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# The Role of Appellate Court in Mandatory Sentencing Schemes

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## I. INTRODUCTION

During an era of judicial activism in America, appellate courts have promulgated detailed rules for scrutinizing police conduct and trial court holdings, while they have by and large ignored the issues surrounding sentencing. As a consequence, public and scholarly expositions of the criminal process in recent years have focused on appellate review of pre-trial and trial decisions.[1] Since the articulated goal of this effort has been the protection of individual liberty,[2] it is surprising, and unfortunate, that so little attention has been devoted to post-trial decisions, which also affect that liberty.

### A. *The Policy of Discretion in Sentencing*

The willingness to subject pre-trial and trial decisions to intensive appellate review while withholding appellate scrutiny from decisions about sentencing and parole reflects a peculiarly American way of handling conflicting goals. By tolerating the coexistence of "legally bound agents"—police and trial judges—and

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1. Palmer, *A Model of Criminal Dispositions: An Alternative to Official Discretion in Sentencing*, 62 GEO. L.J. 1 (1973) [hereinafter cited as Palmer, *A Model of Criminal Dispositions*].

2. *Id.* at 2.

"free agents"—prison officials, parole board members, and sentencing judges—society attempts to satisfy its desires for both social control and the protection of the rights of the accused. It is acknowledged that the transgressor should be subject to social control because of what he has done and also that his rights and individuality should be protected in the process. The system of guilt determination is infused with broad notions of "due process" which imply that "legal" rather than "factual" guilt should ultimately determine who will be subject to state control. On the other hand, sentencing and corrections decisions are guided by the desire to "individualize punishment."[3]

Thus, the sentencing judge is given broad discretion by legislative enactments designed to permit him to tailor the sentence to fit the convicted criminal. One argument asserted in defense of this policy is that the individualization of punishment through a system of free agents best achieves the goals of "reformation and rehabilitation."[4] If a sentence is ill-suited to a particular offender, the sentencing judge is always subject to reversal for abuse of discretion. Under this view, however, such instances of appellate court intervention should be rare since judge's decisions are infrequently reversed for abuse of discretion.

Confidence in the efficacy of a policy which rests sentencing discretion in trial judges has led to the creation of other free agents. Thus, correctional officials have been given broad discretion in their application of penal laws to criminal offenders, and various legal doctrines have been developed to inhibit the judiciary from influencing or modifying the actions of prison and parole officials.[5] Indeed, such confidence raises a further argument in support of judicial non-reviewability of the practices of these free agents. This rational is essentially one of institutional competence.

It is often argued that the adoption of any particular penal policy to control sentencing judges and correctional officials in their dealings with offenders is simply not a judicial function.[6]

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3. *See generally id.* at 1-6.

4. *Id.* at 3-4.

5. *See* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

6. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 406-11 (1972) (Blackmun, J., dissenting). Justice Blackmun's personal distaste for the death penalty was explicitly stated: "[w]ere I a legislator, I would vote against the death penalty . . . ." *Id.* at 406. He saw his judicial role differently:

> I do not sit on these cases, however as a legislator, responsive, at least in part, to the will of constituents. Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the solc task for judges.

Rather, the enactment of specific policies to guide correctional officials or sentencing judges is uniquely within the competence of the legislature. Following this line of analysis, a growing number of legislatures have attempted to reform sentencing and correctional practices through the enactment of a variety of mandatory sentencing schemes.[7]

The position advocated here, however, is that the post-conviction treatment of individuals must be subject to legal review by the appellate courts. Convicted persons justifiably may be subject to society's control, but the need to control the criminal does not warrant the unregulated use of mandatory sentences. In fact, as will be demonstrated later, some legislative attempts to limit discretion through mandatory sentencing schemes serve only to shift discretionary decision making from one sentencing official to other decision makers.[8] Furthermore, the convicted person is protected by a practice of "individualized punishment" only when the appellate courts actively participate in the administration of sanctions.[9] The entire doctrine of official discretion needs to be replaced by a new mode of analysis compatible with modern views of the goals of the criminal law. In effect, a new jurisprudence of sentencing is needed.[10]

### B. *Discretion and Assumptions about American Criminal Law*

The alternative method of legal analysis proposed here stems from the belief that the discretion of sentencing officials should be governed by *legal* standards developed to insure the fairness and efficacy of post-conviction treatment. This method of analysis is based on four assumptions about modern American criminal law. First, the method posits a distinction between "dispositive" and "adjudicative" decision making within American criminal law.

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*Id.* at 410-11.

7. *E.g.*, CAL. PENAL CODE § 1203 (West Supp. 1979); FLA. STAT. ANN. § 775.087(2) (West Supp. 1979); MASS. ANN. LAWS ch. 269, § 10 (Michie/Law. Co-op Supp. 1978).

*See also* TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING: FAIR AND CERTAIN PUNISHMENT (1976) [hereinafter cited as FAIR AND CERTAIN PUNISHMENT]; A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS: REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION (1976) [hereinafter cited as DOING JUSTICE]. According to the National Institute of Law Enforcement and Criminal Justice, study solicitation document of August 24, 1977, at least 40 states are considering some form of determinate sentencing to supplant their current sentencing systems. For a discussion of various scholarly works on determinate sentencing, see Zimring, *Making the Punishment Fit the Crime*, 6 HASTINGS CENTER REP., INST. SOC'Y, ETHICS & LIFE SCI. 13 (1976).

8. *See* notes 168-80 & accompanying text *infra*.

9. *See* notes 181-83 & accompanying text *infra*.

10. *See generally* Palmer, *A Model of Criminal Dispositions*, note 1 *supra*; *see also* O'Connor v. Donaldson, 422 U.S. 563 (1975).

The term "disposition" includes any decision in which an official of the legal system is empowered to exercise direct control over another individual.[11] Under this definition, trial judge sentencing decisions are part of a larger category of legal decisions that includes decisions by prison and parole officials and even decisions that deprive individuals of their liberty through the civil process.[12] "Adjudication," on the other hand, includes all issues that are decided at trial and on appellate review of the trial process. Thus, issues concerning the exclusion of evidence, instruction of juries, and standards of proof are part of adjudicative decision making.[13]

Second, since the disposition of criminals is assumed to serve functions different from the adjudication of criminality, separate legal standards should govern the two types of decisions. The distinction between adjudication and disposition is a critical analytical device for understanding the effect of major innovations in American criminal law decision making. For instance, when this distinction is kept in mind, the "right to counsel" cases decided by the United States Supreme Court are better understood.[14] A prophylactic requirement of counsel at trial[15] as a part of due process and the lack of such a requirement for probation or parole revocation hearings[16] under the same due process rubric are partially explained by the different kinds of legal decision making involved in adjudication and disposition.[17]

Third, in order to integrate the various purposes served by disposition and adjudication, a method of explicitly analyzing the interests or values served by the criminal law is needed.[18] This

11. *See generally* Palmer, *A Model of Criminal Dispositions*, note 1 *supra*.

12. *Id.* McNeil v. Director, Patuxent Inst., 407 U.S. 245 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972) (all discussing the institutional limitations on the use of civil dispositions).

13. This definition of adjudication is in many respects similar to the ideal of legal guilt developed in the late Professor Packer's Due Process Model. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-72 (1968). The major divergence between Professor Packer's concept of legal guilt and the present definition of adjudication lies in the definitions of reviewing functions in criminal law decision making. Packer assumes that direct review of criminal convictions and collateral review of criminal convictions by way of habeas corpus can be analyzed under the same rubric. *Id.* at 227-38. This Article suggests that these functions ought to be separate. *See* Palmer, *Implementing the Obligation of Advocacy in Review of Criminal Convictions*, 65 J. CRIM. L. & CRIMINOLOGY 267 (1974) [hereinafter cited as Palmer, *Advocacy*].

14. Palmer, *Advocacy, supra* note 13, at 274.

15. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (due process right to counsel in felony trial).

16. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (no due process right to counsel in probation revocation proceedings).

17. *See generally* Palmer, *Advocacy*, note 13 *supra*.

18. Palmer, *A Model of Criminal Dispositions*, *supra* note 1, at 9-35. This method of analysis of the interests protected by the criminal law should not be confused with Professor Fletcher's characterizations of "socially protected interests." *See* Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 519 (1976) [hereinafter cited as

method of analysis should seek to look behind the usual labels of "crime control," "due process," "crime prevention," and "social control" in discussing sentencing issues. More specifically, when dealing with issues of disposition, a method is required that considers both the interests underlying legislative formulation of particular criminal offenses as well as "[t]he policies underlying court-developed constitutional limitations on criminal adjudication"[19] and disposition.[20]

For example, in analyzing the policies underlying homicide in its modern context, one would consider not only recent legislative innovations, but also recent constitutional pronouncements. These would include not only Supreme Court opinions regarding the death penalty for murder,[21] but also those cases involving methods of proof in homicide.[22] While such an analysis is beyond the scope of this Article, it can be said that this analysis of homicide would involve an examination of the particular ways in which the values of human life and individual liberty[23] are promoted through the processes of criminal adjudication and disposition. Broadly speaking, this method of analysis is a means of integrating the substance and process of modern criminal law decision making.[24]

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Fletcher, *Larceny*]. Professor Fletcher identifies what he calls a "nineteenth century preference for classifying crimes as intrusions against specific socially protected interests." He goes on to suggest that a view of substantive criminal law as protection against certain interests, such as life, personal security, or property, makes moral concerns, such as betrayal of a friend, insignificant. Under the analysis proposed in this Article, there is no a priori reason why moral concerns would not be part of the value analysis. For instance, the analysis of the crime of rape requires analysis of the society's moral concerns about sexual integrity and normative judgments about sexual relations in general. In addition, an analysis of "defenses" requires clear articulation of various kinds of moral concerns. *See* note 50 *infra*.

19. Palmer, *A Model of Criminal Dispositions, supra* note 1, at 5.

20. The present constitutional limitations on dispositions have involved two major areas. First, there are limitations on the imposition of the death penalty. *See, e.g.*, Coker v. Georgia, 429 U.S. 815 (1977); Roberts v. Louisiana, 428 U.S. 325 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Second, there are lesser known constitutional limitations on the use of civil dispositions. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563 (1975) (right to liberty); McNeil v. Director, Patuxent Inst., 407 U.S. 245 (1972) (due process); Jackson v. Indiana, 406 U.S. 715 (1972) (equal protection and due process); Humphrey v. Cady, 405 U.S. 504 (1972) (equal protection).

21. *See, e.g.*, Roberts v. Louisiana, 428 U.S. 325 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

22. *See, e.g.*, Handerson v. North Carolina, 432 U.S. 233 (1977); Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975).

23. Historically, the substantive structure of the American crime of homicide and the methods of imposing the death penalty have been related. The development of degrees of murder in America was related to an attempt to avoid the death penalty for some offenders. *See, e.g.*, McGautha v. California, 402 U.S. 183 (1971) (discussing the relationship of the death penalty to the substantive definition of homicide).

24. This view also represents one interpretation of the promulgation function of

A fourth and final assumption about the American criminal law is that appellate courts, rather than legislatures, should perform the interest analysis underlying rulemaking for disposition. Traditionally, these courts have assumed the forefront in analyzing particular social control practices. For example, the appellate courts were the first to question the operation of civil commitment statutes[25] and to conform the operation of this alternative social control method to some principles of legality. One need not argue that the legislature has no voice in dispositional decision making. Rather, the position taken here is that the appellate courts should articulate the social interest to be served in dispositional rule making and that the legislatures should enact dispositional methods that best serve those identified interests.[26]

The proponents of mandatory sentencing ignore the role of the courts for two reasons. First, they assume that the dispositional issues can be separated from the basic policy questions that underlie the criminal law; however, the assertion here is that dispositional and substantive policy decisions are interrelated. Second, the proponents of mandatory sentencing fail to recognize fully all the ramifications of the various methods of social control. Understanding these ramifications will require a full exegesis of the role of legislatures and appellate courts in modern criminal law decision making. The contention of this Article is that courts have been making policy choices in the course of administering the criminal law and will continue to do so under newly enacted mandatory schemes. Further, the failure to consider the proper role of courts in dispositional decision making has obscured the policy choices that must be made in adopting or rejecting legislatively mandated sentencing.

### C. *The Alternative Analysis of Mandatory Sentencing Schemes*

Part II of this Article uses an interest analysis to critique

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the American criminal law. *See* J. GOLDSTEIN, A. DERSHOWITZ & R. SCHWARTZ, CRIMINAL LAW: THEORY AND PROCESS 251-1224 (1974).

25. *See* O'Connor v. Donaldson, 422 U.S. 563 (1975); McNeil v. Director, Patuxent Inst., 407 U.S. 245 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972).

26. Where the limited utility of criminal dispositions for some purposes has been recognized and alternative civil forms have been made available, the legislature's major function is to choose the method of social control. For instance, whether the criminal process or the family court ought to be used as a means of social control in "family assault" cases is a question that a modern legislature is equipped to address and decide. *See, e.g.*, N.Y. FAM. CT. ACT §§ 811-846 (McKinney 1976 & Supp. 1978). The criminal process should not be excluded automatically, rather it must be consciously chosen over the alternative methods of social control. Once the appellate court has identified the particular social interests to be served, the legislative choice can be made more easily and intelligently.

some specific mandatory sentencing schemes. First, the means by which an appellate court should approach issues of disposition under the analysis are summarized. Next, selected legislative enactments imposing mandatory minimum jail terms in the areas of gun control[27] and drug abuse are examined.[28] This analysis illustrates the inadequacies of existing theories with respect to the allocation of sentencing authority between appellate courts and legislatures. In Part III, an examination of one jurisdiction's attempt to impose more certain sentences by eliminating parole[29] demonstrates the proper relationship between courts and the correctional processes. Finally, Part IV analyzes a comprehensive attempt by one legislature to establish fixed or mandated sentences.[30] This analysis reveals the basic deficiencies in a legislative view of sentencing that does not consider the appellate court's role in administering dispositional policy.

The current movement to impose legislatively determined fixed sentences is supported by a growing body of literature.[31] The reform efforts have assumed a utilitarian posture in justifying a particular form of disposition. Under this view, if rehabilitation does not work, deterrence or retribution should be the justification for reform. Adherents of this theory also support the view that the legislature can resolve all policy issues involved in mandatory sentencing. Those "reformers" who advocate legislatively determined mandatory sentences, however, fail to recognize the crucial role of the appellate courts in dispositional decision making.

This view bears two defects. First, the reformers' perspective is functionally simplistic. To justify a recommendation on the ground that it is "the legislature's function to determine punishment," is to ignore the complexity of the relationship between the appellate courts and legislatures. Second, this view fails to confront the moral issues raised by viewing the criminal law and its processes as instruments of social control over the lives of individual members of the community. These reformers have not offered a method of value analysis for legislative dispositional decision making. Facing these issues does not lobby either for or against imposing state control; instead, the intent is to articulate the value choices incident to the exercise of, or the failure to exercise, a certain form of social control through the criminal law.[32]

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27. *See* notes 51-62 & accompanying text *infra*.

