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Criminal Law: The Missing Element in Sentencing Reform

Michael H. Tonry*

I. INTRODUCTION

Recent developments in sentencing reform have occurred against a background of mounting dissatisfaction with the indeterminate sentencing system that has pervaded the United States for much of the twentieth century.¹ The sentencing reform movement has been underway in earnest since 1976.² The Alaska Attorney General banned all forms of plea bargaining in 1975,³ and the United States Parole Commission's guidelines have been in effect for several years.⁴ Denver has adopted the first descriptive sentencing guidelines system.⁵ The California legislature enacted the California Uniform Determinate Sentencing Law in 1976.⁶ Several

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1. For comprehensive surveys of recent sentencing reform developments, see von Hirsch & Hanrahan, *Determinate Penalty Systems in America: An Overview*, 27 *CRIME & DELINQ.* 289 (1981); 4 *ABT ASSOCIATES, AMERICAN PRISONS AND JAILS* (National Institute of Justice 1980); *CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT, OVERVIEW OF STATE AND LOCAL SENTENCING GUIDELINES AND SENTENCING RESEARCH ACTIVITY* (American University Law Institute 1980) [hereinafter cited as *OVERVIEW*].

2. Although the first major institutional developments date from about that time, several influential books appeared some years earlier. See, e.g., *AMERICAN FRIENDS SERVICE COMM., STRUGGLE FOR JUSTICE* (1971); M. FRANKEL, *CRIMINAL SENTENCES* (1973); N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974).

3. See *NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, ALASKA BANS PLEA BARGAINING* (1980). See also *infra* text accompanying notes 122 & 168.

4. United States Parole Commission Rules, 28 C.F.R. §§ 2.1-2.60 (1981); see *infra* notes 76-77 and accompanying text.

5. See L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, *SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION* (National Institute of Law Enforcement and Criminal Justice 1978) [hereinafter cited as L. WILKINS]; W. RICH, L. SUTTON, T. CLEAR, AND M. SAKS, *SENTENCING GUIDELINES: THEIR OPERATION AND IMPACT ON THE COURTS* (National Center for State Courts 1980) [hereinafter cited as W. RICH]. See also *infra* text accompanying notes 87-94.

6. 1976 Cal. Stat. ch. 1139 (as amended); see *infra* notes 95-102 and accompanying text.

states, including New York⁷ and Massachusetts,⁸ have enacted mandatory sentencing laws, and Maine adopted a determinate sentencing statute and abolished its parole board in 1976.⁹ By 1981, most states either had considered or planned to consider major changes in sentencing laws, institutions, and procedures.¹⁰

Although indeterminate sentencing systems vary in significant respects from state to state, the similarities are marked. In the model form of indeterminate sentencing procedures, the legislature sets maximum lawful sentences, the judge sets the maximum—and sometimes minimum—terms, and the parole authorities decide when to release prisoners. The judge and the parole board possess immense discretion to individualize punishment decisions to meet the peculiar needs of each offender. In most jurisdictions, appellate courts lack authority to review the judge's sentencing decision or the parole board's release decision.¹¹

Two aspects of indeterminate sentencing—immense discretion¹² and freedom from review¹³—are the targets of many sentencing reform initiatives. The establishment of sentencing standards and review procedures is necessary and laudable, but it is not sufficient to achieve genuine improvement in the justness of sentencing in America. Under indeterminate sentencing laws, the substantive criminal law is not especially important; once the defendant has been convicted of an offense, the sentencing judge is entitled to impose any lawful sentence, and no connection need exist between the defendant's wrongdoing and his punishment. Whether a defendant is convicted of armed robbery, robbery, theft, or assault is unimportant as long as the statutory sentence maximums do not constrain the judge's sentencing choices and his ability to individualize the sentence he imposes.¹⁴

7. See JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION, THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE (1977) [hereinafter cited as JOINT COMMITTEE]. See also *infra* note 117 and accompanying text.

8. MASS. ANN. LAWS ch. 269, § 10 (1980). See Beha, "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 (pts. 1-2), 57 B.U.L. REV. 96, 289 (1977); see also *infra* text accompanying notes 110-11.

9. ME. REV. STAT. ANN. tit. 17-A, §§ 1151-1254 (Supp. 1981). See Zarr, *Sentencing*, 28 ME. L. REV. 117 (Special Issue 1976). Maine's parole board, ME. REV. STAT. ANN., tit. 34, §§ 1671-79, was abolished in 1975 by 1975 Me. Laws ch. 499, § 71.

10. See von Hirsch & Hanrahan, *supra* note 1, at 299 n.27.

11. *Id.* at 289-94.

12. See Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978).

13. See P. UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* (1978). ¶

14. If the maximum authorized sentences for armed robbery, robbery, theft, and assault are twenty-five years, twelve years, six years, and three years respectively, the judge

The thesis of this Article is that the substantive criminal law is the missing element in sentencing reform. If comprehensive sentencing reform strategies are to have lasting effect, legislatures must reintroduce the criminal law to the sentencing process. This step will require a rekindled interest in a moral analysis of the substantive criminal law and the enactment of greatly reduced statutory sentence maximums, along with more conventional institutional changes to structure discretion and increase official accountability.

Objections to American sentencing procedures range from the principled to the practical. Part II of this Article summarizes the basic objections that have influenced recent sentencing initiatives. All concern the unstructured discretion and absence of official accountability that characterize indeterminate sentencing. Part III then outlines the sentencing law reforms that have been proposed or adopted in response to these objections. Part IV asserts and attempts to demonstrate that sentencing in America has been divorced from the criminal law, and that present reform proposals are inadequate because they fail to address this separation. At trial, constitutional rights, the law of evidence, and the criminal burden of proof provide the defendant with important procedural safeguards. In addition, the state must meet all substantive criminal law requirements before the defendant can be convicted. Most convictions, however, result from guilty pleas.¹⁵ In these cases trial rights and protections are unimportant. Under an indeterminate sentencing scheme, defendants have virtually no rights at sentencing except for procedural rights such as the rights to counsel and to present and contest evidence.¹⁶ A court, therefore, can convict and sentence a defendant without ever applying substantive criminal law requirements. The new sentencing reforms have not addressed this systemic flaw. Thus, part V of this Article argues that the logic and effect of sentencing reform proposals require that the criminal law be returned to the sentencing process. Finally, part VI

who wishes to impose a five-year sentence would be constrained only if the defendant was convicted of assault.

15. NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1978, table 5.19 (guilty plea rates vary from place to place but are typically in the 85%-95% range) & 5.30 (85% of federal convictions in 1977 resulted from guilty pleas).

16. For a comprehensive review of the law, see ABA TASK FORCE ON SENTENCING ALTERNATIVE AND PROCEDURES, SENTENCING ALTERNATIVES AND PROCEDURES (2d ed. 1979), Pt. VI, Standards 18-6.1 to 18-6.9 and supporting commentary [hereinafter cited as TASK FORCE].

sketches the contours of a comprehensive sentencing reform package that would go a long way towards accomplishing this result.

II. THE HARBINGERS OF REFORM

Indeterminate sentencing was an invention of the early twentieth century.¹⁷ Before 1900 judges set precise terms of incarceration for most defendants. In 1900 only six states provided for probation.¹⁸ A handful of states permitted parole, but generally only for first offenders in reformatories.¹⁹ By 1920, thirty-three states permitted adult probation, and all states permitted juvenile probation.²⁰ By 1923, approximately half of all persons sentenced to state prisons were under an indeterminate sentence, and slightly more than half of all releases were under parole.²¹

Historians differ in their explanations of the abrupt changes during the early 1900's in the penal sanctioning system.²² Some suggest that the changes were a reaction to the brutality and ineffectiveness of the prisons, which were themselves a hopeful reform of the first half of the nineteenth century.²³ The more likely answer, however, lies in a series of intellectual developments concerning the causes of crime and methods of crime prevention. First, the early developers of social work and settlement houses offered environmental accounts of crimes and attributed the origins of crime to ghetto poverty and social disruption.²⁴ Suggested remedies included social programs aimed at improving the moral and economic condition of the ghetto and individualized efforts to provide delinquents with role models, discipline, material resources, and new opportunities.²⁵ Second, newly influential psychiatrists and psychologists argued that criminal behavior was the result of the personal pathology of the individual.²⁶ Thus, criminals increasingly began to receive individualized analysis, case work, and treatment

17. D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 43-81 (1980).

18. *Id.* at 44.

19. *Id.*

20. *Id.*

21. *Id.* See also U.S. ATTORNEY GENERAL, SURVEY OF RELEASE PROCEDURES, vol. 2, Probation; vol. 4, Parole (1939).

22. See B. MCKELVEY, AMERICAN PRISONS chs. 4-9 (1977); D. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC chs. 10-11 (1971). See generally D. ROTHMAN, *supra* note 17, at 17-40.

23. D. ROTHMAN, *supra* note 17, at 17-18.

24. *Id.* at 50-54.

25. See *id.* at 53.

26. *Id.* at 54-58.

programs.²⁷ Last, the eugenics movement of the time explained criminal deviance as partly the result of heredity.²⁸ Since individuals are not responsible for their hereditary traits, the eugenicists questioned the incarceration of criminals for behavior that was based on these traits.²⁹ According to David Rothman, the leading historian of early twentieth century criminal justice institutions, these conceptual developments and the social movements they precipitated pointed to a single solution to the problems of crime: "[T]he origins of deviancy had to be uncovered through a case-by-case study, an individual approach. Ameliorative action had to be fitted specifically to each individual's special needs, and therefore required a maximum of flexibility and discretion."³⁰ The resultant indeterminate sentencing system delegated virtually unfettered discretion to judges and parole boards, endured unchallenged into the 1960's,³¹ and underwent major changes only in the 1970's.

