DETERMINATE SENTENCING IN CALIFORNIA AND ILLINOIS: ITS EFFECT ON SENTENCE DISPARITY AND PRISONER REHABILITATION

The movement away from "indeterminate"[1] toward "definite"[2] sentences for persons convicted of crime marks a major development in the administration of criminal justice in the United States.[3] The trend emanates primarily from a growing dissatisfaction over indeterminate sentencing systems that have failed to rehabilitate criminal offenders[4] and have created vast disparities in sentences imposed on like defendants for like crimes.[5] California and Illinois have been in the vanguard of states that have turned to definite sentencing systems in response to

---

1. Under an indeterminate sentencing system, the judge ordinarily sets a minimum but not a maximum term for confinement; a parole authority decides the ultimate release date. *See* Prettyman, *The Indeterminate Sentence and the Right to Treatment*, 11 AM. CRIM. L. REV. 7, 13 n.27 (1972). *See generally* D'Esposito, *Sentence Disparity: Causes and Cures*, 60 J. CRIM. L.C. & P.S. 182, 185-86 (1969); Note, *"Defective Delinquent" and Habitual Criminal Offender Statutes—Required Constitutional Safeguards*, 20 RUT. L. REV. 756, 756 n.3 (1966).

An indefinite sentence, in contrast, consists of a legislatively established minimum and maximum term of detention during which the prisoner may be released. *See* P. TAPPAN, CRIME, JUSTICE, AND CORRECTION 432-33 (1960); Prettyman, *supra*, at 13 n.27. *See also* Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 305 (1974).

2. "A definite commitment is said to be one fixed by the judge . . . at a term of years which may be less than (but not more than) the maximum provided by statute for the particular crime." S. RUBIN, THE LAW OF CRIMINAL CORRECTION 157-58 (2d ed. 1973). *See also* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 131 (Approved Draft 1968).

3. D. FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS 238-49 (1975); AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971); Bayley, *Good Intentions Gone Awry—A Proposal for Fundamental Change in Criminal Sentencing*, 51 WASH. L. REV. 529, 551-63 (1976); O'Leary, Gottfredson & Gelman, *Contemporary Sentencing Proposals*, 11 CRIM. L. BULL. 555, 563-70 (1975); McGee, *A New Look at Sentencing Part I*, 38 FED. PROB. 3 (1974).

4. Bayley, *supra* note 3, at 562; Morris, *The Future of Imprisonment: Toward a Puntive Philosophy*, 72 MICH. L. REV. 1161, 1161 (1974); O'Leary, Gottfredson & Gelman, *supra* note 3, at 562. *Contra*, Hodges, *Crime Prevention by the Indeterminate Sentence Law*, 1971 AM. J. OF PSYCH. 128, 291-95 (indeterminate sentence has met dual purpose of protecting society and treating prisoners more humanely).

5. R. HOOD & R. SPARKS, KEY ISSUES IN CRIMINOLOGY 141-54 (1970); Coburn, *Disparity in Sentences and Appellate Review of Sentencing*, 25 RUT. L. REV. 207 (1971); Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. CHI. L. REV. 109 (1975); Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 56 (1965).

these concerns over rehabilitation and sentence disparities. This Note analyzes and compares those provisions of the California and Illinois statutes most relevant to these concerns.

I. THE DEFINITE SENTENCE: ITS DEVELOPMENT

The origins of the definite sentence can be traced to the late 1700's. The "classical" school of English penology objected to the harsh and arbitrary sentences imposed by judges who held unlimited sentencing powers.[6] The classical school proposed that the legislature determine sentences for all types of offenses to make the "punishment fit the crime."[7]

In the 1880's, however, the neoclassicists argued that sentences should be less definite in their specificity and consistency of application, and urged consideration of extenuating circumstances such as the age and mental condition of the defendant.[8] The positivist school, which originated in Italy in the nineteenth century, turned further toward individualized sentencing, proposing that judges should be educated in the psychological sciences and should fashion sentences according to the needs of each defendant.[9] This proposal also contained elements of the indeterminate sentence because it removed the power of sentencing from the legislature and returned sentencing discretion to the judge.[10]

Ultimate credit for the development of the indeterminate sentence, however, is given to Alexander Maconochie, an Australian who instituted a system in which prisoners reduced their sentences through scholastic and work achievement.[11] Maconochie based his system on the theory that imprisonment should reform prisoners for their return to

6. Reid, *A Rebuttal to the Attack on the Indeterminate Sentence*, 51 WASH. L. REV. 565, 567 n.13 (1976); Weinstein, *The Sentence Without a Period. . . The Paradox of Criminal Sentences*, 32 MO. B.J. 490, 491 (1976). *See also* Coburn, *supra* note 5.

7. Bruce, Burgess & Harno, *A Study of the Indeterminate Sentence and Parole in the State of Illinois*, 19 J. CRIM. L.C. & P.S. 10, 26 (Part II, 1928); Reid, *supra* note 6, at 567 n.13.

8. Bruce, Burgess & Harno, *supra* note 7, at 27. The term "neoclassical" arose from the school's advocacy of a sentence whose length was specified at the outset.

9. S. REID, CRIME AND CRIMINOLOGY 114 (1976); Bruce, Burgess & Harno, *supra* note 7, at 28; Weinstein, *supra* note 6, at 493-94. The term "positivist" was applied to this school of thought because of its optimistic belief that the criminal could benefit from his sentence.

10. Reid, *supra* note 6, at 567 n.13.

11. *Id. See generally* White, *Alexander Maconochie and the Development of Parole*, 67 J. CRIM. L. & CRIMINOLOGY 72 (1976); *see also* Bruce, Burgess & Harno, *supra* note 7, at 64-65 n.3.

society. The system thus combined the indeterminate sentence, in which a prisoner's personal progress determined his time of release, with rehabilitation.[12]

In the United States the definite sentence prevailed until New York established an "indefinite" system in 1876.[13] By 1910 twenty-one states had adopted the New York model,[14] and today thirty-five jurisdictions use some form of indeterminate sentencing.[15] Until recently, California and Illinois also maintained indeterminate sentencing systems.[16] A California defendant received a statutorily determined maximum term during which he could be released at any time.[17] In Illinois the judge set the minimum and maximum periods for detention, and the parole board could release the prisoner at any point within that range.[18]

California and Illinois, however, now lead the movement toward the definite sentence. One reason for this predilection is the failure of the indeterminate sentence to achieve its touted objective—the rehabiliation of prisoners.[19] The sole justification for the flexible indeterminate sentence is the belief that the prisoner can reform himself, however long a time that may take.[20] The definite sentence, on the other hand,

12. Prettyman, *supra* note 1, at 13-14.

13. *Id.* at 14; *see* note 1 *supra.*

14. S. RUBIN, *supra* note 2, at 157.

15. *Id.* at 158. The federal courts may choose from a number of sentencing alternatives: (1) a definite term, after one-third of which parole eligibility begins; (2) an indeterminate sentence, consisting of a minimum and maximum term set by the judge, the minimum being no more than one-third of the maximum; (3) an indeterminate sentence in which a maximum term is fixed by the court, and release is at the discretion of the Parole Commission; (4) a term of six months set by the judge, the remainder of a definite sentence spent on probation. 18 U.S.C. §§ 3651, 4205 (1976).

