

# Book Reviews

## Modes of Choice

*Tragic Choices.* By Guido Calabresi & Philip Bobbitt. New York: W. W. Norton, 1978. Pp. 252. \$9.95.

Reviewed by Kenneth Arrow†

Reading this book<sup>1</sup> is an experience that is both fascinating and frustrating. It is very like crossing a rocky unfamiliar terrain at night in a lightning storm. All sorts of new perceptions appear with blinding clarity. But it is difficult to draw a map afterwards showing others where one has been; and during the traverse, the traveler is apt to come back to the same place several times, without being aware that he has done so because it is being viewed under different lights.

The authors have set themselves a profound and difficult task, and we should be grateful for the attempt and for the many insights garnered en route. Societies, in one way or another, make allocative choices in many fields and by many mechanisms, including the market, the political process, and sheer chance. Among the kinds of choices made the authors seek to distinguish a special class, which they term "tragic." This key concept is left undefined, but one may infer from the discussion that tragic choices are those in which deeply held values necessarily conflict. Typically, choices of life and death are at issue, and resources are scarce so that these choices cannot be avoided. Three examples are used throughout the book: the allocation of renal dialysis therapy, military service, and births. The first two are choices that modern societies have openly and painfully made. The discussion of the third choice has been largely confined to academic speculation; specifically, there is Kenneth Boulding's proposal that each family be given the rights to a specified number of children (2.1 to yield a zero population growth, for example), with the rights being saleable.<sup>2</sup>

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1. G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* (1978) [hereinafter cited by page number only].

2. See pp. 202 n.1 & 216 n.27 (citing K. BOULDING, *THE MEANING OF THE TWENTIETH CENTURY* 135-36 (1964)).

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Since allocations must be made, people must be treated differently. The authors do not stress that their tragic choices—particularly the draft and dialysis—all involve indivisibilities. Assume, for example, that draft eligibility can be readily determined for any individual. Then if the need for soldiers could be met with reasonable efficiency by having each person eligible to serve for, say, five weeks, there would be a practical, egalitarian solution. “The really tough problems arise when the differences society wishes to recognize are ones to which it cannot openly admit without offending values basic to egalitarian conceptions.”<sup>3</sup> The incompatibility of notions of an equal right of all to life and the scarcity of resources gives rise to tragic conflict.

Conflicts of values in the presence of scarcity are inevitable; that proposition is a tautological implication of the definition of “scarcity.” At an individual level, with given purchasing power, we must choose among food, drink, housing, clothing, and education, and each choice represents a conflict of values. Rationality is a consistency in the resolution of such conflicts. Social choices are more complex because they involve interpersonal relations and comparisons, but the authors do not regard all social choices as inherently tragic. Rather there are apparently certain values that, when sacrificed, lead to very grave losses indeed. When two such values conflict, a society may seek to obscure tragic implications by avoiding a clear statement of choice.

A basic theme is that in tragic choices, there is often a separation between what the authors term “first-order” and “second-order” determinations, *i.e.*, between the decision as to *how much* of the resource will be provided and the allocation decision about *who* will receive the scarce supply of the life-saving or life-threatening “resource.”<sup>4</sup> When ordinary goods are provided through a market, these two determinations are made simultaneously. The State might therefore prefer the market because it seems to enable the State to wash its hands of tragic choice altogether by, for example, allowing access to renal dialysis machines to be governed by profit-maximization and individual purchases. But in a truly tragic choice situation, the obvious price this procedure places on life makes the plight of the poor too vivid.

The authors devote the major part of the work to the taxonomy and analysis of alternative allocation mechanisms for the second-order de-

3. P. 98.

4. Separation of the two kinds of determinations of course exists in many nontragic choices such as, for example, the exploitation of mineral reserves on government-owned land.

terminations (who shall be conscripted or given access to renal dialysis or allowed to bear children). The market, the political process, and the lottery are each discussed in their pure and modified forms, and the possibilities of mixtures studied. It is here that the book begins to suffer from a multiplicity of purposes. Much of the toting up of credits and debits has little specifically to do with tragedy. For example, it is repeatedly emphasized that the market, in pure or modified form, has two major defects: (1) it cannot compare individual intensities of desire, and (2) it cannot handle the differences between individual desires and social utility. These are hardly new points and certainly not ones that are specific to tragic choices, whatever domain they may cover. Hence, we frequently have a generalized discussion of defects (perhaps more often than of virtues) interrupted by some reference to tragic choices. It is difficult to see a systematic order in the discussions. The authors themselves seem to anticipate the reader's reaction: "As we read over these pages, we fear the reader will tire of endless lists of problems, endlessly enumerated, each solution breeding new problems without end."<sup>5</sup>

