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NEW YORK'S SYSTEM OF INDETERMINATE SENTENCING AND PAROLE: SHOULD IT BE ABOLISHED?

I. Introduction

The apparent failure of New York State's indeterminate sentencing and parole system1 to rehabilitate prisoners2 requires a reevaluation of penal sentencing policy in New York State.3 The current system has resulted in sentence disparity,4 uncertain and prolonged prison

1. An indeterminate sentence is a range of years imposed upon a defendant by the trial judge from within the minimum and maximum that are specified in the statute for the offense committed. When the prisoner has completed the minimum sentence, he then becomes eligible for release on parole. See D. GLASER, F. COHEN & V. O’LEARY, PAROLE DECISION-MAKING: THE SENTENCING AND PAROLE PROCESS 5 (1966) [hereinafter cited as PAROLE DECISION-MAKING]; infra notes 48-54 and accompanying text. Parole is "the release of an offender from a penal or correctional institution after he (or she) has served a portion of his (or her) sentence, under the continued custody of the state and under conditions that permit his (or her) reincarceration in the event of misbehavior." R. MONTGOMERY & S. DILLINGHAM, PROBATION AND PAROLE IN PRACTICE 6 (1983) (definition provided by 1939 Attorney General's Survey of Release Procedures) [hereinafter cited as MONTGOMERY & DILLINGHAM].

2. Several justifications are commonly asserted for the imposition of criminal sanctions:
   1. to deter the offender from offending again by punishment or fear of punishment . . .; 2. to deter others from behaving as the offender has;
   3. to incapacitate the offender and thus deprive him of the opportunity to offend again for a given period of time; 4. to forestall personal vengeance by those hurt by the offender; 5. to exact retribution from the offender and to set right the scales of moral justice; 6. to educate people morally and socially; 7. to rehabilitate or reform the offender.

   Critics of indeterminacy and the rehabilitative model question whether incarceration has any reformative effect on the prisoner. See infra notes 80-85 and accompanying text.

   3. See Serrill, The Heated Question of Parole: Who Should Decide When Inmates Ought To Be Set Free?, TIME, Mar. 5, 1984, at 50 [hereinafter cited as Serrill]; Travis, The Politics of Sentencing Reform, in SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY 62 (M. Forst ed. 1982) [hereinafter cited as Travis]; infra notes 80-109 and accompanying text. More than half of the states have reformed their criminal codes over the past decade to provide for determinate sentencing. See infra notes 130, 147 and 164 for lists of the states which have established comprehensive determinate sentencing schemes. See also G. CAVENDER, PAROLE: A CRITICAL ANALYSIS 82 (1982) [hereinafter cited as CAVENDER].

   4. See Serrill, supra note 3, at 50; Travis, supra note 3, at 62. Senator Edward Kennedy has asserted:
terms and prisoner unrest rather than in peaceful prison rehabilita-
tion.5

Under an indeterminate sentencing system, the trial judge selects
a minimum and maximum sentence range to apply to the convicted
defendant.6 The prisoner becomes eligible for parole any time after
completion of the minimum term, but he must be discharged from
confinement upon completion of the maximum term.7 Rarely does
the prisoner actually serve out his maximum term of imprisonment.8
In most jurisdictions, time may be subtracted for good behavior
while in prison from the maximum or minimum sentence imposed
by the judge.9 Moreover, the prisoner usually is released when

Sentencing in America today is a national scandal. Every day our system
of sentencing breeds massive injustice. Judges are free to roam at will,
dispensing ad hoc justice in ways that defy both reason and fairness.
Different judges mete out widely differing sentences to similar offenders
convicted of similar crimes. There are no guidelines to aid them in the
exercise of their discretion, nor is there any mechanism for appellate
review of sentences.

1 (1978) [hereinafter cited as Kennedy].

5. See Serrill, supra note 3, at 50. "Almost immediately after it had been
signed into law, conservative factions began to lobby for changes in [California's]
Determinate Sentencing Law of 1976. They sought stiffer penalties, a longer period
of parole supervision, and safeguards in the retroactive application of the new
law." Travis, supra note 3, at 76.

6. An indeterminate sentence is "'[a] sentence of imprisonment the duration
of which is not fixed by the court but is left to the determination of penal authorities
within minimum and maximum time limits fixed by the court of law.'" Black's

7. Parole Decision-Making, supra note 1, at 8; see Galfunt, "Sentencing—
Individualized or Computerized", 53 N.Y. St. B.J. 26, 27 (1981) [hereinafter cited
as Galfunt].

8. In New York State, for example, approximately 70% of all inmates are
released by action of the Parole Board, 26% are conditionally released to supervision
after serving two-thirds of their sentences, while only 4% actually serve out their
entire terms. Appendix D: Survey of Actors in the New York Criminal Justice System,
in The Executive Advisory Committee on Sentencing, Crime and
Punishment in New York: An Inquiry into Sentencing and the Criminal
Justice System at 210 (1979). Each year, nearly 70% of all adult felons nationwide
are released and placed on parole. J. Smykla, Probation and Parole: Crime
Control in the Community 119 (1984) [hereinafter cited as Smykla].

9. Parole Decision-Making, supra note 1, at 8; see infra note 38. Good time
laws vary among the jurisdictions and depend upon the severity of the crime.
Smykla, supra note 8, at 106. Good time is similar to parole in that both devices
duplicate in large measure the initial sentencing function and detract from the
judge's power to control the type and length of sentence. P. O'Donnell, M.
Churgin & D. Curtis, Toward a Just and Effective Sentencing System:
Agenda for Legislative Reform 68 (1977) [hereinafter cited as Agenda for
Reform]. However, good time laws are narrower and more realistic than the parole
corrections authorities deem him fit to return to society, or "rehabilitated." Therefore, the length of imprisonment and time of release under an indeterminate sentencing system are dependent upon the prisoner's need for and responsiveness to correctional treatment programs.

The critical component of any indeterminate sentencing plan is parole. Parole is the conditional release of an inmate who has served a portion of his sentence under the continued supervision of the state. Parole release is designed to prepare the prisoner for his eventual unsupervised return to and reintegration into society. The laws because they are designed to assure good behavior and discipline in the correctional institution and provide an incentive to obey rules and perform assigned tasks. Id. at 70.

10. See Galfunt, supra note 7, at 27. This rehabilitative theory originated with the reformers of the late nineteenth century who believed that sanctions should be applied proportionately to the individual circumstances of the criminal rather than the crime committed. The Council of State Governments, Definite Sentencing: An Examination of Proposals in Four States 4 (1976) [hereinafter cited as Definite Sentencing].


To reformers, parole and probation represented a turn away from the idea of vengeance to the notion of rehabilitation. The fixed, flat sentence, they insisted . . . reflected the idea that an offender deserved only punishment. . . . Reformers believed that the fixed sentence violated the principle of individualized justice. Only such measures as probation and parole could take into account the potential of the deviant to be rehabilitated and reflect the complexity inherent in each individual case. . . . The most popular slogan of the period phrased it "Treat the criminal, not the crime."

National Institute of Law Enforcement and Criminal Justice, Incarceration and Its Alternatives in Twentieth Century America 9-10 (1979) [hereinafter cited as Incarceration]. Probation is distinct from parole in that it is the method by which the community seeks to aid, supervise, discipline and reform offenders without imprisoning them. 1931 State of N. Y. Div. of Parole of the Executive Dept: First Ann. Rep. 22 [hereinafter cited as First Annual Report]. If the court chooses to impose a sentence of probation, the defendant is not imprisoned at all, unless he violates his probation. "Probation . . . is apt to represent the first step in the State's program for the reformation of the offender while parole often represents the last step." Id. at 23.


parole board, the agency which determines if and when the prisoner should be released, ordinarily hears an inmate's case for the first time once he has served at least the minimum term of his sentence. If the parole board decides that an inmate may be returned to the community, a release date is set. If, however, the parole board decides that the inmate is not yet ready to return to the community, the case is deferred, and a rehearing date is scheduled. However, in many jurisdictions, the lack of any clear guidelines in making these decisions either at trial or at parole-release hearings has led

15. The parole board is an administrative agency authorized by the government to make decisions relating to release date and supervision of the inmate. See, e.g., N.Y. EXEC. LAW §§ 259-a to 259-q (McKinney 1982 & Supp. 1984-1985).


17. The criteria for parole release are highly subjective and are rarely formalized. See infra notes 94-98 and accompanying text. However, the Model Penal Code urges a strong presumption in favor of release. See Model Penal Code § 305.9 (Proposed Official Draft 1962).

18. von HIRSCH & HANRAHAN, supra note 16, at 27. In New York, an inmate serving an indeterminate sentence is entitled to a hearing once every two years. O'LEARY & HANRAHAN, supra note 12, at 246. Several procedural safeguards, such as the presentation of written reasons for parole denial and the adoption of parole-release guidelines, have been set up by the various jurisdictions to ensure that due process is observed in parole board proceedings. See United States ex rel Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir. 1974) (New York State Parole Board must give written reasons for parole denial); see also United States ex rel Richardson v. Wolff, 525 F.2d 797 (7th Cir. 1975), cert. denied, 425 U.S. 914 (1976) (parole board must give written reasons for parole denial); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974) (parole board must give written reasons for parole denial); Monks v. New Jersey State Parole Bd., 58 N.J. 238, 277 A.2d 193 (1971) (parole board must state reasons for parole denial); cf. Franklin v. Shields, 399 F. Supp. 309 (W.D. Va. 1975) (parole board must give access to data upon which decision based, provide written decision for parole denial and promulgate criteria for granting parole); Haymes v. Regan, 394 F. Supp. 711 (S.D.N.Y. 1975) (parole board must develop criteria for granting parole); Cooley v. Sigler, 381 F. Supp. 441 (D. Minn. 1974) (board must give access to data upon which parole decision made); In re Prewitt, 8 Cal. 3d 410, 503 P.2d 1326, 105 Cal. Rptr. 318 (1973) (board must give access to data upon which parole decision made).

19. AGENDA FOR REFORM, supra note 9, at vii-viii.

The legislature sets a broad range, knowing that the judge and the parole board will really decide what sentence is appropriate in each case. The judge also imposes a range, knowing that the legislature has made the larger judgment and that the parole board will refine this. And the parole board, in deciding when the prisoner should actually be released, assumes that the broad moral judgments have already been made and that all that is left is to administer the decision in accordance with its expertise.

Dershowitz, Background Paper to Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment at 117 (1976) [hereinafter
to a serious disparity in sentencing. Thus, the sentencing decision under an indeterminate system may be highly subjective, individualized and subject to abuse.

In response to the problems of indeterminate sentencing, the federal government and several state legislatures already have abandoned or modified indeterminacy and have adopted a variety of fixed-sentencing plans. Currently, New York is considering a plan to reform its indeterminate sentencing system. To that end, New York State

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20. One study of average sentence lengths imposed by federal courts throughout the United States in 1972 found that there was great disparity in sentences imposed for the same offense in the different districts. Agenda for Reform, supra note 9, at 5 (citing Administrative Office of the United States Courts, Federal Offenders in United States District Courts, 1972 App. Table x-4). For example, the national average sentence length for a burglary conviction was 63 months but the average sentence imposed in the Eastern District of Kentucky was 167 months and in the Northern District of California was 120 months, while in the Eastern District of New York, the average sentence for burglary was only two months. The same sort of disparity was consistently found throughout the districts for a wide range of offenses. Id. Another study has indicated that in New York State there are wide variations in the length of prison terms imposed on defendants convicted of the same offense. Appendix A: Statistical Profile of New York City Criminal Justice System in The Executive Advisory Committee on Sentencing, Crime and Punishment in New York: An Inquiry Into Sentencing and the Criminal Justice System at 53 (1979) (citing 1977 New York State Division of Criminal Justice Services, Crime and Justice: Annual Report 180) [hereinafter cited as Statistical Profile]. For example, in 1977, the crime of attempted robbery was punished by sentences ranging from 3 years to 15 to 20 years. 18.3% of the convicted defendants received sentences between three to four years, 11.4% between four to five years, 30.6% between five to seven years, and 21.9% of the sentences were from seven to ten years in duration. Id. In addition, sentence lengths imposed for the same offense in the various counties of New York State greatly differ. In 1976, 7.3% of defendants convicted of first degree robbery in New York City received maximum sentences of 240 to 300 months, 4.3% received this sentence in the suburban counties and 20.6% received this sentence in upstate counties. Id. at 61 (citing unpublished data provided by New York State Department of Correctional Services).

21. Jacobson, Sentencing Guidelines, 57 Fla. B.J. 234, 235-36 (1983) [hereinafter cited as Jacobson]. See infra notes 116-92 and accompanying text for full discussion of the determinate sentencing plans which have been adopted. Proposals generally have included provisions whereby sentencing criteria would be statutorily required, sentencing would be based upon classification of offenders into risk categories, sentences would be reviewable and more definite and graduated by seriousness of the offense, and sentences of imprisonment would be substantially reduced and would be imposed only if there were no satisfactory community-based sanction. D. Fogel, "... WE ARE THE LIVING PROOF ..." 242-44 (2d ed. 1979) [hereinafter cited as Fogel].

Governor Mario M. Cuomo has appointed a commission to study sentencing patterns in the state and to draft a fixed sentencing plan. The system consists of indeterminate sentencing for most felons with the possibility of parole. N.Y. Penal Law § 70.00(1) (McKinney 1975 & Supp. 1984-1985).

[A] sentence of imprisonment for a felony shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

Id.

A person who is serving one or more than one indeterminate sentence of imprisonment may be paroled. . . at any time after the expiration of the minimum or the aggregate minimum period of imprisonment of the sentence or sentences. Release on parole shall be in the discretion of the state board of parole, and such person shall continue service of his sentence of sentences while on parole. . .

Id. § 70.40(1)(a).

