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Fixing California Sentencing Law--The Problem with Piecemeal Reform

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Code Sections Affected

Penal Code §§ 1170, 1170.3 (new, amended, and repealed).
SB 40 (Romero); 2007 STAT. Ch. 3 (*Effective March 30, 2007*).

I. INTRODUCTION

On January 22, 2007, the U.S. Supreme Court in *Cunningham v. California* held California's determinate sentencing law unconstitutional.[1] The law violated the defendant's Sixth Amendment right to a jury trial because the law authorized a judge—rather than a jury—to find facts that potentially warranted an increased term.[2] The Court presented California two options with which to remedy its sentencing system.[3] The first option would allow juries to find the facts on which to base an upper sentencing term, and the second option would increase the discretion of the judges to select an appropriate sentencing term.[4]

Prison reform advocates found that the *Cunningham* ruling provided a rare opportunity for thoughtful and effective long-term sentencing reform.[5] California's legislature, however, recognized that without a constitutional sentencing structure in place, chaos would quickly consume the courts.[6] Thus, the Legislature hastily complied with *Cunningham* in Chapter 3 by increasing judicial discretion, but did not address long-term prison reform.[7] One might ask whether a prudent response is just as important as a prompt one.[8]

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1. Cunningham v. California, 127 S. Ct. 856, 871 (2007).

2. *Id.* ("Because the [determinate sentencing law] authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent.").

3. *Id.* ("California may follow the paths taken by its sister States or otherwise alter its system, so long as the State observes Sixth Amendment limitations declared in this Court's decisions.").

4. *See id.* (noting that in response to the newly developing Sixth Amendment case law, states have either required juries to determine any fact that may be used to increase a sentence or granted judges the broad discretion to determine a sentence within a defined statutory range).

5. B. Cayenne Bird, *SB40 Is Not a Prison Sentencing Fix Kill this Bill Now!*, AM. CHRON., Mar. 21, 2007, http://www.americanchronicle.com/articles/viewArticle.asp?articleID=22554 [hereinafter Bird, *Kill this Bill*] (on file with the *McGeorge Law Review*) ("The Supreme Court ruling was a rare ray of hope to everyone whose lives have been devastated under this harshness."); *see also* STANFORD CRIMINAL JUSTICE CTR., CALIFORNIA SENTENCING AND CORRECTIONS: SIGNIFICANT ISSUES 6 (2007), http://www.pewpublicsafety.org/pdfs/CA%20Sentencing%20Issues.pdf [hereinafter SIGNIFICANT ISSUES] (on file with the *McGeorge Law Review*) ("[S]ome argue that to ensure long-term improvements in the California corrections system, the Legislature must reconceive its entire scheme of sentencing statutes.").

6. *See* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 40, at 5 (Mar. 26, 2007) (noting that until there is time for a thorough revision of California sentencing law "this bill would bring desperately needed stability to a court system that has been thrown into chaos by the *Cunningham* decision").

7. *See* 2007 Cal. Stat. ch. 3, § 1 (stating the limited intent of the statute as an answer to *Cunningham* but

II. LEGAL BACKGROUND

A. *California's Past Sentencing Law*

Prior to 1976, California operated under indeterminate sentencing, a sentencing philosophy driven by rehabilitation.[9] Judges had the "discretion to impose sentences within broadly defined ranges,"[10] which essentially set a statutory maximum term of confinement.[11] The parole board, however, had the discretion to permit an inmate's early release.[12] Policymakers condemned California's indeterminate sentencing system because it "lack[ed] uniformity, proportionality, and transparency, and . . . unrealistically promot[ed] rehabilitation as [its] primary goal."[13]

In 1976, the California Legislature enacted the Determinate Sentencing Act (DSA) in response to the perceived failure of rehabilitation and lack of uniformity of indeterminate sentencing.[14] The DSA described the purpose of California's new sentencing scheme as punishment rather than rehabilitation.[15] The DSA increased uniformity in sentencing structure by "limit[ing] [the] range of sentencing options for each offense"[16] and by abolishing discretionary parole release.[17] Different crimes were divided into prescribed categories, each category

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not as sentencing reform); *see also* Bird, *Kill this Bill*, *supra* note 5 (criticizing Senator Romero for responding only to *Cunningham* and not long-term prison reform).

8. *See* Letter from Jeff Adachi, Public Defender, City & County of S.F., to Assembly Member Mark Leno, Cal. State Assembly (Mar. 20, 2007), *in* Bird, *Kill this Bill*, *supra* note 5 [hereinafter Letter from Adachi to Leno] (on file with the *McGeorge Law Review*) ("[I]t is also imperative that the state of California chooses that resolution wisely and with great care.").

9. Kara Dansky, *Why California Needs a Sentencing Commission*, Jan. 22, 2007, http://www.californiaprogressreport.com/2007/01/why_california.html (on file with the *McGeorge Law Review*).

10. *Id.*; *see, e.g.*, *In re* Lynch, 8 Cal. 3d 410, 413, 503 P.2d 921, 922 (1972) (citing the relevant indeterminate sentence as one year to life for a second offense of indecent exposure).

11. JOSHUA WEINSTEIN, SENTENCING IN CALIFORNIA: WRITTEN TESTIMONY FOR THE LITTLE HOOVER COMMISSION 5 (2006), http://www.lhc.ca.gov/lhcdir/sentencing/WeinsteinJune06.pdf (on file with the *McGeorge Law Review*) ("[T]he statutory maximum, . . . in most cases, meant a life sentence.").

12. Dansky, *supra* note 9.

13. *Id.*

14. *Id.*; LITTLE HOOVER COMM'N, PUTTING VIOLENCE BEHIND BARS: REDEFINING THE ROLE OF CALIFORNIA'S PRISONS (1994), http://www.lhc.ca.gov/lhcdir/124rp.html [hereinafter BEHIND BARS] (on file with the *McGeorge Law Review*).

15. Dansky, *supra* note 9; BEHIND BARS, *supra* note 14.

16. People v. Black, 35 Cal. 4th 1238, 1246, 113 P.3d 534, 537 (2005). Judges, however, still retained some discretion under this system. *See* CALIFORNIA JUDGES BENCHBOOK: CRIMINAL POSTTRIAL PROCEEDINGS § 2.11 (1991).

> Under the determinate sentencing law, the judge retains discretion to: (1) grant or deny probation to an eligible defendant, (2) choose a base term from among the three specified alternate terms, (3) choose a term for some enhancements from among three specified terms, (4) strike additional punishment for most enhancements, and (5) determine whether sentences will run concurrently or consecutively (except when consecutive sentences are mandated by statute).

Id.