The matter is complicated by the absence of a definite list of the values that might conflict. There are too many kinds of egalitarianism, each brought up in a different context. This is of course a dilemma basic to any kind of ethical study. One can be consistent by setting forth once and for all a set of axioms, and thereby run the risk of omitting large parts of the problem. One can instead take a concrete ethical problem and bring up all the ethical considerations that might be relevant. The authors seem to fall between these two stools; they apply an abstract formulation to particular institutions, and, for each one, bring up the value conflicts that might arise; but the values are introduced ad hoc, and one has an uneasy feeling that they may have been inconsistently applied.

Nonetheless, considered as a survey of allocation mechanisms, the discussion contains pearl after pearl. The idea of the trial jury as a social choice mechanism is certainly new to me, and the range of its validity is brilliantly argued. The discussion of the role of uncertainty, the interaction between present and future markets, and the bearing of risks in a social choice context is a highly intelligent combination of abstract analysis and predictions about social reactions that should stimulate further thought.<sup>6</sup> For example, the authors discuss a hypothetical renal dialysis allocation system in which each

5. P. 114.

6. Pp. 116-22.

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individual may buy, in advance of the illness, the right to care if needed. The resources used to buy these rights could finance production of the machines and thus specify the first-order determination without any obvious public "anti-life" decision. But could our society accept such a scheme? Suppose an individual did not buy the rights; would we really penalize the individual if he or she had a kidney failure? There is not a lack of such individual gems; it is the setting that disappoints.

The conclusion<sup>7</sup> is striking. Here the authors examine the responses of several societies to these tragic choices. Faced with problems that by their nature admit no good solution, societies appear to react by changing the allocative mode from time to time. As any particular mode begins to threaten some key value, steps are taken to reaffirm it, at the necessary expense of some other value, most notably the value of honesty. Selective service exemption rules are constantly changed, and the whole system eventually replaced by a volunteer army; the renal dialysis problem in the United States is momentarily resolved by a system that provides an adequate number of machines for all cases, but meanwhile uses up resources that could have been used to save lives endangered by other diseases.

Though the reader has experienced both pity and terror, his emotions have not been purged as Aristotle prescribed. But then we live in a world where tragedy is exemplified by *Waiting for Godot*, rather than *Oedipus the King*.

7. Pp. 195-99.

## Sentencing Reform: The Current Round

*Toward a Just and Effective Sentencing System: Agenda for Legislative Reform.* By Pierce O'Donnell, Michael J. Churgin & Dennis E. Curtis. New York: Praeger Publishers, 1977. Pp. xvi, 137. \$16.50.

Reviewed by Robert O. Dawson†

It would be difficult to imagine a more timely book. Of course, scholars and others have for years deplored the American system of sentencing. The litany of injustices is familiar to any reader of legal or correctional literature: unreviewable discretion, sentence disparity, biased sentencing, unsuccessful prison rehabilitation programs, the agonizing impact of sentence indeterminacy upon prison inmates, severe sentences, lenient sentences, and our inability to agree upon the application of acknowledged, legitimate sentencing goals to even simple factual situations.<sup>1</sup> What makes *Toward a Just and Effective Sentencing System* so timely is that at last we appear willing to act and to do *something* about our traditional methods of criminal sentencing. The book is a product of, and a contributor to, a national debate over whether we should abandon a system of indeterminate sentencing,<sup>2</sup> and whether we should shift from a system of broad judicial sentencing discretion to one in which discretion is restricted substantially.<sup>3</sup> Such a shift has already occurred in California<sup>4</sup> and

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1. See, e.g., M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5-6, 18-25 (1973).

2. An indeterminate sentence is one in which a parole board has discretion to fix the date of release from prison within limits imposed by the legislature, the sentencing court, or both. A determinate sentence is one in which parole is not a possibility. Felony sentences in this country are usually indeterminate; misdemeanor sentences are usually determinate.

