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Proposal For Determinate Sentencing in New York: The Effect on an Offender's Due Process Rights

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NOTES

PROPOSAL FOR DETERMINATE SENTENCING IN NEW YORK: THE EFFECT ON AN OFFENDER'S DUE PROCESS RIGHTS

I. Introduction

The concept of indeterminacy presently provides the foundation upon which criminal sentences are based in a majority of jurisdictions. Indeterminate sentencing reflects an underlying belief that rehabilitation is the primary objective of the criminal law. Indeterminate sentencing requires that punishment be on an individualized basis. To meet the rehabilitative needs of the individual offender, as with any physical or mental illness with which a criminal activity is equated, an indeterminate sentence is justified because the time necessary to effect a cure can not be known with certainty when the offender is first incarcerated. In 1870, New York enacted


2. Williams v. New York, 337 U.S. 241, 248 (1949). TWENTIETH CENTURY FUND, FAIR AND CERTAIN PUNISHMENT 73-75 (1976)(Background Paper by A. Dershowitz); ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 143 (1968); Bayley, Good Intentions Gone Awry—A Proposal for Fundamental Change in Criminal Sentencing, 51 WASH. L. REV. 529 (1976); OR. CONST. art. I § 5 (“Laws for the punishment of crime shall be found on the principle of reform and not of vindictive justice.”). It has generally been acknowledged that there are four basic rationales which have justified the imposition of sentence on the offender. These rationales are (1) the deterence of crime; (2) the incapacitation of the offender; (3) the vindication of the social order and; (4) the rehabilitation of the offender. Campbell, Law of Sentencing 21-23 (1978); Pell v. Procunier, 417 U.S. 817 (1974).

3. 337 U.S. at 247 (1949). See also United States v. Foss, 501 F.2d 522 (1st Cir. 1974); Woosley v. United States, 478 F.2d 139, 143 (8th Cir. 1973) (“A mechanical approach to sentencing plainly conflicts with the sentencing guidelines announced by the Supreme Court in Williams v. New York.”).

4. EXECUTIVE ADVISORY COMMITTEE ON SENTENCING, CRIME AND PUNISHMENT IN NEW YORK: AN INQUIRY INTO SENTENCING AND THE CRIMINAL JUSTICE SYSTEM xii (Report to Governor Hugh L. Carey, March, 1979) [hereinafter cited as EXECUTIVE COMMISSION ON SENTENCING].

5. Id. at xii, 13. The Wickersham Commission, a New York State Crime Commission of the early 1930's, advanced this argument. "Physicians, upon discovering disease, cannot name the day upon which the patient will be healed. No more can judges intelligently set the date of release from prison at the time of trial." NATIONAL COMMISSION ON THE OBSERVANCE OF LAW AND ENFORCEMENT (The Wickersham Commission) REPORT ON PENAL INSTITUTIONS, PROBATION AND PAROLE 142-43 (1931).
the first indeterminate sentencing statute.⁶ This statute provided for the release of young offenders "at any time before they had completed their full prison term, if it was believed that they had been rehabilitated."⁷ Although a sharp departure from past sentencing practices, indeterminate sentencing quickly gained wide acceptance. By 1922, thirty-eight states had enacted, in one form or another, limited indeterminate sentencing procedures.⁸

During the sentencing process significant constitutional problems concerning the procedural due process rights of an offender often emerge. These questions concern, among other things, the evidence available to the sentencing judge and the right of the offender to challenge the use of such evidence.⁹ The Supreme Court has held that the policies of an indeterminate sentencing system require that many of the criminal offender's due process rights be subordinated to state's interest in his rehabilitation.¹⁰ To effectuate this state goal, sentencing judges have therefore been granted wide discretion to consider any relevant evidence pertaining to the defendant to realize the state's interests. For example, the rules of evidence,¹¹ the right to confrontation and cross-examination of adverse witnesses,¹² and the exclusion of evidence obtained in violation of the fourth amendment have been found inapplicable to the sentencing process.¹³

Recently, indeterminate sentencing has come under increasing

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7. Id.
10. 337 U.S. at 249-50.
12. 337 U.S. at 243.
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criticism for a number of reasons. Two of these criticisms are directed at the results of these sentencing practices. First, vast disparities exist among sentences for offenders who have committed similar crimes. It has been argued that this disparity is the product of uncontrolled discretion in imposing sentences. Second, critics argue that under indeterminate sentencing decisions frequently are made behind a "veil of secrecy." The public does not know whether the judge or the probation officer who prepared the presentence report determines the appropriate sentence nor how sentencing decisions are made. A third criticism focuses on the rationale underlying indeterminate sentencing. It is argued that to assess the rehabilitative potential of the offender is either impossible or impractical. A final criticism of indeterminate sentencing is that, as a result of the aforementioned deficiencies, it is popularly viewed as a principle cause in the declining public respect for the criminal justice system. The secretive nature of sentencing decisions have accentuated disparity among sentences and have severely undermined the integrity of the sentencing process in the eyes of the public.

The uncertainty of punishment engendered by the disparate nature of present practices has diminished the capacity of the law to do justice to individuals.

Determinate sentencing seeks to avoid the pitfalls of the indeterminate system by limiting and structuring the actions of sentencing

15. Executive Commission on Sentencing, supra note 4, at x-xxi.
16. Id. at 2. The "veil of secrecy" to which the Executive Commission refers is the perception on the part of the public that the identity of the government officials determining the sentence, and the criteria which are considered, is unavailable information. These complaints in their basic form represent questions as to the right to confrontation and the right to cross-examination guaranteed by the sixth amendment. U.S. Const. amend. 6.
18. Executive Commission on Sentencing, supra note 4, at xiii.
20. Executive Commission on Sentencing, supra note 4, at xii.
21. Id. at xiii.
judges so as to increase the certainty of punishment. This end is achieved through the use of a system of relatively fixed sanctions, considering primarily the offense committed while taking into account the offender's prior record. A number of states have recently adopted a determinate sentencing system and federal legislation is presently before the Congress. In the New York State Assembly a bill (A.8308) has been introduced which proposes that a sentencing guidelines scheme similar to proposed federal legislation and the practices of a number of states be enacted in New York.

This Note will address the issue of what procedural protections are due an offender at sentencing, and how these rights will be affected under a system of determinate sentencing. An examina-

22. Id. at 212-13. N.Y.A. 8308 § 906(1), 202nd Sess. (1979)[hereinafter cited as A.8308].
23. There are four basic determinate sentencing schemes. First, flat sentencing requires that the sentence imposed at trial constitute the term which the offender will have to serve, less applicable good time credits. Crimes are grouped into a number of categories with a broad sentencing range prescribed for each category. The judge may impose a "flat sentence" anywhere within the prescribed range. Second, mandatory sentencing takes away from the sentencing judge all possible discretion in imposing sentence. A single penalty for each crime is established by the legislature and that is the penalty which must be meted out. Third, presumptive sentencing envisions the legislature enlarging its penal code to include many more degrees for each crime corresponding to the specific elements of the offense. The legislature, for each degree would establish a range of presumptive sentences thereby allowing the sentencing judge some discretion in imposing sentence. Finally, a sentencing guidelines approach foresees the creation of a Sentencing Commission which would determine sentencing parameters. These guidelines would be used by the sentencing judge as a benchmark from which a sentence is imposed. A judge could impose a sentence outside the guidelines if he felt that such a determination was warranted, but a written statement of reasons for such a departure usually must be given. EXECUTIVE COMMISSION ON SENTENCING, supra note 4, at 214-18.
25. A.8308, supra note 22.
26. A full discussion of the merits and deficiencies of a determinate sentencing system will not be undertaken here. For such a discussion see generally Symposium on Sentencing,
tion of constitutionally permissible sentencing procedures under an indeterminate scheme will be reviewed in part II. Part III will discuss the proposed legislation. Specifically, three proposals will be analyzed. The first proposal shifts responsibility for the preparation of presentence reports from probation officers to investigative court officers. This officer is to be appointed by the chief administrative judge. The second proposal establishes a sentencing hearing to determine the existence of any aggravating or mitigating circumstances which might lead to an enhancement or reduction of the offender's sentence. The proposed sentencing hearing will be contrasted with current indeterminate sentencing practices to assess the continued vitality of present procedures under a new sentencing scheme. The final proposal grants both the offender and the prosecutor increased access to appellate review of sentences.

