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Sentencing Reform in California

AARON RAPPAPORT*

Introduction

Over the past twenty-five years, California's prison population has increased dramatically — from about 25,000 inmates in 1980 to approximately 172,000 in 2008.¹ A primary cause of this increase has been the series of changes in the sentencing laws, including the enactment of the Determinate Sentencing Law (the “DSL”) of 1976, the passage of the Three Strikes law in 1994, and a host of lesser changes to the sentencing system.²

This policy change has had dramatic implications for the state. It has led to a prison system bursting at the seams, widely criticized for its poor conditions, and now subject to federal court oversight.³ It has put an enormous strain on the state budget at a time of great fiscal challenges. And it has heightened concerns about the effectiveness — and basic fairness — of California’s criminal justice system.⁴ Indeed, repeatedly, California has been cited as possessing one of the worst, if not the worst, prison system in the nation.⁵

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¹ See, e.g., California Corrections: Confronting Institutional Crisis, Lethal Injection, and Sentencing Reform in 2007, 13 BERKELEY J. CRIM. L. 117, 139 (2008) (“This emphasis on rehabilitation began to change in 1977” with the adoption of the DSL. “During the following decade California’s legislature passed more than 1000 laws increasing mandatory prison sentences, culminating in 1994 with the enactment of the Three Strikes law . . . .”).

² For further discussion of this litigation, see infra Aaron Rappaport, Litigation over Prison Medical Services, 7 HASTINGS RACE & POVERTY L.J. (this issue, Winter 2010).

³ The State’s 2009-2010 budget allocates $8.234 billion (or 6.9% of total state expenditures) to the California Department of Corrections and Rehabilitation (“CDCR”). CAL.

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Despite these problems, efforts to make significant changes to the sentencing scheme have repeatedly failed, swamped by a persistent and often unthinking tough-on-crime mentality — at least until recently. In the last two years, a series of events have brought the issue of sentencing reform to the forefront. Serious sentencing reform now appears to be a real possibility.

Three events have contributed to this new attitude. First, California's fiscal crisis has put pressure on officials to cut costs, leading to heightened scrutiny of the prison system as a source of savings. Second, litigation over prison conditions has resulted in a federal court order requiring the state to release approximately 40,000 inmates, forcing the state to rethink how its correctional resources are allocated. Third, in 2007, the U.S. Supreme Court struck down a central part of California's sentencing system as unconstitutional. The legislature adopted a "temporary" fix designed to salvage the system, but it is set to expire in two years.

The time, in short, seems ripe to have a real debate on whether California's sentencing system needs major reform. Whether the political branches are capable of making the necessary changes, however, remains a question. Indeed, as this essay argues, the steps needed to make California's sentencing system workable, just and effective require far more than a few modifications at the margins. California needs nothing less than a complete overhaul of its sentencing structure.


I. Introduction to California Sentencing

California's sentencing system actually consists of two overlapping sentencing systems: a "determinate" sentencing structure and an indeterminate "lifer" system.

A fairly large number of offenders in California's prison system are serving "life sentences" of fifteen or twenty-five years to life. These include offenders sentenced to the most serious types of offenses, like murder, as well as offenders sentenced under California's notorious Three Strikes law.6

The Three Strikes law is relatively well known. Defendants are eligible for Three Strikes if they have two prior "serious felonies" (as defined by law) and their current offense is "any felony."7 Defendants convicted under Three Strikes receive sentences of twenty-five years to life for each eligible count.8

By contrast, the details of the DSL are much less frequently discussed, even though many more offenders are sentenced under the DSL's provisions.9 In part, this is because the rules for applying the DSL are extremely complex. Nonetheless, the general outline of the DSL's approach can be understood if we limit our attention to a simple case — the case of an individual offender convicted of a single crime.10

Under the DSL, crimes typically allow for three possible sentences: a lower, middle, and upper term. For instance, the offense of "continuous sexual abuse of a child" is punishable by six, twelve,
or sixteen years of imprisonment. The original idea was that the middle, or "normal," term was the presumptive sentence. A judge was required to impose that sentence unless he or she found appropriate circumstances warranting an aggravated or mitigated term.

