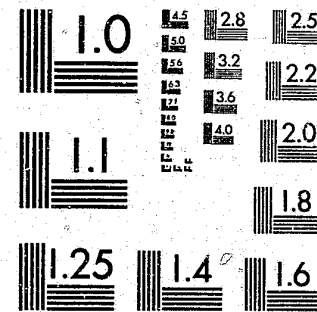


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10/5/84

U.S. Department of Justice *National Institute of Corrections*

**The Impact
of Determinate Sentencing
on Corrections**

A Handbook for Decisionmakers

73539

Prepared by the
National Institute of Corrections
and the
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Long Beach
July 1980

73539

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Acknowledgements

The conference held in April 1979 on the impact of the determinate sentence upon corrections, the proceedings of the conference, and this Handbook have been funded through NIC Grant BB-3.

The Handbook is a culmination of several months of effort by the staff and program coordinators of the Department of Criminal Justice, California State University, Long Beach. Several individuals need to be singled out and thanked for their participation in the original conference held in April 1979. These individuals include the four principal speakers—John Kramer, Professor, Pennsylvania State University; Raymond I. Parnas, Professor, University of California Law School at Davis; Vaughn C. Overstreet, Director, Community Services/Adult Authority, Indiana Department of Corrections; and Kenneth Schoen, Former Director, Minnesota Department of Corrections.

The panel reactors at the original conference included William Amos, Member, United States Parole Board; David Cunningham, Judge, Superior Court of California, County of Los Angeles; Jerry J. Enomoto, Director, California Department of Corrections; Cleon H. Foust, Executive Director, Indiana Lawyers Commission; James G. Fox, Research Associate, American Justice Institute; Gary George, Psychologist, Federal Correctional Institution, Terminal Island, California; and Joan Petersilia, Research Associate, Rand Corporation.

Jim Pass, Graduate Assistant, Department of Criminal Justice, California State University, Long Beach, spent many hours searching National Criminal Justice Reference Service data and library sources for bibliographical documents. The task of converting information from rough form into its finished type was performed by Veronica Longmire.

Executive Summary

The purpose of this Handbook is to outline the issues and expected impact surrounding the use of the determinate sentence. It is based on a review of the relevant literature on this subject and a conference on determinate sentencing held in April 1979 at California State University in Long Beach that was sponsored by the National Institute of Corrections.

This handbook is intended for legislators and correctional administrators who wish to be informed about the issues and current state-of-the-art regarding determinate sentencing.

To assist policymakers in placing this topic in the appropriate historical context, Section 1 presents a brief overview and a discussion of how indeterminate sentencing has been replaced by various forms of determinate sentencing.

The second section summarizes how the determinate model has been interpreted by legislation passed in Maine, California, Indiana, and Illinois, and proposed in federal bills.

Section 3 presents a summary of recent research that has focused on the impact that determinate sentencing may have on prison populations, length of incarceration, and the severity of sentences.

The concluding section addresses the major issues raised by the trend toward determinate sentencing. These issues concern length of sentences, impact on prison populations, sentencing disparity, retroactivity, "good time" credits, the effects on staff and programs, and the impact of determinate sentencing upon the interrelated components of the criminal justice system.

Whether inmates will actually serve longer terms of incarceration under determinate sentencing is an unanswered question that reflects the lack of research in this area. The impact on inmate populations includes the speculation that prison populations will increase, that there may be an increase of minority groups in the populations, and that there may be changes in the social climate of the prisons.

Whether the intention of determinate sentencing is to reduce sentencing disparity is an issue that needs to be addressed by the persons drafting the legislation. This objective has not been unanimously agreed upon. Whether the law is to be retroactively applied is also a source of variation. Clearly defined standards on the withholding of "good time" credits must be established.

Legislators and correctional administrators moving in the direction of determinate sentencing must be aware of the unanticipated consequences such legislation may have on other components of the criminal justice system. This Handbook is not presented as a solution to all problems, but to enable decisionmakers to become aware of some of the dilemmas that they must face.

1 Introduction

"What are the goals of the United States' criminal justice system?" The answer one gives to this question lies at the heart of this Handbook. The sentencing structure one chooses to employ within this system will be influenced by whether the goals of the criminal justice system are considered to be rehabilitation, retribution, deterrence, incapacitation, or some combination of these. Determinate sentencing is associated with the goals of retribution, deterrence, or incapacitation, while indeterminate sentencing is based on the goal of rehabilitation.

The sentencing component of the criminal justice system is faced with the awesome responsibility of trying to answer this value-loaded question in the form of practical, day-to-day operational strategies.

Rationales for Determinate Sentencing: An Overview

The advent of the indeterminate sentence in America represented a grand experiment in controlling and possibly eliminating criminal behavior. This "medical model of corrections" offered several supposed benefits:

- It would provide an incentive for rehabilitation by linking it to release from prison.
- This incentive would also act as a mechanism to control the prison population, ensuring discipline and safety.
- Parole would provide a mechanism to control the size of the prison population.
- The parole board would share the responsibility for societal protection with the judiciary through its control over release. The board could also serve as a check and balance to judicial discretion by reducing sentencing disparities.

In recent years, several states have decided to discard indeterminate sentencing and move toward the determinate model. Movement toward determinate sentencing resulted from the merging of several diverse interests, particularly a dissatisfaction with the medical model.