The history of the sentencing reform movement remains to be written. For reasons that are unclear, indeterminate sentencing retained general acceptability for three quarters of a century³² and then lost much of its credibility within a few years.³³ The principal causes of this change presumably included developments such as the prisoners' rights and civil rights movements,³⁴ loss of faith in the rehabilitative ideal,³⁵ and demands throughout the legal system for greater accountability in official decisionmaking processes.³⁶

Four overriding concerns permeate recent sentencing critiques and reform proposals: disparity in sentencing, discrimination in

27. *Id.*

28. *Id.* at 58-59.

29. *See id.*

30. *Id.* at 50.

31. *But see* F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* (1964).

32. D. ROTHMAN, *supra* note 17, at 1-13. *See supra* text accompanying notes 17-21. Indeterminate sentencing was the pattern in every American state in 1975 when Maine abolished its parole board and thereby became the first modern "determinate" sentencing jurisdiction. ME. REV. STAT. ANN. tit. 17-A, §§ 1151-1254 (Supp. 1981).

33. *See* von Hirsch & Hanrahan, *supra* note 1, at 289; Crump, *Determinate Sentencing: The Promises and Perils of Sentence Guidelines*, 68 Ky. L.J. 1, 3-4 (1979-80).

34. Zimring, *Prisoners, Professors, and Politicians—The Origins of Sentencing Reform*, 2 N. ILL. L. REV. (1982) (forthcoming).

35. *See, e.g.*, AMERICAN FRIENDS SERVICE COMM., *supra* note 2; Martinson, *What Works? Questions and Answers About Prison Reform*, 10 PUB. INTEREST 22 (1974).

36. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970) (due process requires notice of accusations and opportunity to respond); *see also* *Wolf v. McDonnell*, 418 U.S. 539 (1974) (prison disciplinary procedures established); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (minimum procedural requirements for probation revocation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (minimum procedural requirements for parole revocation).

sentencing, normlessness, and irresponsibility.³⁷ A fifth concern is the apparent ineffectiveness of indeterminate sentencing in reducing or controlling crime.³⁸

A. Disparity in Sentencing

Compelling evidence suggests that sentencing in America is often unacceptably disparate, and that the identity of the decisionmaker rather than the offender's crime and past criminal conduct is frequently the critical element in sentence determination.³⁹ For more than a half century, research consistently has demonstrated the existence of significant, unexplained disparities in sentencing.⁴⁰ Sophisticated statistical analyses are able to account for only one-third of the variations in sentences.⁴¹ In several well-known experiments researchers asked trial judges to review presentence reports and to indicate the sentences that they would impose. The results demonstrated that for the same defendant, some judges would impose probation and other judges would impose a lengthy prison sentence.⁴²

B. Discrimination in Sentencing

Reformers have asserted repeatedly that sentencing is racially discriminatory, and that blacks, Hispanics, and native Americans receive harsher sentences than whites.⁴³ Numerous social science

37. See, e.g., M. FRANKEL, *supra* note 2; N. MORRIS, *supra* note 2; A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976).

38. See E. VAN DEN HAAG, *PUNISHING CRIMINALS* (1975); J. WILSON, *THINKING ABOUT CRIME* (1975). For a review of the scientific control strategies, see NATIONAL ACADEMY OF SCIENCE, *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* (1978).

39. See Green, *Research on Disparities*, in 2 *CRIME AND JUSTICE* 529 (L. Badzinowicz & M. Wolfgang eds. 1971).

40. *Id.*; see also Gaudet, Harris & St. John, *Individual Differences in the Sentencing Tendencies of Judges*, 23 *J. CRIM. L. & CRIMINOLOGY* 811 (1933).

41. For a review of the evidence, see NATIONAL ACADEMY OF SCIENCE, *RESEARCH ON SENTENCING: THE SEARCH FOR REFORM* ch. 2 (1983) (forthcoming) [hereinafter cited as *RESEARCH ON SENTENCING*].

42. See, e.g., FEDERAL JUDICIAL CENTER, *THE SECOND CIRCUIT SENTENCING STUDY* (1974); INSTITUTE FOR LAW AND SOCIAL RESEARCH AND YANKELOVICH, SKELLY, AND WHITE, INC., *FEDERAL SENTENCING: TOWARD A MORE EXPLICIT POLICY OF CRIMINAL SANCTIONS* ch. 3 (1980) (*Sentencing Goals and the Disparity Issue*).

43. See, e.g., AMERICAN FRIENDS SERVICE COMM., *supra* note 2; NATIONAL MINORITY ADVISORY COUNCIL ON CRIMINAL JUSTICE, *THE INEQUALITY OF JUSTICE: A REPORT ON CRIME AND THE ADMINISTRATION OF JUSTICE IN THE MINORITY COMMUNITY* (Law Enforcement Assistance Administration 1980); Joyner, *Legal Theories for Attacking Racial Disparity in Sentencing*, 18 *CRIM. L. BULL.* 101 (1982).

researchers have investigated discrimination in sentencing.⁴⁴ Research covering periods before 1969 provides compelling evidence of sentencing discrimination—especially in the South—both in capital cases and in cases with black offenders and white victims.⁴⁵ The evidence for periods since 1969, however, is inconclusive and inconsistent.⁴⁶ Considerable anecdotal evidence suggests that some judges discriminate on the basis of race. The gross disproportion in black/white imprisonment rates—the ratio is approximately nine to one⁴⁷—appears to present a prima facie case of substantial racial discrimination in sentencing. Nevertheless, the black overrepresentation in prison—forty-eight percent of the prison population in 1979,⁴⁸ compared with thirteen percent of the general population—is consistent with black overrepresentation both among persons arrested for serious crimes and among persons identified by victims as the perpetrators of crimes.⁴⁹ Thus, the evidence does not necessarily support the claim that sentencing is substantially racially discriminatory. Since nearly half the inmates of federal and state prisons are black, however, many people quite naturally believe that sentencing is racially discriminatory.

C. Normlessness in Sentencing

Reformers contend that indeterminate sentencing is normless because the moral distinctions that are discernible in the criminal law bear no necessary relation to punishment.⁵⁰ The substantive

44. For reviews of the literature, see D. TOMPKINS, *SENTENCING THE OFFENDER—A BIBLIOGRAPHY* (1971); Green, *Inter- and Intra-Racial Crime Relative to Sentencing*, 55 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 348 (1964); Green, *supra* note 39; Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW & SOC'Y REV. 357 (1974); Hagan and Bumiller, *Making Sense of Sentencing: A Review and Critique of Sentencing Research*, in RESEARCH ON SENTENCING, *supra* note 41; Overby, *Discrimination Against Minority Groups*, in CRIME AND JUSTICE, *supra* note 39, at 569.

45. See Green, *supra* note 39; Hagan and Bumiller, *supra* note 44.

46. RESEARCH ON SENTENCING, *supra* note 41, ch. 2. But see Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981). Professor Zeisel sees a clear pattern of continuing discrimination and places the blame on the prosecutor. *Id.* at 468.

47. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONS AND PRISONERS (1980).

48. *Id.* In November 1979, the racial distribution of state prisoners was 49.6% white, 47.8% black, and 2.5% "other."

49. Hindelang, *Race and Involvement in Common Law Personal Crimes*, 43 AM. SOC. REV. 93 (1978).

50. See G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978); D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977); Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395 (1979).

law, for example, scales offenses according to the seriousness of the act.⁵¹ The sentence imposed for robbery, however, need not be less than that imposed for armed robbery. Similarly, the criminal law contains formal mitigations such as the defenses of provocation, extreme emotional disturbance, and diminished capacity that serve to reduce the severity of the offense.⁵² The sentence, on the other hand, is not necessarily less severe when the mitigation is present.

In recent years a resurgence of interest has emerged in punishment philosophies that closely relate punishment to blameworthiness.⁵³ A retributive, "just deserts" approach is widely discussed and firmly supported⁵⁴ and attaches high priority to the achievement of equality and proportionality in punishment.⁵⁵

In contrast, the indeterminate sentencing systems were based on utilitarian premises in which blameworthiness was not the primary sentence determinant. A utilitarian punishment philosophy, according to H.L.A. Hart, is "forward looking" to the preventive effects of punishment such as rehabilitation, incapacitation, and deterrence.⁵⁶ A retributive punishment scheme, on the other hand, is "backward looking" to the defendant's culpability and, perhaps, to the harm that he caused or threatened.⁵⁷ Indeterminate sentencing laws are forward looking in Hart's sense and are not concerned primarily with the sentencing values of equality, proportionality, and moral culpability. Academics and reform activists, as well as legislatures, have criticized this normlessness.⁵⁸ Consequently, new sentencing statutes, for example, specify that "the purpose of imprisonment . . . is punishment,"⁵⁹ and that "commensurate" deserts⁶⁰ should be the primary determinant of sentences.

51. See, e.g., MODEL PENAL CODE § 6.01 (Official Draft 1962).

52. See, e.g., *id.* §§ 4.01-4.10 (defenses of mental illness or defect), §§ 210.3(1)(b), .6 (3)-(4) (mental or emotional disturbance reduces severity of homicide offense).

53. See, e.g., A. VON HIRSCH, *supra* note 37.

54. See, e.g., N. MORRIS, *supra* note 2, at 59-60; see also *infra* notes 59-60 and accompanying text.

55. A. VON HIRSCH, *supra* note 37, at 66-76.

56. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 72-83 (1968).

