Cassou & Taugher, supra note 11, at 31; and TWENTIETH CENTURY FUND, supra note 27, at 57.

179 The Twentieth Century Fund proposal for example recommends a presumptive sentence of ten years for first-degree murder. TWENTIETH CENTURY FUND, supra note 27, at 55-57. The task force recognizes that this presumptive sentence "may seem . . . extremely low," but justifies it on the ground that it is "congruent with the average term of imprisonment actually served." Id.

A dissent to the Twentieth Century Fund Proposal expresses opposition to the recommended presumptive sentence of ten years for first-degree murder and also to a provision that "designates a four-year sentence that could be applied to . . . the LaGuardia Airport bombing of December 1975." Id. at 55-56, 58. The dissent states its case, since the task force recommends this four-year sentence for offenders killing with extreme recklessness rather than intent (and it would only be presumptive even then); nevertheless, the case is there to be made.

180 Interview with Raymond I. Parnas, Professor of Law, University of California, Davis, and Counsel to the California Senate Select Committee on Penal Substitutions,
tive function may have been part of the reason.

This problem serves to emphasize that sentencing is a matter of reconciling pluralistic and partly inconsistent values. Some loss of condemnation, expiation and victim solidarity may be the inevitable cost of the compression of sentencing ranges that determinate sentencing brings about. Retention of discretionary parole, as in Arizona,181 would effectuate the retributive function in a better way, perhaps, and so would the use of presumptive sentences within a range of higher maximums, as in Indiana.182 But sentence guidelines, particularly comprehensive ones, are premised on the assumption that some loss in condemnation is compensated for by what can be gained in terms of equality, proportionality and rational grading of offenses. It is in this latter area—sentencing uniformity—that determinate sentencing holds both its greatest perils and its greatest promise.

E. **Uniformity and Individualization**

An attitudinal poll of attorneys experienced in the handling of criminal cases, conducted for this article, demonstrates deep dissatisfaction with the lack of uniformity in the present sentencing system.183 Sixty-eight percent of respondents agreed

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181 See note 107 supra for a discussion of Arizona’s presumptive sentencing system in which the sentences are slightly higher than California’s, and hence the difference in effects is small.

182 See notes 102-06 supra and accompanying text for a discussion of Indiana’s system.

183 Written responses were obtained from a sample of forty-four lawyers attending the Advanced Criminal Law Refresher Course sponsored by the State Bar of Texas during the week of July 7, 1978. The main purpose of the poll was to determine whether initial attorney attitudes toward determinate sentencing were favorable or unfavorable, whether the problem of irrational disparity was seen by attorneys as a serious one, whether reforms short of determinate sentencing might be preferred and what objections attorneys might hold.

The responses showed little agreement; indeed, their most interesting characteristic was the absence of strong consensus on any of the subjects at issue. The questions and responses were as follows:

1. Do you think the problem of sentencing disparity or inconsistency is serious enough so that there should be sentence reform aimed at making sentences more consistent? YES 32; NO 13.
that disparity was "serious enough so that there should be sentence reform." One lawyer elaborated by saying, "Disparity and inconsistency are rampant, and [the] public is very aware of the problem. . . . [T]his results in [a] general cynical feeling about 'justice.'" Other respondents used words like "ridiculous" to describe present sentencing practices. The evidence bears out the complaint that a substantial number of sentence differences cannot be explained rationally.\(^{184}\) Statistical comparisons show that individual judges in the same geographical areas differ widely in the percentage of cases in which they grant probation, in the lengths of terms they assess and in their willingness to consider alternative dispositions.\(^{185}\) Aver-

\(^{2}\) Does it sound to you as though determinate sentencing is a sufficiently promising solution so that it should be studied by the Texas legislature? YES 25; NO 13; DON'T KNOW ENOUGH ABOUT IT TO SAY 6.

\(^{3}\) What sorts of objections would you consider probable, or what sorts of problems do you see with the idea of determinate sentencing? . . .

\(^{4}\) Of the types [of determinate sentencing] suggested, which sounds most promising to you—assuming that it were necessary to select among them? PRESUMPTIVE SENTENCING 7; GUIDELINES THAT ARE ADVISORY ONLY 25; THE BASE-PLUS-ENHANCEMENT TYPE 15.

\(^{5}\) Explain why you have selected the method you have selected. . . .

\(^{6}\) There are many methods other than determinate sentencing that can be used to create greater consistency. For example, judges can be provided with information regarding sentencing decisions of other judges; sentencing juries or judges can be given instructions concerning what to consider in assessing a sentence; appellate review of sentences can be allowed; a judge who renders a sentence can be required to state reasons on which the sentence is based, etc. Do you think that some of these techniques should be used instead of attempts at determinate sentencing? YES 24; NO 11.

\(^{7}\) My criminal practice is primarily on the DEFENSE SIDE 26; PROSECUTION SIDE 12; NEITHER 2 [members of the judiciary].

\(^{8}\) Are you a certified criminal law specialist? YES 9; NO 33.

\(^{184}\) The Wilkins study found that "approximately 50 percent" of sentences that did not conform to the guidelines derived by the study were explainable by reason of some item of information not included in the guidelines. Thus, the remaining 50 percent, by inference, were probably what the study calls "unjustified or disparate" decisions. L. WILKINS, supra note 16, at 26. It is to be remembered, furthermore, that the Wilkins study bases the development of guidelines on actual sentencing practices of judges, as opposed to guidelines developed by legislatures or commissions. See notes 92-95 supra and accompanying text for a discussion of the Wilkins system. It may be hypothesized that if sentencing decisions were measured by criteria developed more publicly, the deviations would be more pronounced.

\(^{185}\) One study found that two federal district judges chosen at random from the Eastern District of New York and Illinois differed, on the average, by 46 percent of the mean of the two (taking the mean of the two as 100 percent). Diamond & Zeisel,
age sentences vary from one city to another in the same legal system, showing differences that cannot be based upon application of similar standards.\textsuperscript{186} And when one expands the inquiry to include offenses that differ in kind and degree—price fixing and burglary, for example—one questions whether the results bear the kind of proportionality that they should.\textsuperscript{187} Every inmate serving a lengthy term has stories about persons similarly situated who received relatively trivial sentences,\textsuperscript{188} and the frequency of disparity in serious cases makes the problem well known; consequently, disparity in sentencing engenders a disrespect for the criminal justice system disproportionate to its actual magnitude.

But the attitudinal poll indicates that attorneys also harbor a deep distrust of sentence reform because they suspect it

\textsuperscript{186}Sentencing Councils: A Study of Sentence Disparity and Its Reduction, 43 U. Chi. L. Rev. 109 (1976). For two chosen at random from the Northern District of Illinois, the average difference was 37 percent. \textit{Id.; see also Zeisel & Diamond, supra} note 56, at 884-85. An Ohio study showed that certain judges sentenced without incarceration four times as often as certain others for the same offense. \textsc{Council on State Governments}, \textit{supra} note 128, at 8. Similar disparities among judges in Detroit were reported in \textsc{President’s Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts} 23 (1976) [hereinafter cited as \textsc{President’s Commission}]. In a California survey two judges said that they sent 80 percent of convicted felons to prison, one reported 10 percent, two 60 percent, sixteen between 25 and 50 percent, and the rest between five and 20 percent. Comment, \textit{Disparity and Discretion in Sentencing: A Proposal for Uniformity}, 25 U.C.L.A. L. Rev. 323, 334 n.73 (1977), citing \textit{L.A. Times}, June 2, 1977, \textsection 1, at 24, col. 2.

\textsuperscript{187}For example, comparison of narcotics sentences in one year showed an average of 44 months in one federal circuit and 83 months in another. \textsc{President’s Commission}, \textit{supra} note 185, at 23. A Washington study showed that in one county, 17.5 percent of felons were sentenced to prison, in another county 32 percent were sentenced to prison, and in a third county 14 percent were sentenced to prison. Bayley, \textit{supra} note 112, at 536 n.22, \textit{citing Wash. Dep’t of Social & Health Services, Office of Research, Adult Corrections Data} 20, 105 (1975). For other examples of area-to-area disparity, see Comment, \textit{supra} note 185, at 334 nn.69-72.

\textsuperscript{188}Disparity from one geographical area to another, of course, is not as serious a concern as disparity within a single court or other unit. One has notice, in going from one district to another, that practices are different; the difference is expected. It is in part based on rational differences in values and concerns, such as the differences between rural and urban communities. Geographically based differences are also less visible, less glaring, less offensive and less likely to create disrespect for law.

\textsuperscript{187}See M. Frankel, \textit{supra} note 5, at 18-22.

\textsuperscript{188}"The convicted criminal is left to devise his own explanation for such disparities and the end result is often to instill in him a deep sense of the unfairness of the system." Bayley, \textit{supra} note 112, at 536.
may result in sentencing that is not sufficiently individualized. Forty-three percent of respondents were unable to bring themselves to agree that determinate sentencing was promising enough even to merit study by the legislature. 189 "People get sentences, not crimes," said one of these respondents. Another added that determinate sentencing "fails to take into account the human factor." Some of this resistance was apparently due to a lack of understanding that determinate sentencing need not be mandatory, 190 and some may have been due to economic interests—such as the complaint of one lawyer that determinate sentencing would "take away [a] defendant's desire to hire the best attorney who could get [a] lighter sentence"; 191 nevertheless, it is clear that the major reason for these responses is profound suspicion of the reduction of discretion in sentencing.

Each of these viewpoints is correct insofar as it goes, but neither is an adequate guide by itself. The best approach is not one of preserving complete discretion or one of removing all discretion, but of searching for the right level of discretion. 192 As a starting point, the two extremes—that of excessive discretion and that of inadequate discretion—must be examined to see the problems they create.

189 See note 183 supra and accompanying text for the results of an attitudinal poll among lawyers regarding determinate sentencing conducted by the State Bar of Texas during 1978.

190 Many respondents seemed to assume, as one of them stated, that determinate sentencing would "take away the judge's discretion." The argument that determinate sentencing "fails to take into account the human factor" is a variant of this basic theme. The confusion of determinate sentencing with mandatory sentencing is a common misunderstanding. There were also a few respondents who thought that determinate sentencing was the same as indeterminate sentencing (and who therefore opposed it on the ground that it was, as they understood it, too discretionary). But perhaps the most surprising group of responses came from lawyers who stated general opposition to all kinds of determinate sentencing—but who then opted for the most stringent models of determinacy when asked to choose among different types. See note 183 supra and accompanying text for other assumptions of the participants in the attitudinal poll.

191 This conclusion not only is a dubious basis for decision but is almost certainly wrong as well. It misapprehends the effect of complicated new regulatory legislation on the fortunes of attorneys. Cassou and Taugher, for example, cheerfully assert that California's new determinate sentencing law "ought to be dubbed the 'Lawyers Relief Act of 1976,'" and the last sentence of their article advises the befuddled practitioner to "think of it as job security." Cassou & Taugher, supra note 12, at 106.

192 See K. Davis, supra note 18.
1. The Problem of Excessive Discretion: The “Individualized” Sentencing Model

While few jurisdictions have adopted systems so rigid as to eliminate consideration of individual characteristics, determinate sentencing does imply the restriction of this consideration. Some commentators, postulating that “individualized” adjudication is a positive benefit in its own right, see any restriction of discretion as a drawback even if more consistent and rational results are produced in the long run. Fixed, presumptive or even guideline sentences are undesirable in this view not so much because they give the wrong results, but because they focus upon the calculation rather than upon the individual offender.

The argument is laden with intangibles and is difficult to express, but it is also difficult to dismiss. Professor Alschuler puts it this way:

Although a corrective for the undue optimism of the past is undoubtedly in order, the corrective may be carried too far. We may find ourselves thinking: “Don’t tell us that a robber was retarded. We don’t care about his problems. We don’t know what to do about his problems and we are no longer interested in listening to a criminal’s sob stories. The most important thing about this robber is simply that he is a robber. He committed the same crime as Bonnie and Clyde.”

Professor Alschuler concludes that “should this sort of sentiment prevail, we will almost certainly have lost something, not in terms of the effectiveness of the criminal justice system, but as human beings.”

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103 Habitual offender statutes, as an important exception, have generally been interpreted to allow for individual characteristics in exceptional cases, but they apply to a tiny minority of dispositions. See note 21 supra for a consideration of Tex. Penal Code Ann. tit. 3, § 12.47(d) (Vernon 1974), an example of a “habitual offender” statute.

104 E.g., National Council on Crime & Delinquency, Model Sentencing Act § 1 (2d ed. 1972). See also notes 195-98 infra and accompanying text for the position that discretion in sentencing should be unrestricted to promote “individualized” adjudication.

105 Alschuler, supra note 7, at 558.

106 Id.
quently, so far as it goes, but it may be a signpost in the wrong direction.\textsuperscript{197}

A partial answer to the argument is that sentencing discretion can and should be guided in such a manner that retardation and a number of characteristics similar to it are emphasized as mitigating factors. The jurisdictions that have adopted determinate sentencing do take such factors into account—by specific guidelines.\textsuperscript{198} But the real answer is that discretion for discretion's sake will not necessarily produce a more "human" system, and it may very well produce a less human one. The crux of the problem is that it is not clear how a sentencing decider without standards will take factors such as retardation into account. A judge inevitably has before him some offenders who are retarded, some who are average and some who are highly intelligent, and it does not take great imagination to construct rational arguments for lenient treatment of each of the three classes.\textsuperscript{199} A sentencing judge given the latitude to do so is quite likely, in fact, to empathize with persons who are most "normal"—that is, people who conform most closely to the image of desirability that he personally holds.\textsuperscript{200} In other

\textsuperscript{197} Professor Alschuler's work so recognizes, and it equally condemns the extreme of the opposing view: "'Did someone rob a bank? If so, this person must never have had a chance. We will give him that chance. We will teach him to be a welder, and he will not rob banks any more.' . . . [S]tudies that demonstrate the naiveté of our earlier rehabilitative ambitions have diminished our buoyancy." Id. at 557-58.

\textsuperscript{198} Cf. Cal. Rules of Court 414(d)(4), 423(b)(2) (defendant's "health" and "mental faculties" to be considered in granting probation; furthermore, if defendant "was suffering from a mental or physical condition that significantly reduced his culpability," this circumstance mitigates sentence). It is also significant that enumerated aggravating circumstances tend to support higher sentences for offenders without mental or emotional problems. Cf. Cal. Rules of Court 421 (a)(8) (planning, sophistication or professionalism).