Recent actions to reform the system have been prompted by the dissatisfaction of the public as well as state officials. Reasons underlying recent demands for sentencing reform efforts include the public's perception of increasing violent personal and property crime rates, disparate sentencing and the belief that rehabilitation is unrealistic or undesirable. J. Miller, M. Roberts & G. Carter, Sentencing Reform: A Review and Annotated Bibliography 6 (1981) [hereinafter cited as Miller, Roberts & Carter]; see D. Stanley, Prisoners Among Us: The Problem of Parole 19 (1976) [hereinafter cited as Stanley]. The public has a very poor perception of the efficacy of the present criminal justice system in New York. This became clear in the wake of the recent "vigilante" shootings on a New York City subway train. On December 22, 1984, Bernhard Goetz shot four youths who allegedly had approached him in a menacing fashion and asked him for money. N.Y. Times, Jan. 3, 1985, at B4, col. 1. It was later discovered that all four youths had arrest records for various offenses, yet none of them had ever served any sentence longer than 60 days. TRB From Washington, I've Got Five Dollars, The New Republic, Feb. 4, 1985, at 6 [hereinafter cited as TRB]. There was almost unanimous public support for Goetz as people expressed their disgust with the criminal justice system and their fears of the unceasing threat of crime. See N.Y. Times, Jan. 3, 1985, at B4, col. 3; Starr, Crime: How It Destroys, What Can Be Done, N.Y. Times, Jan. 27, 1985, § 6 (Magazine), at 19 [hereinafter cited as What Can Be Done].

New York State Governor Mario M. Cuomo is an active proponent of the proposed shift to determinate sentencing. See Gargan, Has Parole Run Out of Time in New York?, N.Y. Times, Feb. 19, 1984, § 4, at 8, col. 1 [hereinafter cited as Out of Time]. One member of the New York State Assembly expressed his support and described the rationale of the proposed change. "We intend to send the message out [to the potential criminal] that if you commit a crime . . . you will get a sure punishment for a specific crime . . . and that punishment will be fairly precise. We think that that will reduce crime." Interview with New York State Assemblyman Ivan C. Lafayette (D-Jackson Heights), in New York City (Feb. 6, 1985); see infra notes 193-214 and accompanying text. The proposed change has also received the full support of New York City Mayor Edward I. Koch. Out of Time, supra, at col. 4. In a recent statement, Mayor Koch stated that New York should adopt tougher criminal penalties even if this requires that millions of dollars of state and local money be utilized to build additional state prisons. He said, "[t]he two top priorities for us are education and law enforcement. . . If I had to deal with only one, if I had to make a choice, it would be to punish criminals." N.Y. Times, Feb. 15, 1985, at A1, col. 1.

23. N.Y. Times, Oct. 27, 1984, at 27, col. 1; see 1983 N.Y. Laws 711 (State
which would include the abolition of the New York State Parole Board.24

This Note describes the history and development of the indeterminate sentencing and parole system.25 It exposes the flaws inherent in this system and the abuses to which it is subject.26 In addition, this Note explores the various alternatives to the indeterminate sentencing system and how they have been implemented by the federal government and by the states27 and then examines the specific sentencing reform plan proposed in New York State.28 Finally, this Note

Committee on Sentencing Guidelines). In approving the bill which established the Committee, Governor Cuomo stated:

The Executive Advisory Commission on Sentencing and the Executive Advisory Commission on the Administration of Justice each concluded that inconsistency and unjustified disparity in sentencing undermines the credibility and effectiveness of the criminal justice system. The concept of fairness in sentencing depends, in large measure, upon the imposition of similar penalties upon similar offenders who commit similar crimes.

To remedy the problem of disparate sentences the Commissions recommended the adoption of a system of determinate sentencing. Such a system would be based upon the concept that a court rather than the Board of Parole should set the actual period of confinement. It would ensure that both the defendant and the public will know at time of sentence the nature and length of the sentence.


24. See Out of Time, supra note 22, at col. 4; see also infra notes 59-60 and accompanying text (describing New York State Parole Board membership and criteria). Several recent incidents have sparked heated criticism of the Board as paroled inmates have committed additional and more serious crimes. One glaring example of this is the case of George Acosta, a parolee who murdered a New York City police officer on February 14, 1984. N.Y. Times, Feb. 16, 1984, at A1, col. 5. Despite several parole violations, Acosta’s parole had not been revoked. Id. On January 25, 1985, New York City police arrested another parolee and charged him with the muggings of 12 elderly women. N.Y. Daily News, Jan. 27, 1985, at 27, col. 1. Steven McGauley had been paroled after serving only nine years in prison for the murder of a 78 year-old woman. Id. His parole was effective until the year 2001. Id. During a period in which police suspect that McGauley may have committed 20 robberies, no action was taken against him by parole officials. Id. On February 18, 1985, a young woman was raped and beaten by a paroled rapist, Gregorio Rodriguez. N.Y. Times, Feb. 19, 1985, at B18, col. 4. Rodriguez had been released from prison in 1984, after serving 10 years for a rape conviction. Id. Rodriguez had previously served a prison sentence for rape and had also been released on parole. N.Y. Times, Feb. 26, 1985, at B3, col. 4. Mayor Edward Koch remarked about the incident: “The parole board put him out on the streets when he would be in jail otherwise. . . . To me it shows the idiocy of our criminal justice system not working. That's why I'm so outraged.” Id.; see infra note 100 and accompanying text. See also infra notes 94-105 and accompanying text for a discussion of the failure of the New York State Parole Board.

25. See infra notes 32-54 and accompanying text.

26. See infra notes 80-114 and accompanying text.

27. See infra notes 116-92 and accompanying text.

28. See infra notes 193-214 and accompanying text.
recommends that a modified version of the proposed plan be adopted by the New York State Legislature and that the existing parole system in New York be eliminated. 29

II. Indeterminate Sentencing

Defendants convicted under an indeterminate sentencing system generally are given sentences selected from a range determined according to the classification of the crime committed. 30 At the expiration of the minimum period of imprisonment specified by the court, all inmates serving indeterminate sentences become eligible for release at the discretion of parole board officials. 31

A. Historical Development of the Indeterminate Sentence

In the late eighteenth century, American courts determined guilt or innocence and applied legal sanctions to the guilty without regard to aggravating or mitigating circumstances. 32 The most commonly prescribed sanction was lengthy incarceration. 33 Judges fixed the offender's period of incarceration precisely, and the offender was expected to serve it in full. 34 By the early nineteenth century, however, prisons had become crowded, in part, because of the lengthy fixed sentences imposed by judges. 35 To alleviate this problem, governors and prison wardens often granted pardons. 36 As it became evident that pardons would not solve the problem, several methods were devised to reduce crowding. Two such methods were “good time” laws. 38

29. See infra notes 215-82 and accompanying text.
30. See, e.g., N.Y. PENAL LAW § 70.00 (McKinney 1975 & Supp. 1984-1985); see infra note 117. In New York State, indeterminate sentences are imposed only on felons. N.Y. PENAL LAW § 70.00 (McKinney 1975 & Supp. 1984-1985). However, the court may impose a definite sentence on a felon who has committed any class D, class E, or certain class C felonies. Id. § 70.00(4). The court may also impose a definite sentence if no prior felonies have been committed and the court deems that imprisonment is necessary but that it would be “unduly harsh” to sentence the felon to an indeterminate term. Id. All misdemeanors and violations are punished by imposition of a definite sentence where imprisonment is deemed appropriate. Id. § 70.15.
32. DEFINITE SENTENCING, supra note 10, at 3.
33. Id. at 4.
34. Serrill, supra note 3, at 50; see INCARCERATION, supra note 11, at 9.
35. See DEFINITE SENTENCING, supra note 10, at 4; Serrill, supra note 3, at 50.
36. See id.
37. See DEFINITE SENTENCING, supra note 10, at 4.
38. Id. Good time laws provide for the reduction of an inmate’s sentence as long as he maintains good prison conduct. SMYKLA, supra note 8, at 106; see supra
and indeterminate sentencing. Proponents of these methods sought to establish a system which allowed prison administrators to fix the term to be served by the prisoner through early-release programs.

In 1876, Zebulon R. Brockway, superintendent of the Elmira Reformatory and one of the first proponents of indeterminate sentencing, proposed to the New York State Legislature the adoption of the indeterminate sentencing system which he had implemented at Elmira. Brockway's system provided for the training of inmates and their conditional liberation, but it did not contemplate a system of minimum and maximum sentences.

Instead of adopting Brockway's proposal, the New York State Legislature, in 1889, enacted the country's first indeterminate sentencing law, which established minimum and maximum prison terms for given offenses. By 1900, five states had enacted indeterminate sentencing laws, and twelve states had established some form of adult parole systems. While in 1922, thirty-seven states had some form of indeterminate sentencing statute, the number of states currently using this form of sentencing has declined to twenty-five.

As part of the Elmira Reformatory indeterminate sentencing system, Brockway introduced the limited use of conditional liberation or parole. Under the parole system, a prisoner was released to the supervision of a guardian for a six-month period upon a showing of good conduct in prison. Determination of the prisoner's release date was made by the parole board.

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note 9 and accompanying text. In 1817, New York passed the first good time law in the nation and by the end of the nineteenth century most other states had similar laws. DEFINITE SENTENCING, supra note 10, at 4.

39. See supra notes 6-20 and accompanying text. The success of indeterminate sentencing in Ireland and Australia provided the impetus for the movement in America. DEFINITE SENTENCING, supra note 10, at 4.

40. DEFINITE SENTENCING, supra note 10, at 4.

41. Id. at 5; see Note, Should Parole Outcry Be Considered and Utilized to Rescind Parole?, 5 WHITTIER L. REV. 601, 606 (1983) [hereinafter cited as Parole Outcry].

42. DEFINITE SENTENCING, supra note 10, at 5.

43. Id.; see J. BRAMER, A TREATISE GIVING THE HISTORY, ORGANIZATION AND ADMINISTRATION OF PAROLE 21 (1926) [hereinafter cited as BRAMER].

44. BRAMER, supra note 43, at 21.

45. INCARCERATION, supra note 11, at 21.

46. DEFINITE SENTENCING, supra note 10, at 5.

47. Indeterminate sentencing is also used in the District of Columbia. See infra note 117.

48. DEFINITE SENTENCING, supra note 10, at 5.

49. Id. In essence, the prisoner's behavior during incarceration determined his
The creation of parole boards and their subsequent growth was a product of the belief that parole boards, removed from the political pressures of the community, could objectively and reliably identify when an offender could safely be returned to the community. Parole boards could also serve a secondary function of correcting mistaken judicial sentencing practices, and parole supervision could assist an offender in his readjustment to the outside community.\(^{50}\)

The first statewide law governing parole was enacted in Massachusetts in 1884.\(^{51}\) By 1922, forty-four states had some provision for parole release.\(^{52}\) Today, all of the states except Maine and Florida\(^{53}\) maintain some form of parole agency.\(^{54}\)

### B. Indeterminate Sentencing in New York State

In New York State, most felons are sentenced to indeterminate prison terms pursuant to New York Penal Law section 70.00 which sets forth the permissible range of minimum and maximum terms release date. *Parole Outcry*, supra note 41, at 606-07. The impetus for the parole movement came from the English and Irish ticket-of-leave system, which was used during the early and mid-nineteenth century. *Definite Sentencing*, supra note 10, at 5. Under the ticket-of-leave system, convicts would have to serve specific periods of time on good behavior before obtaining eligibility for commutation. *Id.* After serving a portion of his sentence, the prisoner might then receive a ticket-of-leave and be released from prison. *Id.*


51. *Id.*

52. *Id.*


that a judge may impose for the various felony classifications.\textsuperscript{55} Once the inmate has served the minimum sentence, he becomes eligible for parole release at the discretion of the New York State Parole Board (Board).\textsuperscript{56} In addition, an inmate may earn credit of up to one-third of his maximum term for good institutional conduct.\textsuperscript{57} When the amount of good time earned equals the unserved portion of the inmate's maximum term, the inmate is given a conditional release to parole supervision regardless of parole eligibility and without any Board action.\textsuperscript{58}

The Board is comprised of fifteen members who are appointed by the governor with the advice and consent of the senate.\textsuperscript{59} The Board has the power and the duty to determine which inmates may be released on parole and what the conditions of that release will be.\textsuperscript{60} Since 1978, the Board has adhered to a set of written guidelines

\begin{footnotesize}

\textsuperscript{55} See \textit{N.Y. Penal Law} § 70.00 (McKinney 1975 & Supp. 1984-1985); \textit{supra} note 22.


\textsuperscript{57} \textit{Id.} § 70.30(4).

\textsuperscript{58} \textit{Id.} § 70.40(1)(b); see \textit{New York State Division of Parole, New York State Parole Handbook: Questions and Answers for Inmates/Releasees 5} (1982) [hereinafter cited as \textit{Parole Handbook}].

\textsuperscript{59} \textit{N.Y. Exec. Law} § 259-b (McKinney 1982 & Supp. 1984-1985); see \textit{id.} §§ 259-a to 259-q (describing functions of division of parole). Requirements for Board membership are: (1) graduation from an accredited four-year college with a degree in criminology, criminal justice administration, law enforcement, sociology, law, social work, corrections, psychology, psychiatry, or medicine; (2) at least five years of experience in one or more of these fields; and (3) abstention from holding any other public office or serving as representative for any political party. \textit{Id.} § 259-b(2), (4).

\textsuperscript{60} \textit{Parole Handbook, supra} note 58, at 2. The Board must determine which . . . inmates serving indeterminate sentences of imprisonment may be released on parole, when and under what conditions . . . the conditions of release of any person who may be conditionally released under an indeterminate sentence of imprisonment, and of determining which inmates serving a definite sentence of imprisonment may be conditionally released, when and under what conditions.

\textit{Id.}

\end{footnotesize}
in making parole release decisions. The Board considers factors such as the inmate's institutional record, his performance in a temporary release program and the inmate's release plan. Under the guidelines, offenses are divided into six levels of seriousness, and inmates are scored accordingly. The Board must use the guideline score, but other mitigating and aggravating factors such as particularly good or bad institutional behavior or involvement in rehabilitative programs may result in a decision above or below the guideline range.

