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Jay S. Albanese

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CONCERN ABOUT VARIATION IN CRIMINAL SENTENCES: A CYCLICAL HISTORY OF REFORM

JAY S. ALBANESE*

I. INTRODUCTION

Criminologists, policymakers, and the public have been very concerned about variation in criminal sentences during the last ten years. Whether arguing on grounds of fairness, leniency, severity, or justice, few people seem to be without opinions on the causes of, or solutions to, unwarranted disparity in criminal sentencing.¹ While states are scrambling to implement their own favorite remedies, it is interesting to know that the problem has been with us for quite some time. In fact, the search for "solutions" to the disparity problem has probably existed for as long as sentence lengths have been dependent upon judicial discretion.²

This Article traces the history of dissatisfaction with disparity³ in

* Assistant Professor, Department of Criminology and Criminal Justice, Niagara University. Ph.D., Rutgers University, 1981; M.A., Rutgers University, 1976; B.A. Niagara University, 1974. I am indebted to several colleagues and friends who provided both intellectual support and relief during the preparation of this manuscript. Richard F. Sparks, Bridget A. Stecher, Peggy L. Shelly, Julia Mueller, Carol Kenney, and Wilbur each played a role in its completion, although they might not agree with all of my conclusions. I am also indebted to a place, the luxurious Eliot Hotel, for providing a paranormal backdrop for some of this research. Most of the research for this paper was supported by a grant from the National Institute of Justice and was conducted at Rutgers University Criminal Justice Research Center in Newark, New Jersey. The views expressed here are not necessarily those of the Institute or the Research Center.

¹ See, e.g., M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); W. GAYLIN, *PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING* (1974); N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); *SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY* (M. Forest ed. 1982); *TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT* (1976); E. VAN DEN HAAG, *PUNISHING CRIMINALS* (1975); A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976).

² See C. BECCARIA, *ON CRIMES AND PUNISHMENTS* (H. Paolucci trans. 1963); C. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 285 (1980); *Judicial Discretion*, 11 *CENT. L.J.* 504 (1880); Kaufman, *Judicial Discretion*, 17 *AM. L. REV.* 546 (1883); Osborne, *The Establishment of Uniformity in Determining Punishments in Different Courts and Different Jurisdictions*, 7 *J. AM. INST. CRIM. L. & CRIMINOLOGY* 804 (1917).

³ It should be noted that the term "disparity" pervades the sentencing literature and is

sentencing during the first half of this century, as that dissatisfaction was manifested by a number of attempts to demonstrate empirically the existence of disparity and proposals to eliminate it. In addition, this Article notes how the same concerns have arisen twice during the last hundred years, resulting, during the 1940's, in the indeterminate sentencing system and, during the late 1970's and early 1980's, in widespread adoption of determinate sentencing.

II. EARLY EMPIRICAL EFFORTS

Although objections to the range of discretion exercised by judges in sentencing were made much earlier,⁴ it was not until the early 1900's that statistical evidence was compiled. In 1914, the Committee on Criminal Courts of the New York City Magistrate's Courts reviewed more than 155,000 cases disposed of in that year to determine the extent that judges' reputations for severe or lenient sentencing were reflected in their dispositions of cases. The results showed a dramatic variation in sentences given to apparently similar classes of cases.⁵

What was perhaps the earliest study containing a detailed statistical examination of sentencing variation was published in 1919.⁶ It analyzed sentencing data for the New York City Magistrate's Courts cases of 1916. There were forty-two judges in the magistrate's courts at that time who rotated at fifteen-day intervals among twenty-eight different

usually defined by a single phrase, such as "when like individuals, committing like offenses, are treated differently." See W. GAYLIN, *supra* note 1, at 3; A. VON HIRSCH, *supra* note 1, at 29. Such a definition is misleading in its simplicity. Do differences in the sentencing provisions of various state legal codes constitute disparity? Is it possible to separate legislatively produced disparity from judicial disparity? To what degree should judges be expected to sentence like offenders differently based upon community norms? These questions point to a distinction that must be made between legitimate disparity and illegitimate disparity. Disparity may have a legitimate role. Given two towns in the same state, one having one serious crime per year and the other having one serious crime per hour, two similar offenders, committing similar offenses, could receive widely different sentences within the judge's legal range of discretion (i.e., within the statutory minimum and maximum). Whether or not this constitutes legitimate or illegitimate disparity entirely depends upon: (1) whether regional interpretations of offense severity are legitimate, and (2) whether the statutory minimum and maximum provide an acceptable range within which a judge can exercise his discretion (i.e., not too wide or too narrow). This is a political, rather than empirical, issue and it will not be discussed further here. The remainder of this Article assumes "unwarranted disparity," however defined, when referring to disparity in criminal sentences.