A change from indeterminate to determinate sentencing has even been proposed for the juvenile process. IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO JUVENILE DELINQUENCY AND SANCTIONS 40 (Tent. Draft 1977).

3. It is possible to abolish indeterminate sentences without also attempting to restrict judicial discretion in the selection of determinate sentences. Such a move would be highly irresponsible because one benefit of parole is that it is used to "correct" sentence disparity among trial judges. To abolish parole, therefore, would enhance the impact of sentence disparity on the lengths of time actually served.

It should be noted that determinate sentences are sometimes confused with mandatory sentences, in which the judge is required by legislation to impose a specified sentence. A mandatory sentence may, of course, be determinate or indeterminate.

4. Uniform Determinate Sentencing Act of 1976, CAL. PENAL CODE, §§ 1170 (West 1977).

Maine,<sup>5</sup> and similar federal legislation is pending.<sup>6</sup> Although it is unclear what discretion-limited determinate sentencing will accomplish and at what costs, a momentum to change in that direction clearly exists.

The book had its origins in a Yale Law School workshop series on federal sentencing and parole held in the mid-1970s. Participants included representatives of the federal judiciary and the federal correctional establishment, as well as academics. The proposed statute on federal sentencing that appears in the book is the "product of joint deliberation and drafting"<sup>7</sup> by the workshop participants. It is a promising blueprint for dealing with the problems posed by sentencing and parole discretion without attempting to eliminate discretion totally or to impose rigid legislative limits on it.

### I

Until recently, the single most important reform in criminal sentencing in the United States was acceptance of the notion that criminal punishments should be individualized to fit the circumstances of each offense and the background of each offender.<sup>8</sup> Only then, it was reasoned, could the criminal sanction hope to attain its goals of deterrence of future criminality, rehabilitation of the offender, at least temporary protection of the public by the offender's incarceration, appropriate restitution to the victim, and proper allocation of community condemnation. Aside from these particularized aims of the criminal process, the individualized sentence was also thought to deter the community generally (or at least identifiable segments of it) from the commission of criminal offenses or, at least, of similar offenses. There were always limits to the ideal of sentence individualization. For example, the legislature and, perhaps, the Constitution would not permit punishing a petty thief with the same severity as a convicted murderer. Nonetheless, the limits were conceived to be just that, upper and sometimes lower limits on the ability of the system to mete out the just punishment postulated to exist for each instance of criminality.

The legislative limits, then, had to be sufficiently broad to permit

5. ME. REV. STAT. ANN. tit. 17-A, § 1151 (1976).

6. S. 181, 95th Cong., 1st Sess. (1977) [hereinafter cited as S. 181].

7. P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM xii (1977) [hereinafter cited by page number only]. The United States Commission on Sentencing, proposed in S. 181, sponsored by Senator Kennedy and others, is adapted from the authors' proposal.

8. See *United States v. Grayson*, 98 S. Ct. 2610 (1978) (brief history of this reform).

sentences to take account of the myriad of aggravating and mitigating circumstances that mark each criminal act and to reflect major differences in offender backgrounds. The upper legislative limits tended to be quite high because legislatures have used a "worst case" mentality in setting them. They have, however, relied upon prosecutors, trial judges and parole boards to mitigate the severity of punishment in the great majority of cases.<sup>9</sup>

Individualization of sentencing also required the maximum possible information about the offense and the offender. According to this ideal, no information about either was too trivial to be brought to the attention of the sentencing authority since the goal was to choose the one "correct" disposition under all the circumstances. The system had come more and more to rely, not upon the presentation of that information in an adversarial hearing, but upon its presentation in a report prepared by a "disinterested" and "professional" probation officer. The report typically contained a professional "diagnosis" of the case and a recommended disposition.<sup>10</sup>

If a sentence of incarceration was imposed, it was thought to be most precise and sensible to wait until sometime during the process of serving that sentence before selecting the exact release date and to give an agency the authority to select that date for each individual case. This was essential if a major objective in determining the length of incarceration was to maximize the rehabilitative effects of the prison experience for the offender. The response of offenders to prison rehabilitation programs, it was argued, is highly individual and cannot be predicted by the sentencing judge. Through individualized treat-

9. The authors note that an essential part of their proposal is a substantial reduction in the length of sentences authorized by the legislature. Pp. 54-55.