In addition to its function as a releasing agency, the Board also performs a supervisory role. Each parolee must report periodically to a parole officer who monitors the parolee for violations of the conditions of his parole. If the parolee violates any of these conditions, his parole may be revoked by the Board, and he may be

61. See N.Y. Exec. Law § 259-c(4) (McKinney 1982 & Supp. 1984-1985). The Parole Reform Act of 1977, 1977 N.Y. Laws 904, requires that the Board decide which inmates are to be released to parole supervision, when and under what conditions, that the Board set the minimum period of imprisonment for any inmate serving an indeterminate sentence where the court did not fix a minimum term and that the Board adopt written guidelines for its use in making minimum period of imprisonment and release determinations. New York State Division of Parole, 1978-79 Annual Report Series, Volume 2, An Overview of the Implementation of Parole Board Decision-Making Guidelines in New York State 5-6 (1979) [hereinafter cited as Parole Guidelines]. These guidelines provide an explicit statement of the Board's parole policies by identifying the major decisionmaking criteria and indicating the customary ranges of time to be served by various categories of inmates based on the severity of the offense and the inmate's prior criminal history. Id. at 2.

The United States Parole Commission has been using similar guidelines for several years in order to reduce unwarranted disparity in the sentences served by inmates. See 28 C.F.R. § 2.20(a) (1984); M. Gottfredson and D. Gottfredson, Decision-Making in Criminal Justice: Toward the Rational Exercise of Discretion, 296 (1980) [hereinafter cited as Gottfredson & Gottfredson]; Cavender, supra note 3, at 65.

62. Parole Guidelines, supra note 61, at 5-6. The release plan involves the availability of community services, employment, education, training and support services outside of the institution. Id. at 6. The Board receives this information in the form of a pre-parole summary. This report should include information concerning the inmate's present offense, his personal and legal history, his disciplinary record and participation in institutional programs and his post-release plans. Parole Handbook, supra note 58, at 10. The Board then reviews this summary, together with the inmate's complete criminal record, Family Court record and any other relevant information and makes the ultimate parole decision. Id. at 3.


64. Id. at 8. For example, during a six-month period, the Board made decisions 51% within the guidelines range, 15% above and 34% below the range on the basis of such factors. Id.


66. See id. at 3.

67. Id. The conditions imposed on New York State parolees are far-reaching.
An example of such a violation is the commission of a new crime by the parolee. Most revocations, however, actually result from technical violations of parole conditions such as neglecting to make required visits to the parole officer or absconding from supervision.

If a parole officer learns that the parolee has violated the conditions of his release, he conducts a personal investigation and then confers with his supervisor on the matter. If there is proof that parole has been violated, the supervisor may petition the Board to issue a violation warrant. A parolee is considered to have violated parole, or to have been “delinquent,” when the Board reasonably believes that he has absconded from supervision, has lapsed into criminal ways or company or has violated any other condition of his release, and probable cause has been found or the parolee has waived a preliminary hearing. Once a parolee has been declared delinquent,

They include a promise to make office and written reports as directed, to stay within the state or other designated areas unless permission to leave the area has been granted by the parole officer, to notify the parole officer of any arrest, to refrain from fraternizing with any person having a criminal record, to refrain from violating the law, to refrain from owning, purchasing or possessing any firearm without written permission of the parole officer, and to refrain from using or possessing drugs or drug paraphernalia. 

The Model Penal Code is far less restrictive. It requires only that the parolee "refrain from engaging in criminal conduct." MODEL PENAL CODE § 305.13 (Proposed Official Draft 1962).

68. PAROLE HANDBOOK, supra note 58, at 3. A violation of parole occurs when the parolee violates the conditions of his parole “in an important respect.” 1982-1983 N.Y. STATE DIV. OF PAROLE, ANN. REP. 44 (1984) [hereinafter cited as ANNUAL REPORT].

69. STANLEY, supra note 22, at 106.

70. See id. at 106-07; N.Y. PENAL LAW § 70.40(3) (McKinney 1975 & Supp. 1984-1985). The Parole Board reports that in 1982-1983 only two percent of parolees were returned to prison by the Board for committing a new crime, while eight percent were returned for violating the rules of parole. ANNUAL REPORT, supra note 68, at 45. But see infra notes 99-105 and accompanying text for an explanation of why these statistics are misleading.

71. PAROLE HANDBOOK, supra note 58, at 25.

72. Id.; see infra notes 73-75 and accompanying text.

73. PAROLE HANDBOOK, supra note 58, at 27. N.Y. EXEC. LAW § 259-i(3) (McKinney 1982 & Supp. 1984-1985) sets forth the procedures for revocation of parole and conditional release. These procedures are in accordance with the due process requirements of Morrissey v. Brewer, 408 U.S. 471 (1972). In that case, Petitioners Morrissey and Booher had had their paroles revoked for technical violations on recommendation of their parole officers. 408 U.S. at 472-74. Petitioners then brought this claim against the parole board alleging that they had been denied due process because their paroles had been revoked without a hearing. Id. at 474.
the New York State Division of Parole must afford him a prompt final revocation hearing at which the Board must prove that the conditions of parole have been violated.

The parole system was designed to assist the parolee in his readjustment to community life and to protect the community by requiring that he maintain regular contact with his parole officer, thus diverting the parolee from further criminal behavior. However, each Board member conducts over 1000 interviews per year, and each parole officer carries a large caseload. Consequently, realization of the system's goals becomes increasingly difficult as the burden on each member of the system increases.

The Supreme Court held that parole cannot be revoked until it has been determined at a preliminary hearing by a neutral party that there is probable cause to believe that a condition of parole has been violated. In addition, a final revocation hearing must be held at which certain minimum due process requirements must be observed. Under Morrissey, the parolee is entitled to: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . . ; (e) a "neutral and detached" hearing body such as a traditional parole board . . . ; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Professor Fogel asserts that, since Morrissey, parole revocations have decreased and parolees are rarely returned to prison for any offense less than a new crime. Fogel, Foreword to R. McCleary, Dangerous Men: The Sociology of Parole at 14 (1978).


In the fiscal year 1981-1982, each Board member conducted 1040 release interviews. This figure rose to 1507 in the succeeding year. During those two years, a total of 29,000 interviews and hearings were conducted by the Board.

The Division of Parole currently has a workforce of 700 professionals and a support staff of 500, who supervise over 25,000 parolees. In 1983, each parole officer handled approximately 70 cases, which represented a 66.7% increase from 1980. It seems logical to assume that a reduction in the size of each officer's caseload would result in a more efficient parole organization, but studies have found no correlation between caseload size and parole efficiency. Manson, Determinate Sentencing, 23 CRIME & DELINQ. 204, 205 (1977) [hereinafter cited as Manson].

See infra notes 94-98 and accompanying text.
C. The Failure of Indeterminate Sentencing and Parole

Over the last decade, it has become increasingly clear that the indeterminate sentencing system has failed to achieve its lofty goal of rehabilitation of convicted felons.\textsuperscript{80} Imposition of an indeterminate sentence does not lead to the reformation of the convict nor are prisons adequately structured and equipped to rehabilitate inmates.\textsuperscript{81}

\textsuperscript{80} Robert Martinson, who reviewed 231 studies of prison rehabilitation programs, concluded that "[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." Halleck & Witte, \textit{Is Rehabilitation Dead?}, 23 CRIME & DELINQ. 372, 373 (1977), quoting Martinson, \textit{What Works? Questions and Answers About Prison Reform}, PUBLIC INTEREST, Spring 1974, at 25. A recent study conducted by the Bureau of Justice Statistics of the Justice Department indicated that almost 84% of arriving inmates at state prisons around the country in 1979 were repeat offenders. Sixty-one percent had been imprisoned previously and 42% were on probation or parole for an earlier conviction at the time they entered prison. N.Y. Times, Mar. 4, 1985, at A17, col. 2.

\textsuperscript{81} Many studies have been conducted on prison rehabilitation programs, but there are no reliable statistics which conclusively prove or disprove their effectiveness. After 40 years of research and literally hundreds of studies, almost all the conclusions that can be reached have to be formulated in terms of what we do not know. . . . The entire body of research appears to justify only the conclusion that we do not know of any program or method of rehabilitation that could be guaranteed to reduce the criminal activity of released offenders. Although a generous reviewer of literature might discern some glimmers of hope, those glimmers are so few, so scattered, and so inconsistent that they do not serve as a basis for any recommendations other than continued research.

REHABILITATION PANEL, supra note 2, at 3; see SMYKLA, supra note 8, at 104. In New York, it has become increasingly difficult over the last decade for the system to offer education and vocational training to inmates, as the prison population has more than doubled. Out of Time, supra note 22, at col. 3.

The Uniform Parole Reports Program of the National Council on Crime and Delinquency Statistics shows that if the goal of parole is to retain people in the community for a time, rather than return them to prison, the system serves its purpose well. DEFINITE SENTENCING, supra note 10, at 46-47 app. D. The statistics indicated that of parolees released in 1972, 81% encountered no new problems leading to parole violation as of the first anniversary of their release, and 87% of this group had not been returned to prison. Id. After two years, the success rate dropped to 69% and after three years, to 66%. Id. Although these statistics tend to make parole seem quite successful, there is reason to believe that parole violation and return to prison rates are faulty measures of parole effectiveness. See infra notes 99-105 and accompanying text. Additionally, approximately 75% of the crimes committed in New York City are committed by individuals who have been previously tried and convicted. Interview with New York State Assemblyman Ivan C. Lafayette (D-Jackson Heights) in New York City (Feb. 6, 1985). According to a recent study by the Bureau of Justice Statistics of the Justice Department, about 28% of all of the crimes which resulted in incarceration in the nation's state prisons in 1979 were committed by repeat offenders who would still have been in prison for earlier offenses if they had served the maximum sentence to which they
Instead, incarceration and the parole system have a deleterious effect on the inmate. For example, it was determined in the aftermath of the Attica prison riots in the early 1970’s that “the operation of the parole system was a primary source of tension and bitterness within the walls.” Forced rehabilitation often is manipulated by

had been sentenced. N.Y. Times, Mar. 4, 1985, at A17, col. 2.

Two early studies, the 1948 Schnur study and the 1962 Saden study, concluded that those involved in prison educational programs had a recidivism rate slightly lower than the rate of those not involved. Appendix E: Sentencing and Social Research: A Review of the Literature on Deterrence, Incapacitation and Rehabilitation in the Executive Advisory Committee on Sentencing, Crime and Punishment in New York: An Inquiry Into Sentencing and the Criminal Justice System at 309 (1979) [hereinafter cited as Research Review]. However, the Glaser study in 1964 and the Coombs study in 1965 found that there was no difference in recidivism rates and that those taking part in the educational programs actually fared worse than those who were not enrolled. Id. Those not participating in enrollment programs were found to have a recidivism rate of 33% while participants had a recidivism rate of 39%. Id. However, offenders who had been incarcerated for more than three years and who were enrolled in educational programs had a lower recidivism rate than similar offenders who did not participate. Id. Also, those inmates who were enrolled in educational programs at medium security institutions had a lower recidivism rate than their counterparts when released. Id. Inmates who had completed ninth grade or higher, however, fared significantly worse than their counterparts. Id.

The PICO Project, an experiment conducted by Stuart Adams in 1961, produced similar results. L. TRAVIS III, M. SCHWARTZ & T. CLEAR, CORRECTIONS: AN ISSUES APPROACH 175 (2d ed. 1983) [hereinafter cited as CORRECTIONS]. In this experiment, offenders were evaluated at the start of their imprisonment and classified as “amenable” or “non-amenable” to treatment. A partial group of each were given counseling while the rest were given no treatment. “Amenables” ultimately fared better after receiving intensive counseling while those designated “non-amenable” and given counseling fared worse than the group of “non-amenables” who were not given counseling. Id. “In other words, counseling persons who were not amenable to therapy decreased their chances of success following treatment. As a group, they would have fared better if no treatment at all had been given.” Id.

82. Newman, A Critique of Prison Building in CORRECTIONS, supra note 81, at 81, 86.

Prison is always a brutalizing experience and necessarily involves removing an offender from community ties, including family and employment. At the benefit of temporary incapacitation, prisons return to communities offenders who are disenfranchised, disengaged from employment and family, damaged, brutalized, and likely to be more brutal after the prison experience.

Id. Indeed, the only education which many criminals receive in prison is how to become more skilled in their craft. “They learn how to be better crooks and how to beat the system better.” Interview with New York State Assemblyman Ivan C. Lafayette (D-Jackson Heights) in New York City (Feb. 6, 1985).

83. ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 9 (1972) [hereinafter cited as ATTICA].