II. Constitutional Challenges to Indeterminate Sentencing Proceedings

Constitutional challenges to sentencing practices are a recent phenomena. While offenders traditionally were accorded limited review of sentencing procedures, sweeping attacks on sentencing practices brought pursuant to the due process clause of the fourteenth amendment were disfavored. Townsend v. Burke repre-

27. A.8308, supra note 22, § 75.05(9)(t)-(u), .05(9).
28. Id. § 400.10.
29. Id. § 906(10)(a)(b).
30. Id. §§ 450.12, .25, 470.07, .21.
31. Until the middle of the nineteenth century, sentencing judges were limited as to the amount of discretion which they could exercise at sentencing. With the rise of the indeterminate sentence, the discretionary powers of the sentencing judge were increased substantially and therefore dictating greater review of the propriety of sentence. See Procedural and Substantive Fairness in Sentencing: An Unnecessary and Unappealing Subject to Pennsylvania Higher Courts, 82 Dick. L. Rev. 379, 380-81 (1978).
32. At common law, appellate review was limited to the question of whether the sentence imposed fell within the statutory limits. Traditionally, federal appellate review was confined to the same narrow scope. Gurera v. United States, 40 F.2d 338 (8th Cir. 1930); Blockburger v. United States, 284 U.S. 299 (1932).
33. The fourteenth amendment reads in part: "Nor shall any State deprive any person of life, liberty or property without due process of law." U.S. Const. amend. XIV, § 1.
35. Id.
presented a significant departure from this practice. This case involved the conviction of a defendant on two counts of burglary and two counts of robbery. The defendant challenged the judge’s use of the confession made without the aid of counsel and misleading allegations concerning his criminal record in the determination of the defendant’s sentence. The defendant claimed that the use of suspect information at sentencing ran afoul of the fourteenth amendment due process requirements. The Court’s decision did not reach the question as to what specific procedural rights were due a defendant. Rather, it held only that elements of fair play and a desire to have convictions rest on reliable information necessitated that the sentence be overturned. The Court concluded that it was “the carelessness of designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct ... that renders the proceedings lacking in due process.”

Williams v. New York, decided one year after Townsend, ignored the due process claims upheld in Townsend. In Williams, the defendant was found guilty of murder in the first degree. The jury recommended a life sentence, but the judge rejected this recommendation and imposed the death penalty. The judge made this determination on the basis of additional information not admissible at trial, but which appeared in the presentence report. This information consisted of alleged confessions by the defendant and allegations of “‘thirty other burglaries in and about the same vicinity’ where the murder had been committed.” Williams appealed, arguing that

36. Id.
37. Id. at 739-40.
38. Id. at 741.
39. Id.
40. Id.
41. 337 U.S. 241 (1949).
42. Id. at 242.
43. Id.
44. Id. at 244.
45. Id. The report also referred to other activities which indicated that the defendant “possessed ‘a morbid sexuality’ and classified him as a ‘menace to society.’ “ Such evidence, while inadmissible at trial (see WIGMORE, LAW OF EVIDENCE §§ 1367-1368, 1377 (Chadbourn Rev’d ed. 1974)) was considered crucial evidence for a presentence report. See FED. R. EVID. § 32(2), N.Y. CRIM. PROC. LAW § 390 (McKinney 1975). It was argued that the purpose of the report was to inform the sentencing judge of all information concerning the convicted person’s past life, health, habits, conduct and moral and mental propensities. 337 U.S. at 245.
the guarantee of procedural due process requires that prejudicial information contained in the presentence report be subjected to the evidentiary rules applicable at trial. The Supreme Court rejected this argument. Justice Black, writing for the majority, subordinated the defendant’s due process rights to the sentencing judge’s need for the “fullest information possible concerning the defendant’s life and characteristics” in order to impose an appropriate sentence. The majority contended:

[Modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.]

Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that punishment should fit the offender and not merely the crime. . . . Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.

Given this commitment to individualized sentencing, a number of justifications were advanced to curtail a defendant’s procedural due process rights during sentencing. First, the presentence report is designed to present the sentencing judge with all possible information concerning the defendant so that an informed rehabilitative sentence can be meted out. The probation officer’s effectiveness will be seriously limited if the information in the report is subject, for example, to the rules of evidence applicable at trial. It was noted that most of the information commonly found in the probation reports would be unavailable if such information were “restricted to that given in open court by witnesses subject to cross-examination.” Second, a fear implicit in Williams, and later made explicit by a number of courts, was the state interest in protecting confidential sources. Finally, it was asserted that extensive proce-

46. 337 U.S. at 245. The defendant argued that he was denied reasonable notice of the charges against him and was not afforded an opportunity to confront adverse witnesses who contributed to the presentence report.
47. Id. at 247.
48. Id. at 247-48.
49. Id. at 250.
50. Id.
51. The problem of confidential sources is twofold. On the one hand there is the fear that the disclosure of the confidential source, i.e., an informer, could endanger the physical well-being of the confidential source. See United States v. Picard, 464 F.2d 215, 217 (1st Cir. 1972);
dural safeguards would "endlessly delay criminal administration in a retrial of collateral issues." 52

The limitations placed on due process protection in Williams were predicated on the belief that the sentencing proceeding was deemed to be nonadversarial. This view, however, has been modified. In Kent v. United States,53 a juvenile offender challenged a proceeding conducted by the Juvenile Court of the District of Columbia, wherein the court waived its jurisdiction over the offender and transferred him to the criminal court.54 The Supreme Court held that such a proceeding was of such "critical import" to the juvenile that he was entitled to the essential requirements of due process and fair treatment.54 Such requirements were held to include the right to the effective assistance of counsel, access to information which could have a possible impact on the deliberations of the sentencing judge, and a statement of reasons for the decision of the trier of fact.56

While the factual distinction between the two cases seems clear,57 much of the rationale in Kent undermines the very substance of the Williams decision. Kent rejects the contention made in Williams that because the proceeding at issue is characterized as non-adversarial, the individual subject to such a proceeding should be denied procedural process.58 The Kent court argued that although the Juvenile Court was designed to protect the child's welfare, the actual effect of the system was far different.59 The present operation of these courts places the child in a position where he "receives the


52. 337 U.S. at 250.
54. Id. at 546.
55. Id. at 556-57.
56. Id. at 554. While the court in Kent extended a number of due process safeguards to the individual, it was made clear that the hearing did not have to conform with all the requirements of a criminal trial. Id. at 562.
58. 383 U.S. at 554-56.
59. Id. at 555-56.
worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."\(^6\)

The "no due process" rule at sentencing enunciated in *Williams* was modified further in *Specht v. Patterson.*\(^61\) *Specht* brought before the Supreme Court the question whether an individual convicted of indecent liberties, which under Colorado law carried a maximum sentence of ten years, was entitled to notice and a full hearing when sentenced under the Sex Offenders Act.\(^62\) Sentencing under the Sex Offenders Act is predicated on a finding by the trial court that an offender convicted of specified sex offenses "if at large, constitutes a threat of bodily harm to members of the public. . . ."\(^63\) An individual sentenced under the Colorado Sex Offenders Act is subject to an indeterminate term of from one day to life imprisonment.\(^64\) *Williams* was held inapplicable because the sentencing process under question in this case involved the determination of whether the offender constituted a "threat of bodily harm to members of the public," a new finding of fact not an ingredient of the offense charged.\(^65\) The Court held that "a defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings.' "\(^66\)