10. Traditionally, the presentence report contained a great deal of information on the defendant's personal and family background. For example, in ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE PRESENTENCE INVESTIGATION REPORT No. 103 (1965), a standard work on the presentence report, the following categories are suggested in addition to the circumstances of the offense, the defendant's version of the offense, and his prior criminal and juvenile record: family history, marital history, home and neighborhood, education, religion, interests and leisure-time activities, health, employment, military service and financial condition. *Id.* at 7-20. In recent years, the need for such detailed "social history" information has been reevaluated in view of the heavy caseloads of probation officers, the time consumed in investigating and writing reports and the suspicion that judges and correctional decisionmakers do not read or pay attention to such data. In 1974, therefore, the Administrative Office recommended a shorter format for reports in routine cases. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE SELECTIVE PRESENTENCE INVESTIGATION REPORT No. 104 (1974). Finally, in 1978, the Administrative Office formulated a "core concept" notion, that varied the amount of information presented with the needs of particular consumers of the report. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE PRESENTENCE INVESTIGATIVE REPORT No. 105 at 5 (1978). This tendency toward shorter presentence reports marks the decline of the theory that the sentencing judge can never be provided with too much information.

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ment, the progress of the individual in rehabilitation could be gauged accurately and the appropriate time of release could be selected.

Thus, our present system of criminal sanctions in felony cases arose. Legislative limits were set to allow substantial individualization of the sentence to fit offense and offender; complete information was provided to the trial judge who sentenced the offender; timing of the release from incarceration was based in part upon the inmate's response to institutional rehabilitation programs. The premises of this system of individualization are splendid and the system itself is an elegant one that would give maximum justice if it worked.

But it has not. The evidence that it has not is substantial. Study after study has shown that institutional (and other) rehabilitative programs do not make a measurable difference in the likelihood that the person treated will refrain from breaking the law in the future.<sup>11</sup> Studies have demonstrated that two trial judges are much more likely to disagree than to agree upon the appropriate sentence in the same case.<sup>12</sup> Sentences often reflect the race, sex, or class prejudices of the judge.<sup>13</sup> Sentencing has become a numbers game in which a sentence does not mean what it appears to mean because of "good time" and parole laws.<sup>14</sup> Sentence individualization and indeterminacy mean that long periods of time in prison are sometimes served to permit fanciful rehabilitation programs to take effect.<sup>15</sup> The existence of sentence indeterminacy means not that prison inmates are motivated to rehabilitate themselves in order to win early release, but that they are motivated to persuade the parole board they have rehabilitated them-

11. Pp. 47-48 (citing studies). As a result, the authors propose that a prison sentence for the purpose of accomplishing rehabilitation be limited to a period of two years and that the trial court seek and consider a certification by prison officials that an appropriate program exists with a vacancy for the defendant and that "the defendant, if committed to the program, would more likely than not complete it successfully." P. 47.

12. Pp. 3-10 (citing studies).

13. See generally AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 100-23 (1971).

14. Pp. 12-13. For example, a trial court, accompanied by great publicity, may sentence a convicted offender to 10 years' imprisonment. By routinized operation of prison good-time rules, however, the 10-year sentence is likely to be reduced to about six years. If parole eligibility laws permit release after one-third of the sentence less good time, a common provision, the inmate will be eligible for release on parole after serving only two years of his sentence. The inmate's parole release, if it comes at the end of two or three years, is not accompanied by the same publicity that accompanied the "tough" sentence imposed initially. This system may accomplish the maximum general deterrence of criminality with the least cost to the individual offender, but it also may simply fool the public into believing that the system is dealing harshly with crime.

15. The authors refer to this as the "magic moment" theory of parole—"that parole release should be, and could be, determined by a clinical evaluation that an inmate had derived all he could from the prison environment and rehabilitative programs, and that it would be harmful or serve no purpose to incarcerate him further." P. 27.

selves. In addition, indeterminacy means that inmates regard themselves as being subject to the capricious whim of bureaucrats from whose decisions there are few, if any, avenues of review.