28. *See* notes 91-102 & accompanying text *infra*.

29. *See* notes 168-80 & accompanying text *infra*.

30. *See* notes 212-51 & accompanying text *infra*.

31. *See, e.g.*, FAIR AND CERTAIN PUNISHMENT, note 7 *supra*; DOING JUSTICE, note 7 *supra*; J. WILSON, THINKING ABOUT CRIME (1975).

32. Examining the "reforms" of a modern indeterminate sentencing scheme will help to clarify the relevance of the historical origins of the idea of mandatory sentenc-

The Article concludes by recommending that the call for legislatively mandated sentences be resisted. It is asserted that the need for more certain sentences will be served better if the interests that underlie the use of criminal sanctions[33] in our modern legal system are more clearly articulated. This functional approach to the problems of criminal dispositions and to the criminal process generally should lead to the establishment of a more active policy-making role for appellate courts in dispositional decision making. A mode of analysis that conceives of a more than nominal role for appellate courts also makes more explicit the roles of the various other decision makers. In particular, it is argued that the legislature must choose whether to use the criminal law as an instrument of social control, while it is up to the appellate courts to develop policies for the administration of authorized criminal dispositions in individual lives. This division of policy-making authority between legislatures and appellate courts is proposed because the use of the criminal law as a means of social control presents unique kinds of value questions that are best resolved by appellate courts.[34]

In one area of deep value conflict, the imposition of a mandatory death penalty, appellate courts have already begun to ask fundamental questions about the nature of the dispositional processes. While this Article does not fully resolve these issues, it attempts to generate a mode of analysis in which these questions are made visible and thus amenable to discussion and perhaps eventual resolution.

## II. LEGISLATIVELY AUTHORIZED MANDATORY SENTENCING: WHO IS MAKING DISPOSITIONAL POLICY?

Much legislative activity has been devoted to enacting mandatory sentencing schemes. However, that approach overlooks the crucial role of the appellate courts in dispositional policy making. In what follows, an "interest analysis" of the appropriate policy-making role of the appellate courts is discussed. Then, selected legislative enactments are examined in order to illustrate

ing to the current discussion. This Article argues that the task force and the political leaders of various persuasions recommending legislatively mandated sentences may have given new impetus to notions of retribution, ignoring the variety of methods of social control other than the criminal law available in a modern legal system.

33. "Sanctions," as used in this Article, "are imposed by the state presumably against, or at least without regard to, the wishes of the individual being deprived." Sanctions are thus involuntary in a political, though not necessarily in a psychological sense. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 544 n.4 (1960).

34. *Cf.* Palmer, *A Model of Criminal Dispositions*, note 1 *supra* (discussing the role of appellate court value analysis in four problem areas of the criminal law).

the inadequacies of the currently employed division of dispositional authority between the courts and the legislatures.

### A. *An Interest Analysis of Dispositional Decision Making*

An interest analysis of dispositional decision making requires an explicit articulation of the interests or values protected by the criminal law. Five broad categories of values may be posited as a mode of analysis of the criminal law:[35] human life, integrity of one's person, private property, "state process," and individual liberty. While the first three values are easily recognizable if one asks what interests are served by the substantive offenses of murder, assault, and theft, the other two values, "state process" and individual liberty, require further explication.

A criminal offense relates to the state process value when the determination of criminal liability is based on interferences with some legislatively imposed system of social control. The category of offenses can include anything from violation of licensing requirements to noncompliance with regulations regarding food storage[36] or firearm transfer.[37] Thus, the value of state process underlies the host of criminal offenses labelled "public welfare"[38] or "regulatory" offenses. State process crimes differ from crimes such as murder, assault, or theft where the social control goal is to regulate directly an actor's conduct towards members of the community. In contrast, when one examines the gun control legislation, which in this analysis is a state process crime, it becomes evident that state process crimes have distinctive means of determining criminal liability[39] that distinguish them from common law crimes. Although some scholars employ the concepts of "strict liability" and the "public welfare" when discussing these problems,[40] the state process category is here employed to illuminate the value choices made in adopting particular standards for adjudication and disposition.[41]

Whether individual liberty is or ought to be a goal of the criminal law has sparked considerable debate.[42] Individual lib-

35. Alternatively, it might be said that the criminal law protects three broad interests—security of person, private property, and public welfare. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157, 158 (1967).

36. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975).

37. *See, e.g.*, United States v. Freed, 401 U.S. 601 (1970).

38. *See generally* Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

39. *See* text accompanying notes 97-102 *infra*.

40. *See* Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

41. *See* Palmer, *A Model of Criminal Dispositions*, note 1 *supra* (discussing examples of how the state process value can be used).

42. *See* H. PACKER, *supra* note 13, at 14-16. Professor Packer recognizes that a concept of individual liberty or autonomy ought to qualify the interest of the criminal

erty is adopted here as an interest or value of equal weight for four reasons. First, viewing individual liberty as a goal "serves to integrate the substance and process of modern criminal law."[43] That is, the judicially fashioned due process limitations are thereby integrated into the overall interest analysis of criminal law decision making.[44] Second, the criticisms directed at judges, legislatures and other officials who give too little or too much weight to individual liberty in their decision making can be made more explicit.[45] Third, the individual liberty value performs particular functions when an interest analysis is applied to dispositional policy making. Because individual liberty is necessarily affected by any state sanction, the use of any disposition to achieve particular social control goals must be justified in terms of the values served.[46] In addition, the concept of liberty helps one to understand why individuals who are subject to dispositions are entitled to certain allocations of dispositional authority.[47] Finally, where the social control goals of the criminal law are in doubt, a focus on the value of individual liberty is a good starting point for developing dispositional rules. In other words, by employing the individual liberty interest, it is possible to examine the range of policy choices that exist with respect to the substance of criminal sanctions as well as the policy choices presented in sentencing for particular offenses.

The analysis could include more categories or subcategories if, for example, the interests underlying the offense of rape were

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law in crime prevention, but he does not place individual liberty on an equal footing with "the prevention of crime . . . the primary purpose of the criminal law." *Id.* at 16.

One of Packer's most outspoken antagonists suggests that the minimizing of state interference with an individual's life ought to be viewed as one of the primary goals of criminal law. Griffiths, *Ideology in Criminal Procedure* or *a Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 367 n.34, 374-75 (1970).

43. *See* Palmer, *A Model of Criminal Dispositions*, *supra* note 1, at 9.

44. At one level, these constitutional limitations on both criminal law adjudication and disposition are essentially new ways in which individuals who are potentially subject to the criminal process can force the legal system to respond to their challenges. Prior to the criminal law's "constitutionalization," the broad "principle of legality" was a means of recognizing the individual's need to challenge the legality of state control. Whether or not one agrees with what the courts have done to modern criminal law, it should be acknowledged that to include the concept of individual liberty as an interest of equal importance makes more explicit the way in which individual interests ought to be recognized within the criminal process. *See* Palmer, *A Model of Criminal Dispositions*, *supra* note 1, at 10.

45. *See* notes 187-203 & accompanying text *infra*.

46. However, the interest of individual liberty as used in dispositional decision making is not synonymous with freedom from governmental interference. Still, to recognize individual liberty would allow the state to interfere with an individual labeled "criminal" only to the extent necessary to achieve social control goals.

47. That is, the individual has a "right" to have the courts, rather than legislatures and correctional officials deciding some dispositional policy issues.

considered.[48] Using only the five categories proposed here, rape involves the interest of bodily integrity. A full analysis would require that one consider whether the value of sexual integrity is part of the broader value of bodily integrity or a separate value promoted in unique ways by the criminal law.[49] However one answers this question, he should be conscious that any categorization of values is a heuristic device that will not serve all purposes.[50] The five categories of values proposed, however, are sufficient for the purpose of establishing a method of rule making for disposition.

### B. *Gun Control in Massachusetts: The General Preventive Function of the Criminal Law*

A much publicized Massachusetts statute requires a mandatory one year term of incarceration upon conviction for unlicensed gun possession.[51] The highest court in Massachusetts has recently upheld the statutory scheme against several constitutional attacks.[52] The court rejected the defendant's contentions that the statute imposed cruel and unusual punishment,[53] violated the state separation of powers provisions by infringing on judicial discretion,[54] and denied the defendant the equal protection of the laws under the United States Constitution.[55] The court avoided any discussion of the wisdom or efficacy of the particular scheme or of the general debate on mandatory sentencing[56] and declared its institutional incompetence to consider any policy argument about what amount of flexibility in the legal system best serves the needs of the citizenry. Those policy choices were deemed more properly within the province of the legislature.[57] The court's re-

48. Several state legislatures have recently recharacterized forcible rape as merely one type of criminal assault. *E.g.*, FLA. STAT. ANN. § 794.011 (West 1976); MONT. REV. CODES ANN. § 94-5-503 (Supp. 1977) (criminal sexual assault; but same penalties as assault); N.D. CENT. CODE § 12.1-20-03 (Supp. 1977).

49. Deciding whether to change the law of rape to some form of sexual assault would require this type of analysis.

50. For instance, a different type of value analysis should be developed with respect to the functions of a "defense" such as self-defense. *Cf.* Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 71 YALE L.J. 853, 856-57 (1963) (suggesting that if a person is allowed to stand his ground and kill in self-defense the law is subordinating the value of human life to the value of being free of the feelings of cowardice).

51. MASS. ANN. LAWS ch. 140, § 131 & ch. 269, § 10 (Michie/Law. Co-op Supp. 1978).

52. Commonwealth v. McQuoid, 344 N.E.2d 179 (Mass. 1976); Commonwealth v. Jackson, 344 N.E.2d 166 (Mass. 1976).

53. Commonwealth v. Jackson, 344 N.E.2d 166, 170-74 (Mass. 1976).

54. *Id.* at 176-79.

55. Commonwealth v. McQuoid, 344 N.E.2d 179, 180-81 (Mass. 1976).

56. Commonwealth v. Jackson, 344 N.E.2d 166, 169 (Mass. 1976).

57. *Id.* at 169-70.

sponse is in accord with existing analyses of sentencing issues.

An interest analysis of the problem before the Massachusetts court reveals two aspects of its dispositional decision that are submerged in existing analysis. First, existing analysis does not view the legislature's promulgation of the offense as part of an overall gun control system that relies heavily on police and administrative decision making for its operation. The record in the Massachusetts case illustrates that courts are asked to review not only the decision of the legislature, but the decisions of police and administrative officials as well. The "agreed statement of facts" necessary to the court's holding reveals that two police officers observed the defendant and his companion in "suspicious circumstances." The officer discovered a gun in the defendant's possession after apprehending him and a companion. The defendant admitted that he had neither a license for the weapon nor proper identification as required by statute.[58] Thus, the most accurate technical description of the defendant's offense was carrying a gun without legal authorization.[59]

Second, the court failed to acknowledge the competition between the values of individual liberty and state process. Were a court to review only the police encounter with the accused, it might have assessed the significant impact of this system of social control upon the value of individual liberty.

Under the proposed analysis, it is apparent that the legislature had made policy choices about the means of social control long before the addition of a mandatory jail term to the statute. First, the legislature chose to delegate its authority to a licensing agency rather than to prohibit completely the carrying of guns by the civilian population.[60] Such a delegation to an administrative agency constitutes a determination that it is in the community's interest to allow some private individuals to have guns. Second, a system of regulation, rather than a prohibition of all civilian gun use through the criminal law, might have been relied upon as the primary means of social control. The theory behind such regulation would be that qualifying the user of guns prevents conduct harmful to the community and thereby serves the public interest. If the licensing procedures were minimal, nearly every gun owner could be expected to comply. Obtaining a gun license would be similar to obtaining a driver's license. However, even with the licensing of drivers, it should be noted that the legislature has found

58. *Id.* at 169.

59. MASS. ANN. LAWS ch. 269, § 10 (Michie/Law. Co-op Supp. 1979).

60. *Cf.* Adams v. Williams, 407 U.S. 143, 149-51 (1972) (Douglas, J., dissenting) (suggesting that a legislature has extremely broad discretion in enacting gun control measures).

it necessary to authorize penalties for those individuals who fail to register and obtain a license.

Were the legislature to use the driver licensing system as a model in establishing a gun licensing system, the role of the police in apprehending violators would be minimal. The police are central to the administration of this particular state process crime, however, because of the purpose underlying the statute. While the licensing systems for both guns and drivers protect the "public safety," the licensing of guns relates directly to the prevention of crime. The "unlicensed gun," it is posited, is likely to be used by a person in a robbery, assault or murder. Thus, the modern legislature and society in general rely upon the police as an official instrument of crime prevention. The apprehension of one unlicensed gun owner is deemed a general crime prevention measure.

In reviewing the mandatory jail term, the appellate court should have articulated the underlying legislative theory of preventing crimes and the role that police perform in the legislative system of social control. Viewing disposition functionally, the appellate court could have demonstrated that judicial review of police conduct under these types of statutes should perform two functions. First, a reviewing court should articulate the particular prevention function of police in accordance with a general theory of crime prevention.[61] Second, the court should specify the role it performs when the general prevention function is made explicit in the legislative promulgation of offenses.

In the United States Supreme Court's opinions on the "stop and frisk" situation,[62] the Court discussed the role of police in administering a gun control statute. The Court did not, however, analyze the cases before it in terms of dispositional roles and did not engage in an explicit value analysis as proposed here. An analysis of these cases in these terms demonstrates how dispositional decision making authority might be allocated among the police, legislature, and appellate courts. In what follows, an examination of these cases will illustrate how the proposed analysis integrates constitutional development into overall policy analysis for the criminal law.

1. The Crime Prevention Function of the Police

In the first "stop and frisk" case, *Terry v. Ohio*,[63] the Supreme

61. *See generally* Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L.C.&P.S. 176 (1953).

62. Adams v. Williams, 407 U.S. 143 (1972); Sibron v. New York, 392 U.S. 40 (1968); Terry v. Ohio, 392 U.S. 1 (1968).

63. 392 U.S. 1 (1968).

Court upheld the admission of a gun as evidence in Terry's trial for carrying a concealed weapon. In approving the officer's decision to take the gun from Terry's person, the opinion relied heavily upon a detailed analysis of the arresting officer's words and actions with respect to Terry and his companions.