More recently, lower federal courts have held that as a matter of due process hearsay evidence must be excluded from consideration at sentencing when such evidence lacks any indicia of reliability. In *United States v. Weston*,\(^67\) the Ninth Circuit reviewed the conviction of a defendant for receiving, concealing and facilitating trans-

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60. *Id.* at 556.
62. *Id.* at 607.
63. *Id.*
64. *Id.*
65. *Id.* The *Specht* court went to some lengths to distinguish the holding of *Williams*. Specht argued that a sentencing proceeding under the Sex Offender's Act was completely different than the defendant's criminal trial. While not addressing the contention that any sentencing proceeding involves issues entirely different than a criminal trial. The court in *Specht* felt justified in concluding that the nexus between the issues at trial and at sentencing found in *Williams*, was not present when the state sought to sentence an individual under a different statutory proceeding thereby mandating a result in stark contrast to the holding of *Williams*.
66. 386 U.S. at 609.
67. 448 F.2d 626 (9th Cir.), *cert. denied*, 404 U.S. 1061 (1971).
portation of heroin. The trial judge initially imposed a minimum mandatory sentence of five years. However, when presented with a presentence report which alleged that the defendant was a large scale trafficker in narcotics, the judge imposed the maximum allowable sentence of twenty years. The defendant appealed, disputing the veracity of the assertions made in the presentence report and arguing that the judge’s consideration of them without more substantiation than appeared in the presentence report violated her fourteenth amendment rights to due process. The court distinguished Williams and relied on Townsend v. Burke to vacate the higher sentence. The court held that a sentence cannot be based on information the accuracy of which is extremely suspect.

The Ninth Circuit expanded the holding of Weston in Farrow v. United States. In Farrow, a defendant, sentenced for jumping bail and failing to pay a special tax on marijuana, moved to vacate his sentence. Defendant argued that the sentencing court had considered four invalid prior convictions and had enhanced his sentence based on allegations in the presentence report which were materially untrue. The defendant contended that the use of false material violated the due process commands of Townsend. While the court denied the defendant’s motion on factual grounds, with regard to his second contention it was stated that “clear teaching of Townsend and Weston is that a sentence will be vacated on appeal if the challenged information is (1) false or unreliable, and (2) demonstrably the basis of sentence.”

The application of the exclusionary rule under the fourth amend-

68. Id. at 627.
69. Id. at 627-30.
70. Id. at 630-31.
71. Weston sought to distinguish Williams on two grounds. First, Weston vigorously denied the allegations in the presentence report and the judge’s consideration of them at sentencing, Williams did neither. Second, Williams, it was contended, involved sweeping challenges to the constitutionality of the whole sentencing process. Weston’s challenge was limited to the accuracy and use of alleged unreliable material in her presentence report. Id. at 631.
72. 448 F.2d at 634.
73. 580 F.2d 133 (9th Cir. 1978).
74. Id. at 1344.
75. Id. at 1358.
76. Id. at 1362.
77. Id. at 1359.
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Determination has worked to limit the evidence used in the sentencing process. In Verdugo v. United States, a leading case applying the exclusionary rule at sentencing, the defendant had been convicted of selling and transporting heroin. The sentencing judge sought to increase the defendant's sentence on the basis of evidence which had been suppressed at trial. Defendant appealed, arguing that the use of such evidence even for the limited purpose of sentencing violated the commands of the exclusionary rule. The Ninth Circuit concluded that the use of illegally seized evidence would be a substantial incentive for unconstitutional searches and seizures. Judge Browning, in a separate opinion, made further reference to the individual's privacy interest in removing such evidence from consideration at sentencing.

No clear test has yet been developed to indicate when the offender's constitutional rights have been violated to an extent suffi-

78. The exclusionary rule was first enunciated by the Supreme Court in Weeks v. United States, 232 U.S. 383 (1914). In Weeks, a unanimous court held that in a federal prosecution the fourth amendment barred the admission of evidence obtained through an illegal search and seizure. Id. at 398. Mapp v. Ohio, 367 U.S. 643 (1961), expanded the scope of the Weeks rule to exclude all evidence obtained in violation of the fourth amendment from admission in state court proceedings. Id. at 655. While the commands of the exclusionary rule seem clear, there has been some conflict as to what interests are being vindicated by the rule. A number of decisions have justified the rule on the grounds that the exclusionary rule is the "only effective deterrent to lawless police action." Linkletter v. Walker, 381 U.S. 618, 636 (1965), accord, Terry v. Ohio, 392 U.S. 1, 12 (1968)(the exclusionary rule is the "principal mode of discouraging lawless police conduct"). Another line of decisions ground the exclusionary rule in the protection of the individual's right to privacy. Dodge v. United States, 272 U.S. 530, 532 (1926)("If the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence were allowed to be used."). The emphasis on the protection of the individual's privacy interests is further manifested by the requirement that a violation of personal interest must be shown in order to have standing to bring a fourth amendment challenge. See Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Calandra, 414 U.S. 338, 348 (1974); Simmons v. United States, 390 U.S. 377, 389-90 (1968); Mancusi v. DeForte, 392 U.S. 364, 367-70 (1968). See generally Note, Application of the Exclusionary Rule at Sentencing, 57 Va. L. Rev. 1255 (1971).

79. 402 F.2d 599 (9th Cir. 1968), cert. denied, 402 U.S. 961 (1971). See also People v. Belleci, 24 Cal. 3d 879, 885, 598 P.2d 473, 477, 157 Cal. Rptr. 503, 507 (1979) (evidence suppressed at trial as illegally obtained may not be introduced at sentencing).


81. 402 F.2d at 608.

82. Id. at 610.

83. Id. at 611.

84. Id. at 616 (Browning, J., separate opinion).
cient to require a departure from the tenets of Williams. However, departures from Williams frequently have been predicated on the showing of one of three factors: (1) where substantial rights may be adversely affected as a result of the proceeding; (2) where issues not adjudicated at trial must be resolved; and (3) where information relied on in sentencing was materially untrue. These qualifications reflect an underlying dissatisfaction with the balance struck in Williams between the individual's rights and the state's interests at sentencing.

The balance struck in other post-conviction proceedings illustrates the necessary safeguards which should be applicable to the sentencing process. In Morrissey v. Brewer, the Supreme Court determined that certain minimum due process protections must be extended to an individual in a parole revocation hearing when a

85. See Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv. L. Rev. 821 (1968). One commentator has formulated decision rules which courts arguably employ when passing sentence. One rule is that an offender "has a relatively clear right not to be sentenced on the basis of false information about one's past record... defendants have a right not to be sentenced on the basis of nonadjudicated allegations of criminal behavior unless the prosecution presents persuasive proof of such allegations." Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L. J. 810, 856 n.231 (1975). United States v. Fatico, 441 F. Supp. 1286, 1293 (E.D.N.Y. 1977), rev'd, 579 F.2d 707 (2d Cir. 1978).


87. Specht v. Patterson, 386 U.S. 605 (1967); Hollis v. Smith, 571 F.2d 685, 693 (2d Cir. 1978) ("where a higher sentence requires the proof of a fact not established in the criminal trial, rather than the judge's overall assessment of the defendant, the sentencing is subject to certain due process guarantees with respect to the proof of the critical fact"); People v. Bailey, 21 N.Y.2d 588, 596, 237 N.E.2d 205, 208, 289 N.Y.S.2d 943, 948 (1968) ("an additional finding of fact independent of the question of guilt before the indeterminate sentence can be imposed clearly brings this case within the ambit of the Specht holding and entitles those sentenced under the statute to a hearing"); People v. Rosello, 97 Misc. 2d 963, 412 N.Y.S.2d 975 (Sup. Ct. 1979).