## II

A response to these criticisms might be to eliminate the discretion to individualize. We could decide, for example, that all bank robbers should be treated exactly the same because they have engaged in the same misconduct. We could abandon all efforts to adjust the system's punishments to take account of the infinite number of gradations in the seriousness of offenses. We could even say that we will not take account of the background of the offender—first or repeat, deprived or privileged—because it is the law infraction and only the law infraction that should be of concern. I doubt we are willing to go anywhere near that far in our response to the inequities of the present system.<sup>16</sup> Yet, if we are prepared to acknowledge that certain aggravating and mitigating circumstances and certain offender background characteristics should be reflected in sentences, then we must provide a mechanism that gives effect to those distinctions with some degree of accuracy. Otherwise, we have created a new sentencing disparity by not making distinctions between offenders that we agree can and should be made.

A second approach is the new California system.<sup>17</sup> California had been extreme in its adherence to the notions of broad sentencing discretion and sentence indeterminacy. Once the trial court ruled out probation in a case and decided that a prison sentence was necessary, the length of the sentence and the date of actual release from incarceration were determined, within broad legislative limits, by the California Adult Authority.<sup>18</sup> Neither judge nor prosecutor nor defense attorney had much to do with determining the actual length of incarceration. Under such a system there was little or no sentence disparity at the judicial level (with respect to sentence length) because no decision as to length was made there. The decisions of the Adult Authority, how-

16. It is true that we have proposed mandatory sentences from time to time for various offenses. See p. 90. It is, however, a giant leap from such proposals to a system of mandatory sentences for all offenders.

17. See CAL. PENAL CODE § 1170 (West 1977).

18. CAL. PENAL CODE §§ 1168, 3020 (West 1970) (amended 1977); see Messinger & Johnson, *California's Determinate Sentencing Statute: History and Issues*, in DETERMINATE SENTENCING 15-17 (Proceedings of Nat'l Inst. of Law Enforcement and Criminal Justice Special Conference, 1978).

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ever, were subjected to much of the same criticism leveled against judicial sentencing elsewhere.<sup>19</sup>

California then radically changed its sentencing policy. Instead of employing broad discretion and maximum indeterminacy, California adopted the posture of legislatively restricted discretion and virtually maximum determinacy. For each felony offense category, the legislature authorized only three sentences.<sup>20</sup> The judge is required to select the middle sentence unless upon proof of aggravating or mitigating circumstances he chooses the higher or lower sentence, giving a statement of reasons for the selection. The selection must be based upon guidelines promulgated by the California Judicial Council.<sup>21</sup> The sentence can be increased if certain specific aggravating circumstances or "enhancements" are pleaded and proved.<sup>22</sup>

19. See Messenger & Johnson, *supra* note 18, at 17:

Such critics charged that the system gave too much unchecked discretion to a board which overrepresented law enforcement interests; was based on false assumptions about the predictability of human behavior; resulted in overlong prison terms on the average and especially for prisoners guilty of displeasing their guardians for failing to conform to middle class behavioral norms; and, above all, was cruel and frustrating for prisoners who had no clear idea of how long they might have to serve or what they could do to shorten their sentences.

20. The authorized sentences are 16 months, two or three years; two, three or four years; three, four or five years; five, six or seven years; or "any other specification of three time periods." CAL. PENAL CODE § 1170(a)(2) (West 1977). The scheme does not apply to certain serious offenses, such as first-degree murder, that carry punishment of life imprisonment, or to certain other offenses of relatively little importance. *Id.* For a detailed explanation of the scheme, see Cassou & Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L.J. 1, 22-26 (1978).

