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

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I. INTRODUCTION

In the American system of criminal justice, power over punishment is allocated primarily among four types of governmental decisionmakers—legislatures, prosecutors' offices, courts, and correctional agencies (including, most notably, parole boards).¹ The thrust of many recent proposals for sentencing reform has been to reduce or eliminate the discretion of both courts and correctional agencies and to increase the extent to which legislatures specify criminal penalties in advance.² In "fixed" sentencing schemes, statutes specify the exact penalty that will follow conviction of each offense; in systems of "presumptive" sentencing, statutes specify a "normal" sentence for each offense but permit limited departures from the norm in atypical cases. Although prosecutors' offices, in practice, have probably had a greater influence on sentencing than any of the other agencies (including state legislatures), the call for sentencing reform has largely ignored this extensive prosecutorial power. In my view, fixed and presumptive sentencing schemes of the sort commonly advocated today (and of the sort enacted in

* This Article is based on a speech delivered at the Conference on Determinate Sentencing in Berkeley, California on June 2 & 3, 1977. The conference was sponsored by the University of California Law School and the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration.

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

² See D. FOGEL, "... WE ARE THE LIVING PROOF . . .": THE JUSTICE MODEL FOR CORRECTIONS (1975); M. FRANKEL, CRIMINAL SENTENCES 103-24 (1972); REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976) [hereinafter cited as FAIR AND CERTAIN PUNISHMENT]; A. VON HIRSCH, DOING JUSTICE 98-106 (1976). See also J. MITFORD, KIND AND USUAL PUNISHMENT (1973); STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (prepared for the American Friends Service Committee 1971) [hereinafter cited as STRUGGLE FOR JUSTICE]; N.Y. Times, Feb. 3, 1976, at 13, col. 1 (views of Attorney General Levi); N.Y. Times, Dec. 6, 1975, at 29, col. 1 (views of Senator Kennedy).

California³) are unlikely to achieve their objectives so long as they leave the prosecutor's power to formulate charges and to bargain for guilty pleas unchecked. Indeed, this sort of reform is likely to produce its antithesis—a system every bit as lawless as the current sentencing regime, in which discretion is concentrated in an inappropriate agency, and in which the benefits of this discretion are made available only to defendants who sacrifice their constitutional rights.

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

II. THE DISCRETION OF PAROLE BOARDS

Of the various components of the call for sentencing reform, academic observers have probably been most receptive to proposals for severely restricting or eliminating the powers of parole boards. The present extent of these powers reflects a reformatory jurisprudence implemented, for the most part, in the early twentieth century as a concomitant of the Progressive Movement.⁴ The

³ CAL. PENAL CODE § 1170 (West Cum. Supp. 1977).

⁴ Address by David Rothman to the Advisory Committee of the National Institute of Law Enforcement and Criminal Justice, Washington, D.C. (Feb., 1976). Professor Alan M. Dershowitz prepared a short history of sentencing reform in America for the Twentieth Century Fund Task Force on Criminal Sentencing. He noted that as early as 1787 Dr. Benjamin Rush proposed a system of indeterminate sentencing in which an offender's release from prison would depend upon his progress toward rehabilitation. Dershowitz, *Background Paper*, in FAIR AND CERTAIN PUNISHMENT, *supra* note 2, at 86. In 1847, S. J. May argued against judicial sentencing on the ground that every offender should be held in prison "until the evil disposition is removed from his heart." *Id.* 90. The first indeterminate sentencing law in the United States, providing a three-year sentence for "common prostitutes" which could be terminated at any time by the inspectors of the Detroit

asserted justification for the parole board's sentencing powers is essentially that expert penologists, who can evaluate an offender's conduct and his response to treatment in prison, can best determine the appropriate moment for his release.

That I and many other academics adhered in large part to this reformatory viewpoint only a decade or so ago seems almost incredible to most of us today. To probe a person's psyche and predict his future behavior is always an awesome task, and the optimistic belief that one can discern a person's general propensity for law observance from his regimented conduct in a prison now seems remarkably naive. Although not all of us are ready simply to abandon rehabilitation as one objective of the criminal process (at least not in every circumstance), we have become far less ambitious in pursuing this goal than we were a few years ago when we encouraged our state legislatures to adopt some variation of the Model Penal Code's sentencing scheme. Our general disillusionment with rehabilitative goals stems from both jurisprudential and pragmatic considerations. Even if the state could achieve its rehabilitative objectives far more often than it does, we have become doubtful that an offender's wrongdoing justifies a broad assumption of governmental power over his personality. Moreover, almost every means of rehabilitating criminals has been tried, and almost nothing seems to work.⁵ The sad fact is that, so far as we can tell, most prisoners are not perfectable victims of social ills who will respond to one kind of treatment or another. Some, an undetermined number, may draw a lesson from the unpleasant experience of being arrested, convicted and punished; but apart from this "specific deterrence," only two personal experiences, aging⁶ and religious conversion, seem likely to work dramatic changes in an offender's behavior.

The principal practical effect of our emphasis on "cure" has been to encourage convicts to view their time in prison as an exercise in theatre.⁷ They "volunteer" for group therapy and other

House of Correction, was enacted at the behest of Warden Zebulon R. Brockway in 1869. *Id.* 95. The following year, the National Prison Congress endorsed indeterminate sentencing with a religious fervor that persisted among prison officials in the decades that followed. *Id.* 93. See D. FOGEL, *supra* note 2, at 1-64. Despite some noteworthy intellectual precursors dating back at least to Dr. Rush's proposal in the eighteenth century, the flowering of indeterminate sentencing has been a relatively recent phenomenon.

⁵ See, e.g., Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22 (1974).

⁶ E. SUTHERLAND & D. CRESSEY, *CRIMINOLOGY* 121-26 (9th ed. 1974).

⁷ See N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974).

rehabilitative programs, say the right things about the help that they have received, and even find Christ and become guinea pigs for medical experimentation in hypocritical efforts to curry favor with parole boards. In addition, it has become increasingly apparent that the very indeterminacy of indeterminate sentences is a form of psychological torture.⁸

Even if parole boards do not effectively serve their intended function, they are probably not utterly useless. As a statewide agency, a parole board can sometimes exercise its power in such a manner as to reduce the disparities in sentencing created by the varying outlooks of local judges and prosecutors. In addition, as an agency whose decisions are somewhat removed from local pressures and emotions and removed in time from the adjudication of guilt, a parole board can sometimes counteract the untoward vindictiveness of local sentencing officials.⁹ (It seems worth noting that the concept of parole as a period of supervised release halfway between confinement and freedom can be retained even if the sentencing powers of parole boards are eliminated. Parole release has been criticized on the ground that it constitutes merely a gratuitous "hold" over former prisoners rather than a meaningful aid to reintegration or a worthwhile form of policing,¹⁰ but if a supervised period of transition from prison to the streets is desirable, it can become a regular feature of every prison sentence rather than a subject of the parole board's discretion.¹¹)

Under America's regime of guilty plea bargaining, an offender who has exercised the right to trial is likely to receive a much more severe sentence than an otherwise identical offender who has pleaded guilty.¹² The available evidence suggests that parole boards have used their sentencing powers to reduce this disparity, albeit to a limited extent.¹³ Reduction of the sentence differential between guilty plea and trial defendants may be another worthwhile "inci-

⁸ See, e.g., Ramsey, *Book Review*, 24 STAN. L. REV. 965 (1972).

⁹ See, e.g., N. MORRIS, *supra* note 7, at 48.

¹⁰ J. MITFORD, *supra* note 2, at 216-27.

¹¹ See, e.g., CAL. PENAL CODE §3000(a) (West Cum. Supp. 1977) (at the expiration of an inmate's determinate sentence less whatever "good time" credit he has earned, he "shall be released on parole for a period not exceeding one year, unless the board for good cause waives parole and discharges the inmate from custody.").

