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Consecutive Misdemeanor Sentencing: Curing The Inequity

BY GARY R. NICHOLS* AND HARRY M. CALDWELL**

"Let the punishment fit the crime,"¹ expresses a bedrock concept of Anglo-American jurisprudence.² However, as is true of most fundamental policy statements, application to specific situations often yields results which cannot be reconciled with the seminal theory. Such an anomaly currently exists in California law pertaining to consecutive misdemeanor sentencing.

California statutory law, literally read, allows unlimited consecutive misdemeanor sentences.³ Conversely, consecutive sentences for multiple felony offenses are generally subject to stringent restrictions on both the consecutive terms which may be imposed as well as the length of the aggregate term.⁴ The imposition of unrestrained

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1. W. Gilbert & A. Sullivan, *The Mikado or the Town of Titipu*; *Let The Punishment Fit The Crime* (March 14, 1885), Full score (Leipzig 1898).

2. Protection against cruel and unusual punishment is provided in U.S. CONST. art. I, § 17 and amend. VIII. Amendment VIII to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

3. See CAL. PENAL CODE §§ 19a, 669 (West 1985). Section 19a provides in part: "In no case shall any person sentenced to confinement in a county or city jail . . . on conviction of a misdemeanor . . . or for any reason except upon conviction of more than one offense when consecutive sentences have been imposed, be committed for a period in excess of one year . . ." Section 669 provides in part: "When any person is convicted of two or more crimes . . . the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently or consecutively"

4. CAL. PENAL CODE § 1170.1(a),(g) (West 1985). Section 1170.1(a) provides: Except as provided in subdivision (c) and subject to section 654, when any per-

consecutive misdemeanor sentences netted one man a term of nine years, seven months in county jail in 1984 for multiple misdemeanor drunk driving offenses⁵ and has resulted in other misdemeanants receiving county jail terms of six and one-half years,⁶ five and one-half years,⁷ and four years, three months.⁸ While many may believe, as apparently the sentencing judges did, that the punishments meted out in these four examples did "fit the crime[s]," comparison of these sentences with sentences imposed for multiple felony offenses reveal that inequity exists in the law⁹ which allows, in many instances, less

son is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or a different court, and a consecutive term of imprisonment is imposed under sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term and any additional term imposed pursuant to section 667.5, 667.6, or 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any enhancements imposed pursuant to section 12022, 12022.3, 12022.4, 12022.5, 12022.6, 12022.7, 12022.8 or 12022.9. The subordinate term for each consecutive offense which is not a "violent felony" as defined in subdivision (c) of section 667.5 shall consist of one-third of the middle term of imprisonment prescribed for each other such felony conviction for which a consecutive term of imprisonment is imposed, and shall exclude any enhancements. In no case shall the total of subordinate terms for such consecutive offenses which are not "violent felonies" as defined in subdivision (c) of section 667.5 exceed five years. The subordinate term for each consecutive offense which is a "violent felony" as defined in subdivision (c) of section 667.5, including those offenses described in paragraph (8) of subdivision (c) of section 667.5, shall consist of one-third of the middle term of imprisonment prescribed for each other such felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of any enhancements imposed pursuant to section 12022, 12022.3, 12022.5, 12022.7, or 12022.9.

Section 1170.1(g) provides:

The term of imprisonment shall not exceed twice the number of years imposed by that court as the base term pursuant to subdivision (b) of section 1170 unless the defendant stands convicted of a "violent felony" as defined in subdivision (c) of section 667.5, or a consecutive sentence is being imposed pursuant to subdivision (c) of this section, or an enhancement is imposed pursuant to section 12022, 12022.3, 12022.5, 12022.6, 12022.7, 12022.9, or the defendant stands convicted of felony escape from an institution in which he is lawfully confined.

5. L.A. Daily J., Oct. 1, 1984, § II, at 1, col. 3. See also *People v. Carr*, 6 Cal. 2d 227, 228, 57 P.2d 489 (1936) (approving four consecutive one year sentences); *People v. Blume*, 183 Cal. App. 2d 474, 482, 7 Cal. Rptr. 16, 21 (1960). For treatment outside California, see *People v. Knaub*, 624 P.2d 922, 923 (Colo. 1980); *State v. Divers*, 51 Or. App. 351, 625 P.2d 681 (1981).