88. Farrow v. United States, 580 F.2d 1339, 1359 (9th Cir. 1978); see also Townsend v. Burke, 334 U.S. at 741; United States v. Weston, 448 F.2d at 634; Collins v. Buckhoe, 493 F.2d 343, 345 (6th Cir. 1974); United States v. Espinoza, 481 F.2d 553, 556 (5th Cir. 1973).


91. 408 U.S. at 484-89.
"grievous loss of liberty" was threatened. Among these minimum rights held to be due to the defendant were the right to written notice of the charges, the disclosure of evidence upon which the charges are based, the opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses, a "neutral and detached" hearing body, and a written statement of the fact findings." The Court in Morrissey remanded the case to the district court to determine whether the defendants had been accorded these minimum due process protections.

The importance of the requirement that information used at sentencing be reliable is illustrated by the Supreme Court's recent decision in Greenholtz v. Inmates of the Nebraska Penal and Corrections Complex. The Court in Greenholtz was asked to determine what process is due a prisoner in a parole release hearing. The Court distinguished between a release and revocation of parole. It

92. Id. at 479.
93. Id. at 489. These minimum requirements must be read in consonance with the Court's conclusion that due process is a flexible concept. Id.
94. Id. at 490. See Goldberg v. Kelly, 397 U.S. 254, 263 (1970); United States v. Dockery, 447 F.2d 1178, 1190 (D.C. Cir.) (Skelly Wright, J., dissenting), cert. denied, 404 U.S. 950 (1971). The balancing of interests analysis used in Goldberg to determine the applicability of procedural due process guarantees in many respects can be likened to the deliberations of the Williams court. Williams held that the state interests in an informed rehabilitative sentence outweighed the individual offender's constitutional rights. Williams v. New York, 337 U.S. at 247-51. Williams read in this light is similar to the Supreme Court's post-Morrissey decision in Wolff v. McDonald, 418 U.S. 539 (1974). In Wolff, due process safeguards were held to be inapplicable to a prison disciplinary hearing. Id. at 561. The extension was denied because the balance of interests within the context of a prison disciplinary proceeding "militated against adopting the full range of procedures suggested by Morrissey." Id. The strong state interest in maintaining order and safety within the prison outweighed the individual's right to procedural due process safeguards at a disciplinary hearing. Id. at 561-62. Gardner v. Florida, 430 U.S. 349 (1977), which voided a death sentence where important presentence materials were not disclosed to the defendant, rejected the alleged state interests which justified non-disclosure. Id. at 358-61. The interests rejected in Gardner mirror the interests relied on in Williams to deny the individual due process protections. The apparent inconsistency on the part of the Supreme Court as to what state interests will justify the curtailment of individual due process protections has led some to question the continued validity of Williams. See note 171 infra and accompanying text.
96. Id. at 3.
97. Id. at 9. Parole revocation involves the return to prison from the outside world, of an individual who had previously been granted a release from prison by his Parole Board. An individual, who formerly had been free on the streets, is required to re-enter prison. Parole
was felt that parole release involved a liberty interest too tenuous in nature to require invocation of procedural due process requirements. The Court stated that the factual determinations necessary for the revocation of parole were not present in the parole release context. Parole release involved questions highly subjective in nature which have traditionally been left to the determination of experts while parole revocation was based for the most part on "retrospective factual questions." The possibility of factual error, which has been judiciously guarded against in the revocation hearing by the requirements of minimum due process, was found less relevant in the context of a release determination.

Greenholtz modified the "grievous loss of liberty" requirement enunciated in Morissey for the imposition of due process procedural safeguards. The invocation of the procedural due process mandated by Morissey is now predicated on a showing of both a possibility of "grievous loss of liberty" coupled with a showing that such a loss is based on "retrospective factual questions." After Greenholtz, an individual must allege, inter alia, that factual matters decided

release is concerned with the return of the individual to society from prison. The parole releases question is handled by a parole board. The determination is made by considering the inmate's prior criminal record and his activities and achievements while incarcerated. The Supreme Court in Greenholtz, distinguished between parole release and revocation in the following manner:

The fallacy in respondent's position is that parole release and parole revocation are quite different. There is a crucial distinction between being deprived of a liberty one has in parole, and being denied a conditional liberty that one desires. The parolees in Morissey (and the probationer's in Gagnon) were at liberty and as such could "be gainfully employed and (were) free to be with family and friends and to form enduring attachments of life." 408 U.S. at 482. The inmates here, on the other hand, are confined and thus subject to all of the necessary restraints that inhere in a prison.

Id. See N.Y. Exec. Law § 259(i)(1)-(3) (McKinney Supp. 1979) (parole release and parole revocation, respectively).


99. Id.

100. An example of a "retrospective factual question" according to the court was the determination "whether the parole in fact acted in violation of one or more conditions of parole and whether the parolee should be recommitted either for his or society's benefit." Id. at 9.

101. Id.

102. Id. Justice Marshall, writing for the dissenters, argues that the majority's fixation on the "retrospective factual determination" requirement may have added a second element to the requirements for due process protections under Morissey. The dissenters contended that the Morissey holding should not be limited to instances where only objective, factual determinations are being made. Id. at 27-28 (Marshall, J., dissenting).
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at a proceeding have a strong potential for being unreliable. 103

The recent trend in most courts has been to expand the procedural safeguards due an offender during the sentencing process. Whether this trend will continue with a shift to determinate sentencing is an open question. One of the aims of determinate sentencing is to replace the subjective sentencing decisions made under present practices, with objective factual determinations. Although Greenholtz curtails the offender's constitutional right to due process, the factual determinations which will govern the proposed sentencing procedures for New York will require extensive procedural due process protections for an offender subject to a determinate sentencing hearing.

III. The Proposed Determinate Sentencing Legislation

New York, following the initiative taken on both the federal and state levels, has proposed that a sentencing guidelines approach be adopted by the state legislature. 104 Under the proposed legislation, a sentencing commission will be established, consisting of appointees of the Governor, the State Senate and Assembly and by the administrative board of the courts. 105 The sentencing guidelines es-

103. Under a system of indeterminate sentencing the decision process required before sentence can be imposed bears a strong resemblance to the “purely subjective appraisals by the Board members based on their experience with the difficult and sensitive task of evaluating the advisability of parole release.” Greenholtz, id. at 10. See Kadish, The Advocate and the Expert—Counsel in the Peno-Correctional Process, 45 MINN. L. REV. 803, 812-13 (1961) (“Determining when during the offender's term he shall be released approximates the judicial setting of the term of imprisonment. The only difference is the time of determination.”).


105. A.8308, supra note 22.

106. Id. § 902(2)-(4). The bill not only attempts to balance the influence which each branch of the government will be able to exert on the commission, it further seeks to limit the ability of special interests to affect the commission's decisionmaking.