Inmates are confused and angered by sentencing disparity and the arbitrary nature of parole board decisions. Parole is especially important since it
parole boards to justify the decision to grant or deny parole.\textsuperscript{64} Moreover, no one has ascertained the optimal time for an inmate’s release that suggests that behavior of an inmate in prison is not a valid basis on which to predict the likelihood of future criminal conduct by a released inmate.\textsuperscript{65}

A major problem with the indeterminate sentencing system is that when the sentencing decision is split between the discretionary judgments of two disparate entities, such as the judge and the parole board, there is inherent potential for inequity.\textsuperscript{66} This inequity is illustrated by the disparity in sentences imposed on and in actual time served by different offenders for the same offense.\textsuperscript{67} Under an

\begin{itemize}
\item is a way out of prison, but uncertainties about the process produce a sense of injustice and an air of hostility that make rehabilitative efforts futile and actually provide an example of lawlessness for offenders.
\item CAVENDER, supra note 3, at 59.
\item 84. Kennedy, supra note 4, at 3-4.
\item Coercive rehabilitation programs too often force the prisoner to make a Hobson’s choice: Reject the programs offered, in which case this apparent lack of cooperation with the prison authorities assures the prisoner a longer indeterminate sentence, less likelihood of parole, and less opportunity for participating in early release or other diversionary programs; or “go along with the game plan” and pretend to respond to compulsory prison training and programs. In the latter case, “rehabilitation” is little more than a sham to ingratiate the prisoner with the parole board.
\item Id. at 3.
\item A system that would avoid conditioning release on inmate participation in rehabilitation programs and upon official determinations that an acceptable level of rehabilitation has been reached might be more likely to achieve some measure of prisoner rehabilitation. F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 83 (1981) [hereinafter cited as ALLEN]. “There is reason to hope that programs that facilitate a prisoner’s own goals of education and self-improvement and are freed from the distorting effects of traditional regimes, will improve the efficacy of such programs.” Id. at 84.
\item 86. See Kennedy, supra note 4, at 1. Unwarranted disparity in sentencing results when judges impose different sentences which cannot be justified by the histories or characteristics of the various defendants. Skrivseth, Abolishing Parole: Assuring Fairness and Certainty in Sentencing, 7 Hofstra L. Rev. 281, 284-85 (1979).
\item Unwarranted disparity in sentences actually served occurs when mechanisms in the criminal justice system designed to correct sentencing disparity, such as parole and corrections authorities, are unsuccessful. Id. Uncertainty regarding the length of time which is actually served in prison occurs when the release date is subject to constant adjustment by a body such as a parole board. Id.
\item 87. Various types of disparity exist, including overall disparity among judges in the severity of sentences imposed, disparity within an individual judge’s pattern of sentencing for different offenses, disparity in the sentencing of different races, statutory disparity, parole disparity, disparity within and among the states, and
indeterminate sentencing plan, different judges often impose widely disparate sentences on similar facts, and a single judge may impose different sentences on different offenders who have committed the same offense. However, since rehabilitation does not necessarily

disparity in the different goals and philosophies of sentencing. See Fair and Certain Punishment, supra note 19, at 4-5; Spader, Criminal Sentencing and Punishment: The Search for the Golden Zigzag, 28 S.D.L. Rev. 1, 33 (1982).

An example of disparity among the states is found in one study which showed that in 1971, 62.5% of Minnesota prisoners released from prison had served more than 10 years while none of the Vermont inmates released in that year had served more than five years. Fair and Certain Punishment, supra note 19, at 103. The study also indicated that 3.06% of Washington prisoners released originally had received sentences between one and five years while 86.1% of South Dakota releasees had received sentences in that range. Id. Disparity in sentencing practices among judges was found in a study of the sentences imposed during a two-year period in Montgomery County, Ohio. Id. at 104. For example, in cases of robbery, one judge had imposed prison sentences in 77% of the cases before him while another judge had imposed prison sentences in only 17% of the cases before him. Id. Disparity in the Illinois sentencing statute prevailed before that state adopted determinate sentencing. For example, an armed robber in Illinois could have served anywhere from nine months to 13.5 years while, at the same time, commission of the non-violent property crime of forgery could have triggered a sentence anywhere between eight months and 5.3 years. Definite Sentencing, supra note 10, at 9; see supra note 20 and accompanying text.

88. See, e.g., Tsimbinos, A Survey on Sentencing, Queens B. Bull., Nov. 1979, at 5, 20; Appendix C: Sentencing Simulation Study in The Executive Advisory Committee on Sentencing, Crime and Punishment in New York: An Inquiry Into Sentencing and the Criminal Justice System at 167 (1979) [hereinafter cited as Sentencing Simulation Study]. In a sentencing simulation study, the Executive Advisory Committee concluded that the wide divergence in sentences imposed was based on judicial attitudes rather than on the facts of each case. Id. Different judges differed in both type, either probation or bail, and length of terms imposed under the same circumstances. Id. Even when judges agreed on sentencing rationales and objectives, such as deterrence, retribution or rehabilitation, they still imposed different sentences. Id.; see van den Haag, Punitive Sentences, 7 Hofstra L. Rev. 123 (1978) [hereinafter cited as van den Haag]. The sentencing simulation study also revealed that different judges imposed sanctions ranging from probation through the statutory maximum on the same offenders. Sentencing Simulation Study, supra, at 99.

In a study of actual prison terms served, the Executive Advisory Committee found that there were wide variations in the length of prison terms imposed in New York State on defendants convicted for the same offenses. Statistical Profile, supra note 20, at 52. For example, first-degree robbery offenders received sentences ranging from the statutory minimum of three years through the maximum of 25 years. Id. While parole release substantially reduces judicially imposed sentences, variations in time served by offenders for the same crime continue to be substantial. For example, first degree manslaughter convicts have served sentences ranging from 13.7 to 137.7 months. Id. at 70. Advocates of the rehabilitative ideal would contend that such disparity is justifiable, as it stems from the varying "treatment needs" of the different offenders. See Cavender, supra note 3, at 59.
result from incarceration, the imposition of disparate sentences is reduced to "disparate punishment inimical to traditional legal values [rather than] an equal application of law.""

Another problem with indeterminate sentencing is that the various members of the system are forced to "second-guess" one another on sentencing decisions. For example, a judge may impose a long sentence because he expects the parole board to release the convict at some point before the full term has been served. The danger in this situation is that, occasionally, the sentence is served in full.

Finally, while a great deal of reliance has been placed on the attitudes and actions of the parole board, its decisions often are made inconsistently, hastily and without well-defined bases since

To the rehabilitationist, differences in penal treatment are not disparities so long as they reflect genuine therapeutic considerations: treatment is to be made commensurate with the criminal, not with his criminal act, and is to be distributed among offenders "according to their needs." When, however, confidence is lost in the rehabilitative capacities of penal programs and in the ability of parole boards and correctional officers to determine when reformation has been achieved, the rehabilitationist rationales for treatment differentials no longer serve, and the differences are seen as irrational and indefensible.

Allen, supra note 84, at 73.

89. See supra notes 80-82 and accompanying text.

90. Cavender, supra note 3, at 59. Unwarranted sentence variation produces several negative consequences. D. Gottfredson, L. Wilkins & P. Hoffman, Guidelines for Parole and Sentencing 119 (1978) [hereinafter cited as Gottfredson, Wilkins & Hoffman]. First, it is morally offensive to defendants and can lead to disrespect for the judicial process. Id. Second, it has a negative impact on prison rehabilitative efforts and on judicial administration. Id.

91. See supra note 19 (quoting Alan Dershowitz); Newman, A Better Way To Sentence Criminals, 63 A.B.A. J. 1563, 1565 (1977) [hereinafter cited as Newman]. Kenneth Conboy, criminal justice coordinator for New York City Mayor Edward I. Koch, commented, "[i]ndeterminate sentencing divides responsibility and renders more ambiguous the ultimate accountability of the judge, the Parole Board, and the district attorneys. ... There is confusion as to who is responsible that a particular person is on the street or in jail." Out of Time, supra note 22, at col. 5.


93. Id.

94. The parole-release decision is based on an amalgam of elements, some of which are factual, but many of which are purely subjective appraisals by the Board members, based solely upon their experience. Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 9-10 (1979); accord Peterson v. Rivers, 350 F.2d 457, 458 (D.C. Cir. 1965).

In fact, parole boards are trying to do something that is impossible: predict the future of human beings. They are doing some things that are not valid: basing decisions on the belief that prison training or therapy are effective. They are doing other things that are unjust: keeping people in prison because they may do something bad when they get out.
only a few jurisdictions require the use of parole board guidelines. Moreover, many states do not require any specific, relevant qualifications for employment in the division of parole despite the highly specialized duties of parole employees. These employees should be experts at identifying the causes of criminal behavior, establishing treatment programs and determining when a sufficient degree of rehabilitation has occurred so that the inmate may be returned to society safely. However, parole board employees throughout the United States are inadequately trained and overworked and are provided with meager resources with which to carry out their duties.

Notwithstanding this criticism, New York State Parole Board statistics indicate that ninety-one percent of all parolees during 1982 and 1983 had not returned to prison. These statistics are misleading, however, as not all parole failures are detected or acted upon.

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STANLEY, supra note 22, at 185; see Orland, From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation, 7 Hofstra L. Rev. 29, 32 (1978) [hereinafter cited as Orland]; van den Haag, supra note 88, at 135.

95. See STANLEY, supra note 22, at 185. However, the federal government, New York, and Oregon do require the use of guidelines by their parole agencies. See 28 C.F.R. § 2.20 (1984); N.Y. Exec. Law § 259-c(4) (McKinney 1982 & Supp. 1984-1985); Or. Rev. Stat. § 144.780 (1981); supra notes 61-65 and accompanying text.

96. CAVENDER, supra note 3, at 40-41.

97. Id. at 41-46.

98. "Ordinarily the parole officer is given little more than a manual, a car, a gun (in some jurisdictions), and the power to grant or deny permission for certain activities. Training . . . consists of a brief orientation period followed by a period of working with an experienced agent." VON HIRSCH & HANRAHAN, supra note 16, at 59-61.

99. ANNUAL REPORT, supra note 68, at 45. Eighty-eight percent of all parolees during 1981-1982 were not returned to prison. Id. This figure is defined in terms of the number of parolees not returned to prison while on parole. In terms of enforcement of the rules of parole, the Board claims a 92% success rate. Id.

100. This is clear from an examination of the incidents discussed supra note 13. For example, on February 14, 1984, George Acosta, a parolee whose parole had not been revoked despite an arrest for gun possession, an arrest for burglary and a conviction for criminal mischief, murdered New York City Police Officer Thomas Ruoto and injured two other officers. N.Y. Times, Feb. 16, 1984, at A1, col. 5. In the wake of this incident, the Board came under a great deal of heated criticism from public officials and the media, which ultimately led to an investigation of Board procedures. Id.; Feb. 18, 1984, at A1, col. 1. The investigation exposed the fact that established procedures had been ignored by Acosta’s parole officer. Id. Edwin Elwin, the Executive Director of the State Division of Parole, stated that there had been a “breakdown” in the system. Id. Specifically, Acosta’s parole officer had failed to investigate the burglary arrest by neither reviewing the court papers nor interviewing the arresting officer, the complainant or the assistant district attorney. Id., Feb. 22, 1984, at B6, col. 1. In addition, the officer never interviewed
Additionally, the decision whether to revoke parole rests in the discretion of the parole officer and his supervisors. Consequently, parole violators often are not returned to prison. Moreover, the Board's statistics indicate simply that those who were released did not commit new crimes while still on parole. The Board's statistics do not show that the same non-return rate would not have been achieved at the normal expiration of these convict's sentences nor that these parolees did not return to crime after their parole periods had expired. A 1975 study of the New York State parole system showed that the rate of success for parolees was only one or two percent higher than the success rate for prisoners discharged after serving their sentences in full. Thus, parole may merely delay recidivism not prevent it.

Acosta, never notified the Board of the arrest and did not discuss the case with his supervisors. Id.; see Out of Time, supra note 22, at col. 1.

In another case, parolee Steven McGauley was arrested for mugging an elderly Bronx woman. At the time of his arrest, police suspected McGauley of having committed up to 20 similar offenses while out on parole. The Bronx District Attorney's office planned to investigate the circumstances of McGauley's parole with respect to these incidents. N.Y. Daily News, Jan. 27, 1985, at 27, col. 2.


102. See id. Professor McCleary's study of a large metropolitan parole agency exposed a general pattern of rule-breaking, incompetence and laxity. See McCleary, supra note 12, at 103. He found that parole officers and their supervisors were most interested in doing as little work as possible and that department officials were most concerned with minimizing political squabbles and maintaining a positive public image. Id.; accord Cavender, supra note 3, at 54-55.

103. Citizens' Inquiry on Parole and Criminal Justice, Prisons Without Walls: Report on New York Parole 163 (1975), quoted in Manson, supra note 78, at 205. Success rate is determined in terms of reincarceration, thus the study indicates that parolees are not significantly more successful in avoiding new convictions than are discharges, those who are deemed to represent the worst risks among the prison population and are, therefore, never paroled.

104. Recidivism is the usual measure for assessing the effectiveness of rehabilitative efforts. Rehabilitation Panel, supra note 2, at 7. Recidivism applies to the frequency of an individual's return to crime after some form of disposal by the courts. L. Wilkins, Evaluation of Penal Measures 12 (1969) [hereinafter cited as Wilkins]. A recidivist is "a habitual criminal; a criminal repeater. . . . One who makes a trade of crime." Black's Law Dictionary 1141 (5th ed. 1979). The recidivist is usually denied probation and is subject to more serious punishment following subsequent criminal activity. Wilkins, supra, at 13.

105. H. Sacks & C. Logan, Parole: Crime Prevention? Or Crime Postponement? 37 (1980). The authors compared 169 Connecticut parolees with inmates who had served their full sentences. Id. at 14. They found that while there was a modest reduction in recidivism while the parolees were on parole or for a short period thereafter, recidivism increased in parolees who had returned to the community for two full years. Id. at 14-15. The authors concluded that parole has no long-term effect and cannot be relied upon to rehabilitate offenders. Id. See generally
The parole system was based on a theory of reform, reeducation and rehabilitation and the supposed ability of a releasing authority to predict future lawful behavior. Theoretically, the parole system should help offenders become better members of society. However, because most jurisdictions encourage parole eligibility upon completion of the minimum sentence rather than upon actual rehabilitation, parole has evolved into custodial management and control. The goal of rehabilitation thus has been displaced by the goal of maintaining peaceful penal institutions.

The implementation of guidelines signifies a commendable effort on the part of the Board to rectify past abuses. However, if parole

H. Sacks & C. Logan, Does Parole Make a Difference? (1979) (reporting results of earlier phase of this study).

106. See Jacobson, supra note 21, at 235. The movement toward indeterminate sentencing was anchored in the concepts of rehabilitation and individualized justice, which held that prisoners were victims of "social sickness" and needed individualized treatment rather than punishment. See Williams v. New York, 337 U.S. 241, 248-49 (1949); Galfunt, supra note 7, at 61; Serrill, supra note 3, at 50. Early reformers strongly believed that the shorter, less harsh indeterminate sentence would bring about the reformation of the convict and his quick restoration to lawful citizenship. They believed that at the root of deviant behavior were substandard living conditions, and that the best method for eliminating deviancy was a case-by-case approach to each criminal. Incarceration, supra note 11, at 10-11; see Williams v. New York, 337 U.S. 241, 250-51 (1949); In re Lynch, 8 Cal. 3d 410, 416, 503 P.2d 921, 924, 105 Cal. Rptr. 217, 220 (1972). Proponents of the new system were convinced that it would foster the rehabilitation of inmates. "[T]he date, 1876, marks the practical application of the idea now so generally accepted that the aim of punishment is not only the protection of society but the reformation of the offender." First Annual Report, supra note 11, at 10. In 1926, one optimistic reformer predicted: "Parole will develop into a science. It will be more than an agency of legal justice. It will become an agency of social justice building lives to respect and maintain the laws of God and man." Bramer, supra note 43, at 76.