¹² See, e.g., ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *FEDERAL OFFENDERS IN UNITED STATES DISTRICT COURTS* 1971, at 13 (1973) (Exhibit VII); Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059, 1085 n.89 (1976).

¹³ See Shin, *Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Processes*, 1 J. CRIM. JUST. 27, 36-40 (1973).

dental" function of parole boards. When the ability of parole boards to perform this function is reduced or eliminated, the power of bargaining prosecutors is likely to be increased. With the restriction of the parole board's discretion, a defendant who is considering whether to accept a proposed plea agreement need not fear that parole practices may, to some extent, deprive him of the apparent benefit of his bargain; nor can a defendant who chooses to stand trial hope that parole practices will ameliorate the penalty that our system of criminal justice threatens for his exercise of a constitutional right.

Nevertheless, the practice of plea bargaining does not necessarily argue for maintaining the existing powers of parole boards, for much depends on what becomes of those powers in a reformed system of sentencing. The powers currently exercised by parole boards can be assumed by legislatures or transferred to judges to be exercised following an offender's conviction, or they can be transformed into additional levers that prosecutors may use in inducing pleas of guilty. Prior to the recent elimination of the California Adult Authority as part of that state's sentencing reform, the sentencing power of that agency was so extensive that most practitioners saw little point in plea bargaining when an offender seemed certain to be sentenced to state prison in any event.¹⁴ Under the new California sentencing statute, bargains affecting the length of an offender's stay in prison will undoubtedly become commonplace.¹⁵ Much of the Adult Authority's power will, in other words, be transferred to the prosecutor's office.¹⁶ Moreover, when the benefits of discretion become available *only* through the plea bargaining process, the concentration of abusive power in the hands

¹⁴ Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 101-03 & n.129 (1968).

¹⁵ See text accompanying notes 54-70 *infra*.

¹⁶ Professor Phillip E. Johnson read a draft of this paper and commented that it was somewhat misleading to speak of the transfer of power to the prosecutor's office. Because defense attorneys are active participants in the negotiating process, Professor Johnson suggested that one might better refer to the enhanced power of *both* the prosecutor and his adversary. Of course defense attorneys do have a significant voice in the formulation of plea agreements. Nevertheless, after a defense attorney has made his arguments and exerted whatever plea bargaining leverage he can, a prosecutor must still determine what punishment is acceptable to the state before entering a plea agreement. In this sense, the input provided by the defense attorney can be viewed as one important influence on an official sentencing decision made by the prosecutor. Professor Johnson is certainly correct that a prosecutor's sentencing power is likely to be constrained by a variety of circumstances, and I hope that my continued use of the term "prosecutorial power" does not convey too imperial an image.

of a single agency is especially to be feared. I therefore turn to proposals to restrict the discretion of trial judges.

III. JUDICIAL SENTENCING DISCRETION

The advocates of fixed and presumptive sentencing commonly argue that judicial sentencing discretion stands on about the same discredited footing as the discretion of parole boards. For example, Andrew von Hirsch has written that "wide discretion in sentencing has been sustained by the traditional assumptions about rehabilitation and predictive restraint. Once these assumptions are abandoned, the basis for such broad discretion crumbles."¹⁷

Unlike the discretion of parole boards, judicial sentencing discretion is not an outgrowth of the optimism of the Progressive Era.¹⁸ Judges have had broad sentencing powers for as long as prisons have been used to punish and even longer. I recently discovered an old volume of Tennessee and North Carolina statutes that contains some illustrations, including the following provision on horse stealing enacted by the Tennessee General Assembly in 1807:

Be it enacted, that every person who shall feloniously steal, take and carry away, any horse, mare or gelding, the property of another person, the person so offending, shall, for the first offense be adjudged and sentenced by the court before whom convicted, to receive on his or her bare back, a number of lashes, *not exceeding thirty-nine*, be imprisoned *at the discretion of the court, not less than six months, and not exceeding two years*, shall sit in the pillory two hours on three different days, and shall be rendered infamous . . . and shall be branded with the letters H.T. *in such manner and on such part of his person as the court*

¹⁷ A. VON HIRSCH, *supra* note 2, at 98.

¹⁸ Professor Dershowitz concluded that penal code revisions between 1790 and 1820 "reflected the views that certainty of punishment is more important than severity of punishment." Dershowitz, *supra* note 4, at 85. Yet the statute that he cited to illustrate this proposition, a Massachusetts law on maiming enacted in 1804, gave trial judges discretion to select any term of solitary imprisonment not exceeding 10 years. *Id.* 134 n.6. Professor Dershowitz also quoted a 1750 Massachusetts statute that provided: "where there shall appear any circumstances to mitigate or alleviate any of the offenses against this act . . . it shall and may be lawful for the judges . . . to abate the whole of the punishment of whipping or such part thereof as they shall judge proper." *Id.* 134 n.5. And he noted a 1676 Pennsylvania law that empowered judges to sentence offenders who were unable to pay a fine to "Corporal punishment not exceeding twenty Stripes, or do Service to Expiate the Crime." *Id.* 133 n.2.

*shall direct; and on the second conviction shall suffer death without the benefit of clergy.*¹⁹

Even more interesting is a North Carolina statute on suborning perjury enacted in 1777—thirteen years before the establishment of the Walnut Street Jail in Philadelphia, the event commonly viewed as inaugurating the use of imprisonment as a penal sanction in America.²⁰ This statute provided that a convicted offender should “stand in the pillory one hour, have his or her right ear nailed thereunto, *and be further punished by fine and imprisonment at the discretion of the court.*”²¹

The North Carolina legislature of 1777 would probably have agreed with the position adopted by the California legislature two hundred years later: “[T]he purpose of imprisonment for crime is punishment.”²² Rather than establish a system of fixed sentences, however, the North Carolina legislature chose the opposite extreme; it imposed no limitations whatever upon the trial judge’s power to determine the length of an offender’s confinement. This bit of history suggests that the medical model of rehabilitation has been neither the exclusive nor the primary impetus for the grant of judicial sentencing discretion in America.

Simply in terms of blameworthiness or desert, criminal cases are different from one another in ways that legislatures cannot anticipate, and limitations of language prevent the precise description of differences that can be anticipated. One need not adopt grandiose rehabilitative goals to think that it should sometimes

¹⁹ An Act Defining the Punishment to be Inflicted on Persons Guilty of the Crimes and Offenses Therein Mentioned, § 4, Tenn., Dec. 3, 1807, *reprinted in* 1 E. SCOTT, LAWS OF THE STATE OF TENNESSEE INCLUDING THOSE OF NORTH CAROLINA 1056 (1821) (emphasis added).

²⁰ See, e.g., Cloward, *Correctional Administration and Political Change*, in PRISON WITHIN SOCIETY 78, 84 (L. Hazelrigg ed. 1968). For a discussion of the inauguration of the Walnut Street prison, see B. McKELVEY, AMERICAN PRISONS 2-7 (1936).

²¹ An Act for the Punishment of Such Persons as Shall Procure or Commit Any Wilful Perjury, N. Car., Apr. 8, 1777, *reprinted in* 1 E. SCOTT, *supra* note 19, at 155-56 (emphasis added). Many of the early nineteenth century statutes included in Scott’s interesting book provided for punishments such as a fine of not less than \$50 or more than \$1000, imprisonment for not less than one nor more than 12 months, and whipping “on the bare back with a whip or cow-skin, with not less than ten nor more than thirty-nine lashes.” See, e.g., 1 E. SCOTT, *supra* note 19, at 5, 140. Later in the nineteenth century, terms of imprisonment became longer as state penitentiaries replaced local jails and as both capital and corporal punishment fell into disfavor, yet broad judicial sentencing discretion remained the norm. See, e.g., Revised Statutes of the Territory of Colorado, ch. 22, § 44 (1868) (“Every person convicted of the crime of rape, shall be punished by confinement in the penitentiary for a term not less than one year, and such imprisonment may extend to life”).