The arresting officer, a plainsclothes detective, observed Terry and two others walking back and forth in front of a jewelry store. The officer testified that after some period of observation, he suspected that the trio were about to rob the jewelry store. The officer approached the suspected robbers and, after a mumbled exchange of words, frisked all three men for weapons. Since the frisk indicated the presence of hard items beneath the outer clothing of Terry and one of his companions, Chilton, the officer searched them for weapons. The third person, Katz, was frisked but not searched because there was no indication of a weapon after the frisk. The officer took the guns from Terry and Chilton and arrested the trio. Later, both Terry and Chilton were charged with and convicted of carrying a concealed weapon. Upon denial of the suppression motion, the case was appealed to the Supreme Court.[64]

For Chief Justice Warren, the author of the *Terry* opinion, a decision on the suppression motion was the analytical starting point for a judicial resolution of the conflict between the citizen's right to be free from police intrusion and the necessity that the police have decision-making authority to prevent crime.[65] The first prong of his analysis required that the officer have a "reasonably articulable suspicion" that a robbery was about to occur before stopping the person.[66] In *Terry*, the police officer's conduct met this test because the actions of Terry and his companions would lead "a reasonably prudent" police officer to conclude that a robbery was about to occur.[67] The second prong of the analysis required the Court to assess the reasonableness of the scope of the search. That the officer did not search Katz, the third member of the trio, indicated that the officer went no further than necessary to prevent the robbery and to protect himself from the potentially dangerous weapons.[68]

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64. *Id.* at 4-5.

65. *Id.* at 23-27.

66. *Id.* at 20-21.

67. Possession of a firearm is one indication that a person may be contemplating a robbery. Under Chief Justice Warren's analysis, the officer had a duty to prevent the robbery. *Id.* at 23.

68. *Id.* at 29-30. This after-the-fact review of what the police officer saw and did under the rubric of "reasonableness" bears a close resemblance to the way in which the judiciary views the significance of events in common law adjudication. *See* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). *See also* Palmer, *Advocacy*, note 13 *supra*.

When the decision in *Terry* is viewed functionally, two other aspects of the decision not mentioned by Warren become apparent.[69] First, the Ohio statute with respect to carrying a concealed weapon[70] serves the same underlying crime prevention purpose as the Massachusetts prohibition against carrying an unlicensed weapon. The Ohio statute does not include a regulatory licensing requirement and thus constitutes a direct legislative delegation of a crime prevention role to the police. The officer's decision in *Terry* to place under state control a person about to commit a robbery was consistent with the legislative purpose.

Second, the decision on the suppression motion in *Terry* is equivalent to an adjudication of guilt on the specific charge of carrying a concealed weapon. Hence, approving the arresting officer's conduct in the course of adjudicating Terry's criminal liability is an implicit delegation of a dispositional function to the police. That is, the Court's approval of the officer's decision and conduct is ultimately determinative of whether Terry is subject to state control.[71] The result in *Terry* allows the police to exercise direct control over individuals to prevent an identifiable community harm such as robbery. However, Warren's failure to acknowledge this dispositional function of the police and to articulate the values served thereby has caused his *Terry* analysis to engender great confusion.

Five years later, in *Adams v. Williams*,[72] Justice Rehnquist used Warren's stop and frisk analysis to validate a police search of a suspect in his car. The patrolman in *Adams* approached the defendant's car after being told only minutes beforehand by an unidentified informant that the defendant had both a gun and narcotics in his possession. Justice Rehnquist reasoned that when

69. Admission of the weapon on the charge of carrying a concealed weapon concluded the issue of Terry's guilt. For possession crimes at least, Judge Cardozo's admonition that "the criminal goes free because the constable has blundered" is true. People v. DeFore, 242 N.Y. 13, 150 N.E. 582 (1926). To approve the arresting officer's conduct in the course of adjudicating Terry's liability for carrying a concealed weapon was also to approve the legislature's delegation of a crime prevention function to the police. Since the legislature and the judiciary view the gun as necessary evidence, it is necessary that there be a prior police-accused encounter every time this particular offense is adjudicated. *See* Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Harlan, J., concurring).

70. OHIO REV. CODE ANN. § 2923.12 (Baldwin 1978).

71. Were there no statute prohibiting the carrying of a concealed weapon, the officer's conclusion that Terry and his companions were "criminals" might have been based on a charge of attempted robbery. Even though the charge of "attempted robbery" serves a prevention function, the evidentiary problems of determining Terry's "intent" under such a charge would have been considerable. While determining standards for "intent" in an attempted robbery charge is one way of protecting individual interests in the criminal process, an analysis of the actual conduct of the official doing the prevention, the police officer, is a preferable technique.

72. 407 U.S. 143 (1972).

the defendant rolled down the window instead of complying with the patrolman's request that he step outside of his car, the patrolman was justified in searching for a gun. And since the defendant carried the gun precisely where the informant had said it would be, the scope of the search was reasonable.[73]

Justice Rehnquist's interpretation of Warren's *Terry* opinion to mean that an officer should prevent any crime represents a significant shift in judicial analytical emphasis. The focus of the Rehnquist analysis is the dangerousness of the criminal rather than the conduct of the officer.[74] Under this view, since the perceived purpose of *Terry* was to insure police safety, an officer would always be justified in disarming a person he deemed dangerous. The function of the judiciary is thus to allow the police to perform a self-defined crime prevention role. No attempt is made to resolve the conflict between the values of liberty and state process raised by the citizen-police encounter since the defendant's arrest is functionally a "conviction."

Despite its shift in focus from the officer's conduct to the dangerousness of the individual, Rehnquist's analysis is similar to Warren's analysis in one important respect: both Rehnquist and Warren see the issue of crime prevention two dimensionally as an allocation of decision-making authority between the appellate courts and the police. In similar fashion, recent treatment of the crime prevention function of the police under gun control statutes has avoided a full analysis of the problem. Such an analysis should be "tripartite." That is, the appellate court would define not only its role and the role of the police, but also that of the legislature.[75]

### 2. The Legislature's Role in Crime Prevention

Warren missed an opportunity to develop a tripartite analysis of the stop and frisk problem in the companion cases to *Terry*. For example, in *Sibron v. New York*,[76] a case involving a search for illegal narcotics, Warren invalidated the search under the

73. *Id.* at 148. After the officer found the gun, an arrest for illegal possession of a gun was legal. The search for the narcotics was then incidental to this lawful arrest for illegal possession of a gun. *Id.* at 149.

74. According to Justice Rehnquist, the patrolman, "properly investigating the activity of a person who was reported to be carrying narcotics and a concealed weapon and who was sitting alone in a car in a high-crime area at 2:15 in the morning, . . . had ample reason to fear for his safety". *Id.* at 147-48.

75. A full constitutional analysis of this problem in criminal law should address the allocation of decision-making authority to the courts, the police, and the legislature. *Cf.* Palmer, *Advocacy*, note 13 *supra* (discussing a constitutional theory that includes the role of courts and legislatures in formulating regulations for investigation).

76. 392 U.S. 40 (1968).

*Terry* analysis but dismissed the issue of the constitutionality of the New York stop and frisk law as "abstract and unproductive" even though the litigants had briefed and argued the point.[77] The first section of the underlying statute provided procedural standards for police conduct.[78] The second portion defined the circumstances under which an officer could search a person for a weapon, and when the officer could seize the weapon.[79] Why a decision about this legislative enactment is "unproductive" in light of the significance of the legislation to the police crime prevention function is not made apparent. The assertion here is that Warren's failure to address the issue is based on his original formulation of the issues as two dimensional in *Terry*.

Warren's analysis in *Terry* did not consider the role of legislative decision making. In other words, because for Warren the problem was solely a matter of allocating decision-making authority between judges and police, a perception of any role for legislative decision making in *Sibron* was impossible. Had Warren asked what role the legislature grants to police in the administration of drug offenses, he would have had to decide explicitly whether his own determination of the police function should take precedence over the legislature's definition.[80]

In the other companion case to *Terry*, *Peters v. New York*,[81] Warren used a search incident to arrest theory to uphold the admission into evidence of burglary tools. He reasoned that the of-

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77. *Id.* at 59.

78. '1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the offenses specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.'

*Id.* at 43 (quoting N.Y. CODE CRIM. PROC. § 180-a) (current version at N.Y. CRIM. PROC. LAW § 140.50(1) (McKinney Supp. 1978)). Under this section, an officer could walk up to Sibron and ask him his name, if narcotics possession is a felony.

79. '2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion, of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.'

*Id.* at 43-44 (quoting N.Y. CODE CRIM. PROC. § 180-1) (current version at N.Y. CRIM. PROC. LAW § 140.50(2) (McKinney Supp. 1978)).

80. If the goal were to control drugs, perhaps Warren would prefer other methods of police investigation. The more typical methods of drug investigation, the use of specialized narcotics agents and the recruitment of informants, has certain advantages for the judiciary. As pointed out in Justice Harlan's concurring opinion in *Sibron*, the legislature's general grant of authority to the police could be constitutional and at the same time the evidence could be excluded at trial if detention was not necessary to prevent harm to the community or the police officer. 392 U.S. at 70-74 (Harlan, J., concurring).

81. *Id.* at 40 (*Peters* and *Sibron* were decided together in one opinion).

ficer had probable cause to arrest Peters for attempted burglary when the tools were seized. In so doing, Warren created a doctrinal absurdity by formulating the nonsensical crime of "attempted burglary."[82] Under the substantive definition of burglary, "breaking and entering with the intent to commit a felony," burglary is itself a form of attempt crime.[83] If Warren's formulation of attempted burglary is to be taken seriously, he is saying that the police officer believed the defendant was attempting to attempt larceny or some other felony.

A functional analysis of the particular crime involved in *Peters* avoids the doctrinal absurdity of Warren's analysis. The purpose of a statute prohibiting the possession of burglary tools is to prevent burglaries. The theoretical justification for controlling the instrumentalities of burglary is similar to the theoretical justification for controlling guns. Warren's use of a search incident to arrest analysis in *Peters* does not take account of the different functions that the police perform under various fourth amendment analyses.[84] When the police are trying to detect a crime already committed, the search incident to arrest doctrine is an appropriate vehicle for appellate review of police crime detection activities. Requiring a search warrant prior to search when an arrest is planned is a further limitation upon the crime detection function of the police.[85] In *Terry*, Warren for the first time explicitly stated that another judicial doctrine, the reasonable suspicion test, would be utilized when the police perform a crime prevention function. The combination of the *Terry* analysis and the search incident to arrest analysis is in effect a confusion of two distinct functions of the police: crime detection and crime prevention.[86]

If the role of the police in preventing burglary is accepted, the particular social control functions of the statute in *Peters* can be understood. Under this analysis, the judiciary could conclude that the legislature expects police officers encountering persons with

82. *Id.* at 66.

83. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 426 (1972). *But see* Taylor v. State, 155 Tex. Crim. 253, 233 S.W.2d 306 (1950).

84. Justice Harlan's concurrence in *Peters* is a protest against this doctrinal and factual analysis. Justice Harlan argued that the "search incident to arrest doctrine," was inapplicable to the facts of the case. 392 U.S. at 74 (Harlan, J., concurring). If the purpose of the *Terry* analysis is to protect the officer from harm, the search should have been permitted on the ground that there was evidence to justify the officer's immediate stop and frisk of the suspect. Under Justice Harlan's analysis, the search and seizure are justified by the apprehended harm to the officer. There is no separate analysis of the justification for the arrest as required under Chief Justice Warren's "search incident to arrest" analysis. 392 U.S. at 77-79 (Harlan, J., concurring).

85. *Cf.* Chimel v. California, 295 U.S. 752 (1969) (warrantless search of suspect's house held not justified as incident to arrest).

86. *See generally* Adams v. Williamson, 407 U.S. 143, 153-62 (1972) (Marshall, J., dissenting).

guns or burglary tools to sanction those individuals. As with the gun control statute, here the judicial standards for reviewing police conduct seek primarily to insure that there is sufficient evidence to justify judicial approval of police conduct in their performance of the crime prevention function.[87]

More generally, Warren's analysis obscures the variable relationship between the police crime prevention function and the substance of the offense. Although *Terry*, *Sibron*, and *Peters* all involve defendants found guilty of possession offenses, the role given police in administering sanctions under each of the statutes derives from different values. An appellate court reviewing police conduct under these statutes should acknowledge the distinct legislative purposes in sanctioning the *carrying* of weapons, the *possession* of drugs, and the *possession* of burglary tools. The best way to see how the crime prevention function of police varies with the offense is to analyze the three cases in terms of the particular values upheld by the decisions.

3. An Interest Analysis of Crime Prevention

The value of individual liberty is at issue in the *Peters*, *Sibron*, and *Terry* cases since each involves a possession crime.[88] The values of private property and, secondarily, bodily security are promoted by laws prohibiting robbery. Similarly, the value of private property is protected by a law prohibiting burglary. Control of the instruments themselves as a means of protecting private property is legitimate as long as other competing values, individual liberty and bodily security (here, the bodily security of a person who also happens to perform the function of police officer),[89] are not compromised excessively.

In effect, were Sibron's adjudication and disposition upheld, he would be subject to state control solely to uphold the state process. In contrast, Peters' and Terry's convictions uphold the values of property and bodily security as well as the value of state process. Thus, *Terry* and *Peters* are two cases in which the appellate court implicity agreed that the appropriate value balance is

87. *See* M. KADISH & S. KADISH, DISCRETION TO DISOBEY 37-94 (1973) (examining the use of roles in analyzing problems of discretion).

88. *See, e.g.*, Allen v. County Court, Ulster County, 568 F.2d 998 (2d Cir. 1977) (holding facially unconstitutional a New York statute stating that the presence of a gun in a car constitutes presumptive evidence of its possession by the car's occupants), *cert. granted*, 99 S. Ct. 75 (1978).

89. Notice that here one is not confronted with a situation in which an "innocent" civilian is carrying a gun in Massachusetts for "self-protection" and police arrest discretion is used to avoid bringing this "innocent" person into the process. *See* Beha, *"And* Nobody *Can Get You Out": The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the Use of Firearms and on the Administration of Criminal Justice in Boston* (pt. 2), 57 B.U.L. REV. 289, 299-300 (1977).

maintained under the legislatively authorized method of social control—prohibiting possession of the instrumentalities of crime. For a court to determine what balance is appropriate is to assume a policy-making role. Thus, to inquire whether the *Terry* analysis is to be applied to mere possession offenses is to ask whether the judiciary should limit the legislature's ability to delegate a crime prevention function to the police.[90]

Under existing stop and frisk case law, there are essentially two ways of viewing the crime prevention function of the police. Under the view espoused by Mr. Justice Warren, the crime prevention function of the police is limited by the judiciary's implicit definition of the types of societal harm that justify police intrusions upon individual liberty. The results in *Terry*, *Sibron*, and *Peters* indicate that the types of harms police can prevent are closely related to common law crimes. Police intrusions to prevent a robbery or burglary were consistent with their crime prevention duty under *Terry* and *Peters*, but an effort to prevent drug possession was viewed as inconsistent with that duty in *Sibron*. Narrowly defining "harm" in terms of common-law crimes allows the judiciary to evaluate an officer's testimony under the judicial standards of proof of common law crimes. The purpose of the evaluation is to determine whether there indeed exists the feared societal harm. While possession crimes underlay the convictions in *Peters* and *Terry*, the real purpose of the approved police conduct was the prevention of a particular robbery or burglary. The judicial role under this view is to provide guidelines on a case-by-case basis that confine the police crime prevention function within a common law based definition of harm. By so doing, the judiciary is evaluating and defining the dispositional role of the police.