57. *Id.* at 81-82.

58. See, e.g., N. MORRIS, *supra* note 2; A. VON HIRSCH, *supra* note 37. See generally Committee Report, *Indeterminate Sentencing*, 35 REC. A.B. CITY N.Y. 61 (1980); Crump, *supra* note 33; Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle*, 1980 DUKE L.J. 1103; Kennedy, *Introduction, Symposium on Sentencing, Part I*, 7 HOFSTRA L. REV. 1 (1978); Meyerson, *The Board of Prison Terms and Paroles and Indeterminate Sentencing: A Critique*, 51 WASH. L. REV. 617 (1976).

59. CAL. PENAL CODE § 1170(a)(1) (West Supp. 1982).

60. OR. REV. STAT. § 144.780(2) (1981).

D. *Irresponsibility in Sentencing*

A fourth criticism of indeterminate sentencing is that it is "lawless."⁶¹ Indeterminate sentencing allows judges—often influenced greatly by prosecutors, defense lawyers, and probation officers—to impose any sentence authorized by law. The range of sentence that is legally permitted often extends from probation to a long prison term.⁶² Furthermore, statutes seldom require judges to indicate the reasons for the sentences that they impose, and no credible mechanisms exist for review of individual sentences. Thus, judges are not accountable for their sentencing decisions. In contrast, judges in most civil cases routinely indicate the reasons for their holdings. Decisions in civil matters also are subject to review of both the legal analysis and the application of the law to the facts.⁶³ Moreover, due process requires criminal justice officials in other punishment contexts such as prison disciplinary hearings and parole revocation proceedings to give their reasons for any actions that are contrary to an offender's interests.⁶⁴ In sum, traditional indeterminate sentencing procedures have become an anomaly.

E. *Crime Control*

Critics of traditional sentencing practices argue that indeterminate sentencing and rehabilitative correctional programs have not controlled or reduced crime.⁶⁵ For the past decade, increasing attention has been given to deterrent and incapacitative crime control strategies.⁶⁶ Millions of federal dollars have been spent on deterrence and incapacitation research. Many jurisdictions have established "career criminal" prosecution units with mandates to identify and prosecute repetitive violent offenders. The goal of such units is to imprison and thereby incapacitate repetitive of-

61. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

62. For example, the Tennessee Code prescribes a minimum term of five years for robbery. TENN. CODE ANN. § 39-3901 (Supp. 1981). The maximum term is execution. *Id.*

63. For a colorful contrast between the respective opportunities of appellate review of a person sentenced to prison and an unsuccessful party in civil litigation, see M. FRANKEL, *supra* note 2, at 75.

64. *Wolf v. McDonnell*, 418 U.S. 539 (1974) (prison disciplinary procedures); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation).

65. The preventive effects of punishment are too extensive to be addressed in this Article. See *supra* note 38 for several introductory sources.

66. See NATIONAL ACADEMY OF SCIENCE, *supra* note 38; E. VAN DEN HAAG, *supra* note 38; J. WILSON, *supra* note 38.

fenders. Mandatory minimum sentence laws represent efforts both to deter prospective offenders—by the threat of certain and severe punishment—and to incapacitate those persons who ignore the law's admonition. These strategies, however, are difficult to implement when judges and parole boards have unfettered discretion in punishment decisions. According to these critics, sentencing can be an effective crime control weapon only if punishments are harsher, more certain, or both.

These five sentencing concerns—disparity, discrimination, normlessness, irresponsibility, and crime control—have coalesced into a compelling case against indeterminate sentencing and have been the harbingers of recent reform. Although indeterminate sentencing has enjoyed almost universal support throughout much of this century, a remarkable coalition of prisoners' groups, reformers, and bureaucrats became convinced by the late 1970's that the indeterminate sentencing era was at its end.⁶⁷

III. THE CURRENT SHAPE OF REFORM

Current sentencing reform strategies aim in various ways to diminish the scope of officials' discretion, to establish general standards for decisionmaking, and to enhance official accountability. Each of these aims in effect constitutes a repudiation of indeterminate sentencing. Recent sentencing reform initiatives include the Model Penal Code's system of offense classification,⁶⁸ the creation of statutory presumptions favoring particular sentencing decisions,⁶⁹ requirements that reasons for sentences be stated,⁷⁰ sentencing councils,⁷¹ sentencing institutes,⁷² and appellate review of sentences.⁷³ These sentencing initiatives, however, are not inconsistent with indeterminacy and are not discussed at length here. Instead, this part of the Article introduces the major sentencing re-

67. See, e.g., Messinger & Johnson, *California's Determinate Sentencing Statute: History and Issues*, in STRATEGIES FOR DETERMINATE SENTENCING — (National Institute of Law Enforcement and Criminal Justice 1978).

68. MODEL PENAL CODE §§ 210.0-251.4 (Official Draft 1962). The Model Penal Code has been adopted in more than 30 states.

69. See, e.g., CAL. PENAL CODE §§ 1170-1170.7 (West Supp. 1982). See also *supra* notes 95-105 and accompanying text.

70. See, e.g., Criminal Code Reform Bill, S. 1630, 97th Cong., 1st Sess. § 2003 (1981).

71. See generally von Hirsch & Hanrahan, *supra* note 1.

72. *Id.*

73. See, e.g., 18 U.S.C. § 3575(b) (1976) (sentence limited to a term "not disproportionate" to that for base offense). See generally Md. CTS. & JUD. PROC. CODE ANN. § 12-302(c) (1980).

form measures that contain structural changes which are designed to remedy the problems described in part II by substantially altering the discretions delegated to prosecutors, judges, and parole boards. These reform measures, which are discussed below in turn, include parole guidelines, descriptive sentencing guidelines, presumptive sentencing, mandatory minimum sentences, parole abolition, and plea bargaining bans.

A. Parole Guidelines

The United States parole guidelines emanated from the Parole Decisionmaking Project of the National Council on Crime and Delinquency Research Center, in collaboration with the United States Board of Parole. One phase of that project was an attempt to identify the weights that decisionmakers gave to various criteria in the parole decision. A study of those criteria showed that decisionmakers' primary concerns were the severity of the offense, the prisoner's parole prognosis, and his institutional behavior, and that "a parole board's decisions could be predicted fairly accurately by knowledge of its ratings on these three factors."⁷⁴ The project developed a statistical model that made explicit the Parole Board's implicit policies. Thus, the guidelines were "descriptive" of past practices.⁷⁵ The United States Board of Parole initiated the first parole guidelines system in 1972 as part of a pilot project to test the feasibility of regionalizing the parole board's operation. In 1976 the Parole Commission and Reorganization Act⁷⁶ modified the parole guidelines that had been developed in the Parole Commission's Northeast Region and then adopted them for use in the entire federal system.⁷⁷ Current guidelines are expressed in matrix format, as shown in Table I: the vertical axis contains six offense categories and the horizontal axis contains four parole prognosis categories.

74. Gottfredson, Hoffman, Sigler & Wilkins, *Making Paroling Policy Explicit*, 21 CRIME & DELINQ. 34, 37 (1975).

75. See generally D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *GUIDELINES FOR PAROLE AND SENTENCING* (1978).

76. 5 U.S.C. § 5108 (1976 & Supp. IV 1980); 18 U.S.C. §§ 3655, 4201-4218, 5005-5006, 5010, 5014-5021, 5041 (1976).

77. On the development of the U.S. parole guidelines, see D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *supra* note 75.

TABLE 1
U.S. PAROLE GUIDELINES (ADULTS)

Offense Severity	Offender Characteristics			
	Very Good	Good	Fair	Poor
Low	0-6 months	6-9 months	9-12 months	12-16 months
Low moderate	0-8	8-12	12-16	16-22
Moderate	10-14	14-18	18-24	24-32
High	14-20	20-26	26-34	34-44
Very High	24-36	36-48	48-60	60-72
Greatest I	40-52	52-64	64-78	78-100
Greatest II	52+	64+	78+	100+

Source: U.S. Parole Commission, Rules § 2-20 (Eff. Sept. 1, 1981); 28 C.F.R. 2-20.

When setting release dates, hearing examiners determine the category within which the prisoner's criminal conduct falls. The examiners then calculate the prisoner's salient factor score, which is based on the predicted recidivism rates of persons sharing certain characteristics with the prisoner. After consulting the cell at which the applicable offense severity row and parole prognosis column intersect, parole officials in the ordinary case set a release date that is consistent with the range which is identified in this cell.⁷⁸

Florida,⁷⁹ Georgia,⁸⁰ New York,⁸¹ Oklahoma,⁸² Oregon,⁸³ and Utah⁸⁴ have adopted similar parole guidelines. Minnesota and Washington adopted and have since repealed matrix parole guidelines. Minnesota abolished parole release.⁸⁵ Washington first adopted a different parole guideline format and later abolished its

78. United States Parole Commission Rules, 28 C.F.R. §§ 2.1-2.60 (1981).

79. FLA. STAT. ANN. §§ 947.16-.18 (1982).

80. GA. CODE ANN. § 77-512.1 (1981).

81. NEW YORK PENAL LAW § 70.40 (Consol. 1981-1982).

82. The Oklahoma Pardon and Parole Board implemented matrix-type parole guidelines without a legislative mandate, on April 1, 1980.

83. 1977 Or. Laws ch. 372.