17. Dansky, *supra* note 9.

with its own lower, middle, and upper sentencing term.[18] Under the DSA, a determinate sentence consisted of a base term,[19] plus conduct enhancements,[20] and status enhancements.[21]

California's Rules of Court articulated the application of determinate sentencing law, which further promoted the sentencing scheme's uniformity.[22] Before Chapter 3 was passed, California law presumptively imposed the middle term for a convicted defendant unless aggravating or mitigating factors[23] justified imposition of the upper or lower term.[24] The Rules of Court identified those factors and how a judge could use them to determine an appropriate term.[25] During a trial's sentencing phase, the defense and prosecution could establish any mitigating or aggravating factors by a preponderance of the evidence.[26] The judge would balance those factors and would depart from the presumptive term when warranted.[27]

B. Supreme Court Sentencing Precedent and Sixth Amendment Jurisprudence

California's determinate sentencing scheme operated for nearly three decades;[28] nonetheless, the Supreme Court's decision in *Cunningham* was not

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18. *Id.* This group of sentencing terms is known as a "triad." *Id.*

19. The base term of a determinate sentence is the lower, middle, or upper term of the sentencing triad. WEINSTEIN, *supra* note 11, at 3 (referring to the mitigated term, the middle term, and the aggregated term).

20. *Id.* ("Conduct enhancements relate to the way the crime was committed.").

21. *Id.* ("Status enhancements are imposed based on the history or position of the defendant at the time the crime was committed.").

22. People v. Black, 35 Cal. 4th 1238, 1247, 113 P.3d 534, 538 (2005).

23. "Circumstances in mitigation" include factors that relate to both the crime and the defendant. CAL. R. CT. 4.423. Examples of mitigating factors that relate to the crime include that the defendant only passively participated or was exceedingly cautious in executing the crime, or the victim willingly participated in or initiated the incident. CAL. R. CT. 4.423(a). Examples of mitigating factors that relate to the defendant include the lack of a criminal record, a mental or physical condition that reduced culpability, or early and voluntary admission of wrongdoing. CAL. R. CT. 4.423(b). "Circumstances in aggravation" also include factors that relate to both the crime and the defendant. CAL. R. CT. 4.421. Two examples of aggravating factors that relate to the crime are that the crime was particularly cruel, vicious, callous, or violent, or that the defendant took advantage of a particularly vulnerable victim. CAL. R. CT. 4.421(a). Two examples of aggravating factors that relate to the defendant are a prior conviction or violent conduct indicating a danger to society. CAL. R. CT. 4.421(b).

24. *See* CAL. R. CT. 4.420(a) ("The middle term must be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.").

25. *Black*, 35 Cal. 4th at 1247, 113 P.3d at 538.

26. CAL. R. CT. 4.420(b) (amended May 23, 2007).

27. *Id.* ("The relevant facts [in aggravating or mitigating circumstances] are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing."); *see also* CAL. R. CT. 4.420(c) (stating that a fact may not be charged and used as both an enhancement and a reason to impose the upper term); CAL. R. CT. 4.420(d) ("A fact that is an element of the crime may not be used to impose the upper term.").

28. *See Black*, 35 Cal. 4th at 1246, 113 P.3d at 537 ("California's determinate sentencing law became operative on July 1, 1977, replacing the prior system under which most offenses carried an indeterminate sentence."); 2007 Cal. Stat. ch. 3 (stating that Chapter 3 was signed into law and filed on Mar. 30, 2007).

wholly unexpected.[29] The Court viewed the Sixth Amendment's guarantee of a jury trial to mean not only that the defendant has a right to present his or her case to a jury, but also that the jury has a right to determine the aggravating circumstance that justify a higher sentence.[30] In 2000, the Court articulated this view in a new line of cases in Sixth Amendment jurisprudence.[31]

The first of these cases was *Apprendi v. New Jersey*.[32] In *Apprendi*, the defendant pled guilty to two weapons charges that would have resulted in a ten-year maximum sentence.[33] The judge, however, sentenced the defendant to twelve years after determining the existence of a hate-crime enhancement by a preponderance of the evidence.[34] The Court in *Apprendi* held that New Jersey's determinate sentencing law, which permitted the two-year increase, violated the defendant's Sixth Amendment right: "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[35]

Blakely v. Washington further developed this rule to define the statutory maximum as the highest sentence that the defendant could receive based solely on the jury's verdict or the defendant's guilty plea.[36] In *Blakely*, the defendant pled guilty to second degree kidnapping—with a presumptive term of forty-nine to fifty-three months[37]—but was sentenced to a ninety-month term after the judge found evidence of deliberate cruelty.[38] The Court held that the presumptive term, rather than the maximum term set by the Washington Criminal Code, was the statutory maximum.[39]

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29. *See* Vikram David Amar, *The Supreme Court Invalidates California's "Determinate Sentencing" Law: Part One in a Two-Part Series on Yet More Cases Involving Judicial Factfinding in Sentencing*, Feb. 2, 2007, http://writ.lp.findlaw.com/amar/20070202.html (on file with the *McGeorge Law Review*) (stating that *Cunningham* is only one case in the Supreme Court's "growing list of Sixth Amendment cases involving – and invalidating – certain state and federal sentencing schemes"); John Silva, Comment, Blakely v. Washington: *What do Past Cases Mean for California's Use of Enhancements and Aggravating Circumstances at Sentencing?*, 32 W. ST. U. L. REV. 227, 241 (2005) ("In light of Blakely, California will be forced to make . . . changes to their determinate sentencing guidelines . . . .").

30. Amar, *supra* note 29.

31. MODEL PENAL CODE: SENTENCING 3 (Preliminary Draft No. 4, 2005) [hereinafter MPC SENTENCING].

32. Apprendi v. New Jersey, 530 U.S. 466 (2000).

33. *Id.* at 469-70.

34. *Id.* at 471.

35. *Id.* at 490.

36. Blakely v. Washington, 542 U.S. 296, 303-04 (2004) ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* . . . . [T]he relevant 'statutory maximum' . . . [is] the maximum [the judge] may impose *without* any additional findings." (citations omitted)).

37. *Id.* at 299.

38. *Id.* at 298.

39. *Id.* at 303-04 ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.").

In *United States v. Booker*,[40] the Supreme Court applied its Sixth Amendment analysis to the mandatory Federal Sentencing Guidelines to clarify[41] whether *Blakely* applied to the Guidelines.[42] In a complicated decision, the Court issued two opinions—each supported by a five-to-four majority.[43] First, Justice Stevens presented the "merits opinion,"[44] which held the Guidelines unconstitutional because of the judicial fact-finding used to justify an aggravated sentence.[45] This result—the application of the *Blakely* analysis to the Guidelines—was expected.[46] Justice Breyer delivered the unexpected "remedial opinion,"[47] which made the Guidelines advisory.[48] The Justices agreed that advisory guidelines did not violate

40. United States v. Booker, 543 U.S. 220, 229-43 (2005).

41. Federal courts needed clarification as to whether *Blakely* applied to the Federal Sentencing Guidelines because, while new sentencing hearings poured into federal courts, a circuit-split emerged. *See, e.g.*, United States v. Penaranda, 375 F.3d 238, 247 (2d Cir. 2004) (certifying to the Supreme Court the question of whether to apply *Blakely* to the Federal Sentencing Guidelines because the "various attempts to implement *Blakely* ultimately may prove misguided—or even wholly unnecessary [and] while these judicial approaches are being litigated, defendants, victims, and the public will be left uncertain as to what sentences are lawful"); United States v. Pineiro, 377 F.3d 464, 473 (5th Cir. 2004) (determining that *Blakely* did not apply to the Federal Sentencing Guidelines, but acknowledging the likelihood that "the question presented in cases like this one will soon receive a more definitive answer from the Supreme Court, which can resolve the current state of flux and uncertainty"); United States v. Booker, 375 F.3d 508, 513 (7th Cir. 2004) (determining that the Federal Sentencing Guidelines "violate the Sixth Amendment as interpreted by *Blakely*" while explicitly acknowledging that the "Supreme Court [may] speedily reverse").