On the other hand, Mr. Justice Rehnquist sees the crime prevention function of the police essentially as one of controlling dangerous persons. Under this view, the judiciary is more concerned with ascertaining whether there is sufficient evidence of individual dangerousness than with regulating police conduct. Thus, the modern police force has the authority to control dangerous individuals unless, while obtaining custody of the individual, there is a violation of some previously promulgated procedural rule.

The assertion here is that a recognition of the crime prevention function of the police requires the judiciary to establish a gen-

90. *See* Adams v. Williams, 407 U.S. 143 (1972) (Brennan, J., dissenting). Justice Brennan quoted Judge Friendly's dissent in the Court of Appeals below: "I have the gravest hesitancy in extending [*Terry v. Ohio*] to crimes like the possession of narcotics . . . . There is too much danger that, instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true." 407 U.S. at 151.

eral dispositional theory. Such a theory should first articulate the legislative role in creating the police crime prevention function. As suggested above, the legislative promulgation of the prohibitions against the possession of certain items or instrumentalities implicitly creates a police crime prevention function. Then, in monitoring the operation of these legislative crime prevention measures, the judiciary must choose a theory of prevention. The position taken in this Article is that the judiciary should choose an approach that seeks to limit the crime prevention role of the police. Such an approach would preserve existing case law that seeks to insure the safety of the police officer, but would be critical of cases that allow the police too broad a crime prevention role. This analysis would recognize that the initial police-citizen encounter under a gun control statute is at least as significant, in terms of dispositional consequences, as the sanction imposed after formal adjudication. A better method of judicial analysis would acknowledge the interrelationship among the methods of crime prevention, adjudication, and disposition in gun control legislation.

### C. *Drug Use and Abuse: The Criminal and Civil Law as Means of Crime Prevention*

In a series of controversial modifications of its penal and correctional laws, the New York Legislature established mandatory sentences for drug trafficking. The legislators first reclassified the offenses prohibiting the selling or possession of certain amounts of drugs, such as heroin and cocaine. As a result of this reclassification, illegal drug possession and selling were crimes with long mandatory minimum periods of confinement.[91] In addition, narcotics offenses could not be reduced by the process of plea negotiation.[92] Lastly, narcotics offenders became ineligible for unconditional discharge from their sentences.[93] A narcotics offender released prior to the end of his prison term was subject to parole supervision for the remainder of his life.

These legislative reforms, collectively known as the "Rockefeller Drug Law," were recently sustained by New York's highest court.[94] In an opinion consolidating the appeal of eight different cases, the court rejected the claim that the sentences were "grossly disproportionate" when compared with sentences imposed for

91. The impact of New York's Drug Law is analyzed in NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE, FINAL REPORT OF THE JOINT COMMITTEE ON NEW YORK DRUG LAW EVALUATION 3-6 (1978).

92. N.Y. CRIM. PROC. LAW § 220.10 (McKinney Supp. 1978).

93. N.Y. CORREC. LAW § 212(8) (Consol. 1977) (repealed 1977).

94. People v. Broadie, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471 (1975).

other offenses.[95] The court acknowledged that the wisdom of the legislative decisions to increase the gravity of drug offenses and reduce discretionary decision making in handling narcotics offenders was highly debatable. Like the Massachusetts court, however, the New York court saw its role as requiring it to accept the legislature's conclusions about the gravity of the offenses and the penological purposes served by the reforms. The court felt compelled to hold that subjecting drug sellers and possessors to penalties commensurate with those imposed for murder, kidnapping, and arson was "reasonable" and thus constitutional.[96]

The court justified its decision by relying on legislative reports that supported the proposition that drug penalties prevent collateral crimes such as robberies and burglaries.[97] The more general crime prevention purpose attributed to legislatively determined drug offenses, however, is a mere label that hinders a full analysis of the competing interests. The court should have used an interest analysis to articulate what particular values are served by these statutes before concurring in the legislative judgment about the similarity of murder to the drug offenses.

Making murder a crime upholds the value of human life; and creating penalties for kidnapping and arson upholds the values of bodily integrity and private property.[98] Promulgating the drug offenses might be thought to uphold the value of health; but as structured, these criminal offenses protect the value of state process.[99] The New York court assumed that all three values are treated similarly by the criminal law. However, the contention here is that the criminal law does not and ought not treat these values in the same fashion.[100] The court should have analyzed the complex manner in which these drug offenses—"controlled substances offenses"—protect the state process and health values.

In order to perform an interest analysis of drug offenses, a court would have to examine the variety of ways in which the legal system deals with drugs. For example, an individual may ob-

95. *Id.* at 110, 332 N.E.2d at 341, 371 N.Y.S.2d at 475. *See also* Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978) (holding that mandatory sentences of life imprisonment imposed on defendants under the Rockefeller Drug Law were not so grossly disproportionate to the nature of their offenses as to constitute cruel and unusual punishment), *cert. denied*, 99 S. Ct. 874 (1979).

96. People v. Broadie, 37 N.Y.2d 100, 115-18, 332 N.E.2d 338, 344-46, 371 N.Y.S.2d 471, 479-81 (1975).

97. *Id.* at 113, 332 N.E.2d at 343, 371 N.Y.S.2d at 477.

98. *Cf. id.* at 115-17, 332 N.E.2d at 344-46, 371 N.Y.S.2d at 479-81 (comparing the punishment for drug offenses with the punishment for other felonies).

99. *See, e.g.*, New York Controlled Substances Act, N.Y. PUB. HEALTH LAW §§ 3300-3397 (McKinney 1977). Section 3301(a) provides that "this article shall govern and control the possession, manufacture, dispensing, administering, and distribution of controlled substances . . . ."

100. *See* notes 102-40 & accompanying text *infra*.

tain a drug at the supermarket to relieve his self-diagnosed ailment without direct interference from the legal system. In contrast, an "addict" may be subject to involuntary civil commitment to cure him of his "affliction." A complex system of state and federal regulations is designed to assure the patient's access to necessary drugs, yet the use and the distribution of drugs outside this regulatory scheme are crimes.[101]

The New York court's analysis thus fails to acknowledge that a criminal disposition is only one of a variety of means of controlling drugs in our society. Furthermore, the court's analysis does not take account of the growing controversy with respect to both the practice of regulating drugs to promote health and the effects of using the criminal law to control drug use.[102] Before concurring in a legislative judgment that a mandatory sentence for drug trafficking prevents collateral crimes, a court should analyze its role in allocating the prevention function within the legal system: it should articulate the precise role of the criminal law in this varied system of control over drug use. Such an endeavor would require an analysis of the adjudicative and dispositive processes in the area of drug abuse.

### 1. Criminal Liability for Drug Abuse: A Medical Model of Social Control

In *Robinson v. California*,[103] for the first time, the Supreme Court addressed the application of the eighth amendment to the problem of drug abuse control statutes. An analysis of *Robinson* illustrates how medical knowledge and perspectives can shape legal approaches to the imposition of social control over drug abuse. In holding that it is unconstitutional to inflict "punishment" on a person afflicted with the "illness" of narcotic addiction, the Court initiated a full-fledged debate about the social control role of the criminal law over drug-related offenses. That debate involves various perspectives on the proper relationship of criminal liability for drug offenses to the particular form of disposition authorized for drug abusers.[104]

Two points about *Robinson* are essential for a full under-

101. Thus the statute specifically upholds the value of "state process"—the administrative process of regulating drug use—designed to protect the community's health.

102. *See* H. PACKER, note 13 *supra*. Moreover, many state legislatures recently have reduced certain drug related penalties in an attempt to decriminalize some drug offenses. *See, e.g.*, New York Marijuana Reform Act of 1977, N.Y. PENAL LAW § 221.05 (McKinney Supp. 1978). *See also* State v. Ward, 57 N.J. 75, 82-83, 270 A.2d 1, 5 (1970) (suggesting that first offenders in marijuana possession cases should receive suspended sentences).

103. 370 U.S. 660 (1962).

104. The full ramifications of this particular debate for eighth amendment jurisprudence will not be explored here.

standing of the dispositional policy issues courts must confront in the drug abuse area. First, the precise holding of Justice Stewart's opinion in *Robinson* is unclear and remains the subject of controversy.[105] It is difficult to determine whether Stewart meant that the state could not use the criminal adjudicative process to label the "sick" addict a criminal or that it could not use a criminal disposition for the addict.[106] Indeed, *Robinson* has been used to stand for both propositions in subsequent cases.

In *Powell v. Texas*,[107] a case dealing with the nexus of "disease" and criminal liability, Justice Marshall held that a person afflicted with the disease of "chronic alcoholism" constitutionally could be convicted of the crime of public drunkenness. For Marshall, *Robinson* stood only for the proposition that to attach criminality to the mere "status" of being an addict or being sick was unconstitutional. Hence, it is not cruel and unusual punishment to hold a person criminally accountable for "voluntarily" going into a public place while intoxicated.[108] In other words, *Robinson* was a constitutional limitation on criminal adjudication rather than a limitation on disposition.[109] In contrast, Justice Stewart's use of *Robinson* in his series of death penalty opinions indicates that he was in fact concerned about dispositions.[110] Thus, it was the criminal form of disposition under Stewart's view that was impermissible under the eighth amendment.[111]

The second point to be recognized about *Robinson* is that the controversy over the holding is a reflection of a larger controversy about the role of the criminal process in drug abuse generally. In *Robinson*, Stewart and other justices *disagreed* over whether a "medical model"[112] of control ought to be used for drug abuse. The Stewart analysis exemplifies the medical model of social control.

*Robinson* was decided in an era when the rehabilitative ideal

105. *See, e.g.*, Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413 (1975).

106. *See* Palmer, *A Model of Criminal Dispositions*, *supra* note 1, at 8.

107. 392 U.S. 514 (1968).

108. *Id.* at 532-34.

109. Justice White's concurrence in *Powell* went even further in suggesting that *Robinson* was a constitutional limitation on all forms of adjudication. *Id.* at 548-49. Although other justices still treat *Robinson* as a limitation on adjudication, Justice White's recent death penalty dissents are particularly noteworthy examples of that view. *See, e.g.*, Roberts v. Louisiana, 428 U.S. 325, 350-56 (1976) (White, J., dissenting); Woodson v. North Carolina, 428 U.S. 280, 306-07 (1976) (White, J., dissenting).

110. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 172 (1976).

111. Under such a view of the meaning of the eighth amendment, Justice Stewart's decision gave constitutional approval to involuntary civil confinement of addicts in a case in which that issue was not before the court.

112. *See* text accompanying notes 117-19 *infra* (defining the medical model).

dominated scholarly and public discussion of criminal process[113] and of drug abuse in particular. In contrast to the goals of the present era, reform and rehabilitation of the ordinary criminal offender by experts was thought to be the only justifiable purpose of imposing state control.[114] Avoiding the stigma and degradation of jail or prison was the first step in fundamental reform of the entire criminal process.[115] In this philosophical atmosphere, even one day in jail for the presumably "sick" addict would be abhorrent.[116]

Hence, Stewart's view recognizes the legitimate need for the control of drug abuse but prefers a medical method of controlling individuals to a criminal method of control:[117] an involuntary *civil* commitment designed to *cure* the addict of his affliction is more palatable than a criminal disposition.[118] Thus, Stewart's constitutional analysis permitted the legislature to use the criminal law to impose sanctions on the manufacture, distribution, and possession of drugs, but not the disease of "addiction."[119]

Judges and legislatures have never fully embraced the medical model as the general method of social control for the criminal law.[120] However, most legal policy makers acknowledge the importance of medical and scientific decision making in devising a system of criminal liability for drug abuse. For instance, Justice Clark's *Robinson* dissent is based on his disagreement with Justice Stewart over the proper legal interpretation of the term "addicted"

113. *See* Allen, *Legal Values and the Rehabilitative Ideal*, in THE BORDERLAND OF CRIMINAL JUSTICE 25 (1964).

114. *But see* Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 973-74 (1966).

115. *See, e.g.*, Robinson v. California, 370 U.S. 660, 668 (1962) (Douglas, J., concurring). During the course of his opinion, Justice Douglas discusses the changing methods of dealing with the "insane." *Id.* at 668-69. He intimates that civil commitment is a preferred method of dealing with "addicts," *id.* at 677, and rejects criminal prosecutions for addicts by asserting: "This age of enlightenment cannot tolerate such a barbarous action," *id.* at 678.

116. In *Robinson*, Justice Stewart, writing for the majority, concluded that

> a State law which imprisons a person [afflicted with the illness of narcotic addiction], even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for a "crime" of having a common cold.

370 U.S. at 667.

117. *See id.* at 668 (Douglas, J., concurring).

118. *Id.* at 665.

119. *Id.* at 664-67.

120. *See, e.g.*, *In re* Foss, 10 Cal. 3d 910, 933-38, 519 P.2d 1073, 1088-91, 112 Cal. Rptr. 649, 663-66 (1972) (Clark, J., concurring in part and dissenting in part).

in the California Health and Safety Code.[121] Under Clark's interpretation, the defendant Robinson was a "voluntary addict," that is, a person just starting to use the prohibited drug. When the person became unable to control his craving for the drug, he became an "involuntary addict" amenable to civil commitment. In Clark's view there was nothing unconstitutional about using a ninety day jail term with two years of parole supervision as a method of controlling a "voluntary" addict.[122]

Stewart failed to perceive Clark's distinction because, in Stewart's view, all addicts are assumed to be physiologically and thus medically addicted. Even though their discussions of what the legislature meant by addiction differed, both their analyses require some background scientific knowledge or assumptions about the effects of particular drugs upon human beings. Determinations of these effects are made by medical investigators and practitioners in our society. Hence, the issue is not, for example, whether all legal decisions should now be made on the assumption that newer information relating drug addiction to peer social influence is correct.[123] Rather, when analyzing a problem of criminal liability for drug abuse, the issue is the extent to which medical or scientific decision making should influence legal decision making.

Were an appellate court to confront the appropriateness of a "medical model" for determining individual liability for drug use, it would necessarily consider a series of questions about the social institutions utilized to facilitate and control drug use. First, the court would ask itself: in what ways does the law view the medical process as a system of social control? In formulating an answer, the court should acknowledge that in some circumstances the law, or at least judges, have demonstrated a certain ambivalence in delegating delicate social value judgements to medical professionals.[124] Second, and more specifically, in the area of drug use, the

121. Robinson v. California, 370 U.S. 660, 679-85 (1962) (Clark, J., dissenting) (discussing former CAL. HEALTH & SAFETY CODE § 11721 (enacted as ch. 1079, 1939 Cal. Stats. 3003)).