84. The Utah guidelines were drafted by the research staff of the Utah Department of Corrections.

85. MINN. STAT. ANN. §§ 244.01-11 (West Supp. 1982). For a general review of these developments, see R. SPARKS, A. VON HIRSCH & S. MESSINGER, PROJECT ON STRATEGIES FOR DETERMINATE SENTENCING (a forthcoming federally funded comprehensive review of sentencing reform developments); von Hirsch & Hanrahan, *supra* note 1.

parole board effective July 1, 1988.⁸⁶

B. Descriptive Sentencing Guidelines

Descriptive sentencing guidelines originated in Denver and resulted from an effort to apply the research experience and statistical technology that had been developed in establishing the United States parole guidelines.⁸⁷ Researchers collected data on a sample of cases and subjected this data to statistical analyses to identify those offense and offender variables that best "explained" the sentences imposed. The premise of this initial study was that "the gradual build-up of case-by-case decisions results in the incremental development of a sentencing policy."⁸⁸ Thus, the Denver guidelines were descriptive because they were purportedly based on the past practices of the Denver courts, as shown by the statistical analyses, and were constructed so approximately eighty-five percent of the sentences in the sample of cases fell within the sentencing ranges contained in the guidelines.⁸⁹ The Denver guidelines and most other descriptive sentencing systems, therefore, are in the matrix format of the United States parole guidelines.

Judicial compliance with the resulting empirically informed matrix guidelines is wholly voluntary.⁹⁰ The developers postulated that the guidelines' descriptive character would make them inherently credible, and, consequently, that judges would comply with them and "significantly reduce unjustified variation from the norm by making the established policy of the court explicit."⁹¹ The Denver guidelines took effect in 1976. Subsequent generations of federally funded projects have developed descriptive sentencing guidelines in Newark, Chicago, and Phoenix, and, at the state level, in Maryland and Florida.⁹² Alaska, Massachusetts, Michigan, New Jersey, and Washington also have developed statewide descriptive sentencing guidelines.⁹³ According to one recent survey, as of April 1, 1981, twenty-three states had implemented or were developing descriptive sentencing guidelines.⁹⁴

86. See WASH. REV. CODE ANN. § 9.95.009 (Supp. 1982).

87. See *supra* note 4.

88. See W. RICH, *supra* note 5, at —.

89. *Id.* at 24-25.

90. *Id.* at 31.

91. *Id.*

92. See J. KRESS, *PRESCRIPTION FOR JUSTICE* (1980).

93. See von Hirsch & Hanrahan, *supra* note 1.

94. See OVERVIEW, *supra* note 1.

C. Presumptive Sentencing

California's Uniform Determinate Sentencing Act⁹⁵ is an example of a presumptive sentencing scheme. The Act establishes a detailed sentencing scheme that specifies mitigated, normal, and aggravated prison sentences for defendants convicted of particular felonies.⁹⁶ The middle term is the presumptive base. The Act directs the judges to impose the middle or normal term in the ordinary case, though the judge may, consistent with criteria established by the California Judicial Council, impose the higher or lower terms to reflect aggravating or mitigating circumstances.⁹⁷ In addition, the California Act directs the judge to increase the term variously by one to three years if specific aggravating factors such as weapon possession or use,⁹⁸ personal injuries,⁹⁹ or great property loss or damage¹⁰⁰ are "charged and admitted or found true."¹⁰¹ Finally, the Act directs the judge to increase the sentence by specified amounts if the defendant has been incarcerated previously for felony convictions.¹⁰² Alaska, Arizona, Colorado, Connecticut, Illinois, Indiana, New Jersey, New Mexico, and North Carolina have enacted similar presumptive sentencing statutes with much less detailed standards.¹⁰³

Minnesota,¹⁰⁴ Pennsylvania,¹⁰⁵ and Washington¹⁰⁶ have created sentencing commissions and have charged them with establishing presumptive sentencing guidelines. The Minnesota Sentencing Guidelines Commission has promulgated detailed guidelines in the familiar matrix format. These guidelines specify narrow ranges of presumptive sentences—typically five percent on either side of a

95. CAL. PENAL CODE §§ 1170-1170.7 (West Supp. 1982).

96. Three prison terms are specified for every offense. For example, the sentences for robbery are two, three, or five years. *Id.* § 213.

97. *Id.* § 1170.

98. *Id.* § 12022.5.

99. *Id.* § 12022.7.

100. *Id.* § 12022.6.

101. *Id.* § 667.5(d).

102. *Id.* 667.5.

103. ALASKA STAT. §§ 12.55.005-185 (1968); ARIZ. REV. STAT. ANN. § 13-702 (1978); COLO. REV. STAT. § 16-11-101 (1978 & Supp. 1980); CONN. GEN. STAT. ANN. § 53a-35 (1972 & West Supp. 1981); ILL. ANN. STAT. ch. 38, §§ 1005-5-1 to -5-3 (Smith-Hurd 1973 & Supp. 1981-1982); IND. CODE ANN. § 35-50-1A-7 (Burns 1979); N.J. STAT. ANN. 2C:44-1 (West Supp. 1980); N.M. STAT. ANN. §§ 31-18-12 to -18-21 (1981); N.C. GEN. STAT. § 15A-1340.4 (Supp. 1979).

104. MINN. STAT. ANN. § 244.09 (West Supp. 1982).

105. 42 PA. CONS. STAT. ANN. §§ 2151-2155 (Purdon 1981).

106. WASH. REV. CODE ANN. §§ 9.94A.010-94A.910 (Supp. 1982).

midpoint—for various combinations of offense severity and prior criminality and authorize judges to impose other sentences only for “substantial and compelling” reasons.¹⁰⁷ Sentences outside the guidelines can be appealed to the Minnesota Supreme Court.¹⁰⁸ At the present time, sentencing commissions in Pennsylvania and Washington are in the process of developing presumptive sentencing guidelines for their states.¹⁰⁹

D. Mandatory Minimum Sentences

Mandatory minimum sentence laws generally require imposition of a prison sentence that is not less than a specified length. Massachusetts’ Bartley-Fox law,¹¹⁰ for example, requires a mandatory minimum prison sentence of one year without suspension, parole, or furlough for anyone who is convicted of illegally carrying a firearm.¹¹¹ Similarly, the Michigan Felony Firearm Statute¹¹² mandates a two-year prison sentence—in addition to any sentence for the underlying felony—for any defendant who possesses a firearm while engaging in a felony.¹¹³ New York’s Rockefeller Drug Law imposes minimum prison sentences of fifteen, six, and one years for persons who are convicted of various heroin trafficking offenses.¹¹⁴

Most major law reform bodies have disapproved mandatory minimum sentencing laws.¹¹⁵ Nevertheless, mandatory minimum sentencing schemes are the single most common recent sentencing innovation.¹¹⁶ In 1980 the Department of Justice reported that twenty-seven states had adopted mandatory minimum sentence laws between 1977 and 1980, and that fourteen other states were

107. Minnesota Sentencing Guidelines Commission, *Minnesota Sentencing Guidelines and Commentary*, § II. D. [hereinafter cited as *Minnesota Guidelines*]. See *id.* § II. C.

108. MINN. STAT. ANN. § 244.11 (West Supp. 1982) (authorizes such appellate review of a sentence on request of either the state or the defendant).

109. See Pennsylvania Commission on Sentencing, *Proposed Sentencing Guidelines*, 12 Pa. Admin. Bull. 431 (Jan. 23, 1982) [hereinafter cited as *Proposed Pennsylvania Guidelines*]; WASH. REV. CODE ANN. §§ 9.94A.040-.94A.070 (Supp. 1982).

110. MASS. GEN. LAWS ANN. ch. 269, § 10 (West Supp. 1981).

111. *Id.*; see Beha, *supra* note 8.

112. MICH. COMP. LAWS ANN. § 750.227b (Supp. 1982-1983).

113. *Id.*; see Heumann & Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 LAW & SOC’Y REV. 393 (1979).

114. See JOINT COMMITTEE, *supra* note 7.

115. See, e.g., TASK FORCE, *supra* note 16, § 18-2.1 (2d ed. approved Aug. 1979).

116. See generally PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 350-52 (1968).

considering similar action.¹¹⁷

E. Parole Abolition

The term "parole abolition" is a misnomer. Most states that have abolished parole release retain short mandatory periods of parole supervision that include the possibility of parole revocation.¹¹⁸ Many states that have eliminated parole release in general have retained parole systems for small categories of offenders who continue to receive indeterminate sentences.¹¹⁹ At least nine states have followed Maine's lead and abolished parole release for most prisoners.¹²⁰

F. Plea Bargaining Bans

Plea bargaining provides prosecutors with great influence in the sentencing process, especially under presumptive sentencing laws that determine sentences by the nature of the charges filed or not dismissed.¹²¹ Some localities have attempted to ban some or all forms of plea bargaining.¹²² The most dramatic effort to abolish plea bargaining remains the Alaska Attorney General's 1975 directive banning all prosecutorial participation in plea bargaining.¹²³

G. Summary

The reform initiatives outlined above address the perceived defects of indeterminate sentencing. Normative standards and limitations on prosecutorial, judicial, and parole board discretion can

117. U.S. Dept. of Justice Press Release (March 23, 1980); see Note, *Daring the Courts: Trial and Bargaining Consequences of Minimum Penalties*, 90 YALE L.J. 597 (1981).

118. See, e.g., CAL. PENAL CODE §§ 3000, 3053 (West Supp. 1982) (sets maximum parole supervision periods and creates Board of Prison Terms to administer parole supervision); IND. CODE ANN. § 11-13-3-5 (Burns 1981) (maximum parole supervision periods).

119. California, Illinois, Indiana, Maine and Minnesota have abolished parole, although most have retained a period of parole supervision as a consequence of a prison sentence.