\textsuperscript{199} The intelligent offender, for example, is arguably more susceptible to rehabilitation. The person of average intelligence may be more easily deterred and in any event this person is more likely than the retarded offender to have others who depend upon him for support. The California guidelines would tend to reduce the impact of these arguments at least insofar as imprisonment is concerned (though perhaps not as to probation). Cal. Rules of Court 414, 416, 423.

\textsuperscript{200} One study has challenged the "assumption . . . that it is possible to individualize a sentence," because most observed sentences were "directly dependent on the judge's background and unconscious biases rather than upon the defendant's needs." Comment, Discretion in Felony Sentencing—A Study of Influencing Factors, 48 Wash. L. Rev. 587, 572 (1973) (emphasis in original), cited in Bayley, supra note 112, at 537 n.28. James Q. Wilson sees the same phenomenon: "The reasons for sentencing pat-
words, what is likely to happen in many cases is that the retarded offender will be treated not less harshly in a discretionary system, but more harshly.

There is at least one area in which this result has been judicially recognized, and that is in death penalty cases. In *Furman v. Georgia,*\(^{201}\) a number of justices concluded that unfettered sentencing discretion led to "wanton and freakish results,"\(^{202}\) and others, taking the argument one step farther, considered that it resulted in harsher sentences for the poor, the underrepresented and members of racial minorities\(^{203}\) — precisely those for whom a humanitarian system presumably should show greater solicitude. There is no treason to suspect that noncapital sentencing is different in other than a constitutional sense. Wealth or poverty, educational level, personality disorders, family status, employment, social class, even race or sex—all of these factors are likely to enter into a standardless discretionary adjudication, but the way they affect it may not be what we would expect from a criminal justice system attuned to the human factor.\(^{204}\)

Thus the fallacy of individualized sentencing, when carried to its extreme, is that it results in such haphazard weighting of factors that even the direction of their influence, whether

\[^{201}\] 408 U.S. 238 (1972).

\[^{202}\] Id. at 291-95 (Brennan, J., concurring).

\[^{203}\] Id. at 309-10 (1972) (Stewart, J. concurring).

\[^{204}\] See Bayley, *supra* note 112, at 536-37.
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aggravating or mitigating, becomes distorted. There is mounting evidence, indeed, that the differences produced by unguided discretionary sentencing are as likely to be the result of differing prejudices held by sentencing judges as of differences in circumstances. Standardless sentencing does nothing to prevent the carrying out of prejudices; it encourages it by romanticizing discretion and camouflaging its inadequacies. It is objectionable not only because it produces inconsistencies but because its sloppiness permits discrimination for the sake of discrimination against the very individuals it seeks to protect, and thereby makes the process less human rather than more so.

There is a further, and more direct, reason for limiting the “individualized” model of sentencing. An offender sentenced in today’s criminal justice system may feel justified in concluding that his term of imprisonment is based not so much on what he has done as what he is.

Thus the message that an individualized sentencing philosophy conveys to the imprisoned offender is counterproductive to both rehabilitation and retributive justice. An offender may, through effort, refrain from criminal conduct, but an offender who believes that his personality or lifestyle is the basis of his sentence can be expected to respond with alienation and rebellion. Discretionary sentencing increases the likelihood that the sentence will be perceived. It is a substantial cause of prison unrest today.

205 See K. Davis, supra note 18, at 133-41.
206 See note 200 supra and authorities therein cited for further explanation of this proposition.
207 See Motley, “Law & Order” and the Criminal Justice System, 64 J. Crim. L.C. & Crim. 259, 268-69 (1973). Judge Motley puts it thus: “The defendant knows that the kind of treatment he receives from the criminal process is not primarily a function of the crime he has committed. It is more likely to be a reflection of the judge’s estimate of him as a person.” Id. at 269. It is submitted that this formulation overstates the case; it is doubtful that judges really decide to give offenders long prison terms “primarily” because of personality rather than criminal conduct. But the prevailing sentencing philosophy encourages offenders so to perceive their terms of imprisonment, and this encouragement is sufficient cause for concern in and of itself.
208 A difficult philosophical question is presented if there are rational bases for sentencing on such factors as personality or lifestyle. For example, an offender might sensibly be incarcerated for a longer term because he has not only committed an offense but is dangerous. See generally notes 227-36 infra and accompanying text for a conclusion as to the “right level of discretion” to be permitted a sentencing judge.
209 See generally Council of State Governments, supra note 128.
elimination of unnecessary discretion would do much to reduce this problem.

2. The Problem of Inadequate Discretion: The "Uniform" Sentence Model

The objections to an excess of discretion, however, do not end the inquiry, for another concern in adopting a determinate sentencing system is the avoidance of undue rigidity. A statute or rule can be written so as to weight important factors improperly just as an individual adjudication can distort them. Furthermore, the varieties of deviant behavior are infinite, and even if it were possible to devise a rigid system that took a sufficient variety into account so as to produce acceptable results, it would be too cumbersome to be workable in practice.

One might consider the following offenses, which were actually charged in Harris County (Houston), Texas:

—A man rapes a woman and then, as part of the same criminal episode, forces her to have intercourse with a dog;

—A man kills another under circumstances amounting to murder, then attaches the corpse to a hook on his wrecker vehicle and drives about town with it displayed there;

—A man and his wife resist arrest by a police officer, but part of their motivation for doing so is concern over the death of their son at the hands of another police officer, a crime for which they were important witnesses for the prosecution.

In each of these situations, the proper sentence is not assessable according to any sort of mathematical formula. No one could have predicted these cases, much less established reasonable values in advance for the unusually aggravating and mitigating circumstances they present. And yet those unusual cir-

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210 See K. DAVIS, supra note 18, at 15-25. Professor Alschuler criticizes the Twentieth Century Fund proposals on this ground. The Fund suggests six degrees of robbery, but "robbery with a machine gun is treated no differently than robbery with a .22 caliber target pistol." Alschuler, supra note 7, at 560.

211 See K. DAVIS, supra note 18; Alschuler, supra note 7, at 561.


213 Id.

214 Id. The defendants were acquitted of resisting arrest but convicted of public intoxication. The conviction was reversed on trial de novo.
cumstances are the essence of the sentencing decision in each case.

The problem of inadequate discretion has already arisen in jurisdictions with narrow sentencing guidelines. Indeed, the first case decided by the California Supreme Court under that state's new determinate sentencing system resulted in an ill-fitting sentence produced not by discretion, but by standards so rigidly fixed that they placed the judiciary in a straitjacket. *People v. Caudillo* involved a nightmarish crime—an abduction, robbery and rape combined with repeated forcible anal and oral sodomy that produced knife wounds on the victim's neck. The jury found that the victim had suffered "great bodily injury," and this finding, if valid, would have subjected the defendant to a three-year enhancement. The California Supreme Court, however, found the evidence insufficient to support the finding on the ground that rape, without more, was not bodily injury, and it shortened the sentence accordingly. In doing so, the majority took pains to indicate that it was acting not out of a sense of natural justice but out of deference to the statute; it labeled the offense as "outrageous, shocking and despicable." The Chief Justice, in a concurring opinion, stated, "This court has no choice in this matter. It must accept the Legislature's intent despite personal feelings to the contrary."

In the wake of *Caudillo*, there have been efforts in California to broaden discretionary ranges for sentencing judges.
The suggestion of a statutory change to this effect has been opposed by at least one of the California Act’s principal drafters, who observes that it “would lead to disparity.”\textsuperscript{220} While this observation may be true for some cases, the dilemma is that in other cases, such as Caudillo, the appearance of uniformity produced by the statute is arguably misleading, and a somewhat greater discretion might in these cases bring more proportional results.\textsuperscript{216}

3. \textit{The Right Level of Discretion}

Rational sentencing is neither a matter of discretion for the sake of discretion nor of rigidity for the sake of rigidity, but of setting discretion at the right level. The question immediately follows: What is the right level? It is submitted that the best answer to that question is the one given by Professor Kenneth Davis in his landmark work \textit{Discretionary Justice}:\textsuperscript{222} discretion should be reduced to the level that is necessary, and remaining discretion should be structured, confined and checked. More injustice is probably done on account of discretion that is too broad than discretion that is too narrow.\textsuperscript{223} Notwithstanding

\textsuperscript{220}Id.

\textsuperscript{216}Id.

\textsuperscript{222}K. Davis, supra note 18, at 216. “The broad framework of the [recommended] approach . . . is expressed in this one sentence: The vast quantities of unnecessary discretionary power that have grown up in our system should be cut back, and the discretionary power that is found to be necessary should be properly confined, structured and checked.” Id.

\textsuperscript{223}“In a government of men and of laws, the portion that is a government of men, like a malignant cancer, often tends to stifle the portion that is a government of laws. Perhaps nine-tenths of injustice in our legal system flows from discretion and perhaps only one-tenth from rules.” Id. at 25.
Professor Alschuler's eloquent argument to the contrary, it is unlikely that we can reduce necessary discretion to such a point that we will eliminate the human factor, provided we structure it so that the extraordinary case, such as Caudillo, can be dealt with appropriately. A presumptive sentence within an adequate discretionary range would produce this result.

To return once more to Professor Alschuler's example, a retarded offender should, as Alschuler argues, be the subject of individualized sentencing. But it should not be a romanticized sort of individualized sentencing. Discretion ought to be resorted to only when a presumptive sentence or guideline is inappropriate, and insofar as is possible, the discretion for departing from the presumptive sentence should be guided at least by general principles. The California Act, for instance, allows the judge discretion to select a lower base term for a retarded offender, and applicable rules provide guidance as to the direction of that discretion. The range of discretion allowed in California is open to criticism, and one may easily argue that it is too narrow, but the principle is sound. The result will probably be fairer treatment of all concerned, including (one might say especially) retarded offenders, for it can hardly decrease a court's concern for humanitarian goals to have its attention specifically directed to retardation as a factor in mitigation. All of this is to say we must necessarily rely in this area upon a government of men and women, but we should do so only to the extent that a government of laws is impractical.

See notes 195-97 supra and accompanying text for a discussion of the "individualized sentencing" which Professor Alschuler would accord a retarded robber.

These rules also allow retardation to be taken into account in probation decisions; indeed, for those crimes for which probation is restricted by statute to unusual cases, the rules provide that such an unusual case may be present if "the crime was committed because of psychological problems," the defendant is not dangerous and treatment will be required as a condition of probation with a likelihood of success. See notes 198-99 supra and accompanying text for a discussion of the California rules as they relate to California's determinate system.

4. The Most Difficult Cases: Conflicts Between the Goal of Uniformity and Those of Deterrence, Incapacitation or Rehabilitation

The most difficult philosophical problems of determinate sentencing, however, will concern not the proper treatment of discretion but the conflict of sentencing goals. One can readily imagine cases in which offenders A and B are equally blameworthy in a moral sense, but the incarceration of offender A would serve deterrent, incapacitative or rehabilitative purposes while the incarceration of offender B would not. In such a situation, if offender B is incarcerated for a term equal to that imposed upon A, the sentence seems cruel because it fails to carry out any sentencing purpose other than slavish uniformity. If, on the other hand, B's term is less than that given A, the sentencing process appears unfair because it treats equally blameworthy offenders unequally.\(^2\) Examples of this dilemma are commonplace. They appear whenever a white collar offender's sentence is compared to that of a burglar, whenever the sentence of a police officer who has engaged in violent conduct toward a suspect is compared to that of a violent street criminal, and in an infinite range of other situations.

It is a problem with no satisfactory solution other than compromise. That is to say, the best possible disposition might be to set offender B's sentence lower than offender A's to reflect the difference in utilitarian purposes but not so much lower as to offend utterly the retributive goal of uniformity.\(^2\)^2 Under a discretionary system, the court is free to strike the balance on an ad hoc basis, but the practical result is certain to be a loss

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27 See J. Wilson, supra note 121, at 162-82.

28 See United States v. Bergman, 416 F. Supp. 496 (S.D.N.Y. 1976) (Frankel, J.). Bergman, an elderly rabbi with a long history of philanthropy, pled guilty to two counts of an eleven-count indictment involving large medicare frauds. The court decided upon a sentence of four month's imprisonment as a result of a process harmonizing retributive and utilitarian concerns (though there may be debate upon whether balance was truly reached by this sentence). But cf. Cal. Rules of Court 410, which lists protection, punishment, specific deterrence, general deterrence, isolation, restitution and uniformity as sentencing goals, and concludes: "Because in some instances these objectives may suggest inconsistent dispositions, the sentencing judge shall consider which objectives are of primary importance in the particular case." This rule seems to imply that the judge should select one or more "primary" objectives rather than balancing.
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of uniformity. As we consider determinate sentencing in an effort to regain uniformity, we should ask whether it will produce superficial equality at the cost of other goals. If we incarcerate offender \textit{A} because we need to, and if we then also incarcerate offender \textit{B} for an equal term to produce equality, we will be sending many more offenders to prison for more time with no more reason for doing so, and we may feel in the end that we have lost more than we have gained.\textsuperscript{229}

There is some indication that determinate sentencing may present this difficulty. Some proponents of determinate sentencing have suggested decreased emphasis upon factors related to stability of the offender, factors such as employment and family circumstances\textsuperscript{230} These factors undoubtedly lead to discriminatory sentencing; they cause married offenders to be preferred over single ones and employed offenders over unemployed ones. But these factors may correlate closely with the offender’s susceptibility to rehabilitation, with effectiveness of deterrence and with the need for incapacitation. It may be that the decision in a given instance to give emphasis to the equality factor could be justified; the point, however, is that the decision should be based upon a recognition that utilitarian goals are being de-emphasized and upon a purposeful weighing of the two against each other.\textsuperscript{231} Moreover, there will be some cases that require the opposite result—cases in which unequal sentences may have to be tolerated in order to make the results rational in pragmatic terms or in rehabilitative, deterrent or incapacitative terms—and this choice will be an exceedingly difficult one.\textsuperscript{232} Determinate sentencing will force us to face it, and if it quantifies differences so as to make a necessary inequality seem bald and offensive, the structure may force the wrong decision.

\textsuperscript{229} See J. Wilson, supra note 21.

\textsuperscript{230} E.g., Bayley, supra note 112, at 536-37; see also L. Wilkins, supra note 16, at 8.

\textsuperscript{231} For example, California allows full consideration of such factors as “age, education, health, mental faculties and family background and ties” as criteria affecting probation, but further limits their use in cases where probation is restricted by statute, and omits them from a list of mitigating circumstances affecting the length of a prison term. CAL. RULES OF COURT 414(d)(4), 416(f)-(g), 423. This is a purposeful weighing of the type called for here, and the result seems sensible.