42. *Booker*, 543 U.S. at 243. The *Blakely* opinion acknowledged that amicus curiae United States noted the differences between Washington's sentencing scheme and the Federal Sentencing Guidelines, but expressly stated that whether those differences were constitutionally significant was not an issue before the Court. *Blakely*, 542 U.S. at 305 n.9.

43. *Booker*, 543 U.S. at 226 (Stevens, Scalia, Souter, Thomas, Ginsburg); *id.* at 244 (Breyer, Rehnquist, O'Connor, Kennedy, Ginsburg); MPC SENTENCING, *supra* note 31, at 10 ("Remarkably, only Justice Ginsburg joined both majorities. Eight Members of the Court were in sharp disagreement with one or another of the Court's major rulings.").

44. MPC SENTENCING, *supra* note 31, at 11.

45. *Booker*, 543 U.S. at 243 ("All of the foregoing support our conclusion that our holding in *Blakely* applies to the Sentencing Guidelines."); *see also* Amar, *supra* note 29 ("[A]pplication of the Guidelines often requires just the type of fact findings that *Blakely* held are unconstitutional: sentence-lengthening judge-made fact findings. These judge-found facts (such as how much money was stolen, how many drugs were possessed, etc.), combined with facts found by the jury or implicit in the guilty plea, determined which Guidelines sentencing range (for example, [twenty to thirty] months) controlled each particular case.").

46. *See* MPC SENTENCING, *supra* note 31, at 11 ("The merits opinion, for the most part, rehearsed the reasoning of *Blakely* and produced a constitutional ruling that was anticipated by most observers.").

47. *Id.* at 11.

48. *Booker*, 543 U.S. at 245 ("We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory incompatible with today's constitutional holding. . . . So modified, the federal sentencing statute, as amended, makes the Guidelines effectively advisory." (citations omitted)); *see also* Amar, *supra* note 29 ("In lieu of mandatory Guidelines, the Court stated, the Guideline ranges would now operate as advisory only. U.S. district judges would still be required to calculate sentencing ranges based on jury and judge-made factual findings, but would no longer be bound to impose a sentence in that range. Instead, the Court held, the district judge's sentence must simply fall between the minimum and maximum set out by Congress in the particular criminal statute, and should be upheld on appellate review so long as it is 'reasonable.'").

defendants' Sixth Amendment right to a jury trial, although the judge rather than the jury decided whether to impose an aggravated sentence.[49]

In sum, the Supreme Court's Sixth Amendment jurisprudence opposes the use of presumptive terms that judicial fact-finding can overcome.[50] Yet the Sixth Amendment permits indeterminate sentencing systems that give judges nearly unlimited sentencing discretion within broad statutory ranges.[51] Those two ideas are reconciled through the concept of exposure: if a judge can increase a presumptive term, a defendant is exposed to an unknown maximum sentence, while if a judge only has discretion to sentence within a predetermined range, a defendant is exposed to a known maximum sentence. The idea of exposure also explains why it is theoretically possible "to require a sentence in the aggravated range . . . unless the trial court finds the *absence* of aggravating circumstances," because a jury determination is not constitutionally required if the sentence is mitigated.[52]

In 2005, the defendant in *People v. Black* challenged California's sentencing scheme in light of the U.S. Supreme Court's new Sixth Amendment jurisprudence.[53] In *Black*, however, the California Supreme Court held that judicial fact-finding to justify an upper term did not violate the Sixth Amendment.[54] The court denied *Blakely*'s applicability to California's existing presumptive sentencing scheme,[55] emphasizing the scheme's flexibility.[56] The U.S. Supreme Court disagreed.[57]

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49. MPC SENTENCING, *supra* note 31, at 12 ("What *Booker I* [the merits opinion] bestowed under the auspices of the Sixth Amendment, *Booker II* [the remedial opinion] took completely away.").

50. *Id.* at 17.

51. *Id.*

52. *Id.* at 15 ("No jury determination is constitutionally necessary if [fact-finding] drive[s] punishment downward rather than upward.").

53. *See* People v. Black, 35 Cal. 4th 1238, 1246, 113 P.3d 534, 537 (2005) ("We granted review to determine the effect of *Blakely* on the validity of the trial court's decisions to impose the upper term sentence . . . .").

54. *Id.* at 1244, 113 P.3d at 536.

55. *Id.* at 1254, 113 P.3d at 543 ("[A] trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*, *Blakely*, and *Booker*.").

56. *Id.* at 1255, 113 P.3d at 543-44.

> Under the California scheme, a judge is free to base an upper term sentence on any aggravating factor that the judge deems significant, subject to specific prohibitions . . . . The judge's discretion to identify aggravating factors in a case is guided by the requirement that they be "reasonably related to the decision being made." Thus, section 1170, subdivision (b)'s requirement that the middle term be imposed unless an aggravating factor is found preserves the traditional broad range of judicial sentencing discretion. Although subdivision (b) is worded in mandatory language, the requirement that an aggravating factor exist is merely a requirement that the decision to impose the upper term be *reasonable*.

Id. (citation omitted).

57. Cunningham v. California, 127 S. Ct. 856, 871 (2007) ("Contrary to the *Black* court's holding, our decisions from *Apprendi* to *Booker* point to the middle term specified in California's statutes, not the upper term, as the relevant statutory maximum.").

C. Cunningham v. California

In *Cunningham v. California*, the U.S. Supreme Court held California's sentencing scheme nearly indistinguishable from the sentencing schemes invalidated in *Blakely* and *Booker*.[58] When the jury in *Cunningham* found the defendant guilty of continuous sexual abuse against a minor—a conviction that would have resulted in a presumptive twelve-year term—the judge found aggravating facts by a preponderance of the evidence and imposed a sixteen-year term.[59] Just as in *Blakely*, the Court held that the presumptive term was the relevant statutory maximum.[60] Thus, California's determinate sentencing law violated a defendant's Sixth Amendment right because aggravating facts that potentially warranted an increased sentence were "found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt."[61]

III. CHAPTER 3

Chapter 3 is California's response to the U.S. Supreme Court's decision in *Cunningham v. California*.[62] The statute took effect immediately in March 2007 as an urgency measure,[63] and is designed to stabilize California's criminal justice system while the Legislature reviews California's sentencing structure.[64]

Chapter 3 aims to comply with the Sixth Amendment[65] by deleting the language in California's determinate sentencing law that directed courts to impose the middle term absent aggravating or mitigating factors.[66] Judicial discretion to choose the appropriate term—lower, middle, or upper[67]—replaced the presumptive imposition of the middle term of imprisonment.[68] The decision is left entirely to the judge's discretion and is not dependent upon the establishment

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58. *Id.* at 858.