120. Alaska, California, Colorado, Connecticut, Illinois, Indiana, Minnesota, New Mexico, and North Carolina have abolished parole release. See NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, *ABOLISH PAROLE?* (1978).

121. Under presumptive sentencing procedures the prosecutor can determine the prison sentence by electing which charges to file or dismiss and also by deciding what enhancements and prior prison sentences to charge and prove. See *supra* notes 95-109 and accompanying text.

122. See Alschuler, *supra* note 12, at 563-76. See generally Church, *Plea Bargains, Concessions, and the Courts: Analysis of a Quasi-Experiment*, 10 LAW & SOC'Y REV. 377 (1976).

123. See *supra* text accompanying note 3.

rationalize sentencing, reduce disparity, enhance accountability, and diminish the likelihood of various forms of invidious discrimination. These sentencing reforms, however, are in an important respect only half-measures. Although purporting to reject the institutional manifestations of the rehabilitative ideology that underlies indeterminate sentencing, the reforms operate within the context of criminal laws that are the product of precisely the same rehabilitative ideology. The Model Penal Code, for example, was avowedly rehabilitative in its premises and provisions and was designed to meet the needs of indeterminate sentencing.¹²⁴ Part IV of this Article argues that criminal codes drafted under the influence of indeterminate sentencing are inadequate and suggests that these criminal codes will frustrate modern sentencing reform initiatives unless the sentencing reform movement broadens its focus to include criminal law reform.

IV. THE IRRELEVANCE OF CRIMINAL LAW IN INDETERMINATE SENTENCING

A. *The Paradox of Sentencing*

The defendant at trial stands protected by a formidable array of substantive, procedural, and evidentiary rights. The common law requires strict construction of penal statutes; courts must resolve statutory ambiguities in the defendant's favor.¹²⁵ The defendant may be convicted only after a finding of guilt based on proof beyond a reasonable doubt.¹²⁶ Prophylactic evidentiary rules limit the evidence that the state may introduce to convict the defendant.¹²⁷ In addition, a defendant is entitled to various procedural protections, including the right to counsel,¹²⁸ the right to confront accusers,¹²⁹ and the right to present evidence in his own behalf.¹³⁰ If the defendant is convicted, he may appeal on the grounds that evidentiary rules were inappropriately applied, that the evidence

124. MODEL PENAL CODE § 1.02 Commentary (1962). See generally Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968).

125. See, e.g., J. HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 35-39 (2d ed. 1960).

126. *In re Winship*, 397 U.S. 358 (1970).

127. See, e.g., FED. R. EVID. 404, 405. See generally Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 760-61 (1980).

128. U.S. CONST. amend. VI.

129. *Id.*

130. *Id.* See generally ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 4.3(a) commentary at 211-12 (1968).

adduced at trial does not support the conviction, or that essential trial or pretrial safeguards were lacking.

Most of these protections are absent during the sentencing stage. Indeed, sentencing in most jurisdictions is a mystery. The judge has immense discretion to impose a wide range of sentences—often ranging from probation to lengthy prison terms—and that discretion is rarely subject to any meaningful constraints. Most statutory maximum sentences are very long—much longer than the prison sentences that typically are imposed or served.¹³¹ The prosecution does not have to meet any burden of proof standard at sentencing proceedings, and the rules of evidence do not apply. The sentencing judge may consider any information that he considers relevant, including allegations of prior criminality that did not result in arrest, that resulted in arrest but no conviction, or even that resulted in a dismissal or an acquittal at trial.¹³² Even though a defendant has been charged with armed robbery but convicted only of theft, the judge nevertheless may impose the sentence he would have imposed if the defendant had been convicted of armed robbery. Thus, the substantive law matters only to the extent that it authorizes maximum sentences that often have little practical significance. Finally, in many jurisdictions no right to appeal a sentence exists, and when it does exist, it generally appears to be ineffective.¹³³

This litany of distinctions between adjudication and sentencing suggests that adjudication is the important decision and that sentencing is subsidiary. In theory this proposition is true, but the reality is to the contrary. A substantial majority of convictions result from guilty pleas, which often follow plea negotiations.¹³⁴ The vast array of evidentiary rules, burdens of proof, and other trial rights are irrelevant to these defendants, although sometimes counsel may tactically invoke these rights during plea negotiations. In these cases the substantive criminal law is substantially attenuated, if not wholly insignificant. If sentence bargaining is preva-

131. For example, the maximum sentence for robbery under several federal statutes is 25 years (300 months). In 1976 the average federal prisoners released from prison for the first time had served 44.4 months of an average sentence of 131.3 months. NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1978, table 6.61.

132. See *United States v. Cardi*, 519 F.2d 309, 312-13 (7th Cir. 1975). See generally Schulhofer, *supra* note 127, at 765.

133. See Zeisel & Diamond, *Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut*, 1977 AM. B. FOUND. RESEARCH J. 881.

134. See *supra* note 15 and accompanying text.

lent, then the conviction offense is of little consequence. If charge bargaining is prevalent, the defendant pleads guilty to an offense less serious than that which was charged originally. The conviction offense, therefore, is at best an uncertain guide to the offender's crime.

B. *The Irrelevance of the Criminal Law*

Reliance on plea negotiation is a major cause of the diminished importance of adjudication and the resultant deemphasis on the criminal law. The relationship between indeterminate sentencing and the criminal law, however, is more complex and in part explains why plea bargaining has become ubiquitous. This relationship suggests several reasons why the criminal law has become increasingly irrelevant in recent decades.

1. Individualized Sentencing and Rehabilitation

The theoretical premises of indeterminate sentencing require that the sentencing judge tailor sanctions to fit the defendant.¹³⁵ A judge, therefore, can legitimately consider during the sentencing process any information—whatever its nature or source—that may be relevant to the sentencing determination. The Supreme Court in *Williams v. New York*¹³⁶ held that the determination of evidentiary relevancy at sentencing hearings was solely within the discretion of the sentencing judge.¹³⁷ This evidentiary latitude accorded to sentencing judges even extends to the consideration of alleged but unproven prior criminal acts.¹³⁸ The Court in *Williams* reasoned that individualized sentencing requires judges to have access to all relevant information.¹³⁹ This stance was not remarkable in the rehabilitative penological climate of the 1940's. The effect of *Williams*, however, was to diminish the importance of a defendant's conviction offense. A defendant charged with armed robbery, but convicted by a jury of theft, may later be sentenced as if he had been convicted of armed robbery. The conviction offense, therefore, has little, if any, relevance to sentencing.

135. See *supra* notes 11-14 and accompanying text.

136. 337 U.S. 241 (1949).

137. See also *United States v. Grayson*, 438 U.S. 41 (1978) (reaffirming *Williams*' evidentiary discretion).

138. Compare FED. R. EVID. 608(b) (prior bad acts may not be proved by extrinsic evidence) with *id.* 609 (limitations on admissibility of prior convictions).

139. 337 U.S. at 247.

2. Plea Bargaining and the Law

Since substantive criminal law analysis has few implications for sentencing after *Williams*, lawyers have little reason to argue vigorously over the proper application of the criminal law. The defendant is concerned primarily about whether he will be convicted, and, if so, whether he will be imprisoned. If conviction for some offense appears inevitable, the defense lawyer can best serve a client either by keeping the client out of prison or by attaining the shortest possible sentence. The defendant who makes a sentence bargain knows his punishment when he pleads guilty. The effect of a charge bargain, however, is less predictable. Arrangements with prosecutors over the charge that will be filed can provide real protection, since in most jurisdictions dismissal of felony charges for a misdemeanor plea guarantees that the defendant will not be sentenced to the state penitentiary. Sometimes, of course, charge bargains provide no more than insurance against long sentences. For example, if the defendant pleads guilty to robbery, which often has a ten year maximum sentence, in exchange for the dismissal of an armed robbery charge, which frequently carries a twenty-five year maximum sentence, this arrangement at least provides protection against extremely long sentences.

The prospect or certainty of less severe sentences than would otherwise obtain provides the impetus for guilty pleas. Under indeterminate sentencing procedures, the alternative to a plea bargain is to risk sentencing by a judge, who is subject to no meaningful standards and accorded great statutory latitude. Sentencing by the court entails the risk of an extremely severe sentence relative to sentences received by other defendants for that offense. Thus, the defense lawyer must concern himself with sentencing rather than with either the substantive law or the appropriate conviction offense.

3. Moral Incoherence of the Criminal Law

The theoretical underpinnings of indeterminate sentencing undermine the substantive criminal law in other ways. Professor Zimring implores the "moral incoherence of the criminal law" and refers to the modern tendency of legislatures to draft penal statutes broadly to encompass a wide variety of behaviors.¹⁴⁰ Many

140. Zimring, *Making the Punishment Fit the Crime*, HASTINGS CENTER REP. December, 1976, at 13, 15-16.

statutory robbery definitions and related sanction provisions, for example, include conduct that ranges from professional, violent bank robberies to a fifteen year old's forcible taking of a basketball in a school year.¹⁴¹ Judges, lawyers, and probation officers distinguish between these acts. The criminal law, however, often fails to address even gross distinctions within a broad statutory offense. This failure creates a shadow criminal law within the sentencing process that distinguishes among cases in ways that the criminal law does not.