⁴ For instance, Cesare Beccaria, writing in 1764, maintained that judges cannot determine punishment for another member of society because they do not have authority of legislators: "Only the laws can decree punishments for crimes; authority for this can reside only with the legislator who represents the entire society united by a social contract." C. BECCARIA, *supra* note 2, at 13.

⁵ COMMITTEE ON CRIMINAL COURTS, NEW YORK CITY MAGISTRATE'S COURT ANNUAL REPORT (1914).

⁶ Everson, *The Human Element in Justice*, 10 J. AM. INST. CRIM. L. & CRIMINOLOGY 90 (1919).

courts. This resulted in each magistrate presiding over a majority of the courts at one time or another during a given year. The study pointed out that under this rotation system "it can reasonably be assumed that each magistrate handles practically the same classes of cases as those handled by his colleagues."⁷ This study found wide disparity in the sentencing practices of different judges. For peddling without a license, one judge levied fines in all of his cases, while another levied fines in only ten percent of his and gave suspended sentences in the remainder. For disorderly conduct, one judge gave suspended sentences in just over two percent of his cases, and another gave suspended sentences in fifty percent of his cases. One judge gave workhouse sentences in eighty percent of his vagrancy cases, while another gave such sentences in only seventeen percent of his cases.⁸

The author of that study saw these variations in sentences as unalarming: "The magistrates are not to be condemned for this variation. . . . It is assumed that each magistrate is doing his duty as he sees it and is rendering his best service in disposing of cases brought before him."⁹ It is important to note that at the time of this study a city magistrate disposed of from fifty to 100 cases daily.¹⁰ Thus, "he must get the facts quickly and decide quickly."¹¹ This circumstance alone could lead to arbitrary sentencing simply because of the lack of information necessary to make a reasoned decision.¹² In addition, prior to 1914, a magistrate was not able to compare his work with that of his colleagues and, therefore, "his personal peculiarities were inclined to become accentuated."¹³ Although an important step, these revelations were but a distant precursor of contemporary sentencing reform.

In 1933, Gaudet, Harris and St. John conducted an important study of individual differences in sentencing tendencies among judges.¹⁴ From the records of one county in New Jersey, they selected 7,442 cases covering a period of nine years and a total of twenty-one different offenses.¹⁵ Six judges, who rotated among jurisdictions and were likely to

⁷ *Id.* at 91.

⁸ *Id.* at 97.

⁹ *Id.* at 98.

¹⁰ *Id.*

¹¹ *Id.*

¹² There is evidence that burdensome court caseloads have forced this high turnover to continue today. See W. GAYLIN, *supra* note 1, at 77; C. SILBERMAN, *supra* note 2, at 256.

¹³ Everson, *supra* note 6, at 98.

¹⁴ Gaudet, Harris & St. John, *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. AM. INST. CRIM. L. & CRIMINOLOGY 811 (1933).

¹⁵ The crimes were chosen because of their relatively high frequency. The crimes used were: larceny; larceny and robbery; breaking, entering, and receiving; breaking and entering; robbery; embezzlement; burglary; assault; assault and battery; battery and robbery; larceny from the person; assault and battery with intent to rob; violations of the Hobart Act

receive a similar mix of cases, were involved.

The study revealed a significant range in sentencing tendencies among the judges. The percentages of each judge's cases resulting in imprisonment ranged from thirty-four percent to fifty-eight percent; the imposition of suspended sentences ranged from sixteen percent to thirty-four percent.¹⁶ A secondary analysis conducted for the purposes of this Article confirms that the differences in incarceration rates among the judges are statistically significant.¹⁷

In 1940, the *Newark Evening News* conducted a study of sentence lengths in the Essex County (New Jersey) Court of Common Pleas.¹⁸ The analysis included 4,029 sentences of adult males imposed by four judges during three separate years.¹⁹ The results of this study indicate that, taking all cases as a group, there were "considerable differences" in the types of sentences imposed by the judges.²⁰ For example, the frequency of use of probation by each judge ranged from 29.6 to 40.5 percent; and commitments to the county jail were imposed 2.2 to 11.9 percent of the time, depending upon which judge imposed sentence.²¹