59. *Id.* at 860.

60. *Id.* at 868.

61. *Id.*

62. 2007 Cal. Stat. ch. 3, § 1.

63. Kenneth Ofgang, *Governor Approves Changes to California Sentencing Law*, METRO. NEWS-ENTER. (Los Angeles, Cal.), Apr. 2, 2007, http://www.november.org/stayinfo/breaking07/SB40.html (on file with the *McGeorge Law Review*) (describing SB 40 as a "bill, which takes effect immediately as an urgency measure"); 2007 Cal. Stat. ch. 3 ("Approved by Governor March 30, 2007. Filed with Secretary of State March 30, 2007.").

64. 2007 Cal. Stat. ch. 3, §1.

65. SIGNIFICANT ISSUES, *supra* note 5, at 2.

66. *See* CAL. PENAL CODE § 1170(b) (amended by Chapter 3) ("When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court.").

67. *Id.* § 1170.3(a)(2) (enacted and amended by Chapter 3).

68. *Id.* § 1170(b) (amended by Chapter 3) (further stating that the interests of justice drive the courts' discretion).

of any specific standard of proof.[69] However, the judge must state a reason for his or her sentencing decision.[70]

An additional feature of Chapter 3 monitors the effects of the new advisory sentencing policy on convicted felons.[71] Biannually, beginning in July 2007, the California Department of Corrections and Rehabilitation (CDCR) must update its website with current information on the number of felons sentenced to the upper term.[72]

The California Judicial Council is responsible for advising the Legislature, on or before January 1, 2008, of the effect and consequences of Chapter 3's implementation.[73] This includes, but is not limited to, a revision of California's Rules of Court.[74] Chapter 3 also contains a sunset provision,[75] meaning without further legislative action to extend it, Chapter 3 remains in effect only until January 1, 2009.[76]

IV. ANALYSIS OF CHAPTER 3

California's options for responding to *Cunningham* were limited: the Legislature had to either give the fact-finding role in the determinate system to the jury or increase judicial discretion.[77] According to Chapter 3's author, the bill did little more than codify the second option[78] by raising the statutory maximum from the presumptive middle term to the upper term.[79] Chapter 3 increases

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69. *Id.* (amended by Chapter 3).

70. *Id.* § 1170(c) (amended by Chapter 3).

71. 2007 Cal. Stat. ch. 3, § 6(a). The first report, released July 2007, contained annual data as of June 30, 2007. CAL. DEP'T OF CORR. & REHAB., NUMBER OF FELONS ADMISSION WITH A FLAG FOR THOSE WHO RECEIVED AT LEAST ONE UPPER TERM SENTENCE WHOSE ADMISSION TO ADULT CDCR WAS WITHIN THE CALENDAR YEAR 2007, at 1 (2007), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/UpperTerm/UpperTermd0706.pdf [hereinafter CDCR REPORT] (on file with the *McGeorge Law Review*). The chart broke down by gender the felon admissions with and without an upper term. *Id.* Of the 4,045 female felon admissions, 367 (nine percent) were admitted with an upper term. *Id.* Of the 30,345 male felon admissions, 3,426 (11.3 percent) were admitted with an upper term. *Id.* Cumulatively, of the 34,390 felon admissions, 3,793 (eleven percent) were admitted with an upper term. *Id.*

72. 2007 Cal. Stat. ch. 3, § 6. Presumably, the Legislature wanted to track whether there is actually a correlation between an increase in judicial discretion and an increase in disparity of sentences by tracking the number of upper term sentences imposed.

73. *Id.* § 6(b).

74. *Id.*; *see, e.g.*, CAL. R. CT. 4.420 (amended May 23, 2007) (updating California's Rules of Court to reflect the new sentencing law under Chapter 3 rather than the past law declared unconstitutional under *Cunningham*).

75. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 40, at 6 (Mar. 27, 2007).

76. CAL. PENAL CODE §§ 1170(h), 1170.3(c) (enacted by Chapter 3).

77. Cunningham v. California, 127 S. Ct. 856, 871 (2007) (presenting California with two options to make its sentencing scheme constitutional: (1) require juries to find any fact used to increase a sentence from the presumptive term, or (2) increase the judge's discretion to determine an appropriate sentence from a statutory range).

78. *Id.*

79. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 40, at 5 (Mar. 26, 2007).

judicial discretion by removing the requirement that judges rely on additional findings before altering a sentence.[80] Not everyone felt the second option was the correct one—a small but vocal opposition found California's legislative remedy ineffective and possibly unconstitutional.[81]

A. Why Not Codify the First Option?

It was not a foregone conclusion that California would remedy its sentencing scheme with increased judicial discretion.[82] Post-*Blakely*, states with presumptive sentencing guidelines favored the first option—allowing the trial jury or a bifurcated jury[83] to determine any aggravating sentencing factors beyond a reasonable doubt.[84] This approach, pioneered by the Kansas Legislature in 2002, is known as "'Blakelyization.'"[85] Blakelyization attracts states where non-jury proceedings impose the majority of sentences.[86] For such states, Blakelyization is cost effective because the additional jury requirement applies to so few cases.[87] According to the American Law Institute, this approach "should be the preferred option among jurisdictions that have realized important gains through the implementation of sentencing reforms."[88]

As of 2005, only one state decided against Blakelyization—Tennessee.[89] California followed Tennessee's lead.[90] Chapter 3's author opposed Blakelyization because the issue of whether a bifurcated jury would be required

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80. *Id.*

81. Jeff Adachi, SB 40 Will Not "Fix" California's Sentencing Scheme and is Unconstitutional, Mar. 26, 2007, http://www.californiaprogressreport.com/2007/03/sb_40_will_not.html [hereinafter Adachi, SB 40 Will Not "Fix"] (on file with the *McGeorge Law Review*).

82. *See, e.g.*, Silva, *supra* note 29, at 241 (listing other possible remedies to a Sixth Amendment violation: holding a single jury trial or a bifurcated jury trial to determine aggravating factors, or imposing the same penalty on every defendant convicted of an offense regardless of aggravating or mitigating circumstances).

83. A bifurcated trial contains two phases: a guilt phase and a sentencing phase. *Id.*

84. MPC SENTENCING, *supra* note 31, at 20.

85. *Id.* at 20. The approach worked well in Kansas. *Id.* at 20-21. The state did not experience significant disruption because such a small percentage of cases went to trial and the new procedures did not require very much additional time. *Id.* at 20-21 n.65.

86. *Id.* at 21 ("The attraction of Blakelyization is greatest in jurisdictions that anticipate they will not have to make use of jury sentencing proceedings very often.").