Reformers have not addressed this incoherence in the criminal law. Section 1721(1) of the Proposed Federal Criminal Code of the National Commission on Reform of Federal Criminal Laws¹⁴² provides that "[a] person is guilty of robbery if, in the course of committing a theft, he inflicts or attempts to inflict bodily injury upon another, or threatens another with imminent bodily injury." Other subsections grade robberies as Class A, Class B, or Class C offenses for the possession or use of a dangerous weapon,¹⁴³ the infliction of serious bodily injury,¹⁴⁴ or the presence of an accomplice.¹⁴⁵ The bulk of robberies, however, fall within the general definition of section 1721(1). This definition, therefore, provides no basis for a judge to distinguish among schoolyard thefts accompanied by threats, muggings, robberies of the elderly, and professional bank robberies. Reasonable people will differ in their assessments of the relative seriousness of these different robberies. Few people, however, would regard all these acts as equally evil and deserving of equal punishment. Thus, the shadow criminal law discriminates among kinds of conduct that the criminal codes fail to distinguish.

This moral incoherence of the criminal law is most acute at the federal level. Under the mail fraud statutes, for example, the prosecution need only prove the existence of a "scheme or artifice to defraud" and the use of the mails in furtherance thereof.¹⁴⁶ Although the statute requires proof of "specific intent,"¹⁴⁷ the factfinder may infer intent from all the surrounding circumstances.¹⁴⁸ The courts have refused to define "scheme to defraud"

141. See, e.g., MODEL PENAL CODE § 222.1 (Official Draft 1962).

142. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE (1970) [hereinafter cited as STUDY DRAFT].

143. *Id.* § 1721(2).

144. *Id.*

145. *Id.*

146. 18 U.S.C. § 1341 (1976).

147. *Id.*

148. See, e.g., *United States v. Mackay*, 491 F.2d 616 (10th Cir. 1973), *cert. denied*,

with precision, but instead have

established that a "scheme to defraud" need not result in actual pecuniary or property loss to any victim nor need the scheme be contrary to state or federal law. Rather, the governing standard seems to be that of fair play, an obviously elusive standard upon which to make the question of criminal liability turn.¹⁴⁹

The vagueness of the mail fraud statute gives rise to the federal prosecutorial maxim "when in doubt, charge mail fraud"¹⁵⁰ and illustrates the prosecutorial advantages that inhere in a broadly phrased criminal statute. Use of the mails is seldom difficult to prove. Moreover, the elasticity of the "scheme to defraud" language has permitted federal prosecutors to initiate mail fraud prosecutions in response to the temper of the times. Thus, federal prosecutors have invoked the mail fraud statute in many recent political corruption prosecutions.¹⁵¹ The proverbial visitor from another planet would be surprised to learn that the venal indiscretions of Governor Kerner of Illinois, Governor Mandel of Maryland, and Governor Blanton of Tennessee were all prosecuted under the mail fraud statute.

Arguably, the federal mail fraud statutes and other similar federal statutes such as the Hobbs Act,¹⁵² the Travel Act,¹⁵³ the wire fraud statute,¹⁵⁴ and the Racketeer Influenced and Corrupt Organizations Act¹⁵⁵ serve important law enforcement interests. These statutes permit prosecutions in cases that otherwise would fall outside the criminal code. The elements of the crimes are relatively easy to prove, and the statutes can be directed to meet contemporary needs. For example, since no federal statute criminalizes local political corruption and local prosecutors cannot be relied upon to prosecute these cases, mail fraud becomes a useful federal weapon. The mail fraud statute thus permits federal authorities to

416 U.S. 972 (1974).

149. Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 127 (1981). See also 18 U.S.C. § 1341 (1976).

150. Coffee, *supra* note 149, at 126.

151. Governor Mandel of Maryland, Governor Kerner of Illinois, and Governor Blanton of Tennessee all were convicted under the mail fraud statute. See *United States v. Mandel*, 602 F.2d 652 (4th Cir. 1979) (Mandel); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1973), *cert. denied*, 417 U.S. 976 (1974) (Kerner); *United States v. Blanton*, No. 80-30253 (M.D. Tenn. Aug. 14, 1981), *appeal filed*, No. 81-5644 (6th Cir. Aug. 21, 1981) (Blanton).

152. 18 U.S.C. § 1951 (1976).

153. 18 U.S.C. § 1952 (1976).

154. 18 U.S.C. § 1343 (1976).

155. 18 U.S.C. §§ 1961-1968 (1976 & Supp. IV 1980).

proceed without waiting for Congress to enact a federal statute prohibiting local political corruption.

Congress' implicit delegation to federal prosecutors of the power to determine what behavior will constitute federal offenses creates separation of powers and federalism problems. Federal prosecutors may abuse their power to criminalize behavior and to extend federal criminal law into areas that are more appropriately within the province of the states—or into areas that Congress would not have expressly authorized.

The mail fraud statute and other similar federal laws illustrate the same ambivalence toward the criminal law that characterizes sentencing in the state criminal courts. Under indeterminate sentencing procedures, the substantial protections afforded defendants are largely symbolic because most defendants plead guilty. In addition, the rehabilitative sentencing ideology authorizes the sentencing judge to look beyond the defendant's conviction offense to determine the appropriate sentence. Thus, the conviction is a formality; the critical decisionmaking and distinguishing function occurs during the sentencing process. Similarly, the conviction under the mail fraud statute can be a formality that bears no close moral relation to the defendant's wrongdoing. It serves simply to subject the defendant to the court's sentencing authority, under which the judge can assess the moral quality of the defendant's acts and determine the appropriate punitive response.

Informal defenses also contribute to the moral incoherence of the criminal law. The substantive criminal law contains formal defenses that are classified as excuses,¹⁵⁶ justifications,¹⁵⁷ and mitigation.¹⁵⁸ These defenses are formal because they relate to the formal application of the criminal law. Judges, however, often consider informal mitigating defenses when setting sentences. Youth, inexperience, motive, contrition, unemployment, and mental subnormality are examples of the informal considerations that the substantive criminal law does not recognize, but which may be taken into account during sentencing. The Model Penal Code, for example, states that in most contexts the victim's consent to an assault is no defense.¹⁵⁹ Prosecutors and judges, however, routinely dismiss family assault cases if the victim elects to drop the prosecution. Similarly, repayment of stolen or embezzled money is not a

156. See, e.g., MODEL PENAL CODE §§ 4.01-4.09 (Official Draft 1962) (insanity excuse).

157. See, e.g., *id.* § 3.04 (self-defense).

158. See, e.g., *id.* § 210.3 (1)(b) (provocation).

159. *Id.* § 2.11.

defense to a criminal charge,¹⁶⁰ but prosecutors and judges often dismiss the charges if repayment is made. These cases require decisionmakers to draw normative and moral distinctions without guidance from the criminal code.

Under an indeterminate sentencing scheme, the criminal law purposely fails to address the moral grading of offenses and informal defenses. Criminal code draftsmen delegated to the judge the authority to take these considerations into account during sentencing. Thus, the moral incoherence of the criminal law enhances the importance of the sentencing stage. Many sentencing initiatives of recent years, however, attempt to establish a closer relation between the offender's wrongdoing and his punishment. Successful sentencing reform, therefore, will require major revisions of the substantive criminal law.

V. THE IMPORTANCE OF CRIMINAL LAW IN REFORM

The aspects of the criminal law identified above are responsible for the shift in focus of normative distinctions from the criminal law/adjudication stage of the criminal process to the sentencing stage. The criticisms of indeterminate sentencing—disparity, discrimination, noninclusion, irresponsibility, and crime control¹⁶¹—relate to the quality and consistency of normative distinctions. Recent sentencing reform initiatives, however, have concerned sanctioning—the back end of the criminal law. Very few sentencing proposals have addressed the substantive criminal law itself. This failure to scrutinize the normative distinctions is an astonishing oversight, since many of the perceived defects in sentencing are the product of the manner in which the criminal law is formulated. If meaningful changes are to result, comprehensive reform efforts must direct their attention to the substantive law.

Three recent developments suggest a need to focus attention on the criminal code. First, most sentencing initiatives that have been implemented under the existing indeterminate sentencing criminal codes have had little effect on the distribution of sentences. Second, since plea bargaining is ubiquitous and can eas-

160. *Id.* § 223.8.

161. *But see* TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT—REPORT OF THE TWENTIETH CENTURY TASK FORCE ON CRIMINAL SENTENCING app. A (1976).

ily frustrate any system of sentencing standards, reformers have made radical and unprincipled proposals for the control of plea bargaining under the guise of sentencing reform. Last, reform efforts, especially sentencing and parole guidelines systems, include attempts to expose the shadow criminal law and to subdivide statutory offenses into categories that draw the moral lines which the criminal codes lack.

A. *Evaluations of Sentencing Reforms*

Evaluations of the effect of recent sentencing reforms consistently point to three broad generalizations about sentencing.¹⁶² First, sentencing officials—judges, parole board hearing examiners, and prosecutors—must comply with the formal requirements of new sentencing procedures only if some mechanisms exist to maintain accountability.¹⁶³ When prosecutors or parole boards establish detailed policy guidelines along with managerial arrangements to monitor their employees' decisions, the guidelines are likely to be applied.¹⁶⁴ Conversely, if the sentencing procedures do not contain credible compliance mechanisms, new sentencing standards tend to have little effect.¹⁶⁵

Second, sentencing reforms that affect only judicial sentencing aspects of the criminal justice process appear to have little effect on sentencing patterns. Mandatory minimum sentence laws, for example, do not increase substantially the likelihood of imprisonment.¹⁶⁶ Defendants who would have been imprisoned before mandatory minimum sentencing are equally likely to be imprisoned under such a scheme. Defendants who clearly would not have been imprisoned before mandatory minimum sentencing remain unlikely to be incarcerated. Mandatory minimum sentencing laws, therefore, increase the likelihood of imprisonment only in marginal categories of defendants—those who might or might not have gone to prison before mandatory minimum sentencing took effect. In addition, an evaluation of California's Uniform Determinate Sen-

162. The body of social science evaluations of recent sentencing reforms remains small. For a critical review of recent studies of the effects of sentencing reforms, see RESEARCH ON SENTENCING, *supra* note 41, ch. 4.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

tencing Act¹⁶⁷ and Alaska's plea bargaining ban¹⁶⁸ reflects the conclusion that major sentencing reforms have had little effect on sentencing patterns.