The members of the commission appointed by the administrative board of the courts shall be active trial judges of the state. The members of the commission appointed by the governor shall be one district attorney of this state, one public defender or legal aid attorney of this state and one individual with substantial experience and expertise in the field of criminal justice, no more than two of whom shall belong to the same political party. The members of the commission appointed by the temporary president of the senate, the speaker of the assembly and jointly by both shall be individuals with
established by the Sentencing Commission will be determined by two factors: the magnitude of the offense and the prior criminal background of the offender.\textsuperscript{107} The proposed sentencing system for New York, like other determinate systems throughout the country, provides the sentencing judge with discretion to enhance or reduce sentences where certain aggravating or mitigating circumstances are proven.\textsuperscript{108} Such circumstances will be proven at the sentencing hearing for the offender.\textsuperscript{109} The State Executive Commission on Sentencing characterized the guidelines approach as a "middle course between the inflexibility of mandatory or presumptive sentences and the virtually unfettered judicial discretion which marks indeterminate . . . sentencing."\textsuperscript{110}

The proposed legislation also recommends revision of the procedures for designating and sentencing persistent felons.\textsuperscript{111} A determi-

\textsuperscript{107} Id. § 902(3).
\textsuperscript{108} Id. § 906(1).
\textsuperscript{109} Id. § 907(10)(a)(b). The proposed legislation in New York also differs from other commission/guideline models in that its vests the Sentencing Commission with complete discretion to determine what would constitute an aggravating or mitigating circumstance. A.8308 further deviates from other commission guideline formulas by prescribing that an enhancement which would accompany a determination that an aggravating circumstances exists could bring the offenders to the upper limit of the maximum sentence allowed by the law. In the case of a mitigating circumstance the converse is true.
\textsuperscript{110} Id. §§ 400.10(4), .10(5).
\textsuperscript{111} Executive Commission on Sentencing, supra note 4, at 221-22. See notes 15-17 supra.
nation that an offender is a persistent felon will result in a substantially increased sentence.112 This determination, made after the offender's criminal trial, is based on the types of offenses and the number of times that the offender has committed the offenses.113

Three basic reforms are proposed by A.8308. First, the legislation seeks to amend existing procedures employed in preparing the presentence report which constitutes the primary source of information for the sentencing hearing.114 It is proposed that responsibility for the preparation of these reports be shifted from probation officers to investigative court officers. The investigative officers will be appointed by the chief administrative judge and will be responsible to the court.115 Second, the legislation establishes a sentencing hearing to determine the existence of any aggravating or mitigating circumstances.116 Finally, the legislation proposes to amend certain statutory provisions, thereby extending to both the offender and the pros-

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1. Applicability. The provisions of this section govern the procedure that must be followed in order to impose sentence as a persistent felony offender. Such sentence may not be imposed unless, based upon evidence in the record of a hearing held pursuant to this section, the court:

(a) Has found that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, and

(b) Is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration of the defendant is warranted to best serve the public interest.

2. Authorization for hearing. When information available to the court prior to sentencing indicates that the defendant is a persistent felony offender, and when, in the opinion of the court, the available information shows that a persistent felony offender sentence may be warranted, the court may order a hearing to determine:

(a) Whether the defendant is in fact a persistent felony offender, and

(b) If so, whether a persistent felony offender sentence should be imposed.

5. Burden and standard of proof; evidence. Upon any hearing held pursuant to this section the burden of proof is upon the people. A finding that the defendant is a persistent felony offender, as defined in subdivision one of section 70.10 of the penal law, must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to the trial of the issue of guilt. Matters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct may be established by any relevant evidence, not legally privileged, regardless of admissibility under the exclusionary rules of evidence, and the standard of proof with respect to such matters shall be a preponderance of the evidence.

112. A.8308, supra note 22, § 70.08(2) (persistent violent felony offender); § 70.10(2) (persistent felony offenders).
113. Id. §§ 70.08(1)(a)-(b), .10(1)(a)-(b).
114. Id. § 390.10(1)(c)-(f).
115. Id. § 75.05(8)(t)-(u). EXECUTIVE COMMISSION ON SENTENCING, supra note 4, at S-6.
116. A.8308, supra note 22, § 400.10(4)-(5).
executor for greater access to appellate courts than is available under present law.” It is important to assess the aforementioned proposed changes in New York’s sentencing structure in light of the constitutional protections guaranteed to convicted defendants.

A. The Proposed Role of Investigative Court Officers

The proposal to shift responsibility for the preparation of presentence reports from probation officers to investigative court officers is a radical departure from present practices. At present, the probation officer is responsible to a local probation department office. The officer’s role is to offer the court guidance in determining the rehabilitative needs of the offender; to this end, any relevant material may be submitted to the court.” In contrast, the investigative court officer is responsible to the court and is directed to provide the court with information objectively describing the circumstances of the offense.” Neither the proposed legislation nor the memorandum attached to the legislation make explicit the rationale for depriving the probation department of responsibility for compiling and draft-

117. Id. §§ 450.12, .25, 470.07, .21.

118. See N.Y. CRIM. PROC. LAW § 390.20 (McKinney 1976). The presentence report contains information concerning the offender’s prior criminal record, employment record, a description of the circumstances surrounding the offense, and information concerning the offender’s social, moral and psychological propensities. Probation officers are also responsible for policing probationers under his charge. N.Y. EXEC. LAW §§ 255, 256(a)(5) (McKinney Supp. 1979)(section 255 concerns probation in the City of New York).

119. Investigative court officers will conduct presentence investigations and also prepare the report. A.8308, supra note 22, § 75.05(8). The proposed legislation also suggests an appropriate scope for presentence reports. Id. § 390.30(1)(c)-(e):

§ 390.30 Scope of presentence report:

1. In felony cases the pre-sentence report shall set forth:
   (a) The circumstances attending the commission of the offense;
   (b) The defendant’s history of delinquency or criminality, including any certificates of conviction where available;
   (c) A description of the normative sentence applicable to the particular defendant;
   (d) Information relating to any aggravating or mitigating circumstances, as specified by the commission on sentencing guidelines, which may warrant enhancement or reduction of the normative sentence and asserted by the parties, and the source from which such information was obtained;
   (e) Information relating to any aggravating or mitigating circumstances, as specified by the commission, which may warrant enhancement or reduction of the normative sentence, although not asserted by the parties, and the source from which such information was obtained;
   (f) Information relating to any other aggravating or mitigating circumstances which may justify the imposition of a sentence outside of the sentencing guidelines.
ing the presentence report. The Executive Commission’s Report provides two possible justifications. First, it notes that probation departments throughout the state were overworked.\[120] By removing the burden of preparing presentence reports, the Executive Commission posits that probation officers would be able to more adequately perform what is considered their proper function: to provide social services to probationers.\[121] Second, it is felt that given the critical importance of the presentence report, the individual who prepared the report should be entirely accountable to the Court.\[122]

At the time the Williams case was decided, disclosure of information in a presentence report was left to the discretion of the sentencing judge.\[123] In most instances, this meant nondisclosure to the offender.\[124] This policy was based on several factors. First, it was presumed that disclosure of the report would impair the report’s rehabilitative function.\[125] Second, it was contended that the non-adversarial relationship nurtured by the probation officer with the offender would deteriorate if the offender knew that his probation

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120. Executive Commission on Sentencing, supra note 4, at 54.
121. Id. at S-7.
122. Id. at S-6. See note 119 supra. The accountability requirement to a large extent represents an underlying dissatisfaction with the present quality of presentence reports. The Executive Commission on Sentencing cited with approval a study of the New York City Probation Department which concluded that even though there were “‘almost 200 professional staff engaged full time in making presentence investigations and reports,’ the reports were found to be redundant, repetitive and often irrelevant to the sentencing decision to be made.” Executive Commission on Sentencing, supra note 4, at 54 (quoting from Economic Development Council Probation Task Force, Report on New York City Department of Probation 43 (1977)). While there is no clear reason for the proposed shift, the argument can be made that the prime motivation for the accountability requirement is the belief that probation officers are not doing a proper job. If the problem was perceived to be a question of overworked probation officers the solution would be to hire more staff, not to go out and create a new system to perform the same function. An implication to draw from the “accountability requirement” is that the former practice of treating the relationship between probation officer and offender as non-adversarial may no longer be viable. See notes 46-50 supra and accompanying text.
officer took part in his sentencing. Third, it was argued that proce-
dural due process safeguards would interfere with the probation
officer’s expert evaluations.