²² CAL. PENAL CODE § 1170(a)(1) (West Cum. Supp. 1977).

make a difference whether an armed robbery was committed with a machine gun, a revolver, a baseball bat, a toy gun or a finger in the pocket. Perhaps it should also make a difference whether the crime was motivated by a desperate family financial situation or merely a desire for excitement; whether the robber wielded a firearm himself or simply drove the getaway car; whether the victim of the crime was a blind newsstand operator whom the robber did not know or a person against whom the robber had legitimate grievances; whether the robber took five cents, \$100,000 or a treasured keepsake that the victim begged to retain; whether the crime occurred at noon on a crowded street corner or at midnight in an alley; whether the robber walked voluntarily into a police station to confess or desperately resisted capture; and whether the robber was emotionally disturbed or a calculating member of an ongoing criminal organization. The principal function of judicial sentencing discretion has probably been to permit a detailed consideration of differences of this sort in culpability—a consideration that legislatures have historically recognized their own inability to provide. When, in recent years, a judge has sentenced one of several co-felons to a term of probation and the others to imprisonment, he was likely to remark that the defendant placed on probation had exhibited greater rehabilitative potential than the others. The judge may have meant nothing more, however, than that the favored defendant was young, had participated in the crime in a relatively minor way and had been induced to participate through some beguilement on the part of his confederates; he therefore seemed substantially less blameworthy than his fellows. Even when our rhetoric has emphasized reformation, the dominant reality may have been “just deserts.”

In short, the varieties of human behavior are so great that a legislative definition of crime must usually encompass acts of substantially different culpability. Even more importantly, the personal characteristics of offenders may remain as significant in a sentencing regime based on desert as in a regime based in part on the goals of rehabilitation and predictive restraint. Our past optimism concerning criminal justice issues apparently accorded with our view of history as progress and of America as the newfound land: “Did someone rob a bank? If so, this person must never have had a chance. We will give him that chance. We will teach him how to be a welder, and he will not rob banks any more.” Recently, however, the experiences of Vietnam, Watergate and, in the criminal justice area, studies that demonstrate the naiveté of our

earlier rehabilitative ambitions have diminished our buoyancy. Some Americans have apparently become weary and disillusioned in general and, in particular, tired of thinking of offenders as individuals. Although a corrective for the undue optimism of the past is undoubtedly in order, the corrective may be carried too far. We may find ourselves thinking: "Don't tell us that 'a robber was retarded. We don't care about his problems. We don't know what to *do* about his problems, and we are no longer interested in listening to a criminal's sob stories. The most important thing about this robber is simply that he *is* a robber. He committed the same crime as Bonnie and Clyde." Should this sort of sentiment prevail, we will almost certainly have lost something, not in terms of the effectiveness of the criminal justice system, but as human beings. One need not know what to do about an offender's problems in order to regard those problems as highly relevant to the punishment that he should receive.

Sentencing reformers typically object to the instrumental use of human beings to accomplish generalized social objectives.²³ It seems to them more consistent with individual dignity to punish an offender because he "deserves" it than to punish him for the sake of society at large. Nevertheless, treating defendants of differing degrees of culpability alike for the sake of certainty in sentencing seems to involve greater instrumentalism than that exhibited by our current sentencing regime. In a system of fixed or presumptive sentencing, cases may arise in which the legislative "tariff" will prove unjust, but the reformers do not seem to worry very much about this problem. Their attitude apparently is that one who commits a crime must always expect to pay the price. This offender's punishment may be deserved only in the sense that it was specified in advance. Nevertheless, "the law must keep its promises."²⁴

The intellectual progenitor of today's fixed-sentencing movement, Cesare Beccaria, wrote in 1764 that "crimes are only to be measured by the injury done to society. They err, therefore, who imagine that a crime is greater, or less, according to the intention of the person by whom it is committed. . . ." ²⁵ If one were to adhere to Beccaria's remarkably primitive concept of blame, the formulation of a workable fixed-sentencing scheme might not be too difficult a task. Reformers in the last quarter of the twentieth

²³ See STRUGGLE FOR JUSTICE, *supra* note 2, at 145-50; A. VON HIRSCH, *supra* note 2, at 66-67.

²⁴ 1 HOLMES-LASKI LETTERS 806 (M. Howe, ed. 1953).

²⁵ C. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENT 26 (London 1767).

century, however, have not been so inhumane. As von Hirsch has observed, "[The seriousness of the crime] depends both on the harm done (or risked) by the act and on the degree of the actor's culpability."²⁶ It is noteworthy that Beccaria himself recognized that a consideration of factors other than social harm would require individualized sentencing: "[I]t would be necessary to form, not only a particular code for every individual, but a new penal law for every crime."²⁷

Most of today's reformers recognize the need for some small amount of judicial discretion to take account of variations in culpability within single offense categories. Their proposals typically provide for variations of plus-or-minus twenty percent or plus-or-minus one year in the presumptive prison sentence for each offense.²⁸ A basic question is, of course, whether this limited degree of flexibility is enough.²⁹ In addition, California's recently revised penal code leaves the most important component of the sentencing decision—the choice between prison and probation—to the same

²⁶ A. VON HIRSCH, *supra* note 2, at 69.

²⁷ C. BECCARIA, *supra* note 25, at 27.

²⁸ See, e.g., A. VON HIRSCH, *supra* note 2, at 98-101.

²⁹ Fixed and presumptive sentencing schemes have focused primarily on the sentence to be imposed for a single crime. Before being apprehended, however, an offender commonly will have committed 5 armed robberies, or will have made 150 fraudulent entries in his employer's books, or will have sold 1000 counterfeit lottery tickets. To multiply a legislatively fixed or presumptive sentence 5 or 150 or 1000 times in these situations would be manifestly unjust, yet to disregard the defendant's "additional" crimes seems at least equally improper. None of today's reformers have devised a non-discretionary formula for weighing multiple crimes that appears equitable in all situations.

The approach taken in the new California statute toward this problem is better than most. When a judge imposes consecutive sentences for multiple felonies, the aggregate sentence is limited to "the greatest term of imprisonment imposed by the judge for any of the crimes, including any enhancements . . . plus one-third of the middle term of imprisonment prescribed for each other felony convictions for which a consecutive term of imprisonment is imposed without such enhancements." CAL. PENAL CODE § 1170.1a(a) (West Cum. Supp. 1977). In addition, the aggregate sentence imposed for crimes other than the "base" offense cannot exceed five years. *Id.* § 1170.1a(e). The decision whether to impose consecutive sentences, however, is left to the judge's discretion. In multiple-crime situations, this discretion seems necessary, and indeed, more discretion might well be desirable.

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

lawless discretion as in the past.³⁰ The seemingly ludicrous result is that a judge may have an unfettered choice between probation and a specified prison term but no power to impose an intermediate punishment. Whatever the logic of their demands for certainty, some liberal reformers appear unwilling to advocate the "mandatory minimum sentences" that they have previously condemned, and reluctant to take any step that obviously will disadvantage defendants. Hence their proposals retain probation on the same discretionary terms as in the past.