Last, sentencing innovations often significantly affect court processes and functionings. The adaptive responses of lawyers and judges have maintained traditional sentencing patterns despite new institutional arrangements. Thus, one common effect of mandatory minimum sentencing laws is that more defendants tend to be diverted or dismissed from the criminal justice process under a mandatory minimum sentencing scheme than under conventional sentencing procedures.¹⁶⁹ Under New York's Rockefeller Drug Law,¹⁷⁰ for example; the percentages of defendants charged with drug offenses who were indicted, indicted defendants who were arrested, and arrested defendants who were convicted all steadily declined.¹⁷¹ The likelihood of imprisonment among those defendants convicted of drug charges, however, increased substantially.¹⁷²

This minimal effect that sentencing reforms have on sentences is not surprising. Criminal courts, especially urban felony courts, are complex organizations; just sentencing is but one of their many goals. Judges and prosecutors strive to keep cases moving and backlogs down. Prosecutors desire to maintain high conviction rates. Because many defense lawyers operate on a high-volume, low-fee basis, they cannot afford to invest much time or effort into any single case. On the other hand, defense lawyers at the same time need to be perceived as useful and effective. Moreover, lawyers and judges must maintain friendly relations with one another; if the court's daily and seemingly ceaseless work is to be accomplished, judges, prosecutors, and defense counsel must cooperate.¹⁷³

These interests encourage efforts to resolve cases in ways that serve everyone's ends. Amicable disposition of cases through plea negotiations embodies the shared interests of everyone, including the defendant. When sentencing reforms threaten recognized conventions and traditional expectations, lawyers and judges find nu-

167. See *supra* notes 95-102 and accompanying text.

168. See *supra* note 3.

169. See RESEARCH ON SENTENCING, *supra* note 41, ch. 4.

170. See *supra* note 114 and accompanying text.

171. See RESEARCH ON SENTENCING, *supra* note 41, ch. 4.

172. *Id.*

173. See J. EISENSTEIN & H. JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS 45-52, 60-64 (1977).

merous ways to adapt and to carry on business as usual. This behavior is not necessarily as insidious as it may appear. Judges and counsel may believe that conventions and expectations are right and just, and that sentences mandated by new procedures are unjust. Court functionaries may see avoidance of new sentencing laws as a necessary step toward avoiding injustice, rather than as an improper manipulation of the criminal justice process.

Under indeterminate sentence laws, the criminal codes offer the judge little guidance in sentencing. Statutory maximum sentences are often ten, twenty, twenty-five years, or longer. Generic offense definitions force judges to make their own moral discrimination among crimes. This combination of great power and few standards induces the judge to share the responsibility with plea-bargaining counsel.¹⁷⁴ Moreover, under indeterminate sentencing laws, the alternative to a plea bargain is to risk sentencing by a judge, who possesses great unregulated and unreviewable sentencing power. Defendants accordingly desire assurances either from counsel or through a plea bargain that the range of possible sentences is tolerable. This combination of the judge's great powers, the absence of standards, the functional and psychological benefits of shared responsibility for sentences, and the defendant's need for reassurance fosters a collegial system of case disposition. This tradition, which is firmly rooted in many jurisdictions, explains why many sentencing reforms have had little perceptible effect on sentences and why they instead have caused lawyers and judges to modify their practices to achieve traditional sentencing results. If sentencing innovations are to significantly change existing sentencing patterns, sentencing reforms must address the structural features of the criminal code.

B. *Criminal Law Reconstitution*

The numerous efforts to recognize normative distinctions in sentencing standards suggest the importance of the criminal law in sentencing. Following the lead of the United States Parole Commission, many jurisdictions have developed guidelines that specify

174. In evaluating the Alaska plea bargaining ban, some judges and lawyers complained that the ban impoverished sentencing by converting what had been a collegial interactive process into an individual and idiosyncratic one. See NAT'L INST. OF JUSTICE, *supra* note 3, at 30-32.

a recommended range of sanctions for any combination of offense and offender. The development of guidelines requires that the seriousness of different crimes and the relevance of various offender circumstances be considered. Thus, guideline developers must consider whether the criminal code or the offenses of which defendants are convicted reflect the necessary moral distinctions. If the criminal code fails to distinguish between the professional bank robber and the teenaged basketball thief, then sentencing guidelines must either ignore the obvious differences or create new distinctions. Sentencing reforms have tended to do the latter.

Many sentencing reform efforts reclassify felonies when developing sentencing guidelines, which is a reaction that illustrates even further the criminal law's normative inadequacy. Modern criminal codes either classify all felonies into a small number of classes or implicitly scale severity by specifying maximum lawful sentences.¹⁷⁵ Sentencing guideline drafters, however, often ignore these statutory classes and draft new distinctions. The Minnesota Sentencing Guidelines Commission and the United States Parole Commission, for example, have developed their own offense severity rankings. Drafters developed the severity ratings by conducting exercises in which the commissioners were asked to rate all regularly recurring crimes. The commissioners then negotiated the differences between the ratings. The Commissions subsequently adopted the resultant offense severity scale, notwithstanding the inconsistencies both with applicable criminal statutes and with the ratings implied by the maximum sentences authorized for each crime.¹⁷⁶

The criminal law's normative inadequacy is also demonstrated by the guidelines developers' efforts to subcategorize the criminal code's substantive offense definitions so that sentencing and parole standards will incorporate gradations of harm and culpability that the substantive law does not recognize. Similarly, the original Denver descriptive guidelines contained a category for unqualified robbery, but provided for sentence enhancement if a weapon was used, if an injury was inflicted, or if death resulted.¹⁷⁷ The Minne-

175. The Model Penal Code, for example, provides for three felony classes. MODEL PENAL CODE § 6.01 (official Draft 1962).

176. See MINNESOTA SENTENCING GUIDELINES COMM'N, ESTIMATING THE IMPACT OF SENTENCING POLICIES ON PRISON POPULATIONS 5, 6 fig. 2 (1980); HOFFMAN, BECK & DeGOSTIN, *The Practical Application of a Severity Scale in PAROLE: LEGAL ISSUES/DECISION-MAKING RESEARCH* 169-87 (1975).

177. See *supra* text accompanying notes 66-70; see also J. KRESS, *supra* note 92, *pas-*

sota Sentencing Guidelines created four "aggravated forgery" offenses from one statutory offense.¹⁷⁸ The Pennsylvania Commission on Sentencing subcategorized one statutory burglary definition into four different kinds of burglary.¹⁷⁹ These efforts to subclassify categories of conduct demonstrate that criminal statutes draw distinctions that are excessively gross and overly generic. Reform efforts, therefore, must incorporate these reclassifications into the criminal law.

C. Real Offense Sentencing

As noted earlier,¹⁸⁰ most convictions are the result of plea negotiation. Under conventional plea bargaining procedures, the defendant is convicted of the offense that he admits to rather than the offense that he committed. This conviction discrepancy presents no difficulty under an indeterminate sentencing scheme because the sentencing judge can disregard the conviction offense and consider the defendant's actual offense. The discrepancy, however, does pose a dilemma under determinate sentencing laws. Sentencing decisions must be based either on the conviction offense, and thus be subject to manipulation by plea bargaining counsel, or be based on the underlying criminal behavior, and thereby make explicit the irrelevance of the defendant's trial rights. After Minnesota abandoned parole release, the Minnesota Sentencing Guidelines Commission debated whether to base its sentencing guidelines on the conviction offense, which could be an artifact of plea bargaining, or on the defendant's real offense. Table 2 sets out the guidelines matrix that the Minnesota Sentencing Guidelines Commission developed. All felonies are divided into ten categories and are shown on the vertical axis.

sim; L. WILKINS, *supra* note 5, at 65.

178. Minnesota Guidelines, *supra* note 107, table V; *see* MINN. STAT. ANN. § 609.625 (1964).

179. Proposed Pennsylvania Guidelines, *supra* note 109, at 434; *see* 18 PA. CONS. STAT. ANN. § 3502 (Purdon 1973).

180. *See supra* notes 121-23 & 134 and accompanying text.

TABLE 2
MINNESOTA SENTENCING MATRIX: SENTENCING BY
SEVERITY OF OFFENSE AND CRIMINAL HISTORY

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

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

* one year and one day

Source: Minnesota Sentencing Guidelines Commission, Report to the Legislature 14 (1980)

The prior criminal records of defendants are divided into seven groups, which are arrayed on the horizontal axis. To ascertain the applicable guideline sentence, the judge determines the severity level of the conviction offense and the defendant's criminal history source. The cell located at the intersection of the appropriate row and column indicates the number of months that the defendant must serve. The cells below the jagged bold line contain a guideline sentence and a sentencing range. The judge may impose any sentence within this narrow range. Since the conviction offense determines the presumptive sentence, the defense counsel's ability to negotiate the defendant's plea determines the defendant's sentence. Notwithstanding this problem, the Minnesota Sentencing Guidelines Commission decided that to base its guidelines on any

offense other than the conviction offense would raise insurmountable problems of fairness: "Offense severity is determined by the offense of conviction [S]erious legal and ethical problems would be raised if punishment were to be determined on the basis of alleged, but unproven, behavior."¹⁸¹ The question remains whether the Minnesota guidelines will shift power to lawyers and whether lawyers will use that power to manipulate and circumvent the sentencing guidelines.