\textsuperscript{232} See note 116 supra and accompanying text for the point that the necessity of making difficult choices mandates formulation of a careful sentencing philosophy.
It is for all these reasons that an attempt to reduce discretion to its lowest necessary level should still leave enough so that the courts will be touched by the human problems of people affected by them. The most workable solution to these conflicts appears to be retention of wide discretion to depart from guidelines. It may be, therefore, that a presumptive system accompanied by a wide range within which a court can fashion an extraordinary sentence is preferable, at least in these difficult cases, to a quasi-mandatory one. Thus California’s more rigid system may not reconcile the conflicting purposes of sentencing as well as the Wilkins, federal or Indiana systems.

III. PROBLEMS OF LEGALITY AND CONSTITUTIONALITY

Even if there were agreement that the general effects of determinate sentencing were desirable, several questions would remain. Among these questions are constitutional issues regarding due process,233 confrontation, cruel and unusual punishment, the right to jury trial, multiple jeopardy and other doctrines. The broad scope of decisions construing these provisions makes it difficult to know precisely what they mean in the context of determinate sentencing.234 Nor is it merely a matter

233 For a discussion of some of the due process issues raised by the California Act, see Uelmen, supra note 8. See also Note, The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals, 89 Harv. L. Rev. 356 (1975).

234 It is difficult to comprehend, at first, the breadth and variety of constitutional attacks that defendants are likely to make upon determinate sentencing. At least one district court, for example, has held that enhancements based on separate criminal activity violate the fifth amendment guarantee of grand jury indictment (the appellate court expressly refused to approve this holding). United States v. Neary, 552 F.2d 1184 (7th Cir. 1977). Another has held sentencing enhancements in violation of U.S. Const. art. III, § 2 on the questionable reasoning that a jury trial is required for all crimes. United States v. Duardi, 384 F. Supp. 874 (W.D. Mo. 1974). See Uelmen, supra note 8, at 746-48. Separation of powers presents an interesting dilemma; it can be argued on the one hand that sentencing is a judicial function and that legislative or executive participation in the fixing of sentences violates the separation doctrine. See Imlay, supra note 95, at 55. But on the other hand, it can be argued that sentencing guidelines applying to cases generally involve the development of substantive law rather than adjudication and should therefore be done by the legislature, not the judiciary. Cf. Gore v. United States, 357 U.S. 386, 393 (1958) (“apportionment” and “severity” of sentence are “peculiarly questions of legislative policy”); Frankel, supra note 45, at 41; see also M. Frankel, supra note 5, at 104-05, 123. Both of these arguments seem overtechnical, and many determinate systems use both legislative and judicial officers
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of adopting careful procedures, for the constitutional arguments are such that they would make the entire idea of determinate sentencing impractical if pushed to extremes. Although this result seems neither likely nor necessary, the possibility does indicate the importance of analysis of the constitutional questions.

A. Due Process: What Standard Is Applicable?

Perhaps the due process case that could support the most serious constitutional challenge to determinate sentencing is Specht v. Patterson, in which the Supreme Court held that procedures incorporated in the Colorado Sex Offenders Act were constitutionally insufficient. The Colorado Act provided for enhanced sentencing of a sex offender if the judge found that the defendant was dangerous or was mentally ill and a habitual offender. No hearing was required for this determination, nor was any evidence required other than a psychiatric report. Mr. Justice Douglas began the Court's opinion by noting that the Court had previously upheld the discretionary model of sentencing in the landmark decision of Williams v. New York. In that case, the Court had explicitly allowed sentencing judges to consider material from any source, including hearsay reports. That sentencing method was still viable where sentencing was within a discretionary range, Justice Douglas concluded; however, he considered that the "new finding of fact" required for enhancement made the Colorado Act

to fix guidelines. See notes 80-84, 96 supra and accompanying text for a discussion of the California system as such an example. Arguments based on provisions respecting ex post facto laws (since retroactivity is usually a concern), equal protection or even bills of attainder can be constructed. See, e.g., United States v. Ilacqua, 562 F.2d 399 (6th Cir. 1977). Some such arguments seem tenuous at first but gain credibility upon reflection. Other arguments may seem to remain tenuous after reflection but may then be accepted by courts (for example, the Neary and Duardi district court decisions cited above).

Determinate sentencing is especially likely to be the subject of such attacks: it is new; it is revolutionary; it involves a sensitive process; and it produces a veritable army of disgruntled individuals, each of whom has a right to representation by counsel who are themselves likely to have strong opposition to it.

386 U.S. 605 (1967).


337 U.S. 241 (1949).
"radically different" from ordinary sentencing. The procedures leading to this new finding of fact had to provide "the full panoply of the relevant protections which due process guarantees in state criminal proceedings." The opinion lists some of those protections, including the right to notice, an opportunity to be heard, confrontation of the witnesses against the defendant, cross-examination and the right to offer evidence.

If read broadly, Specht v. Patterson would make determinate sentencing virtually unusable. The "full panoply" requirement seems to apply the same tests required for the guilt stage of criminal trial to any proceeding at which a "new finding of fact" is to be made. Since new findings of fact are at the heart of sentencing guideline systems, some commentators have suggested, in light of Specht, that reliance upon hearsay in the sentence hearing might violate the confrontation clause, that facts at the sentencing stage must be found by a jury, that sources of information must be subject to cross-

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238 386 U.S. at 608-10. The Court also emphasized that the sentence was not based on "the commission of a specified crime" but on "another proceeding under another Act."

239 Id. at 609, quoting Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1962).

240 Id. at 610.

241 The opinion cited the following language from Gerchman v. Maroney, 355 F.2d 302 (3d Cir. 1962):

It is a separate criminal proceeding which may be invoked after conviction . . . . Petitioner therefore was entitled to a full judicial hearing before the magnified sentence could be imposed . . . . [D]ue process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essentials to a fair trial . . . .

Id. at 312 (emphasis added). Following this quotation, Justice Douglas wrote: "We agree with this view." Id.

In light of the italicized language, it is difficult to read Specht other than as equating sentencing and trial for due process purposes in enhancement cases. It has not been so read, however, because of the peculiar nature of the Colorado law at issue and because of implicit but widespread rejection of the "full panoply" dictum. See, e.g., United States v. Bowdach, 561 F.2d 1160, 1172 (5th Cir. 1977).

242 It might be possible to distinguish presumptive or guideline systems on the theory that although they involve factual issues, the court may consider the facts within a system of discretion. The better approach, however, would be to reject the "new finding of fact" reasoning. See note 244 infra and accompanying text for a consideration of the desirable approach which requires a more restrictive reading of Specht.
examination, that sentencing criteria must meet stringent tests of specificity and that detailed pre-trial notice of sentencing factors must be given in each individual case. Such an approach might cause an increase in the cost of the sentencing process so great as to make determinate sentencing prohibitively expensive. It might also have such undesirable procedural results as making reports of presentence investigations inadmissible.

But such a broad reading of Specht does not seem appropriate. A few courts have noted the ironic contrast between the Williams approval of unregulated discretionary sentencing and the insistence in Specht upon stringent protections whenever "new facts" are involved; these courts have rightly noted that judges exercising sentencing discretion always do so on the basis of facts which they first must "find." This analysis alone has led to a narrower view of Specht. More importantly, the Supreme Court itself has retreated from the "full panoply" dictum. In Morrissey v. Brewer, the Court stated:

Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.

Morrissey involved revocation of parole, a process akin to sentencing but crucially dependent upon new findings of fact. Chief Justice Burger began the Court's opinion by stating that "the full panoply of rights due a [criminal] defendant . . . does not apply" to parole revocation, and he went on to conclude that an "informal" hearing, with reliance upon "letters, affidavits and other material that would not be admissible in an adversary criminal trial," was appropriate. More recently,

243 Uelmen, supra note 8. See also Note, supra note 233.
244 E.g., United States v. Bowdach, 561 F.2d 1160, 1174 n.6 (5th Cir. 1977); Note, supra note 233, at 366. The Williams case, for example, involved the upholding of a death sentence issued in part because the trial judge was furnished information allowing him to conclude that the defendant had committed thirty burglaries and was influenced by "morbid sexuality." 337 U.S. at 244.
245 408 U.S. 471 (1972).
246 Id. at 481.
247 Id.
248 Id. at 489.
in *Gardner v. Florida*,\(^{249}\) the Court implicitly approved the use of hearsay in presentence reports for determinate sentencing. A plurality opinion states, "The fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights."\(^{259}\)

Actually, the constitutional cases most closely analogous to determinate sentencing problems after *Specht v. Patterson* are those analyzing the federal dangerous special offender statute.\(^2\) This statute, which creates a hybrid of discretionary and determinate sentencing, allows enhanced sentencing of a federal offender found by a court to have a certain kind of prior criminal record or to have engaged in certain kinds of conspiratorial or profit-making activities,\(^{22}\) provided the court also finds him to be dangerous.\(^3\) The length of the enhancement is discretionary, but the total sentence cannot exceed twenty-five years and may not be disproportionate to the ordinary maximum for the offense.\(^{254}\) Although the statute contains due pro-

\(^{249}\) 430 U.S. 349 (1977). *Gardner* involved the Florida death penalty statute, a type of determinate sentencing law. The Court held that presentence reports must be disclosed to the defense.

\(^{250}\) Id. at 358 n.9. See also *Patterson v. New York*, 432 U.S. 197 (1977), in which the Court refused to extend to sentencing the requirement of *Mullaney v. Wilbur*, 421 U.S. 684 (1975), that elements of the offense be proven beyond a reasonable doubt. *Mullaney*, said the Court, "should not be broadly read" in the sentencing context. 432 U.S. at 214-15.


\(^{252}\) 18 U.S.C. § 3575(a) contains three sections defining different types of "special offenders." Subsection (1) covers any person twice previously convicted on separate occasions of offenses carrying potential sentences exceeding one year, imprisoned for at least one such offense and released within the past five years—i.e., habitual or repeat offenders. Subsection (2) covers any person engaged in a pattern of crimes that produced substantial income and demonstrated special skills—i.e., professional criminals. Subsection (3) covers certain conspiratorial conduct in which the defendant was a leader or financier or which involved bribery or force—i.e., organized crime.

\(^{253}\) "Dangerousness," which is defined in 18 U.S.C. § 3575(f), means that "a period of confinement longer than provided for [the underlying] felony is required for the protection of the public from further criminal conduct by the defendant." Id. Thus the defendant need not be violent or physically dangerous to be "dangerous."

\(^{254}\) 18 U.S.C. § 3575(b) (1970). Pretrial notice must state "with particularity" the information relied upon to establish that the defendant is a dangerous special offender; the defendant has a right to confront witnesses who appear and testify, as well as the right of compulsory process; the court must make fact findings; and appellate review is provided. On the other hand, there is no right to jury trial; hearsay may be used; and the burden of proof is by the "preponderance of the information"—a phrase
cess protections greater than those applicable to ordinary sentencing, these protections are not as stringent as the guilt-innocence stage would require. Nevertheless, cases involving the statute have reached the Fourth, Fifth, Sixth and Seventh Circuits, and each has upheld it against broad due process challenges incorporating claims such as those dealt with in Specht.

It thus appears that neither the Williams "complete discretion" approach nor the Specht "full panoply" approach should be directly applied to determinate sentencing. The Specht language equating sentencing due process with guilt-innocence due process is little more than careless dictum. And yet the significance accorded to specific facts by determinate sentencing does suggest that greater care ought to be exercised in the finding of those facts than is provided by the unregulated procedure approved by Williams. An intermediate standard should apply. This standard, even though not so stringent as a guilt-innocence standard, involves consideration of due process problems regarding notice, proof, evidence and vagueness.

B. The Due Process Issues in Determinate Sentencing

1. Vagueness

Criminal legislation defining guilt and innocence must have a degree of specificity that does not require persons of ordinary intelligence to "guess at its meaning." The purpose

indicating not only that proof beyond a reasonable doubt is not required but also that facts may be established by data that would not be competent evidence in a trial. 18 U.S.C. §§ 3575(a)-(b), 3576 (1970). See also Uelmen, supra note 8, at 730-31.

255 United States v. Williamson, 567 F.2d 610 (4th Cir. 1977); United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977); United States v. Neary, 552 F.2d 1184 (7th Cir. 1977); United States v. Stewart, 531 F.2d 326 (6th Cir.) cert. denied 426 U.S. 922 (1976); Cf. Ianelli v. United States, 420 U.S. 770, 786-87 (1975) (the Supreme Court cited 18 U.S.C. § 3575(e) and stated, "The content of the Act reflects the dedication with which the Legislature pursued this purpose [of combatting organized crime]").

256 When the question arises as to how to apply the due process clause to a particular criminal-justice context, "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (denying the right of confrontation in prison discipline cases).

257 See generally Uelmen, supra note 8.

of this requirement is to allow individuals fair warning of the consequences of their conduct, to protect conduct from unduly harsh punishment and to give reasonable guidance to deciders of fact. It is a standard that has rarely been applied to sentencing. However, with the adoption of fixed, presumptive or guideline sentencing, the sentence is controlled more visibly by discrete facts than it would be in a discretionary system, and consequently there have come suggestions based on Specht that enhancements and other aggravating factors must be defined in terms more specific than might otherwise have been expected. The proponents of this argument rely not only upon Specht but also upon Gregg v. Georgia and Arnold v. State, in which the Supreme Courts of the United States and of Georgia, respectively, indicated that a finding that a defendant had "a substantial history of serious assaultive criminal convictions" was an unconstitutionally vague standard upon which to base death sentences. The death penalty context is not completely analogous to the problem of determinate sentencing, since higher standards apply to capital cases (indeed, the Georgia Supreme Court hinted that it might accept the "substantial history" test in cases of lesser magnitude); but just as certainly, some commentators argue, there are some minimum standards of specificity that must be applicable to determinate sentencing. The argument is appealing and may well be


But cf. Furman v. Georgia, 408 U.S. 238 (1972) (applying the cruel and unusual punishment rationale).

But cf. note 244 supra and accompanying text. Discretionary sentencing is also controlled by fact findings; the only difference is that they are not findings on issues set forth by guidelines.

E.g., Uelmen, supra note 8, at 731-35.


224 S.E.2d 386, 391 (Ga. 1976). Reliance might also be placed upon State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974) (the terms "especially heinous, atrocious or cruel" could be saved from unconstitutional vagueness by limiting construction). Other examples of the vagueness concern can be found in Gregg v. Georgia, 428 U.S. 153, 200-03 nn.52-55 (1976).


224 S.E.2d at 392.

Uelmen, supra note 8, at 735. See also Note, supra note 233, at 375; United States v. Duardi, 384 F. Supp. 874, 885-86 (W.D. Mo. 1974).
adopted by a court at some time.