16. 1917 Cal. Stats., ch. 527 § 1168. Indeterminate Sentence Act, 1899 Ill. Laws 142.

17. "[T]he court in imposing the sentence shall not fix the term or duration of the period of imprisonment." CAL. PENAL CODE § 1168 (Deering 1971) (repealed 1977). "[T]he Adult Authority may determine . . . after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned . . . ." CAL. PENAL CODE § 3020 (Deering 1971) (repealed 1977). *See* Coonrad, *Parole Revocation and Indeterminate Sentencing: The California Experience*, 2 NEW ENG. J. PRISON L. 15, 15 (1975).

18. "A sentence of imprisonment for a felony shall be an indeterminate sentence . . . ." ILL. REV. STAT. ch. 38, § 1005-8-1 (a) (1973) (sections (b) and (c) describe the maximum and minimum sentences for each class of felony). "Every person serving a term of imprisonment for a felony . . . shall be eligible for parole when he has served: (1) the minimum term of an indeterminate sentence . . . ." *Id.* § 1003-3-3(a).

19. Morris, *supra* note 4, at 1161; Reid, *supra* note 6, at 565.

20. *In re* Minnis, 7 Cal. 3d 639, 498 P.2d 997, 102 Cal. Rptr. 749 (1972) (purpose of indeterminate sentence is rehabilitation). *See generally* Bruce, Burgess & Harno, *supra* note 7, at chs. 10-15; Reid, *supra* note 6, at 565-68.

generally has been justified as a means to achieve the goals of deterrence and retribution.[21] The historical vacillation between sentencing postures directly relates to trends of thought in the psychological, behavioral, and criminal-penal fields; at times the societal interest in deterrence and retribution outweighs the rehabilitative ideal.[22] The goals of deterrence or retribution and rehabilitation are not incompatible when combined cohesively, and modern sentencing approaches attempt to reflect all three.[23] Rehabilitation, however, seldom is practiced effectively,[24] and the rehabiliation theory has not been tested adequately for lack of satisfactory prison treatment facilities and medically knowledgeable judges and parole boards.[25] These failures underlie the shift to determinate sentencing.

A second cause of the definite sentence movement is the disparity among sentences imposed on like defendants who have committed the same crime.[26] Sentence disparity exists within a single jurisdiction, among neighboring jurisdictions, and on a national level.[27] Disparities

---

21. Reid, *supra* note 6, at 566.

22. *See generally* Bruce, Burgess & Harno, *supra* note 7, at chs. 5-15.

23. *Id.* at 71. In Williams v. New York, 337 U.S. 241 (1949), the Supreme Court approved of the trend to combine rehabilitiation and retribution in a single sentencing scheme. "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Id.* at 248. "[A] judge should consider in imposing sentence: '1st. The protection of society against wrong-doers. 2nd. The punishment—or much better—the discipline of the wrong-doer. 3rd. The reformation and rehabilitation of the wrong-doer. 4th. The deterrence of others from the commission of like offenses.' " *Id.* at 248-49 n.13 (quoting S. GLUECK, PROBATION AND CRIMINAL JUSTICE 113 (1933)). *See also* United States v. Baker, 487 F.2d 360, 362-64 (2d Cir. 1973) (Lumbard, J., dissenting in part).

24. D. FOGEL, *supra* note 3, at 114-26; Morris, *supra* note 4, at 1161; Prettyman, *supra* note 1, at 19-21; Weinstein, *supra* note 6, at 497-98.

25. M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 88-100 (1973); Bayley, *supra* note 3, at 551-63; Morris, *supra* note 4, at 1179; Reid, *supra* note 6, at 572-79, 593-601; Weinstein, *supra* note 6, at 497. *See generally In re* Minnis, 7 Cal. 3d 639, 498 P.2d 997, 102 Cal. Rptr. 749 (1972); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1974) (dangerousness, a crucial criterion of parole boards' decisions, cannot be accurately predicted or evaluated); Prettyman, *supra* note 1, at 25-37 (failure of Maryland's Patuxent Institution, the foremost attempt at "curing" criminals through medical and psychological treatment on an indefinite basis). Comment, *Senate Bill 42 and the Myth of Shortened Sentences for California Offenders: The Effects of the Uniform Determinate Sentencing Act*, 14 SAN DIEGO L. REV. 1176, 1182 (1977) [hereinafter cited as *Senate Bill 42*]. (tendency of psychiatrists to "overpredict" dangerousness of prisoners often results in unnecessarily long prison terms).

26. *See* Berger, *Equal Protection and Criminal Sentencing: Legal and Policy Considerations*, 71 NW. U.L. REV. 29, 32 (1976) ("At one level, disparity means no more than the imposition of different sentences upon different defendants and as such is an inherent part of any sytem of individualized sentencing."); Rubin, *supra* note 5, at 56.

27. *See* Diamond & Zeisel, *supra* note 5, at 110; Rubin, *supra* note 5, at 55. For a criticism of

in the indeterminate sentencing systems result primarily from the personal reactions of judges to particular cases and the inconsistent actions of parole boards.[28]

Judicial individualism may be controlled, in part, by a minimally discretionary sentence structure,[29] but this solution deals inadequately with the distinct differences among defendants and fact situations. A more just method to reduce sentence disparity is to restrict the discretion of the parole board, because the board's function is secondary to that of the judiciary. The parole board operates with few, if any, guidelines on when a prisoner is "cured" and ready for release,[30] and reaches its decisions after only a short review of each case.[31] For prisoners with identical sentences, this system of parole results in vast differences in release dates that are unrelated to the prisoner's progress toward rehabilitation.[32] Because the parole authority need exist only under an indeterminate sentencing system,[33] a definite sentence structure eliminates this cause of sentence disparity.

---

disparate sentences given to codefendents, see United States v. Wiley, 267 F.2d 453, 455-56 (7th Cir. 1959).

28. *See* D'Esposito, *supra* note 1, at 185; McAnany, Merritt & Tromanhauser, *Illinois Reconsiders "Flat Time": An Analysis of the Impact of the Justice Model*, 52 CHI.-KENT L. REV. 621, 640 (1976) [hereinafter cited as *Illinois Reconsiders "Flat Time"*]; Rubin, *supra* note 5, at 58-60. Other reasons for sentence disparities include: excessive judicial discretion with few guidelines; differing social attitudes; varying personal backgrounds of judges; different geographic locations; race and ethnicity of the defendant; and the availability of presentence reports. Coburn, *supra* note 5, at 210-11. For a discussion on race and socioeconomic background of the defendant as major sources of disparity, see H. HAGAN, EXTRA-LEGAL ATTRIBUTES AND CRIMINAL SENTENCING: AN ASSESSMENT OF A SOCIOLOGICAL VIEWPOINT 357, 362-74 (1974).

29. The ideal definite sentence structure, under which the sentence is imposed entirely without regard to the defendant's personal history and attributes, eliminates judges' individual reactions. California and Illinois attempt to reduce this cause of sentence disparity by severely narrowing the range of years from which a judge can choose to impose the defendant's sentence. *See* note 47 *infra* and accompanying text. This range, however, still allows the judge to consider the individual circumstances of the defendant's case. *See* notes 98-100, 102-106 *infra* and accompanying text.

30. *See* note 25 *supra* and accompanying text.