On the other hand, a second analysis, separating those defendants facing multiple charges from those having only one charge against them, showed "no striking differences" between the two judges compared.²² The study also compared these two judges in an analysis of their sentences for seven separate offenses. This comparison found that the relative frequencies of different types of punishment selected by the two judges for all of the seven offense categories were "not too

(New Jersey's prohibition law); adultery; rape; battery and rape; assault and battery with intent to rape; abuse; carnal abuse; and assault and battery with intent to abuse.

¹⁶ Gaudet, Harris & St. John, *supra* note 14, at 815. The study also found that the general sentencing tendencies of the judges did not greatly increase or decrease as they gained experience on the bench and that pending reappointments had no marked effect on the overall severity or leniency of sentences. Accordingly, the authors concluded that the past environment and heredity of the judge must be the factors that influence the severity of sentencing. *Id.* at 815-17.

¹⁷ $X = 355.1$, d.f. = 15, $p .001$. A reanalysis of Gaudet's finding that experience on the bench made no difference in judicial sentencing tendencies, however, shows that the data does not support his result. *See supra* note 16. The original study did not include tests for statistical significance, thereby permitting disparate results upon subsequent analysis ($X = 292.24$, d.f. = 4, $p .0001$). These findings negate Gaudet's explanation of the possible reasons for the existence of sentencing variation, but they do confirm the existence of variation to a significant degree.

¹⁸ Frankel, *The Offender and the Court: A Statistical Analysis of the Sentencing of Delinquents*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 448 (1940).

¹⁹ The three years were 1932, 1935, and 1939.

²⁰ Frankel, *supra* note 18, at 451.

²¹ *Id.*

²² *Id.* at 454. Only two judges were compared because they were the only ones "having a large enough number of cases to make the findings significant." *Id.* at 450.

dissimilar."²³

The authors did not test these latter comparisons for statistical significance, however. A secondary analysis, done as part of the research for this Article, shows that, for all seven offenses combined, there was a significant difference between the sentences chosen by each of the two judges.²⁴ The findings of this study, then, are in accord with those preceding it: there appears to have been significant variation among judges and jurisdictions even when sentencing similar types of cases.

These findings obtained additional support during this period from the federal government. The 1939 annual report of the United States Attorney General stated:

My studies of the disposition of criminal cases in the Federal courts have led me to the conclusion that there frequently occur wide disparities and great inequalities in sentence imposed in different districts, and even by different judges in the same district, for identical offenses involving similar states of facts.²⁵

In addition, the Committee on Sentencing, Probation, Prisons, and Parole of the American Bar Association also issued a report in 1939 discussing the findings of a United States Department of Justice nationwide study of the sentencing practices of federal judges. The report stated: "The sentencing records of many judges, as well as the judges' own statements concerning their sentencing practices, shows the presence of arbitrary variance and numerous highly subjective factors and personal biases in the imposing of sentence."²⁶

III. REFORM OF THE ITALIAN PENAL CODE

An important step in the evolution of sentencing reform occurred in Italy on September 14, 1919, when the Italian Minister of Justice nominated the Commission for the Reform of the Italian Penal Code. Enrico Ferri was named president of the Commission. Although the Commission originally included representatives from all the various "schools" of criminological thought, there were a number of resignations, and the final product—a proposed new Italian penal code—reflected Ferri's strong positivistic orientation.²⁷ Ferri believed that the primary focus in sentencing should be on the personal and social back-

²³ *Id.* at 454.

²⁴ $X = 293$, d.f. = 3, p .001.

²⁵ Holtzoff, *The Indeterminate Sentence: Its Social and Legal Implications*, 5 *FED. PROBATION* 3 (1941).

²⁶ Morse, *Report of the Committee on Sentencing, Probation, Prisons, and Parole*, 1939 A.B.A. SEC. CRIM. L. REP. 37, 38.