For all its appeal, however, the argument has the potential for preventing the structuring of discretion and, thereby, most meaningful sentencing reform. A high degree of flexibility is necessary if the proper degree of discretion is to be built into a sentencing system. Many factors relevant to sentencing can only be expressed in guideline form. For instance, the California Judicial Council, in fulfillment of its statutory duty to promulgate rules for the uniform imposition of aggravating and mitigating factors, has created several standards that are necessarily more vague than the one condemned in Arnold and Gregg; an allowance of aggravation if the defendant "has engaged in a pattern of violent conduct" is an example strikingly similar to the language in those cases. Nor is this the only factor that will probably be challenged as vague; aggravation in California is also allowed if the victim was "particularly" vulnerable, the amount of contraband was "large," the defendant's previous probationary conduct was "unsatisfactory" or the defendant's record shows crimes of "increasing seriousness." Likewise, a sentence may be mitigated if the defendant played a "minor" role in the crime, caused a "small" amount of damage or harm, was motivated to provide family "necessities," has an "insignificant" prior criminal record or has had "good" performance on probation.

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267 K. Davis, supra note 18, at 55 (1969). Davis says that the use of both "rules in the form of generalizations" and "rules in the form of hypotheticals" should be encouraged. Id. at 61. The use of "policy statements" will never satisfy a person insisting on strict specificity, even though it may be the best alternative—indeed, the only feasible alternative to lawless, unstructured discretion—in many cases.


269 See notes 262-63 supra and accompanying text for a consideration of Arnold and Gregg.

270 The full text of the aggravating circumstance is: "He has engaged in a pattern of conduct which indicates a serious danger to society." Cal. Rules of Court 421(b)(1). The rule structures discretion in a meaningful way. If the defendant's conduct is a single isolated instance, it can be said with certainty that it does not meet the test. A course of frequently repeated dangerous acts over a long period of time can be said with certainty to meet the test. Of course, there is no bright line of demarcation between the two, but that is typical of rules of law. In the gray area, the elasticity of the standard is itself healthy, because it allows the court discretion to give it a lesser weight when it is balanced against other factors in aggravation or mitigation.

271 Cal. Rules of Court 421(a)(3), (11), (b)(5).

272 Cal. Rules of Court 423(a)(1), (6), (8), (b)(1), (6).
It is clear beyond peradventure that some of these standards would be insufficiently specific in a statute defining criminal conduct for guilt-innocence purposes, and yet it is equally clear that their elasticity is necessary, because what is "large," "small," "unsatisfactory" or "minor," or who is "particularly vulnerable," depends on the circumstances of the case. These rules are simply an effort to structure discretion without destroying individual adjudication.

There is, moreover, an element of circularity in arguments against the "vagueness" in standards such as these. Attempts to reform discretionary sentencing necessarily involve the inclusion of more specific (though still elastic) factors in the sentencing structure. But precisely because of their increased specificity, the argument goes, these factors take on the status of "facts" to be "proved" and require an even greater degree of specificity. Thus no attempt at increasing specificity in a discretionary system can be constitutional, because the resulting guidelines become, ipso facto, insufficiently specific if any flexibility remains whatsoever. One commentator on the California Act, recognizing this result, has written: "My own prediction is that the inevitable injection of all of these procedural

Conviction itself often depends on elastic standards. How large is a "reasonable" doubt? What does it mean to say that a person was "reckless"? In California, "premeditation" and "deliberation" are terms that can make a life or death difference (literally). But it seems fair to conclude that juries will have difficulty understanding them—not to mention such amorphous neologisms as "malice aforethought" or "diminished capacity." When one contemplates a California jury charge containing all of these terms—such as that recommended by the California Supreme Court in People v. Conley, 411 P.2d 911, 920 (Cal. 1966)—the California Rules of Court governing sentencing look like models of specificity by comparison.

For example, Professor Uelmen writes: "Every victim, of course, is 'vulnerable.' What makes a victim 'particularly' vulnerable is left to our imagination: age? sex? physical incapacity? stupidity? time of day or night?" Uelmen concludes that this standard is a "startling example of vagueness," which could be applied to "every crime" and which may be unconstitutional. Uelmen, supra note 8, at 735-36.

Uelmen makes some valid points in this passage. But they do not prove his conclusion; in fact, they prove the opposite. Uelmen, by this passage, has persuasively documented the futility of attempting to list specifically all categories of "particularly vulnerable" victims. The California Judicial Council was wise not to attempt to do so. The Council went right to the heart of the matter; a sensible application of the standard will produce aggravated sentences in cases where the victim is vulnerable in some unusual way or degree but will not produce such results where he or she is not vulnerable. Of course, sensible adjudication is necessary, but so it is with every rule of law. Id. Cf. People v. Schmidt, 146 Cal. Rptr. 516 (Cal. Ct. App. 1978) (victims were "particularly vulnerable" since they were elderly and defendant used a knife).
rights into the sentencing process will render the ‘aggravation’ procedure a useless dead letter which will seldom be invoked.”

If dictum in Specht v. Patterson is blindly followed, this pessimistic view may prove to be correct.

But the decisions indicate that the destruction of guided discretion is no more necessary than it is desirable. The California trial courts are today responding to the aggravation rules set forth by the Judicial Council in precisely the manner the legislature appears to have intended. Death penalty cases, particularly Proffitt v. Florida, Jurek v. Texas, Woodson v. North Carolina and Lockett v. Ohio, indicate that guided discretion through flexible standards is desirable. Finally, decisions construing the federal dangerous special offender statute show the resolution of the question that the appellate courts are

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275 Uelmen, supra note 8, at 752.

276 For example, during the quarter from July 1, 1977, to September 30, 1977, California trial courts selected the upper (aggravated) term in approximately 25% of cases, the middle term in approximately 65% of cases and the lower (mitigated) term in approximately 10% of cases. Sentencing Practices Quarterly, Sept. 30, 1977, at 1, col. 2 (newsletter of the California Judicial Council).

277 428 U.S. 242 (1976). The Florida statute upheld in Proffitt included mitigating factors quite similar to some in California—including “no significant” criminal history and “relatively minor” participation. Id. at 248 n.6; Fla. Stat. Ann. §§ 921.141 (6)(a), (d) (West Supp. 1977-78).


280 438 U.S. 586 (1978). The Ohio statute was construed as mandating a sentence of death unless one of three mitigating factors was present: (1) inducement by the victim; (2) duress, coercion or strong provocation; or (3) mental deficiency. Id. at 607-08. See Comment, The Constitutionality of Imposing The Death Penalty for Felony Murder, 15 Hous. L. Rev. 356, 381-85 (1978).
likely to reach. Application of the federal statute has been repeatedly attacked on the ground that the term "dangerous" is unconstitutionally vague, and similar challenges have been made against language in the statute that limits enhancements to a term "not disproportionate" to the maximum provided for the underlying felony. In each of the circuit courts that has considered these arguments, the statute has been upheld, apparently because the courts have recognized that the elasticity inherent in the standards is necessary.

None of this analysis should be taken to imply that the drafting of standards for determinate sentencing is a matter of indifference. The choice of words is important. Unquestionably, it is possible to write sentencing criteria that are unconstitutional. For example, if a standard misdirects the exercise of discretion rather than structuring it in meaningful ways, it ought to be considered unlawful. Thus a standard is vulnerable to attack if it forces the sentencer to decide the case on the basis of irrelevant criteria, if it nullifies significant relevant factors or if it requires an unreasonable weighting of conflict.

28 United States v. Williamson, 567 F.2d 610, 613 n.7 (4th Cir. 1977) ("sentencing judges are not unfamiliar with the problem of determining dangerousness . . . . [18 U.S.C. § 3575 provides] more information on which to base [a] decision"); United States v. Bowdach, 561 F.2d 1160, 1175 (5th Cir. 1977) ("[T]he addition of this term simply grants greater protection to the defendant . . . ."); United States v. Neary, 552 F.2d 1184, 1194 (7th Cir. 1977) ("The concept of dangerousness as defined in § 3575 is a verbalization of considerations underlying any sentencing decision"); United States v. Stewart, 531 F.2d 326, 36-37 (6th Cir.), cert. den., 426 U.S. 922 (1976) ("Congress undertook to improve upon State statutes . . . by prescribing standards. . . .").

228 Indeed, a few courts have recognized that the dangerousness and proportionality provisions operate as safeguards in excess of constitutional requirements, in that the decision could lawfully be based on no standards at all. E.g., United States v. Bowdach, 561 F.2d 1160, 1175 (6th Cir. 1977). See also note 281 supra for other cases dealing with dangerousness as it relates to the task of sentencing.

229 One commentator, for instance, has attacked Texas' death penalty sentencing standards as "fundamentally misleading" on the ground that, although the probability-of-future-violence question is supposed to allow balancing of aggravating and mitigating factors, its words do not so inform the jury. Dix, supra note 278, at 1384. But see Jurek v. State, 522 S.W.2d 934, 945, 948 (Tex. Crim. App. 1975) (Odom, J. and Roberts, J., dissenting), and Jurek v. Texas, 428 U.S. 262, 279 (1976) (statute has a "common-sense core of meaning," White, J., concurring). See also Crump, supra note 278, at 555-57.

224 See Lockett v. Ohio, 438 U.S. 586 (1978); cf. Alschuler, supra note 7, at 560-61 (criticizing Twentieth Century Fund proposals, as well as death penalty statutes, for attempting to produce an exhaustive list of criteria).
ing considerations. Justice White has said that sentencing standards should possess a "common-sense core of meaning."

A traditional vagueness analysis of the kind that one would apply to the definition of crimes is inapposite, however, for if completely discretionary adjudication is valid, the enunciation of rational rules for its exercise ought, by implication, also to be considered valid. And since flexibility is usually the only alternative to having no standard at all, it should not be possible to cause reversion to standardless discretion merely by the rhetorical device of calling it vagueness.


Once aggravating factors, mitigating factors and enhancements are defined, the adversary process is likely to produce constitutional challenges based upon the method of proving them. Determinate sentencing systems will be subjected to demands, for instance, that the sentencing facts be proved by the prosecution beyond a reasonable doubt, that evidence be confined to sources similar to those applicable to trials on guilt or innocence and that rights of confrontation, discovery and

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253 "The presumptive-sentencing structure should also recognize that some mitigating or aggravating factors may be more important or serious than others and therefore could be assigned different weights." TWENTIETH CENTURY FUND, supra note 27, at 46 and unnumbered footnote; cf. CAL. RULES OF COURT 408, 410 (the weight assigned to factors may vary; "primary" objectives are to be determined for each particular case). But see Alschuler, supra note 7, at 561. Alschuler maintains that "[A] list of unweighted aggravating and mitigating factors does little to confine judicial discretion." Id. But the same arguments Alschuler expresses against specifying all sentencing factors in advance would also apply to an effort to specify their weights in advance, and there is no reason to assume that statements of policy concerning factors to be considered will fail to guide judicial discretion. See authorities cited notes 267-84 supra for further examination of this problem.


257 For example, Professor Uelmen's argument, to the effect that sentencing standards are constitutionally suspect if they leave prosecutors discretion concerning what to allege as governing the sentencing disposition, should be rejected. Uelmen, supra note 8, at 752. Cf. Gregg v. Georgia, 428 U.S. 153, 199 (1976) (argument that "unfettered" prosecutorial discretion with reference to death sentencing standards "is not determinative of the [constitutional] issues before us. . . .")

258 "It would indeed be ironic if procedural due process required the absence of legislative guidance in order for the sentencing proceeding to be informal." AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 5.5(c), Comment (approved Draft, 1968) (emphasis in original).
cross-examination attach. These procedural attacks, if successful, would have enormous impact upon the feasibility of determinate sentencing.

The burden-of-proof problem does not seem an insurmountable one in constitutional terms. Although the decisions of the Supreme Court indicate that proof of every element of the substantive crime must be supplied by the prosecution under the reasonable doubt standard, the Court has treated the sentencing decision differently. In *Patterson v. New York*, for instance, it permitted the burden of proof to be placed upon the defendant. The dangerous special offender decisions uphold the use of a preponderance-of-the-information test with respect to enhancement under that statute. These decisions, however, have been criticized as depending upon the mere manipulation of labels, and it remains to be seen whether the assessment of heavy enhancements will be permitted without proof beyond a reasonable doubt, whether leaving the burden undefined (as is often done in presumptive sentencing) is constitutional and whether factors closely identified with the crime itself can be removed from the reasonable doubt standard.

Closely related to the question of proof standards is the question of evidence. Under the *Williams* standard, and under current law in many jurisdictions, a sentencing judge may consult any source and consider almost any factor, giving each such weight as he deems appropriate. Thus the inclusion of hearsay, opinion and arrest records not resulting in conviction is a routine part of presentence reports in many jurisdictions. There is some authority for the proposition that the court may

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289 See, e.g., Uelmen, *supra* note 8, at 738-45; Note, *supra* note 233, at 383. See also authorities cited in notes 234 and 256 *supra* for further discussion of other constitutional attacks that may be made on determinate sentencing.


292 See authorities cited note 274 *supra*.

293 Uelmen, *supra* note 8, at 741-45.

294 See note 23 *supra* and accompanying text for further discussion of judicial freedom in terms of scope and kinds of information which a sentencing judge may consult.

even consider the facts underlying arrests resulting in dismissal because of the exclusion of illegally seized evidence, so long as the court is aware of that result.\textsuperscript{298}

It seems clear that determinate sentencing will bring great impetus for change in some of these evidence principles. In a system of standardless discretion the court can give less weight to factors proved by unreliable evidence, but in a determinate system if the court finds a factor in aggravation the consequences may be definite—even if the finding is based on opinion, arrests not resulting in convictions or the like. Exactly what effect this conclusion should have, however, is not clear. It seems doubtful that the shift to sentence guidelines requires a shift to less complete information or a shift away from the efficiency offered by the presentence report.\textsuperscript{297} Again, the death penalty and dangerous special offender cases are important analogues, and again, these cases indicate that reliance on presentence reports for enhancements is justified.\textsuperscript{298} The right of confrontation and cross-examination, in these cases, is extended only to live witnesses, so that hearsay materials can be considered.\textsuperscript{299} Thus the evidence question may have to be resolved on a case-by-case basis, with the key test being a “sufficiency of the evidence” approach that focuses upon whether the evidence is weighty enough, and reliable enough, to sustain the conclusion made.\textsuperscript{300}

\textsuperscript{296} United States v. Tucker, 404 U.S. 443, 446 (1972); see also United States v. Johnson, 507 F.2d 826 (7th Cir. 1974), cert. denied, 421 U.S. 950 (1976).