122. *Id.* at 681-84.

123. Subsequent research, for example, has demonstrated that Stewart's assumptions about the physiological basis of heroin addiction were unwarranted. *See* J. WILSON, *supra* note 31, at 128-33.

124. *See, e.g.*, *In re* Dinnerstein, 380 N.E.2d 134, 134 (Mass. App. 1978) ("[A] physician attending an incompetent, terminally ill patient may lawfully direct that resuscitation measures be withheld in the event of cardiac or respiratory arrest where such a direction has not been approved in advance by a Probate Court"). *Cf. In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976) (court hesitant to delegate facially similar human value decisions to physicians). "Determinations as to these must, in the ultimate, be responsive not only to the concepts of medicine but also to the common moral judgment of the community at large. In the latter respect, the Court has a non-delegable judicial responsibility." *Id.* at 44, 355 A.2d at 665.

court should ask itself: What role does the medical profession play in preventing drug abuse in the society? In formulating an answer to that question, a court should note that the legislative method of controlling drugs is dependent upon doctors' adherence to strict medical standards when giving drugs to "patients."[125] Thus, the exercise of medical discretion is generally a key element in the legislative design of social control systems for drug use.

Drugs have been characterized as the "key to modern medicine";[126] and medication is the preferred mode of treatment for a host of medical problems. Because of this societal esteem, we often fail to acknowledge that "overruse, abuse and misuse" of drugs constitute a major health problem in the United States.[127] Ambivalence about the role of medical professions in the social control of drug use in our society, therefore, is not explicit.

Drugs are thus a mixed blessing in that they are necessary for modern medical treatment and yet are potentially hazardous. This mixed blessing aspect is reflected in several ways in our laws regulating drug use. First, the typical criminal drug statute regulates how the drugs can be dispensed. This regulatory scheme is designed to insure that patients are able, for instance, to obtain needed prescription drugs. This facilitates the use of drugs in curing medically defined illnesses. It should be noted, however, that some drugs, such as heroin, have been legislatively declared to have no accepted medical use.[128] One might ask for the scientific or medical justifications for such a classification. The answer from a scientific point of view is probably "none." However, the answer in terms of helping society deal with the health threat of drugs is more complex.

By prohibiting some drugs, society assures itself that health risks are minimized and medicinal benefits are maintained. This is not to suggest that the preceding effect follows from eliminating heroin use in society. Rather, the legislative scheme puts the societal imprimatur on what are the safe as opposed to the unsafe drugs.

A court analyzing the role of the medical profession under criminal drug statutes could articulate the values underlying those

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The court's ambivalence was expressed in the closing sentence of its opinion: "[W]e do not intend to be understood as implying that a proceeding for judicial declaratory relief is necessarily required for the implementation of comparable decisions in the field of medical practice." *Id.* at 55, 355 A.2d at 672.

125. A typical drug statute prohibits use unless the drug is administered by a person licensed to do so, such as a physician. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11550 (West Supp. 1979).

126. V. FUCHS, WHO SHALL LIVE? HEALTH, ECONOMICS AND SOCIAL CHOICE 104 (1975).

127. *Id.* at 119.

128. *See* 21 U.S.C. § 812(b)(1)(B) (1976).

statutes that require proof of drug use without medical or state administrative approval. In fact, a typical drug abuse statute includes a provision prohibiting use "unless authorized by law" or "administered by a person licensed by the state board."[129] Thus, the statutes as structured uphold the value of the state process. While it is already the defendant's burden to prove lawful use, statutes also generally use presumptions to ease both the prosecutor's burden of producing evidence and his burden of persuasion at trial.[130]

A court evaluating the medical model could then address the legislative schemes mandating involuntary (or voluntary, if that is truly possible) commitment for certain forms of drug abuse[131] as part of this system of state regulation. The legislatures sometimes explicitly allow an individual to be removed from the criminal process after adjudication and to be placed in the civil process instead.[132] At other times, before adjudication, judges without legislative authorization allow individuals to be shifted out of the criminal process through pretrial diversion.[133]

Perceiving the melange of social control mechanisms within the law, a court could put into perspective the often exaggerated and confused community responses to drug use and abuse. For example, the present intellectual atmosphere is one of disillusionment with the prospect of rehabilitating any offender, and particularly drug offenders, through the legal process. Some scholars now suggest that confronting the public policy issues surrounding heroin use requires an acknowledgement of the general lack of understanding of drug abuse in society.[134] In contrast, the political atmosphere that leads legislatures to call drug abuse a "grave offense" is fed by the image of a drug-driven individual robbing to obtain money to purchase illegal drugs. The drug-driven robber is perceived as being more in need of social control than the mere robber. More social control is thought necessary because the

129. CAL. HEALTH & SAFETY CODE § 11550 (West Supp. 1979).

130. *See, e.g.*, N.Y. PENAL LAW § 220.25 (McKinney Supp. 1978).

131. *See, e.g.*, N.Y. MENTAL HYG. LAW §§ 23.01-.29 (McKinney 1978); N.Y. PENAL LAW § 60.03 (McKinney 1975).

132. *See, e.g.*, CAL. WELF. & INST. CODE §§ 3050-3059 (West 1972 & Supp. 1979); *cf. In re* De La O, 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489 (1963) (statute providing for suspension of criminal proceedings and confinement for treatment of narcotics addiction held not to impose cruel and unusual punishment and was not intended to be a penal sanction when enacted by the legislature).

133. *See, e.g.*, State v. Leonardis, 71 N.J. 85, 363 A.2d 321 (1976); *cf.* People v. Reed, 112 Cal. Rptr. 493 (2d Dist. 1974), *vacated*, 46 Cal. App. 3d 625, 120 Cal. Rptr. 250 (2d Dist. 1975) (post-trial diversion by trial judge; later vacated because statute only allowed diversion prior to trial).

134. *See generally* J. WILSON, *supra* note 31, at 125-59.

drug-driven robber has acted in contradiction to two social control systems, the legal and the medical.

Additionally it would be recognized that the social control potential of medical programs, such as methodone maintenance, has been exaggerated. Having given the "patient-robber" a new drug, "methadone," policy makers are discovering that he has not been "cured" of his propensity to rob.[135] Under these circumstances, a court should point out that the medical model's image of a drug-driven robber reflects conflicting goals. Unfortunately, the need to "help and cure" the patient-criminal obscures the additional need that he be controlled and punished.[136]

A legislature might attempt to implement the previous analysis and clarify the social control goals by redefining statutory crimes. For example, a legislature could provide that anyone found under the influence of an illicit drug when committing robbery would receive a mandatory sentence. Instead of a statute authorizing judges to order a medical examination to determine the defendant's need for care and custody,[137] a different kind of statutory provision would be needed. Such a statute would require a medical examination of the accused prior to trial to see if the prosecutor has sufficient evidence to elevate the charge of robbery to "drug-related robbery."[138]

Note, however, that even to state the bare outline of the statutory scheme raises a constitutional question. The accused robber's right not to be used as a source of evidence in the adjudication of his guilt is possibly violated by the proposed statute. One purpose of the statute might be to allow the prosecutor to meet his burden of proof at adjudication.[139] Were the proposed statute enacted, society would be left with the choice of either modifying standards of proof when scientific evidence is used to define substantive crimes or compelling the accused to be used as a source of evidence.

In raising the constitutional question, one merely adopts the

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135. *Id.* at 154.

136. *Cf.* Goldstein & Katz, *Abolish the Insanity Defense—Why Not?*, 72 YALE L.J. 853, 868-70 (1963) (noting that desires for retribution against the "sick" law-breaker are masked by more socially acceptable ideas favoring "treating the sick").

137. *See, e.g.*, N.Y. MENTAL HYG. LAW §§ 23.07, .09 (McKinney 1978).

138. Some legislatures have authorized mandatory sentences if an offense is committed with a firearm. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 53a-35(c)(2),-134 (West Supp. 1978). The proposed drug related robbery statute builds upon this legislative model.

139. To meet the constitutional standard of proof beyond a reasonable doubt, *see* Mullaney v. Wilbur, 421 U.S. 684 (1975), a legislature would have to authorize the admission of the evidence obtained in the mandated examination.

existing perspective of appellate courts on the social control policies proposed. In adopting this perspective, one should be aware that society is not prepared to make determinative policy choices. The social utility of drugs may well be increasing—that is, congruent with notions of how to promote "health" as a value, society may need more drugs, not less. The "drug-related robbery" statute would make the ambivalence about the social utility of drug use more visible.

For good reasons, society has not formally altered its basic methods of adjudicating and disposing of drug offenders. First, to adopt the proposed statute allowing preadjudicative examination of the offender would require one to treat the medical knowledge that is the foundation of the statutory scheme as if it were fundamentally valid and indisputable. Although this conforms to the lay view of medical science, medical knowledge is derived from a process of clinical experience and reasoning that is essentially dynamic. A particular drug is an appropriate treatment because of clinical tests demonstrating its effectiveness. Subsequent tests may indicate that its side effects are so serious that the drug should no longer be prescribed.[140] To base the entire criminal process for drug abusers on a premise which is as dynamic as medical knowledge would make the criminal process appear uncertain and transient. In particular, if the presumed causal relationship between crime and drugs is disproved, or at least recognized to change over time with further research and clinical experience, the justification for employing criminal means to regulate drug abuse would be open to serious doubt.

Second, and more importantly, ignoring doubts about the nature of criminal liability for drug offenses allows existing invisible methods of control to operate without question. The present drug control system is at variance with the basic principle of criminal law that courts are the primary arbiters of criminal liability. An ambivalence about the appropriate methods for controlling drugs has led to a shift in decision making authority from courts to other officials; and prosecutors have been the primary recipients of this redistribution of authority.

140. The recent controversy over diethylstilbestrol (DES) illustrates the point. DES is a man-made estrogen that has many medical uses. For a period of 25 years DES was prescribed to prevent miscarriages in pregnant women. Subsequent research, however, indicated that use of DES during pregnancy increased the risk of cancer in the user's daughters. As a result, in 1971, the Food and Drug Administration banned the use of DES for pregnant women. *See* Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978) (discussing some of the legal issues surrounding DES).

## 2. Prosecutors as Social Control Agents: An Inquisitorial Theme in the American Criminal Process[141]

In theory, the American prosecutor's obligation is to present vigorously the community's case against its adversary, the criminal defendant in an accusatory criminal process. Since the prosecutor is elected for a short term, the local community, or "client," can "fire" him through the electoral process whenever his performance is deemed unsatisfactory. The American prosecutor, then, is generally a practicing lawyer serving as the community's advocate.[142]

In contrast, the typical European prosecutor is an appointed or career official having closer ties with the courts and the central government in what may be called an inquisitorial criminal process.[143] The Continental prosecutor's role is to pursue the "public interest," and not simply to represent the community in a lawsuit. As an arm of the court and central government, he is not even considered a member of the practicing bar.[144] As a public servant, the inquisitorial prosecutor takes an active part in the investiga-

141. The subtitle for this section is taken from Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedures*, 26 STAN. L. REV. 1009 (1974). In the course of developing his basic thesis that the development of American criminal procedure has been influenced by concepts and practices from the European inquisitorial systems of criminal procedures, Professor Goldstein suggests that regulatory offenses create pressures for inquisitorial procedures. He states:

> It was probably inevitable that American criminal procedure would become less accusatorial as government became more complex and criminal law was used more often as an instrument of social policy. Many of the new regulatory offenses could not be enforced if exclusive reliance were placed, in accordance with accusatorial theory, upon those who were wronged. In some instances, this is because victims lack the resources or self-assurance to litigate or because there are not victims in the usual sense. Such "victimless" crimes include gambling, narcotics, and sex offenses, where the criminal law has been used to control conduct engaged in consensually. To enforce this new body of regulatory criminal laws and to cope with the increase in the older crimes against property and person as America became more industrial and urban, police forces grew and prosecuting attorneys expanded their activities. The criminal sanction became only one among a range of devices—criminal, administrative, injunctive, and monetary—for controlling conduct.

*Id.* at 1021.

While Professor Goldstein does not specifically point to changes in the prosecutor's role as an example of an "inquistorial theme" in American criminal procedure, *see, e.g., id.* at 1022-25, I believe the analysis presented in this section is consistent with his overall analysis.

142. AMERICAN BAR ASSOCIATION, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 17-19 (1970).

143. Even the English Director of Public Prosecutions is a career official and a subordinate of the cabinet minister. *Id.* at 17. Thus, the English prosecutor responds to different institutional forces than does the American prosecutor.

144. For example, the Continental prosecutor would not generally be expected to participate in a bar association meeting. *Id.* at 17.

tion and adjudication of crimes and the disposition of criminals: both identifying the innocent and seeking punishment for the guilty.[145]

In practice, the American prosecutor plays a dominant role in all phases of drug enforcement (much like a Continental prosecutor). First, in contrast to their role in other types of offenses, prosecutors supervise the investigative agents involved in drug abuse detection and control. For example, a prosecutor decides whether information gathered from an accused drug abuser should be used to obtain a search warrant against another accused drug abuser. It is the prosecutor who is required by law to seek judicial authorization for a wire-tap to "break up a drug ring."[146]

Besides supervising the investigation of drug offenses, the American prosecutor has an important policy-making role in deciding who will be adjudged guilty of narcotics crimes. The prosecutor decides how the information gathered by specialized narcotics agents is to be used; for example, whether the information gathered from informants will be used in the prosecution of a particular drug trafficker.[147] By law, the prosecutor is required to decide who among several candidates will be granted immunity in exchange for testimony against a fellow offender. And, without explicit legislative authorization, it is the prosecutor who must approve any "plea bargains" arranged by narcotics agents with offenders who desire to become informants.

As far as the ultimate disposition of offenders is concerned, it is the prosecutor who must decide whether to charge individuals with offenses carrying mandatory prison sentences.[148] Until quite recently, prosecutors had complete discretion to refuse an accused drug offender's request for disposition outside of the criminal

145. In theory, the Continental prosecutor has no discretion not to prosecute for major crimes. *See* Jescheck, *The Discretionary Power of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508 (1970). Considerable controversy has developed over whether the Continental prosecutor exercises wider discretion in practice than the theory of his role would suggest. *Compare* Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977) (suggesting that empirical studies of the three European systems reveal that prosecutors have considerably more discretion than many Americans have been led to believe) *with* Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978) (disputing the claims of Professor Goldstein and Mr. Marcus).

146. *See, e.g.*, N.Y. CRIM. PROC. LAW §§ 700.05(5), .05(8)(c), .10(1) (McKinney 1971 & Supp. 1978).

147. *See* J. SKOLNICK, JUSTICE WITHOUT TRIAL 136 (1966).