Several penologists, reviewing the conclusions of research reports on correctional rehabilitation programs, concluded that the medical model failed to cure criminals, reduce recidivism, and protect the public. Others argued that the medical model harmed the inmates because participation in programs was coerced. Inmates rightly believed that their release from prison was tied to, and dependent upon, such participation. The parole board held unchecked discretionary power. From the inmates' point of view, the decisions of the board were arbitrary, unpredictable, and not subject to external review by any governmental body. Thus, the individualized sentence became not an incentive, but a sword of Damocles which could fall upon an inmate's head at any time.

The determinate sentence was viewed as a cure for these ills. It would return imprisonment to its ultimate purpose, punishment rather than treatment. If correctional programs were continued, inmate involvement would be genuine rather than feigned. It would abolish the supreme power of the parole board over releasing policies, while simultaneously reducing sentencing disparity by fixing the term of imprisonment. The sentence would once again be tailored to fit the crime, not the criminal. The public would be protected from further criminal acts by individuals who had committed dangerous offenses, and notice would be served to potential criminals as well. Convicted individuals would, at the time of sentencing, have a more definite idea of how much time they would serve in prison. The determinate sentence would remedy a multitude of problems and thus please a number of diverse groups.

Before a more detailed discussion of current legislative experiments in the establishment of determinate sentencing strategies, a brief review of the seven major models that are theoretically possible is given in Table 1. These models all differ in the nature and extent of discretion available to the sentencing authority. They reflect a continuum of determinacy, ranging from the most indeterminate to the purest determinate model. As the discussion of some examples of determinate sentencing will demonstrate in the next section, considerable variation exists in the amount of determinacy associated with existing determinate sentencing statutes.

Table 1. Variations in Sentencing Structures¹

Degree of Determinacy	Sentence Structure	Legislative Range	Actual Sentence
Purely indeterminate	1. Certain offense categories (sexual psychopaths, defective delinquents) allow for completely indeterminate term. Parole authorities or rehabilitation staff set actual release date.	0-life	4 years
Moderately indeterminate	2. Judge sets limits within legislatively determined minimum and maximum sentences.	1-7 years	2-5 years
Purely determinate	3. Maximum fixed by statute—judge determines minimum at any point up to maximum.	Judicial determination—7 years	4-7 years
	4. Legislature provides absolute maximum—judge sets both maximum and minimum, but minimum can be no more than some fraction of maximum, usually one-third.	Judge sets both maximum and minimum—absolute maximum is 7 years	2-6 years

Table 1. Variations in Sentencing Structures (continued)

Degree of Determinacy	Sentence Structure	Legislative Range	Actual Sentence
	5. Maximum set by judge within upper limit, minimum is determined by legislature.	2—judicial determination up to 7 years	2-5 years
	6. Presumptive sentence set by legislature—judge can increase or decrease sentence by some set time limit, usually 1 year for aggravating or mitigating circumstances.	5 years 4 years mitigating; 6 years aggravating	5 years
	7. Both maximum and minimum set by legislature—no judicial discretion.	3-7 years	3-7 years

2 Examples of Determinate Sentencing²

Determinate sentencing basically involves the use of a legal code in which punishments are based upon the crime rather than the criminal. Prison terms are fixed to some degree and thus appear to be more predictable and inflexible. Yet, there remains some confusion over what actually constitutes a determinate sentence. A review of the experience of several states and of legislation proposed at the federal level should help clarify this definition, and also demonstrate the varying paths that this reform has taken.

Maine (Enacted on May 1, 1976)

The sentencing model in Maine has been termed "judicial" since the length of sentence imposed by the judiciary for a particular offense is limited by statutory maxima. Thus, judges have total discretion to sentence up to the maximum as defined by law. This sentencing model is similar to the fourth structure identified in Table 1. The Maine statute, however, includes a provision that permits inmates to appeal their sentences, and there is no parole board to exercise control over actual time served. Both the parole board and parole supervision were effectively abolished by the statute.

Maine's statute does not fit the definition of a pure determinate sentencing model since sentence disparity was actually institutionalized under the new statute. Table 2 presents the range of punishments that may be set by the trial court for persons convicted of the same or similar offenses.

The code was not applied retroactively, so it did not apply to those individuals incarcerated at the time of its passage. Those inmates will still be subject to parole board hearings and, if released, to parole supervision as well.

One of the most interesting aspects of the Maine statute is the provision that all sentences in excess of one year are "tentative." An inmate may be sent back to court for resentencing if prison officials feel that

Table 2. Crime Categories and Maximum Sentences in Maine³

Crime Category	Maximum Sentence	Fine	Examples
Murder	Life or any term of imprisonment that is not less than 25 years		
Class A	20 years		Felony murder; kidnapping; rape; armed robbery
Class B	10 years	Not more than \$10,000	Trafficking in narcotic drugs; robbery (unarmed); theft (in excess of \$5,000)
Class C	5 years	Not more than \$2,500	Manslaughter by motor vehicle; burglary (unarmed, no injury)
Class D	1 year	Not more than \$1,000	Unlawful gambling
Class E	6 months	Not more than \$500	Prostitution; theft (less than \$500)

there has been a "misapprehension" of an inmate's "history, character or physical condition . . . or as to the amount of time that would be necessary to provide protection of the public from such offender" Thus, while parole has been abolished, the existence of this resentencing provision raises the possibility that parole may have been reincarnated in some other form.

The time to be served as fixed at sentencing can also be modified by "good time" credit. "Good time" is earned at the rate of ten days per month, with two extra days per month awarded for significant work inside the institution or outside its walls. In this fashion, a sentence could be effectively reduced by as much as 33 percent. Administratively, "good time" is granted automatically to inmates at the time of intake with the idea that it can be taken away if necessary.