31. *See In re* Sturm, 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974) (parole hearings short and very perfunctory); *In re* Tucker, 5 Cal. 3d 171, 486 P.2d 657, 95 Cal. Rptr. 761 (1971) (same). *See also* Meyerson, *The Board of Prison Terms and Paroles and Indeterminate Sentencing: A Critique*, 51 WASH. L. REV. 617, 625-28 (1976); Murray, Ringer & Alarcon, *Prison Reform: Backward or Forward?*, 50 CAL. ST. B.J. 356, 358 (1975). *See generally* Note, *The California Adult Authority—Administrative Sentencing and the Parole Decision as a Problem in Administrative Discretion*, 5 U. CAL. D.L. REV. 360 (1972).

32. *Senate Bill 42*, *supra* note 25 at 1185, 1203.

33. In a definite-sentence scheme, the judge sets the prison release date, and it may be altered only by that judge.

Dissatisfaction with indeterminate sentencing systems also arises from their susceptibility to constitutional infirmities.[34] In *Specht v. Patterson*[35] the United States Supreme Court held unconstitutional under the due process clause a Colorado sex-offender statute that provided a special indeterminate sentence (one day to life) for defendants who present a particular danger to society, without opportunity for a presentence hearing. Although the Court based its decision on the defendant's inability to challenge the factual basis for his placement into the "danger" category, the Court may have been particularly protective of the defendant's rights because of the extraordinary potential for abuse inherent in open-ended sentences.

Several jurisdictions have found equal protection violations in sentencing schemes that permit longer indeterminate sentences for females than males on the assumption that women are more likely to reform.[36]

---

34. *See generally* Berger, *supra* note 26, at 35-51; D'Esposito, *supra* note 1, at 191-94; Rubin, *supra* note 5, at 62-69. For an expansive view of the constitutional implications of indeterminate sentences, see *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (indeterminate sentence of up to life imprisonment for second conviction of indecent exposure held unconstitutional as disproportionate to the crime). *See generally* 10 SAN DIEGO L. REV. 793 (1973).

On balance, however, the courts have rejected constitutional objections to the indeterminate sentence on either equal protection or "cruel and unusual punishment" grounds. Equal protection is too strict a standard to impose on the individualized indeterminate sentencing process. Berger, *supra* note 26, at 38-40. *See* People v. Kostal, 159 Cal. App. 2d 444, 323 P.2d 1020 (1958); Note, *Equal Protection Applied to Sentencing*, 58 IOWA L. REV. 596, 612-15 (1973); 81 HARV. L. REV. 890 (1968). The "cruel and unusual" clause has been applied to excessive sentences, *see, e.g.*, Weems v. United States, 217 U.S. 349 (1910), but not, in general, to the indeterminate sentence. *See* Hendrick v. United States, 357 F.2d 121 (10th Cir. 1966); Rogers v. United States, 304 F.2d 520 (5th Cir. 1962); People v. Dyer, 269 Cal. App. 2d 209, 74 Cal. Rptr. 764 (1969); People v. Polk, 10 Ill. App. 3d 408, 294 N.E.2d 113 (1973) (four-to-twenty years for indecent liberties with child represents moral beliefs of People, and thus is not cruel or disproportionate); State *ex rel.* Nelson v. Tahash, 265 Minn. 330, 121 N.W.2d 584 (1963) (indeterminate sentence not cruel and unusual because maximum penalty is subject to discretionary reduction and is not frail for lack of certainty). *But see* People v. Wingo, 14 Cal. 3d 169, 534 P.2d 1001, 121 Cal. Rptr. 97 (1975) (cruel or unusual punishment is that which is so disproportionate to the crime as to shock the conscience); *In re* Foss, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974) (same); *In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (same); People v. Kane, 31 Ill. App. 3d 500, 333 N.E.2d 247 (1975) (seven-to-fifteen years for possession of heroin held disproportionate and reduced to minimum of four years because defendant was first offender with good work history); 61 CALIF. L. REV. 418 (1973). *See generally* Ughbanks v. Armstrong, 208 U.S. 481 (1908) (indeterminate sentence is constitutional); Dreyer v. Illinois, 187 U.S. 71 (1902) (same), *In re* Lee, 177 Cal. 690, 171 P. 958 (1918).

35. 386 U.S. 605 (1967). *See also* Humphrey v. Cady, 405 U.S. 504 (1972) (procedures under Wisconsin's Sex Crimes Act denied equal protection and due process).

36. United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); Liberti v. York, 28 Conn. Super. 9, 246 A.2d 106 (1968); State v. Chambers, 63 N.J. 287, 307 A.2d 78 (1973);

Other courts have sustained due process challenges to indeterminate sentencing systems.[37] Arguably, due process is denied when a person is held indefinitely until "cured" but does not receive effective treatment,[38] particularly if the patient would be released at an earlier time under a definite sentence.[39]

II. DETERMINATE SENTENCING IN CALIFORNIA AND ILLINOIS

Consternation over the indeterminate sentence led to the passage of determinate sentencing legislation in California in 1976 and Illinois in 1977.[40] These enactments seek to promote uniformity of sentencing and to eliminate disparity in sentences.[41] Each act also incorporates deterrence and retribution principles into its sentence structures[42] and minimizes the importance of rehabilitation.[43] This part of the Note

---

Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968). *See also* 8 SUFFOLK U.L. REV. 830 (1974).

37. Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975); Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

38. Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960); Katz, *The Right to Treatment—An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755 (1969). *See* Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970) (denial of medical treatment cruel and unusual); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971) (denial of psychiatric treatment cruel and unusual); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) (lack of effective rehabilitation contributed to holding that treatment was cruel and unusual), *aff'd.* 442 F.2d 304 (8th Cir. 1971).

39. Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966).

40. Uniform Determinate Sentence Act of 1976, ch. 1139 CAL. PENAL CODE (Deering) (effective July 1, 1977) (amended 1978); ILL. REV. STAT. ch. 38, §§ 1003-1008 (effective Feb. 1, 1978); *see* D. FOGEL, *supra* note 3. Maine was the first state to enact a fully determinate sentencing structure. ME. REV. STAT. ANN. tit. 17-A, §§ 1151, 1252 (1976).

41. *See* CAL. PENAL CODE § 1170(f) (Deering 1979); ILL. REV. STAT. ch. 38, § 1005-5-4.2 (1978). *See also* ILL. CONST. art. 1, § 11. *See generally* Pusateri & Scott, *Illinois' New Unified Code of Corrections*, 61 ILL. B.J. 62, 69 (1972).