21. CAL. R. Ct. 403-453 [hereinafter cited to individual Rule only]. The Council's guidelines are not particularly helpful. After noting that its criteria are not intended to be exclusive, Rule 408(a), and that the criteria are deemed to have been considered by the trial court unless the record reflects otherwise, Rule 409, the Council enumerates criteria of aggravation and mitigation. Under Rule 421, circumstances of aggravation include: (i) the victim was particularly vulnerable, Rule 421(a)(3); (ii) the crime involved multiple victims, Rule 421(a)(4); (iii) the defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed, Rule 421(a)(7); (iv) the planning, sophistication or professionalism with which the crime was carried out, or other facts, indicate premeditation, Rule 421(a)(8); (v) the crime involved a large quantity of contraband, Rule 421(a)(11); and (vi) the defendant has engaged in a pattern of violent conduct that indicates a serious danger to society, Rule 421(b)(1). Under Rule 423, circumstances of mitigation include: (i) the defendant was a passive participant or played a minor role in the crime, Rule 423(a)(1); (ii) the victim was an initiator, willing participant, aggressor or "provoker" of the incident, Rule 423(a)(2); (iii) the crime was committed because of unusual circumstances, such as great provocation, that are unlikely to recur, Rule 423(a)(3); (iv) a defendant with no apparent predisposition to do so was induced by others to participate in the crime, Rule 423(a)(5); and (v) the defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process, Rule 423(b)(3). For a criticism of the Judicial Council's criteria, see Uelmen, *Proof of Aggravation under the California Uniform Determinate Sentencing Act: The Constitutional Issues*, 10 LOY. L.A. L. REV. 725, 731-35 (1977).

22. CAL. PENAL CODE § 1170.1 (West 1977). Once the trial court selects one of the three authorized sentences, upon proof of an enhancement, it may add a specified term

Under the California scheme, the sentence imposed by the court approximates the sentence actually served.<sup>23</sup> Parole is abolished, except as a period of supervised release added to each sentence.<sup>24</sup> The California legislature apparently attempted to select sentence levels that conformed to the actual time served under the practices of the Adult Authority.<sup>25</sup> The effect of the legislation is to eliminate the extremes of time served under Adult Authority practice and to permit the inmate and others to know how much time must be served when the sentence is imposed.

*Toward a Just and Effective Sentencing System* takes a third approach to the problem of criminal sentencing. It does not seek to eliminate sentencing discretion or to legislate tight restrictions on its exercise. Rather, it attempts to mandate the development of guidelines by an agency of the federal judiciary. The principal element of the proposal is a Commission on Sentencing and Corrections that would set sentencing guidelines for federal district judges.<sup>26</sup> A judge would select a sentence and give a statement of reasons, showing he has applied the sentence guidelines to the individual case. The defendant could appeal the length of the sentence to the Court of Appeals, and the government, in some circumstances, could also appeal.<sup>27</sup> The appellate court could reverse the sentence and remand for a new sentence or impose a different sentence itself. The sentence selected would

to the sentence selected. Enhancements are authorized for being armed with a firearm during commission of the offense (one year), personal use of a deadly or dangerous weapon during commission of the offense (one year), personal use of a firearm during commission of the offense (two years), theft, damage, or destruction of property in excess of \$25,000 in value (one year) or in excess of \$100,000 (two years), personally and intentionally inflicting great bodily injury during commission of the offense (three years), prior prison terms (one or three years for each prior prison term). *Id.* §§ 667.5, 12022, 12022.5-.7. There is also a provision for limited imposition of consecutive sentences. CAL. R. Cr. 425. It should also be noted there are quite complicated rules against "double counting" aggravating circumstances and enhancements, and aggravating circumstances and circumstances of enhancement that are also elements of the offense itself. CAL. R. Cr. 441.

23. The sentence can be reduced by one-third for good time and for participation in institutional programs. Cassou & Taugher, *supra* note 20, at 77-84.

24. The parole period is one year except for those sentenced to life imprisonment, in which case it is three years. CAL. PENAL CODE § 3000 (West 1977).

25. Messinger & Johnson, *supra* note 18, at 30.

26. Pp. 73-75, 111-15. Attorney General Bell recently announced the award of a contract of nearly \$900,000 to develop extensive data that could be used by a Commission on Sentencing and Corrections for the formulation of sentencing guidelines. 9 CRIM. JUST. NEWSLETTER, July 3, 1978 at 7.

27. P. 115. The Court of Appeals would be authorized to modify a sentence that is within the sentencing guidelines if the sentence is "clearly unreasonable," and to modify a sentence that is outside the sentencing guidelines if the sentence is merely "unreasonable." The appellate court would be required to write an opinion in each case in which it modified a sentence. Pp. 62-64. The trial court would be required to state "specific reasons" for a sentence outside the guidelines but would be required only to state briefly the reasons for a sentence within the guidelines. P. 59.