However, in Cunningham v. California, the U.S. Supreme Court deemed this approach unconstitutional, holding that it violated the defendant's Sixth Amendment right to jury trial. To remedy the constitutional violation and preserve the basic structure of the sentencing scheme, the legislature enacted a "temporary" fix, called SB40, which allowed the judge to choose any one of the three sentencing options without making further fact-finding. Thus, a judge faced with an offender convicted of continuous abuse of a minor would have virtually unfettered discretion to impose a sentence of six, twelve, or sixteen years. The specific sentence chosen is sometimes called the "base offense level."

In addition to the base offense level, the DSL also authorizes a judge to make several additional adjustments to the ultimate sentence to reflect specific features of the offense and offender. One is the so-called "conduct enhancement," which attaches to specific charges. The conduct enhancements can take into account circumstances related to the crime or victim. Common enhancements increase the sentence because of the use of a firearm, the infliction of injury, or the amount of financial loss.

Usually, an enhancement will require a specific increase in sentence. For example, the use of a gun triggers a one-year increase in the sentence. In addition, conduct enhancements are associated

13. Id. at 283. The ruling was based on the constitutional rules set out in the Court's Apprendi line of cases. Id. at 275.
14. SB40 was expiring on January 1, 2009, but the Legislature extended it for another two-year term, buying time to consider a more permanent change to the sentencing scheme.
15. This example, of course, assumes that no additional enhancements or adjustments apply to increase the sentence further.
16. The formal term is "specific enhancements." See CAL. PENAL CODE § 1170.11 ("the term 'specific enhancement' means an enhancement that relates to the circumstances of the crime.").
17. Exceptions exist. For example, some enhancements have triads of their own. See, e.g., CAL. PENAL CODE § 12022.2(a) ("Any person who, while armed with a firearm in the commission or attempted commission of any felony, has in his or her immediate possession ammunition . . . designed primarily to penetrate metal or armor" shall "be punished by an additional term of . . . 3, 4, or 10 years.").
with specific counts. As a result, in a multi-count conviction, the same adjustment might apply to different counts, so long as the enhancements refer to different criminal conduct.

A second kind of enhancement is based not on the criminal conduct (or victim characteristics), but on the status of the defendant at the time the crime was committed. For example, a common enhancement adds one year to the prison sentence for each of the defendant’s prior convictions. Other enhancements might be warranted if, say, the defendant committed the current crime while out on bail or out on his own recognizance for a previous crime. Where multiple enhancements apply to a defendant, they run consecutively. Thus, if a defendant has three prior convictions, three years will be added to his sentence.\(^\text{18}\)

The ultimate sentence is comprised of the three factors just discussed: (1) the base offense level; (2) any relevant conduct enhancements; and (3) any relevant status enhancements. This description might make the DSL appear rather straightforward in its application. The reality is much different. As the Little Hoover Commission has observed, “[t]oday, there are more than 1,000 felony sentencing laws and more than 100 felony sentence enhancements across twenty-one separate sections of California law.”\(^\text{19}\) Furthermore, all of the rules discussed above have exceptions that might come into play in an actual case: special rules for imposing sentences after violating probation, for low level drug crimes (under Proposition 36), for sex crimes, for domestic violence cases, for gang crimes, for hate crimes, for deciding when you can or cannot strike prior enhancements, for multi-count prosecutions. In other words, while the general idea of California’s determinate sentencing system is straightforward, the actual practice is not.

II. Evaluating California’s Sentencing System

The basic parameters of the sentencing system are relatively clear. But is it a good system? Although a full review of the State’s

\(^{18}\) Id. § 667.5(b). Subject to a few exceptions, the sentencing court may dismiss most status enhancements “in furtherance of justice.” Id. § 1385(a).

enormously complex system is beyond the scope of this essay, a few
general comments can be made. As I suggest below, California’s
sentencing system fails to satisfy what seem to be three essential
features of any modern sentencing system. First, the system must be
administratively feasible. Second, the system must place reasonable
restrictions on the discretion of the sentencing judge. Third, the
system must have a rule-making institution capable of weighing and
balancing the complex individual and social factors inherent in the
sentencing decision.