42. "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." CAL. PENAL CODE § 1170 (a)(1) (Deering 1979). *See* note 43 *infra*

43. "[Punishment] is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." CAL. PENAL CODE § 1170(a)(1) (Deering 1979). *But see* ILL. REV. STAT. ch. 38, § 1001-1-2 (1978), which provides for rehabilitation and penalties proportionate to the offense. For criticism of the Illinois "punishment-equality approach," see *Illinois Reconsiders "Flat Time," supra* note 28, at 660. The proposed Federal Criminal Code Reform Act of 1978, S. 1437, 95th Cong., 2d Sess. (1978), provides that one factor to be considered when sentencing is "the need to avoid unwarranted sentence disparities." *Id.* § 2003(a)(F). One purpose of the proposed code is to "promote the correction and rehabilitation of persons who engage in such conduct, recognizing that imprisonment is generally not an appropriate means of promoting correction and rehabilitation." *Id.* § 101(b)(4).

compares major provisions of the California and Illinois statutes, focusing in particular on their effect on rehabilitation and sentence disparity.[44]

The most significant revision enacted by each state's legislature is the elimination of the minimum-maximum sentencing system under which the judge (in Illinois)[45] or the statute (in California)[46] sets a sentence range and the parole authority later decides the prison-release date.[47] Both states now require a determinate sentence—a specific term of imprisonment selected by the judge from a relatively narrow range set forth in the statute.[48] These states apply a determinate sentence to most felonies and all misdemeanors, but reserve an indeterminate sentence for certain aggravated felonies.[49] California and Illinois also classify felonies and misdemeanors into a number of smaller categories (with corresponding ranges of sentences) to further restrict judicial discretion.[50] Although it is too early for clear patterns to emerge, curtailed

44. California and Illinois have been chosen for discussion because those states' codes most clearly demonstrate the concern over inadequacy of rehabilitation and disparity among sentences. *See* note 122 *infra* for a list of states that have revised or considered revision of their indeterminate sentence laws. *See generally* Zarr, *Commentaries on the Maine Criminal Code (Sentencing)*, 28 ME. L. REV. 117 (1976).

45. "A sentence of imprisonment for a felony shall be an indeterminate sentence set by the court . . . ." ILL. REV. STAT. ch. 38, § 1005-8-1 (1973) (amended 1978).

46. "[Defendant shall] be sentenced to be imprisoned in a state prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment." CAL. PENAL CODE § 1168 (Deering 1976) (amended 1976).

47. "[T]he Adult Authority may determine and redetermine, after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned . . . ." CAL. PENAL CODE § 3020 (Deering 1976) (amended 1976). "The Parole and Pardon Board shall determine the time of release on parole . . . ." ILL. REV. STAT. ch. 38, § 1003-3-2(a)(1) (1973) (amended 1978).

48. California provides for "determinate sentences . . . to be imposed by the court with specified discretion." CAL. PENAL CODE § 1170(a)(1) (Deering 1979). "A sentence of imprisonment for a felony shall be a determinate sentence set by the court . . . ." ILL. REV. STAT. ch. 38, § 1005-8-1(a) (1979).

49. The indeterminate sentence is retained for aggravated felonies because the judge should have unfettered discretion to deal with the unusual defendant in ways not contemplated by the narrow range of sentencing alternatives properly applicable to the vast majority of similar defendants and offenses. California regards murder as an aggravated crime, CAL. PENAL CODE § 190 (Deering 1979), and persons convicted of murder may receive a sentence of life imprisonment, life imprisonment without parole, or death. *Id.* Illinois imposes life imprisonment on persons found guilty of murder if the murder is "brutal" or if the person is adjudged a "habitual criminal." ILL. REV. STAT. ch. 38, § 1005-8-1(a) (1979).

50. California treats misdemeanors in a single group, punishable by a term not to exceed six months, or a fine up to $500, or both. CAL. PENAL CODE § 19 (Deering 1979). Felonies comprise 10 classes. *Id.* § 1170(a)(2). Illinois classifies its offenses as Murder, Class X (aggravated felonies), Class 1, 2, 3, or 4 felonies, and Class A, B, or C misdemeanors. ILL. REV. STAT. ch. 38, § 1005-5-1

judicial discretion should produce greater uniformity in sentences imposed for identical crimes.[51] At the same time, however, the elimination of minimum-maximum sentencing vests a new responsibility in judges.[52] Both the California and Illinois statutes now require that the judge determine the prisoner's date of release.[53] This emasculation of the parole authority especially alters sentencing responsibility in California. Prior to the new legislation, a California judge had only to decide whether imprisonment was warranted and automatically assign the appropriate statutory sentence range,[54] allowing the parole authority to determine the ultimate length of imprisonment.[55]

Another significant revision in California and Illlinois law, which complements the adoption of the definite sentence, is the abolition of the parole authority.[56] The California Department of Corrections[57] now governs "parole," but the process is wholly unlike the traditional parole procedure in which the crucial element is the board's power to release a prisoner at any time. The Department of Corrections now adds "parole," a period of up to three years, to each term of imprison-

---

(1979). Illinois maintained a classification system as early as 1973, but the prior system did not contain the "Class X" category. ILL. REV. STAT. ch. 38, § 1005-5-1 (1973) (amended 1978). Other states also categorize criminal offenses. *See, e.g.,* CONN. GEN. STAT. § 53a-25 (six classes of felonies), § 53a-26 (four classes of misdemeanors) (1979); ME. REV. STAT. ANN. tit. 17-A, § 4 (Supp. 1978) (five classes of crimes); N.Y. PENAL LAW § 55.05 (McKinney 1975) (five classes of felonies, three of misdemeanors).

51. *See* notes 30-33 *supra* and accompanying text; Reid, *supra* note 6, at 569.

52. *See Illinois Reconsiders "Flat Time," supra* note 28 at 660.

53. *See* note 48 *supra* and accompanying text.

54. CAL. PENAL CODE § 1168 (Deering 1966) (amended 1976).

55. *Id.* § 3020.

56. CAL. PENAL CODE § 3000 (Deering 1979); ILL. REV. STAT. ch. 38, § 1003-3-1(a) (1979). Maine abolished parole in 1975. ME. REV. STAT. ANN. tit. 17-A, § 1254 (Supp. 1978). Another section of the code, however, emasculates this innovation because it terms any sentence over one year "tentative" and permits the Department of Corrections to petition the trial court to shorten the sentence if "as a result of the Department's evaluation of such person's progress toward a noncriminal way of life, the Department is satisfied that the sentence of the trial court may have been based upon a misapprehension as to the history, character, or mental condition of the offender." ME. REV. STAT. ANN. tit. 17-A, § 1154(2) (Supp. 1978). The practical effect of this section may be to release many prisoners on rehabilitative grounds, which is the traditional function of parole. *See* Zarr, *supra* note 44, at 144-47.

S. 1437, 95th Cong., 2d Sess. 3831 (1978), provides for "early release," as distinct from parole. The proposed code requires an automatic postimprisonment term to be served under supervision in the community at the end of any prison term. *Id.* § 3841. For a thorough discussion of federal parole, see Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810 (1975).

57. CAL. PENAL CODE § 5002 (Deering 1979).

ment for a felony,[58] which the Department may waive for "good cause."[59] The statute, however, provides no guidelines to determine "good cause"; thus the parole waiver may lead to disparity in the total length of sentences.[60] The Community Release Board of the Department of Corrections sets guidelines for the conditions and length of parole,[61] but again, disparity could result because the law provides no standard of "good cause."[62]

An integral part of the new parole scheme in California is the extension to prisoners of credit for good behavior and for participation in work, educational, and vocational prison programs.[63] The Department of Corrections has authority to reduce a prisoner's sentence by one-third for accumulated "good-time" credits.[64] Conversely, a prisoner loses credits when he violates prison rules or fails to participate in prison programs.[65] This system accords with the determinate sentence concept in that the prisoners themselves, rather than an outside authority, account for any unequal periods of incarceration for like crimes.