6. *People v. Powell*, 166 Cal. App. 3d Supp. 12, 212 Cal. Rptr. 454 (1985). Defendant pleaded guilty to thirteen counts of grand theft under Cal. Penal Code § 487(1), was sentenced to six months in the county jail for each count, to run consecutively, and was placed on probation for an additional six and one-half years. See *infra* notes 43, 75-78, and accompanying text.

7. *In re Jiminez*, 166 Cal. App. 3d 686, 688, 212 Cal. Rptr. 550, 552 (1985).

8. *People v. Haendiges*, 142 Cal. App. 3d Supp. 9, 12, 191 Cal. Rptr. 785, 788 (1983). Defendant was convicted of numerous violations of driving under the influence of drugs and/or alcohol. See *infra* notes 67-69 and accompanying text.

9. For instance, under the present statutory scheme, the maximum sentence which could be imposed for twenty felony burglary counts is eleven years (a six-year

serious offenders such as misdemeanants to be punished more severely than more serious offenders such as felons.¹⁰

Compounding the anomaly is the difficulty of reviewing multiple maximum consecutive misdemeanor sentences. The difficulty is caused by the complete absence of any guidelines for trial courts to follow in making the sentencing choice or the absence of any requirement that the factors considered by the sentencing court in arriving at that choice be specified. Additionally, once a nonprobationary sentence has been imposed and its service commenced, the trial court is without jurisdiction to modify the sentence even if the trial judge decides that the sentence was unduly harsh or otherwise deserving of reconsideration. These difficulties have been recognized with respect to felony sentencing, and safeguards have been incorporated into the felony sentencing scheme. This article examines the California consecutive sentencing laws as they apply to misdemeanor sentencing, compares that scheme with the rules applicable to consecutive felony sentencing, and proposes legislative action which can eliminate the disparity found to exist between the two.

I. CALIFORNIA FELONY SENTENCING

A. *The Determinate Sentencing Law*

To fully appreciate the severity of the felony-misdemeanor inequality currently existing in California sentencing, it is necessary to review California felony sentencing. In 1976, the California Legislature abandoned the indeterminate sentencing scheme and enacted the Determinate Sentencing Law.¹¹ In so doing, the legislature specifically set forth in the statute its findings and intent:

The legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as

base term with a five-year cap on consecutive sentences, while the maximum sentence for twenty misdemeanor burglary counts is twenty years (one-year maximum for each count running consecutively).

10. Use of the terms "less serious" or "more serious" offenses refers solely to the statutory classifications of the offense as a misdemeanor or felony and is not intended to address questions of moral culpability.

11. 1976 Cal. Stat. 1139; CAL. PENAL CODE § 1170 (West Supp. 1986). See Note, *Review of Selected 1976 California Legislation, Criminal Procedure*, 8 PAC. L.J. 282, 283 (1977).

determined by the Legislature to be imposed by the court with specified discretion.¹²

Under the Determinate Sentencing Law, most felonies, other than those carrying sentences of death or life imprisonment, have three specified possible terms of imprisonment: the low or mitigated term, the middle term, and the upper or aggravated term. When a prison sentence is to be imposed, the middle term specified for the offense is the presumptive term unless there are circumstances in aggravation or mitigation of the crime.¹³ The circumstances in aggravation or mitigation which the trial judge may consider are set forth in the Rules of Court promulgated by Judicial Council,¹⁴ and the circumstances found and relied on by the trial court must be set forth on the record

12. CAL. PENAL CODE § 1170(a)(1) (West Supp. 1986).

13. CAL. PENAL CODE § 1170(b) (West Supp. 1986). Section 1170(b) reads in part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime."

14. CAL. RULES CT. 421, 423.

The Judicial Council is a constitutionally created body consisting of the Chief Justice, members from the bench from each of the five levels of state court, a member of each house of the legislature and members of the bar. CAL. CONST. art. 6 § 6. Its powers and duties are prescribed by the constitution and statutes.

Under Rule 421, circumstances in aggravation include:

(a) Facts relating to the crime, including the fact that:

1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness or callousness, whether or not charged or chargeable as an enhancement under section 12022.7.

2) The defendant was armed with or used a weapon at the time of the commission of the crime, whether or not charged or chargeable as an enhancement under section 12022 or 12022.5.

3) The victim was particularly vulnerable.

4) The crime involved multiple victims.

5) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

8) The planning, sophistication or professionalism with which the crime was carried out, or other facts, indicate premeditation.

9) The defendant used or involved minors in the commission of the crime.

10) The crime involved an attempted or actual taking or damage of great monetary value, whether or not charged or chargeable as an enhancement under section 12022.6.

11) The crime involved a large quantity of contraband.

12) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

1) He has engaged in a pattern of violent conduct which indicates a serious danger to society.

2) The defendant's prior convictions as an adult or adjudications of commission of crimes as a juvenile are numerous or of increasing seriousness.

if either the mitigated or aggravated term is imposed.¹⁵

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- 3) The defendant has served prior prison terms whether or not charged or chargeable as an enhancement under section 667.5.
 - 4) The defendant was on probation or parole when he committed the crime.
 - 5) The defendant's prior performance on probation or parole was unsatisfactory.

Under Rule 423, circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

- 1) The defendant was a passive participant or played a minor role in the crime.
- 2) The victim was an initiator, willing participant, aggressor or provoker of the incident.
- 3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.
- 4) The defendant participated in the crime under circumstances of coercion or duress, or his conduct was partially excusable for some other reason not amounting to a defense.
- 5) A defendant with no apparent predisposition to do so was induced by others to participate in the crime.
- 6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.
- 7) The defendant believed he had a claim or right to the property taken, or for other reasons mistakenly believed his conduct was legal.
- 8) The defendant was motivated by a desire to provide necessities for his family or himself.

(b) Facts relating to the defendant, including the fact that:

- 1) He has no prior record or an insignificant record of criminal conduct considering the recency and frequency of prior crimes.
- 2) The defendant was suffering from a mental or physical condition that significantly reduced his culpability for the crime.
- 3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.
- 4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.
- 5) The defendant made restitution to the victim.
- 6) The defendant's prior performance on probation or parole was good.

15. CAL. RULES CT. 433(c)(1). Rule 433(c)(1) provides with respect to matters to be considered at time set for sentencing:

(a) In every case, at the time set for sentencing pursuant to section 1191, the sentencing judge shall hold a hearing at which the judge shall:

- 1) Hear and determine any matters raised by the defendant pursuant to section 1201.
- 2) Determine whether a defendant who is eligible for probation should be granted or denied probation, unless consideration of probation is expressly waived by the defendant personally and by counsel.

(b) If the imposition of sentence is to be suspended during a period of probation after a conviction by trial, the trial judge shall make factual findings as to circumstances which would justify imposition of the upper or lower term if probation is later revoked, based upon evidence admitted at the trial.

(c) If a sentence of imprisonment is to be imposed, or if the execution of a sentence of imprisonment is to be suspended during a period of probation, the sentencing judge shall:

- 1) Hear evidence in aggravation and mitigation and determine, pursuant to

When a person is convicted of two or more felonies for which sentences may be imposed, whether in the same proceeding or court or in different proceedings or courts, and whether the judgment is rendered by the same court or by a different court and consecutive sentences are imposed, the court generally proceeds as follows:

1) The court first imposes sentence on the offense for which the greatest term of imprisonment will be imposed, choosing between the three possible terms for that offense by applying the aggravating and mitigating factors found. This is the "principal" or "base" term.¹⁶

2) For each other offense for which a consecutive or "subordinate" term is to be imposed, the court shall impose one-third of the middle term of imprisonment prescribed for the offense;¹⁷

3) The total of the subordinate terms shall not exceed five years;¹⁸

4) The total term of imprisonment may not exceed "twice the number of years imposed . . . as the base term."¹⁹

section 1170(b), whether to impose the upper, middle or lower term; and set forth on the record the facts and reasons for imposing the upper or lower term.

2) Determine whether any additional term of imprisonment provided for an enhancement charged and found shall be stricken.

3) Determine whether the sentences shall be consecutive or concurrent if the defendant has been convicted of multiple crimes.

4) Determine any issues raised by statutory prohibitions.

5) Pronounce the court's judgment and sentence, stating the terms thereof and giving reasons for those matters for which reasons are required by law.

(d) All these matters shall be heard and determined at a single hearing unless the judge otherwise orders in the interests of justice.

(e) When a sentence of imprisonment as imposed under subdivision (c) or under rule 435, the sentencing judge shall inform the defendant, pursuant to section 1170(c), of the parole period provided by section 3000 to be served after expiration of the sentence in addition to any period of incarceration for parole violation. P.C. § 1170(b),(c).