California (Enacted on July 1, 1977)

The California statute has been termed the "purest determinate sentencing scheme yet adopted" since it follows the suggestions of several reformers and committees concerned with determinate sentencing. The statute states that the purpose of sentencing is imprisonment—not rehabilitation—and that the sentencing process should limit disparity.

This code follows the definition of a presumptive sentence, where the judge is required to impose a selected sentence which, while usually fixed, can vary when mitigating or aggravating circumstances are present.

The California law effectively abolished the indeterminate sentence for crimes other than "capital cases," which carry a maximum sentence of life imprisonment and are parolable at a minimum term of seven years, or capital punishment. All other felony crimes are classified into four categories arranged on a scale that indicates the severity of the crime committed.

In each category, the court has a choice of three definite sentences. The judge is required by law to select the middle term, unless mitigating or aggravating factors that would merit the lowest or highest term are present. When the trial court selects any of the three prison terms, the judge must set forth in writing the reasons for this selection and must inform the defendant of such reasons. This requirement, in effect, opens the sentence to appeal by the defendant by making it a part of the trial record. Table 3 provides a summary of the California law and its provisions.

Table 3. Felony Categories and Sentencing Ranges in California^a

Felony Category	Sentencing Range	Examples
Class A	5-6-7 years	Murder in the second degree; rape with force or violence; exploding a destructive device to cause bodily harm
Class B	3-4-5 years	Robbery in the first degree by a person armed with a firearm; safecracking; kidnapping; burglary in the first degree
Class C	2-3-4 years	Robbery in the second degree; arson; assault with a deadly weapon; bribery of a public officer
Class D	16 months-2 years-3 years	Grand theft; burglary in the second degree; forgery; car theft

The code also provides for "enhancements," or additions, to the determinate sentences listed in Table 3 if certain factors (e.g., violence, habitual criminality) are present. The factors that could lead to an enhancement must be proven and pleaded in court. For example, one year can be added for carrying a weapon in the course of a crime, and three years for seriously injuring a victim or for a prior conviction for a violent felony. In addition, the court may impose an additional year for each prior prison term. But certain limitations exist; for violent crimes, if an individual's prison term was followed by ten years without a felony conviction, that prior term cannot serve as the basis for an enhancement. For non-violent convictions, the post-prison period without a felony conviction reduces to five years.

Once the sentence is imposed, the length of time served can be reduced by one-third through the use of good time credit. For each eight months served without a disciplinary infraction, an inmate earns three months credit. An additional month can be gained every eight months through participation in required work details or in self-improvement programs. Under this formula, an inmate sentenced to three years who maintains good conduct and participates in programs can be released after two years.

Although the statute abolished the parole release function of the Adult Authority, parole supervision has been retained. Under the original statute, all inmates were required upon completion of their prison terms to undergo one year of parole supervision; inmates convicted of "capital offenses" were required to serve three years under parole supervision. This provision was amended in 1979: required parole supervision was extended to three and five years respectively, with the possibility of final release after the first year of supervision. If parole is revoked for a technical violation, the maximum term that can be served in prison is six months.

To administer these provisions, the statute established the Community Release Board. This board has several duties. First, since the new code was applied retroactively to include all persons incarcerated at the time of its passage, the board was required to reset the terms of those prisoners. As a result, some inmates were released shortly after the law was enacted. Second, the board conducts hearings and fixes parole release dates for inmates convicted in capital cases. Third, the board reviews all prison sentences within the first year and recommends resentencing when it finds disparity. (Sentences can also be modified by the trial court on its own motion within 120 days of commitment.) Fourth, the board reviews all actions and procedures affect-

ing the assignment or forfeiture of good time credits. Finally, the Community Release Board has the power to revoke the parole supervision period and conducts associated hearings.

In sum, the object of this statute was to transform the sentencing process in California to reduce the discretionary power of the judiciary and parole boards in determining the number of years served by convicted felons. Consequently, the legislature now determines the length of sentence for crimes.

Indiana (Enacted on October 1, 1977)

Basically, the Indiana code also follows the format of presumptive sentencing. As in California, the Indiana statute establishes categories of offenses and provides a range of penalties that can be imposed in light of aggravating and mitigating circumstances. The statute is also similar to Maine's in that the penalties stipulated provide substantial leeway for judicial discretion. Table 4 provides an outline of the Indiana statute.

The presumptive sentences listed in Table 4 were arrived at by examining the average time served for such offenses under the previous code. The use of additional punishment for aggravating circumstances as defined by statute (e.g., "the person has a history of criminal activity") is directly comparable to the enhancement provision in the California code. The mitigating factors that justify a reduction in the sentence are also defined by law (e.g., "the crime was a result of circumstances unlikely to recur"). In addition, the prosecutor may invoke the "habitual offender" provision of the code if the offender has committed two prior felonies. If found guilty, this individual would serve the fixed term imposed for the new offense, plus an additional 30 years. The code mandates the use of a bifurcated sentencing procedure in which the judge, acting upon evidence presented by the prosecutor in support of aggravating or mitigating circumstances, arrives at a sentence in a separate hearing.

The law provides for early release through the accumulation of good time credit. It also provides for a mandatory release to parole supervision for all felons. If inmates avoid serious violation of institution rules, they earn good time credits at varying rates, depending upon the category in which they are placed by correctional officials. Class I inmates receive one day of credit for each good day served; Class II inmates receive one day of credit for each two days served; Class III inmates cannot earn good time credit.