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be the sentence served. There would be no parole. The Bureau of Prisons would be required to release the inmate when he has served ninety percent of the sentence unless he has violated prison rules.<sup>28</sup> With that exception, however, the inmate would know when he would be released at the time he entered the institution, assuming he or the government does not appeal the sentence. He would not be required to feign rehabilitation or religious conversion in order to win release. Sentencing uniformity would be enhanced by the Commission guidelines and by appellate review. The fiction that release from prison is a function of institutional rehabilitation would be abandoned in favor of a notion that the individualized sentence set at the beginning of the correctional process will be the sentence served, absent extraordinary circumstances.<sup>29</sup>

It is ironic, as noted in the book,<sup>30</sup> that the proposal to abolish parole as a part of a criminal sentence is based upon the work of the United States Board of Parole and its successor, the United States Parole Commission. The Board initiated a study of its paroling practices and isolated nine salient factors that had the strongest association with success on parole.<sup>31</sup> In each case, numerical scores were assigned to indicate the presence or absence of each salient factor. The total of those scores then became the inmate's salient factor score. The Board then constructed an offense severity scale that listed the most frequent federal violations,<sup>32</sup> combined that with a scale reflecting possible salient factor scores, and assigned a range of months in prison for each intersection of the two scales.<sup>33</sup> The Commission reports that eighty

28. P. 70.

29. The Bureau of Prisons would be authorized to petition the sentencing court to vacate a sentence and to permit release if there are "extraordinary circumstances involving catastrophic illness or hardship on the part of a prisoner or his immediate family or other highly compelling circumstances." P. 71.

30. P. 28.

31. Pp. 22-23. Of 66 variables tested against parole success, nine were found to have the strongest association. They were number of prior convictions, number of prior incarcerations, age at first commitment, involvement with auto theft, history of parole revocation, history of drug dependence, completion of twelfth grade or equivalent, six months' verified employment in the community during the last two years, and participation in a release plan permitting residence with spouse and/or children. P. 22. As the authors point out, it is significant that no correlation was found between the "institutional performance" of the inmate and success on parole. P. 27.

32. Six offense severity categories were created, ranging from "Low" for immigration law violations and minor theft to "Greatest" for aircraft hijacking and robbery with a weapon being fired or personal injury. P. 24 (citing 28 C.F.R. § 2.20 (1978)). The Parole Commission has since subdivided the "Greatest" category into "Greatest I," including very large sales of hard drugs, and "Greatest II," including murder. 42 Fed. Reg. 52,398-99 (1977) (to be codified in 28 C.F.R. § 2.20).

33. For example, one convicted of burglary of a bank or post office with a very good salient factor score was assigned a term of imprisonment of 16-20 months, while one convicted of the same offense with a poor salient factor score was assigned a term of 32-38 months. *Id.*

percent of its parole releases are within the guidelines it has promulgated.<sup>34</sup>

An examination of the salient factors used by the Commission reveals that with the exception of the inmate's parole release plan, each of the factors can be identified and applied at the time sentence is imposed.<sup>35</sup> Why then do we need parole? We do not, the authors respond. Thus, the difficulties caused by indeterminacy can be eliminated and the benefits of sentence individualization retained. The authors go further and abolish a second function of parole—a period of supervised release of ex-inmates—but that element of their proposal seems unnecessary to their scheme.<sup>36</sup>

### III

It would be easy to criticize the book for dealing with a symptom of the malaise of the criminal justice process, rather than with underlying causes. The criticism would be accurate, but shortsighted and unfair. The book is a serious and sensible effort to deal with the very real problem of sentence disparity by securing a uniform approach to sentencing without addressing the cause of the disparity—our inability to apply acknowledged sentencing goals to concrete cases in any reliable fashion. The remedy proposed by the authors will not cure the patient, but it may bring necessary relief.

Although appellate courts in a number of American jurisdictions now review criminal sentences, the existence of appellate review has not "solved" the sentence disparity problem. Studies show that appellate courts have been unable to develop a "common law" of sentencing.<sup>37</sup> Thus, with some exceptions, fundamental principles of sentencing are unlikely to be developed simply by a system that gives appellate courts the power to review criminal sentences.<sup>38</sup>

Can we expect more from the Commission on Sentencing and Cor-

34. P. 25 (citing *United States v. DiRusso*, 535 F.2d 673, 675 n.4 (1st Cir. 1976); *Grasso v. Norton*, 376 F. Supp. 116 (D. Conn. 1974)). Sentences with low maxima or substantially postponed parole eligibility effectively prevent application of the parole guidelines to all cases.