107. Cavender, supra note 3, at 38.

108. Id.

109. See id. at 48. Consideration of prison overpopulation is another factor which leads to increased resort to parole and non-incarcerative sanctions as means of control, thus suggesting that the rehabilitative ideal of imprisonment is no longer being applied. See Foote, Deceptive Determinate Sentencing in National Institute on Law Enforcement and Criminal Justice, Determinate Sentencing: Reform or Regression? at 138 (1978) [hereinafter cited as Determinate Sentencing].

If the masks of individualization and rehabilitation are stripped away, the basic function of discretion in paroling and sentencing practices is revealed: to adjust an impossible penal code to the reality of severe limitations in punishment resources. . . . By necessity, from the masses of convicted persons legislatively declared to be eligible for imprisonment, most must be diverted and only a small proportion winnowed out for actual imprisonment.

Id.

110. In particular, the use of guidelines tends to reduce the chance of disparity in sentences served due to parole release. See supra notes 61-65 and accompanying text.
release decisions can be made effectively through the use of guidelines, arguably, the Board is no longer needed to perform its releasing function since most guideline factors are known to the judge at the time of sentencing. Rather than base its decisions on the degree of an inmate's rehabilitation, the Board, based on a combination of offense severity and offender characteristics, simply selects the appropriate length of time to be served by the inmate.

In essence, the indeterminate sentencing system has been reduced to a policing function in which the system merely protects the community from parolees who would engage in further criminal behavior. This function can be better performed by the imposition of determinate sentences. The theoretical goal of indeterminate sentencing is rehabilitation; yet the system provides little rehabilitative effect. Thus, there is no clear justification for the continued existence of the indeterminate sentencing system in its present form.

III. Determinate Sentencing

Over the past decade, there has been a trend among the states toward adoption of determinate sentencing schemes. Moreover, Congress recently enacted sweeping anti-crime legislation that provides, in part, for a complete overhaul of the federal government's present indeterminate sentencing system. Legislators have concluded that indeterminacy is no longer an effective method for sentencing felony offenders and that alternative sentencing plans must be explored. Even its advocates recommend that traditional indeterminate sentencing statutes be modified and reformed to provide for

111. Newman, supra note 91, at 1566; see Parole Guidelines, supra note 61, at 5-6.
112. See Newman, supra note 91, at 1566.
113. Id.
114. See Annual Report, supra note 68, at 41, 44.
115. A determinate sentence is a "[s]entence to confinement for a fixed period as specified by statute . . . ." Black's Law Dictionary 405 (5th ed. 1979). Under a determinate sentencing plan, the judge must impose the specified statutory penalty or impose a penalty from a permissible range on the convicted defendant. The defendant must serve out this term in prison, less any time deducted from the sentence for good behavior while in prison. See Parole Decision-Making, supra note 1, at 8. See infra notes 124-86 for a discussion of the various forms of determinate sentencing.
more sentence review and more certainty in sentencing.\textsuperscript{118}

Although the distinctions among them are somewhat blurred,\textsuperscript{119} determinate sentencing plans generally fall into one of the following

\textsuperscript{118} There are several possible alternatives to the present administration of the indeterminate sentence. The sentencing council has been used in several courts, such as the Eastern District of New York, the Northern District of Illinois, the Eastern District of Michigan, and the District of Oregon. \textit{Research Review, supra} note 81, at 273. Under this method, a council composed of three judges aids the sentencing judge in his determination of the sentence to be imposed in each case. Each participating judge is given a copy of a pre-sentence investigation report. Based on this report, each judge makes a recommendation on the sentence he thinks should be imposed in the case, and the judges discuss the recommendations. \textit{Id.} The sentencing judge then makes the final decision. The sentencing council is purely advisory as the sentencing judge is entirely responsible for the sentence imposed. \textit{Id.} Appellate review is another method which has been used to temper the effects of an indeterminate system. \textit{Id.} at 274. In Massachusetts, for example, every defendant sentenced to serve 25 or more years in state prison, or five or more years in the women's reformatory, has the right to apply for sentence review. \textit{Id.} Another device for controlling judicial discretion under indeterminate sentencing is to require judges to supply written statements of their reasons for imposing each sentence. Judge Frankel has suggested enactment of a sentencing statute which declares for what reasons a judge may impose a sentence combined with a requirement that the judge state which of the reasons underlies his judgment in each case. See M. \textit{FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER} 73, 108-09 (1973); W. \textit{GAYLIN, PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING} 226-31 (1974); \textit{GOTTFREDSON, WILKINS AND HOFFMAN, supra} note 90, at 120-22.

\textsuperscript{119} There are generally three approaches to implementing determinate plans. Under the legislative approach, the legislature fixes a penalty in the statute and allows for limited judicial discretion in the event that aggravating or mitigating circumstances are present. \textit{DEFINITE SENTENCING, supra} note 10, at 14. An example of this approach is found in the California statute. \textit{See infra} notes 172-79 and accompanying text. Under the judicial approach, the judge must impose a definite term if he decides that imprisonment is the appropriate sanction, but the sentence cannot exceed the designated maximum penalty. \textit{DEFINITE SENTENCING, supra} note 10, at 14. This approach is exemplified by the Maine statute. \textit{See infra} notes 134-40 and accompanying text. The third method is the administrative approach. Definite parole dates are established by an administrative body within specified ranges.
four distinct categories: (1) mandatory sentencing;\textsuperscript{120} (2) definite sentencing;\textsuperscript{121} (3) sentencing guidelines;\textsuperscript{122} or (4) presumptive sentencing.\textsuperscript{123}

A. Mandatory Sentencing

Most states have enacted mandatory sentencing statutes, which require the offender to serve an established period of imprisonment for a limited number of offenses.\textsuperscript{124} For these offenses, however, the judge is required to impose the predetermined sentence of incarceration.\textsuperscript{125} In Hawaii, for example, the use of a firearm during commission of a class A felony requires imposition of a ten-year sentence of incarceration.\textsuperscript{126} No state has adopted this type of sentencing throughout its penal code because it does not allow for mitigation based on individual consideration of the criminal and the crime.\textsuperscript{127}

\begin{footnotesize}
\begin{enumerate}
\item According to the offense and characteristics of the offender. \textit{Definite Sentencing, supra} note 10, at 14. The New York State parole guidelines method is an example of this approach. \textit{See supra} notes 61-65 and accompanying text.
\item See \textit{infra} notes 124-27 and accompanying text.
\item See \textit{infra} notes 128-46 and accompanying text.
\item See \textit{infra} notes 147-63 and accompanying text; \textit{Cavender, supra} note 3, at 65-66.
\item See \textit{infra} notes 164-92 and accompanying text.
\item Usually these provisions are only enacted for offenses involving crimes of violence and the use or possession of firearms. \textit{See infra} note 125.
\item A person convicted of a felony, where the person had a firearm in his possession and threatened its use or used the firearm while engaged in the commission of the felony, may be sentenced to a mandatory term of imprisonment the length of which shall be... (1) For a class A felony—up to 10 years; and (2) For a class B felony—up to 5 years.

\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
B. Definite Sentencing

Under a definite sentencing plan, the legislature establishes a range of sentences which may be imposed for each type of offense.\(^{128}\) The judge must impose a fixed term of imprisonment from within that range for each convicted defendant.\(^{129}\) Twelve states have adopted definite sentencing provisions in their criminal codes,\(^{130}\) including Maine which, on May 1, 1976, became the first state to abandon indeterminate sentencing and abolish parole.\(^{131}\) The Maine Legislature disapproved of the state parole board’s record of releasing ninety-seven percent of all prisoners at their first parole hearing and, therefore, adopted a definite sentencing statute\(^{132}\) to keep prisoners in jail longer.\(^{133}\)

The Maine statute empowers judges to impose fixed sentences limited only by statutory maximums.\(^{134}\) The statute categorizes all crimes and states only the upper limit of punishment which may be imposed in each category except for murder.\(^{135}\) The trial court must impose a definite term within this limit.\(^{136}\) Prior to 1983, the Maine statute retained a measure of indeterminacy as any sentence in excess of one year was deemed tentative and could be revised by the court.\(^{137}\)

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\(^{128}\) See Cavender, supra note 3, at 64.

\(^{129}\) See id.; Fogel, supra note 21, at 254.


In the case of a person convicted of a crime other than murder, the court may sentence to imprisonment for a definite term as provided for in this section. . . . The sentence of the court shall specify the term to be served and the place of imprisonment if that place is to be a county jail, otherwise the court shall commit the person to the Department of Corrections.

Id.; see Comparative Assessment, supra note 131, at 387-88.


\(^{135}\) Id.

\(^{136}\) See id.; Comparative Assessment, supra note 131, at 387-88.

Apart from this proviso, under Maine's definite sentencing statute, prison terms rarely have been altered once they have been imposed by the court. However any inmate serving a sentence in excess of six months is eligible to earn good time credits which are awarded at the rate of ten days per month with an additional two days credit given for completion of special work assignments.

Under the Illinois definite sentencing plan enacted in 1977, the judge may select any term of imprisonment within the minimum and maximum limits set by the legislature for each felony. The statute also lists the aggravating and mitigating factors to be considered by the judge in determining what sentence to impose. Under section 1005-6-1(a), probation and conditional discharge are the preferred sanctions for most offenses and must be imposed if the offender does not represent a threat to the public and if the imposition of such a sanction is not disproportionately lenient with respect to the seriousness of the offense. There is no parole provided:

2. If, as a result of the department's evaluation of such prisoner's progress toward a noncriminal way of life, the department is satisfied that the sentence of the court may have been based upon a misapprehension as to the history, character or physical or mental condition of the offender, or as to the amount of time that would be necessary to provide for protection of the public from such offender, the department may file in the sentencing court a petition to resentence the offender.

Id. § 1255(2)-(3).


140. See id.; Comparative Assessment, supra note 131, at 388.


143. Ill. Ann. Stat. ch. 38, §§ 1005-5.3.1 to .2 (Smith-Hurd 1982 & Supp. 1984-1985). Some of the mitigating factors include the absence of any physical harm caused or threatened by the defendant, strong provocation and the likelihood that defendant will not commit another crime. Id. § 1005-5-3.1(a). Aggravating factors include serious harm caused to another by defendant's conduct, receipt of compensation by defendant for commission of the offense, and defendant's history of prior delinquency or criminal activity. Id. § 1005-5-3.2(a).

144. Id. § 1005-6-1(a); Comparative Assessment, supra note 131, at 396.
provision, but sentence lengths may be altered by the trial court on its own motion within thirty days, and all sentences for murder and felony convictions may be appealed.\textsuperscript{145} Good time, under section 1003-6-3 of the statute, is earned at the rate of one day for each day served, and an additional ninety days may be awarded by the department of corrections for “meritorious service.”\textsuperscript{146}

C. Sentencing Guidelines

Four states and the federal government have adopted sentencing guidelines systems.\textsuperscript{147} Under the guidelines method, a sentencing commission develops a narrow range of penalties for each offense.\textsuperscript{148}

\begin{tabular}{|c|c|c|c|c|}
\hline
-1 & 0 & 3 & 6 & 9+ \\
\hline
-7 & 2 & 5 & 8 &  \\
\hline
8-10 & OUT & 7-8 & 10-12 & 15-18 & 20-25 \\
& 14-17 & 17-20 & 20-25 & 25-35 &  \\
\hline
6-7 & OUT & OUT & 5-6 & 7-8 &  \\
& & & 10-12 & 14-17 &  \\
\hline
3-5 & OUT & OUT & OUT & OUT & 5-6 \\
& & & & & 8-10 \\
\hline
1-2 & OUT & OUT & OUT & OUT & 5-6 \\
& & & & & 8-10 \\
\hline
\end{tabular}

145. ILL. ANN. STAT. ch. 38, §§ 1005-8-1(c), 1005-5-4.1 (Smith-Hurd 1982 & Supp. 1984-1985); Comparative Assessment, supra note 131, at 397. In addition, there is a period of mandatory supervised release which requires the supervision of the parole agency. ILL. ANN. STAT. ch. 38, § 1003-14-2 (Smith-Hurd 1982).

146. Id. § 1003-6-3(a)(2) to -3(a)(3); Comparative Assessment, supra note 131, at 397.


148. CAVENDER, supra note 3, at 65. The guideline sentence is determined by the intersection of the offender score, which is based on prior convictions, incarcerations and revocations, and the offense score, which is based on the number and seriousness of the offenses committed. A. GELMAN, J. KRESS & J. CALPIN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION, VOLUME III: ESTABLISHING A SENTENCING GUIDELINES SYSTEM 69 (1982). This is an example of a sentencing guidelines grid for a third degree felony:
The potential sentence ranges established by the commission are placed in a table which is comprised of a two-dimensional grid consisting of an offense score determined by the seriousness of the offense and an offender score based on the offender's prior criminal record. The intersection of the offense-seriousness score and the offender score provides the location of the guideline sentence. The trial judge must impose a sentence from within the prescribed range. A sentencing judge retains the discretion to set a sentence outside of the guideline range, but he must specify his reasons for doing so in a written opinion. Furthermore, the defendant has an automatic right of appeal if the sentence is above the guideline range, and the prosecutor has the right to appeal if the sentence falls below this range.