A related problem concerns the use of illegally seized evidence itself. A few courts have allowed the use of such evidence, reasoning that it is collateral in nature and that extension of the exclusionary rule will not increase deterrence. \textit{E.g.}, United States v. Schipani, 435 F.2d 26 (2d Cir. 1970); United States v. Williamson, 567 F.2d 610 (4th Cir. 1977).

\textsuperscript{297} Insistence on strict factual accuracy would, as one commentator has noted, lead to “a possible paradox”: it might mean that sentences would tend to be determined by relatively less relevant criteria because those criteria simply happened to be verifiable. Note, supra note 233, at 385.


\textsuperscript{299} Of course, the defendant has the right to compulsory process under death penalty and dangerous special offender laws. This right may provide a partial substitute for the confrontation right. \textit{See}, \textit{e.g.}, 18 U.S.C. § 3575 (1970).

\textsuperscript{300} The increased concern for reliability is reflected in a number of factors. \textit{Cf. Cal. Rules of Court} 437, Comments (aggravating or mitigating factors to be disregarded unless supported by the record, by reports “properly filed” or by “other competent evidence”); United States v. Weston, 448 F.2d 626 (9th Cir. 1971) (unsubstantiated allegations denied by defendant cannot be considered).
There is one further complication that is more difficult to unravel. The practice in many jurisdictions is to keep portions of the presentence investigation confidential. There are already constitutional challenges that spell limitations on this practice—including the decision in *Gardner v. Florida*,, holding that it is unconstitutional in the context of death penalty sentencing—but confidentiality is defended in other instances on the ground that it leads to more complete information. In the case of dangerous offenders or persons closely identified with the defendant, this approach undoubtedly has some validity. Nevertheless, it may be that determinate sentencing, with increased emphasis upon discrete factual variables, will require an increased reliability in the fact finding process that is inconsistent (absent special circumstances) with confidentiality and its corresponding lack of testing of the evidence.

3. **Notice**

Due process requires reasonable notice for the purpose of allowing the defendant to meet the contentions of the opposition. Determinate sentencing, because it narrows discretion and focuses the attention of the sentencing judge upon specific facts, should probably trigger a greater requirement for notice of the facts to be relied upon than ordinary sentencing. The exact nature of the notice that should be required, however, is unclear. While relatively few authorities provide guidance, there is a variety of possible notice methods, and the nature of the sentencing factors may themselves influence the answer to the notice question.

The Federal Dangerous Special Offender Statute contains a requirement of "particularized" pretrial notice of the factors relied upon to show dangerousness. The requirement is onerous and difficult to meet. There are decisions indicating that notice merely apprising the defendant that he is considered dangerous is insufficient to comply with the statute, and so is notice specifying only the defendant's prior convictions.

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304 United States v. Duardi, 529 F.2d 123 (8th Cir. 1975); United States v. Kelly, 519 F.2d 251 (8th Cir. 1975).
Notices that have been held sufficient are highly detailed and resemble proffers of the testimonial and evidentiary basis for the sentencing hearing.\(^{395}\)

The death penalty decisions suggest another analogy that may be helpful. These cases indicate that notice less particularized than that required by the Dangerous Special Offender Statute may be sufficient in appropriate circumstances. The statutes that have been upheld require only general notice of the aggravating factor that is to be used to support the use of capital punishment, and aggravating and mitigating factors that actually control the decision are not required to be set forth in advance at all. The general availability of an aggravation-mitigation list published in court opinions or statutes appears to satisfy the notice requirement.\(^{396}\) Yet another analogy may be found in habitual offender statutes, which usually allow lengthy enhancement of punishments upon proof of specific kinds of prior convictions. Such statutes have generally been interpreted to require that the convictions be set forth with particularity in the indictment.\(^{397}\)

Thus, although the decisions do not speak directly to the problem of determinate sentencing, they do indicate that different kinds of notice are applicable to different situations. The requirement that the Constitution imposes is one of reasonable notice. For enhancements of a specific number of years dependent upon specific aspects of the offense or offender, greater notice is possible and desirable. Such enhanced sentencing approaches the mandatory model, and greater due process protection should be available.\(^{398}\) On the other hand, for guidelines containing general aggravating and mitigating factors that are to be weighed in the balance in an unspecified

\(^{395}\) E.g., United States v. Stewart, 531 F.2d 326, 337-39 (6th Cir. 1976); cf. United States v. Duardi, 384 F. Supp. 861 (W.D. Mo. 1973) (requiring government to submit all policy guidelines used and all evidence intended to be used to prove dangerousness). See also CAL. RULES OF COURT 437(c) (requiring “general description” of evidence).


\(^{398}\) Specificity is also more feasible. See Note, supra note 233, at 383 n.140.
way, a particularized notice requirement may be less practi-
cal. Such sentencing factors are closer to the discretionary
model, although the discretion is structured—and the avail-
ability of the published list of potentially applicable factors
gives the defendant considerably more notice than the discre-
tionary model would.

4. The Due Process Advantages of Determinate Sentencing

As counterweights to these due process arguments against
determinate sentencing, there are many ways in which deter-
minate sentencing provides greater due process protection to
criminal defendants than the discretionary method. First and
foremost, determinate sentencing is likely to decrease arbitrary
disparity. Since the due process clause prohibits invidious dis-
crimination, this decrease can be viewed as a significant due
process advantage. Secondly, the notice provided by determi-
nate sentencing, even when the notice comes in the form of a
list of aggravating or mitigating criteria, is greatly superior to
that available in traditional sentencing. Under the discretion-
ary model the possibilities are literally infinite and guessing at
the thinking of the judge or jury is a real and important goal.
Finally, determinate sentencing will tend to focus the judge
away from inappropriate criteria. There is strong evidence that
sentencing without structured guidelines results in the unin-
tended consideration of such factors as race, lifestyle and asser-
tion of constitutional rights. Even conscientious sentencers
are probably affected by these improper factors more than they
realize.

Thus even if there are disadvantages to structured discre-

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209 For example, specifying all factors and all evidence relevant to a “pattern of
violence” would produce a lengthy document. However, that is what appears to be
required by CAL. RULES OF COURT 437. The requirement applies to mitigation as well
as to aggravation—i.e., to the defense as well as the prosecution.


211 “Because of the resulting diffuse nature of issues at sentencing [under the
discretionary model], counsel has no way of crystallizing the arguments that would
best serve his client.” Note, supra note 233, at 363. See also Crump, The Function and
Limits of Prosecution Jury Argument, 28 Sw. L. J. 505, 528-31 (1974) (argument on
sentencing tends to be “standardized,” “hollow,” “illogical” and “emotional,” partly
because of “inadequate instructions to the jury”).

212 See note 200 supra and accompanying text for further discussion of unconscious
judicial bias.
tion in sentencing, their existence should not end the due pro-
cess inquiry. It may be profitable to ask whether the due pro-
cess advantages in terms of reduction of the effect of inappro-
priate matter, reduction of discrimination and provision of bet-
ter notice significantly outweigh the due process disadvan-
tages. A few decisions upholding sentence guidelines have fol-
lowed this "balancing" analysis. These decisions have con-
cerned systems providing relatively loose control of discretion,
and the upholding of such systems may indicate that a guide-
line system or a presumptive system with broad discretion for
departure will be more likely to survive due process challenges
than a more rigid model.

C. Other Constitutional Doctrines

Although the most complex constitutional limitations on
determinate sentencing are those arising under the due process
clause, the cruel and unusual punishment provision may also
be relevant. The death penalty decisions, which indicate that
haphazard sentencing may be a violation of this provision,
seem a powerful argument in favor of sentence guidelines.
But the cruel and unusual punishment clause has also been
construed to prohibit disproportionate sentences, as well as

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315 E.g., United States v. Bowdach, 561 F.2d 1160, 1171 (5th Cir. 1977); United
States v. Stewart, 531 F.2d 326, 335-37 (6th Cir. 1976) (dangerous special offender
cases).

313 See generally Crump, The Prohibition on Cruel and Unusual Punishments and
Its Application in Texas, in CONSTITUTIONAL LAW IN TEXAS 4-1 (National College of
District Attorneys 1977).

311 E.g., Furman v. Georgia, 408 U.S. 238 (1972) (death penalty); but see Rummel
v. Estelle, 568 F.2d 1193 (5th Cir. 1978) (habitual criminal statute unconstitutional as
applied), rev'd, 587 F.2d 651 (5th Cir. 1978) (en banc).

317 In re Lynch, 503 P.2d 921 (Cal. 1972). See also Coker v. Georgia, 433 U.S. 584
(1977); Weems v. United States, 217 U.S. 349 (1910).
certain kinds of mandatory sentencing. In *Rummel v. Estelle*, the Fifth Circuit used these doctrines to hold the Texas habitual criminal statute, which it construed as requiring a sentence of life imprisonment upon proof of two sequential prior felony convictions, to be constitutional on its face but unconstitutional as applied to the particular defendant before it. Though the holding was reversed by the court en banc, the implication of decisions such as *Rummel* for determinate sentencing is that the court must have an escape valve to avoid disproportionate dispositions. Both the California

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218 Sentencing which does not allow consideration of relevant mitigating factors is particularly suspect. Lockett v. Ohio, 438 U.S. 586 (1978).


220 568 F.2d 1193 (5th Cir. 1978), rev'd, 587 F.2d 651 (5th Cir. 1978) (en banc).

221 Tex. Penal Code Ann. tit. 3, § 12.42(d) (Vernon 1974). The provision under which Rummel was sentenced was an earlier codification with wording that differed slightly but not materially. Tex. Penal Code Ann. art. 63 (Vernon 1925).

222 The court so interpreted the statute on the basis of its literal wording. It has long been construed, however, as allowing the trial court to impose a lesser sentence by the device of "failing to find" one of the prior convictions. *See* note 19 *supra* and accompanying text for their discussions of habitual criminal statutes.

223 The mere fact of two prior felony convictions is not enough. The prosecution must prove that the second offense followed the first conviction; in other words, the sequence must be: crime, conviction; crime, conviction; crime, conviction. Tex. Penal Code Ann. tit. 3, § 12.42(d) (Vernon 1974).

224 This holding was mandated by *Spencer v. Texas*, 385 U.S. 554, *reh. denied*, 386 U.S. 969 (1967).

225 The court applied four "objective" factors: the "nature of the crimes"; the "legislative objective"; a comparison "with the punishment accorded other crimes" under the law of the same state; and a comparison with the "sentence imposed in other jurisdictions for similar offenses." 568 F.2d at 1197-99. The factors were borrowed from the opinion in *Hart v. Coiner*, 483 F.2d 138 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974).

226 However, the required nature and coverage of such an escape valve is unclear because, as the dissent of Judge Thornberry in *Rummel* points out, the four "objective" factors used by the majority are not objective at all. 568 F.2d at 1201 n.3. The dissent notes that the four-part test has not been applied consistently in the past, citing *Griffin v. Warden*, 517 F.2d 756 (4th Cir.), *cert. denied*, 423 U.S. 990 (1975) (three property crimes characterized as "serious" and as having "potential for violence") and *Wood v. South Carolina*, 483 F.2d 149 (4th Cir. 1973) (refusal to apply four-part test to five-year sentence for obscene telephone call). 568 F.2d at 1201 (Thornberry, J., dissenting). The result of *Rummel* "will surely be an attack on the habitual offender statute in every instance. . . . Nothing in the court's opinion informs state prosecutors, courts, or legislatures of the possible limits of error." *Id.* at 1202. On rehearing en banc, the Fifth Circuit held that the Texas habitual criminal statute does not violate the eighth amendment, although some criminal sentences may be so disproportionate as to constitute cruel and unusual punishment. 587 F.2d 651 (5th Cir. 1978).
Act and the Federal Dangerous Special Offender Statute, for example, contain provisions designed to accomplish this result. The escape valve itself may be subject to criticism in that it allows inequality to re-enter the system or is unduly vague, but its inclusion is an improvement over both mandatory sentencing and unguided discretion.

The multiple jeopardy provision is another consideration in the drafting of a determinate sentencing statute. There are those who have insisted, with logic, that the prosecution as well as the defense should have the right to appeal an unlawfully assessed sentence, but the decisions do not make the constitutionality of such a practice clear. In *United States v. Sisson*, for example, the Supreme Court stated that an appellate court could not reform an arrest of judgment it had held erroneous as a matter of law. But other decisions imply that this result may not be applicable to sentencing decisions, and some appellate courts have simply assumed the power to increase sentences on appeal. An additional problem may be

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2. See Alschuler, supra note 7, at 563. California has catalogued circumstances in mitigation to guide the decision for precisely this reason. CAL. RULES OF COURT 423, Comment.


4. See note 86 supra for a description of resentencing procedures in California.
posed by the collateral estoppel doctrine of *Ashe v. Swenson*, which holds that a fact cannot be redetermined adversely to the accused. A finding of fact pertaining to the defendant as distinguished from the crime, such as a finding that an offender has not exhibited a "pattern of violence," probably cannot be redetermined by another court considering another charge that arose about the same time; likewise, it would appear that fact findings on sentence may not be redetermined adversely to the accused on appeal. Difficulties will probably arise with this concept since most sentencing issues will be mixed questions of fact and law, and eventually the collateral estoppel doctrine may have to be adapted to fit the new problem of determinate sentencing.

The advent of determinate sentencing has also created new arguments relating to the right to jury trial. The Constitution does not appear to create any such right at the sentencing stage, and jury sentencing has been widely criticized as both inaccurate and inconsistent; nevertheless, some jurisdic-

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335 See also United States v. Denson, ___ F.2d ___ (5th Cir. 1979) (sentence found illegal; cause remanded for resentencing) (en banc).

336 A "pattern of violence" is an ingredient of one of the aggravating circumstances set forth in *Cal. Rules of Court* 421.

337 For example, prosecutors in the Harris County (Houston) District Attorney's Office decided that trial of a second capital case against a defendant whose first trial ended in a life sentence because of jury fact findings pertaining to the offender could result in no higher sentence than life imprisonment, and they consequently declined to try the second case. Interview with Ted Busch, Assistant District Attorney of Harris County, Texas, in Houston, Texas (March 15, 1977) (approximate date).

338 Other jeopardy arguments could, of course, be constructed. For example, it might be argued that the use of a circumstance more than once to increase a sentence would create jeopardy problems. The issue was dealt with in *Gryger v. Burke*, 334 U.S. 728 (1948), which held that enhanced sentencing based upon prior convictions did not constitute multiple punishment or violate the jeopardy clause. See also *Oyler v. Boles*, 368 U.S. 448 (1962). Multiple use of other kinds of factors may pose different questions.