148. *See* Note, *Drug Abuse, Law Abuse, and the Eighth Amendment: New York's 1973 Drug Legislation and the Prohibition Against Cruel and Unusual Punishment*, 60 CORNELL L. REV. 638, 662 (1975). *See generally* J. SKOLNICK, *supra* note 147, at 120-37.

process through pre-trial diversion.[149]

These discretionary decisions must be made in terms of an overall assessment of the broader public interest rather than in terms of the merits of each individual case. Making these assessments also requires some centralization of decision making in drug law enforcement. Thus, the American prosecutor has become the key arbiter *between* the accused drug offender and the state.

The prosecutor's role as arbiter of the public interest is at odds with other idealized aspects of the criminal process, both accusatorial and adversarial. The trial judge rather than the prosecutor is theoretically the impartial arbiter between the state and the accused.[150] In fact, the trial judge simply ratifies prosecutorial decisions as to which drug offender should be subject to particular investigative, adjudicative, and dispositional measures. In addition, investigative decisions crucial to the accused's fate are made in ex parte proceedings. By the time the process has reached an adversarial trial where the accused is represented by counsel, his fate has usually been determined, absent some "procedural mistake."

Appellate courts have reacted ambivalently to the tension that exists between the ideology of the accusatory system and practices that are more akin to an inquisitorial system. Although the growing complexity of our society has created the need for regulatory drug laws, as noted above, such laws are in fact also pressures for new kinds of criminal procedures.[151] Rather than openly acknowledge the existence of such inquisitorial themes in American criminal law, appellate courts generally have allowed the basic tension to remain unresolved.

Appellate courts might help to eliminate this dissonance by reviewing the social control decisions made in drug prosecutions. *People v. Reed*,[152] for instance, illustrates that pre-trial diversion decisions are dispositional determinations that should not be made solely by prosecutors. In *Reed*, the court held that the purpose of a special statute for diversion of first time drug offenders was to provide rehabilitative treatment for accused drug offend-

149. People v. Reed, 112 Cal. Rptr. 493 (2d Dist. 1974), *vacated*, 46 Cal. App. 3d 625, 120 Cal. Rptr. 250 (2d Dist. 1975); State v. Leonardis, 71 N.J. 85, 121, 363 A.2d 321, 340 (1976), *aff'd on rehearing*, 73 N.J. 360, 375 A.2d 607 (1977).

150. *See* Goldstein, *supra* note 141, at 1016-17.

151. *See* notes 59-62 & accompanying text *supra*.

152. 112 Cal. Rptr. 493 (2d Dist. 1974), *vacated*, 46 Cal. App. 3d 625, 120 Cal. Rptr. 250 (2d Dist. 1975). Upon rehearing, the California Court of Appeal reversed the trial court's grant of diversion because it came after the defendant's trial had commenced. 46 Cal. App. 3d at 629, 120 Cal. Rptr. at 252 (citing Morse v. Municipal Court, 13 Cal. 3d 149, 529 P.2d 46, 118 Cal. Rptr. 14 (1974).

ers.[153] The prosecutor argued that his consent was required before the defendant could be diverted after trial. The court rejected that argument because it reasoned that complete prosecutorial control over the pre-trial diversion decisions would be violative of the separation of powers doctrine.

In *State v. Leonardis*,[154] the New Jersey Supreme Court held that a defendant could not be excluded from a pre-trial diversion program on the ground that a drug offense is a "heinous crime." The court reasoned that the defendant was entitled to a judicial hearing focusing on his individual suitability for the program before his application for participation in pretrial diversion could be rejected. Moreover, the court held that the prosecutor must state his reason for denying participation by any defendant in order to "alleviate existing suspicions about the arbitrariness" of prosecutors' decisions.[155]

What the *Leonardis* court did not acknowledge was its own role in reviewing prosecutorial disposition decisions in drug offense cases. One defendant in *Leonardis* was a college student who had been arrested for possession of marijuana; another was charged with possession of marijuana and conspiracy to possess and distribute marijuana.[156] On their face, the offenses hardly seem to be heinous crimes, even if one concedes that some "hard drug" offenses are heinous crimes. What probably underlay the denial of admission to the pre-trial diversion program was a prosecutor's unarticulated suspicions that both defendants were "key distributors" or "pushers" of the illegal drugs.[157]

The procedural analysis of the *Leonardis* court suggests an attempt to impose judicial review of prosecutors' decisions to select some drug offenders for harsh disposition—criminal incarceration—and others for less restrictive disposition—release in the community to work under supervision through the pre-trial diversion program. Explicit acknowledgement by the judiciary that their review of prosecutorial pre-trial diversion decisions involves supervision of the prosecutor's dispositional decisions would encourage the judiciary to define its own dispositional role in drug offenses.

Such a definition would make visible the choices that must be made in resolving society's ambivalence about criminal drug offenses. Actual criminal dispositions in drug cases should ultimately depend upon the values furthered. For instance, analyzing

153. 112 Cal. Rptr. at 497.
154. 71 N.J. 85, 363 A.2d 321 (1976).
155. *Id.* at 115, 363 A.2d at 332.
156. *Id.* at 90, 363 A.2d at 323.
157. *Id.* at 113-19, 363 A.2d at 336-39.

the proposed drug-related robbery statute[158] in its broadest context should lead to an examination of whether a causal connection between drug use and robbery exists in fact. By posing the question, decision makers may begin to address the interests to be served by imposing criminal liability before deciding dispositional policy. The prohibition of robbery protects the values of private property and bodily integrity. A dispositional policy for robbery should be based upon an analysis of the particular role the criminal law plays in upholding the interests of private property and bodily integrity. Such an assessment could well lead to a dispositional rule requiring some period of incarceration for a convicted robber. A more refined analysis would be required to determine how long the period of incarceration should be.

In contrast, the values upheld by the typical drug offense, those of health and individual liberty, are more difficult to explain.[159] "A particular notion of individual physical and mental health—that the free man is unshackled by the vices of . . . drugs—is promoted"[160] by prohibiting individual drug use.[161] Illicit drug users and distributors, of course, would define liberty and health differently. For them, liberty is freedom from government interference, and in their view there should be no criminal sanction for drug use.[162] For the drug user in particular, health or well-being might be defined as a "continual high." Judicial dispositional policies for drug offenses must develop a method of accommodating these alternative definitions of liberty and health. Addressing these divergent definitions of the basic values may allow courts to see that the use of the criminal sanction allows the majority, through the regulatory process for drugs, to impose its view of liberty and health upon the minority. Under these circumstances, a dispositional rule requiring probation or non-incarceration should be the preferred criminal disposition for all drug offenses.

The divergent dispositional rules of probation for drug offenders and incarceration for robbers reflect the degree of confidence one should have in the criminal law as a means of social

158. *See* notes 136-38 & accompanying text *supra*.

159. Palmer, *A Model of Criminal Dispositions*, *supra* note 1, at 9-10.

160. *Id.* at 17.

161. Under this view, the drug trafficker is preying on an individual in need of the law's *parens patriae*. The assumption is that the community's health is protected by state control of individual decision making. As this class of crimes is in fact structured, however, it upholds the value of the state process. Under this alternative view, the state system of decision making with regard to drug use and distribution is protected by state direction of individual decision making. *See generally* J. WILSON, note 31 *supra*.

162. *See* Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490 (1971).

control. Despite some doubts,[163] it must be acknowledged that the criminal law plays a unique and viable role in protecting the values of property and bodily security. Tort liability in the form of conversion, or assault actions, or even new systems of social compensation for injury will not achieve the same fundamental social ordering as the criminal sanction. On the other hand, the value of health is not generally promoted through criminal law. Society is becoming increasingly reluctant to use the criminal process to promote health even though that coercive process is sometimes necessary.[164] In other words, the social institutions designed to promote health—the family, the doctor-patient relationship, the hospital—have generally operated with little interference from the legal system.[165]

An interest analysis of the values that underlie the currently employed framework of drug controls could lead appellate courts to question legislative and administrative judgments about the harm from drugs.[166] With a fuller understanding of both the positive and negative aspects of drug use, appellate courts could review the dispositional decisions of prosecutors in drug control cases. Appropriate appellate dispositional rule making may lead policy makers to become relatively indifferent at the sentencing stage to whether a robber is or is not a drug user.

## III. ELIMINATING PAROLE: WHO SHOULD HAVE AUTHORITY TO DETERMINE THE SOCIAL NEED FOR INDIVIDUAL PREVENTION?

Consistent with the previously developed framework for dispositional rule making, a comprehensive redefinition of the appellate court role requires an analysis of the proper relationship between the courts and the correctional processes. In what follows, a detailed analysis of two general categories of sentencing reform attempts to serve that end.

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163. *See* Del Vecchio, *Equality and Inequality in Relation to Justice*, 11 NAT'L L.F. 36, 42-45 (1966).

164. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563 (1975).

165. *Compare* Capron, *Informed Consent in Catastrophic Disease Research and Treatment*, 123 U. PA. L. REV. 340, 349-50 (1974) (suggesting the function of informed consent is "personalized" technical decisions for the patients) *with* Goldstein, *For Harold Laswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 690-98 (1975) (suggesting the function of informed consent is to provide standards for doctors to use in the process of informing patients of the consequences of their waiver of rights).

166. *See, e.g.*, Commonwealth v. Miller, [1976] 20 CRIM. L. REP. (BNA) 2331 (Roxbury, Mass. Dist. Mun. Ct. 1976).

### A. *Allocating the Authority to Determine the Purposes of Imposing Sanctions on Individuals*

The Maine legislature eliminated parole in its recent comprehensive revision of its laws on sentencing and corrections.[167] With the elimination of the institution of parole, the prison term determined by the sentencing judge should be the term of incarceration in fact served by the offender.[168] The legislature articulated the purposes of its dispositional reform,[169] so we may expect definite sentences that are congruent with the society's aims.

Officials operating under the Maine statute (with stated purposes as divergent as crime deterrence and the elimination of inequities),[170] however, receive no greater guidance from this statute than from previous schemes. Following prevailing practice, the Maine legislature delegated to the sentencing judge the authority to determine initially the need for "individual prevention" in prescribing sentences. And while the statute eliminates parole, it retains the optional sanctions of fine, unconditional discharge, and probation or revocation of license.[171] Hence, upon close examination, the Maine statute resembles most other statutory schemes, since correctional officials still share decision making authority with the sentencing judge in an undefined manner.

Under the Maine legislation, any sentence of more than one year is deemed tentative; that is, the sentence must be evaluated and reviewed by correctional officials. After the review, the Department of Corrections and Mental Hygiene can petition the court for discretionary resentencing under either of two statutorily defined circumstances. If, after some initial observation of the offender, the correctional officials decide that the trial court may have based its sentence on "a misapprehension as to the history, character, physical or mental condition of the offender,"[172] the Department may file a petition for an adjustment of the sentence. Alternatively, the Department may file a petition if it doubts the sentencing judge's ability to estimate "the amount of time that would be necessary to provide for protection of the public from such offender."[173]

By authorizing the evaluation of both individual factors and

167. ME. REV. STAT. ANN. tit. 17-A, §§ 1251-1254 (West Supp. 1978).

168. Some commentators have vigorously advocated the elimination of parole as a means of obtaining more certain sentences. D. FOGEL, " . . . WE ARE THE LIVING PROOF . . ." (1975).

169. ME. REV. STAT. ANN. tit. 17-A, §§ 1151-1157, 1201-1206, 1251-1254 & official comments (West Supp. 1978).

170. *Id.* tit. 17-A, § 1151.

171. *Id.* tit. 17-A, § 1152(2)-(4).

172. *Id.* tit. 17-A, § 1154(2).

173. *Id.*

social control needs, the statute in effect allows the Department to recommend parole for the offenders. Then, when the sentencing court receives such a petition, it has before it the Department's "expert" evaluation of the offender's progress toward a "noncriminal way of life."[174] Moreover, the court is restricted by a legislative prohibition against increasing the sentence originally imposed.[175] This process is the functional equivalent of traditional parole decision making; the difference is merely that the administrative agency makes recommendations instead of actually making the parole decision. The judge is the purported final decision maker. There is, however, little reason to believe that the results of discretionary resentencing will be different from the results of the prevailing parole practices.[176]

These legislative attempts to control the discretion of sentencing courts and correctional officials have little chance of success because they fail to embody a theory of the allocation of dispositional authority. Such a theory should be built on the experience gained by appellate courts in the administration of the criminal law. At present, however, this experience is unavailable to the legislature because appellate courts have not assumed a policy-making role in dispositional decision making. Though Maine has a legislative provision for appellate review of sentencing, the appellate court function in sentencing has never been made explicit.[177] Furthermore, a specialized appellate tribunal hears sentencing appeals. Thus, Maine's highest appellate court, which regularly engages in criminal law policy making,[178] never hears a sentencing appeal.

Maine is not unique in this respect. Other states authorizing review of sentences have generally limited the appellate courts' role to the elimination of the occasional "grossly excessive" sentence rather than participation in dispositional policy making.[179] Again it must be emphasized that the appellate courts should be the institution responsible for allocating decision-making authority between trial courts and correctional officials within the dispositional process.[180] To do so, the courts must first articulate the purposes of imposing sentences in particular crimes and then allo-

174. *Id.*

175. *Id.* tit. 17-A, § 1154(4).

176. *See* Palmer, *A Model of Criminal Dispositions*, *supra* note 1, at 35-46.

177. ME. REV. STAT. ANN. tit. 15, §§ 2141-2144 (West 1977 & Supp. 1978).

178. *See, e.g.*, State v. Wilbur, 278 A.2d 139 (Me. 1971), *vacated sub nom.* Wilbur v. Robbins, 349 F. Supp. (D. Me. 1972), *aff'd sub nom.* Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973), *remanded*, 414 U.S. 1139, *aff'd on rehearing*, 496 F.2d 1303 (1st Cir.), *aff'd*, 421 U.S. 684 (1974).

179. *See* Halperin, *Sentence Review in Maine: Comparisons and Comments*, 18 ME. L. REV. 133 (1966).

180. *See* Palmer, *A Model of Criminal Dispositions*, *supra* note 1, at 35-46.

cate decision-making authority among the various officials to achieve those purposes.

### 1. Judicial Determination of the Need for Retribution and General Deterrence

Assuming the existence of proper legal standards for determining whether state control is justified, it is proposed that trial courts, with appellate court approval, ought to determine the maximum length of sentences based on the social control purposes of general deterrence and retribution.[181] For instance, rather than try to determine whether a particular robber needs to serve the long term authorized for robbery,[182] the trial and appellate courts should determine the sentence for robbery, generally. In this effort, the appellate courts would focus on two factors: first, what prison term best serves the need for general deterrence of robbery; and second, what term serves the community's need for retribution resulting from the interference with the social values of property and bodily security.