²⁷ E. FERRI, *REPORT AND PRELIMINARY PROJECT FOR AN ITALIAN PENAL CODE* (E. Betts trans. 1921). The new code was completed in 1921 but was never implemented by the Italian Parliament because of the post-World War I unrest that led to the Fascist revolution.

ground of the offender, rather than on the nature of the crime committed. That the new code would have this orientation was clear as early as Ferri's speech at the Commission's inauguration: "We shall try to bring the fulcrum of the law from the crime to the criminal."²⁸

Ferri felt that individualization of sentences by courts was not possible because judges could not make detailed studies of every offender. Accordingly, Ferri felt judges should have enough information to place the offender in the proper class, and then assign a sanction appropriate to that class.²⁹ For those incarcerated for indeterminate sentences, Ferri thought future revisions of the sentence would be the task of "permanent committees in which judges, prosecutors, defenders . . . and with them psychiatrists and anthropologists would examine periodically those committed, with the guarantee of publicity, to determine if the term should be prolonged or not."³⁰

The sentencing provisions in the revised Italian Penal Code emphasized "the principle of the dangerousness of the offender" as the fundamental criterion.³¹ This emphasis manifested itself in an elaborate guideline structure consisting of a list of circumstances that indicated greater or lesser dangerousness of the offender.³² The judges were to use

²⁸ Ferri, *The Nomination of a Commission for the Positivist Reform of the Italian Penal Code*, 11 J. AM. INST. CRIM. L. & CRIMINOLOGY 67, 75 (1920).

²⁹ E. FERRI, *supra* note 27, at ch. III. Ferri identified five classes of offender types: the born or instinctive criminal, the insane criminal, the passional criminal, the occasional criminal, and the habitual criminal.

³⁰ Sellin, *Pioneers in Criminology XV—Enrico Ferri (1856-1929)*, 48 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 481, 492 (1958) (citing *Il Congresso d'Antropologia Criminale a Ginevra*, in LA SCUOLA POSITIVA (Sept. 1896), reprinted in STUDI SULLA CRIMINALITA ED ATRI SAGGI 216, 229 (1901)).

³¹ E. FERRI, *supra* note 27, at 485.

³² *Id.* at ch. III, art. 21.

Circumstances which indicate a greater dangerousness in the offender:

- (1) Dissoluteness or dishonesty of prior personal, family or social life;
- (2) Prior judicial and penal record;
- (3) Abnormal organic and mental conditions before, during and after the offense, which do not constitute mental infirmity and which reveal criminal tendencies;
- (4) Precocity in committing a grave offense;
- (5) Having acted through ignoble or trivial motives;
- (6) Family and social relationship with the injured or damaged party;
- (7) Deliberate preparation of the offense;
- (8) Time, place, instruments, manner of execution, when these have rendered more difficult the defence by the injured or damaged party or indicate a greater moral insensibility in the offender;
- (9) The execution of the offense by means of ambush or stratagem or through the commission of other offenses or by abusing the aids of minors, the deficient, the unsound of mind, the alcoholic, or by employing the assistance of other offenders;
- (10) The execution of the offense during a public or private calamity or common danger;
- (11) Abuse of trust in public or private matters or malicious violation of special duties;
- (12) Execution of the offense on things confided to the public good faith or kept in public offices or destined for public utility, defence, or reverence;
- (13) Abuse of personal conditions of inferiority in the injured party or of circumstances unfavorable to him;

the guidelines in establishing the length and type of sentence.

When the guidelines indicating "conditions of dangerousness" are scrutinized, however, the arbitrariness of Ferri's system becomes apparent. Almost any situation would invoke a number of different "circumstances," each indicating a different level of "dangerousness." When this happened, the judge was supposed to "establish which [circumstances] are prevalent, in order to graduate the dangerousness of the accused and apply . . . the sanction best adopted to his personality."³³ This, however, simply asked the judge to rely on the same sort of unguided individual discretion to which Ferri objected. Moreover, Ferri's proposed code would have placed judges in the unenviable position of making scientific judgments about matters that are not necessarily subject to scientific assessment. For example, Ferri placed a great deal of credence in the unproven ability to accurately assess such "conditions of dangerousness," as the "abnormal organic or mental conditions . . . which do not constitute mental infirmity and which reveal criminal tendencies."³⁴

These faults notwithstanding, the revised Italian Penal Code was a pioneering attempt to elucidate a more specific sentencing system; many of Ferri's "circumstances of dangerousness" have been incorporated into American penal law as degrees of offenses or aggravation/mitigation.