87. *Id.* at 21-22; *see also* Blakely v. Washington, 542 U.S. 296, 337 (2004) (Breyer, J., dissenting) ("The Court can announce that the Constitution requires at least two jury trials for each criminal defendant–one for guilt, another for sentencing–but only because it knows full well that more than [ninety percent] of defendants will not go to trial even once, much less insist on two or more trials.").

88. MPC SENTENCING, *supra* note 31, at 22.

89. *Id.* at 24 (stating that Tennessee chose Bookerization rather than Blakelyization when it "jettison[ed] formerly presumptive guidelines in favor of an advisory system in order to bypass Sixth Amendment requirements at sentencing").

90. *See infra* Part IV.B (describing that California selected Bookerization over Blakelyization as a Sixth Amendment repair to its sentencing scheme).

for sentencing would be hotly contested.[91] Such a bifurcation would "add substantial costs to an already overburdened court system."[92] As a result of budgetary constraints, judges might not grant bifurcated trials, which could lead to the prosecutor presenting evidence of aggravating factors to the same jury that determined guilt or innocence.[93] Such a practice could be highly prejudicial to the defendant and would increase the number of appeals and possible reversals by appellate courts.[94] Chapter 3's author also argued that the increase in judicial discretion would "place[] no additional burden on the courts, the defendant or the prosecutor."[95]

In an unusual political alignment, however, Republican Senator McClintock joined Democratic Senator Migden and opposed Chapter 3.[96] McClintock argued that Chapter 3 should have provided for bifurcated sentencing proceedings to ensure compliance with the Sixth Amendment.[97] Other Chapter 3 opponents[98] similarly supported Blakelyization for several reasons.[99] First, the Supreme Court approved Blakelyization as a solution to California's sentencing problems.[100] Second, the fundamental and constitutional right to a jury trial would be protected, and aggravating factors would be proved beyond a reasonable doubt.[101] Lastly, if Kansas served as any indicator, California's sentencing system would not be overburdened by additional time required by such jury trials.[102]

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91. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 40, at 4-5 (Mar. 26, 2007).

92. *Id.* at 4; *see also Blakely*, 542 U.S. at 319 (O'Connor, J., dissenting) ("If a legislature desires uniform consideration of such factors at sentencing, but does not want them to impact a jury's initial determination of guilt, the State may have to bear the additional expense of a separate, full-blown jury trial during the penalty phase proceeding."); *id.* at 336 (Breyer, J., dissenting) ("Our experience with bifurcated trials in the capital punishment context suggests that requiring them for run-of-the-mill sentences would be costly, both in money and in judicial time and resources.").

93. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 40, at 4 (Mar. 26, 2007).

94. *Id.*

95. *Id.* at 5.

96. Ofgang, *supra* note 63.

97. *Id.*

98. Jeff Adachi, SB 40: The Prison Reform Battle Continues in California!, Apr. 4, 2007, http://www.californiaprogressreport.com/2007/04/sb_40_the_priso.html [hereinafter Adachi, Battle Continues] (on file with the *McGeorge Law Review*) (stating that the Office of Public Defender, City and County of San Francisco, Dr. Cayenne Bird, United for No Injustice, Oppression or Neglect (UNION), the California Attorneys for Criminal Justice, Assembly Members Mark Leno, Sandre Swanson, Loni Hancock, Chuck Devore, and Fiona Ma, and Senators Tom McClintock and Carole Migden oppose Chapter 3).

99. *See infra* notes 100-02 (describing the benefits of Blakelyization).

100. Cunningham v. California, 127 S. Ct. 856, 871 n.18 (2007) (expressly approving Tennessee's approach to increase judicial discretion so a judge can impose any term within a statutory range); *see also* MPC SENTENCING, *supra* note 31, at 24 (describing Tennessee's approach as "Bookerization").

101. *Id.*

102. *See* MPC SENTENCING, *supra* note 31, at 20 (describing the effects of Blakelyization on Kansas' sentencing system as minimal, due to the small number of criminal cases affected, of which most are resolved with pleas).

One of the first post-*Cunningham* appeals, however, explicitly supported the Legislature's decision.[103] In *People v. Sandoval*, the California Supreme Court held that while Blakelyization would comply with the Sixth Amendment, the existing system was not compatible with that approach: neither the determinate sentencing scheme nor the Rules of Court contemplated the use of a jury to determine aggravating factors.[104] Problems might arise if prosecutors did not know how to charge and try the factors to a jury, and no comprehensive list of such factors exists.[105] The court concluded, "engrafting a jury trial onto the sentencing process established in the former [determinate sentencing law] would significantly complicate and distort the sentencing scheme."[106]

B. California Chose Bookerization

If Blakelyization was the most popular legislative response for states with presumptive guidelines, "'Bookerization'" became "[t]he most celebrated 'avoidance' technique."[107] This approach emerged after *Booker* articulated that judicial fact-finding did not implicate the Sixth Amendment when sentencing guidelines are advisory rather than mandatory.[108] This route circumvents the Court's developing Sixth Amendment jurisprudence.[109]

Democratic Senator Gloria Romero, a vocal proponent of prison reform, authored Chapter 3.[110] Along with other Democrats, she promoted Chapter 3 as a

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103. *See* People v. Sandoval, 41 Cal. 4th 825, 848, 161 P.3d 1146, 1160-61 (2007) ("Resentencing under such a discretionary scheme is preferable to the alternative of maintaining the requirement that the middle term be imposed in the absence of aggravating or mitigating factors but permitting a jury trial on aggravating circumstances.").

104. *Id.* at 848-49, 161 P.3d at 1161 (explaining why permitting a jury trial on aggravating factors is incompatible with California's existing sentencing system).

105. *Id.*

106. *Id.* at 848, 161 P.3d at 1161.

107. MPC SENTENCING, *supra* note 31, at 23; *see also id.* at 18-19 (stating that avoidance remodels a sentencing system to escape *Blakely* through one of the Sixth Amendment exceptions in the case law, as opposed to compliance, which modifies the existing system to satisfy the *Blakely* requirements of a jury trial); Blakely v. Washington, 542 U.S. 296, 320 (2004) (O'Connor, J., dissenting) ("To the extent that [states do not elect to bear the costs of jury trials to determine aggravating factors], there will be an inevitable increase in judicial discretion with all of its attendant failings.").

108. United States v. Booker, 543 U.S. 220, 305 (2005) (Scalia, J., opinion of the Court) (finding an exception to the Sixth Amendment violation if the Federal Guidelines were advisory); *id.* at 233 (Stevens, J., opinion of the Court) (finding that if the Guidelines were advisory, "their use would not implicate the Sixth Amendment"); *id.* at 259-60 (Breyer, J., opinion of the Court) (finding that the constitutional issue would have been avoided if the Guidelines were not binding); *see also* MPC SENTENCING, *supra* note 31, at 23 ("*Booker* tells us that judicial factfinding under an advisory guidelines system slips past *Blakely*'s Sixth Amendment rule . . . .").