Illinois retains even fewer remnants of the traditional parole system. The Illinois statute establishes a Prisoner Review Board to supervise after-prison service.[66] Members of the Board must have five years of actual experience in penology, corrections work, medicine, psychology,

58. *Id.* § 3000. The Uniform Determinate Sentence Act of 1976 permitted only a one-year period of parole. *Id.* § 3000 (Deering 1977) (amended 1978). Under the present code no person serving a life sentence may be paroled (if parole is allowed) before seven years' imprisonment. *Id.* § 3046 (Deering 1979). *See also* Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L.J. 5, 73-87 (1978).

59. CAL. PENAL CODE §§ 3000(a), 5003.5 (Deering 1979).

60. *See* Comment, *Senate Bill 42—The End of the Indeterminate Sentence*, 17 SANTA CLARA L. REV. 133, 157 (1977).

61. CAL. PENAL CODE § 3000(f) (Deering 1979). The Community Release Board, for example, must release a felon who completes one continuous year of his additional term even though the originally imposed term may have been longer, unless the Board determines that "good cause" exists to continue the parole. *Id.* § 3001(a). The statute, however, does not provide guidelines to determine "good cause."

62. *See* note 60 *supra* and accompanying text. Disparity also can arise because the Community Release Board may revoke parole for cause (again undefined) after a hearing. CAL. PENAL CODE §§ 3056-3064 (Deering 1979). For a discussion of prior California parole-revocation law, see Coonrad, *supra* note 17, at 15.

63. CAL. PENAL CODE §§ 2930(a), 2931(c) (Deering 1979). *See also* Cassou & Taugher, *supra* note 58, at 25, 77-79.

64. CAL. PENAL CODE §§ 2931, 4019 (Deering 1979).

65. *Id.* § 2932. The Community Release Board may deduct no more than 90 days of good behavior credit or 30 days of participation credit during any eight-month period. *Id.* § 2932(d).

66. ILL. REV. STAT. ch. 38, § 1003-3-1(a) (1978).

or other behavioral sciences.[67] The Illinois act, contrary to California's, lists the conditions that prisoners must follow on "mandatory supervised release,"[68] and specifies the length of supervision periods for various categories of crime.[69] Because the Board may not waive the period of supervision for the first two years,[70] the Illinois system of determinate sentences diminishes Board-created sentence disparity.[71]

Illinois' system of "good-conduct" credits permits a one-day reduction in sentence for each day of prison time.[72] This system implies that a prisoner need only refrain from rules-violations to accumulate credits toward his release.[73] An Illinois prisoner thus may reduce his sentence by one-half, but his California counterpart may obtain only a one-third reduction.[74] Illinois, however, does not grant "good-conduct" incentives for participation in prison work programs. The difference between the two states in "good-conduct" or "good-time" provisions, therefore, may only result in equalizing the actual length of time served by California and Illinois prisoners for similar crimes. Nevertheless, Illinois' new provisions concerning post-imprisonment service proba-

67. *Id.* § 1003-3-1(b).

68. A prisoner must not violate any criminal statutes or carry any dangerous weapon; at the Board's discretion, a prisoner must attend work or school, undergo medical treatment, support his dependents, and report to an official of the Department of Corrections. *Id.* §§ 1003-3-7(a) to 1003-3-7(b). Illinois also allows the Board to assign other conditions. This allowance avoids over-restriction by the statute, but can lead to disparity.

69. *Id.* § 1005-8-1(d). The statute provides a three-year mandatory supervised release term for murder or a Class X felony, a two-year term for a Class 1 or Class 2 felony, and a one-year term for a Class 3 or Class 4 felony. *Id.*

70. *Id.* Under the former Illinois procedure, members of the parole board read the master files, interviewed the prisoners, and discussed the cases at the day's end to determine the parolees. ILL. REV. STAT. ch. 38, § 1003-3-1 (1975) (amended 1978). The Illinois Board based its decisions on the following criteria: seriousness of the offense, number of prior offenses, participation in prison educational programs, history of prison rule-breaking, employment prospects, marital status and number of dependents, and age. A. Heinz, J. Heinz, Senderowitz & Vance, *Sentencing by Parole Board: An Evaluation*, 67 J. CRIM. L. & CRIMINOLOGY 1, 17 (1976).

71. *See Illinois Reconsiders "Flat Time,"* *supra* note 27, at 640-46. *See generally* White, *supra* note 11, at 72; Comment, *The Parole System*, 120 U. PA. L. REV. 282 (1971).

72. ILL. REV. STAT. ch. 38, § 1003-6-3(a)(2) (1978).

73. The statute states that the Department of Corrections is to prescribe rules regarding early release and forfeiture of good-conduct credits, but mentions no specifics. *Id.* § 1003-6-3 (1978). Maine allows a reduction of 10 days a month from a prisoner's sentence when the "record of conduct shows that [the prisoner] has observed all the rules and requirements." ME. REV. STAT. ANN. tit. 17-A, § 1253 (Supp. 1978). The Maine system thus resembles the Illinois approach in that the prisoner need not participate in prison work programs to qualify for the reduction.

74. ILL. REV. STAT. ch. 38, § 1003-6-3 (1978). *See* note 64 *supra* and accompanying text. *See also Illinois Reconsiders "Flat Time,"* *supra* note 28, at 652-57.

bly will promote sentence uniformity better than California's, because California retains more echoes of the disparity-prone parole system.[75]

The California and Illinois statutes also differ with respect to the length of sentences. In all classifications except certain cases of murder, Illinois allows the imposition of longer sentences on criminals than does California.[76] Illinois, for example, punishes murder with a term of twenty-to-forty years, or a term of "natural life imprisonment" if specific aggravating factors are present in the case.[77] California, on the other hand, imposes a sentence of death for murder under aggravated circumstances, death or life imprisonment for first-degree murder, and a term of five, seven, or eleven years for second-degree murder.[78] Interestingly, both California and Illinois provided for substantially greater penalties under prior law for all felonies.[79] The former California Adult Authority[80] could determine a penalty for second-degree murder from a term of five years to natural life,[81] and the prior Illinois statute required judges to impose a minimum sentence of fourteen years for murder and permitted judges to decree any maximum term of imprisonment over fourteen years.[82] The actual sentences imposed under the new law, however, may not differ significantly from those under the prior law because the present statutory terms are based on average sentences imposed under prior law for the same crimes.[83] Both the California and Illinois statutes provide that a prisoner shall not serve a longer term if sentenced under the new law for a crime committed before the effective date of the legislation than if sentenced under the prior law.[84]

---

75. *See* notes 54-55, 57-62 *supra* and accompanying text.

76. *Compare* CAL. PENAL CODE § 1170(a)(2) (Deering 1979) *with* ILL. REV. STAT. ch. 38, § 1005-8-1 (1978).

77. ILL. REV. STAT. ch. 38, § 1005-8-1(a)(1) (1979). Aggravating factors exist: if the victim was a peace officer, fireman, inmate, or Department of Corrections official; if the defendant has been convicted previously of two or more murders; if the victim was aboard a hijacked vehicle; if the murder was committed pursuant to contract; or if the murder was committed in the course of another felony (armed robbery, robbery, rape, kidnapping, arson, or burglary). *Id.*

78. CAL. PENAL CODE §§ 190-190.2 (Deering 1979).

79. *Compare* CAL. PENAL CODE (Deering 1976) *with* CAL. PENAL CODE (Deering 1979); ILL. REV. STAT. ch. 38, § 1005-8-1 (1973) *with* ILL. REV. STAT. ch. 38, § 1005-8-1 (1979).