At sentencing, all inmates are initially assigned to Class I. An inmate found in violation of a rule or regulation in a disciplinary com-

Table 4. Felony Categories and Sentencing Ranges in Indiana¹

Felony Category	Presumptive Sentence	Range in Aggravation	Range in Mitigation	Examples
Murder*	40 years	+ 20 years	-10 years	
Class A	30 years	+ 20 years	-10 years	Kidnapping; rape with use of force; child molesting with use of force; robbery involving bodily injury
Class B	10 years	+ 10 years	-4 years	Voluntary manslaughter; armed robbery
Class C	5 years	+ 3 years	-3 years	Unarmed robbery; burglary; forgery
Class D	2 years	+ 2 years	None†	Theft; perjury; escape; non-support of a dependent child

*The death sentence may be imposed in instances in which the state proves the existence of an aggravating circumstance as defined by law.

†The judge has the discretion to treat such offenses as Class A misdemeanors.

mittee hearing may be reassigned to Class II or III, or may lose all or a portion of credit time earned. The penal code includes standards for conducting such disciplinary hearings.

The period of parole supervision is fixed at a maximum of one year, but the parole board may grant an absolute discharge from parole at any time within that year. Technical violations can result in the parolee being returned to the institution to serve the balance of the original term. The parole board then has the option to release the inmate at any time, or the inmate is released upon the completion of the original term, less credit time earned since the parole revocation. If convicted of a new crime, the parolee must complete the original sentence, less credit time earned, before completing the sentence for the new offense. The Indiana statute did not apply retroactively, so the board continues to set release dates for inmates sentenced before the law was passed.

The Indiana code adopts attributes present in both the Maine and California statutes, but grants some discretionary powers to the parole board and correctional authorities.

Illinois (Enacted in November 1977)

The Illinois code follows the basic principles of the other statutes described, emphasizing punishment and incapacitation as the goals of corrections, and uses many of the same methods to achieve these goals.

As in Maine, the judiciary plays the central role in the new sentencing process. The new statute restructured the discretionary powers of the judiciary and abolished the control of the Parole and Pardon Board over release decisions. As Table 5 illustrates, the Illinois statute sets limits for different categories of crimes, with minimum and maximum terms within which a judge may impose a sentence. In addition, a judge may impose an "extended term" if the defendant is a repeat felony offender, or if the crime was accompanied by "exceptionally brutal or heinous behavior."

Another clause of the statute requires that a defendant be classified as a "Class X offender" upon a third conviction for certain felonies. The Class X designation prohibits a judge from sentencing to probation. When imposing sentence, a judge must specify the reasons used to determine the sentence, thus making sentences applicable to appellate court review. The Illinois code thus embodies aspects seen elsewhere. As in Maine, the statute provides limits for sentencing, including a minimum term. As in California, a judge must clearly state

Table 5. Felony Categories and Sentencing Ranges in Illinois⁶

Felony Category	Regular Terms	Extended Terms	Examples
Murder*	Life or 20-40 years	Life or 40-80 years	
Habitual criminal†	Mandatory life		
Class X	6-30 years	30-60 years	Rape; armed robbery; aggravated kidnapping
Class 1	4-15 years	15-30 years	Dealing in major narcotics
Class 2	3-7 years	7-14 years	Burglary; arson; robbery
Class 3	2-5 years	5-10 years	Theft (over \$150); involuntary manslaughter; aggravated battery
Class 4	1-3 years	3-6 years	Possession of cannabis (30-50 grams); sale of child pornography

*The death penalty may be imposed for murder.

†Persons convicted of "forcible offenses" (treason, murder, rape, deviate sexual assault, armed robbery, aggravated arson, aggravated kidnapping for ransom) with two or more prior forcible offense convictions.

the reasons behind the sentencing decision and may add additional years for certain categories of offenses.

The new Illinois statute was not applied retroactively. The code established a Prisoner Review Board, independent of the Department of Corrections, that has the power to decide release from prison for inmates sentenced under prior law. Prison officials retain the power to reduce sentences through the use of good conduct credit (one day reduction for each good day served), but these actions are now subject to review by the Prisoner Review Board, especially if the amount of good time credit to be reduced or revoked exceeds 30 days over any 12-month period. In addition, the board may revoke the release status of an offender and require that the offender serve the uncompleted portion of the original term, plus an additional year—a provision directly comparable to the California and Indiana statutes.

The code also provides for the establishment of a Criminal Sentencing Commission to promote the uniformity, certainty, and fairness of sentences by monitoring the new sentencing system, developing standardized sentencing guidelines, and making recommendations to improve methods of sentencing.

Federal Movement Toward Determinate Sentencing

Although the exact wording and structure of sentencing reforms to be made at the federal level are as yet unspecified, the legislative activities of both houses of Congress suggest a move away from indeterminacy in cases falling under federal jurisdiction. The most widely publicized activity involves a bill sponsored by Senators Kennedy and McClellan (S-1437) and passed by the Senate in 1978. The essence of this legislative reform is the establishment of a Federal Sentencing Commission that would write sentencing guidelines to be followed by federal judges. A more recent version of this bill, S-1722, also sponsored by Senator Kennedy, would incorporate the major provisions of S-1437, but would also eliminate the possibility of early release from prison under parole supervision. The bill has received considerable support, including a formal endorsement by Attorney General Benjamin Civiletti.⁷

Given the limited jurisdiction of the federal criminal code, it might be argued that reforms made at the federal level will have little impact upon the majority of offenders in this country. (Recent statistics indicate that roughly 10 percent of the adult prison population is incarcerated within federal institutions.) Several states, however, in-

cluding Colorado, Ohio, Minnesota, Washington, and Arizona, are currently examining determinate sentencing structures as potential models of reform within their jurisdictions. Any action in this direction taken by the federal government could act to stimulate such changes. The potential impact of future legislative activity at the federal level, then, may be much broader than is readily apparent.