109. MPC SENTENCING, *supra* note 31, at 24. The Supreme Court's Sixth Amendment jurisprudence is largely composed of five-to-four decisions. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 465, 466 (2000); *Blakely*, 542 U.S. 296; *Booker*, 543 U.S. 220.

110. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 40, at 1 (Mar. 27, 2007) (stating that Gloria Romero authored the bill); B. Cayenne Bird, *Say NO to SB40 - A Sidestep that Takes Away Prisoners' Hope*, AM. CHRON., Mar. 11, 2007, http://www.americanchronicle.com/articles/viewArticle.asp?articleID=

"stopgap measure" for long-term prison reform—a temporary remedy—complete with a sunset provision.[111] Senator Romero argued the stability that Chapter 3 provides to the sentencing system enables the Legislature to create a sentencing commission to review California's complex sentencing practices[112] and to recommend permanent changes.[113] Further, the legislative intent of Chapter 3 characterized the bill as a response to *Cunningham* because it will maintain stability in the criminal justice system *while* the Legislature reviews the sentencing structure.[114]

The bill's quick passage, however, became a source of contention.[115] Chapter 3 went into effect[116] only two months after the Supreme Court decided *Cunningham*.[117] Nearly every member of both houses voted for the bill,[118] and the Governor signed it into law without delay.[119] Governor Schwarzenegger commended the Legislature for the bill's prompt passage[120] and initially supported a sentencing commission in the 2007 budget.[121] Proponents of Chapter 3[122] were also pleased with the quick legislative response and showered the bill with accolades.[123] One group suggested removing the sunset provision to make

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21930 [hereinafter Bird, *Say NO*] (on file with the *McGeorge Law Review*) (describing Gloria Romero as a "heroine in prison reform").

111. Ofgang, *supra* note 63 (describing Chapter 3 as a stopgap measure); CAL. PENAL CODE § 1170(h), 1170.3(c) (enacted by Chapter 3).

112. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 160, at 2 (May 21, 2007). California sentencing is described as "Byzantine and arbitrary," disparate and ineffective, "complex and confusing." ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 110, at 6-7 (July 2, 2007). More than a thousand felony-sentencing laws and one hundred felony sentence enhancements are scattered throughout twenty-one sections of the California codes. *Id.*

113. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 40, at 5 (Mar. 26, 2007).

114. 2007 Cal. Stat. ch. 3, § 1.

115. *See infra* notes 126-27 (criticizing the bill's quick passage).

116. 2007 Cal. Stat. ch. 3 ("Approved by Governor March 30, 2007. Filed with Secretary of State March 30, 2007.").

117. Cunningham v. California, 127 S. Ct. 856 (2007). *Cunningham* was decided on January 22, 2007. *Id.*

118. Only five Assembly Members and two Senators voted against Chapter 3. ASSEMBLY FLOOR, UNOFFICIAL BALLOT (Mar. 26, 2007) (listing DeVore, Hancock, Leno, Ma, and Swanson as voting against Chapter 3); SENATE FLOOR, UNOFFICIAL BALLOT (Mar. 28, 2007) (listing McClintock and Migden as voting against Chapter 3).

119. 2007 Cal. Stat. ch. 3 ("Approved by Governor March 30, 2007. Filed with Secretary of State March 30, 2007.").

120. Ofgang, *supra* note 63.

121. Arnold Schwarzenegger, Cal. State Governor, Transcript of Governor Arnold Schwarzenegger's Remarks at State Budget Release Press Conference, Jan. 10, 2007, http://gov.ca.gov/index.php?/speech/5116/ (on file with the *McGeorge Law Review*).

122. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 40, at 9 (Mar. 27, 2007). Among proponents are the California Attorney General, Los Angeles County District Attorney's Office, California District Attorney's Association, California Police Chiefs Association, California Peace Officers Association, Chief Probation Officers of California, San Bernardino County Sheriff, and Crime Victims United. *Id.*

123. *See, e.g., id.* at 10 ("California's sentencing scheme will once again function as it was designed to do.").

Chapter 3 "more than just a 'temporary fix.'"[124] The group reasoned that since Chapter 3 "repaired the law, there is no principled justification to 'break' it again by imposing a sunset provision that will undo this much-needed legislation."[125]

Opponents, on the other hand, accused legislators of drastically changing sentencing law with Chapter 3,[126] "moving rapidly to get it approved before much opposition [could] mount."[127] Critics contended that because most criminal cases in California are resolved by non-jury disposition, such as plea-bargains or dismissal, Chapter 3 is not needed to maintain stability for the remaining cases that are affected by *Cunningham*.[128] Moreover, uniformity is elusive when some judges sentence defendants to upper terms, while other judges do not.[129] Jeff Adachi, the only elected public defender in California,[130] commented that a defendant's fate is often determined by "the luck of the draw," which is only compounded by giving judges complete discretion to sentence.[131]

A spokesperson for the group United for No Injustice, Oppression or Neglect (UNION) not only criticized Chapter 3, but also expressed disappointment with its author, a politician known for her role in prison reform.[132] The general consensus among opponents was that Chapter 3 was merely a quick fix to the constitutional issues addressed by *Cunningham*.[133] *Cunningham* provided what some saw as a perfect opportunity to address the persistent problems that plague California's prison system[134]—an opportunity that Chapter 3 overlooked.[135]

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124. *Id.*

125. *Id.*

126. Bird, *Say NO*, *supra* note 110 ("SB 40 . . . drastically changes the determinate sentencing law and gives judges power to sentence criminal defendants to aggravated terms without any jury findings.").

127. Bird, *Kill this Bill*, *supra* note 5 ("Why the rush? Such an expensive proposal deserves more debate and scrutiny by the taxpayers in my opinion.").

128. Letter from Jeff Adachi, Public Defender, City & County of S.F., to Assembly Member Jose Solorio, Cal. State Assembly (Mar. 6, 2007), *in* Bird, *Say No*, *supra* note 110 [hereinafter Letter from Adachi to Solorio] (on file with the *McGeorge Law Review*) ("[A] person may voluntarily agree to receive the aggravated prison term as part of a plea disposition, provided they waive any Cunningham issues. This waiver is now standard for any case in which a plea to an aggravated term is contemplated.").

129. *Id.*

130. Bird, *Kill this Bill*, supra note 5 (noting that Jeff Adachi is the only elected California public defender).

131. *Id.*; *see also* Adachi, Battle Continues, *supra* note 98 (stating that Chapter 3 requires the CDCR to biannually report the number of maximum sentences imposed by judges, which might expose those judges who abuse their discretion). The first report issued by CDCR on July 1, 2007, was superficial, giving only the numbers of maximum terms imposed out of the total number of terms imposed, broken down by gender. CDCR REPORT, *supra* note 71, at 1. There is no indication that the maximum terms will be broken down by sentencing judges. *See id.* (lacking any indication of further breakdown of the data).