80. CAL. PENAL CODE § 3000 (Deering 1976) (amended 1976).

81. *Id.* § 190 (Deering 1979).

82. ILL. REV. STAT. ch. 38, § 1005-8-1 (1973) (amended 1978).

83. *See Illinois Reconsiders "Flat Time," supra* note 28, at 634-36 & nn.81 & 88-91; *Senate Bill 42, supra* note 25, at 1189-90, 1196-1200.

84. CAL. PENAL CODE § 1170.2 (Deering 1979); ILL. REV. STAT. ch. 38, § 1008-2-4 (1979).

The new legislation in each state also affects the use of concurrent and consecutive sentences for multiple convictions.[85] Both acts provide that sentences shall run concurrently if the court fails to expressly impose consecutive terms,[86] and both states apply an "aggregate formula" to calculate multiple sentences when consecutive sentences are imposed.[87] The Illinois statute, however, prohibits the judge from imposing a consecutive sentence unless "such a term is required to protect the public from further criminal conduct by the defendant."[88] The California provision permits the judge who decides the later conviction to choose between the consecutive or concurrent form.[89] Because the Illinois provision permits less judicial discretion in the use of consecutive sentences, it should better promote uniformity of sentences than the California version.[90]

Under the recent revisions in California and Illinois, each state now requires a written record of the reasons for the judge's selection of a sentence.[91] This requirement represents an important departure from previous practices, in which California law did not provide for any justification and Illinois law allowed the judge to determine in his own discretion whether to write a summary of reasons for imposing a particular sentence.[92] A major cause of appellate reticence in overturning trial courts' discretionary acts is the lack of reliable information about the judge's reasons for a ruling.[93] A written record thus provides an

85. Under a concurrent sentence system, a prisoner serves all sentences simultaneously; when sentences run consecutively, the additional sentences follow the completion of the original.

86. CAL. PENAL CODE § 669 (Deering 1979); ILL. REV. STAT. ch. 38, 1005-8-4(b) (1979). *See generally* Connell, *Criminal Law: Concurrent and Consecutive Sentencing*, 1973 ILL. L.F. 423.

87. CAL. PENAL CODE § 1170.1(a) (Deering 1979); ILL. REV. STAT. ch. 38, 1005-8-4(c)(2) (1979). *See also* ME. REV. STAT. ANN. tit. 17-A, § 1155(3) (Supp. 1978); S. 1437, 95th Cong., 2d Sess., § 2304 (1978). *See generally* Cassou & Taugher, *supra* note 58, at 62.

88. ILL. REV. STAT. ch. 38, § 1005-8-4(b) (1979).

89. CAL. PENAL CODE § 669 (Deering 1979).

90. *See also* Connell, *supra* note 85, at 440-41.

91. CAL. PENAL CODE § 1170(c) (Deering 1979); ILL. REV. STAT. ch. 38, § 1005-4-1(c) (1978). *See also* S. 1437, 95th Cong., 2d Sess., § 2003(b) (oral statement in open court). Maine requires no written or oral statement.

92. ILL. REV. STAT. ch. 38, § 1005-4-1(d) (1974) (amended 1978). *See generally* Griffiths, *Ideology in Criminal Procedure*, 79 YALE L.J. 359 (1970); Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821 (1968).

93. *See* Rubin, *Judicial Resistance to Sentencing Accountability*, 21 CRIME & DELINQUENCY 201, 203 (1975) (written record of sentencing reasons is essential to effective appellate review); Note, *Appellate Review of Sentences and the Need for a Reviewable Record*, 1973 DUKE L.J. 1357 (discussion of arguments for and against written statement of sentencing reasons).

effective basis for appellate review[94] and promotes utmost judicial care.[95] The requirement also encourages uniformity among individual judge's decisions because of the possibility that scrutiny of the record will reveal an arbitrary sentencing decision.[96]

To aid the court in its sentence determinations, Illinois and California mandate presentence investigations.[97] An Illinois judge may not sentence a defendant convicted of a felony until a presentence investigatory report is filed with the court.[98] The Illinois statute specifies inclusion in the report of certain items calculated to reflect a complete view of the defendant's background and character.[99] This requirement

---

94. "Without such statements, any future review must rely upon mere conjecture or surmise in determining how the final penalty was selected." Korbakes, *Criminal Sentencing: Should the "Judge's Sound Discretion" be Explained?*, 59 JUD. 185, 187 (1975). *See also* Berkowitz, *The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal*, 60 IOWA L. REV. 205, 211 (1974). The lack of a written statement was a consideration in the court's decision to remand the following cases: United States v. Bowser, 497 F.2d 1017 (4th Cir. 1974); United States v. Driscoll, 496 F.2d 252 (2d Cir. 1974); United States v. Espinoza, 481 F.2d 553 (5th Cir. 1973).

95. The judge exercises more care because he is aware, on the basis of other judges' statements in similar cases, that a particular sentence cannot be justified on the facts. Coburn, *supra* note 5, at 217.

96. *Id. See* ABA STANDARDS FOR APPELLATE REVIEW § 2.3(a) (Tentative Draft 1968). The English practice is similar to that in the majority of American jurisdictions. The Powers of Criminal Courts Act of 1973 requires a written statement of reasons for a sentence only when the defendant is over 21 and the offense is his first. Ashworth, *Justifying the First Prison Sentence*, 1977 CRIM. L. REV. 661, 661. *See* Note, *European Approaches to Problems in the Sentencing Process*, 3 NEW ENG. J. PRISON L. 171 (1976).

97. ILL. REV. STAT. ch. 38, §§ 1005-3-1, 1005-3-2, 1005-4-1 (1978). CAL. PENAL CODE §§ 1203, 1204 (Deering 1979). In California the report is called a "probation report." Neither California nor Illinois requires disclosure of the report to the defendant. *See* People v. Forman, 108 Ill. App. 2d 482, 247 N.E.2d 917 (1969); People v. Stroup, 96 Ill. App. 2d 315, 239 N.E.2d 1 (1968). *See also* People v. Jerrick, 62 Ill. App. 3d 914, 379 N.E.2d 1295 (1978) (presentence report does not obviate need for diagnostic examinations before sentencing); People v. Burdine, 57 Ill. App. 3d 677, 373 N.E.2d 694 (1978) (inaccuracies in presentence report may be waived); People v. Cook, 31 Ill. App. 3d 363, 334 N.E.2d 834 (1975) (court allowed under prior law to consider presentence report).

FED. R. CRIM. P. 32(c) requires that a presentence investigation be conducted in the federal courts, and that the contents be disclosed to the defense. *See* Gardner v. Florida, 430 U.S. 349 (1977) (denial of presentence report to defendant sentenced to death violates due process clause); 1977 WASH. U.L.Q. 728. *But see* Iacovetti v. United States, 534 F.2d 1189 (5th Cir. 1976) (court narrowly construed Rule 32 (c) to avoid release of report to defendant). For a criticism of disclosure, see Roche, *The Position for Confidentiality of the Presentence Investigation Report*, 29 ALB. L. REV. 206 (1965).