How does California fare on each measure?

A. Administratively Feasible

First, the sentencing system must be administratively feasible. If
the rules are so complex that judges and practitioners cannot
comprehend or apply the rules, the system is obviously going to fail
to serve its purposes. Judges will reach inconsistent results when
faced with similar cases, and defendants (and their counsel) will lack
fair notice of the punishments to which they are subject.

On this measure, California’s system fails miserably. It is hard
to imagine a more confusing and incoherent system. To illustrate the
complexity of the DSL, consider the following illustration offered by
Judge Richard Couzens (at a talk presented at the Administrative
Office of the Courts).20

A defendant with one prior conviction is charged and ultimately
convicted of three offenses: (1) residential burglary; (2) drug
possession; and (3) grand theft. The sentencing triads associated
with each offense are as follows:

Residential burglary — two, four, or six years.21
Drug possession — sixteen months, two years, or four years.22
Grand theft — sixteen months, two years, or three years.23

20. Judge J. Richard Couzens, Presentation to students of University of California, Hastings
College of the Law, Administrative Office of the Courts of California (Jan. 2009). I am indebted
to Judge J. Richard Couzens for this example. Needless to say, Judge Couzens is not responsible
for any errors I have made in the sentencing calculations to follow.
22. CAL. HEALTH & SAFETY CODE § 11377.
23. CAL. PENAL CODE § 487.
In addition, assume that the offender was found to have been armed during the grand theft, triggering a one-year conduct enhancement for that charge.\(^\text{24}\) What is the appropriate sentence in this case?

In a multi-count conviction, the sentencing judge is required to make a preliminary judgment about the appropriate sentence for each individual count. Assume, for now, that the judge chooses a two-year sentence for residential burglary (the middle term), a four-year sentence for drug possession (the upper term), and a three-year sentence for grand theft (the middle term for grand theft plus one additional year for the weapon enhancement). If we assume that the counts involve separate criminal conduct, the central question is how to combine these three sentences.\(^\text{25}\) The answer turns initially on whether the judge believes the sentences should apply consecutively or concurrently. The judge usually has discretion to make this determination.\(^\text{26}\) If the judge decides to impose concurrent sentences, the rules are relatively straightforward: the offender’s sentence will be equal to the longest sentence of the three counts. So in the example above, the longest sentence is for the drug offense — four years. The defendant’s ultimate sentence, then, will be five years — four years for the drug offense plus a status enhancement of one additional year (for the prior conviction).

But what about consecutive sentences? In that situation, does the judge simply add up the sentences associated with each of the three counts? No, she or he does not. To determine the sentence, the judge must proceed through a number of distinct steps. First, the court must identify the “principal” charge, which is the charge for

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\(^{24}\) Id. § 12022(a)(1) ("[A]ny person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of . . . one year . . . ").

\(^{25}\) Under California Penal Code section 654, a defendant cannot be punished for crimes that concern the same criminal conduct. Id. § 654. Oddly, when section 654 applies, the judge must sentence based on which crime has the largest potential sentence, whether or not the judge would have chosen to impose that sentence. Id. Accordingly, in the example above, the judge must impose the sentence for residential burglary, since it has the largest possible sentence (six years). At the same time, the judge need not impose a six-year sentence. Rather, she must choose one of the three possible sentencing options for that charge (two, four, or six years). What is the rationale for this odd rule? Who knows.

\(^{26}\) However, there are exceptions to a judge’s general discretion of whether a sentence should be consecutive or concurrent. For example, certain designated crimes must be consecutive (e.g., multiple violent sex crimes committed against separate victims or the same victim on separate occasions).
which the judge would have actually imposed the longest sentence. Given the sentences mentioned above, the principal charge is the drug offense (four years in prison). The other counts are called "subordinate consecutive terms."