An important feature of the guidelines method is the sentencing guidelines commission which is composed of judges and citizens from non-legal professions. The commission classifies offenses into narrow categories, stipulates guideline sentences for each category and monitors and periodically alters its guidelines on the basis of ongoing research and existing sentencing practices. Thus, guideline sentences reflect the typical or customary sentences imposed by judges for each offense.

Congress has adopted a sentencing guidelines system in the newly-enacted Sentencing Reform Act (SRA). The SRA created a sent-
encing commission to establish narrow ranges of penalties to be imposed on federal criminals.\textsuperscript{158} The sentencing commission must formulate guidelines and submit them to Congress by April, 1986 at which time they will become law automatically unless they are blocked by new legislation within six months.\textsuperscript{159} The SRA provides that any judge who deviates from the guidelines will be required to provide written justifications for doing so.\textsuperscript{160} The defendant may appeal any sentence harsher than the guideline range, and the government may appeal any sentence more lenient than the guideline range.\textsuperscript{161} Additionally, the SRA provides for a five-year phaseout of the United States Parole Commission.\textsuperscript{162}

The sentencing guidelines method eliminates much uncertainty in the penal system by imposing extreme restrictions on the sentencing judge. Under this method, a judge is able to exercise only limited discretion in departing from the guideline sentences and is required to explain fully his reasons for doing so, thereby eliminating much sentencing uncertainty.\textsuperscript{163}

D. Presumptive Sentencing

The presumptive sentence is the best alternative to the indeterminate sentence since it is narrower and, therefore, more determinate than the ranges established under the definite sentencing and the sentencing guidelines methods.\textsuperscript{164} Under a presumptive sentencing scheme, the

\textsuperscript{158} This law provides that:
\begin{enumerate}
\item There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission. . . .
\item The purposes of the United States Sentencing Commission are to—
\begin{enumerate}
\item establish sentencing policies and practices for the Federal criminal justice system . . . (2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing. . . .
\end{enumerate}
\end{enumerate}


\textsuperscript{160} Id. § 3742(a)(3)(A), (b)(3)(A).

\textsuperscript{161} See N.Y. Times, Oct. 15, 1984, at A6, col. 4. Sentences will be rather precise, as reductions in sentence length for good behavior will be limited to 54 days each year. 18 U.S.C.A. § 3624(b) (1984).

\textsuperscript{162} See Cavender, supra note 3, at 65.

\textsuperscript{164} See, e.g., Fair and Certain Punishment, supra note 19, at 19; see A. Von Hirsch, Doing Justice: The Choice of Punishments 99 (1976). Nine states have
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The legislature establishes three alternative sentences rather than a sentence range for each offense. The middle alternative is the presumptive sentence to be imposed in most cases. The trial judge must impose the presumptive sentence unless aggravating or mitigating factors justify the imposition of the lower or higher alternative. Judicial discretion is curbed because standard penalties and aggravating and mitigating circumstances are predetermined in the sentencing statute for each offense. Therefore, uncertainty and disparity in sentencing are significantly reduced. When the parole board is abolished or is given only limited capacity to review and change sentences, uncertainty is reduced further.

Some presumptive sentencing schemes resemble sentencing guidelines schemes. Often, a sentencing commission is established to formulate presumptive sentencing guidelines. The sentencing commission classifies the offenses according to the level of seriousness but, unlike the guidelines approach, prescribes a specific penalty rather than a range of penalties for each level. The trial judge under both the sentencing guidelines and the presumptive sentencing methods has the authority to impose a sentence outside of the guideline range based on such factors as the recidivism of the offender and the presence of aggravating and mitigating factors.

In 1976, California became the first state to enact a presumptive sentencing scheme. Under this statute, parole board discretion was


165. See CAVENDER, supra note 3, at 62.
166. See id.
167. See id.
168. Id. at 62-63.
169. See supra notes 147-56 and accompanying text. The proposed New York plan, for example, combines elements of both of these methods, as well as aspects of definite sentencing. See infra notes 193-206 and accompanying text; N.Y. Times, Oct. 27, 1984, at 32, col. 4.
170. See supra notes 154-55 and accompanying text for a discussion of sentencing commissions.
171. See SMYKLA, supra note 8, at 108.

When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.

. . . In determining whether there are circumstances that justify impos-
abolished and the scope of judicial discretion was narrowly defined.\textsuperscript{173} Three possible terms are now specified for each category of felony offense.\textsuperscript{174} The sentencing judge must choose the middle term in each category unless the defense has presented evidence supporting the minimum sentence or the prosecutor has presented evidence supporting imposition of the maximum term.\textsuperscript{175} If the court decides to deviate from the middle sentence, the judge’s factual findings and reasoning must be stated in writing.\textsuperscript{176} Additionally, good time may be earned up to one-third of the inmate’s sentence, including three months for good behavior and one month for participation in work, educational, therapeutic or vocational programs each year.\textsuperscript{177}

\textit{Id.} In 1975 and 1976, California courts were taking an increasing and unpredictable role in determining appropriate sentences under the indeterminate sentencing laws. Messinger & Johnson, \textit{California’s Determinate Sentencing Statute: History and Issues} in \textit{DETERMINATE SENTENCING}, supra note 109, at 20. In response to this situation, the California Legislature devised a system more responsive to public opinion. A bill proposing the shift to determinate sentencing, which had previously been introduced and rejected, was amended and introduced again in April, 1976. \textit{Id.} The governor, prison reform groups and the correctional bureaucracy officially supported the new legislation. The bill passed as modified, in September, 1976. \textit{Id.} at 20-21. The new statute dispensed with the rehabilitative ideal of former laws. ALLEN, supra note 84, at 8. Instead, it proclaimed that:  

\begin{quote}
[T]he purpose of imprisonment for crime is punishment. This purpose 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. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.  
\end{quote}

\textsuperscript{173} See \textsc{Cal. Pen. Code} § 1170(b) (West Supp. 1984). The court must impose “the middle term, unless there are circumstances in aggravation or mitigation of the crime . . . [and must] . . . set forth on the record the reasons for imposing the upper or lower term.” \textit{Id.}; see \textit{Comparative Assessment}, supra note 131, at 389.  
\textsuperscript{175} \textit{Id.}; see \textit{Comparative Assessment}, supra note 131, at 389; J. SCHMIDT, \textsc{Demystifying Parole} 139 (1977) [hereinafter cited as SCHMIDT].  
\textsuperscript{177} \textsc{Cal. Pen. Code} § 2931(a) (West 1982 & Supp. 1985); SCHMIDT, supra note 175, at 139.
Sentences imposed in California may be revised within 120 days of commitment by the trial court on its own motion or at any time upon the recommendation of the Board of Prison Terms.\textsuperscript{178} Parole release is limited to the expiration of the inmate’s sentence less good time, but the maximum period of parole is one year, and it may be revoked for a technical violation.\textsuperscript{179}

Under Indiana’s criminal code, each crime is classified according to a category to which a presumptive sentence range is assigned.\textsuperscript{180} From this range, the trial judge imposes a fixed term at the time of sentencing. Substantial deviation from the presumptive sentence is permitted if the trial court finds aggravating or mitigating circumstances.\textsuperscript{181} Moreover, the trial court may reduce or suspend a sentence within 180 days of its imposition after a hearing and after stating its reasons for the record.\textsuperscript{182} While inmates are released upon the expiration of their fixed terms less good time, every prisoner released before the expiration of his term is placed on parole for the remainder of the term.\textsuperscript{183} Good time is administered at rates

\textsuperscript{178} The Board of Prison Terms, formerly called the Community Release Board, must review all sentences within the first year and recommend resentencing if it determines that a sentence is disparate. See \textit{Cal. Penal Code} § 1170(d), (f)(1) (West Supp. 1984); \textit{Comparative Assessment, supra} note 131, at 390.

\textsuperscript{179} \textit{Comparative Assessment, supra} note 131, at 390.

\textsuperscript{180} \textit{Ind. Code Ann.} §§ 35-50-2-3 to -7 (Burns 1979).

(a) A person who commits murder shall be imprisoned for a fixed term of forty (40) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances. A person who commits a class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances. A person who commits a class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances. A person who commits a class C felony shall be imprisoned for a fixed term of five (5) years, with not more than three (3) years added for aggravating circumstances or not more than three (3) years subtracted for mitigating circumstances. A person who commits a class D felony shall be imprisoned for a fixed term of two (2) years, with not more than two (2) years added for aggravating circumstances.

\textit{Id.} §§ 35-50-2-3 to -7.

\textsuperscript{181} \textit{Id.; see Comparative Assessment, supra} note 131, at 391.

\textsuperscript{182} \textit{Comparative Assessment, supra} note 131, at 393.

\textsuperscript{183} See \textit{id.} at 393.

(a) When a person imprisoned for a felony completes this fixed term of imprisonment, less the credit time he has earned with respect to that term, he shall be released: (1) On parole . . . (b) A person released on parole remains on parole from the date of his release until his fixed term expires, unless his parole is revoked or he is discharged from that term
which vary according to the inmate’s sentencing category.\textsuperscript{184} If his parole is not revoked within one year of release, the parolee will be discharged; but if his parole is revoked within that time, he may be imprisoned for the remainder of his original sentence.\textsuperscript{185} The only decision-making authority the Indiana Parole Board retains is the limited power to revoke parole.\textsuperscript{186}

Since presumptive sentencing statutes have been enacted only recently, there is no conclusive data available on whether these new sentencing structures affect crime control. The increase in California’s prison population\textsuperscript{187} may be explained by the state’s failure to adopt a policy of using incarceration as a last resort for novice offenders and to provide for the imposition of shorter terms of imprisonment.\textsuperscript{188} For any determinate sentencing scheme to be successful, incarceration must be resorted to less frequently when viable alternatives are available,\textsuperscript{189} and when sentences must be imposed, they should be shorter yet more definite than those imposed under indeterminate sentencing laws. Legislators must not establish lengthy prison terms for all offenders or most offenses simply to garner public approval. To do so would invite the recurrence of the problem which initially led to the adoption of indeterminate sentencing—overpopulated prisons.\textsuperscript{190} This problem can be avoided easily if New York State maintains an independent sentencing commission\textsuperscript{191} which adheres to the policy of establishing shorter sentences of imprisonment and encourages the utilization of alternative sanctions.\textsuperscript{192}

\textsuperscript{184} IND. CODE ANN. § 35-50-6-1 (Burns Supp. 1984).
\textsuperscript{185} Comparative Assessment, supra note 131, at 393-94.
\textsuperscript{186} See id. Indiana parole officials no longer have any authority with respect to determination of the date of a prisoner’s release. The only authority they retain is the power to supervise those released from prison until the expiration of their fixed terms and to revoke parole if the parolee violates any conditions of his release. IND. CODE ANN. § 35-50-6-1 (Burns 1979 & Supp. 1984).
\textsuperscript{187} See CORRECTIONS, supra note 81, at 68. However, a recent survey conducted in California found that there is less prison violence and greater inmate motivation to train and work since the state adopted determinate sentencing. 1983 N.Y. Laws 2665 (Memoranda of Legislative Representative of City of New York).
\textsuperscript{188} See infra note 210 and accompanying text.
\textsuperscript{189} See infra notes 32-40 and accompanying text.
\textsuperscript{190} See supra notes 223-26 and accompanying text.
\textsuperscript{191} See infra notes 227-34 and accompanying text.
IV. New York's Plan for Sentencing Reform

The New York State Legislature, with the support of Governor Mario M. Cuomo, has developed a plan for sentencing reform (Proposal) which would abolish parole and replace indeterminate sentencing with determinate sentencing. As part of the Proposal, Governor Cuomo appointed the State Committee on Sentencing Guidelines (Committee) to develop fixed prison term guidelines. After these guidelines are issued and enacted into law, the Committee will have the continuing duty to monitor the operation of the guidelines and to report to the New York State Legislature on their effectiveness. In addition, the Committee will have the authority to recommend modifications of the guidelines whenever it deems them appropriate.

On January 15, 1985, the Committee issued a preliminary report based on its study of the average sentences imposed and served
throughout New York State.198 From this study, the Committee constructed a set of preliminary guidelines.199 Under the preliminary guidelines, all felonies are divided into twelve categories depending on seriousness,200 and criminals are classified into five groups according to the extent of their criminal records.201 A sentencing judge would be permitted to impose a sentence only within the corresponding permissible range of sentences, based upon the seriousness of the offense committed and the convicted defendant's prior criminal record.202 Only the presence of specific aggravating or mitigating factors would justify the imposition of a sentence outside of the specified range.203 For the judge to deviate from this range, he would

199. See Fixed Sentencing, supra note 194, at col. 1.
200. Preliminary Proposal, supra note 194, at 4. Every felony offense is classified into one of these categories, Bands One through Twelve, based on the seriousness and the degree of the offense. For the proposed classification of all crimes into these bands, see id. at 116-20.
201. Id. at 4. Each prior conviction of a criminal would serve as the basis for an award of a certain number of points. The total points which a criminal would receive would determine his level of criminal history. There would be five levels of criminal history: none (0-1 point), low (2-4 points), medium (5-9 points), high (10-15 points) and extreme (16 or more points). Id. at 53. These five levels are arranged horizontally on a grid, with the various categories of offenses listed vertically. The intersection of the level of criminal history and the offense would provide the range of sentences which might be imposed by the judge. Id. at 4.
202. Id. at 5. Only "a showing of substantial and compelling circumstances" would warrant departure from the guideline sentence range. Id.
203. Id. at 7-8; see 1983 N.Y. Laws 711, § 3(1)(c). These factors would be set forth in the statute. The Committee's preliminary report sets forth an inclusive list of aggravating and mitigating factors which a judge may consider in deciding to depart from the guideline range. Preliminary Proposal, supra note 194, at 8. The mitigating factors listed are:

1. The victim was an initiator, willing participant, or provocateur of the incident. (2) The defendant voluntarily made a substantial and good faith effort to prevent or mitigate the harm caused. (3) The defendant participated... under circumstances of duress or coercion that significantly affected his or her conduct. (4) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime. (5) The defendant was a passive participant, or played a minor role in the crime, or manifested sincere concern for the safety or well-being of the victim. (6) The defendant... lacked substantial capacity for judgment at the time the offense was committed. (7) The defendant has cooperated... in the investigation, apprehension, or prosecution of any person for a crime. (8) The presumptively correct sentence is unduly harsh given extraordinary circumstances, and a more lenient sentence would not depreciate the seriousness of the crime.