340 "[T]he jury is as totally unequipped to fashion a proper sentence as the twelve would be to perform brain surgery on the poor soul." Chamberlain, *A New Look at Sentencing from a Court that Doesn't Exist*, 37 Tex. B.J. 235, 236 (1974). See also ABA, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 1.1 (1968).

341 "Sentencing by a distinct jury at each trial is necessarily a guarantee of signifi-
DETERMINATE SENTENCING

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Tions have statutes or constitutional provisions respecting jury sentencing, and it may be, therefore, in these states, that sentence guidelines will have to be reconciled with the right to trial by jury. At first blush, the combination seems impossible. However, juries already perform certain kinds of determinate sentencing functions; in death penalty cases, for instance, they render both specific factual decisions and general, discretionary verdicts controlling sentence, and in habitual criminal prosecutions they render fact findings concerning the defendant's prior criminal record. These examples raise the possibility that juries might make fact findings in a determinate sentencing scheme or that they might render a general verdict controlled by instructions (or even by a presumptive sentence with guidelines for departure). The drafting of jury charges for such a system could be a formidable task; it could require extensive instructions and induce reversals based on minute differences in wording. But simpler instructions, such as advising the jury of permissible considerations in sentencing or of general aggravating and mitigating factors, could

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343 As Justice Stewart observed in Gregg v. Georgia, "while some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed." 428 U.S. at 193 (emphasis added).

344 For statutes requiring determination of specific factors, see Fla. Stat. Ann. § 921.141(5)-(6) (Supp. 1979) (aggravating and mitigating circumstances); Ga. Code Ann. § 27-2534.1(c) (1978) (aggravating circumstances); Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1979) (defendant's deliberateness, probable future violence and provocation). As to discretionary decisions, the Georgia statute requires a decision between life and death when an aggravating circumstance is found, the Florida statute requires a balancing of aggravating and mitigating factors and the Texas decisions allow a wide variety of factors to be weighed as part of the process of answering the determinative questions.


347 For example, a jury might be told that, for certain kinds of crimes, probation should be restricted to unusual cases, perhaps with guidelines as to the existence of an unusual case. This is the sort of guidance given by Cal. Penal Code § 1203(d) (West Supp. 1979) and Cal. Rules of Court 418. Likewise, for certain other offenses, a jury
be useful. Such a system could change the jury from the hap-
hazard sentencer it is today to a rational and consistent en-
tity. However, the risks are also great, and the introduction of
determinate sentencing into a jury system ought to proceed on
a piecemeal basis.

These problems are a few of the potential constitutional
difficulties for determinate sentencing. Unfortunately, it ap-
ppears that the type of system most likely to withstand constitu-
tional attack—a system with elaborate protections—may lack
the flexibility or administrative feasibility necessary for a
workable scheme. However, it is easy to exaggerate the impor-
tance of constitutional problems. The Federal Dangerous Spe-
cial Offender Statute was carefully planned to avoid unconsti-
tutionality, and it has withstood nearly all constitutional at-
tacks to date. The legislative debate over the California Act,
ironically, was devoid of constitutional arguments, and constitu-
tional attacks upon it have thus far been few and unsuccess-
ful. Thus, in the final analysis, administrative difficulties
may loom as the most formidable obstacles to determinate
sentencing.

might be told of a presumption in favor of probation where the defendant has no prior

Modern penal codes, for example, often begin with declarations of purpose. E.g., CAL. PENAL CODE § 1170(a)(1) (West Supp. 1979); CAL. RULES OF COURT 410; TEXAS PENAL CODE ANN. § 1.02 (Vernon 1974). If such declarations serve to guide
lawyers and judges, juries might benefit equally from being told the object of their task.
Attorneys are likely to allude to these objectives in argument, but in an emotional and
partisan way. See Crump, supra note 311 at 528-39. This kind of instruction can
probably be given by the court without new legislation, since the declaration of pur-
poses is already in the penal code in many states.

With enabling legislation, jurors might be given lists of aggravating or mitigating
factors (again, jurors presumably need the guidance even more than judges). Or they
might be given better descriptions of sentencing alternatives. Sentencing juries in
many places are given no information concerning probation or parole. Id.

For a persuasive argument against standardless jury discretion in another con-
text, see Brawner v. United States, 471 F.2d 969 (D.C. Cir. 1972) in which the court
rejects instructions telling jurors to acquit on basis of insanity if defendant could not
"justly be held responsible".

See notes 252-55 supra and accompanying text for a discussion of the Federal
Dangerous Special Offender Statute.

Interview with Raymond I. Parnas, Professor of Law, University of California,
Davis, and Counsel to the California Select Committee on Penal Institutions in Davis,
California (Oct. 4, 1978) (conducted by telephone from Houston). For an example of a
constitutional challenge, see People v. Superior Court, 144 Cal. Rptr. 89 (1978).
IV. PROBLEMS OF ADMINISTRATION

If the philosophical and constitutional problems of sentence guidelines can be solved, there remains the problem of making the system work as a practical matter. Determinate sentencing presents questions regarding cost, complexity, delay, plea bargaining and responsiveness to change.

A. Complexity and Confusion

There is no question that some determinate systems make sentencing a more complicated process. The California system, for instance, with its four categories of sentences, its three base sentences for each, its general enhancements and its specific enhancements, has prompted one commentator to refer to it as "new math." The comparison may be justified. There are enhancements under the California law, for example, that require the application of as many as five separate criteria, some of which are cross-referenced to other statutory provisions that also contain multiple criteria. New terminology in the Act introduces subtle but important distinctions: for instance, if an enhancement is disregarded by the court, it makes a difference whether it is "stayed" or "struck." Determination of the total

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For an even franker evaluation, see Bedsworth, The Screendoor Repairman and Certified Criminal Law Specialist's Examination, 53 Cal. St. B. J. 186, 187 (1978). Mr. Bedsworth's "examination" contains the following question:

24.) Which of the following is the funniest?
A) the infield fly rule
B) California's determinate sentencing system
C) Gerry Ford
D) Jimmy Carter
E) hemorrhoids

Mr. Bedsworth's "key" gives the correct answer as "B, although you get part credit for E, which is really indistinguishable from B." Id. at 189.

353 E.g., Cal. Penal Code § 667.5(a) (West Supp. 1979). This section imposes a three-year enhancement if all of the following conditions are met: (1) the present offense is a violent felony listed in § 667.5(c); (2) the defendant has a prior conviction for a listed violent felony; (3) the defendant served a separate prison term for the prior conviction; (4) the prior conviction is pleaded and proved; and (5) the prior conviction has not been superseded by a ten-year period (the "washout" period) during which the defendant remained free of imprisonment or of offenses resulting in conviction. See Cassou & Taugh Carter, supra note 11, at 48.

354 "Staying" the enhancement means that it is found to be valid but that the
length of consecutive sentences is another example of California's new math: it involves an algebraic equation with more potential calculations than are required to compute the alternative maximum marital deduction in a community-separate estate for tax purposes. The Act also contains a few important internal contradictions. For instance, it refers at one point to factors in aggravation or mitigation "of the crime," a phrase that has already required an appellate court to answer the question whether factors peculiar to the offender are intended to affect eligibility for probation in both present and future cases.

The Act also contains a few important internal contradictions. For instance, it refers at one point to factors in aggravation or mitigation "of the crime," a phrase that has already required an appellate court to answer the question whether factors peculiar to the offender are intended to affect eligibility for probation in both present and future cases. CAL. PENAL CODE § 1203(d) (West Supp. 1979).

53 The calculation of a consecutive term begins with the fixing of the principal term, which is the longest single term for any offense of which the defendant stands convicted for consecutive sentencing. Then, increments of one-third the middle base term of any other offenses (or of enhancements for listed violent felonies), called subordinate terms, may be added. Cassou and Taigher give the following calculation for the sentence of a defendant convicted of both second-degree murder and robbery with great bodily injury in separate courses of conduct:

$6 + [(\frac{1}{3} \times 3) - (\frac{1}{3} \times 3)] = 8$ years

In this calculation, the principal term is six years (the presumptive middle term for second-degree murder); the first subordinate term is one-third the three-year middle term for robbery; and the second subordinate term is one-third the enhancement for great bodily injury. Cassou & Taigher, supra note 11, at 57 n.380.

Actually, however, the algebra is only the end result, coming into play after the judge "has considered the multiple punishment aspects of Penal Code Section 654 and any merger problems under Penal Code Section 669, and has chosen or been compelled to sentence consecutively. . . ." Id. at 53. As for the multiple punishment law in California, Cassou and Taigher predict, "It seems probable that the doctrine will break down under the determinate sentence law. . . ." Id. at 56.

It is worth adding that many persons, with considerable justification, may take exception to an eight-year maximum sentence for a defendant who has committed a murder and, in a separate incident, has caused serious bodily injury to another victim in the course of robbing him.

The "minimax" marital deduction is given by

$$A - [B - (C - D)]$$

where A is $250,000, B is the amount of community property in the gross estate, C is the amount of allowable deductions under I.R.C. §§ 2053-2054 and D is the amount of such deductions allocable to separate property. I.R.C. § 2056. See generally Johanson, Marital Deduction Planning After the Tax Reform Act of 1976, ADVANCED ESTATE PLANNING AND PROBATE COURSE D-4 (State Bar of Texas ed. 1978). The maximum marital deduction is the larger of this amount or half the adjusted gross estate. Id. at D-2.
to be included. In the wake of this confusion, attorneys (including the statute's drafters themselves) have evolved a colorful jargon to help them cope, including such terms as "washout," "bad dude hearings" and "the dirty eight."

While complexity of this degree may be tolerable in a statute governing estate taxes, it seems less tolerable as a means of divining the lengths of prison sentences. Unless carefully written, a law of this sort might require a level of expertise that some criminal practitioners may not be able to achieve, and it might make criminal law even more than before a field of which the successful general practitioner will feel justified in washing his hands. Indeed, the California Act presents such an array of principles that they are difficult to keep straight even if one understands them, and hence it may lead to miscalculated sentences. Unless carefully administered, it may lengthen delays in sentencing and review, and it will undoubtedly create unintended loopholes. A pessimistic observer might even re-

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257 CAL. PENAL CODE § 1170(b) (West Supp. 1979). The phrase has been interpreted by the California Judicial Council to include facts relating to the offender (such as absence of criminal record), but its legislative history seems to indicate otherwise. Compare CAL. RULES OF COURT 421, 423 with Cassou & Taugher, supra note 11, at 40-41. An appellate court followed the Council's interpretation of the matter in People v. Schmidt, 146 Cal. Rptr. 516 (1978).

258 The washout period is the time of freedom from incarceration for offenses resulting in felony conviction that is sufficient to avoid enhancement for prior convictions. See note 331 supra for the "washout" period in CAL. PENAL CODE § 667.5(a) (West Supp. 1979). See also Cassou & Taugher, supra note 11, at 49-53.

259 This colloquialism is a consequence of the retroactivity provisions of the California law. Inmates who were sentenced before its effective date are nevertheless to be released in accordance with the new Act. CAL. PENAL CODE § 1170.2(a) (West Supp. 1979). But under certain circumstances, the Community Release Board may impose an increased term on a convict. CAL. PENAL CODE § 1170.2(b). In order to do so, the Board must hold what is called a serious offender (or "bad dude") hearing. Cassou & Taugher, supra note 11, at 94 n.625.

260 This phrase refers to the listed violent felonies of CAL. PENAL CODE § 667.5(c) (West Supp. 1979). See note 331 supra for an explanation of the role these felonies play in California's enhancement system. Cassou & Taugher, supra note 11, at 48 n.320. It is perhaps a fitting anomaly that the felonies referred to are more than eight in number (and also that some are not violent).

261 For example, the high-loss enhancement, CAL. PENAL CODE § 12022.6 (West Supp. 1979), specifically excludes arson (and related burning offenses), robbery and burglary. Furthermore, it is written so as to exclude, apparently, many other property offenses (e.g., forgery). Thus, if a person is convicted of stealing or destroying valuable property other than by burning it, he is liable to a one- (or two-) year enhancement, but if he is convicted of burning the same property or of forging documents leading to
gard it as conceivable that a strict determinate sentencing regime might produce new disparities that are merely different in distribution from the ones of the past, though this conclusion does not seem applicable to the California statute.

B. Distortion of the Legislative Intent

Actually, the complexity of a strict determinate sentencing law is not only in the array of applicable principles; it is in what each of them means. For example, when a determinate sentencing law provides (as California's does) for an enhanced sentence if the offender personally "possesses" a "firearm" during an offense, what does it mean? If the firearm is accessible during a part of the offense, is that sufficient? Other problems are raised when several provisions are construed together. For example, the use of a firearm in California supports imposition of an enhancement, and a "particularly vulnerable" victim is a factor in aggravation—but if both increments are imposed, might it not be possible to argue in a given case that without the firearm the victim would not have been vul-

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362 CAL. PENAL CODE § 12022(b) (West Supp. 1979); see also Cassou & Taugher, supra note 11, at 52.

363 For an example of particularly dubious reasoning by a court in construing statutory language similar to that construed in Roberson and Hunt, see Blount v. State, 542 S.W.2d 164 (Tex. Crim. App. 1976). Blount's victim testified that she submitted to his raping her after a co-defendant procured a knife and that the men made clear that they would kill her if she reported the crime. The court concluded from these facts that "[n]o weapons were used" and "no . . . threats" were made. A dissent pointed out that it would have been difficult to communicate a threat more effectively to the victim because she was a deaf-mute, but the majority's cryptic response was that this argument was "a dissent without reason."

364 See note 70 supra and accompanying text for a discussion of California's enhancement system.

365 See note 254 supra and accompanying text for Professor Uelmen's consideration of the "vulnerable" victim. Uelmen, supra note 8, at 735-36.
nerable and that the single factor of firearm use has thus been used twice to increase the sentence—an increase that would be in violation of the limitations of the Act? These ambiguities are the sort that are unavoidable even in a well-drafted statute, but a narrow-discretion determinate sentencing law is likely to contain an uncommon number of them. Words and phrases of the most apparent simplicity may find their way into disputes at the appellate level, and reasonable decisions by prosecutors or judges may create wholesale miscarriages of justice when hindsight shows them to have been wrong.

Cases decided under the Federal Dangerous Special Offender Statute are an example of the haphazard results that a jurisprudence based on such semantics may produce. One federal court, for instance, has construed the Dangerous Special Offender Statute to mean that indictable offenses could not be considered in deciding whether an offender was "dangerous," a conclusion that led to the anomalous result that only innocent conduct could be used to aggravate the sentence. Another district judge concluded, by application of a mathematical formula invented by him for the occasion, that a ten-year base sentence could not be enhanced by more than one day.