The ultimate sentence will be equal to the sentence imposed for the principal charge, plus one-third the "middle term" associated with the subordinate counts. Status adjustments are added to the final mix. In the example discussed above, the ultimate sentence would combine the following sentences: four years (for the drug offense); one year, four months (one-third of the middle term for residential burglary); one year (one-third of the middle term for grand theft and its enhancement); and one year for the prior criminal record status enhancement. The total sentence, as a result, is seven years, four months. 27

This is just a simple example, involving a very common situation. There are all sorts of exceptions and special rules. For instance, as noted above, with consecutive terms, the subordinate terms are one-third their middle terms. But, certain statutes allow sentences to be fully consecutive for egregious offenses. Also, there are situations where carrying a gun during a theft is punishable by more than one additional year.

The issues become even more complex when multiple cases, rather than multiple counts, are involved. These are situations where a defendant is sentenced on multiple cases that have been "packaged" for a sentencing disposition, or where a defendant has been sentenced to prison by one court for one crime and is soon after prosecuted for another crime and sentenced by another court.

The rules in such cases are beyond complex and almost beyond imagination. The bottom line: on administrative feasibility grounds alone, California’s system needs a major overhaul.

B. Appropriately Guided Discretion

A second requirement of a fair sentencing system is for the system to impose appropriate limitations on the exercise of judicial

27. Note an odd feature of this general approach: when you calculate the contribution of the subordinate terms, you do not take one-third the sentence that would have been imposed for that count. Rather, you just take one-third the middle term, whether or not the judge would have imposed that term. What is the rationale for that rule? Again, who knows.
discretion. This requires a careful balancing of considerations. On one hand, an extraordinary range of factors might be relevant to the decision in any given case. No workable set of rules can incorporate all the different circumstances that might be relevant; only the most significant factors can be taken into account. As a result, any effective sentencing structure must leave a fair amount of discretion to the sentencing judge.\(^{28}\)

At the same time, giving judges largely unfettered discretion over sentencing — as in the traditional indeterminate schemes — is highly problematic. As past studies suggest, the approach can lead to dramatic sentencing disparities, with similarly situated defendants receiving widely disparate sentences.\(^{29}\) To many, leaving sentencing decisions — which have such a fundamental impact on human liberty — to the unfettered discretion of a single person seems fundamentally unjust.\(^{30}\)

The implication is that some discretion should be left with judges, but discretion should be constrained by appropriately designed sentencing rules. A guided discretion regime, in other words, seems best able to serve the goals of sentencing, assuming the rule-making body is well-structured itself. Again, the California sentencing system comes up short in developing a well-balanced guided discretion regime. The system certainly limits the kinds of sentencing options available to the court, but it does so in a largely arbitrary and irrational way. An effective guided discretion regime narrows the sentencing options to a limited range (e.g. two to four years, or six to seven years). By contrast, California’s sentencing system identifies discrete sentencing options, which differ markedly from each other.

\(^{28}\) I will use the term “sentencing judge,” but I leave open the possibility that alternative decision makers might serve in this role.


\(^{30}\) On another level, one might also question whether a sentencing judge is particularly well-positioned to make the range of judgments necessary for a wise punishment decision. While a judge may have some ability to assess the impact of punishment on the individual offender, she may be ill-suited for assessing the effect of punishment on public safety. Those kinds of decisions require familiarity with studies of deterrence, recidivism, and even rehabilitation, which may go beyond many judges’ areas of competence.
Consider the multi-count convictions discussed in the previous section. We noted that the combined sentence in that case was seven years and four months. Suppose, however, that the judge had selected different initial sentencing options. For instance, if the judge had chosen the aggravated sentence for each charge, the ultimate sentence would have been eight years and eight months. In that situation, residential burglary would have been the principal charge; the drug and grand theft charges would have been subordinate terms. With different initial sentencing choices, a range of sentencing outcomes could be generated, including three years and four months; four years and five months; and six years and eight months. In a three strikes case, the range of options would be even more extreme.