(14) Having aggravated the consequences of the offense or having through the same act and not by mere accident damaged or injured more than one person, or having through one and the same crime violated various provisions of law, or the same provision of law at various times, by acts carrying out one and the same resolve;

(15) Blameworthy conduct after the offense towards the injured or damaged party or his relations, the person present at the time of the offense;

(16) In offenses by imprudence (negligency) having caused the damage in circumstances which made it very probable and easy to foresee.

[The following circumstances indicate] less dangerousness in the offender:

(1) Honesty or prior personal, family and social life;

(2) Having acted from excusable motives of public interest;

(3) Having acted in a state of excusable passion or of emotion through intense grief or favor or impulse of anger unjustly provoked by others;

(4) Having yielded to a special and transitory opportunity or to exceptional and excusable personal or family conditions;

(5) Having acted in a state of drunkenness or other form of intoxication not to be foreseen by the offender, through transitory conditions of health or through unknown material circumstances;

(6) Having acted through suggestion coming from a turbulent crowd;

(7) Having used, spontaneously and immediately after having committed the offense, all exertion to diminish the consequences or to make good the damage, even in part, if it be done with sacrifice of one's own economic condition;

(8) Having in repentance confessed the offense not yet discovered or before being interrogated by the judge, immediately after the offense.

Id.

³³ E. FERRI, *supra* note 27, at 546.

³⁴ *Id.* at ch. III, art. 21.

IV. GLUECK'S "RATIONAL PENAL CODE"

In 1928, Sheldon Glueck published "Principles of a Rational Penal Code,"³⁵ which put forth his conception of the proper orientation and structure of a penal code. Like Ferri, Glueck felt that the emphasis in sentencing should be on the offender, rather than on the crime. He called for treatment of the offender's shortcomings rather than punishment based solely upon the offense committed.³⁶ Glueck pointed out that the then-existing trend toward indeterminate sentences, in practice, had little effect on the traditional "mass-treatment" method of dealing with offenders, which focused on the crimes committed rather than on the offenders themselves.³⁷

Glueck went on to criticize accepted sentencing practices that were based on legislative prescription of penalties for various offenses: "Legislative prescription of detailed degrees of offenses is individualization of acts and not of human beings, and is, therefore, bound to be inefficient."³⁸ He maintained, however, that judicial individualization of offenders without "scientific facilities in aid of the court" is destined to "deteriorate into a mechanical process of application of certain rules of thumb or of implied or expressed prejudices."³⁹ Glueck's view represented an important move toward a more flexible sentencing approach inasmuch as he recognized that pre-existing sentencing guidelines can never anticipate the diversity of human circumstances, and that there must be a more scientific method for determining sentence lengths than mere application of arbitrary legislative rules.

Glueck also devoted much of his paper to a critique of Ferri's Italian Penal Code. In addition to criticizing the code's arbitrariness in selecting sentence lengths and types based upon preconceived conditions, Glueck felt that Ferri's one-dimensional emphasis on the dangerousness of the offender was both "unjust and unscientific" and "under-emphasize[d] the rehabilitative possibilities of the offender."⁴⁰ He pointed out that Ferri's criteria for what is dangerousness and less dangerousness permanently label the offender prior to any treatment he may receive. This forces the judge to sentence speculatively, a task better carried out by parole boards.

Glueck recommended the establishment of a "Socio-Penal Commission" (or "treatment board"), made up of social scientists, that would determine the type of treatment and duration best suited to each

³⁵ Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453 (1928).

³⁶ *Id.* at 465.

³⁷ *Id.*

³⁸ *Id.* at 467.

³⁹ *Id.*

⁴⁰ *Id.* at 469.

individual offender.⁴¹ Such a board, in Glueck's view, would provide a more truly indeterminate sentence in which the correctional process would be expressly aimed at the offender rather than the act. However, Glueck did not discuss the specific means by which this "treatment board" would decide on the proper sentence. Thus, in 1928, except for his references to the need for new and improved treatment methods, precisely what his alternative might be to the existing judicial discretion guided by legislative rules was unclear.