Such appellate rule making is necessary because the long maximum sentences usually authorized for the crime of robbery serve a variety of purposes other than the provision of guidelines as to the imposition of individual sanctions.[183] General deterrence and the need for retribution, defined in terms of specific social values and not by the individual characteristics of the offender, should be used to establish the upper limits of the length of sentences.

### 2. Administrative Determination of the Need for Individual Prevention

The proposal here is that the administrative agency, for example, the parole board or its equivalent, is the institution that should consider individual factors in determining whether a particular person should be released before the expiration of his term. Within that maximum sentence established through appellate dispositional rule making, the parole board should determine what reasonable risks should be taken in allowing a particular individual to serve less than the maximum sentence.

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181. *Id.* at 10-21.

182. A typical robbery statute authorizes maximum sentence of 15 years for simple robbery and 25 years for armed robbery. *See, e.g.*, OHIO REV. CODE ANN. §§ 2911.01-.02, 2929.11(B)(1)-(2) (Baldwin 1978).

183. The maximum sentence authorized by the legislature is important in determining its "proportionality." *See* Coker v. Georgia, 429 U.S. 815 (1977). However, the infliction of a particular sanction on an individual in some circumstances requires a process of decision making that is "individualized." *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) (Stewart, J., plurality opinion).

For the parole board to make this determination, it would have to address two general kinds of questions with respect to the individual transgressor. First, is the release of this individual at this time likely to lead to his reintegration into the community? Within this broad question the board would examine, for instance, what resources are available in the community and whether they are available to this particular individual.[184] Second, does the community's interest in the value of liberty outweigh the risk that this individual will again jeopardize a value legitimately protected by the criminal law? While both questions are somewhat open ended, they at least necessitate a more focused inquiry than do existing decision-making practices, which allow both trial judges and correction officials to weigh the more general purposes of dispositions. The more focused inquiry would also allow appellate courts to supervise the use of individual factors in decisions about release.[185]

### 3. Appellate Court Supervision of the Individual Prevention Function

Appellate courts having occasion to review parole board decision making have generally imposed procedural requirements. For instance, one appellate court has required parole boards to give a statement of reasons when parole is denied.[186] This practice has led litigants to assume that further "procedural reform" rather than substantive policy analysis should be pursued before the appellate courts.

Thus, in a group of consolidated cases[187] where the parole board gave its reasons for denying parole, appellate counsel for the prisoners attacked the procedures used by the board.[188] The appellate court denied the claims and praised the parole board's attempts to administer the process fairly under existing guidelines. The court selected one case, that of Walter Beckworth,[189] to illustrate the operation of the guidelines and procedures developed by the parole board.

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184. This question is aimed at evaluating the community's tolerance for the particular individual who engaged in the prohibited activity. *See* Lasswell & Donnelly, *The Continuing Debate over Responsibility: An Introduction to Isolating the Condemnation Sanction*, 68 YALE L.J. 869 (1959).

185. *See* Palmer, *A Model of Criminal Dispositions*, *supra* note 1, at 11-21.

186. Monks v. New Jersey State Parole Bd., 58 N.J. 238, 277 A.2d 193 (1971).

187. Beckworth v. New Jersey State Parole Bd., 62 N.J. 348, 301 A.2d 727 (1973).

188. Besides attacking the adequacy of the reasons given by the parole board, *see id.* at 359, 301 A.2d at 733, counsel for appellants made several claims including: (1) lack of prior notification of materials in parole board's file, *id.* at 362, 301 A.2d at 734-35; (2) informality of the parole release interview and hearing, *id.* at 363, 301 A.2d at 735; and (3) lack of counsel at parole release hearing, *id.* at 366, 301 A.2d at 736-37.

189. *Id.* at 351, 301 A.2d at 729.

The case is one in which counsel for Beckworth could have invoked the appellate court's policy-making role in an attempt to win Beckworth's release. At the age of thirty-eight, Beckworth killed a friend's wife. Beckworth, then estranged from his common law wife,[190] had moved into the home of a male friend, had an affair with the friend's wife, and strangled her after an argument. Following a plea of no contest,[191] he was sentenced to a term of fifteen to twenty years. He was first eligible for parole four years after his incarceration but was denied parole when he appeared before the board. Two years later, he was again denied parole. Two weeks after the second denial, he escaped from prison. After six months, Beckworth was recaptured and sentenced to an additional year for escaping.[192]

A year after his escape, Beckworth was granted another hearing but was again denied parole. This time, however, Beckworth appealed the denial and, on appeal, asked for and received a remand of his case to be heard by the board. Nine months later his case was reheard, and the board again denied his parole.[193]

Beckworth by this time had served eight years of his original fifteen to twenty year sentence. In all three of the parole denials, the board had noted his difficulties in relating to women. The board's view was supported each time by a consulting psychologist who noted Beckworth's hostility toward women, "poor judgment," and his lack of insight into the "circumstances which brought him to prison."[194]

Although counsel for Beckworth thought it at least intuitively unfair to condition Beckworth's liberty now on his character at the time of the homicide,[195] counsel failed to turn that contention into an appellate argument of fairness which might have demonstrated that the parole board had exceeded its proper function. The board gave as the reasons for its denial the fact that the "punitive and deterrent aspects" of Beckworth's sentences had not been fulfilled.[196] Thus the board assumed a dispositional function more properly that of a sentencing judge. The mixing of the general social control purposes of deterrence and retribution with assessments of Beckworth's unchanged condition skewed the decision in favor of social control, generally. A decision-making model of pa-

190. *Id.*

191. The plea is significant in that it requires the court to garner information from "other sources" rather than through "adjudication."

192. Beckworth v. New Jersey State Parole Bd., 62 N.J. 348, 352, 301 A.2d 727, 729 (1973).

193. *Id.* at 350, 352, 301 A.2d at 728, 729.

194. *Id.* at 352, 301 A.2d at 729.

195. *Id.* at 359, 301 A.2d at 733.

196. *Id.* at 353, 301 A.2d at 729-30.

role that maximized the value of liberty would have directed the decision makers' inquiries toward the particular known risks in the case before it. Using the facts as established, counsel for Beckworth could have made a principled argument for Beckworth's release.

A two-fold inquiry should have focused on the improper decision making by the parole board and the improper methods of weighing individual risks. First, counsel should have maintained that the parole board improperly emphasized the punitive and deterrent aspects of the sentence. The judge who is closest to the criminal liability decision is in the best possible position to assess the social need for retribution and general deterrence. This was especially true in Beckworth's case, since there was no formal adjudication of his guilt.[197] Thus, counsel should have argued that the parole board had construed its legislative mandate too broadly.

Second, because the board failed to limit its inquiry to individual characteristics, neither the parole board nor the reviewing court had access to the information which might have revealed the unfairness inherent in the board's decision. The factors actually evaluated included Beckworth's act of killing a woman, his "attempted" suicide, his three unstable marriages, his continuing projection of blame on the women for the marital failures, and factors contained in reports from professional treatment staff.[198] Attention should have been directed at a host of unasked (and, perhaps, unanswerable) questions.

Even if one assumes the accuracy of the parole board's appraisal of those factors actually considered, the proper question for the board was whether remaining in prison would aggravate Beckworth's condition or hold forth any hope of improvement. The more proper line of inquiry would have led a reviewing court into a realistic assessment of this individual vis-à-vis the resources available. For example, assuming Beckworth needs treatment, is such treatment available in the community or even in prison? Given the limited resources of a typical prison, it is unlikely that proper treatment would be available there. Even were the parole board to release the prisoner conditionally to obtain treatment, such treatment would have to be available. One might inquire, in this regard, whether the parole board and its parole counselors[199] investigated whether there were mental health facilities in the community that might offer Beckworth treatment. Such a line of inquiry is the means by which appellate defense counsel can assess

197. *See* note 191 *supra*.
198. 62 N.J. at 353, 301 A.2d at 730.
199. *Id.* at 355, 301 A.2d at 731.

the functioning of the parole board and explore the reasoning processes of the criminal administrative agency for an appellate court.

This second line of inquiry seeks to direct the reviewing court's attention to the tendency of parole boards to favor the values of social control over those of liberty. Such direction is especially needed in cases where deterrent and retributive aspects have been vindicated in the original sentence for murder. Counsel should ask whether the board has examined and rejected as unacceptable the conditions under which it might release the individual. In Beckworth's case, this would involve a difficult inquiry into factors such as Beckworth's social and sexual relations with women. If, for instance, Beckworth were not willing to seek treatment, but would report on his social life to his parole officer, would he then be an acceptable risk in the community?

Before the suggested condition is rejected as "some unconstitutional invasion of privacy and liberty,"[200] note that the particular decision is actuallly one of weighing conditional liberty against nonliberty. In other words, would society prefer to let Beckworth have limited conditional contacts in the community rather than remain in prison for a longer period of time? A parole board might answer this question by suggesting that prison is preferable because "freedom" with state intrusion into one's sexual life does not conform to the *board's* notion of liberty.

However, an appellate judge accepting this determination would have to acknowledge openly that Beckworth is simply being held in a form of preventive detention for social control purposes. The policy choice would be even more apparent were the resources for treatment available in the community but not in prison. In that case, the court's approval of the board decision would make visible to society the harsh consequences of its policy choices in individual cases. It would also make the public and other decision makers aware that proper treatment may never be available in prison.

At a time when even prison administrators are admitting their inability to rehabilitate,[201] the choice to keep Beckworth confined should appear unfair to the court. While the risk of Beckworth's becoming involved in another homicide should be acknowledged, it should not be determinative.[202] The value of human life, like the value of liberty, must be risked in dispositional decision making. *Beckworth* appears to be a case in which

200. *See* Griswold v. Connecticut, 381 U.S. 479 (1975).

201. D. FOGEL, note 168 *supra.*

202. *See* Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 320 n.85 (1974).

an appellate court with the power to review sentences[203] should have held that the parole board had given the value of individual liberty insufficient weight.

### B. *Reforming Disposition Without Reference to Adjudication*

In general, the Maine reform seeks to establish new legal standards for sentencing and correctional decisions with little reference to the evolving standards of criminal accountability. For example, the Maine statute assumes we can have "sentences which do not diminish the gravity of offenses"[204] without explicitly considering the nature of particular offenses.[205] On a metaphysical level, the legislature sought to encourage "just individualization" of sentences without a standard of what is "just"[206] or what are "legitimate criminological goals."[207] In effect, the Maine legislature attempted to deal with the dispositional or punishment issues as distinct items for reform.

In so doing, the legislature failed to take account of the interrelationship of punishment and responsibility. The average citizens thinks about crime in terms of its moral consequences.[208] The label "murder," for instance, carries with it the connotation that the offender should be punished.[209] Law, on the other hand, has not only moral consequences but coercive ones as well. As demonstrated above,[210] the law separates the question of criminal liability—adjudication—from the question of punishment—disposition. After a delineation of the distinctive features of adjudication and disposition in legal decision making, an integration of the two functions adds to an overall understanding of the criminal process. The Maine legislature failed to perceive that

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203. *See* State v. Ward, 57 N.J. 75, 270 A.2d 1 (1970).

204. ME. REV. STAT. ANN. tit. 17-A, § 1151(8) (West Supp. 1978).

205. *See* notes 35-50 & accompanying text *supra*.

206. Legal philosophy would appear to be of great relevance to a further study of sentencing. But until the broad school of legal philosophies allows the unique feature of a legal system, legal decision making, to enter its debates, the influence of legal philosophy on sentencing will be slight. Professor Graham Hughes, without specific references to the problems of sentencing, has noted the failure of legal philosophers to examine the nature of legal reasoning and decision making. *See* Hughes, *Rules, Policy and Decision-Making*, 77 YALE L.J. 411, 439 n.22 (1968). Although certainly worthy of further study, a meaningful integration of legal philosophy and judicial dispositional rules is beyond the scope of this Article.

207. ME. REV. STAT. ANN. tit. 17-A, § 1151(5) (West Supp. 1978).

208. As concepts, punishment and responsibility are metaphysicial notions whose interrelationship deserves to be treated at length in books, not footnotes. *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968). Significantly, problems in this area are replete with concepts that are changing over time. *See* Lasswell & Donnelly, *supra* note 184, at 875.

209. *See generally* J. FEINBERG, DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 38-54 (1970).

210. *See* text accompanying notes 14-17 *supra*.

reform of present dispositional practices requires reference to present and fluctuating standards of adjudication.

In summary, an analysis of the Maine reform effort reveals three defects in the legislature's decision to eliminate parole. First, appellate courts rather than legislatures are the forum in which the policy-oriented integration of adjudication and disposition necessary for reform should take place. The administration of the criminal law necessitates an integration of its various functional stages. Second, the concept of criminal accountability is open to question and reevaluation in the course of appellate court decision making. Thus, "the uncertainty, confusion and inconsistency"[211] that exist in society's notions of criminal accountability are most visible in modern appellate court decision making. Finally, the drafters of the Maine reform package had no theory of dispositional decision making delineating the particular functions of the courts and criminal administrative agencies in imposing sanctions upon individuals.

## IV. MANDATORY SENTENCING IN CALIFORNIA: A VARIATION ON THE THEME OF OFFICIAL DISCRETION IN SENTENCING

### A. *California's Determinative Sentencing Law*

Prior to a recent reform, the California sentencing and correctional system epitomized the practice of indeterminate sentencing in America. The trial judge's sentencing decision was essentially a choice between granting the offender some form of supervised release or placing him in prison under the custody of the Adult Authority for an indefinite term. For example, a person convicted of robbery who was not placed on probation was sentenced to a term of incarceration that would last a minimum of five years and could potentially last for life.[212] The Adult Authority periodically redetermined the term of confinement on the basis of diagnostic tests, the convict's conduct in prison and his progress towards reform.[213] In addition, the Adult Authority supervised individuals whom it had released.[214] Granting the Adult Authority, a criminal administrative agency, a vast amount of discretion over the disposition of an offender was consistent with the ethos of

211. *See* Lasswell & Donnelly, *supra* note 184, at 875.

212. CAL. PENAL CODE § 213 (West 1970) (current version at CAL. PENAL CODE § 213 (West Supp. 1979)).

213. *See* J. GOLDSTEIN, A. DERSHOWITZ & R. SCHWARTZ, *supra* note 24, at 613-30, 641-56 (describing the previous California system).

214. *See, e.g., In re* Sturm, 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974); *In re* Minnis, 7 Cal. 3d 639, 498 P.2d 997, 102 Cal. Rptr. 749 (1972).

individualization that has dominated sentencing practices in America.