This example highlights a core problem in California's sentencing system. The system limits the kinds of sentencing options a judge can endorse to some degree, but it does so in a largely irrational manner. Rather than constraining judicial discretion in a coherent way (to a limited range, such as three to five years), it gives the court a number of sentencing options, which can span a wide range. The danger of such a range of choices is sentencing disparity, inconsistency, and incoherence of sentencing results. As a guided discretion approach, California's sentencing system fails as well.

31. The contributions would be: six years for residential burglary, eight months for the drug offense, one year for the grand theft offense, and one year for the prior record.

32. If the court chooses the middle terms, the sentence would be six years, eight months (four years for the residential burglary, eight months for the drug offense, one year for grand theft, and one year for the prior record). If the judge chooses the mitigated terms, the sentence would be four years, five and one-third months (two years, four months for the grand theft; five and one-third months for the drugs; eight months for the residential burglary; and one year for the prior criminal record). Finally, if the judge chooses the mitigated terms for all charges and runs the sentences concurrently, the sentence would be three years, four months (two years, four months for grand theft, and one year for the prior criminal record).

33. In testimony before the Little Hoover Commission, Judge Richard Couzens gave the hypothetical of a defendant with two prior serious felony convictions who is accused of stealing a chainsaw valued at $350 from a store. The judge in that case would have to decide initially whether to treat the larceny as a misdemeanor or a felony. In the former case, the defendant would receive probation and local jail time. In the latter, the judge would then have to determine whether to sentence the defendant under the three strikes law, or whether to eliminate one or both of the prior strikes. When all is said and done, the sentencing options theoretically available would include: (1) probation with local jail time; (2) a prison term of sixteen months to three years; (3) a prison term of nearly three years up to six years; or (4) a life sentence of twenty-five years to life. See LITTLE HOOVER COMM'N, supra note 19, at 36.
C. Well-Designed Rule-Making Body

The final requirement of a fair sentencing system is the establishment of a rule-making body that is well-suited for balancing the myriad factors that go into a wise punishment decision. To put the point another way, even a system that is easy to use and narrows judicial discretion will fail if the discretion-limiting rules are poorly designed.

California again offers a ready example of this problem. Its Three Strikes provision narrows judicial discretion to a dramatic degree. Defendants subject to the Three Strikes law must be sentenced to twenty-five years to life in prison, regardless of the sentence the court feels is appropriate. But as many commentators have discussed, the provision often results in deeply unjust sentences, imposing long sentences on offenders who warrant far less punishment. Discretion-constraining rules are not, in other words, good in themselves.

How does one ensure that the sentencing rules are appropriately constructed? This is ultimately a question of institutional design. The challenge is to establish a rule-making body that, because of its structure and values, has the institutional competence and orientation to establish appropriately designed rules. In California's case, the sentencing rules have been constructed largely through a political process — either through legislative design (the DSL) or through the initiative process (the Three Strikes provision and others). Is the political process the appropriate way to fashion discretion-limiting rules? The answer depends on what one views is the goal of the sentencing system. Different considerations will be relevant depending on what purpose the sentencing system is supposed to serve; different institutions might be better suited for assessing certain factors rather than others.

The purpose of punishment, of course, is a controversial topic. For the past quarter century, "just deserts" has been the dominant purpose, and it has been used to justify the movement towards harsher sentences and mandatory minimum statutes. A strong argument can be made, however, that the utilitarian goal of public safety is a far more appealing goal. As Judge Michael Wolff has
stated, “[p]rison, it hardly needs to be said, should be reserved for those whom we really are afraid of, not those we are mad at.”

What sorts of factors are relevant in developing sentencing rules that serve utilitarian goals? The answer is complex. In terms of social welfare, any sentencing decision will generate both costs and benefits. The principal benefit of punishment is straightforward — public safety — achieved largely through incapacitation, deterrence, and rehabilitation. By contrast, the costs of punishment are varied; they include the financial costs to society in housing offenders, third party costs, and the costs to the defendant himself.

What sort of institution is well-suited to evaluating and balancing this broad range of factors? Although generalizations are extremely difficult, one thing is clear: the political process (i.e. the legislature or initiative process) is ill-suited for evaluating the “costs” of punishment.