Sentencing Commission

One alternative to determinate sentencing that may limit judicial discretion and promote uniformity in sentencing is the sentencing commission. This approach is currently in use in Minnesota and Pennsylvania and is being considered at the federal level. Basically, a sentencing commission consists of officials from various segments of the criminal justice system (judges, police officers, prison and parole authorities), penologists, lawyers, criminologists, and other relevant parties who develop, implement, and monitor a set of sentencing guidelines. These guidelines typically incorporate several aspects of determinate sentencing—such as a system of fixed penalties based upon the severity of the crime committed, elimination of the power of the parole board over release practice, and appellate review of sentences—while maintaining some measure of flexibility.

The greater measure of flexibility is due to the fact that the guidelines issued by the sentencing commission are based on the operations of the criminal justice system, rather than on past judicial sentencing practices. Therefore, the sentencing commission is better equipped to respond to any situation resulting from a shift to determinate sentencing.

Proposed federal legislation (H.B. 2205 - McClory) calls for the establishment of a Commission on Sentencing to promulgate and distribute to all federal courts sentencing ranges for specific offenses and guidelines for determining the appropriate sentence. The bill also provides for Congressional review of the sentencing ranges and guidelines, and for the abolition of the Commission after six years. Under the proposed legislation, the sentencing court is required to enter into the record the reasons for the sentence imposed; a defendant may file an appeal if the sentence exceeds the maximum established by the guidelines and sentencing ranges; and the government may file an appeal if the established minimums are violated.

Major Features of Determinate Sentencing

The experiences and legislation in those states with determinate sentencing reveal some distinctive features of the determinate sentencing approach. While actual philosophy and practice may vary from state to state, determinate sentencing has four basic characteristics.

- It attempts to limit the discretionary sentencing powers of the judiciary.
- It seeks to limit or abolish the discretionary power of the parole board over release procedures, although the parole release procedure still applies to certain categories of offenders, or to offenders incarcerated prior to the enactment of the new legislation. Parole supervision for purposes of societal protection and surveillance has been retained.
- It stresses the retributive, deterrent, and incapacitative purposes of imprisonment.
- It provides incentives for good behavior in the institution via "good time" credit to replace coerced, feigned involvement in institutional treatment programs.

3 Research on the Impact of Determinate Sentencing

Research regarding the impact of determinate sentencing is in progress. Existing research on this topic is mainly in the form of projections of the effects a move toward determinate sentencing will have on criminal justice system operations.

The implementation problem that has attracted the greatest amount of attention has been the effect of the determinate sentence upon the size of prison populations. Using data for the state of Colorado, Rand Corporation researchers projected the effect of various determinate sentencing schemes upon a random sample of 625 offenders who were convicted of a serious offense.⁸ The authors examined the offenders' records for the two years prior to their latest conviction. The authors then determined whether each offender would have been imprisoned at the time of his/her present offense if a determinate sentence had been applied at the time of the previous conviction. Among the more startling findings of this study was that, in order to reduce the crime rate of this cohort by 50 percent, every felon in the cohort (regardless of the nature of their prior criminal history) would have to be imprisoned for at least five years. Such a policy would increase the prison population by 450 percent, an increase that would have disastrous consequences for the penal system, as well as for taxpayers.

In a similar study, researchers examined the effect of the revised Indiana penal code upon a sample of felony admissions (first offenders) to the Indiana Department of Corrections between January 1 and June 30, 1976.⁹ The authors discovered that if this group of offenders had been sentenced under the new code, they would have been required to serve roughly 50 percent more prison time. This increase in sentence length reflected harsher penalties for violent crime (one of the deterrence-based goals of determinate sentencing); yet the highest increase in time served was among offenders convicted of burglary, a non-violent offense. This study therefore demonstrates that determinate sentencing can have a number of unanticipated effects.

In an unpublished paper prepared for the Pennsylvania legislature, the effects of several proposals were analyzed. The findings echoed those of the previously cited studies in that complete implementation of one bill would result in a 50 percent increase in the prison popula-

tion. In addition, this same bill would have the greatest impact on offenders convicted of the least serious crimes who also had the fewest prior convictions.

An evaluation of Maine's sentencing revisions focused on whether there was any discernible impact on the severity, consistency, visibility, and certainty of sentences handed down during the first year of the revised sentencing practices.¹⁰ A sample of over 1,000 court cases that had been adjudicated during one year prior to the sentencing revisions was analyzed. These cases were compared with over 400 post-revision cases. The evaluation focused only on the three most serious offense categories, thus excluding from analysis those offenses which carried a post-revision maximum penalty of less than one year of incarceration.

The results of the evaluation concluded that the sentences handed down following the code revisions were generally less severe than sentences handed down previously. Following the code revisions, judges were much more likely to sentence Class A offenders (most serious) and Class B offenders to probation. For example, prior to code revisions only 18.5 percent of Class A offenders were granted probation, compared to 34.5 percent of the post-revision Class A offenders. Another indication of decreasing sentence severity was the finding that both Class B and Class C offenders who were sentenced to terms of confinement were likely to receive shorter sentences than their pre-code-revision counterparts. The Class A offenders who were sentenced to terms of confinement were likely to receive longer sentences.

While Maine's new code seems to have decreased the severity of sentencing, the variation or disparity in sentences has increased. Prior to criminal code revisions, sentences handed down in Class A cases ranged from probation to 60 months of incarceration. Following the sentencing modifications, however, sentences ranged from probation to 145 months of incarceration. Similar increases in variation were found in Class B offenses; Class C offenses, however, demonstrated a slight reduction in sentence ranges.