Under a new mandatory sentencing scheme, however, the trial judge is authorized to impose one of three terms of imprisonment when probation is not granted. Today, a person convicted of robbery will either be placed on probation or incarcerated for two, three, or four years.[215] If incarceration is chosen, the trial judge must impose the middle sentence unless he finds, after a motion and hearing, that aggravating or mitigating factors exist.[216] Although there is no statutory enumeration of the factors for aggravating or mitigating prison terms or for determining when probation should be given, the trial judge must sentence in accordance with the rules of the Judicial Council.[217] Release prior to expiration of judicially imposed terms of imprisonment is based on the review and recommendation of a new Community Release Board to the sentencing court. This new Board also operates under the sentencing rules of the Judicial Council.[218]

Thus, the effectiveness of the California reforms depends upon the effectiveness of the rules promulgated by the Judicial Council. An examination of any of the rules reveals the basic approach: to allow the trial judge to consider as many factors as possible. For instance, the "criteria affecting probation" include the likelihood of dangers to others, facts surrounding the crime, and facts relating to the defendant.[219] Since the criteria are not exclusive,[220] the sentencing judge is free to give greater or lesser emphasis to particular factors he may choose. Apparently he may cite any factor as a reason for granting or denying probation.

The rules do not, for instance, tell the trial judge whether danger of addiction[221] is a reason for incarceration. Such a determination would require an analysis of the function that criminal drug prohibitions play in preventing crime or protecting society.[222] Apparently, the Judicial Council deems the individual trial judge's analysis of the problem as sufficient since the judge need only recite the reason for his decision.[223]

Given the composition of the Judicial Council, the failure to resolve the underlying policy issues in sentencing is not surprising. The California Judicial Council is an appointed body consisting

215. CAL. PENAL CODE §§ 213, 1170(a)(2) (West Supp. 1979).
216. *Id.* § 1170(b).
217. *Id.* § 1170(a)(2).
218. *Id.* § 1170(d).
219. CAL. R. CT. 414.
220. CAL. R. CT. 408.
221. CAL. R. CT. 414(d)(1), (6).
222. *See* CAL. R. CT. 410(a), (d), (e).
223. CAL. PENAL CODE § 1170(c) (West Supp. 1979); CAL. R. CT. 443.

of judges of the various courts, members of the bar, and members of the legislature.[224] The state's constitution empowers the Council to establish the rules of practice of the courts and to perform other duties defined by statute.[225] The newly promulgated sentencing rules define its general objectives in terms surprisingly similar to those of the legislature. The Judicial Council states that two objectives of its rules are "(a) protecting society, [and] (b) punishing the defendant . . . ."[226] In similar fashion, the legislature enacting the new mandatory sentencing schemes declared "that the purpose of imprisonment for crime is punishment."[227] Such vague statements of purpose are unlikely to encourage the Judicial Council to establish rules that provide meaningful guidance for the resolution of actual cases.[228]

While the rules and statute require judges to state their reasons for the sentence,[229] there is no indication that the offender can appeal on the grounds that the trial judge's reasons reflect unsound dispositional policy. Rather, the Judicial Council will use these reasons as empirical evidence in either revising its rules or making recommendations to the legislature for modifying the statutes.[230] Apparently, the convicted offender is supposed to treat these often conflicting rules as valid and focus his appellate argument on the propriety of the trial judge's application of the rules. But because appellate courts have assumed a larger policy-making role in criminal law decision making generally, offenders of their counsel should be encouraged to take a more aggressive attitude towards the new rules. The California sentencing rules and the legislation fail to mention the appellate judiciary which must eventually resolve these policy conflicts.

### B. People v. Tanner: *An Indication of the Judicial Response to Mandatory Sentencing*

The recent case of *People v. Tanner*[231] illustrates the point. In

224. CAL. CONST. art. 6, § 6.
225. *Id.*
226. CAL. R. CT. 410.
227. CAL. PENAL CODE § 1170 (West Supp. 1979).
228. Administrative rule making by courts through judicial councils has not usually resolved underlying policy conflicts. Professor Coffee has suggested in a slightly different context that attempts to use such bodies to develop rules for sentencing leads to the "problem of accountability" since judicial councils are not accountable to the political process or organized professional groups. *See* Coffee, *Repressed Issues of Sentencing: Accountability, Predictability and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 1008 n.87 (1978).
229. CAL. PENAL CODE § 1170(c) (West Supp. 1979).
230. Id. §§ 1170.4-.6.
231. 23 Cal. 3d 16, 587 P.2d 1112, 151 Cal. Rptr. 299 (1978), *vacated rehearing granted* (Feb. 8, 1979).

*Tanner*, the California Supreme Court was asked to resolve the conflict between two statutory provisions in the context of reviewing the sentence the trial judge had given a convicted robber. As part of the current movement towards mandatory sentencing, the California legislature recently prohibited trial judges from granting probation for anyone convicted of using a firearm to commit a robbery.[232] Another section of the statute required that the use of a firearm must be alleged in the indictment and found by the factfinder.[233] Tanner met both criteria since he admitted the robbery at trial, and the jury found that he had committed the crime with a firearm.[234]

The trial judge charged with the responsibility of sentencing Tanner, however, relied upon a previously enacted statute and line of cases and struck the finding of firearm use.[235] Following the dismissal of the special finding, the judge imposed a five-year prison term, which he suspended on the conditions that Tanner spend one year in county jail and that he undergo psychiatric treatment.[236] He justified the sentence on the basis of the unusual facts surrounding the robbery as developed in trial testimony and the probation report.[237] Had the trial judge not dismissed the finding of gun use, he would have been required, under the statute, to send Tanner to state prison. The state appealed.

In its initial *Tanner* opinion (rehearing was later granted and the decision, therefore, was vacated), a plurality of the court rejected the state's argument that the later enacted mandatory gun use statute forbidding probation for firearm felonies superseded the older statute allowing dismissals by trial judges at sentencing. The rejection of this argument required the plurality to discuss explicitly the legislative intent in conjunction with the court's own previous interpretations of similar statutory provisions for sentencing.[238] Despite the political rhetoric indicating the legislative intent that all robbers using a gun must go to state prison, the plurality held that the legislature did not intend to overrule an

232. CAL. PENAL CODE § 1203.06(a)(1)(iii) (West Supp. 1979).

233. *Id.* § 1203.06(b)(1).

234. 23 Cal. 3d at 22, 587 P.2d at 1114-15, 151 Cal. Rptr. at 301-02.

235. *Id.* at 23, 587 P.2d at 1115, 151 Cal. Rptr. at 302.

236. *Id.*

237. Tanner, a security guard, in admitting the robbery at trial, claimed he was only trying to convince the store owner to resubscribe to the security service for which Tanner worked. The victim of the robbery, a clerk, testified that Tanner had engaged in a friendly conversation and instructed the clerk to call the police and identify him, Tanner, as the robber. The probation report indicated that Tanner had never been arrested or convicted before and that Tanner's employers had all given him good recommendations. The investigating police detective did not believe Tanner should be sentenced to state prison for the offense. The report recommended a six-month jail term and a period of probation. *Id.*

238. *Id.* at 24-35, 587 P.2d at 1116-24, 151 Cal. Rptr. at 303-11.

entire body of judicial doctrine preserving the judiciary's prerogative to dismiss part of indictments in the "interests of justice."[239]

The concurring opinion would have reached the same result but on constitutional grounds: the legislature meant to forbid probation in Tanner's case, but such prohibition violated the principles of separation of powers.[240] Moreover, the determination of "penalty cnhancement factors" was a judicial function that the legislature had, in effect, delegated to the local prosecutor, an executive officer. The dissenting justices took issue with the concurring opinion's constitutional interpretation and the plurality's interpretation of legislative intent.[241]

This abbreviated analysis of *Tanner* suggests two things about the relationship of appellate courts to mandatory sentencing reform. First, the plurality of the court, at least, demonstrated a willingness to examine new "mandatory" schemes in light of previous judicial interpretations of legislative dispositional policies. Where the court perceived a conflict in those policies, it appeared prepared to resolve those conflicts in terms of its perception of proper dispositional policy. A trial judge trying to avoid a harsher result, as in *Tanner*, or an ingenious defense counsel will often be able to find a conflicting statement of penal policy somewhere in the morass of penal and correctional laws in California or in the judicial interpretations of those policies. Second, the concurring opinion in *Tanner* illustrates how easily a dispositional issue can be transformed into a constitutional issue when sentencing reform ignores the role of appellate courts. Given the political climate in California supporting mandatory sentencing, the *Tanner* case should certainly receive extended analysis. At the very least, *Tanner* indicated an unwillingness on the part of some appellate judges to resolve all conflicts in the administration of new dispositional schemes through a mechanistic reference to the maxim that "it is the legislature's function" to determine punishment.

By failing to resolve the basic conflicts, the new sentencing rules and the legislation invite a resolution on a constitutional basis. Prior to the adoption of the new legislation, the California appellate judiciary had already begun to question the operation of the indeterminate sentencing law.[242] Although these decisions involved complex constitutional analyses, the courts raised basic

239. *Id.* at 35, 587 P.2d at 1124, 151 Cal. Rptr. at 311.

240. *Id.* at 39, 587 P.2d at 1126, 151 Cal. Rptr. at 313 (Bird, C.J., concurring and dissenting).

241. *Id.* at 44-52, 587 P.2d at 1129-35, 151 Cal. Rptr. at 316-22 (Clark & Richardson, JJ., dissenting).

242. *See, e.g., In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (declaring the indeterminate life sentence for a second conviction of indecent exposure as "disproportionate" to the crime).

policy questions about the nature of offenses and the terms of incarcerations. For example, the California Supreme Court's constitutional analysis of "disproportionality" included a consideration of the penological purposes served by particular offenses.[243]

In sum, the California legislation demonstrates some basic inadequacies of present legislative reform of sentencing. First, like the Maine legislature, the California legislature has isolated only the "punishment" issues for reform.[244] By stating the issues in this way, the legislature can employ a stated purpose of punishment to disguise the more basic motivations behind social control in our society.[245] Second, although the California legislature saw a relationship between correctional decision making and sentencing decisions, there is no uniform dispositional theory. Such a theory must include the individual's right to test the legality of his disposition because it is his liberty that is at stake.[246] The determination of the legality of the criminal process ultimately rests with the appellate courts. Thus, the California scheme fails to acknowledge the role of the courts in shaping criminal dispositional decision making.[247]

To encompass the variety of goals and values upheld through the criminal law, a code should include a statement of the general purposes of the criminal law before the particular purposes of sentencing.[248] Such a statement of purpose should disregard the nomenclature of punishment[249] since the term adds little to an understanding of legal decision making. A general purposes section of a code combined with an explicit statement that the appellate courts are empowered to develop rules for sentencing would be a legislative authorization for courts to resolve conflicts of purposes in individual cases. Without an explicit discussion of the issue of legal decision making in dispositions by appellate courts, little more than variations on the theme of official discretion[250] through legislative reform of sentencing can be expected.

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243. *In re* Foss, 10 Cal. 3d 910, 923, 519 P.2d 1073, 1082, 112 Cal. Rptr. 649, 657 (1974).

244. CAL. PENAL CODE § 1170(e) (West Supp. 1979).

245. *See* text accompanying notes 181-211 *supra*.

246. *See* text accompanying notes 205-13 *supra*.

247. *See* text accompanying notes 231-41 *supra*.

248. *See* Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

249. *See* J. GOLDSTEIN, A. DERSHOWITZ & R. SCHWARTZ, *supra* note 24, at 724-27.

250. *See* Palmer, *A Model of Criminal Dispositions*, *supra* note 1, at 53-59.

## V. SUMMARY AND CONCLUSION

That sentencing practices and policies need reform has not been questioned in this Article. What has been seriously questioned, however, is the wisdom of the movement towards legislatively mandated sentencing. These legislative attempts to modify the discretionary aspects of sentencing and parole are by and large based on simplistic conceptions of the interrelationship of the various components of the criminal process. This Article's resistance to present "reform packages" is an attempt to develop a legal framework for determining the limits of the policy-making role of particular officials in the disposition of individuals.

Appellate courts should perform an important role in both guiding dispositional policy making and legitimating the roles of various dispositional decision makers. This Article has demonstrated, for example, that mandatory sentences for "illegal" gun possession raise fundamental questions for legislatures and courts about the role of police in the disposition of individuals. Appellate courts should recognize the implicit legislative delegation to police of a crime prevention function in the definition of the illegal gun possession offense. Further, appellate courts must acknowledge their own power to limit the crime prevention role of police through a variety of doctrines.

In other areas, this Article has demonstrated that appellate courts must develop systematic theories of social control. Sentencing policy for drug offenses must be developed in the context of answering the following question: What is the particular and appropriate role of the criminal process in the social control of drug abuse? Lurking beneath this issue is the larger question of the degree to which an "inquisitional" model of the criminal process should be used for certain crimes. The key policy makers upon whom appellate court attention should focus in this area are prosecutors.

In addition to illustrating the role of appellate courts in developing systematic legal theories for disposition, the Article briefly surveyed two types of sentencing reforms that are likely to dominate public debate. One such reform, the elimination of parole, is intended to make sentences more definite; but a critical examination of one such proposal has revealed that discretion persists under this proposal.

This Article argues strongly against such reform because it assumes that decision makers can separate the punishment issues from the responsibility issues. The suggestion here is that in reviewing parole board decisions, courts should define the unique dispositional role of parole boards: to assess and evaluate individual risks. Under appellate court supervision, sentencing judges

should assess the social risks posed by the individual's conduct. Both prevailing practices and proposed reforms allow trial judges and parole boards to justify their decisions by emphasizing the individual and social risks presented by the individual's conduct.

Another fashionable sentencing reform is legislative delegation of specific rule-making power to commissions and study groups.[251] The analysis proposed here suggests that this strategy is unworkable. The legislature's failure to acknowledge the role of appellate courts in its sentencing reform should not lead one to conclude that the courts will not play an important part in these reforms. Commissions, for all their positive aspects, lack the moral authority and perspective necessary to formulate dispositional policy that relates to the individuals involved in the criminal process. Many of these persons are in fact both offenders and victims.[252]

Despite the current intellectual fashionability of mandatory sentencing and the growing political popularity of such reform, the hope raised here is that the call for mandatory sentencing will be resisted. Reform of our present sentencing practice should involve at least three major components. First, the reform should require policy clarification and articulation. The mere assertion that rehabilitation fails does not alone constitute a promulgation of policy by legal decision makers. Second, sentencing reform requires new concepts of the appropriate mechanisms of dispositional decision making. Importing concepts from adjudication such as "presumptive sentencing" does not answer basic questions such as who must ultimately determine whether general deterrence ought to be the goal. Third, facing these two large issues requires a method of value analysis and a method of resolving conflicts among values. While all decision makers engage explicitly or implicitly in value analysis, the contention here has been that appellate courts must ultimately assume this role within the modern criminal process.

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251. *See* Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics, and Prospects*, 41 LAW & CONTEMP. PROB. 1, 22-25 (1977).

252. *See* Goldstein, *The Meaning of Calley*, NEW REPUBLIC, May 8, 1971, at 13-14, *reprinted in* J. GOLDSTEIN, A. DERSHOWITZ & R. SCHWARTZ, *supra* note 24, at 1022-23.