16. "Base term" or "principal term" is defined as "the greatest term of imprisonment imposed by the court for any of the crimes." CAL. PENAL CODE § 1170.1 (a). (West Supp. 1986).

17. *Id.* The "one-third the middle term" rule does not apply to certain sex offenses where full, separate and consecutive terms may be imposed, and certain kidnappings involving separate victims on separate occasions. *Id.* § 1170.1(b)(i).

18. *Id.* § 1170.1(a). The five-year maximum for subordinate terms does not apply to (1) offenses committed while the perpetrator is in state prison or an escapee from state prison, (2) "violent" felonies as defined in § 667.5(c), (3) the sex offenses for which full, separate, and consecutive terms may be imposed under § 667.6(c), or (4) "consecutive offenses which are all residential burglaries" for which the total subordinate term may not exceed ten years. *Id.* § 1170.95.

19. *Id.* § 1170.1(g). The "double the base term" rule does not apply, *inter alia*, to "violent" felonies, *id.*; sex offenses, *id.* § 667.6(c); residential burglaries, *id.* § 1170.95(b); offenses committed by state prison inmates or escapees, *id.* § 1170.1(c); or where enhancements are imposed for weapons use, CAL. PENAL CODE §§ 12022, 12022.5 (West 1982); excessive taking or damage, *id.* § 12022.6; infliction of great bodily injury, *id.* § 12022.7; or for prior felony convictions, CAL. PENAL CODE §§ 667, 667.5, 667.6

In deciding whether to impose consecutive sentences, the trial court is prohibited from using the same factors in aggravation to impose both an upper base term and consecutive sentences.²⁰ If the court decides to impose consecutive sentences, the reasons upon which that decision is based, as well as the reasons for imposing other than a middle base term, must be set forth on the record.²¹

B. Review For and Correction of Disparate Felony Sentences

Once a convicted felon is sentenced to state prison, two separate procedures exist, exclusive of resort to the appellate courts, for reviewing and correcting disparate sentences. The first such procedure empowers the trial court to recall a sentence within 120 days of its imposition and resentence the defendant as if he had not previously been sentenced.²² If the court exercises its discretion to recall and resentence a convicted felon, it may not sentence the defendant to a greater aggregate term than originally imposed, although it may reduce the term or leave it the same.²³ The order to recall and resen-

(West Supp. 1986). Crimes such as kidnapping, sodomy by force, etc. are dealt with slightly differently. See *id.* § 1170.1(b)(1).

20. *Id.* § 1170(b); *People v. Lawson*, 107 Cal. App. 3d 748, 753, 165 Cal. Rptr. 764, 767 (1980).

21. CAL. PENAL CODE § 1170(b) (West Supp. 1986); *People v. Enriquez*, 159 Cal. App. 3d 1, 5, 205 Cal. Rptr. 238, 241 (1984). Section 669 of the California Penal Code allows concurrent and consecutive sentencing; section 1170 gives the parameters for resentencing. However, in felonies the court must specifically state the reasons for imposing consecutive sentences. *People v. Bejarano*, 114 Cal. App. 3d 693, 173 Cal. Rptr. 71 (1981); *People v. Walker*, 83 Cal. App. 3d 619; 148 Cal. Rptr. 66 (1978). Further, the court may not use the same facts to justify both an aggravated or upper term sentence and a consecutive sentence:

A fact charged and found as an enhancement may be used to impose the upper term, whereupon the additional term of imprisonment prescribed for that fact as an enhancement shall be stricken. The use of the fact to impose the upper term is an adequate reason for striking the additional term of imprisonment.

CAL. RULES CT. 443(b).

22. CAL. PENAL CODE § 1170(d) (West Supp. 1986). Section 1170(d) provides in part:

[T]he court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the Director of Corrections or the Board of Prison Terms, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The resentence under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing

23. *Id.* A recall of sentence and commitment previously ordered may also be made upon the recommendation of the Director of Corrections or the Board of Prison Terms. *Id.*

tence must be made on the court's own motion; the defendant has no standing to make such a motion.²⁴ The statutory provisions which allow for such an order within 120 days of the commitment to prison are an exception to the rule that the court loses jurisdiction of the matter upon finality of the judgment (sixty days following judgment in felony cases). It also appears that the court could exercise its recall and resentencing power even if the matter is then pending in the appellate courts.²⁵