Id. Aggravating factors include the following:

1. The defendant's conduct... manifested deliberate cruelty to the victim. (2) The defendant knew, or should have known, that the victim was
have to state his reasons for doing so in writing. Judges would be permitted to increase sentences by as much as fifty percent above the guideline range and would have the authority to reduce a sentence to fifty percent below that range. Both the defendant and the prosecutor would have the right to appeal any sentence which departed from the guidelines.

Additionally, under the Proposal, parole would be abolished and the Board phased out. During the transition period, the Board would exist only to supervise and determine the release dates of those sentenced prior to the enactment of the new sentencing laws. For all felons sentenced under the new law, the Board's role in determining release dates would be eliminated. The Proposal would require sentencing judges to consider alternatives to incarceration so that prison sentences would be meted out less frequently.

particularly vulnerable . . . , or the defendant used his or her position of trust, confidence or fiduciary responsibility to facilitate commission of the offense. (3) The offense was a major economic offense or series of offenses. . . . (4) The crime . . . was substantially premeditated, as evidenced by a high degree of planning or sophistication, or planning over an extended period of time. (5) The defendant committed a violent felony for hire, or hired another to commit a violent felony. (6) The criminal involvement or enterprise was directly or significantly related to organized crime. (7) The defendant threatened the victim, a member of the victim's family, or a witness, with intent to affect his or her testimony. (8) The offense was a major controlled substance offense. . . . (9) The manner of commission of the crime was so extraordinarily heinous that a harsher sentence is required.

Id. at 9-10.

205. Id.
206. Id. at 13. The defendant would be able to appeal any sentence set above the guideline range while the prosecutor would have the right to appeal any sentence more lenient than the range. Id.
207. Id. at 29; see Fixed Sentencing, supra note 194, at col. 2. It has not yet been determined how the Board would be phased out or how many years this would take. This will depend on a determination of how prisoners sentenced under the indeterminate sentencing statute should be dealt with once the new law is enacted. See Preliminary Proposal, supra note 194, at 107.
208. See N.Y. Times, Feb. 7, 1984, at B2, col. 5. Reportedly, Governor Cuomo has proposed that a new state agency be created which "would combine the currently independent State Divisions of Parole and Probation and would have authority over both programs as well as other prison alternatives. . . ." Id., Jan. 1, 1984, § 1, at 1, col. 1.
210. This is implicit in the statute which establishes the committee.

Sanctions of incarceration shall be established when: a. confinement is appropriate to protect society by restraining a defendant who has a
actual term of imprisonment served by the convicted defendant would be the sentence imposed by the judge reduced by good time credits which would be administered by correctional authorities and "earned by forebearance from violations of disciplinary rules" up to a maximum of one-quarter of the inmate's sentence.\textsuperscript{211}

The Committee has begun to rework its initial proposal in preparation for its final report, which the Committee is scheduled to submit to the Governor for his consideration in April, 1985. In the interim, the Committee has been holding public hearings on the Proposal.\textsuperscript{212} The response to the preliminary report has been mixed. Lawrence T. Kurlander, Governor Cuomo's director of criminal justice, called the plan "a very important first step...[which] will, for the first time in 50 years, bring some predictability to the whole sentencing scheme, which up to now has been basically irrational."\textsuperscript{213} However, New York City Mayor Edward I. Koch denounced the Proposal as an unwarranted restriction on the authority of the judge, and others fear that it would extend an invitation to increase the prison population.\textsuperscript{214}

...
V. Recommendations

New York State's present system of indeterminate sentencing and parole is flawed in many respects.\textsuperscript{215} It does not promote the reformation and rehabilitation of convicts,\textsuperscript{216} and it is the cause of widespread sentencing disparity and prisoner unrest.\textsuperscript{217} Consequently, this system should be abandoned. The New York State Legislature's Proposal,\textsuperscript{218} which is a sensible and reasonable alternative to the present system, should be enacted, with minor modifications, into law in New York State.

Under the Proposal, convicted offenders would be imprisoned for the purpose of punishment rather than rehabilitation,\textsuperscript{219} and the prisoner could no longer win early parole release by proving self-reformation.\textsuperscript{220} Further, the determination of the judge at the time of sentencing no longer could be circumvented by a later Board decision.\textsuperscript{221} Disparity in sentences imposed and served would, necessarily, be greatly reduced because Board discretion would be curtailed sharply. Determinate sentencing under the plan would demonstrate to all citizens, and particularly to criminals, that those who commit crime in New York will receive certain penalties of definite duration.\textsuperscript{222}

A. Is Determinate Sentencing the Answer?

Adoption of determinate sentencing suggests several potential difficulties. One area of difficulty concerns the legislature's role in making sentencing decisions. Legislators tend to use the worst offender as a model in fixing terms of imprisonment\textsuperscript{223} and to be

\begin{itemize}
  \item \textsuperscript{215} See supra notes 80-105 and accompanying text.
  \item \textsuperscript{216} See supra notes 80-85 and accompanying text.
  \item \textsuperscript{217} See supra notes 86-93 and accompanying text.
  \item \textsuperscript{218} See supra notes 193-214 and accompanying text.
  \item \textsuperscript{219} See supra note 193.
  \item \textsuperscript{220} See Fixed Sentencing, supra note 194, at col. 2.
  \item \textsuperscript{221} See id.
  \item \textsuperscript{222} Governor Cuomo also believes that the proposed plan would have this effect.
    There's never justification for people to steal or to assault or to rape or to murder. Never. And when they do, they must know in this state that they will get caught, convicted and punished, swiftly and certainly. I think a new, clear and tough determinate-sentencing system, that I hope we can enact this session, would help produce that result or at least bring us closer to it. N.Y. Times, Jan. 10, 1985, at B4, col. 4.
\end{itemize}
overly responsive to public sentiment in setting prison terms leading to the "crime-of-the-week syndrome," whereby legislators assign unusually high statutory sentence lengths to highly-publicized crimes.\textsuperscript{224} The danger of this syndrome, which could result in the imposition of unjustifiably long prison terms for a given offense,\textsuperscript{225} could be minimized by making the Committee independent of the legislature once the Proposal is adopted. The Committee would review all sentence lengths imposed by the courts free from legislative interference and would determine the average sentence lengths which should be imposed by judges.\textsuperscript{226}

Another potential problem presented by the shift to determinate sentencing is that prison populations\textsuperscript{227} would grow even larger since more offenders would be sent to prison for longer periods of time.\textsuperscript{228} Indeed, data collected in 1981 from departments of corrections in states which have abolished parole and adopted determinate sentencing showed that prison populations swelled during the first half of that year.\textsuperscript{229} However, sentencing reform is not necessarily the cause of the increase in prison populations.\textsuperscript{230} Moreover, imprisonment of many of offenders is unavoidable and desirable. Incarcera-

\begin{itemize}
  \item \textsuperscript{224} Serrill, \textit{supra} note 3, at 50; see Von Hirsch, \textit{supra} note 164, at 103. For example, since the adoption of determinate sentencing in California, a state which does not have an independent sentencing commission, legislators have passed an amendment requiring incarceration of all persons convicted of burglary. However, in 1981 there was a 9.8\% increase in burglaries known to the police. \textit{Corrections}, \textit{supra} note 81, at 68.
  \item \textsuperscript{225} The American Bar Association asserts that 90\% of all incarcerated offenders are sentenced to unjustifiably long prison terms. \textit{Campbell}, \textit{supra} note 223, § 3, at 13.
  \item \textsuperscript{226} See \textit{infra} notes 264-66 and accompanying text.
  \item \textsuperscript{227} In New York State, with over 33,000 inmates currently incarcerated, state prisons are operating at 116\% of their functional capacity. \textit{Preliminary Proposal}, \textit{supra} note 194, at 31.
  \item \textsuperscript{228} See Serrill, \textit{supra} note 3, at 50.
  \item \textsuperscript{229} See Smykla, \textit{supra} note 8, at 121. From December 31, 1979 through June 1, 1981, prison populations increased in Alabama by 29.7\%, in California by 18.4\%, in Illinois by 10.3\%, in Indiana by 34.4\%, and in Maine by 8.9\%. \textit{Id.} at 122. However, it should also be noted that indeterminate sentencing has caused sentences to be lengthened considerably. For example, "[u]nder California's former indeterminate sentencing laws, sentences were among the longest served anywhere in the world." \textit{Id.} at 105. Under New York's indeterminate sentencing plan, the prison population has soared from 12,444 in 1972, to 33,085 in 1984. \textit{Preliminary Proposal}, \textit{supra} note 194, at 42. Thus, it is clear that indeterminate sentencing does not effectively control prison population. Rather, the evidence suggests that prison population is not entirely dependent on the method of sentencing used by the jurisdiction.
  \item \textsuperscript{230} Other factors which contribute to increased prison populations are the increased crime rates in some areas and the general population increase in the United States. \textit{See What Can Be Done}, \textit{supra} note 22, at 24-25.
\end{itemize}
tion, arguably, would be resorted to less often as the deterrent results of the determinate system take effect. Additionally, sentences need not be any longer than those already being served since there would be a transition to "real time" sentencing.\textsuperscript{2}\textsuperscript{31} The sentences devised by the Committee should reflect actual time served rather than the long fictional terms which are being imposed.\textsuperscript{2}\textsuperscript{32} Additionally, in cases where the crime is serious, imprisonment should be required. However, when it is reasonable, an alternative sanction such as probation, work release, a halfway house or a fine\textsuperscript{2}\textsuperscript{33} would be imposed.\textsuperscript{2}\textsuperscript{34}

Moreover, the change to determinate sentencing and the elimination of parole eligibility could remove incentives for good behavior thereby lowering the quality of prison life.\textsuperscript{2}\textsuperscript{35} This concern is invalid, however, since parole uncertainty and sentencing disparity have led to widespread prisoner unrest.\textsuperscript{2}\textsuperscript{36} A correlative fear is that determinate sentencing would prevent self-reformation of offenders who actually desired to change.\textsuperscript{2}\textsuperscript{37} However, prisons have proven to be ill-equipped

\begin{itemize}
  \item[231.] See infra notes 267-72 and accompanying text. The imposition of an indeterminate sentence with a high maximum term is a poor indicator of the actual term of imprisonment which will be served by the offender. Preliminary Proposal, supra note 194, at 24. Only a small fraction of offenders are imprisoned for the entire maximum term imposed by the judge. See supra note 8. Early parole release and substantial reductions in sentence length for good behavior circumvent the original sentencing decisions of the court. Real time sentences reflect the actual terms of imprisonment being served by offenders today, rather than the inflated and uncertain indeterminate sentences which are being handed out. Preliminary Proposal, supra note 194, at 24.
  \item[232.] "The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." American Bar Association Standards Relating to Sentencing Alternatives and Procedures § 2.2, quoted in Campbell, supra note 223, at 425-26; see Frankel, supra note 118, at 58-59; von Hirsch, supra note 164, at 110, 113; Note, Relief for Prison Overcrowding: Evaluating Michigan's Accelerated Parole Statute, 15 U. Mich. J. L. Ref. 547, 547-48 (1982).
  \item[233.] Frankel, supra note 118, at 58-59; see 1983 N.Y. Laws 711, § 2(4).
  \item[234.] The Model Penal Code urges courts not to sentence offenders to terms of imprisonment unless:
    \begin{enumerate}
      \item[(a)] there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
      \item[(b)] the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
      \item[(c)] a lesser sentence will depreciate the seriousness of the defendant's crime.
    \end{enumerate}

    Model Penal Code § 7.01(1) (Proposed Official Draft 1962); accord Model Sentencing and Corrections Act § 3-102(4) (Uniform Law Commissioners 1979); see also 1983 N.Y. Laws 711, § 2(3) (containing similar provisions).
  \item[235.] See H. Trester, Supervision of the Offender 320-21 (1981) [hereinafter cited as Trester].
  \item[236.] See supra notes 94-98 and accompanying text.
  \item[237.] Trester, supra note 235, at 321.
\end{itemize}
to encourage the reformation or rehabilitation of inmates, and participation in rehabilitation programs has been shown to be more the result of a prisoner's desire to impress parole officials than an honest desire to effect self-reformation.\textsuperscript{238} Moreover, a determinate sentencing system does not preclude retention of rehabilitative programs which have proven effective.\textsuperscript{239}

Notwithstanding the elimination of early parole release in a determinate sentencing system, good behavior would continue to be encouraged and rewarded by the administration of good time credits.\textsuperscript{240} Consequently, the accumulation of these credits would become increasingly important to the inmate in accelerating his actual release date. Unfortunately, administration of good time credits could be marred by greater correctional discretion which could be abused or administered discriminatorily.\textsuperscript{241} To avoid such abuse, good time reductions should be sharply limited and awarded on the narrow basis of good institutional conduct.\textsuperscript{242}

A final problem with determinate sentencing is the potential for increased abuse of prosecutorial discretion.\textsuperscript{243} The discretion already vested in prosecutors under an indeterminate sentencing system is quite broad and often is misused.\textsuperscript{244} However, under determinate

\textsuperscript{238} See supra notes 80-85 and accompanying text; Kennedy, supra note 4, at 4.

\textsuperscript{239} See Serrill, supra note 3, at 50. A few states have tried to graft some aspects of parole onto their new determinate sentencing statutes. For example, California passed a law in 1982 which permits inmates to earn reductions of up to 50\% in their sentences for participating in work or study programs. Id.; see CAL. PENAL CODE § 2931 (West 1982). Connecticut has supervised work time and re-entry furlough programs which allow the release of inmates as much as six months before the expiration of their fixed terms at the discretion of officials. Serrill, supra note 3, at 50.