98. ILL. REV. STAT. ch. 38, § 1005-3-1 (1978).

99. *Id.* § 1005-3-2 (defendant's personal, medical, and criminal history; availability of treatment facilities suited to defendant's needs; effect of the offense on the victims; defendant's status

substantially improves upon prior Illinois law, which allowed the defendant to waive the report and failed to delineate its content.[100] Illinois demands the more complete report; California merely mandates a probation report that "may be considered either in aggravation or mitigation of the punishment."[101] Under either statute, presentence reports may reduce disparity by providing judges with a common set of reviewable factors, but these factors, which include the individual characteristics of each defendant, also may introduce greater disparity in sentencing for identical crimes.[102]

Judges also consider factors in aggravation and mitigation of the sentence during the presentence (California) or sentence (Illinois) hearing.[103] The California judge must sentence the defendant to the middle term of those specified in the statute for the particular crime (*e.g.*, seven years for second-degree murder for which the statute prescribes a term of five, seven, or eleven years imprisonment), unless factors in mitigation or aggravation justify the lower or upper term.[104] California law

---

since arrest; an alternate plan, where proper, to institutional sentencing; results of mental and physical tests of defendant, if ordered by the court). *See* Berkowitz, *supra* note 93, at 215. *See also* New York City Board of Correction, *Pre-sentence Reports: Utility or Futility?*, 2 FORDHAM URB. L.J. 27 (1973).

Because some courts lack a professional probation staff, the statute does not designate a particular officer or organization to prepare the report. The court, however, must appoint a qualified neutral party for this purpose. ILL. REV. STAT. ch. 38, § 1005-3-1 (1973) (Council Commentary).

100. ILL. REV. STAT. ch. 38, § 1005-3-1 (1973) (amended 1978). FED. R. CRIM. P. 32(c) allows the defendant to waive the report with the court's consent.

101. CAL. PENAL CODE § 1203 (Deering 1979).

102. *But see* notes 106-07 *infra* and accompanying text. This disparity also can be reduced by informed appellate review. *See* Blake, *Appellate Review of Criminal Sentencing in the Federal Courts*, 24 U. KAN. L. REV. 279, 302 (1976). *See generally* Katkin, *Presentence Reports: An Analysis of Uses, Limitations and Civil Liberties Issues*, 55 MINN. L. REV. 15 (1970); Note, *supra* note 92, at 1371-74; Annot., 40 A.L.R.3d 681 (1971).

103. CAL. PENAL CODE § 1204 (Deering 1979); ILL. REV. STAT. ch. 38, § 1005-4-1 (1978) (the presentence report also includes these factors to some extent). *See* People v. Burdine, 57 Ill. App. 3d 677, 373 N.E.2d 694 (1978).

104. CAL. PENAL CODE §§ 1203-1204 (Deering 1979). *See also* People v. Saffell, 87 Cal. App. 3d 157, 150 Cal. Rptr. 804 (1978) (violation of equal protection to require mentally disordered sex-offenders amenable to treatment to serve the upper term when other defendants receive middle term for the same crime). *Accord*, People v. Superior Court, 80 Cal. App. 3d 407, 145 Cal. Rptr. 711 (1978). *See also In re* Eric J., 86 Cal. App. 3d 513, 150 Cal. Rptr. 299 (1978) (violation of equal protection to impose upper term on juvenile without finding of aggravating factors when such a finding is necessary for adult defendants); *In re* John W., 81 Cal. App. 3d 994, 146 Cal. Rptr. 826 (1978) (adjustment of sentence under § 1170.2 for sentence imposed under indeterminate sentence law allows imposition of upper term even in absence of ordinarily required finding of aggravating factors).

does not specify what factors must be considered in the determination of mitigation or aggravation.[105] Illinois law, in contrast, delineates factors that must be "accorded weight" in the judge's decision to minimize or maximize a sentence.[106] Illinois thus seeks to counterbalance disparity-causing considerations of a defendant's individual characteristics[107] by specifying factors that courts must consider in aggravation or mitigation.

A final noteworthy revision in the Illinois and California statutes concerns appellate review. The Illinois act permits an appellate court to "modify . . . and enter any sentence that the trial judge could have entered, including increasing or decreasing the sentence or entering an alternative sentence to a prison term."[108] The statute establishes a rebuttable presumption that the trial judge acted properly,[109] but the presumption is less difficult to overcome than under the prior statute, which permitted an appellate court to alter a sentence only if the trial judge clearly abused his discretion.[110] Along with Illinois' requirement

105. CAL. PENAL CODE § 1170(b) (Deering 1979). Either party may submit a statement in aggravation or mitigation to contradict or support the probation investigation. *Id.* For a criticism that these California provisions are unconstitutionally vague, see Uelmen, *Proof of Aggravation Under the California Uniform Determinate Sentencing Act: The Constitutional Issues*, 10 LOY. L.A.L. REV. 725, 731-35 (1977).

106. The statute lists these factors in mitigation: defendant's conduct caused no physical harm; defendant acted with strong provocation; grounds exist tending to justify defendant's act; another person induced defendant's act; no history of prior crimes; defendant's character indicates that recidivism is unlikely; defendant is likely to comply with probation terms; and imprisonment would endanger medical condition of defendant. ILL. REV. STAT. ch. 38, § 1005-5-3.1 (1978). Factors in aggravation include: the conduct caused serious harm; defendant received compensation for the act; history of criminal activity; defendant by duties of his position was obligated to prevent the crime; and defendant held public office, and crime related to the official conduct. *Id.* § 1005-5-3.2. New York is the only other state to include specific factors in its statute. The list, however, is shorter and more general. N.Y. PENAL LAW § 65.00(1) (McKinney 1975). For a criticism that lists are too restrictive, see *Illinois Reconsiders "Flat Time," supra* note 28, at 632.

107. *See* text accompanying note 102 *supra.*

108. ILL. REV. STAT. ch. 38, § 1005-5-4.1 (1978). *See also* People v. Bean, 63 Ill. App. 3d 264, 379 N.E.2d 723 (1978) (when appellate court reduces degree of offense, it may also reduce the imposed sentence).

109. ILL. REV. STAT. ch. 38, § 1005-5-4.1 (1978). *See also* People v. Davis, 65 Ill. App. 3d 580, 382 N.E.2d 594 (1978) (rebuttable presumption that trial judge acted properly). *Accord*, People v. Willis, 64 Ill. App. 3d 737, 382 N.E.2d 358 (1978); People v. Rogers, 64 Ill. App. 3d 290, 382 N.E.2d 1236 (1978); People v. Andreano, 64 Ill. App. 3d 551, 381 N.E.2d 783 (1978); People v. Schomer, 64 Ill. App. 3d 440, 381 N.E.2d 62 (1978).