It was also determined that offense severity played a much less significant role in the determination of sentence length than it had played prior to code revisions. Judicial discretion during the sentencing process in Maine was actually **increased** by the revisions. In efforts to identify those variables most significant in determining sentencing severity, the researchers found that judge-to-judge differences probably explained most of the variances. In hypothetical cases of burglary and assault, for example, sentences established by judges ranged from probation to 24 months of incarceration for the identical burglary

case, and from probation to 42 months of incarceration for the assault case. These findings demonstrate that Maine's criminal code revisions did not materially reduce sentencing discretion (which, incidentally, was **not** one of the Revision Committee's goals).

The Maine evaluation was unable to determine whether the revisions increased or decreased the certainty of sentencing. The revised code includes a number of "loopholes"—such as appellate review, appeals for resentencing, executive pardons, and commutations—through which judicially determined sentences can be reduced. Given the possibility that such procedures might be employed to mitigate against the certainty of sentences, it is not possible to discern the impact of Maine's criminal code revisions in this regard.

It is important to note that Maine's experiences are not likely to represent the majority of other states' experiences. Maine's "determinate sentencing experiment" does not involve presumptive sentencing; thus, the degree of determinacy is low. Also important is the fact that Maine's inmate population is not similar to that of many other states which are moving, or have moved, toward determinate sentencing. For example, Maine's inmate population was between 97 and 98.9 percent white during the years involved in the study; such homogeneity in an inmate population is not characteristic of the rest of the United States. Idiosyncracies such as these must be taken into account in attempts to generalize Maine's experiences.

In sum, these studies reveal that determinate sentencing may have far-reaching, unintended effects on prison populations. They also illustrate the kind of research that can be conducted prior to the passage of legislation in order to assess its impact.

4 Salient Issues Relevant to Determinate Sentencing

This section addresses the major issues that have been raised about the trend toward determinate sentencing throughout the United States. This information is provided to assist present and future lawmakers in understanding some of the dilemmas to be faced in considering determinate sentencing.

Length of Sentences

Whether inmates will actually serve longer terms of incarceration under determinate sentencing is unknown. In most instances, the terms of imprisonment for different crimes under determinate sentencing formats are calculated by examining the actual time served for comparable crimes under old sentencing provisions. While this approach seems logical, some have argued that it serves only to institutionalize long sentences, which reflect one of the major problems with America's handling of offenders. Furthermore, even if sentencing standards attempt to mitigate against this practice, legislators will still be susceptible to political pressure to "get tough on crime" and may introduce post-code-revision amendments that result in longer terms of confinement. Since passage of its sentencing law in 1977, California has been experiencing such amendments.

Prison Populations

Projections indicate that determinate sentencing will drastically increase the size of the inmate population. California experienced a 25 percent increase in its prison population during the first year of implementing its determinate sentencing provisions.

There is also reason to believe that the nature of the prison population will change significantly. For example, an assessment of California's inmate population during the first year of determinate sentencing found a small but noteworthy increase in the number of black and Chicano admissions. The potential buildup of long-term prisoners as a result of determinate sentencing could have a significant impact upon the nature of the social system within the prisons.

ent conditions of life are deplorable, the urge to violently reject such conditions may become uncontrollable.

Sentencing Disparity

Although the philosophical underpinnings of the determinate sentencing movement rest, in part, on the argument that sentencing disparity should be reduced, this objective is not unanimously accepted by those states that have introduced sentencing revisions. As the assessment of Maine's legislative revisions indicated, the drafters of the new code were not concerned with reducing sentencing disparity. Certainly, any legislative body considering the implementation of a determinate sentencing model ought to clearly articulate its intentions in this regard. If discretion is to be reduced, legislators should ensure that revisions actually reduce it, rather than simply shifting it to another arm of the system, such as the police or prosecutor.

Retroactivity of Revisions

The issue of fundamental fairness surrounds the retroactive application of determinate sentencing laws. California chose to apply its law retroactively and gave its Community Release Board the responsibility to recalculate inmate sentences to fit the new law. Indiana decided not to apply its law retroactively.

The fairness issue has some important ramifications. If prisoners are deprived of hope and a feeling of justice, a great deal of unrest may be fostered, potentially leading to violence or silent despair. The implications of retroactive application of a determinate sentencing law must be carefully considered.

Good Time Credits

The use of good time credits under determinate sentencing was proposed as an incentive for prisoners and as a means to enforce prison discipline. Several authors have noted, however, that good time has become almost a formality and is seldom taken away from an inmate. If this occurs, the stated premises of good time will be violated.

Critics have warned that the administration of good time credits can become a "perverse remnant of parole" if no clearly defined standards for revocation of good time credits are established. Without such standards, committees established to calculate good time credits

Staffing and Programming

The shift to determinate sentencing, which represents a change in penal philosophy from rehabilitation to one of punishment and retribution, raises other questions. If the "coerced cure" leading to parole is eliminated, can self-change be motivated? Should treatment, vocational, and educational programs continue to be offered? Answers to these questions will affect inmates, staff, and correctional officials.

Other Components of the Criminal Justice System

Criminal justice system elements, from police to parole, have been discussed and criticized extensively in the past. The system has been chastised for exhibiting behavior characterized as provincial or balkan in nature. In spite of the insistence by some that the elements do comprise a system, criminal justice workers, including legislators, continue to operate as if their activities occur in a social vacuum.