Some of today's reformers also recognize that a more precise definition of substantive crimes will be necessary before a scheme of presumptive sentencing can be fair, and the Twentieth Century Fund Task Force on Criminal Sentencing has drafted an "illustrative presumptive sentencing statute for armed robbery" to demonstrate the feasibility of the task.³¹ The statute seems, however, to demonstrate the reverse. It divides the crime of armed robbery into six degrees and yet takes account of only two variables—the sort of weapon used and the amount of physical violence threatened. Even the attempt to rationalize these two variables is somewhat crude; for example, robbery with a machine gun is treated no differently from robbery with a .22 caliber target pistol.³² More importantly, variables such as the amount of money taken, the number and character of the victims, the motivation for the crime, and any special disabilities of the offender are relegated to a list of aggravating and mitigating circumstances that may sometimes justify a departure from the presumptive sentence.³³

The Task Force's effort to provide an "exclusive" list of aggravating and mitigating factors is itself troublesome. For example, under the Task Force proposal, a judge would apparently be expected to disregard the fact that a particular offender was seized with remorse, turned himself in, and provided information that led to the arrest and conviction of a half-dozen violent criminals. Perhaps the Task Force did not make a focused decision that this sort of post-crime conduct is irrelevant to the punishment that an offender should receive. The authors may have given the issue little thought, and therein lies the danger of attempting to specify

³⁰ The new statute does direct the California Judicial Council to adopt rules to promote uniformity in the grant or denial of probation as well as to promote uniformity in resolving other sentencing problems, such as whether to impose the minimum or maximum prison term or consecutive or concurrent sentences. *Id.* § 1170.3.

³¹ FAIR AND CERTAIN PUNISHMENT, *supra* note 2, at 37-53.

³² *Id.* 38.

³³ *Id.* 43-45.

all relevant sentencing factors in advance.³⁴ More importantly, a list of unweighted aggravating and mitigating factors does little to confine judicial discretion. If every significant variable were domesticated in the same manner that the draft domesticates a few, and if each variable were then cross-tabulated with every other variable, the resulting armed robbery statute would probably exhibit about the same degree of prolixity as an entire penal code today. Armed robbery in the 161st degree might be the taking of property worth between ten and fifty dollars from a single victim without special vulnerabilities by a mentally retarded offender acting alone and using a loaded firearm.³⁵

A more promising approach is currently being developed by Leslie Wilkins, Jack Kress and their associates in the City of Denver and in the State of Vermont,³⁶ and by Judge Sam Callan and the other criminal court judges in El Paso, Texas.³⁷ In essence, these

³⁴ Additional illustrations of this danger are provided by the "guided discretion" capital punishment statutes favored by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 188-95 (1976), and its companion cases. A defendant convicted of capital murder might wish to make the following speech to the jury before it considered whether capital punishment should be imposed: "I am deeply sorry for my crime, which I recognize was about as bad as any that can be imagined. I did, in fact, go to the police station shortly after the killing to surrender and make a full confession. Although I have done some terrible things in my life, you may wish to know, before deciding whether I should live or die, that I have also done some good. I once risked my life in combat to save five comrades—an action for which I was awarded the Silver Star—and for the past 10 years I have personally cared for my invalid mother while supporting five younger brothers and sisters." The "mitigating factors" listed in today's capital punishment statutes are sometimes quite general, but none that I have seen would permit a jury to consider any of the circumstances mentioned in this defendant's speech (or, for that matter, any other evidence of pre-crime virtue or post-crime remorse). Certainly the Florida statute upheld in *Proffitt v. Florida*, 428 U.S. 242, 248 n.6 (1976), would not; yet the Supreme Court plurality, seemingly oblivious to the statute's limitations, declared in a companion case that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek v. Texas*, 428 U.S. 262, 271 (1976); see *Roberts v. Louisiana*, 97 S. Ct. 1993 (1977) (per curiam) (mandatory death penalty for murder of fireman or law enforcement officer unconstitutional—jury must be able to consider mitigating factors).

³⁵ In addition to its illustrative armed robbery statute, the Twentieth Century Fund Task Force provided a brief description of how it might treat a number of other crimes. For a forceful dissection of this description, see Zimring, *Making the Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform*, 6 HASTINGS CENTER REPORT, 15-16 (1976).

³⁶ See L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION (1976) [hereinafter cited as SENTENCING GUIDELINES].

³⁷ See Memorandum to Members of the El Paso County Bar from Judges of the Criminal District Courts (Dec. 16, 1975) (on file with the *University of Pennsylvania Law Review*). The El Paso "point system for sentencing" is substantially less sophisticated than that which Wilkins, Kress and their associates are developing. SENTENCING GUIDELINES, *supra* note 36. Without the aid of a computer, an LEAA

scholars and court officials have been working to evolve a "point system" under which a sentencing judge would assign values to a number of recurring sentencing factors in the cases that come before him. When an offender has been convicted of a class 2 felony under the local penal code, for example, the judge might start with a base score of six points. Then he might add two points because the offender carried a firearm during the crime, add another two points because he fired this weapon, add still another point because the offender was convicted of a serious misdemeanor within the past year, subtract two points because the offender cooperated in the prosecution of other offenders, and so on. The final score would be translated into a presumptive sentence which the judge could disregard (and not just within a limited range of plus-or-minus twenty percent or plus-or-minus one year), provided he articulated his reasons for doing so. Another worthwhile approach is incorporated in S. 1437, the compromise proposal for a revised federal criminal code introduced by Senators McClellan and Kennedy.³⁸ This ap-

grant, or a detailed study of past sentencing practices, Judge Callan devised it one day while sitting in a bathtub. El Paso's sentencing reform is especially interesting, however, because the district court judges coupled it with a prohibition of prosecutorial plea bargaining—a prohibition that seems to have been entirely effective.

³⁸S. 1437, 95th Cong., 1st Sess. (1977). The bill would create a United States Sentencing Commission and direct it to prescribe a "suggested sentencing range . . . for each category of offense involving each category of defendant." The bill also enumerates the factors to be considered by a court in imposing a sentence:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed:
 - (A) to afford adequate deterrence to criminal conduct;
 - (B) to protect the public from further crimes of the defendant;
 - (C) to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the sentencing range established for the applicable category of defendant as set forth in the guidelines that are issued by the [United States] Sentencing Commission [which would be established pursuant to S. 181, 95th Cong., 1st Sess. (1977)] and that are in effect on the date the defendant is sentenced; and
- (4) any pertinent policy statement issued by the Sentencing Commission . . . that is in effect on the date the defendant is sentenced.

Id. § 2003(a).

The court, "at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence is outside the range described in subsection [2003](a)(3), the *specific* reason for the imposition of a sentence outside such range." *Id.* § 2003(b). A sentence imposed outside the range established by the Sentencing Commission would ordinarily be subject to appellate review. *Id.* §§ 3725(a) & (b).

proach, when fully developed, promises to combine substantial guidance for sentencing judges with the flexibility needed to treat different cases differently.

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

IV. PROSECUTORIAL PLEA BARGAINING

Any reform of sentencing practices, whether great or small and whether taking the form of fixed sentences, presumptive sentences or sentencing guidelines, can be undercut by the practice of plea bargaining. The advocates of dramatic change in our system of criminal punishment have dutifully noted that prosecutors do, in effect, make sentencing decisions in formulating charges³⁹ and in negotiating pleas of guilty. They have even proclaimed that "there can be no practical understanding of any sentencing system without an appreciation of the role played by plea bargaining."⁴⁰ Sometimes after these brief glances in the direction of reality, however,

³⁹ See, e.g., von HIRSCH, *supra* note 2, at 104-05. In practice, the initial formulation of charges by a prosecutor's office is a substantially less important component of the sentencing process than plea bargaining. Indeed, prosecutors may generally exercise too little sentencing discretion at the charge formulation stage rather than too much. One vice of the plea bargaining system is that it encourages prosecutors mechanically to charge defendants with "the highest and the most" at the outset and to withhold the exercise of any equitable discretion until they can receive something in return. Of course this analysis refers only to the formulation of charges in cases that prosecutors have tentatively decided to pursue to conviction. Prosecutorial "diversion," like plea bargaining, is commonly a device for securing a restriction of liberty without the bother and expense of a trial, and this form of prosecutorial sentencing should be analyzed in similar terms. See Goldberg, *Pre-Trial Diversion: Bilk or Bargain?*, 31 NLADA BRIEFCASE 490 (1973).