35. See note 31 *supra* (listing variables).

36. There may be reason to believe that a short period of parole supervision, perhaps six months, is useful in assisting the offender's adjustment to life in the community. The California determinate sentence system provides for parole periods of one year. See note 24 *supra*.

37. See, e.g., Dix, *Judicial Review of Sentences: Implications for Individual Dispositions*, 1969 LAW & SOC. ORD. 369; Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453, 1462, 1466 (1960).

38. This is not to state that appellate review is useless. Indeed, it is essential to have review in order to reduce the occasional vicious sentence.

rections than we have received from appellate courts? One would hope that because the Commission would be charged with conducting research into sentencing practices and would be functioning in a rule-making rather than an adjudicatory environment that principles would emerge from its efforts.<sup>39</sup> Although it may turn out that there are no sentencing principles that can be stated with sufficient clarity to permit application in the legal process, that conclusion should await efforts to do so. At the very least, the Commission might be expected to adopt somewhat arbitrary rules for sentencing, much like the Parole Commission's guidelines, that would have the great advantage of increasing the uniformity of decisionmaking by sentencing judges.

Sentencing is the most visible discretionary decision made in the criminal justice process, but it is not the only one or, perhaps, the most important one. Prosecutorial discretion in the form of plea bargaining is virtually universal,<sup>40</sup> as is prosecutorial discretion to refrain from filing charges, to select the seriousness of the offense charged, to decide how many charges to file, and to dismiss charges.<sup>41</sup> Police also exercise substantial discretion in the criminal process. They decide whether to seek the filing of charges, how serious a charge to recommend, and how many charges to suggest. They have substantial discretion not to initiate the criminal process at all by failing, despite adequate evidence, to arrest a criminal offender.<sup>42</sup> This discretion is subject to varying degrees of scrutiny and review by administrative officials. It does, of course, create enormous opportunities for abuse, favoritism, bias, and disparity. To some extent, one could predict that discretion denied to the trial judge will be exercised at another stage of the process, in more plea bargaining, more charge selection, more police discretion.<sup>43</sup> By curtailing discretion in sentencing, will we merely increase discretion exercised by different officials with different

39. One must confess, however, that the efforts of the California Judicial Council to formulate sentencing guidelines are not encouraging. See note 21, *supra*. The authors' scheme, like California's, involves appellate review of sentences under statutory guidelines coupled with a requirement that the trial and appellate courts give a statement of reasons for the sentence selected or modified. Pp. 58-64.

40. See, e.g., D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 76-130 (1966) (exploring mechanics of plea bargaining).

41. See, e.g., F. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* 151-280 (1970) (examining methods of and rationales for prosecutorial discretion).

42. See, e.g., W. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 61-164 (1965) (discussing decision not to invoke criminal process).

43. See, e.g., R. DAWSON, *SENTENCING: THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE* 188-92 (1969) (plea bargaining and mandatory sentences in Michigan and Kansas); Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 557-61 (1978) (criticizing California determinate sentencing law as tending to increase plea bargaining and shift control to prosecutors).

constituencies, interests, motives, backgrounds, and information? Unfortunately, we will not know the answer until we have tried the authors' scheme or something like it.

Finally, there is one ominous aspect of the authors' proposal. Parole is a safety valve for prison overcrowding. Prison overcrowding breeds violence and even riots. If time actually served increases under the reform scheme, and it is only a guess that it might, then prisons are likely to become even more crowded than they now are. Yet if we adopt the authors' scheme, we will have abolished the safety valve. Legislatures and even Sentencing Commissions may be slow to respond to this circumstance and prisons take time to build. We may be, therefore, locking ourselves into an explosive situation.<sup>44</sup> Unfortunately, there is again no way of knowing whether this nightmare is a reality until we have tried the scheme or something like it. Although it is a close question, this possible danger, even though catastrophic if it occurs, is probably outweighed by the benefits of a determinate sentencing system. It is a gamble, but it should be tried. The present system is just that bad.

44. This point has been made persuasively by Professor Caleb Foote. See Foote, *Deceptive Determinate Sentencing*, in *DETERMINATE SENTENCING*, *supra* note 18, at 136-37.