Legislators moving toward the implementation of determinate sentencing must be aware that such provisions will have an impact upon every other component within the criminal justice system. The impact of sentencing revisions does not stop, or originate, at the post-adjudicatory sentencing point. The activities of the police, prosecutors, probation, judges, courts, and parole are all affected by sentencing practices, albeit not to the same degree as jail and prison operations.

Determinate sentencing revisions that restrict or broaden sentencing practices in adult criminal cases could have more far-reaching effects than were initially intended. For example, California intended its determinate sentencing revisions to affect only adult criminals. However, the length of incarceration possible for youthful and juvenile offenders in California is determined by the statutory limits established for adults. The maximum term of incarceration for juveniles in California is limited so as not to exceed the periods for which an adult would be incarcerated if convicted of the same offense.

Legislators must recognize the systemic nature of their positions, paying close heed to the potential effects of statutory revisions upon other components of the criminal justice system.

Notes

¹Example: Assume an offender is convicted of second-degree (unarmed) robbery, and probation is precluded by his prior record. The length of his prison sentence depends on the sentencing structure of the jurisdiction in which he is convicted. He becomes eligible for parole at the minimum, but parole may be, indeed usually is, denied at first appearance before the parole board. This is particularly likely in a robbery case where the offender has a prior record. The maximum sentence, whether fixed by statute or by the judge within a statutory outer limit, is the longest period he can be held in prison on the unarmed robbery charge. Nationally, the majority of offenders do not "max out," but are released on parole at some point between the minimum and maximum limits of incarceration. Source: Adapted from Donald J. Newman, Introduction to Criminal Justice, Second Edition (New York: J. B. Lippincott Company, 1978) p. 225.

²Much of the material contained in this section is taken from Stephen P. Lagoy, Frederick A. Hussey, and John H. Kramer, "A Comparative Assessment of Determinate Sentencing in the Four Pioneer States," Crime and Delinquency, Vol. 24, No. 4 (October 1978), pp. 385-400; Richard A. McGee, "California's New Determinate Sentencing Act," Federal Probation, Vol. 42, No. 1 (March 1978) pp. 3-10; Vaughn C. Overstreet, "Impact of Determinate Sentencing upon the Indiana Correctional System," paper presented at the Conference on the Impact of the Determinate Sentencing upon Corrections, Long Beach, California, April 1979.

³Source: Lagoy, et al., "A Comparative Assessment of Determinate Sentencing in the Four Pioneer States," p. 389.

⁴Source: McGee, "California's New Determinate Sentencing Act," pp. 3-10.

⁵Sources: Lagoy, et al., "A Comparative Assessment of Determinate Sentencing in the Four Pioneer States," pp. 385-400; Overstreet, "Impact of Determinate Sentencing upon the Indiana Correctional System."

⁶Source: Lagoy, et al., "A Comparative Assessment of Determinate Sentencing in the Four Pioneer States," p. 395.

⁷Editor's note: Bill S-1722 remains in committee as of May 1980.

*Joan Petersilia and Peter W. Greenwood, "Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations," The Journal of Criminal Law and Criminology, Vol. 69, No.4 (1978) pp. 604-615.

*Todd R. Clear, John D. Hewitt, and Robert M. Regoli, "Discretion and the Determinate Sentence: Its Distribution, Control, and Effect on Time Served," Crime and Delinquency, Vol. 24, No. 4 (October 1978), pp. 428-445.

*John H. Kramer, Stephen P. Lagoy, C.V. MacLaughlin, Frederick A. Hussey, and D. Katkin, "Assessing the Impact of Determinate Sentencing and Parole Abolition in Maine," Pennsylvania State University, University Park, April 29, 1979.

Selected Bibliography

Adams, Gary B.; Kenney, John P.; and Vito, Gennaro F. "Conference Proceedings: The Impact of the Determinate Sentence upon Corrections." The National Institute of Corrections and Department of Criminal Justice, California State University at Long Beach, April 29-30, 1979.

Alschuler, Albert W. "Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for 'Fixed' and 'Presumptive' Sentencing." University of Pennsylvania Law Review, Vol. 126, No. 550 (1978), pp. 550-577.

Bagley, James J. "Why Illinois Adopted Determinate Sentencing." Judicature, Vol. 62, No. 8 (1979), pp. 390-397.

Beha, James A. II. "And Nobody Can Get You Out." The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the Use of Firearms and on the Administration of Criminal Justice in Boston - Part I. Boston University Law Review, Vol. 57, No. 1 (1977).

_____. "And Nobody Can Get You Out." The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the Use of Firearms and on the Administration of Criminal Justice in Boston - Part II. Boston University Law Review, Vol. 57, No. 2 (1977).

Bell, Wendy; Kahn, Deborah; Lawson, Ronald; and Szydlo, Stewart. "The Impact of New Sentencing Laws on State Prison Populations in Pennsylvania - Final Report." Urban Systems Institute, Carnegie-Mellon University, January 1979.

Clear, Todd R. "Correctional Policy, Neo-Retributionism, and the Determinate Sentence." The Justice System Journal, Vol. 4, No. 1 (1978), pp. 26-48.

_____, and Hewitt, John D. "Disparity, Humaneness and the Politics of Reform: A Critical Analysis of the Determinate Sentence." Criminal Justice Review (1978), pp. 81-90.

_____; _____; and Regoli, Robert M. "Discretion and the Determinate Sentence: Its Distribution, Control and Effect on Time Served." Crime and Delinquency (October 1978), pp. 428-445.

Dawson, Robert O. Sentencing: The Decision as to Type, Length, and Conditions of Sentence. Boston and Toronto: Little, Brown and Company, 1969.