⁴⁰ Dershowitz, *supra* note 4, at 81.

and sometimes without them,⁴¹ the reformers have for the most part ignored the dominant reality of prosecutorial sentencing power. They have usually sought to leave this power as they found it without pausing to consider the effects of a still-unchecked power to bargain on the achievement of their objectives.

It seems unlikely that today's reformers are truly content with the regime of prosecutorial power as it is. There is hardly any objection to judicial sentencing discretion that does not apply in full measure to prosecutorial sentencing discretion—a discretion which has been, in practice, every bit as broad and broader.⁴² As much as judicial discretion, the discretion of American prosecutors lends itself to inequalities and disparities of treatment because of disagreements concerning issues of sentencing policy. Like judicial discretion, prosecutorial discretion permits at least the occasional dominance of illegitimate considerations such as race and personal or political influence in sentencing decisions. It may also lead to a general perception of unfairness, arbitrariness and uncertainty and may even undercut the deterrent force of the criminal law.

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

The laissez-faire attitude of sentencing reformers toward this concentration of governmental power in prosecutors' offices is prob-

⁴¹ Judge Frankel, for example, noted that "the great majority (ranging in some jurisdictions to around 90 percent) of those formally charged with crimes plead guilty," M. FRANKEL, *supra* note 2, at vii, but he did not examine the bargaining process that lies behind this lopsided figure and its substantial impact on sentencing.

⁴² A trial judge's sentencing discretion is ordinarily limited by the range of penalties that the legislature has provided for a particular offense, but a prosecutor who is dissatisfied with the range of penalties authorized for one offense can frequently use his charging power to substitute another.

ably not the product of blindness or indifference. It is probably best explained by a pervasive sense that, for one reason or another, the institution of plea bargaining is impregnable. Perhaps the reformers have accepted the claim that trial courts would be swamped if the power of prosecutors to bargain for guilty pleas were substantially restricted, or they may have agreed that efforts to restrict the bargaining process would merely drive it underground. Furthermore, the reformers probably have little desire to engage in what they see as a fruitless political battle. They may sense that sentencing reform will have a rough enough time in the political arena without a hopeless charge at the prosecutor's well-entrenched—and very comfortable—way of doing business. The Twentieth Century Fund Task Force put it this way: "The propriety of plea bargaining—whether it is desirable to eliminate it, if this is a practical possibility—will continue to be debated. But sentencing reform cannot be held in abeyance until the debate is resolved, if it ever is."⁴³ In other words, discussions of plea bargaining may be interesting, but we have the world's work to do.

I am not at all persuaded that our society is too impoverished to give its criminal defendants their day in court. Most nations of the world, including many far poorer than ours, manage to resolve their criminal cases without plea bargaining.⁴⁴ Nor do I accept the "boys-will-be-boys" theory that plea bargaining is inevitable, a theory that depends on the cynical view that prosecutors and defense attorneys will work to undercut even a clear and authoritative legal condemnation of bargaining in its various forms. Moreover, I believe that the political battle could be won if those who recognize the injustice of our current regime of prosecutorial power would simply fight the fight. The only public opinion polls on plea bargaining of which I am aware report that an overwhelming and growing majority oppose the practice.⁴⁵ Nevertheless, I shall not pursue these issues in this article. Rather, I shall contend that if the reformers are correct—if the practice of plea bargaining is indeed invulnerable—this circumstance argues strongly against the reformers' proposals. The asserted resiliency of plea bargaining militates as forcefully against the various changes that the reformers

⁴³ FAIR AND CERTAIN PUNISHMENT, *supra* note 2, at 26-27.

⁴⁴ See, e.g., Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974); Myhre, *Conviction Without Trial in the United States and Norway: A Comparison*, 5 Hous. L. REV. 647 (1968).

⁴⁵ D. FOGEL, *supra* note 2, app. III, at 300 (polls in Michigan by Market Opinion Research in 1973, 1974 & 1975—in 1975: 70% disapproval; 21% approval; 9% "don't know").

seek as it does against the changes that they have foregone. Indeed, from my perspective, the worthwhile goal of sentencing reform might almost as well be forgotten if plea bargaining cannot be restricted.

The reformers themselves, of course, do not see it this way. They vaguely argue that their proposals would rationalize the plea bargaining process, and some of them also suggest—usually in private—that these proposals might constitute the first step toward a more substantial restriction of prosecutorial sentencing power. One must always start somewhere, they maintain, and not necessarily with the most pernicious manifestation of the evil.

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

The defenders of plea bargaining sometimes debate whether the bargaining process should focus on the number and severity of the charges against a defendant or instead on specific sentence recommendations.⁴⁶ Plea bargaining in a world of fixed sentencing, however, would combine the worst features of both forms of negotiation. Under the current system of criminal justice, the principal advantage of charge bargaining is that it involves a

⁴⁶ See Alschuler, *supra* note 12, at 1136-46.

measure of shared discretion and tends to intrude less dramatically upon the judicial sentencing function. Even after a charge-reduction bargain has been fully effected, a trial judge is likely to retain a significant choice in the sentence to be imposed, and he may exercise this discretion without undercutting the credibility of the prosecutor who struck the bargain. When plea negotiations focus on prosecutorial sentence recommendations, by contrast, judges usually follow the course of least resistance and simply ratify the prosecutors' sentencing decisions.⁴⁷ The advantage that charge bargaining exhibits in our current system of criminal justice would plainly disappear in a system of fixed sentences. Under a fixed-sentencing regime, bargaining about the charge would *be* bargaining about the sentence. A nonjudicial officer would determine the exact outcome of every guilty plea case, and every defendant who secured an offer from a prosecutor in the plea bargaining process would be informed of the precise sentence that would result from his conviction at trial and also of the precise lesser sentence that would result from his conviction by plea.⁴⁸

Although plea negotiation in a system of fixed sentencing would not have the same advantages as charge bargaining today, it would retain the same defects. The principal virtue of sentence-recommendation bargaining in our current system of justice is that it permits a reasonably precise adjustment of the concessions that a defendant will receive by pleading guilty. Charge bargaining is not as capable of making fine adjustments but must proceed by leaps from one charge to another. In one case, an agreement to substitute the next available lesser offense for the offense that has been charged may result in a conviction for only a slightly less serious felony. In another case, "going down to count two" may result in a misdemeanor conviction. In still another case, there may be no lesser offense that seems at all related to the defendant's conduct. A prosecutor may often be forced to choose between withholding any concession and granting one that seems too generous, and he may

⁴⁷ *Id.* 1063-67.

⁴⁸ This form of bargaining would be even more explicit, and even less subject to judicial review, than today's sentence bargaining. A defendant who is offered a specific sentence recommendation today in exchange for a plea of guilty can usually be almost certain that the recommended sentence will be imposed, but there remains some chance that the trial judge will reject the prosecutor's proposal. Moreover, the sentence that would follow a conviction at trial is rarely made explicit in sentence bargaining today. The greater explicitness of the plea bargaining process in a system of fixed sentencing would, of course, have its advantages, particularly in terms of letting each defendant know the consequences of his choice of plea, but it would make the coercion inherent in the guilty plea system all the more apparent.

sometimes find that the draftsmen of his state's penal code have failed to provide a lesser offense that he can properly substitute for the offense initially charged. Because plea bargaining in a system of fixed sentencing would similarly require the substitution of one charge for another, accidents of spacing in the drafting of penal codes would assume substantial importance. In addition, prosecutors would be subject to the same temptations for overcharging that they face in systems of charge bargaining today, and criminal conduct would be mislabeled as defendants pleaded guilty to offenses less serious than those that they apparently committed.⁴⁹

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

Of course I have spoken in terms of a simplified model—a "pure" fixed-sentencing system that none of today's reformers, to my knowledge, have advocated. The evaluation of detailed "real world" proposals is more complicated and the prediction of results more perilous. For one thing, many of today's reformers couple their proposals for increased certainty in sentencing with proposals for a substantial reduction in the severity of criminal punishments.⁵⁰

⁴⁹ See Alschuler, *supra* note 12, at 1136-46. For a discussion of convictions resulting from the inaccurate substitution of lesser offenses, see Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?*, 126 U. PA. L. REV. 88 (1977).