V. PERSPECTIVES OF SENTENCING CONCERN

The growing interest in sentencing reform during the 1930's and 1940's⁴² emanated from two perspectives. The first was increasing concern about sentence variation itself. Studies appeared that, for the first time, statistically documented the existence of wide sentence variation among judges and jurisdictions.⁴³ The second perspective, expressed by Ferri and Glueck, saw the need for sentence reform because of dissatisfaction with legislative rules that did not account for the treatment potential of offenders.⁴⁴

Both perspectives are closely linked to the then-existing trend toward indeterminate sentencing throughout the country. By 1941, approximately three-fourths of the states were operating indeterminate sentencing systems in one form or another,⁴⁵ and the Conference of Senior Circuit Judges had adopted a resolution favoring the adoption of an indeterminate sentencing law for the federal courts.⁴⁶ Among the arguments for a change to indeterminacy at the federal level was that the existence of an administrative board (parole board) to determine the actual period of imprisonment within the minimum and maximum set by the court would serve to make penalties more uniform: "The consequence necessarily emerges from the fact that a single board, or perhaps several boards, acting in close cooperation, determine the length of incarceration to which every prisoner would be subjected. In other words, all cases clear through the same channel."⁴⁷

⁴¹ *Id.* at 476.

⁴² See Glueck, *supra* note 35; Holtzoff, *supra* note 25; Morse, *supra* note 26.

⁴³ See Everson, *supra* note 6; Frankel, *supra* note 18; Gaudet, Harris & St. John, *supra* note 14; Holtzoff, *supra* note 25. The basis for this concern was fairness to offenders.

⁴⁴ See Ferri, *supra* note 28 and accompanying text; Glueck, *supra* note 35 and accompanying text; Sellin, *supra* note 30 and accompanying text.

⁴⁵ Holtzoff, *supra* note 25, at 5.

⁴⁶ *Id.* Indeterminate sentencing schemes allowed for the actual length of an offender's confinement to be determined by a parole board, usually quite some time after he began serving the sentence, rather than a more specific sentence set by a judge that characterizes determinate sentencing.

⁴⁷ Holtzoff, *supra* note 25, at 5.

Commentators also thought that this board would take the guesswork out of sentencing by reducing "arbitrary variance in the treatment of prisoners possessing similar case histories."⁴⁸ The parole board would make its judgments based on the offender's treatment potential and his rehabilitation while incarcerated. Thus, indeterminate sentencing was considered both an answer to wide sentencing variations and a recognition of the individualized treatment needs of each offender.⁴⁹

VI. THE CYCLICAL CONCERN FOR SENTENCING REFORM

The arguments used in support of indeterminacy are interesting for a number of reasons, not the least of which is the fact that these same arguments have been widely used during the 1970's and 1980's in support of determinate sentencing. In the 1950's and 1960's, questions began to emerge about whether the new sentencing system was achieving its goals,⁵⁰ much in the same way that questions arose about the old system in the 1930's and 1940's. The first question related to the ability of indeterminate sentencing to reduce wide variations in sentences. This provoked the development of a number of methods to reduce this variation, such as sentencing institutes, appellate review, sentencing councils, and sentencing guidelines⁵¹—none of which enjoyed a great deal of success.⁵²

The ultimate result has been a nationwide trend back toward determinacy. Between 1976 and 1982, forty-three states passed mandatory

⁴⁸ Morse, Kennedy & Ellis, *Comments on the Federal Indeterminate Sentence Bill*, 5 FED. PROBATION 23 (1941).

⁴⁹ *Id.* at 22-42. It should be noted, however, that of the academics, federal judges, and criminal justice officials who commented favorably on the bill in 1941, most saw indeterminacy primarily as a means of reducing disparity in sentences, rather than as a method of individualized treatment. *Id.*

⁵⁰ See NATIONAL PROBATION AND PAROLE ASSOCIATION, GUIDES FOR SENTENCING (1957); DeCosta, *Disparity and Inequality of Criminal Sentences: Constitutional and Legislative Approaches to Appellate Review and Reallocation of the Sentencing Function*, 14 HOW. L.J. 29 (1968); Doyle, *A Sentencing Council in Operation*, 25 FED. PROBATION 27 (1961); Remington & Newman, *The Highland Park Institute on Sentence Disparity*, 26 FED. PROBATION 3 (1962); Sharp, *The Pilot Institute on Sentencing*, 23 FED. PROBATION 9 (1959); Comment, *Criminal Procedure, Appealability of a Criminal Sentence—Sentence Modified on Appeal*, 16 RUTGERS L. REV. 186 (1961).

⁵¹ See *supra* note 50 and sources cited therein.