132. Bird, *Kill this Bill*, *supra* note 5 (noting that Chapter 3 was the first of Senator Romero's bills ever to be opposed by UNION, Dr. Cayenne Bird said, "I hope that it is simply a mistake that [Senator Romero] is taking this route to respond to the Supreme Court Ruling.").

133. Letter from Adachi to Solorio, *supra* note 128; *see also* Bird, *Say NO*, *supra* note 110 ("This bill was hastily drafted to counter the Supreme Court's recent decision declaring California's sentencing law unconstitutional.").

134. *See, e.g.*, Solomon Moore, *New Court to Address California Prison Crowding*, N.Y. TIMES, July 24, 2007, at A16 (stating that prison overcrowding is at a level that might necessitate a cap of the inmate

C. *Long-Term Effects of a Short-Term Solution*

In hindsight, the Legislature's decision to address *Cunningham*'s mandated sentencing changes and prison reform separately[136] may have backfired.[137] Chapter 3 was expected, even intended, to have a counterpart in prison reform—a sentencing commission.[138] When Chapter 3 was passed, Democrats had Governor Schwarzenegger's full support to create a sentencing commission; all that remained was "to work out the details" and determine "how much teeth that commission [would] have."[139] Two months after Chapter 3 passed, however, the Governor withdrew budgetary support for the sentencing commission and diverted the commission's funding to build a new execution chamber at San Quentin.[140] The political leverage to create a sentencing commission began to erode.[141]

Chapter 3's Bookerization, while ideal for partnership with a sentencing commission,[142] was designed as a "stopgap measure."[143] Any effect Chapter 3 will

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population, such that three-judge panels would be formed to determine the release of inmates).

135. *See* Bird, *Kill this Bill*, *supra* note 5 (finding that after the *Cunningham* ruling "there was hope that the legislature would do the right thing" and reform California's sentencing laws, but that "SB40 will dash that hope").

136. Ofgang, *supra* note 63 (describing that Governor Schwarzenegger first commended the Legislature for quickly passing SB 40 to clarify California's sentencing standards, and then stated that he "look[ed] forward to working with the legislature" to reform California's prison system).

137. *See infra* notes 140-41 (describing the difficulties of implementing prison reform after Chapter 3's passage).

138. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 40, at 5 (Mar. 26, 2007) ("Until such time that a sentencing commission (SB 110) can thoroughly perform its review, [Chapter 3] would bring desperately needed stability to a court system that has been thrown into chaos by the [*Cunningham*] decision."); *see also* MPC SENTENCING, *supra* note 31, at 26-27 (stating that, although advisory guidelines are less certain in effect than presumptive systems, the system gives a state the distinct advantage of allowing for a permanent sentencing commission to better amend guidelines over time).

139. Arnold Schwarzenegger, Cal. State Governor, Gov. Schwarzenegger Tours Overcrowded State Prison in Norco, Mar. 6, 2007, http://gov.ca.gov/index.php?/speech/5568/ (on file with the *McGeorge Law Review*).

140. Arnold Schwarzenegger, Cal. State Governor, Governor Releases 2007 May Revision, May 14, 2007, http://www.gov.ca.gov/index.php?/speech/6226/ (on file with the *McGeorge Law Review*) (explaining that the "people of California made it very clear that we go in the direction of capital punishment").

141. *Compare* Frank D. Russo, Covering the End of the California Legislative Session Has Many Challenges and Yet is So Important, Sept. 9, 2007, http://www.californiaprogressreport.com/2007/09/covering_the_en.html (on file with the *McGeorge Law Review*) (describing the two proposed bills, SB 110 and AB 160, that would have created a sentencing commission to deal with California's over-populated prisons), *with* AB 160, 2007 Leg., 2007-2008 Sess. (Cal. 2007) (as amended Sept. 7, 2007, but not enacted), *and* SB 110, 2007 Leg., 2007-2008 Sess. (Cal. 2007) (as amended Aug. 31, 2007, but not enacted).

142. MPC SENTENCING, *supra* note 31, at 26-27.

> An advisory guidelines system, while it may be weaker or less certain in its effects than a presumptive system, still gives a state the important advantage of a permanent sentencing commission with research responsibilities, the ability to generate correctional projections as needed by policymakers, and a mandate to amend guidelines over time in response to judicial behavior, the needs of the corrections system, and developing criminological knowledge.

Id.

have as a more permanent solution to California's sentencing problems is unknown.[144] With the long-term solution of the sentencing commission on hold, the Legislature may extend Chapter 3 past the original 2009 sunset.[145] Chapter 3's actual impact is more relevant than ever.[146]

Advisory sentencing financially impacts California's correction budget.[147] The cost of the transition from presumptive to advisory sentencing may cost substantially more than additional jury fact-finding.[148] The Assembly Committee on Appropriations noted that the annual fiscal impact of Chapter 3 is likely considerable.[149] The Committee acknowledged that while many judges, prosecutors, and even defense attorneys did not believe Chapter 3 would drastically change current sentencing practices,[150] advisory sentencing tends to increase prison populations.[151] An increase in the number of offenders who receive the upper term directly correlates to an increase in California's prison population.[152] Even a relatively minor increase in the percentage of offenders sentenced to the upper term would incur significant cost due to the large number of offenders.[153] The Committee estimated Chapter 3 requires at least thirteen million dollars in additional funding for California's correctional budget.[154]

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143. Ofgang, *supra* note 63.

144. *See supra* notes 126-31 and accompanying text (summarizing the views of Chapter 3 opponents). One possible solution to *Cunningham* might create additional problems.

145. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 40, at 10 (Mar. 27, 2007) (describing the California District Attorney's Association suggestion that Chapter 3 become a permanent rather than a temporary fix to California's sentencing scheme).

146. *See infra* notes 147-59 (predicting that Chapter 3 could significantly impact California's correction budget and increase the racial disparity in sentencing).

147. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 40, at 1-2 (Mar. 21, 2007).

148. MPC SENTENCING, *supra* note 31, at 24 ("On policy grounds, substantial costs may attend the switch from presumptive to voluntary sentencing principles–especially from a state perspective.").

> [M]ost states that have worked with presumptive sentencing guidelines have come to see them as essential tools in the deliberate management of prison population growth, prioritization in how prison bed spaces are allocated, and informed planning for the greater use of intermediate sanctions. . . . In contrast, states that have employed voluntary sentencing guidelines have had a mixed record in these "resource management" arenas. Half of the states using voluntary guidelines have experienced rates of prison growth that outstrip national trends.

Id. at 25.

> Although the issue of advisory guidelines will no doubt be raised in some states as well, it is important to remember that state officials survey the landscape of sentencing reform from a wholly different vantage point than federal officials. . . . Any swelling of support for Bookerization in the federal system should not be extended without careful thought to state sentencing law.

Id. at 26.

149. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 40, at 1 (Mar. 21, 2007).

150. *Id.*

151. *Id.*; *see also* Letter from Adachi to Leno, *supra* note 8.

152. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF SB 40, at 1-2 (Mar. 21, 2007).