The political appeal of increasing sentence lengths is obvious. Being tough on crime always seems like a safe political posture. Prisoners and their advocates are a weak voting block, which means that the electoral costs are slim. The ultimate fiscal and human costs of increasing sentences also lie in the distant future, outside the time horizon of the typical legislator. From the politician’s point of view, increased sentencing is almost all benefit and no cost.

In this regard, it is not surprising that California’s sentencing system has tended toward longer sentences, with little regard to social or human cost. A burgeoning prison population is the predictable result. This means that any effort to reform California’s sentencing structure needs to identify a method of reducing the powerful and direct influence of the political branches in the development of sentencing rules.

III. Reforming California’s Sentencing System

Given the deep defects in the State’s sentencing system, the natural question is: how should California’s system be reformed? Recent proposals have sought to make rather modest changes to specific sentencing rules, such as increasing good time credits for

inmates who complete certain rehabilitation programs, reclassifying some felonies as misdemeanors, and allowing elderly inmates to finish part of their sentences at home or in hospitals.

These are all worthy reforms, but they are changes at the margins. As the previous analysis indicates, California’s sentencing system is flawed at its very core. It is exceptionally complex, fails to cabin judicial discretion in an appropriate way, and relies on a flawed system of rulemaking. In this situation, modest changes to individual rules will not suffice; a complete overhaul of California’s sentencing system is necessary.

What should take the place of California’s problematic institution of punishment? Consider the three criteria discussed above.

First, administrative feasibility. One can imagine many possible approaches for reforming the State’s sentencing system to make it easier to administer. For example, a return to indeterminate sentencing (where judges have free reign to choose a sentence within broad ranges) would be much easier to implement. Indeed, it would result in the elimination of virtually all the current sentencing rules, leaving the ultimate decision over sentencing to judges. Such an approach, however, would violate the second principle discussed above — the principle that an effective sentencing system must impose some constraints on the exercise of judicial discretion. Hence, indeterminate sentencing is a non-starter.

A more appealing approach would be a sentencing guideline system designed to cabin judicial discretion. Guideline systems are favored by a significant number of states, as well as the federal government. These systems vary dramatically in their complexity: from extremely complex and detailed systems (e.g., the federal system) to much more streamlined approaches (e.g., North Carolina’s system). But even the most complex guideline system is more rational and coherent than California’s morass.

35. See, e.g., Gerald Lynch, Marvin Frankel: A Reformer Reassessed, 21 FED. SENT’G REP. 235, 238 (2009) (“Some state guidelines, such as those in North Carolina, have been widely hailed for bringing order and logic to state sentencing, and even for sharply reducing prison populations. Others, such as the Federal Guidelines, have been criticized as unnecessarily rigid, unduly complex, and extremely harsh.”).

The goal of a guideline system would be to rationalize the State’s sentencing rules, “bring[ing] the thousands of existing sentencing enhancement into some sort of cohesive structure.” Ideally, this approach would cabin judicial discretion without being excessively rigid.

A critical question concerns the institution that should develop these guideline rules. We have already criticized the State’s reliance on the political branches for designing sentencing rules. But what alternatives remain? One option is to allow the judiciary to develop sentencing guidelines through a kind of “common law” approach. Under that approach, trial courts would announce sentences, explaining their rationale in each case. Over time appellate courts and the California Supreme Court might refine rules into ranges for certain prototypical crimes and criminals. Great Britain has tried this approach.

A “common law” approach to sentencing, however, has serious shortcomings. As we noted, any rulemaking institution should have the competence to balance competing factors: the public safety benefits of punishment on one hand, and the fiscal, human, and third party costs on the other. The judiciary, operating through the common law process, does not seem particularly well-suited to this analysis.

For instance, to properly assess the public safety benefits of punishment, one would need to collect and analyze the latest research on recidivism, deterrence, and rehabilitation. Individual judges (or appellate courts) do not seem particularly competent in that endeavor. Similarly, the institution must be able to assess the costs of punishment, both to the state budget and to third parties. Again, the judiciary seems ill-equipped for making this assessment.