264 See CAL. PENAL CODE § 1170(b) (West Supp. 1979); cf. People v. Roberson, 146 Cal. Rptr. 777 (1978) (trial court could not use firearm and prior conviction for both aggravation and enhancement; however, court could use prior conviction for enhancement and also use other convictions to support "pattern of violence" aggravation).

265 For example, it has been predicted that the word term (as in base term) "will likely lead to litigation." Cassou & Taugher, supra note 11, at 38 n.179.


254 For example, in Reynolds v. State, 547 S.W.2d 590 (Tex. Crim. App. 1976), the court held that a theft indictment containing the word "unlawfully" rather than "without the owner's effective consent" was fundamentally defective, though the indictment tracked the relevant statute which defined unlawfulness as meaning "without the owner's effective consent." Reynolds involved a construction of Tex. PENAL CODE ANN. tit. 3, § 31.03(d)(4)(B) (Vernon 1974), and was rendered three years after the code had taken effect. The effect of Reynolds was to void all theft convictions (including plea-bargained convictions) in Harris County (Houston), Texas, over that three-year period. Broad changes in criminal law inevitably produce some results of this sort.

without making the total sentence "disproportionate;" hence he assessed an "enhanced" sentence of ten years and one day rather than ten years. Each of these decisions was rendered in the course of construing a statute less ambiguous than the California Act. A decade or two of appellate construction might, under a worst case hypothesis, make a narrow discretion statute unrecognizable to the legislators who drafted it; or to put it another way, it may take a decade or more before it is clear what the Act really means. The task of making sense at the appellate level of a field so fraught with philosophical inconsistencies as sentencing may be as difficult in its own way as making sense of search and seizure, school desegregation or capital punishment.

There are, of course, less complicated determinate sentencing plans. A presumptive system allowing the judge a fair degree of discretion to deviate from the prescribed sentence may be superior to the narrow-discretion model in terms of the complexity factor. General definition of aggravating and mitigating factors, such as is contained in the Indiana statute, might be used to structure the remaining discretion in a pre-

370 United States v. Neary, 552 F.2d 1184 (7th Cir. 1977). The court stated, "We do not regard similar exact calculation necessary for legitimate implementation of the statute." Id. at 1191 n.4.

371 "[T]he appellate review process is quite time-consuming, and a common law of sentencing may well take several decades to develop." L. Wilkins, supra note 16, at 2.

372 As for search and seizure, years of appellate litigation have created a situation in which "[a] great deal of difficulty arises in applying the many guidelines to a particular set of facts . . . . [T]he decisions dealing with search and seizure appear to be in a constant state of flux." Rawitscher & Carnahan, Search and Seizure, in Advanced Criminal Law Course K-1 (State Bar of Texas ed. 1978). In the capital punishment area, no statement expresses the confusion that has been produced by the Supreme Court's decisions better than those of State v. Winkle, 528 P.2d 467, 468 (Utah 1974). The Utah court referred to Furman v. Georgia, 408 U.S. 238 (1979, with the epithet "expletive deleted," and it pointedly observed: "[T]he U.S. Supreme Court (with its nine separate opinions) has created the confusion; now let it lead this state and the others out of this morass." 528 P.2d at 468. Many years and a dozen major opinions later, in Lockett v. Ohio, 438 U.S. 586 (1978), the Court recognized that clear guidelines were still wanting. As to school desegregation decisions, see L. Graglia, Disaster by Decree: The Supreme Court's Decisions on Race and the Schools (1975).

Sentencing is a matter of complexity and conflicting values similar to those of these three areas, and appellate jurisprudence on the subject may have similar results.

373 See notes 102-06 supra and accompanying text for a discussion of the Indiana statute.
sumptive system without undue complexity. Of course, where something is gained, something else is often lost; a broad presumptive system may not produce results as consistent as a narrow-discretion system.

C. Cost

Some increase in cost is probably an unavoidable consequence of the adoption of a determinate system. What such a system seeks is more specific attention to sentencing decisions, and it follows that the goal will not be reached without commitment of resources. For some kinds of systems, the cost may be modest. But for a complex scheme, particularly if steps are taken to maximize uniformity through appeals or statements of reasons and to minimize consequences such as plea bargaining, the increased cost may be significant.

Advocates of non-binding guidelines have pointed out that the calculation necessary for implementation takes only a few minutes per sentence and can be delegated to a clerk. This claim exaggerates the simplicity of the guideline approach, since counsel for both sides will need to verify the calculation, and it neglects the fact-finding that will be necessary before guidelines can be applied. Thus even the use of non-binding guidelines will probably produce some increase in cost. However, it is reasonable to hope that the increase will be small.

The cost of a narrow-discretion system, on the other hand, would be far more significant in the absence of plea bargaining over sentences. A judge would have to receive evidence directed at a number of specific, additional issues in an adversary hearing for every case. The calculation would require extensive data collection, testing of that data in a manner consistent with

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374 L. Wilkins, supra note 16, at 24-25.
375 See note 227 supra and accompanying text for a discussion of the importance of factfinding in the sentencing process.
376 While ten to fifteen percent of California defendants now avail themselves of all of the procedural rights of a trial, all convicted defendants are ultimately subject to the sentencing process, including the eighty-five to ninety percent who plead guilty. . . . [W]e face the possibility of a vast multiplication of the commitment of judicial resources to what is now a rather routine and expeditious process.

Uelmen, supra note 8, at 727.
due process, hearing of adversary argument and appeal—in short, an additional adversary hearing for every case. Such a system might require a number of judges, prosecutors and defenders many times that of today, preparation of records for appeal in many cases that are not now appealed, additional probation officers to prepare additional and better presentence reports, additional court reporters and even additional storage facilities to maintain the additional records that would be necessary.

One may argue, with considerable justification, that additional commitment to this neglected process of sentencing is desirable even at great expense. As James Q. Wilson has said, "[M]ost of the time, for most of the cases in our busier courts, the important decisions concern the sentence, not conviction or acquittal."[7] But whether the enormous commitment that may be required for a narrow-discretion system is attainable or desirable in a time of strained resources is another question. The inevitable argument that criminal justice is priceless and the cost irrelevant[7] fails to consider that there are only two sources from which funds can come: increased taxation, which is not likely in the near future, or decreases in other governmental expenditures. An expensive sentencing system, in other words, may be purchased by the loss of hospitals, schools, mosquito control or police salaries. Presumptive or guideline sentencing would, it seems, produce more consistency for the dollar, though it might not produce as high a level of consistency as a more definite system.


[7] For example, Professor Alschuler, in referring to plea bargaining, concludes: "I am not at all persuaded that our society is too impoverished to give its criminal defendants their day in court." Alschuler, supra note 7, at 565. This kind of analysis fails to consider the allocation of resources between criminal trials and other worthwhile endeavors.

Alschuler also argues that other, poorer nations do not plea bargain. Id. But other countries may not have a jury trial system so elaborate as ours, may use government terror to control crime, or may tolerate crime rates we would regard as unacceptable; furthermore, plea bargaining may be present, though less visible, in countries that purport not to use it. None of these arguments justifies a complete refusal to restrict plea bargaining, but they are arguments in favor of keeping costs firmly in mind.
D. Effects on the Nature and Frequency of Plea Bargaining

No system for reform in sentencing should be undertaken without consideration of its effects on plea bargaining. Changes in the factors that induce plea bargains automatically cause changes in the method and frequency of bargaining, for good or for ill. In the case of determinate sentencing, the effects depend upon practices already in existence and upon the type of discretion control adopted. A few jurisdictions have coupled sentence-guideline systems with prohibitions upon plea bargaining, but in most such systems, bargaining remains and must be dealt with.

1. Charge Bargaining and Sentence Bargaining

The subjects of plea bargains are usually either charges or sentences. In charge bargaining, the prosecution makes concessions by abandoning charges, enhancements or counts that could otherwise make the sentence more severe. Sentence bargaining, on the other hand, involves a promise to recommend (or not to oppose) a specific sentence, with or without charge reduction. Sentence bargaining has the arguable disadvantage of shifting to the attorneys greater discretion than would charge bargaining, but charge bargaining has the arguable disadvantage of distortion, since it changes the nature of the conviction obtained.

The type of bargaining used is influenced by a number of factors in the sentence structure. Sentence bargaining, for example, depends upon the existence of relatively wide sentence ranges, while charge bargaining depends upon a reasonably continuous distribution of lesser included charges (or on a law authorizing conviction for related offenses). Thus a jurisdiction with comparatively few offenses, each of which carries wide discretionarv ranges, would be likely to produce less charge bargaining than sentence bargaining. The nature and frequency of bargaining is also influenced by other factors such as

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379 See Dershowitz, Background Paper, in Twentieth Century Fund, supra note 27, at 81.
380 Deinite Sentencing, supra note 7, at 34.
381 Id.
the caseload and resource balance of the jurisdiction, by the power and respect customarily accorded the court, by laws attaching collateral consequences to particular dispositions and by direct regulation under court rules or internal policies of a district attorney's office.

If a given system, then, has broad sentence ranges and indulges in frequent sentence bargaining, the introduction of determinate sentencing—whether quasi-mandatory, presumptive or guideline—will narrow the discretionary range available to attorneys in most cases and discourage the ordinary method of bargaining. There will be pressure to switch to charge bargaining, but this pressure will be checked by the limited availability of lesser included offenses or enhancements that can be abandoned, and the result will probably be a reduction in plea bargaining. Texas is a good example of a jurisdiction that might exhibit this effect. Current sentence ranges in Texas are broad—they include ranges of five to ninety-nine years with probation alternatives for a wide variety of common felonies—and bargaining over both sentences and charges is in widespread use. While lesser included offenses are generally available, their ranges overlap the probable sentence for higher offenses, and therefore any increase in charge bargaining produced by determinate sentencing would probably not offset the decrease in sentence bargaining. Thus, if Texas were to narrow sentencing discretion, the result might well be a decrease in plea bargaining.

332 See Twentieth Century Fund, supra note 27, at 26; Definite Sentencing, supra note 7, at 34-35.
333 But see Twentieth Century Fund, supra note 27, at 26.
334 Definite Sentencing, supra note 7, at 34.
336 Each of the felonies named in note 335 supra contains a lesser-included offense that is a felony of the second degree, carrying two to twenty years rather than five to ninety-nine years. Tex. Penal Code Ann. § 19.04 (Vernon 1974) (voluntary manslaughter); Tex. Penal Code Ann. § 20.03 (simple kidnapping); Tex. Penal Code Ann. § 21.02 (simple rape); Tex. Penal Code Ann. § 29.02 (simple robbery); Tex. Con. Subs. Act Ann. § 4.03 (Vernon 1974) (possession of heroin). The range of two years to twenty years probably includes sentences for all but the most aggravated rapes, robberies or heroin sales except those in which the accused is a repeat offender.
If, on the other hand, a jurisdiction has relatively little judicial discretion in sentencing ranges and adopts a determinate sentencing scheme with a distribution of possible dispositions that is nearly continuous, the result may be an increase in bargaining. Such a description seems, at least superficially, to fit California. The indeterminate sentence left little room for bargaining other than by charge reduction or probation; if a defendant was sentenced to imprisonment, the length of time he would serve was beyond the range of any agreement among attorneys. The new determinate sentencing law increases opportunities for the abandonment of enhancements and for agreements concerning aggravation or mitigation. It therefore increases the number of potential subjects for agreements between attorneys. But the question is more complicated than this. Charge bargaining was frequent in California prior to the adoption of determinate sentencing, and it required reduction that distorted the nature of the conviction. The main factor that might increase bargaining after the Uniform Determinate Sentencing Act is the new existence of rational "middle ground" sentences; thus even if bargaining frequency is increased it may produce more rational dispositions than the concessions that preceded the Act. Actually, the simultaneous narrowing of sentence ranges, together with the adoption of probation guidelines, will probably keep bargaining from increasing significantly if, indeed, it increases at all.

2. Articulation of Bargaining Concessions on the Record

Many determinate sentencing proposals require reasons for deciding sentences to appear on the record. California's system, for example, requires that affirmative findings be made if a base term other than the middle term is to be assessed, probation is to be ordered or enhancements are to be

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387 See also Alschuler, supra note 7, at 570-73.
388 The Adult Authority acquired jurisdiction after conviction and hence was not directly influenced by considerations relating to the forgoing of trial. See note 31 supra for a discussion of the Adult Authority, California's parole board.
389 Alschuler, supra note 7, at 573.
390 "[A] presumptive-sentencing system . . . can make plea bargaining a more rational and equitable process." Twentieth Century Fund, supra note 27, at 26.
struck. If the reason for any of these actions is a plea bargain, the record may be required to contain an affirmative finding by the court that the bargain, when weighed with other evidence, warrants the action.

This requirement will not by itself eliminate plea bargaining, because the prosecution may be able to make concessions by failing to allege or prove aggravation or enhancements and the court may be disposed to find mitigation on less evidence when there is a plea bargain. But the statement of reasons requirement does seem likely to limit bargaining discretion in some kinds of cases. The first checkpoint is the trial judge; he must enter explicit findings to take certain kinds of actions. A second checkpoint may be found in review by the Community Release Board, and a third in the appellate courts. Finally, some reduction of plea bargaining may come about in that the prosecutor will—in some cases, but not all—have to make or accede to specific statements on the record in order to make bargaining concessions. Prosecutors may be expected to be as reluctant as anyone else, if not more so, to go on the record with factually incorrect statements.

Indeed, determinate sentencing seems likely to present new constitutional challenges to the very institution of plea bargaining. Placing so much of the sentencing process on the record, as California now does, may strip it of some of the ambiguity that sustains it. Plea bargaining under determinate sentencing statutes may ultimately be subjected to requirements that the court quantify the concession that foregoing a trial will produce, and even if that added knowledge does not make plea bargaining less frequent, it may create a political or judicial environment that will keep concessions within rational and consistent limits. Of course, there are disadvantages to

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391 CAL. RULES OF COURT 443, Comment.
392 CAL. RULES OF COURT 440, for example, provides that even in the event of a plea of guilty specifying the sentence, the court may approve that sentence only "provided there is evidence or a factual stipulation in the record justifying that term and appropriate facts and reasons for imposing that term are set forth on the record."
393 See Alschuler, supra note 7, at 575 n.72.
394 Alschuler, supra note 7, at 575 n.72. See CAL. RULES OF COURT 423(b)(3) (fact that defendant "voluntarily acknowledged wrongdoing . . . at an early stage" is a factor in mitigation).
such a prospect. It seems possible that sentence concessions given a witness—a John Dean, for example—who has aided in the conviction of confederates might be impractical under a regime of determinate sentencing. A future Judge Sirica might be unable to ferret out the truth through the threat of heavier sentences, and a future Leon Jaworski might not be able to reach up the conspiratorial ladder through the judicious use of plea bargaining. While some limits on this sort of discretion seem desirable, determinate sentencing should not be construed to require us to sentence little fish in such a manner that big ones get away.