These claims lose much of their validity when examined in light
of a determinate sentencing system. Determinate sentencing rejects
the position that the purpose of sentencing is to rehabilitate the
offender. Therefore, considerations necessary for rehabilitation are
of no consequence to a determinate system. Determinate sentenc-
ing also rejects the notion that the sentencing process is non-
adversarial. While present practices exhibit a more informed regard
for the needs of the offender, the present relationship between the
probation officer and the offender is still characterized as non-
adversarial. This view is inapplicable to a determinate sentencing
system. Finally, the investigative court officer, although expected to
be a competent individual, will have no claim to the alleged expert-
tise necessary to make informed decisions. Guarantees of the fifth

126. 337 U.S. at 249. See notes 46-50 supra and accompanying text.
decision which discusses some of the implications of greater presentence reports vis-a-vis the
extension of greater due process safeguards to an offender is People v. Brant, 83 Misc. 2d 888,
373 N.Y.S.2d 991 (Sup. Ct. 1975). See also United States v. Hartford, 489 F.2d 652,
660 (5th Cir. 1974)(Tuttle, J., dissenting in part); Bertrand v. United States, 467 F.2d 901
(5th Cir. 1972).
128. See notes 19 & 20 supra and accompanying text.
129. Under current practices disclosure to a defendant of the contents of his presentence
report is encouraged. See N.Y. CRIM. PROC. L. § 390.50 (McKinney 1976); FED. R. CRIM.
PROC. § 32(c)(1)-(2) (1970); ABA, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND
130. While the state can no longer assert its interest in the rehabilitation of the offender
to justify the denial of important due process protections, this does not mean that the state
no longer has an interest in sentencing. Aside from the concerns which have led to the
proposal of A.8308, the state still has an important stake in the protection of confidential
sources. While the state may argue that the extension of due process safeguards to the
individual may destroy both the potential sources of information and endanger the safety of
informants the current practices in a number of courts do not support this viewpoint. See 58
GEO. L.J. 451, 472 (1970); Higgins, Confidentiality of Presentence Reports, 28 ALBANY L. REV.
12, 30-32 (1965). The problem of confidential sources “drying up,” see note 51 supra and ac-
companying text, to a large degree depends on the scope of the presentence report. A report
which is limited to such factors as prior arrests, convictions, and prior prison records or
other governmental information would not cause sources to “dry up.” On the other hand, a
report broad in scope which relied on hearsay allegations, may find some sources drying up
with disclosure. The Executive Commission on Sentencing urged that the presentence report
be limited in scope. EXECUTIVE COMMISSION ON SENTENCING, supra note 4, at S-7. A. 8308, while
limiting what factors may be considered in establishing categories of defendants, A.8308,
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and sixth amendment hitherto denied to offenders in the preparation of presentence reports may now, due to the changed nature of the proceeding, become enforceable. Given the diminishing state interest in non-disclosure, complete disclosure of the sentencing report should be accorded to the offender.

B. Sentencing Hearing on Aggravating or Mitigating Circumstances

The sentencing hearing envisioned under the proposed legislation would be used primarily to determine the existence of any aggravating or mitigating circumstances. A finding of either circumstance will allow the sentencing judge to enhance or reduce the sentence established under the guidelines. The prime source of information to be used at this sentencing hearing will be the presentence report. Therefore, a finding that either aggravating or mitigating circumstances exist could have a substantial impact on the offender's sentence. Enhancement of the sentence, or even a failure to reduce the sentence, constitutes a "loss of substantial liberty" which, under Morrissey, would give rise to the requirement of procedural due process protections for the offender. In addition, the finding of either an aggravating or mitigating circumstance involves a factual determination which falls within the "retrospective factual determination" requirement of Greenholtz.

This position is supported by Supreme Court decisions in the

supra note 22, § 907(9)(a)-(c), is open ended as to what limits if any apply to the formation of presentence reports. Id. § 390.30(1)(c)-(f). The Supreme Court has hinted that when an informer's information goes to a critical substantive determination as opposed to a procedural decision, the balance of interests between the individual's right to a proper defense and the public's interest in the protection of confidential sources of information may tip the balance in favor of the individual. Roviaro v. United States, 353 U.S. 53, 62 (1957).

131. A.8308, supra note 22, § 400.10 (1979). An enhanced sentence would qualify as a "grievous loss of liberty" which the Supreme Court looked for in Morrissey to determine whether or not due process protections should be required for a particular hearing. The enhanced sentence is no different than parole revocation in its effect on the offender; both procedures could result in a substantially longer prison term. United States v. Fatico, 441 F. Supp. 1285, 1293 (E.D.N.Y. 1977), rev'd, 579 F.2d 707 (2d Cir. 1978).


133. See note 108 supra and accompanying text.

134. 408 U.S. at 481-82. See notes 92-94 supra and accompanying text.

135. The proposed legislation specifically refers to "any material facts in controversy" as grounds for convening a hearing to determine the existence of any aggravating or mitigating circumstances. A.8308, supra note 22, § 400.10(1).
sentencing context. First, some procedural protections are required during the sentencing process because of the "critical nature of sentencing in a criminal case." This rule is applicable to the sentencing hearing on aggravating or mitigating circumstances. The possibility of a greatly enhanced sentence which may result from a finding that an aggravating circumstance exists constitutes a situation of a "critical nature" to an offender. Second, due process safeguards have been applied when the post-conviction hearing involves the resolution of issues "collateral" to those adjudicated at trial. The sentencing hearing proposed in the legislation will involve such collateral issues. An example of a "collateral issue" which might be used to enhance an offender's sentence is helpful to illustrate the potential threat to the individual's constitutional rights. Assume that A is on trial for stabbing V with a knife. At trial, the district attorney introduces evidence which indicates that A stabbed V with a knife once in the stomach. A is convicted under New York law for assault in the first degree. In the presentence report, it is alleged that A also stabbed V seven other times in the arms and legs. Based on this allegation, the district attorney would seek to enhance the offender's sentence. In effect, the defendant risks being "convicted" of additional assaultive acts, and given a consecutive sentence therefore.

136. See notes 85-88 supra and accompanying text.
137. See note 86 supra and accompanying text.
138. United States v. Bierney, 588 F.2d 620, 623 (2d Cir. 1978), cert. denied, 440 U.S. 927 (1979) ("critical stage for Sixth amendment purposes exists whenever substantial rights of the accused may be adversely affected").
139. Townsend v. Burke, 334 U.S. 736 (1948); Kent v. United States, 383 U.S. 541 (1966); Commonwealth v. Stukes, 435 Pa. 535, 541, 257 A.2d 828, 831 (1969) (critical stage in the criminal process is defined as a situation "where legal rights may be preserved or lost, or where some factual or legal disadvantage may be suffered by the accused").
140. See notes 61-66 & 87 supra and accompanying text.
141. United States ex rel. Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966)(determining what procedures must be employed when sentencing under a Sex Offender statute):
   It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner was therefore entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings.
See also, Hollis v. Smith, 571 F.2d 685, 693 (2d Cir. 1978); United States ex rel. Stachulak v. Coughlin, 520 F.2d 931, 935 (7th Cir.), cert. denied, 424 U.S. 947 (1975).
142. N.Y. Penal Law § 120.10 (McKinney 1975).
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1. Burden of Proof

In a criminal trial, evidence must be proven "beyond a reasonable doubt." 143 Current sentencing procedures require that allegations concerning the defendant's character and history be proven by a "preponderance of the evidence." 144 These standards of proof are comparable with those applied at the hearing to determine whether the offender will be sentenced as a persistent felon. At that hearing, allegations concerning the crime must be proven beyond a reasonable doubt, while issues pertaining to the offender's character and history, and circumstances surrounding his criminal conduct, require a lower standard, i.e., that all evidence not legally privileged is admissible. 145 A new standard of proof is introduced by the proposed legislation as to issues presented at the sentencing hearing. Under A.8308, aggravating or mitigating circumstances must be proven by "clear weight of the evidence." 146 This compromise position between the two traditional standards will not adequately protect the defendant's due process rights at sentencing. 147 Moreover, confusion will certainly result from the myriad standards which will have become applicable to the process of trial and sentencing.