110. "While Illinois enjoys this broader scope of review, the practice of Illinois appellate courts is to respect the trial judge's discretion unless clearly abusive." *Illinois Reconsiders "Flat Time," supra* note 28, at 637. *See* People v. Doyle, 50 Ill. App. 3d 876, 365 N.E.2d 1184 (1977) (no reversal unless clear abuse of discretion); *accord*, People v. Givens, 46 Ill. App. 3d 1035, 361

of a written statement from the judge of reasons for his choice of sentence,[111] this change in standards of review facilitates appellate review and illustrates Illinois' firm intent to eradicate sentence disparity.[112]

California also authorizes appellate review of sentences,[113] but appears to adhere to the stricter "abuse of discretion" standard.[114] California also mandates that the Community Release Board review a sentence within one year from the date of imprisonment and recommends that the sentencing court resentence the prisoner if the Board finds the sentence to be disparate with others.[115] Review by the Com-

---

N.E.2d 671 (1977); People v. Wilson, 32 Ill. App. 3d 57, 335 N.E.2d 499 (1975), *rev'd on other grounds*, 66 Ill. 2d 346, 362 N.E.2d 291 (1977); People v. Long, 30 Ill. App. 3d 815, 333 N.E.2d 534 (1975); People v. Young, 30 Ill. App. 3d 176, 332 N.E.2d 173 (1975).

The following states use the abuse-of-discretion standard: ALASKA STAT. § 12.55.120 (1978); ARIZ. REV. STAT. ANN. § 13-4037(b) (1977); HAW. REV. STAT. § 641-11 (1976); IOWA CODE § 814.6 (1978); NEB. REV. STAT. § 29-2308 (1975); N.Y. CRIM. PROC. LAW § 470 (McKinney 1975); OKLA. STAT. tit. 22, § 1066 (Supp. 1978); OR. REV. STAT. § 138.050 (1973-1974). For detailed excursions through the federal decisions, see Note, *supra* note 93; 23 DRAKE L. REV. 191 (1973); 45 U. COLO. L. REV. 209 (1973). For an analysis of the exceptions to the federal doctrine of limited appellate review, see Kutak & Gottschalk, *In Search of a Rational Sentence: A Return to the Concept of Appellate Review*, 53 NEB. L. REV. 463, 488-90 (1974).

111. *See* notes 91-96 *supra* and accompanying text.

112. Arguments against appellate review include: the appellate court's inadequate view of the trial proceeding; the trial judge's greater familiarity with the defendant; the encouragement of frivolous appeals; and the few sentences that would be modified. Hopkins, *Reviewing Sentencing Discretion: A Method of Swift Appellate Action*, 23 U.C.L.A. L. REV. 491, 492-95 (1976); Comment, *Appellate Review of Sentences: A Survey*, 17 ST. LOUIS L.J. 221, 245-46 (1976); 58 IOWA L. REV. 469, 483-84 (1972).

Arguments in favor of appellate review include: correction of disparity in punishment; appellate freedom commensurate with other reviewable areas of trial discretion; correction of arbitrary sentences; and standardized guidelines for lower courts. Coburn, *supra* note 5, at 216; Hopkins, *supra*, at 491; Comment, *ABA Minimum Standards for Criminal Justice—A Student Symposium*, 33 LA. L. REV. 559, 561-62 (1973).

Four states have created a specific court to review sentences: CONN. GEN. STAT. § 51-195 (1979); ME. REV. STAT. ANN. tit. 17, § 2141 (Supp. 1978); MASS. ANN. LAWS ch. 278, § 28A (Michie/Law. Co-op 1979); MONT. REV. CODES ANN. § 95-2501 (Supp. 1977).

For a discussion of England's Court of Criminal Appeals, which can review sentences, see D. THOMAS, PRINCIPLES OF SENTENCING 40-45 (1970).

113. CAL. PENAL CODE § 1170(f) (Deering 1979). *See also* Comment, *supra* note 60, at 156-58.

114. *See* People v. Alexander, 74 Cal. App. 3d 20, 141 Cal. Rptr. 262 (1977); People v. Harris, 73 Cal. App. 3d 76, 140 Cal. Rptr. 697 (1977) (discretion abused only where ruling "exceeds the bounds of reason"); *In re* Carter, 19 Cal. App. 3d 479, 97 Cal. Rptr. 274 (1971); People v. Fusaro, 18 Cal. App. 3d 877, 96 Cal. Rptr. 368, *cert. denied*, 407 U.S. 912 (1971).

The proposed federal criminal code provides for review of sentences, but restricts it to sentences either below the minimum or above the maximum allowed. S. 1437, 95th Cong., 2d Sess., § 3725 (1978).

115. CAL. PENAL CODE § 1170(f) (Deering 1979).

munity Release Board should decrease arbitrary sentencing.[116]

III. CONCLUSION

No nation has experimented as devotedly with the indeterminate sentence as the United States.[117] The ideal of rehabilitation, which underlies the argument for the indeterminate sentence, is noble but unachievable in the overburdened American penal systems.[118] Present prison facilities are sadly ineffective in "curing" the socially and mentally impaired prisoner,[119] and terms served by prisoners under the indeterminate system differ arbitrarily.

California and Illinois lead the movement away from the indeterminate sentence system toward the more realistic and more evenhanded structures of the determinate sentence and the elimination of parole in its traditional form. Illinois more painstakingly outlines the procedures for implementing the new approach to sentencing,[120] but California also has designed a plan that will likely increase uniformity of sentences and reduce judicial discretion.[121]

Neither sentencing plan, however, will fully eradicate sentence disparity. Each state allows for consideration of the defendant's personal needs and situation, which inevitably introduces elements of inequitable treatment among defendants for similar crimes. Illinois' consideration of factors in aggravation and mitigation of the defendant's offense and California's manipulation of postimprisonment terms through its Community Release Board also inject elements of personal attention into an otherwise fair sentencing procedure. California and Illinois have nevertheless taken bold and commendable steps to eliminate sen-

116. *See* Note, *The Potential Adequacy of the California Uniform Determinate Sentence Law*, 10 SW. U.L. REV. 149, 163-64 (1978).

117. China practices indeterminate sentencing. *See* Edwards, *Reflections on Crime and Punishment in China, With Appended Sentencing Documents*, 16 COLUM. J. TRANS. L. 45, 59 (1977). Scandinavian countries, the Soviet Union, and England also employ the indeterminate sentence. *See* Andenaes, *The Future of Criminal Law*, 1971 CRIM. L. REV. 615, 620-27.

118. *See* Cole, *Will Definite Sentences Make a Difference?*, 61 JUD. 58, 64 (1977). The author disputes claims that the definite sentence will control disparity and discretion, because the prison system remains bureaucratic in nature. The author also questions the wisdom of eliminating parole because the overcrowded prisons require an increasingly faster turnover rate.

119. *See* note 25 *supra* and accompanying text.

120. *See* notes 68, 106, 116, 139 *supra* and accompanying text.

121. *See Illinois Reconsiders "Flat Time," supra* note 28, at 662; Comment, *supra* note 60, at 145.

tence disparity and to provide uniformity of sentencing.[122]

William T. Carey

122. The following states also have considered or are considering sentencing reforms not based on rehabilitation: Alaska, Colorado, Connecticut, Florida, Idaho, Indiana, Maine, Minnesota, Ohio, Oregon, Pennsylvania, South Dakota, Virginia, and Washington. Cole, *supra* note 118, at 59-60 n.5.

California has established a Judicial Council to study patterns of sentencing under the determinate system. CAL. PENAL CODE § 1170(f) (Deering 1979). Illinois now also has a Criminal Sentencing Commission, which reviews the effect of determinate sentencing on prison populations, the effectiveness of felony classification and determinate sentencing, and the uniformity of sentences. ILL. REV. STAT. ch. 38, §§ 1005-10-1 to 1005-10-2 (1978).