⁵² For reviews of the effectiveness of sentencing councils, see Hosner, *Group Procedures in Sentencing: A Decade of Practice*, 34 FED. PROBATION 18 (1970); Levin, *Toward a More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499 (1966). For an analysis of appellate review, see Labbe, *Appellate Review of Sentences: Penology at the Judicial Doorstep*, 68 J. CRIM. L. & CRIMINOLOGY 122 (1977); Comment, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960). For an assessment of sentencing guidelines, see R. Sparks, B. Stecher, J. Albanese & P. Shelly, *Stumbling Toward Justice: Some Overlooked Research and Policy Questions about Statewide Sentencing Guidelines* (March 31, 1982) (unpublished manuscript). For a general review, see von Hirsch & Albanese, *Problems with Abolishing Parole Release: The New York Case*, 15 CRIM. L. BULL. 416 (1979).

sentencing laws for certain crimes and nine states adopted determinate sentencing systems.⁵³ Although these changes were attributable, in part, to dissatisfaction with the rehabilitative ideal,⁵⁴ they were primarily due to the lack of success of the many methods introduced to curb unwarranted variation in sentences.⁵⁵ This concern about variation in sentences is precisely the same as that expressed in the 1930's and 1940's with respect to determinate sentencing. In both instances, existing sentencing practice was criticized for its lack of uniformity and unfairness to offenders. For example, in 1941 George Vold argued in support of indeterminacy that "[t]he essential purpose of providing protection for society against the criminal is in fact facilitated by the generally greater consistency in operation of a single agency as compared with the variety of conflicting views represented in sentences imposed by a number of individual judges."⁵⁶ In comparison, Andrew von Hirsch, arguing for determinate sentencing in 1976, stated: "The most obvious drawback of allowing wide-open discretion in the name of 'individualization' is the disparity it permits. Judges whose sentencing decisions are unchecked by general standards are free to decide similar cases differently."⁵⁷

VII. CONCLUSION

Much of the recent debate concerning determinate and indeterminate sentencing has focused on philosophies of sentencing: rehabilitation, desert, incapacitation, and deterrence. A review of the history of the determinate/indeterminate debate, however, shows that the advo-

⁵³ J. GALVIN, *SETTING PRISON TERMS* (1983); von Hirsch & Hanrahan, *Determinate Penalty Systems in America: An Overview*, 27 *CRIME & DELINQ.* 289 (1981).

⁵⁴ In other words, these changes were attributable in part to the failure of the correctional system to rehabilitate offenders and to know when or how an individual might be rehabilitated. See *supra* note 1. Much of the recent sentencing debate has focused on what the purposes of sentencing should be, if not rehabilitation: desert, see von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 *MINN. L. REV.* 591 (1981); incapacitation, see P. GREENWOOD & A. ABRAHAMSE, *SELECTIVE INCAPACITATION* (1982); or deterrence, see van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 *RUTGERS L. REV.* 706 (1981).

⁵⁵ See *supra* note 52 and studies cited therein.

⁵⁶ Morse, Kennedy & Ellis, *supra* note 48, at 39.

⁵⁷ A. VON HIRSCH, *supra* note 1, at 29 (footnote omitted). Compare Morse, Kennedy & Ellis, *supra* note 48, at 28, 41 with M. FRANKEL, *supra* note 1, at 39-52 and W. GAYLIN, *supra* note 1, at 165. Although determinate and mandatory sentences ignore some lessons of history in producing massive increases in prison populations but decreases in arrests, indictments, and convictions, disillusionment with sentence disparity and rehabilitation appears to carry a stronger message than does the historical record. See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE* (1977); Gatz & Vito, *The Use of the Determinate Sentence—An Historical Perspective: A Research Note*, 10 *J. CRIM. JUST.* 323 (1982); Petersilia & Greenwood, *Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations*, 69 *J. CRIM. L. & CRIMINOLOGY* 604 (1978); Rossman, Froyd, Pierce, McDevit & Bowers, *Massachusetts Mandatory Minimum Gun Law: Enforcement, Prosecution, and Defense Impact*, 16 *CRIM. L. BULL.* 150 (1980).

cates of both methods share a common interest in eliminating unwarranted disparity. Viewed in this way, changing philosophies of sentencing may simply be a reflection of the most recent trend in our cyclical concern about variation in criminal sentences.