153. *Id.*

Advisory sentencing also potentially amplifies current racial inequities in California's prisons.[155] In her *Blakely* dissent, Justice O'Connor noted the transition to determinate sentencing in Washington—guided rather than unguided discretion—correlated to a reduction in racial disparity.[156] She anticipated the regression toward unguided discretion would correlate to an increase in racial disparity in Washington once again.[157] Jeff Adachi suggested that racial disparities in sentencing should be closely monitored[158] due to the "strong probability that [Chapter 3] will result in minority defendants receiving the highest sentence more often than white defendants."[159]

> For example, about 54,000 offenders are projected to receive determinate prison sentences in 2006-07. In 2006, about 10,000 persons sentenced to state prison received a sentence with an upper term. Discounted by a [forty percent] estimate of sentences arrived at via plea, this figure is 6,000. At $43,000 per capita, every [one percent] increase above the 6,000 will cost about $2.6 million. Using 2006 as a base, if SB 40 increases the number of offenders who receive aggravated terms in 2006 by [five percent] (300 inmates), the cost would be about $13 million annually. (This is likely a conservative estimate as it assumes the average sentence increase is only one year served, when many existing sentencing triads contain aggravated terms several years greater than the presumptive middle term.) Also, the number of offenders receiving upper base terms could decrease, though discussions with practitioners suggest there is little reason to believe any increase in the number of lower term sentences will offset the increase in upper term sentences.

Id.

154. *Id.* at 1. Chapter 3's opponents suggest that the budget will increase by much more than $13 million. *See, e.g.*, Letter from Adachi to Leno, *supra* note 8 (estimating a budget increase of "at least $193.5 million"); Bird, *Kill this Bill*, *supra* note 5 (estimating the budget increase to be in the "hundreds of millions of dollars").

155. Adachi, SB 40 Will Not "Fix," *supra* note 81; *see also* Letter from Adachi to Leno, *supra* note 8 ("The Human Rights Watch Report, 'Racial Disparities in the Criminal Justice System,' found that when sentenced for drug offenses in state court, whites serve an average of 27 months while blacks serve an average of 46 months. Thus blacks and other minorities are more likely to receive aggravated sentences than their white counterparts. Racial disparities in the criminal justice system have become such the norm that would-be startling statistics regarding sentencing disparities between white defendants and minority defendants are oft times quickly passed over without a second glance.").

156. Blakely v. Washington, 542 U.S. 296, 315-19 (2004) (O'Connor, J., dissenting).

157. *Id.* at 315 ("This [former indeterminate sentencing] of unguided discretion inevitably resulted in severe disparities. . . . [and] rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race.").

158. Adachi, Battle Continues, *supra* note 98.

159. Adachi, SB 40 Will Not "Fix," *supra* note 81.

> For over a decade academics have concluded less constrained judicial decision-making may lead to unjustifiable reliance on unstated biases in determining a defendant's sentence. At least two legal scholars Albonetti (1991), and Steffensmeier et al. (1998) have described how judges, when equipped with limited information for assessing a defendant's criminal propensity, may act on their own preconceptions. Consequently, those defendants who possess undesirable extralegal characteristics such as lower social and economic status are sentenced more harshly.

Id.

V. CONCLUSION

While Chapter 3 addresses the Sixth Amendment violation in California's determinate sentencing law, it does little more than that.[160] Chapter 3 may not significantly alter California's sentencing scheme absent long-term sentencing reform.[161] California's Legislature designed Chapter 3 to work in conjunction with a sentencing commission[162] that would address issues that extend far beyond *Cunningham* to issues like prison overcrowding.[163] However, that sentencing commission was not passed with Chapter 3.[164]

Chapter 3 can likely maintain the status quo, but "piecemeal reform always creates a risk that it will patch up the system, allowing it to function, but still badly."[165] Further, because advisory guidelines are unenforceable, the system "must work harder to gain the results that presumptive guidelines regularly achieve."[166] Bookerization may still prove effective as long as: (1) the Legislature rapidly creates the promised sentencing commission;[167] (2) the commission is able to implement a long-term, non-partisan, effective and constitutional sentencing scheme in California; and (3) the effects of Chapter 3 do not conflict with the Legislature's intent to keep sentencing disparities to a minimum.[168]

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160. *See* 2007 Cal. Stat. ch. 3, § 1 (stating that Chapter 3 will stabilize California's criminal justice system while sentencing structures are reviewed). Implicit in Chapter 3's purpose is that any prison reform beyond the immediate Sixth Amendment response is left to a counterpart bill—a sentencing commission. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 40, at 5 (Mar. 26, 2007).

161. Post-*Cunningham*, one court has already affirmed this position, finding that changes caused by Bookerization would be insubstantial and "as a practical matter would not substantially alter the [determinate sentencing law] as initially adopted by the Legislature." People v. Sandoval, 41 Cal. 4th 825, 850, 852, 161 P.3d 1146, 1162, 1164 (2007). The court also believed the increase in judicial discretion would not "undermine the legislative goals of establishing proportionate sentences and reducing disparity." *Id.* at 850, 161 P.3d at 1162.

162. *See* ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 40, at 5 (Mar. 26, 2007) (describing that California's sentencing scheme needs to be reviewed by a sentencing commission, but that Chapter 3 brings needed stability to that scheme "[u]ntil such time that a sentencing commission (SB 110) can thoroughly perform its review").

163. *See* Moore, *supra* note 134 and accompanying text (describing the reality of prison overcrowding in California and the responsive measures being taken to alleviate that problem).

164. AB 160, 2007 Leg., 2007-2008 Sess. (Cal. 2007) (as amended Sept. 7, 2007, but not enacted); SB 110, 2007 Leg., 2007-2008 Sess. (Cal. 2007) (as amended Aug. 31, 2007, but not enacted).

165. Letter from Elizabeth Rindskopf Parker, Dean, Univ. of Pac., McGeorge Sch. of Law, and Michael Vitiello, Professor & Scholar, Univ. of Pac., McGeorge Sch. of Law, to Camilla Kieliger, Admin. Coordinator, Cal. State Judicial Council (July 24, 2007) (on file with the *McGeorge Law Review*).

166. MPC SENTENCING, *supra* note 31, at 25.

167. *See, e.g.*, AB 160, 2007 Leg., 2007-2008 Sess. (Cal. 2007) (as amended Sept. 7, 2007, but not enacted); SB 110, 2007 Leg., 2007-2008 Sess. (Cal. 2007) (as amended Aug. 31, 2007, but not enacted). Although a sentencing commission was not created in 2007, SB 110 is slated for reconsideration. CURRENT BILL STATUS, S.B. NO. 110 (Mar. 3, 2008) (on file with the *McGeorge Law Review*) (noting that SB 110 will be reconsidered in the Assembly).

168. *See* People v. Sandoval, 41 Cal. 4th 825, 850, 161 P.3d 1146, 1162 (2007) (stating that the California Supreme Court believed that Chapter 3's increase in judicial discretion over sentencing would not conflict with the Legislature's goals to reduce sentencing disparity).