2. Confrontation and Cross-Examination

The Supreme Court has referred in a number of contexts to the rights of confrontation and cross-examination as fundamental attributes of a fair proceeding. 148 It is recognized that the rights to

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143. Id. § 25.
144. A.8308, supra note 22, § 400.20(5).
145. Id. § 400.20(5).
146. Id. § 400.10(5).
147. Id. § 400.20(5) (1978). The "preponderance of evidence" standard appears wholly inapplicable to the determination as to the existence of either aggravating or mitigating circumstances. In re Winship, 397 U.S. 358, 367 (1970) held that the "reasonable doubt standard" was an essential element of due process. The possible "grievous loss of liberty" which might accompany a determination of guilt in a criminal proceeding justified the more exacting standard for proof of facts in issue. Id. at 364. When making determinations under a sex offender statute, the Seventh Circuit has required the use of the "reasonable doubt standard." United States ex rel. Stachulak v. Coughlin, 520 F.2d 931, 935-36 (7th Cir.), cert. denied, 424 U.S. 947 (1975). Given the similarities between the proposed presentence hearing on aggravating and mitigating circumstances and a proceeding under a sex offender statute, the "reasonable doubt" standard should control.
148. The Supreme Court in Greene v. McElroy, 360 U.S. 474 (1959) stated:
   Certain principles have remained relatively immutable in our jurisprudence. One of these is that where government action seriously injures an individual, and the reasona-
confront and cross-examine witnesses is not absolute, because competing state interests in some instances demand a curtailment of these rights. A significant and substantial denial of these rights, however, will call into question the "ultimate integrity of the fact finding process." In Williams, the right to confront and cross-examine adverse witnesses was denied because the exercise of these rights were found incompatible with the process of making an informed and appropriate sentencing determination. Because the nature of the sentencing process established by A.8308 differs in nature from the one involved in Williams, the offender is given a limited right to counsel, and a conditional right to confront and cross-examine witnesses.

3. Hearsay Evidence

The rules against the admissibility of hearsay evidence do not stand on the same grounds as the right to confrontation. The rules

bleness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases but also in all types of cases where administrative and regulatory actions were under scrutiny.

Id. at 496-97 (citations omitted).
149. 337 U.S. at 248-51.
151. 337 U.S. at 248, characterized the sentencing process as being non-adversarial and rehabilitative in outlook. See notes 45-50 supra and accompanying text.
152. Under A.8308, an offender is granted the right to counsel and the conditional right of his counsel to cross-examine adverse witnesses. A.8308, supra note 22, § 400.10(4). The extension of these rights runs contrary to the characterization of the sentencing process as non-adversarial. See note 151 supra and accompanying text. Ruhala v. Roby, 379 Mich. 102, 124, 150 N.W.2d 146, 156 (1967) ("cross-examination is in its essence an adversary proceeding"). United States v. Dockery, 447 F.2d 1178, 1192-94 (D.C. Cir.) (Skelly Wright, J., dissenting), cert. denied, 404 U.S. 950 (1971).
153. California v. Green, 399 U.S. 149, 155 (1970). Mr. Justice White speaking for the majority stated:

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law.
against hearsay are intended to protect and promote the reliability of evidence.\(^{154}\) Under the *Williams* rationale, hearsay rules are suspended because of the need of sentencing judges to have, at their disposal, as much evidence as possible concerning the offender.\(^{155}\) Countervailing the danger inherent in the use of hearsay evidence, the Court asserted, is the fact that probation officers are skilled investigators\(^{156}\) and are able to differentiate between reliable and unreliable information.\(^{157}\) The most fertile source of unreliable, uncorroborated evidence in the proposed presentence report will be the allegations used to show the existence of aggravating or mitigating circumstances. While the Executive Commission's Report specifically states that, under the proposed legislation, the speculative information formerly admissible in sentencing determinations is to be excluded,\(^{158}\) no mechanism or procedures are proposed to insure the exclusion of such evidence. To insure the greater reliability of the evidence used at the hearing, hearsay evidence should be inadmissible in the presentence report. Reliability would foster similar punishment for essentially similar offenses and offenders. Greater consistency, in turn, would nurture greater public support for the sentencing process. Requiring a hearing to determine the presence of aggravating or mitigating circumstances to conform with the prevailing rules of evidence is wholly congruent with policy objectives underlying determinate sentencing.\(^{159}\)


\(^{155}\) See also Prellwitz v. Berg, 578 F.2d 190, 192 (7th Cir. 1978); Gelfuso v. Bell, 590 F.2d 754, 756 (9th Cir. 1978); United States ex rel. Robinson v. Myers, 222 F. Supp. 845 (E.D. Pa. 1963).

\(^{156}\) 337 U.S. at 249.

\(^{157}\) Id.

\(^{158}\) As pointed out in the Executive Commission on Sentencing Report, *supra* note 4, the presentence investigation should be concerned primarily with information relating to the offender's criminal history and facts relating to the offense. *Id.* at S-7. This information is obtained from court records, prison records and official police records; sources usually accorded a high degree of reliability. *Id.* at 223, S-7.

\(^{159}\) It should be noted that under the determinate sentencing scheme now in operation in California, hearsay evidence is not admissible at such a hearing, Cal. Penal Code § 1204 (1977). See Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 Pac. L.J. 5, 39-40 (1978). Illinois by judicial decision has excluded hearsay evidence from consideration at sentencing. See People v. O'Riordan, 21 Ill. App. 2d 309, 157 N.E.2d
C. Appellate Review

At common law, appellate review was limited to the question of whether the sentence imposed fell within the statutory limits. Traditionally, federal appellate review was confined to the same narrow scope. This practice presumed that when a sentencing judge determined a sentence, he employed his practical experiences accumulated through years of sentencing offenders.

Under the proposed legislation, the prosecutor is, for the first time, given a right to appeal a sentence, and the offender's right to appeal, enunciated in Townsend v. Burke, is codified. Supporters of increased appellate review contend that such a mechanism will decrease unjustified disparity in sentences and foster a more uniform application of sentencing guidelines. More importantly, the increase of the offender's right of appellate review represents a more practical awareness of, and concern for, the abuses which can occur at sentencing and the grave harm potentially caused by


160. See note 32 supra and accompanying text.

161. Gurera v. United States, 40 F. 2d 338 (8th Cir. 1930); Gore v. United States, 357 U.S. 386, 393 (1958)(the Supreme Court refused "to enter the domain of the penology, . . . [and the] tantalizing aspect of it, the proper apportionment of punishment").

162. See Project, Appellate Review of Sentencing Procedures, 74 YALE L.J. 379, 386 (1964). It has been argued that the prior practice of non-review encouraged sentencing judges to pronounce sentence without articulating any reasons for the sentence. The refusal to state grounds for imposing sentence fostered inaccuracy and in many instances outright bias on the part of the sentencing judge. P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM 58 (1977).


165. EXECUTIVE COMMISSION ON SENTENCING, supra note 4, at xxiv, 237.

166. 334 U.S. 736 (1948); United States v. Weston, 448 F.2d 626, 631 (9th Cir.), cert. denied, 404 U.S. 1061 (1971).
such abuses.