⁵⁰ Von Hirsch, for example, recommends adoption of "a [sentencing] scale whose highest penalty (save, perhaps, for the offense of murder) is five years—with sparing use made of sentences of imprisonment for more than three years." A. VON HIRSCH, *supra* note 2, at 136 (footnotes omitted). At least in an aggravated murder case involving an Eichmann, a Speck, or a Manson, the public will undoubtedly insist—as I confess that I think it should—on the power to hold the offender in prison for the rest of his life. If life sentences have an appropriate place in a scheme of penalties for murder, it may attach too much importance to the results of criminal conduct (for example, whether an offender has killed or merely rendered his victim a comatose "vegetable") to limit the penalty for all other crimes to five years' imprisonment.

Von Hirsch's proposal suggests another possible defect of fixed-sentencing schemes, for it would make warning and unconditional release the prescribed penalty for the least serious offenses. *Id.* 137. So minimal a penalty may be appropriate in many cases, but whether it should be advertised in advance as the *only* possible sanction for certain crimes is a somewhat different question. Presumably behavior should not be made criminal at all unless it involves a significant departure from

To the extent that the reformers accomplish this second objective, the plea bargaining leverage of prosecutors is likely to be reduced. A prosecutor who can threaten only a penalty of three years following a defendant's conviction at trial plainly has less bargaining power than a prosecutor who can threaten a sentence of twenty-five years.⁵¹ Nevertheless, a caveat of Professor Franklin Zimring is worth repeating: "Once a determinate sentencing bill is before a legislative body, it takes only an eraser and pencil to make a one-year 'presumptive sentence' into a six-year sentence for the same offense."⁵² Political forces may push sentencing reform away from the humanitarian objectives of its authors and toward a sterner model. Even if liberal reformers were to succeed initially in securing a reduction in penalties, instances in which a legislatively specified penalty appeared too lenient would probably attract more public attention than cases in which the penalty appeared too severe. Politicians pressed to find issues upon which to campaign can always propose an increase in the penalty for whatever crime has caught the public's eye.⁵³

community standards of morality, and when an offender knows that he does not risk even so much as a fine if apprehended, he may conclude that he has a "license" to engage in criminal behavior. A degree of uncertainty concerning the community response to crime may have deterrent value, and although the sanctions that society threatens as well as those that it imposes should be limited by considerations of just desert, it does not seem inconsistent with this principle to bark a bit harder than we will probably want to bite in the "typical" case.

⁵¹ *Id.* 104-05. In one sense, prosecutorial power may also be restricted when a fixed or presumptive sentencing scheme does not reduce the aggregate severity of criminal penalties but merely "evens out disparities" by limiting departures from a previously established "norm." This sort of sentencing scheme should be viewed as having two components with countervailing effects. First, by limiting the ability of prosecutors to threaten unusually harsh, "exemplary" penalties for defendants who stand trial the scheme would reduce the prosecutors' bargaining power. Second, by effectively mandating minimum sentences for offenses, the scheme would give prosecutors the kind of bargaining leverage commonly observed today when mandatory penalties have been enacted.

⁵² Zimring, *supra* note 35, at 17.

⁵³ This danger cannot necessarily be eliminated by assigning the task of setting presumptive sentences to a commission or other non-legislative body. Cf. S. 1437, 95th Cong., 1st Sess. (1977). Once a commission has established a seemingly lenient presumptive sentence for a particular offense, the pressure for legislative revision is likely to be much greater than when the legislature has established a broad range of sentences for that offense and when judges have imposed a variety of sentences within this range (even if the average judicial sentence is every bit as lenient as the presumptive sentence that a commission would approve).

Of course our system of discretionary sentencing cannot reasonably be defended on the ground that it enables criminal justice officials to fool most of the people most of the time. If the popular will favors more severe sentences than judges in fact impose, the popular will should probably prevail. Nevertheless, the imperfections of the democratic process seem especially pronounced in the criminal justice area, and I suspect that the popular will is sometimes misperceived. In the course of working on a state penal code revision, for example, I was struck by the manner

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

The recently-enacted California sentencing statute⁵⁴ illustrates the expansion of prosecutorial power that sentencing reform may

in which "liberal" proposals were abandoned or defeated although almost no one seemed to oppose them on the merits. The first modification of a proposal was likely to occur when it was presented to a reporters' group composed primarily of academics. Some reporters would explain that they favored the proposal as drafted but that the state bar committee on the revision of the penal code would not, and that it was necessary to be "realistic." The proposal would be further modified by the state bar committee on the ground that, although most committee members favored it, the board of directors of the state bar would not. Then the board of directors would repeat the process, noting that the proposal could not be "sold" to the legislature in its current form. Finally, individual legislators would explain that they had no personal quarrel with the draft submitted by the state bar but that it would be unacceptable to their constituents. In talking with a constituent or two, however, I usually found that they favored the proposal as it had first been presented to the reporters' group.

Apart from the general tendency to perceive the rest of the world as less progressive than ourselves, there is a difference between making sentencing decisions "in the large" and making them "in the specific." People may sound vindictive in conversations about criminal justice issues with pollsters (a phenomenon that may be attributable in part to the kind of leadership that politicians often provide in this area), yet the same people may act with decency and compassion when confronted with specific cases. In El Paso, Texas, a few years ago, the district attorney's office announced a policy of opposing probated sentences in burglary cases, even those involving first offenders. The district attorney had apparently concluded that this policy would be popular, and indeed it probably was. After some resistance, El Paso's district judges decided that they could not withstand the political pressure exerted by the district attorney's office, and as a result, virtually all burglary defendants exercised the option of being sentenced by juries. Interviews with members of the El Paso legal community revealed that in more than 90% of all first-offense burglary cases, juries—composed of people who may well have nodded their general approval of the district attorney's policy when they read about it in the newspapers—awarded probated sentences.

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

⁵⁴ CAL. PENAL CODE § 1170 (West Cum. Supp. 1977).

bring. In the main, this statute creates a bargainer's paradise. It authorizes extended prison terms for offenders who have been previously sentenced to prison for other crimes,⁵⁵ for offenders who were armed or who used firearms during the commission of their crimes,⁵⁶ for offenders who deprived their victims of extraordinarily large amounts of property,⁵⁷ and for offenders who inflicted great personal injury while committing their crimes.⁵⁸ In each instance, a prosecutor can apparently foreclose the additional punishment simply by failing to allege the relevant aggravating circumstance, and the prosecutor's decision can, of course, become the subject of a trade. The principal practical use of habitual offender and similar statutory provisions for enhanced punishment in most states has, in fact, been to provide plea bargaining leverage; these provisions are very rarely invoked except when defendants have asserted the right to trial.