3. The Balance of Bargaining Power

Some commentators have voiced concern that determinate sentencing might enhance the bargaining strength of the prosecutor at the expense of the defense attorney. In particular, Professor Alschuler sees in the new California law a scheme whereby lazy prosecutors may have greater power to induce guilty pleas from the defense so that they can go home early on a pleasant afternoon. This picture of raw prosecutorial power is an important concern but appears to be overdrawn.

The California system may or may not increase the frequency or style of bargaining, but it does not seem likely to shift the balance of power to the prosecutor. The prosecutor's main bargaining chips concern reduction of sentence. The California Determinate Sentencing Act does not increase the severity of sentences or the range of sentences; it reduces them, and it requires findings by the court before major concessions can be made. By contrast, the main bargaining chip of the defense concerns savings of time and cost in the adjudicatory process. Thus the California Act, if anything, brings about an increase

323 Alschuler, supra note 7, at 575 n.72.
324 For example, Professor Alschuler repeatedly refers to "prosecutorial plea bargaining" as one of the disadvantages of determinate sentencing. Alschuler supra note 7, at 563. If this phrase is intended to communicate the notion that plea bargaining involves prosecutors, it is tautologous. If it is intended as a qualifying description—that is, if it is an effort to say that there are some kinds of plea bargaining in which prosecutors (but not defense attorneys) engage—it is misdirected. The addition of "prosecutorial" overstates the argument because it implies the existence of a one-sided, unchecked source of bargaining power.
in the bargaining power of the defense because it vastly increases the potential cost and time consumption of the adversary process. The unspoken threat of a defense attorney holding out for significant sentence concessions might be something like the following:

I demand that enhancements be abandoned and that you use whatever influence you have to assure that my client will be sentenced to the minimum base term on a reduced charge. If you do not accede to this demand, we will not only try the case on guilt or innocence before a jury; we will also, as is our right, require trial of all enhancements before the jury. In the event of conviction for either the charge or a lesser-included offense, if the enhancement is also found, we will marshall evidence and arguments in favor of disregarding enhancements, since the court must make a finding on that issue. And we will, at the sentence hearing, introduce evidence against every factor in aggravation and in favor of every factor in mitigation. We will appeal the case on each of these issues after petitioning the Community Release Board for reduction. Needless to say, we expect the proceedings to be time-consuming and expensive; they will interfere, as much as we can make them do so, with your ability to handle the rest of your docket as well as the court’s.

The California Act as ultimately drafted was supported by many prosecutors, but in light of the increased power that it gives to the defense, the reason does not seem to have been a desire for additional prosecutorial power. Sufficient reason was to be found in dissatisfaction with the indeterminate sentence, dissatisfaction with sentence disparity and dissatisfaction with a plea bargaining system that required distortion of the conviction and sentence for prosecution concessions to be made at all.

This is not to say that determinate sentencing might not in some cases be structured so as to shift bargaining power to the prosecutor. Habitual offender statutes allowing for mandatory life sentences are an example. If drafters of a statute wish

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387 See Cassou & Taugher, supra note 11, at 15, 17.
388 See generally Bayley, supra note 112. Mr. Bayley is the prosecuting attorney for King County (Seattle), Washington.
to avoid this effect, they might give the trial judge discretion to strike the enhancement, make the enhancement an upper limit upon a range of sentence that can be added or decrease the length of enhancements in relation to base sentences. But, in addition, care should be taken to avoid increased costs in the sentencing process that would enable the defense to force concessions on the basis of cost alone. The concern should not be confined, in other words, to the position of the prosecutor, but should extend to the balance between prosecution and defense.

E. Changes in Sentencing Structure or Sentence Lengths

A determinate sentencing structure also requires consideration of workable methods for change. Criteria and the method of their expression, as well as the length of sentences, need to be adaptable to the social conditions of the future. Some models of determinate sentencing use the writing of opinions by panels or appellate courts to enunciate changes. Others, particularly guideline or presumptive systems, use statements of reasons to provide the basis for new guidelines. By providing for periodic review of reason statements and sentencing statistics in a council or committee charged with responsibility for enunciating new guidelines, a jurisdiction can build a cybernetic effect into its system. Problems of retroactivity, notice and uniformity are created by these solutions, but they are superior to the unprincipled change that characterizes purely discretionary sentences.

Determinate sentencing schemes created by legislatures, of course, can be changed by legislatures. Some commentators, indeed, have criticized determinate systems processes because they allow public control over the criminal process. "Political forces," Professor Alschuler says, "may push sentencing reform away from the humanitarian objectives of its authors and to-

\footnotesize{313} For example, sentences for marijuana possession today are not what they were ten years ago. See, e.g., J. Bakalar, Marijuana: Six Years of Reconsideration, in L. Grinspoon, Marijuana Reconsidered 372 (1977). Sentences for offenses involving evasion of military responsibilities may logically be more severe during wartime than peacetime. See, e.g., Sentencing Selective Service Violators: A Judicial Wheel of Fortune, 5 Cal. J. L. & Social Problems 164, 177 (1969).

\footnotesize{400} See L. Wilkins, supra note 16, at 29.

\footnotesize{401} Id.
ward a sterner model," and he adds that this phenomenon may
defeat the aims of liberal reformers. Another commentator
has said, "Once a determinate sentencing bill is before a legis-
lative body, it takes only an eraser and pencil to make a one-
year 'presumptive sentence' into a six-year sentence for the
same offense." 403

Recent experience does not support the notion that deter-
minate systems will be easily influenced toward unduly harsh
sentences. 404 The base terms for California's Uniform Determi-
nate Sentencing Act, even after increases by amendment, 405
seem lenient for many offenses, 406 and it was enacted by a het-
erogeneous legislature against a background of sensational
crimes. 407 Other states that have adopted determinate schemes
have, with few exceptions, enacted sentence proposals roughly
equal to, or less severe than, their existing practices. 408 Further-
more, it is an exaggeration to assert that all it takes to sextuple
sentence proposals is "an eraser and pencil." It also takes legis-
lative sponsorship, staff drafting, committee assignment, hear-
ings, floor debate, the vote of a majority of two legislative
houses and a gubernatorial signature.

But the real point is that even if the public reaction to a

403 Alschuler, supra note 7, at 569.
404 Zimring, Making the Punishment Fit the Crime: A Consumer's Guide to Sen-
tencing Reform, 6 HASTINGS CENTER REPORT 15-16 (1976); see also Alschuler, supra
note 7, at 569.
405 See generally, Dershowitz, Background Paper, in TWENTIETH CENTURY FUND,
supra note 27, at 121-24. Indeed, the evidence cited by Dershowitz tends to indicate
the opposite, though "it is difficult to test the hypothesis." Id. "It is clear that no
matter what other factors govern sentence length, the inevitable result of the indeter-
nimate sentence is that sentences over five years will strongly predominate; and in a
definite sentence state sentences of under five years will strongly predominate." Rubin,
Long Prison Terms and the Form of Sentences, 2 NAT'L PROB. & PAROLE ASSOC. J. 337,
344-47 (1956).
406 See note 220 supra for a discussion of the amendment provisions of the Califor-
nia Act.
407 Cf. notes 67-69, 360 supra and accompanying text (six-year sentence for mur-
der; eight-year sentence for murder and robbery causing serious bodily injury to the
victim in separate episodes).
408 The Act was introduced in basic form in 1975 and passed in 1976, with technical
and substantive amendments in 1977. Cassou & Taugher, supra note 11, at 18, 21. See
also V. BUGLIOSI & C. GENTRY, HELTER SKELTER (1974) (covering the Manson murder
cases). It has been amended to increase sentences slightly. See note 221 supra.
serious crime wave were a call for increased sentences, better understanding and public control over the criminal justice system would not be an evil but a virtue. As Professor Alschuler recognizes, one cannot validly complain that determinate sentencing will make the criminal process well enough understood so that frustration with serious offenses translates itself into actual legislative action. The electorate may not share the notion that liberal politics and humanitarian concern for the defendant are the only permissible factors in sentencing, and it should be able to express that belief. Basic questions of policy in a democracy (other than constitutional ones) ought to be decided by processes such as legislation rather than by adjudication, so that the decision is made by representatives accountable to the people, rather than by solitary judges. In fact, in some respects the people may have been wiser than the experts all along; they have never been collectively fooled by the notion that the rehabilitative ideal was an exclusive goal or by the corresponding proposition that justice and uniformity were unacceptable criteria for sentencing.

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46 Alschuler, supra note 7, at 569 n.53. "Of course, our system of discretionary sentencing cannot reasonably be defended on the ground that it enables criminal justice officials to fool most of the people most of the time. If the popular will favors more severe sentences than judges in fact impose, the popular will should probably prevail." Id. Nevertheless, Professor Alschuler concludes that legislative determinate sentencing is dangerous because "the imperfections of the democratic process seem especially pronounced in the criminal justice area, and I suspect that the popular will is sometimes misperceived." Id. But the "imperfections" of democracy are no more "especially pronounced" in the criminal area than they are in other controversial issues pitting public policy against private disadvantage—natural gas rate regulation, for example, or inflation control or foreign policy. Furthermore, an insulated judiciary is not the solution to a misperception of the popular will.

40 See authorities cited note 382 supra for more information on the subject of whether determinate systems produce harsh sentences.


42 Cf. S. Rubin, supra note 161, at 408-09 (1973) (criticizing newspaper editorials calling for sentencing consistent with principles of just dessert on the ground that "the stronger view today is that the purpose of punishment is not vengeance, but rather deterrence, public security, and if possible, rehabilitation of the offender").
V. Conclusions

Widespread dissatisfaction with sentence disparity, a perception of unfairness in the sentencing process on the part of those affected by it and a lack of democratic control over this most important aspect of the criminal justice system are three salient reasons why sentencing discretion should be confined and structured. At the same time, the need to fit sentences to individual offenders and offenses and the difficulty of reconciling conflicting sentencing criteria require the retention of a significant degree of sentencing discretion. Determinate sentencing means nothing more nor less than sentencing in which discretion has been confined, guided and checked, but in which discretion still remains to the extent deemed necessary. The wide variety of determinate systems—including the base-plus-enhancement model, presumptive sentencing and advisory guidelines, together with combinations of these types—allows a jurisdiction to tailor its system to the level of discretion it wishes to retain.

In choosing among the several models, a legislature or judiciary ought to consider the treatment it wishes to make of traditional goals such as rehabilitation, deterrence, incapacitation, uniformity and condemnation. Determinate sentencing as it has thus far been adopted is, for the most part, sentencing on the basis of factors other than rehabilitative potential. The failure of attempts at rehabilitation in the past and the active harm they have done may motivate such a shift, but the shift should not signal the abandonment of rehabilitation as a correctional effort. For deterrable offenses, the system should be structured so that it does not mandate trivial sentences, and it should provide such alternative dispositions for violent or repeat offenders as enhanced sentencing, indeterminate ranges or dangerous offender provisions. If these considerations are attended to, determinate systems may offer improved deterrence and—for some offenses—improved incapacitation, particularly if enhancements identify those circumstances society most feels the need to avoid or those offenders most necessary to restrain. One negative aspect of determinate sentencing is that the condemnatory function may be decreased by the compression of sentences it produces. This result could be avoided through the retention of wide discretion in the parole process,
but that approach might be undesirable in that it would compromise some goals of determinacy. Uniformity seems the strongest argument for determinate sentencing; it too is dependent upon the retention of a proper degree of discretion in the system, because a sentence can be rendered disproportionate by ill fitting criteria just as it can by the absence of criteria.

For all of these reasons, as well as for reasons having to do with cost, administrative difficulties and constitutional compliance, it appears that a presumptive system with wide ranges of discretion, or a system of non-binding guidelines, would be a safer alternative to a narrow-discretion system in the present state of our experience. Wider discretion systems seem likely to be less confusing and complex. They seem less likely to have adverse influences upon plea bargaining. They seem less vulnerable to constitutional attack. And they allow for the accommodation of most sentencing goals without destroying the interest in uniformity. Such systems could be improved, perhaps, by the addition of presumptive or guideline enhancements, by the requirement of articulation-of-reason statements and by other refinements. The basic outlines for such an approach are given by the Wilkins model. For the reasons given in this Article, a legislatively-created system seems preferable to that proposal, but the Wilkins model has the advantage of being susceptible to judicial adoption without implementing legislation, or to legislative adoption or to judicial adoption followed by legislation.

The only thing that is certain about these conclusions, however, is that they are uncertain. The jury is still out, and will be for some time, on the California Uniform Determinate Sentencing Act of 1976. As one of the drafters of that Act has candidly stated, the Act has a most indeterminate future.\footnote{See Cassou & Taugher, supra note 11, at 106.} The variety of legislation that has been adopted to date is beneficial in itself, in that it increases the likelihood that the best models will be identified. But it may also be true, as another spokesperson for the California Act has argued, that a halfway step in the form of nonbinding guidelines may perpetuate itself so as to prevent the adoption of more definite sen-
tencing even if it proves superior. Efforts must be undertaken to avoid this result.

In the meantime, it may be expected that the rhetoric of sentencing reform will polarize, not rationalize, the thicket of conflicting considerations that underlie this most misunderstood part of the criminal system. Those wishing to talk about discretion as a desirable thing will probably refer to it as "individualization," "flexibility" or "attention to the human factor," and they will denounce what they will call "mandatory" or "rigid" sentencing. But others (or perhaps the same commentators in other situations), wishing to attack the evils of discretion, will refer to it as "arbitrariness," "vagueness," "disparity" or "unfettered discretionary power," and they will advocate the use of "guidelines," "standards" or "rules" to eliminate it. None of these rhetorical devices will make it easier to accomplish the difficult task of achieving uniformity within a system of individualized adjudication. Perhaps our best approach is to be cognizant of the risks but aware of the substantial evils we now have, and to take initial steps toward sentencing guidelines.

* Interview with Raymond I. Parnas, Professor of Law, University of California, Davis, and Counsel to the California State Select Committee on Penal Institutions, in Davis, California (Oct. 4, 1978) (interview conducted by telephone from Houston).

It must also be recognized that an ambitious plan, once enacted, may be difficult to remove even if ill-conceived; the indeterminate sentence lasted more than half a century.