A sentencing “commission” would seem to be a far better alternative. A properly constituted commission would be better

39. Such an approach has been the favored option of the ALI, in its recent Model Penal Code sentencing project. See AM. LAW INST., MODEL PENAL CODE: SENTENCING, TENTATIVE DRAFT NO.1 Sec. 6A.01 (Apr. 8, 2009) (recommending establishment of a sentencing commission).
able to assess both the public safety effects and the human costs of punishment. The key qualifier here is “properly constituted.” Whether a sentencing commission succeeds in this task depends on a host of additional factors, including the institution’s structure and staffing.

For example, if the sentencing commission is staffed by political appointees who have short terms and can be removed at will by the Governor, the commission will truly become a “junior varsity” legislature, sharing many of the flaws of the political branches of government in the sentencing sphere. Any truly effective sentencing commission must, in short, possess a significant degree of insulation from political pressures.

Various institutional mechanisms might be used to insulate the commission. As an example, a bipartisan state commission might be established to appoint commission members (just as many states have commissions to make recommendations for judgeships). Similarly, members might be appointed to serve long, staggered terms. And commission members might be equally divided between the political parties. The goal would be to create a relatively bipartisan, politically insulated institution dedicated to sentencing.

To ensure the commission would have access to the latest studies and reports, the institution should be staffed by experts in law, criminology, and related disciplines. This would enable the commission to stay up-to-date on current research regarding deterrence, recidivism risk for different offenders, and feasibility of rehabilitation. The goal would be to promote decisions based on empirical evidence, rather than the political whims of the public or the legislature. Moreover, since the institution would be an on-going entity, it would be able to make changes as circumstances change and as new information about the effects of sentencing practices comes to light.

Finally, certain additional institutional constraints might be useful in ensuring that the institution considers the relevant costs and benefits of punishment. For instance, the temptation will always exist to increase sentences, ignoring the long term costs of such initiatives. To counteract that tendency, it might make sense to adopt a kind of “pay-as-you-go” rule, which would allow increased

sentences only if funds for the costs of punishment are allocated (or off-setting cuts are made) at the same time.\textsuperscript{41}

Lastly, to help guide the commission in its deliberations, the legislature (or the commission itself) should identify an overriding purpose of its sentencing decisions and attempt to orient its practices to serve that purpose. Ideally, the legislature would adopt the promotion of social welfare as the overriding goal, rather than the retributive goals of "punishment" or "just deserts."\textsuperscript{42} An institution that sets clear goals can act more consistently and effectively in meeting those objectives and in communicating its underlying rationale.

So we can see the outlines of a sentencing system. The Determinate Sentencing Law and the Three Strikes law would be repealed and replaced by a more coherent and workable guided discretion system. A politically insulated commission would enact rules that would limit judicial discretion to some degree. And judges would retain a fair degree of discretion to take account of unusual circumstances. These changes taken together would, I am confident, make California's system fairer and more effective. It is a change long past due.

\textbf{IV. Looking Ahead}

What are the chances that a guideline approach of this sort might be implemented? Between 1984 and 2007, at least eight attempts were made to create a state sentencing commission.\textsuperscript{43} Influential think tanks, like the Little Hoover Commission, have given such efforts their full support. Nonetheless, none of the proposals have passed the legislature.

This past summer gave renewed hope to sentencing reformers. In June, a sentencing commission proposal passed the Assembly by a