In addition, although the California statute commonly authorizes sentences for felonies within a three-year range, the trial judge is not authorized to select the most severe sentence unless the prosecutor has filed a motion alleging some aggravating circumstance (not a circumstance specified by the statute but any aggravating circumstance that strikes the prosecutor's fancy).⁵⁹ Whether such a motion will be filed seems likely to become a frequent topic of discussion during plea negotiations, and of course a prosecutor can also agree not to oppose a defense attorney's efforts to obtain the least severe of the authorized terms. (A prosecutor might, indeed, add some sweetener to a bargain by agreeing to file a motion in mitigation of the defendant's punishment himself.) As I have noted, bargains for an award of probation are not limited by the new California statute.⁶⁰ Finally, and perhaps most importantly, the statute does not restrict the prosecutor's ability to substitute one charge for another in the plea bargaining process. Under this statute, some of the powers formerly exercised by the California Adult Authority have been assumed by the legislature through its narrowing of the range of authorized penalties, and judges also

⁵⁵ *Id.* § 667.5.

⁵⁶ *Id.* §§ 12022 to 12022.5.

⁵⁷ *Id.* § 12022.6.

⁵⁸ *Id.* § 12022.7.

⁵⁹ *Id.* § 1170(b).

⁶⁰ See text accompanying note 30 *supra*.

have slightly greater powers than in the past.⁶¹ The big winners, however, are the prosecutors.

The California statute, like most of today's reform proposals, does exhibit some countervailing tendencies. For example, prior to the enactment of this statute, the reduction of a first-degree murder charge to second-degree murder in California did not deprive the Adult Authority of the power to hold an offender in prison for the rest of his life.⁶² Under the new statute, a reduction from first- to second-degree murder will make the difference between a sentence of death or life imprisonment (with or without the possibility of parole) and a term of five, six or seven years.⁶³ The value of a charge reduction to second-degree murder may thus have been increased and the prosecutor's bargaining leverage enhanced. Under the old code, however, a prosecutor could threaten an armed robber with a potential life sentence if he were convicted at trial.⁶⁴ The offer of a probated sentence conditioned upon serving a county jail term of one year or less was therefore a very powerful lever. Under the new code, the maximum sentence for armed robbery when no injury has been inflicted and when a weapon has not been fired is five years (two, three or four years for the crime of robbery itself plus an additional year for being armed).⁶⁵ When a defendant has been charged with armed robbery in California today, an offer of probation remains remarkably coercive, but the bargaining leverage of the past has been reduced.⁶⁶ (Note, however, that a

⁶¹ Formerly, California judges had no control whatever over the length of an offender's penitentiary confinement. Sentences were fixed and paroles granted by the Adult Authority. CAL. PENAL CODE § 5077 (West 1970); see Alschuler, *supra* note 14, at 101.

⁶² See CAL. PENAL CODE § 190 (West 1970).

⁶³ See *id.* § 190 (West Cum. Supp. 1977).

⁶⁴ See *id.* § 213 (West 1970).

⁶⁵ See *id.* § 213 (West Cum. Supp. 1977).

⁶⁶ The authors of the new California statute evidently determined the presumptive penalties for particular felonies primarily by examining the amount of time that the Adult Authority had required offenders to serve for those felonies in the past. It might seem, therefore, that a reduction from one charge to another should have about the same effect under the new statute as under the old. Under the old statute, however, defendants and defense attorneys undoubtedly had less complete knowledge of the Adult Authority's sentencing practices than they did of the range of legislatively authorized penalties, and they probably acted more in response to the latter than to the former. In addition, even a defendant with detailed knowledge of the Adult Authority's practices was likely to be a "risk-avertor," concerned about the danger that he might receive a more severe sentence than the norm. Most importantly, a defendant who had been charged initially with a more serious crime than that to which he had pleaded guilty was very likely to be treated more severely by the Adult Authority than other defendants in the same conviction category. See J. MITFORD, *supra* note 2, at 91 ("The Adult Authority's official orientation bulletin states: 'The offense for which a man is committed is

prosecutor can restore the prospect of a life sentence if he can charge the defendant with *kidnapping* for the purpose of committing a robbery.⁶⁷)

As suggested earlier, one consequence of the California Adult Authority's broad sentencing powers was that defense attorneys usually saw little point in plea bargaining when acceptance of the prosecutor's best offer would lead to a state prison sentence.⁶⁸ Because California prosecutors will now be able to bargain more specifically about the length of an offender's penitentiary confinement, the guilty-plea rate in very serious—or "automatic prison"—cases will probably increase. A second consequence of the Adult Authority's broad powers, however, was that prosecutors usually sought ways to avoid prison sentences when felony defendants were willing to plead guilty. Even in a relatively aggravated case, a prosecutor was likely to offer to reduce the charge to a misdemeanor or a "wobbler" (an offense that the court could treat either as a felony or as a misdemeanor) or to recommend an award of probation on the condition that the defendant serve a county jail term. Of course, a defendant who would have pleaded guilty under the old statute in exchange for a county jail sentence followed by a term of probation may refuse to plead guilty when he is offered only a two-year reduction in his prison term. Thus, although the guilty-plea rate in "automatic prison" cases may increase, the guilty-plea rate in other sorts of cases may decline. Prosecutors may, in other words, begin to offer only lesser prison sentences in cases in which, for the sake of obtaining what was formerly the only available sort of bargain, they would have agreed to non-prison sentences in the past. One consequence may be an increase—perhaps a dramatic increase—in the population of California's state prisons.

Bargaining patterns established in response to California's distinctive regime of indeterminate sentences may not change immediately with the implementation of the new sentencing law. Perhaps the offer of county jail sentences even in rape and armed robbery cases became common because of the perceived necessities

only one of the factors that the AA considers when making a decision.' Other factors may be (and often are) crimes for which the prisoner was arrested but never brought to trial"); Alschuler, *supra* note 14, at 96 ("San Francisco defense attorney Benjamin M. Davis adds, 'All the charges against a defendant may be dismissed except one. But if the defendant is sentenced to the penitentiary and comes before the Adult Authority, those super-judges will want to know all about the ten robberies.'").

⁶⁷ CAL. PENAL CODE § 209(b) (West Cum. Supp. 1977).

⁶⁸ See text accompanying note 14 *supra*.

of the plea bargaining process when the Adult Authority reigned supreme. Nevertheless, the view that this sort of offer is appropriate may now have become internalized. Prosecutors may have persuaded themselves that their offers of county jail time in serious felony cases are just, or they may simply not pause to reconsider their established methods of inducing guilty pleas merely because the new statute has been enacted. Under the new law, however, prosecutors will gain the power to make "intermediate" offers of relatively short prison sentences, and with the use of this newfound power, the extraordinarily favorable (and extraordinarily coercive) offers of the past may gradually become less frequent.

Although Chief Justice Burger has suggested that legislation affecting the work of the courts ought to be accompanied by a "court impact statement,"⁶⁹ the preparation of such a statement for California's new sentencing law and for most other reform proposals is beyond my competence. There will be pulls in different directions, and much will depend upon the idiosyncratic responses of individual prosecutors in what will remain a highly discretionary regime. The persistence of unchecked prosecutorial power itself, however, is a dominant and probably fatal aspect of the California reform. In California as elsewhere, the proponents of sweeping change in our sentencing laws have ignored the ways in which our system of criminal justice is a system.⁷⁰

Of course, in terms of accomplishing its ends, the system of criminal justice is sometimes not much of a system at all; the allegation that ours is a non-system whose left hand does not know or care what its right hand is doing may be very often accurate. In terms of protecting its bureaucratic methods of processing criminal cases, however, the American system of criminal justice is indeed a system, and the effect of suppressing an injustice at one point in the criminal process may be to cause a comparable injustice to appear else-

⁶⁹ Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049, 1050 (1972); see Burger, *Chief Justice Burger's 1977 Report to the American Bar Association*, 63 A.B.A.J. 504, 505 (1977).