\textsuperscript{240} See supra notes 9, 38 and accompanying text.

\textsuperscript{241} The current good time laws are difficult to administer, susceptible to abuse and can contribute to inmate frustration. AGENDA FOR REFORM, supra note 9, at 70. However, good time laws are vital to the success of any determinate sentencing plan. Since inmates may not obtain early release via parole, the primary means of controlling inmate behavior is by rewarding good behavior with good time credits. Correctional discretion exercised through the good time laws will play a central role in the control of inmate behavior and the size and flow of prison populations under a determinate sentencing scheme and can sometimes help to correct questionable sentencing decisions. CAVENDER, supra note 3, at 69.

\textsuperscript{242} See infra notes 267-72 and accompanying text; AGENDA FOR REFORM, supra note 9, at 70.

\textsuperscript{243} See CAVENDER, supra note 3, at 69.

\textsuperscript{244} Prosecutorial discretion often leads to unfairness and disparity in sentencing as it permits such apparently irrelevant considerations as race and personal and political influence to occasionally dominate. Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing in NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL
sentencing, prosecutors would wield even greater discretion\textsuperscript{245} since defendants would be more apt to plea bargain than to suffer the consequences of a certain sentence.\textsuperscript{246} Since plea bargaining would be employed more frequently, defendants generally would be charged with lesser offenses which carry more lenient sentences.\textsuperscript{247}

As practiced under indeterminate sentencing, plea bargaining has given great power to the prosecutor, in part, because the defendant knows that, if he does not plead guilty to a reduced charge, the prosecutor may be able to convict him of the more serious crime.\textsuperscript{248} Defendants may be apprehensive that insistence on the right to trial might be

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\textbf{JUSTICE, DETERMINATE SENTENCING: REFORM OR REGRESSION} at 69 [hereinafter cited as Alschuler]. The exercise of prosecutorial discretion is often made contingent upon a waiver of constitutional rights and is conducted beyond the open forum of the courtroom. \textit{Id.} It is commonly exercised for the sole purpose of obtaining convictions in those cases in which guilt could not be proven at trial and may be motivated by a desire to avoid the trouble of preparing and trying cases. \textit{Id.} In addition, prosecutorial discretion "is usually exercised by people of less experience and less objectivity than judges." \textit{Id.}

\textsuperscript{245} See infra notes 250-52 and accompanying text.

\textsuperscript{246} More than 90\% of the felony indictments obtained in New York in 1983 were decided by plea bargaining. \textit{N.Y. Times}, July 7, 1984, \S\ 1, at 22, col. 2. Plea bargaining is the practice in which the prosecutor offers a reduced charge to a defendant in return for his promise to plead guilty to that offense. \textit{See Preliminary Proposal, supra} note 194, at 39-40. Usually, plea bargaining takes place when the prosecutor's evidence is insufficient to prove the defendant guilty beyond a reasonable doubt. \textit{See TRB, supra} note 22, at 42. In such a case, a guilty plea to the reduced charge is the only sure way to get a conviction and can be had without going to trial. "The prosecutor, the defense lawyer, and sometimes the judge," participate in the process: they "assess the likelihood of conviction and make a deal." \textit{Id.}

\textsuperscript{247} \textit{See Frankel, supra} note 118, at 65. The increase in prosecutorial discretion is a valid concern but it is not a problem peculiar to determinate sentencing. Under indeterminate sentencing laws, the plea bargaining process is a regular part of the criminal justice system. For example, in New York State, prosecutors exercise virtually unreviewable discretion in the decision whether to charge a suspect with a crime. \textit{Preliminary Proposal, supra} note 194, at 39. By necessity, the plea negotiation process is fully entrenched in the criminal justice system due to the high volume of cases faced by New York State's prosecutors each year. \textit{Id.} In 1983, convictions were obtained in 85\% of the 45,360 felony dispositions reported in New York State. Of these convictions, guilty pleas accounted for 92\% while jury verdicts of guilty and non-jury verdicts of guilty accounted for only seven percent and one percent, respectively. \textit{Id.} at 40. Frequently, the possibility of parole is taken into account by the criminal when he is plea bargaining with the prosecutor. For example, an experienced criminal will usually prefer to have a predictable term. Thus, he will bargain for a low maximum sentence and take his chances on an early parole rather than accept a sentence which carries a low minimum but a high maximum. Conversely, the prosecutor may persuade the first-time offender that if he cooperates by pleading guilty to a lesser offense he will receive a low minimum sentence and therefore will have a good chance at obtaining early release through parole. \textit{Parole Decision-Making, supra} note 1, at 10.

\textsuperscript{248} \textit{Von Hirsch, supra} note 164, at 104-05.
punished by the imposition of a harsher sentence than normally would be imposed.\footnote{249} Under a determinate sentencing system, prosecutorial discretion could play an even greater role in the sentencing process.\footnote{250} However, judges would be constrained to adhere to the guideline sentences in meting out punishment or to justify their reasons for not doing so in a well-reasoned written statement.\footnote{251} In addition, under a proper determinate sentencing plan, plea bargaining should be modified to monitor the prosecutor more closely.\footnote{252}

B. Proposed Modifications of the New York Plan

The Proposal\footnote{253} should be modified to provide for the establishment of presumptive sentences\footnote{254} within a range devised by the Committee. Under the Proposal, the judge would have discretion to impose any sentence which falls within the established range. Although this range would provide greater uniformity in sentencing than does indeterminate sentencing, the presumptive sentence would be even more precise. Presumptive sentencing provides that the offender's sentence be based on the offense rather than on the personal characteristics of the offender and assumes that his sentence may be best represented by a norm rather than a range of sentences.\footnote{255} The judge would be required to impose the presumptive sentence in every case unless the presence of aggravating or mitigating circumstances relating to the seriousness of the crime persuaded the judge that the normative sentence was inappropriate.\footnote{256}

Even if the Proposal were modified to provide for presumptive sentencing, sentencing judges still should be allowed the discretion to impose sentences outside of the prescribed range in limited cases.\footnote{257}
To promote the highest degree of fairness in sentencing, the statute also should require judges to stipulate in writing their reasons for deviating from the presumptive sentence. This requirement is especially important in those extraordinary cases in which a judge might be justified in imposing a sentence beyond the narrow range established in the guidelines for aggravation and mitigation. Its purpose would be two-fold: (1) it would provide a written document which could become subject to further judicial scrutiny on appeal; and (2) it would deter judges from deviating from the presumptive sentence by requiring them to articulate in a well-reasoned written statement their justification for doing so.

The Proposal, which provides for maximum and minimum sentence limits of fifty percent above and below the prescribed range, leaves the judge considerable discretion in imposing sentences beyond the guideline range. The minimum and maximum departure limits should be narrowed so that judicial discretion cannot be abused or the purposes of the reform circumvented.

New York's determinate sentencing plan also provides that the Committee should be established as a permanent independent body. The Committee's independence from the legislature is important to insulate its work from the political pressures which affect legislative decisions. The Committee should assume total responsibility for the establishment of fair and equitable guidelines, and it should

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68 and accompanying text for a discussion of how this can be done under a presumptive sentencing statute.

259. FAIR AND CERTAIN PUNISHMENT, supra note 19, at 21.
260. See id.; Newman, supra note 91, at 1565; Singer, supra note 255, at 407.
261. Singer, supra note 255, at 407. In addition, to the extent that judges decide to use their discretion and vary from the presumptive sentence, a "common law" of sentencing might develop to guide judges in making future sentencing decisions. Id.
262. See supra notes 205-06 and accompanying text.
263. If judges are left with such wide margins of discretion they would once again be free to impose disparate sentences on different offenders for the same crimes. Different judges would have different views on the importance of each aggravating or mitigating factor and would be free to act in accordance with their individual judgments. Once again, the problem of disparity would arise. See supra notes 86-90 and accompanying text.
264. The sentencing committee should have a professionally diverse background so that all sectors of the community who may be affected by crime are represented. It should be composed of prosecutors, defense attorneys, judges, criminologists, penologists, sociologists, psychologists, theologians, business people, artists and former and present inmates. See FRANKEL, supra note 118, at 119-20; Newman, supra note 91, at 1565.
continue to monitor and modify them after their enactment.\textsuperscript{265} Therefore, the Committee should collect data constantly on all sentences imposed in New York State to determine whether judges are adhering to the guidelines and, if they are not, to decide whether this lack of conformity warrants changing the existing guidelines.\textsuperscript{266}

Further, the maintenance of an orderly and just corrections system requires that each inmate, at the outset, know exactly how long his term of confinement will be.\textsuperscript{267} Under present law, this predetermination is impossible because the awarding of good time credits and the granting of parole are totally discretionary.\textsuperscript{268} The new statute should specify that good time credits be administered only in modest numbers and only for the faithful observance of prison rules.\textsuperscript{269} The Proposal's recommendation that the maximum number of good time reductions be reduced from one-third to one-fourth of the sentence imposed\textsuperscript{270} is insufficient. Good time should be earned at the maximum rate of ten percent of an inmate's sentence.\textsuperscript{271} Limiting good time earned and eliminating parole release would result in sentences of more definite duration.\textsuperscript{272}

Once the Proposal is fully implemented in New York State, the Board will no longer exercise its releasing function.\textsuperscript{273} However, the new statute should provide for the retention of a modified version

\begin{itemize}
  \item \textsuperscript{265} See 1983 N.Y. Laws 711, § 3(2); Agenda for Reform, supra note 9, at 73-74; Newman, supra note 91, at 1565.
  \item \textsuperscript{266} See Singer, supra note 255, at 408.
  \item \textsuperscript{267} See Newman, supra note 91, at 1565; Von Hirsch, supra note 164, at 88.
  \item \textsuperscript{268} See supra notes 91-98 and accompanying text.
  \item \textsuperscript{269} Since early release discretion would simply be shifted to prison disciplinary authorities once parole is abolished, the possibility of discretionary abuse by this entity becomes a more vital concern. Orland, supra note 94, at 45-46. Therefore, substantive standards must be set forth which define prison misconduct and the maximum number of good time credits which may be earned for each offense. \textit{Id.}
  \item \textsuperscript{270} Preliminary Proposal, supra note 194, at 99.
  \item \textsuperscript{271} See Agenda for Reform, supra note 9, at 70; van den Haag, supra note 88, at 135; see also Von Hirsch & Hanrahan, supra note 16, at 88 (recommending “no more than 15%” good time reductions).
  \item \textsuperscript{272} See Von Hirsch & Hanrahan, supra note 16, at 99-100, in which the authors describe a three-step process for phasing out parole and converting gradually to “real time.” See also supra notes 231-34 and accompanying text for a discussion of real time sentencing.
  \item \textsuperscript{273} Parole boards in a determinate sentencing scheme are not necessary because they merely duplicate the sentencing decisions made by the judge. See Newman, supra note 91, at 1565; van den Haag, supra note 88, at 135. Thus, the Board should be eliminated when the new sentencing system is enacted in New York. In the interim, the activities of the Board should be more closely monitored by the state to ensure that proper procedures and parole guidelines are followed. Training
of the New York State Division of Parole (Division). In its modified capacity, the Division should function only to supervise and assist released inmates in readjusting to society. Since a successful period of transition from prison to society is a desirable and worthwhile goal, transitional supervision by parole authorities should become a regular feature of every prison sentence. With these modifications, the Proposal should be adopted by the New York State Legislature.

VI. Conclusion

New York State’s system of indeterminate sentencing and parole has proven to be an ineffective method of sentencing offenders. Consequently, New York should follow the lead of the federal government and many states which have abandoned indeterminate sentencing and replaced programs for parole employees should be established and professional parole examiners should be employed to conduct hearings and interviews. This would allow the Board to concern itself with broad policy questions and to act as an appellate body on the decisions of the examiners. See The President's Commission on Law Enforcement and Administration of Justice Task Force Report: Corrections, Organization of Parole Authorities in Sourcebook on Probation, Pardon and Parole at 340 (C.L. Newman 3d ed. 1972). If increased funding and staffing are required for the achievement of a more orderly and efficient parole process, a concerted attempt must be made to provide the necessary resources. A recent study conducted by the Bureau of Justice Statistics of the Justice Department found that most offenses committed in 1979 by prior offenders occurred shortly after release from prison for the previous offense. N.Y. Times, Mar. 4, 1985, at A17, col. 3. The study found that about 60% of those who will return to prison in 20 years do so in the first three years. Id. One study, applying a costs-benefits analysis to the parole process, determined that parole authorities should adopt a policy of discharge at the end of one year of arrest free parole since parolees who complete this year with minimal difficulty tend to have a 90% chance of satisfactorily completing their second and third years without serious incident. Bennett & Ziegler, Early Discharge: A Suggested Approach to Increased Efficiency in Parole, 39 Fed. Probation, Sept. 1975 at 27, 30. If this suggestion were followed, a considerable number of resources could be reallocated to the proper maintenance of parole release and supervisory procedures. See id.

274. The Proposal suggests that after a prisoner has served his determinate sentence and is released, there should be a period of community supervision by the Division of Parole. Preliminary Proposal, supra note 194, at 105. This type of plan has been implemented in other determinate sentencing states. Oregon, for example, has retained and reformed its parole board to perform such post-release functions despite the adoption of sentencing guidelines. See Or. Rev. Stat. § 144.775 (1981).


276. See Alschuler, supra note 244, at 61.

277. See supra notes 80-114 and accompanying text.
it with determinate sentencing. The Proposal, which currently is being developed by the New York State Legislature, is a sensible and long overdue approach to sentence reform. The legislature should give serious consideration to this Proposal but should modify it to include the establishment of presumptive sentences, the maintenance of a permanent and independent sentencing guidelines committee and the strict limitation of good time allowances. It is imperative that the Proposal, as modified, be enacted.

Jeanine M. Schupbach

278. See supra notes 115-92 and accompanying text.
279. See supra notes 193-214 and accompanying text.
280. See supra notes 253-56 and accompanying text.
281. See supra notes 264-66 and accompanying text.
282. See supra notes 267-72 and accompanying text.