Diamond, Shari S., and Zeisel, Hans. "Sentencing Councils: A Study of Sentence Disparity and its Reduction." The University of Chicago Law Review, Vol. 43, No. 109 (1975), pp. 109-149.

Espey, Lowell. "Towards Certainty in Sentencing: Correctional Alternatives." Criminal Justice Quarterly, Vol. 4, No. 3 (1976), pp. 111-128.

Fogel, David. "...We Are the Living Proof..." The Justice Model for Corrections. Cincinnati: W. H. Anderson, 1975.

Fogel, David. "Justice, Not Therapy: A New Mission for Corrections." Judicature, Vol. 62, No. 8 (1979), pp. 373-380.

Gaylin, Willard. Partial Justice: A Study of Bias in Sentencing. New York: Vintage Books, 1974.

Gettinger, Stephen. "Fixed Sentencing Becomes Law in 3 States; Other Legislatures Wary." Corrections Magazine, Vol. 3, No. 3 (1977), pp. 16-36.

_____. "Tinkering with Determinate Sentencing." Corrections Magazine, Vol. 5, No. 3 (1979), pp. 54-55.

Table 4. Felony Categories and Sentencing Ranges in Indiana¹

Glick, Henry R. "Mandatory Sentencing: The Politics of the New Criminal Justice." Federal Probation, Vol. 43, No. 1 (1979), pp. 3-9.

Greenberg, David F., and Humphries, Drew. "The Cooptation of Fixed Sentencing Reform." Crime and Delinquency, Vol. 26, No. 2 (April 1980), pp. 206-225.

Hoffman, Peter B., and Stover, Michael A. "Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function." Hofstra Law Review, Vol. 7, No. 1 (Fall 1978), pp. 89-121.

Holbert, Fred, and Webb, Vince. "Inmate Support for 'Flat Time' Sentencing and Related Proposals: A Research Note." Criminal Justice Review, Vol. 3, No. 1 (Spring 1978), pp. 101-106.

Howard, George W., and McHugh, John J. "Fixed Sentences Emerge as New Trend in Corrections." American Journal of Correction (September-October 1978), pp. 30-34.

Kramer, John H.; Lagoy, Stephen P.; MacLaughlin, C. V.; Hussey, Frederick A.; and Katkin, D. "Assessing the Impact of Determinate Sentencing and Parole Abolition in Maine." Pennsylvania State University, University Park, April 29, 1979.

Lagoy, Stephen P.; Hussey, Frederick A.; and Kramer, John H. "A Comparative Assessment of Determinate Sentencing in the Four Pioneer States." Crime and Delinquency, Vol. 24, No. 4 (October 1978), pp. 385-400.

LeFrancois, Arthur G. "An Examination of a Desert-Based Presumptive Sentence Schedule." Journal of Criminal Justice, Vol. 6, (1978), pp. 35-46.

McGee, Richard A. "A New Look at Sentencing - Part I." Federal Probation, Vol. 38, No. 2 (June 1974), pp. 3-8.

_____. "A New Look at Sentencing - Part II: A Plan for Maximum Justice With Minimum Capriciousness." Federal Probation Vol. 38, No. 3 (September 1974), pp. 3-11.

_____. "California's New Determinate Sentencing Act." Federal Probation, Vol. 42, No. 1 (March 1978), pp. 3-10.

O'Donnell, Pierce; Churgin, Michael J.; and Curtis, Dennis E. Toward a Just and Effective Sentencing System: Agenda for Legislative Reform. New York and London: Praeger Publishers, 1977.

Orland, Leonard. "Is Determinate Sentencing an Illusory Reform?" Judicature, Vol. 62, No. 8 (1979), pp. 381-389.

Overstreet, Vaughn C. "Impact of Determinate Sentencing upon the Indiana Correctional System," paper presented at the Conference on the Impact of the Determinate Sentencing upon Corrections, Long Beach, California, April 1979.

Petersilia, Joan, and Greenwood, Peter W. "Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations." The Journal of Criminal Law and Criminology, Vol. 69, No. 4 (1978), pp. 604-615.

Reid, Sue T. "A Rebuttal to the Attack on the Indeterminate Sentence." Washington Law Review, Vol. 51, No. 565 (1976), pp. 565-606.

Rubin, Sol. "New Sentencing Proposals and Laws in the 1970's." Federal Probation, Vol. 43, No. 2 (1979), pp. 3-8.

Ryan, Marie V., and Pannell, William C. "Some Experience with Uniform Determinate Sentencing Act: July 1977 - June 1978." California Department of Corrections, January 3, 1979.

Singer, Richard G. "In Favor of 'Presumptive Sentences' Set by a Sentencing Commission." Crime and Delinquency (October 1978), pp. 401-427.

_____, and Hand, Richard C. "Sentencing Computation: Laws and Practices." Criminal Law Bulletin, Vol. 10, No. 4 (May 1974), pp. 318-347.

U.S. Department of Justice. Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice. Determinate Sentencing: Reform or Regression? (Proceedings of the Special Conference on Determinate Sentencing, Boalt Hall School of Law, University of California, Berkeley, June 2-3, 1977). Washington, D.C.: United States Government Printing Office, 1978.

van den Haag, Ernest. Punishing Criminals: Concerning a Very Old and Painful Question. New York: Basic Books, Inc., 1975.

von Hirsch, Andrew. Doing Justice: The Choice of Punishments. New York: Hill and Wang, 1976.

Yeager, Matthew G. Do Mandatory Prison Sentences for Handgun Offenders Curb Violent Crime? Cleveland: United States Conference of Mayors, 1976.

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