\begin{itemize}
  \item \textsuperscript{41} Virginia adopted a similar sort of approach. See Daniel Wilhelm & Nicolas Turner, \textit{Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?} 10-11 (2002) \textit{available at} \textit{http://www.nacdl.org/sl_docs.nsf/issues/sentencingreform/$FILE/vera_jun02.pdf} (discussing how Virginia requires a “fiscal impact statement” for any bill resulting in an increase in sentences. A finance subcommittee “then determines if there is funding to support the bill. If not, the bill dies without reaching the floor for final consideration. . . . In short, if the sponsor cannot find the money to pay for the increased correctional burden, the bill cannot get to the floor for a vote.”).
  \item \textsuperscript{42} See generally Michael Marcus, \textit{Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1}, 30 AM. J. CRIM. L. 135 (2003) (arguing for the adoption of "crime reduction" as the primary purpose of sentencing systems).
  \item \textsuperscript{43} See LITTLE HOOVER COMM’N, \textit{supra} note 19, at 63-65; Dansky, \textit{supra} note 37, at 73.
\end{itemize}
vote of fifty to twenty-nine. However, the bill was short on details; it appeared to be a place-holder for a more detailed bill expected to emerge later.\footnote{The bill, in full, said: “There is hereby established an independent, multijurisdictional body to provide a nonpartisan forum for statewide policy development, information development, research, and planning concerning criminal sentences and their effects.” Assem. 1376, 2009-10 Leg., Reg. Sess. (Cal. 2009).} Subsequently, a more elaborate sentencing commission proposal was introduced into the Senate as part of a broader package of sentencing reforms.\footnote{The sentencing commission proposal was based on a proposal introduced by Assembly Member Arambula. Assem. 14, 2009-10 Leg., 3d Extra Sess. (Cal. 2009).} On August 20, 2009, that bill, including the sentencing commission proposal, passed the Senate by the slimmest of margins: twenty-one to nineteen.

The Senate-passed bill was then debated in the Assembly. Unfortunately, in the end, the Assembly gutted large parts of the reform package and eliminated the sentencing commission proposal. On October 11, 2009, the legislature approved a slimmed-down sentencing reform package that did not include the proposal to establish a sentencing commission.\footnote{See S. 18, 2009-10 Leg., 3d Extr. Sess. (Cal. 2009).}

Many viewed the defeat of the sentencing commission proposal to be a great loss for sentencing reform in California. At the same time, it is worth noting that the Senate-passed proposal was not a perfect bill. As noted earlier, political independence is one key requirement of an effective sentencing commission. However, the Senate-passed proposal endorsed a commission structure with strong links to the political process.

For instance, under the proposal, the Governor would have the authority to appoint eight of the thirteen commission members.\footnote{This was one of the features of the bill that the Governor mentioned when endorsing the proposal. Governor Schwarzenegger’s spokesman said the Governor supported this version “because it would allow him to appoint the members, would have a majority of public safety members, and ‘has teeth.’” Jack Chang, Sentencing Panel Sets off Alarms, SACRAMENTO BEE, Aug. 20, 2009, at 1A. The spokesman added: “It’s important that the commission would have real authority…. We’ve been debating this for two years. It’s time to act.” Id.} This feature alone raises questions about whether the sentencing commission would ultimately operate in a politically neutral and insulated manner. Similarly, the proposal did not require that the members be divided between the two parties, or that there be a “pay-as-you-go” feature of the proposal. Finally, the proposal appears to
adopt "just deserts" as the dominant purpose of punishment. 48 Public safety goals of rehabilitation, deterrence, and incapacitation are to be pursued only "when reasonably feasible." 49

Even with these flaws, the proposal would be a step forward for California. The state sentencing system is in such a sorry state that even a less than ideal guideline system would be an improvement. But with the slate now clean, the bar should be set higher. If the state legislature ever finds the courage to reform the current system, it should seize the moment to adopt a truly effective and carefully-calibrated guideline system with a commission insulated from political pressure. Whether the legislature or the Governor would ever seriously consider such a proposal is another matter entirely. But dreamers can dream, can’t they?

48. "The general purposes of rules . . . are the following: . . . In decisions affecting the sentencing or paroling of individual offenders, . . . [t]o render sentencing in all cases within a range of severity proportionate to the gravity of the offense, the harms done to the crime victims, and the blameworthiness of the offenders." Assem. 14, 2009-10 Leg., 3d Extr. Sess. (Cal. 2009).
49. Id. This language does not appear in the enacted Senate bill. See S. 18, 2009-10 Leg., 3d Extr. Sess. (Cal. 2009).