Other options were available to the Minnesota Commission. One leading proposal would have acknowledged the pressures that give rise to plea bargaining and would have attempted to confine plea bargaining's scope through "charge reduction guidelines."¹⁸² These guidelines would have specified the amount by which a defendant's sentence could be reduced if he pleaded guilty. The guidelines thus would have authorized judges to award only the prescribed "guilty plea discount."¹⁸³

The Model Sentencing and Corrections Act,¹⁸⁴ which provides for a sentencing commission and a presumptive sentencing guideline system, offers a different solution to the problem of circumventing sentencing guidelines. The Uniform Law Commissioners have attempted to counter charge bargains by basing sentences on "actual offense behavior."¹⁸⁵ The pertinent comment explains: "[T]he language, nature and circumstance of the offense authorizes . . . the sentencing court to consider offense behavior rather than the offense for which the defendant was ultimately convicted. The major purpose of the provision is to reduce disparity resulting from the effect of plea bargaining."¹⁸⁶ Unfortunately, the Model Act tends to trivialize the criminal process and thus is fundamentally flawed. For example, consider three defendants, each of whom has committed and been indicted for armed robbery. The first is convicted at trial of armed robbery, the second pleads guilty to robbery and the armed robbery charge is dismissed, and the third is tried by a jury and convicted only of theft. Under the real offense

181. See Minnesota Guidelines, *supra* note 107, comment II.A.01.

182. See S. SCHULHOFER, 1 PROSECUTORIAL DISCRETION AND FEDERAL SENTENCING REFORM 10 (Federal Judicial Center Report 1979); 2 *id.* at 47; Schulhofer, *supra* note 127, at 745. Several federal criminal code reform bills have included this proposal. See S. 1722, 96th Cong., 1st Sess. (1979); H.R. 6233, 96th Cong., 1st Sess. (1979).

183. See von Hirsch & Hanrahan, *supra* note 1, at 312-15.

184. NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT (Approved Draft 1979) [hereinafter cited as MODEL ACT].

185. *Id.* §§ 3-115, -206(d).

186. *Id.* § 3-115(b) comment at 144-45.

provision of the Model Act, all three defendants would be sentenced for armed robbery. This repugnant result trivializes the substantive law, the law of evidence, the defendant's procedural rights, and the criminal burden of proof. At the same time, indeterminate sentencing laws and the practices in most criminal courts today achieve the same regrettable results.

VI. CONCLUSION

The principal argument of this Article is that sentencing reform efforts have been partially misconceived because they ignore the substantive criminal law—an inattention that is an inherent aspect of indeterminate sentencing. The dilemmas which guideline draftsmen face confirm that determinate sentencing has drawn tighter the relationship between crime and punishment.¹⁸⁷ If sentencing innovations are to diminish sentencing injustices materially, reform must include four elements.

First, reformers must revise criminal codes substantially to reflect the morally salient features of criminal conduct. The Model Penal Code provides the basis of most state criminal codes. The intellectual roots of the Model Penal Code, however, are in the 1950's and reflect the rehabilitative goals of that time. Model Penal Code sentence maximums are long to allow for those whose rehabilitative needs require lengthy detention. Drafters of the Code anticipated that parole boards would shorten sentences routinely. Although offenses are defined in broad generic terms, judges may consider salient offense circumstances and thereby individualize the sentences that they impose. Consequently, developers of sentencing and parole guidelines systems have attempted to specify detailed criteria for decisionmaking and have had to define salient distinctions among crimes in terms that are much more detailed and specific than the offense definitions found in criminal codes.¹⁸⁸ Defining crime, however, is the quintessential legislative function to which guideline developers have been driven by the legislatures' failure to act. Legislatures, therefore, must return the task of drawing moral distinctions to the adjudicative stage where it belongs.

Second, legislatures should shorten to realistic levels the enormously long maximum sentences that are prevalent under inde-

187. See *supra* notes 175-86 and accompanying text.

188. See *supra* notes 175-79 and accompanying text.

terminate sentencing laws. Long maximum sentences permit "bark and bite" sentencing—the judge's bark and the parole board's bite. The abandonment of parole release, which has occurred in ten states,¹⁸⁹ makes lengthy maximum sentences unnecessary and invites disparate and aberrant sentences. If criminal statutes authorize judges to impose any sentence from probation to twenty-five years, sentences naturally will span that range. For the same offense, lawful sentences that range from probation to five years would narrow the range of disparity and reduce the likelihood of aberration.

Legislatures can reduce sentence maximums in several ways. The simplest and most honest method, which has been proposed in Great Britain by the Advisory Council on the Penal System and in Canada by the Law Reform Commission, is to amend the criminal code to establish much shorter maximum sentences.¹⁹⁰ The Study Draft of the National Commission on Reform of Federal Criminal Laws reduces statutory maximums through sleight of hand.¹⁹¹ Although the nominal maximums are conventional—Class A, twenty-five years; Class B, fifteen years; and Class C, seven years—the effective maximum sentences for most offenders are three and four years, since a mandatory parole term—five years, three years, and two years—is included within each maximum sentence. Table 3 sets out the National Commission Proposal. Longer sentences are reserved within each offense class for exceptional cases in which the judge makes a special finding that the defendant "presents an exceptional risk to the safety of the public."¹⁹²

Regardless of the method chosen, reduction of sentence maximums should be a primary goal of sentencing reform. Otherwise, the long sentence maximums of indeterminate sentencing systems will continue to frustrate efforts to reduce disparities in sentencing. Although lengthy sentence maximums occupied a logical position in the era of indeterminate sentencing, they have no place in the current period of reform.

189. See *supra* note 120 and accompanying text.

190. ADVISORY COUNCIL ON THE PENAL SYSTEM, SENTENCES OF IMPRISONMENT—A REVIEW OF MAXIMUM PENALTIES 77-88, 147-64 (1978); LAW REFORM COMM'N OF CANADA, STUDIES ON IMPRISONMENT (pt. 2) 21-22 (1975).

191. STUDY DRAFT, *supra* note 142, at §§ 3201-3202.

192. *Id.* § 3202(3)-(5). The "exceptional risk" assessment includes situations in which the defendant is a "persistent felony offender," a "professional criminal," or a "dangerous, mentally abnormal offender." *Id.*

TABLE 3

NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS:
NOMINAL AND ACTUAL MAXIMUM SENTENCES

FELONY CLASS*	NOMINAL	ACTUAL	ACTUAL
		WITHOUT SPECIAL FINDING	WITH SPECIAL FINDING
A	30 years	15 years	25 years
B	15 years	4 years	12 years
C	7 years	3 years	5 years

* The vast majority of felonies, and felons, would fall within Felony classes B and C and thus, ordinarily, be subject to terms of incarceration not longer than 3 or 4 years. An enormous amount of sentencing disparity would disappear.

Source: National Commission on Reform of Federal Criminal Laws, Study Draft §§ 3201-3202 (1970).

Third, reformers must develop detailed sentencing standards that provide clear guidance to judges and permit them to use discretion when appropriate. Minnesota's sentencing guidelines system provides the most hopeful model for reform.¹⁹³ The Minnesota system prescribes narrow ranges within which sentences should be imposed in ordinary cases, but permits judges, subject to appellate sentence review, to depart from these ranges if they provide written explanations of the "substantial and compelling circumstances."¹⁹⁴ This sentencing system attaches high priority to equal treatment, but avoids the problems of fixed and mechanical applications.

Last, legislatures should establish appellate review of sentences and provide adequate material support. Although sentencing affects a defendant's most fundamental interests, defendants in most states are unable to obtain review of their sentences.¹⁹⁵ The lack of detailed sentencing criteria, long maximum sentences, and parole board release powers impede effective appellate review under indeterminate sentencing. Appellate review, however, should be more practicable under new sentencing laws. The Minnesota Supreme Court, for example, appears to be monitoring the Minnesota sentencing guidelines with some vigor.

193. See *supra* notes 178 & 180-81 and accompanying text.

194. See Minnesota Guidelines, *supra* note 107.

195. See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (Approved Draft 1968).

These four changes would make the American criminal process similar to those of other countries. Plea bargaining as the primary form of case disposition, for example, is a uniquely American phenomenon. Similarly, the combination of long sentences with parole discretion for shortening sentences routinely by half is peculiarly American. Parole release, for example, was not established in England until 1967, and West Germany and Scandinavia use parole to reduce prison sentences only by increments that are measurable in months.¹⁹⁶ In addition, the United States is the only major common-law country that lacks a tradition of vigorous appellate review of sentences.¹⁹⁷

The sentencing reform movement has made major progress in developing decision rules and increasing official accountability. If attention is now refocused to include substantive criminal law in the sentencing process, the result could be a system in which crime and punishment are closely related, and in which the law recognizes the enormity of the issues at stake when depriving citizens of their liberty.

196. See R. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 280 (6th ed. 1972).

197. The Australian Law Reform Commission recently pointed out that in virtually all common law jurisdictions "with the exception of the United States, appellate review of sentences has been the main method adopted to achieve consistency in, and develop principles for, the imposition of punishment." *AUSTRALIAN LAW REFORM COMM'N, SENTENCING OF FEDERAL OFFENDERS* 360 (1980).