⁷⁰ At the conference at which this Article was initially presented, Professor Raymond I. Parnas, one of the principal authors of the new California statute, protested that he and his colleagues had indeed considered the relationship between the statute and prosecutorial sentencing power. Professor Parnas did not, however, deny that the California statute would substantially augment the bargaining power of prosecutors, nor did he argue that this enhanced prosecutorial power was either desirable or consistent with the statute's objectives. By contrast, D. Lowell Jensen, the District Attorney of Alameda County, did argue that enhanced prosecutorial discretion was desirable. He observed that many prosecutors had supported enactment of the California statute for exactly that reason.

where.⁷¹ Reform of our amorphous regime of criminal justice is not impossible, but it is feasible only if one begins with a will to see it through. Without this commitment, the principal effect of sentencing reform will be to push the evils of excessive discretion toward an instrument of easy accommodation, the practice of plea bargaining.

Plea bargaining can be retained in a system of fixed or presumptive sentencing without undercutting the objectives of reformers, but only if its form is substantially altered. In place of the prosecutor's sentencing power, the legislature must specify the reward that will follow the entry of a plea of guilty. Just as a sentencing statute can treat the carrying of a firearm while committing a crime as an aggravating factor leading to an additional year's imprisonment, it can treat the entry of a plea of guilty as a mitigating factor leading to a specified reduction in penalty.⁷² Under such a statute, coupled, of course, with the elimination of plea bargaining by prosecutors, the "break" that follows the entry of a guilty plea would not depend upon the prosecutor's whim. The extent of this "break" would not be affected by a prosecutor's feelings of friendship for particular defense attorneys, by his desire to go home early on an especially busy day, by his apparent inability to establish a defendant's guilt at trial, by his (or the trial judge's) unusually vindictive attitude toward a defendant's exercise of the right to trial, by the race, wealth or bail status of the defendant, by a defense attorney's success in threatening the court's or the prosecutor's time with dilatory motions, by the publicity that a case has generated, or by any of a number of other factors—irrelevant to the goals of the criminal process—that commonly influence plea bargaining today.⁷³

⁷¹ See D. OAKS & W. LEHMAN, *A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT* 178-96 (1968).

⁷² The enactment of a statutory provision specifying the reward that would follow the entry of a guilty plea would, as suggested in the text, improve the present system of plea negotiation. Paradoxically, however, this legislative provision might be more vulnerable than the present system to constitutional challenge. See *United States v. Jackson*, 390 U.S. 570 (1968); but see *Brady v. United States*, 397 U.S. 742 (1970).

⁷³ The use of administrative rulemaking procedures and the formulation of internal guidelines for prosecutorial decisionmaking might provide another way to reduce the influence of these extraneous factors. See, e.g., Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 *DUKE L.J.* 651, 680-82. I am not convinced, however, that guidelines could domesticate prosecutorial sentencing power to the extent that plea bargaining by prosecutors would become compatible with the objectives of today's sentencing reformers for two reasons.

First, just as it is difficult or impossible for legislatures to specify all relevant sentencing factors in advance, it is difficult or impossible for prosecutors to do so.

The principal objection to a legislative specification of the sentence differential between guilty-plea and trial defendants is that it would make the penalty that our system imposes for the exercise of the constitutional right to trial painfully apparent,⁷⁴ and the open legislative articulation of the principle that makes our system of plea bargaining effective should indeed cause us to blush. Nevertheless, if sentencing reformers are unwilling to take this step toward channeling and controlling the plea bargaining process, perhaps they should abandon the reform effort. Determinate sentencing statutes may not always make things worse, but unless they achieve a major restriction of prosecutorial power, the reformers will not accomplish the goal of more certain sentencing that they have sought so earnestly and, to a considerable extent, so rightly.

Guidelines may tend to be so general as to provide only minimal constraints on a prosecutor's discretion. Of course, it is hard to quarrel in the abstract with the ideal of the rule of law. When a governmental decisionmaking process can be reduced to a formula that will yield justice in a substantial majority of cases, the development of rules and guidelines usually becomes worthwhile. Nevertheless, the problem of balancing justice in the individual case against the desirability of legal rules cannot be resolved without regard to the specific problem at hand. Rather than call for less discretion and more rules in the abstract, it would be desirable for the scholars currently enamored of this approach actually to try their hands at drafting some useful guidelines.

Second, even reasonably specific guidelines may prove delusive in practice. Prosecutorial guidelines seem to be frequently honored in the breach, *see, e.g.*, GEORGETOWN UNIVERSITY LAW CENTER INSTITUTE OF CRIMINAL LAW AND PROCEDURE, PLEA BARGAINING IN THE UNITED STATES: PHASE I REPORT 33, 124 (1977). Indeed, these guidelines may sometimes be intended more for show than for implementation. In Houston, Texas, the District Attorney once announced a policy against recommending less than a ten-year sentence in any case of robbery by firearm, yet a number of Houston defense attorneys told me of cases in which their skillful bargaining had led to less severe prosecutorial sentence recommendations for their clients. Most of these defense attorneys seemed unaware that other attorneys were achieving the same success, and it gradually became apparent that the District Attorney's announced policy served in practice as a sales device comparable to that of some Maxwell Street clothing merchants: "Our usual price in a case of robbery by firearm is ten years, but for *you* . . ." Partly because plea bargaining policies are usually subject to ill-defined exceptions for "weak cases," *see, e.g.*, Berger, *The Case Against Plea Bargaining*, 62 A.B.A.J. 621 (1976), this sort of evasion does seem common. In addition, prosecutors frequently subvert office policies by taking "unofficial" positions "off the record" and by agreeing "not to oppose" actions that they cannot affirmatively recommend. Dale Tooley, the District Attorney in Denver, commented that his office had developed guidelines for a variety of prosecutorial decisions and had generally found them useful. He added, however, "I have yet to see the policy that an assistant district attorney couldn't get around when he wanted to." Interview with Mr. Tooley in Denver (July 11, 1977). Although one might provide for judicial review at the behest of disgruntled citizens (or perhaps some other device for enforcing prosecutorial rules), it is far from clear that this mechanism would yield beneficial results as often as it proved burdensome and oppressive.

⁷⁴ See note 72 *supra*.

V. CONCLUSION

This article has not suggested that our criminal justice system is a closed, watertight mechanism in which discretion can be re-allocated but never reduced. Nevertheless, one must evaluate proposals for sentencing reform in light of the existence within the criminal justice system of diverse locations of sentencing power. Eliminating or restricting the discretionary powers of parole boards and trial judges is likely to increase the powers of prosecutors, and these powers are likely to be exercised without effective limits through the practice of plea bargaining. The substitution of fixed or presumptive sentences for the discretion of judges and parole boards tends to concentrate sentencing power in the hands of officials who are likely to allow their decisions to be governed by factors irrelevant to the proper goals of sentencing—officials moreover, who typically lack the information, objectivity, and experience of trial judges.

Some reformers may believe that prosecutorial discretion is more valuable than judicial discretion, and if so, they have things topsy-turvy. The reformers have levelled their attack—a basically well-founded if somewhat one-sided attack—on the form of discretion that is most frequently exercised “on the merits” of criminal cases for the purpose of taking differences in culpability into account. They have disregarded the form of discretion that is most frequently bent, manipulated, twisted and perverted to gain convictions when guilt cannot be proven, to make the work of participants in the criminal justice system more comfortable, and to save the money that might otherwise be required to implement the right to trial. If the reformers hope to do more than to reallocate today’s lawless sentencing power in a way that will give prosecutors an even heavier club, they must exhibit greater courage. They must view the criminal justice system as a system, recognize that the ideal of equal justice is currently threatened more by the practices of prosecutors than by those of trial judges, and bite the bullet on the question of plea bargaining.