Attendant to a greater right to appellate review, of course, is the frequently cited detriment of extensive delay in the sentencing process. While increased appellate review will obviously not burden the sentencing courts, there exists the likelihood of overcrowding at the appellate level.\textsuperscript{167} At the sentencing stage there is little, if any, disincentive to the offender to pursue any and all rights of appellate review.\textsuperscript{168} A second problem associated with appellate review is the difficulty in reviewing discretionary sentencing decisions. The Executive Commission on Sentencing, noting the deficiencies of appellate review of sentences, comments that because the sentencing decision is the "product of unstructured judicial discretion, rather than formalized legal criteria, the appellate court is deprived of workable standards by which to review the appropriateness of a sentence."\textsuperscript{169} To alleviate this problem, the proposed legislation requires a written statement of reasons from the sentencing judge explaining a finding as to the existence of either aggravating or mitigating circumstances.\textsuperscript{170} Although the written statement addresses a problem which has hampered effective appellate review of sentences, the confusion created by the proposed legislation as to what procedures and evidentiary rules are applicable at sentencing may present the same "unstructured judicial discretion" problems found under indeterminate sentencing. Clearly delineated procedures and rules applicable to the sentencing hearing should be established to guarantee an effective right of appellate review. The existence of such procedures and rules would help reduce the excessive due process challenges now facing the courts.


\textsuperscript{168} The cases in New York and on the federal level are legion. The following cases are a brief sampling of New York opinions concerning presentence reports and whether they should be disclosed to the defendant as an matter of due process. People v. Huff, 35 A.D.2d 1033, 316 N.Y.S.2d 816 (3d Dep't 1970); People v. Wiesner, 34 A.D. 2d 1048, 312 N.Y.S.2d 163 (3d Dep't 1970); People v. Cleary, 33 A.D.2d 814, 305 N.Y.S.2d 384 (3d Dep't 1969); People v. Brant, 83 Misc. 2d 888, 373 N.Y.S.2d 991 (Sup. Ct. 1975); People v. Gagliardi, 57 Misc. 2d 929, 293 N.Y.S.2d 961 (Sup. Ct. 1968). There have been considerably less appeals taken with the reform of N.Y. Crim. Proc. Law § 390.50 (McKinney 1976).

\textsuperscript{169} Executive Commission on Sentencing, supra note 4, at 76.

\textsuperscript{170} A.8308, supra note 22, § 400.10(4).
D. The Analogy to Parole Revocation

It has been argued by one court that the procedures applicable to a parole revocation proceeding should apply at sentencing.\(^{171}\) Presently, New York provides for a two-step hearing process to determine whether or not parole will be revoked.\(^{172}\) The first step in effect is a probable cause hearing to determine whether a parole violation occurred.\(^{173}\) The second step, that of the formal revocation hearing, provides the alleged violator with detailed procedural safeguards.\(^{174}\) While the proposed sentencing legislation explicitly sets forth some procedural protections to be observed at the sentencing hearing,\(^{175}\) little guidance is provided as to the applicability of other procedural due process rights. These rights include the right against self-incrimination in the presentence report and, possibly, the right to a jury trial, which are present in similar proceedings conducted by the state.\(^{176}\) If the balance between individual and state interests calls for the extension of significant due process safeguards at one proceeding, individuals subject to the proposed sentencing hearing should be accorded the protections found in analogous proceedings.\(^{177}\)


\(^{172}\) N.Y. Exec. Law § 259(i) (McKinney 1979).

\(^{173}\) Id. §§ 259(i)(3)(a)(i)-(iii), 259 (i)(3)(6).

\(^{174}\) Id. § 259(i)(3)(c)(i)-(vi). At the revocation hearing, the alleged violator is accorded the right to counsel, to confront and cross-examine witnesses and to present evidence in his defense. Id. § 259 (i)(3)(c)(v)-(vi). The preponderance of evidence standard applies to the resolution of factual questions, but the statute is silent as to what rules of evidence apply. People ex rel. Wallace v. State, 417 N.Y.S.2d 531 (4th Dep’t 1979) (allowing the use of hearsay testimony when witness could not be located). See People ex rel. Menechino v. Warden, Greenhaven State Prison, 27 N.Y.2d 376, 382, 267 N.E.2d 238, 241, 318 N.Y.S. 2d 449, 453 (1971); People ex rel. Newcomb v. Metz, 64 A.D.2d 219, 409 N.Y.S.2d 554 (3d Dep’t 1978).

\(^{175}\) A.8308, supra note 22, § 400.10(4) provides that at the sentencing hearing testimony must be taken under oath and the offender is granted a conditional right to call or cross-examine witnesses. The statute further provides that the proceeding must be recorded and a transcript be made part of the presentence report.

\(^{176}\) A.8308 is conspicuously silent on the question as to what rules of evidence apply, and whether fourth amendment protections are relevant at the hearing.

\(^{177}\) Reliance on other proceedings, where the individual has similar interests at stake, i.e., parole revocation and sentencing as either a persistent or violent felony offender, may present questions as to whether the procedures proposed for the sentencing hearing violate the individual's equal protection rights secured by the fourteenth amendment. See Hollis v. Smith, 571 F.2d 685, 692 n.7 (2d Cir. 1978).
IV. Conclusion

Under the current system of indeterminate sentencing, the transformation of the sentencing hearing into something akin to a second trial has been consistently rejected. Courts have justified the denial of significant due process at sentencing on two bases. First, the extension of such safeguards would interfere with the rehabilitative process. Second, the sentencing proceeding is essentially non-adversarial in nature. A determinate sentencing scheme rejects the underlying rationale for the denial of due process to the individual. Determinate sentencing, in many respects, is the product of a widely held notion that the non-adversarial, remedial approach to sentencing does not work.

The proposed determinate sentencing procedure for New York grants the offender the right to a hearing, to a written record of the proceeding, to receive a written statement by the sentencing judge as to his reason for imposing sentence, to a conditional right to confront and cross-examine adverse witnesses, to a conditional right to present witnesses on his own behalf and to appellate review of the sentence. While the application of these entitlements accords the offender greater protection, the proposed legislation fails to provide the offender with the full panoply of rights applicable at a criminal trial.

In light of the policy shift toward determinate sentencing, a number of changes in sentencing practices is recommended. First, evidence obtained in violation of the fourth amendment should be excluded from consideration at a sentencing hearing. The exclusion of such evidence will insure that the individual's sentence will not be enhanced by evidence which was inadmissible at his trial. Second, the constitutional guarantee against self-incrimination should be accorded to offenders when being examined for the presentence report. Under the proposed legislation for New York, the presentence report is no longer prepared in a non-adversarial

178. See notes 47-50 supra and accompanying text.
179. See notes 2-5 supra and accompanying text.
180. See note 19 supra and accompanying text.
181. A.8308, supra note 22, § 400.10.
182. See notes 78-84 supra and accompanying text.
183. U.S. Const. amend. V.
context; therefore, rules applicable to an adversarial relationship should apply to any interview between the offender and the investigative court officer responsible for the report's preparation. Third, the rules governing the use of hearsay evidence applicable at the offender's criminal trial should apply at the sentencing hearing proposed by the bill. Under indeterminate sentencing, hearsay evidence was used because of the trust that was placed in the probation officer who gathered the evidence. The proposal to shift responsibility for the preparation of the presentence report from the probation officer to the investigative court officer is an implicit rejection of this trust. Fourth, the standard of proof required at a sentencing hearing should conform to the "beyond a reasonable doubt" standard used at a criminal trial. This standard should apply uniformly to all determinations made at sentencing. The uniform application of this standard will guarantee the offender an essential element of due process and will obviate confusion as to what standards of proof are applicable within the sentencing context. This, in turn, will increase the effectiveness of appellate review of sentences. Finally, the offender should be granted the right to confront and cross-examine witnesses at a sentencing hearing. The determinations made at a sentencing hearing are likely to have a grievous effect on an offender's liberty interest. Therefore, these determinations should be governed by rules which not only protect the due process rights of the offender but also guarantee the integrity of the state's fact-finding process.

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184. See notes 119-30 supra and accompanying text.
185. See notes 47-50 supra and accompanying text.
186. See notes 120-22 supra and accompanying text.
187. See notes 143-47 supra and accompanying text.
189. See notes 162-67 supra and accompanying text.
190. See notes 143-52 supra and accompanying text.