The second procedure for review of disparate felony state prison sentences is a statutorily mandated review by the Board of Prison Terms within the first year of the sentence.²⁶ That review compares the sentence with those imposed in similar cases throughout the state. The Board employs a three-step procedure, which includes an initial screening by computer to identify cases in which potentially disparate sentences have been imposed, a second screening by the Board's staff of those cases indicated by the computer screening, and a final review by a Board panel of those cases referred to it by the staff as potentially disparate.²⁷ If the Board determines that a particular sentence is disparate, it is required to notify the sentencing judge, the prosecutor, the defendant and his attorney of that finding and the reasons for the finding. Upon receipt of such notification, the trial court is required to schedule a hearing within 120 days. At that hearing the court may recall the previously imposed sentence and resentence the defendant on its own motion in the same manner as described above. At the resentencing hearing, the court shall consider the information supplied by the Board of Prison Terms and should give it great weight.²⁸

The recall and resentence procedures are safeguards that neither require nor necessarily imply that the original sentence was an abuse

24. *Id.*; *People v. Gainer*, 133 Cal. App. 3d 636, 641, 184 Cal. Rptr. 120, 123 (1982).

25. A notice of appeal from a felony conviction must be filed within sixty days of the imposition of judgment. Cal. Rules Ct. 31(a). The trial court is generally divested of jurisdiction to modify a judgment once an appeal is perfected. *See People v. Perez*, 23 Cal. 3d 545, 591 P.2d 63, 153 Cal. Rptr. 40 (1979). The court in *Perez* stated that the "filing of a valid notice of appeal vests jurisdiction in the appellate court . . . [W]e need not determine whether in the present case this rule precluded the trial court from amending judgment." *Id.* at 554, 591 P.2d at 69, 153 Cal. Rptr. at 45. *See also People v. Sonoqui*, 1 Cal. 2d 364, 366, 35 P.2d 123, 124 (1934).

The 120 days within which the trial court may recall and resentence under section 1170(d) necessarily extends at least sixty days into the period following the filing of a timely notice of appeal. It therefore appears that the legislature intended the provisions of section 1170(d) to be an exception to the general rule that the taking of an appeal divests the trial court of jurisdiction to modify a judgment.

26. CAL. PENAL CODE § 1170(f) (West Supp. 1986).

27. BOARD OF PRISON TERMS, REPORT ON SENTENCING PRACTICES, DETERMINATE SENTENCING LAW 3-4 (1985) [hereinafter cited as REPORT].

28. CAL. PENAL CODE § 1170(f)(1) (West Supp. 1986); *People v. Herrera*, 127 Cal. App. 3d 590, 600, 179 Cal. Rptr. 694, 700 (1982).

of discretion or otherwise erroneous. In performing its sentence review duties, the Board of Prison Terms assumes that the sentence originally imposed is a legal sentence and that the sentencing court complied with all applicable sentencing rules and procedures.²⁹ Sentences imposed in violation of those rules and procedures are reviewable on direct appeal or in some instances by extraordinary writ.³⁰ Despite the elaborate safeguards and procedural requirements in felony sentencing, a large portion of felony appeals involve an alleged error in sentencing.³¹ This may be a result of the complexity of the statutory sentencing scheme.

II. CLASSIFICATION OF OFFENSES

In addition to felonies, there are two other distinct, statutorily defined classes of crime: misdemeanors and infractions.³² Infractions are not punishable by incarceration³³ and are not dealt with herein. Misdemeanors are punishable by fines and/or county jail sentences of six months or less,³⁴ unless otherwise specified, but in no case more than one year.³⁵ This contrasts with felonies which are punishable by death or imprisonment in the state prison.³⁶

It is the exclusive province of the legislature to classify crimes and

29. See Report, *supra* note 27, at 3.

30. See CONTINUING EDUCATION OF THE BAR, STATE BAR OF CALIFORNIA, APPEALS AND WRITS IN CRIMINAL CASES §§ 1.25 and 2.111 (1982).

31. There appear to be no statistics on the percentage of felony appeals which raise sentencing error issues. However, in response to inquiries of the authors, knowledgeable members of the California Courts of Appeal, the Attorney General's Office, and the criminal defense appellate bar have provided estimates ranging from twenty to fifty percent.

32. CAL. PENAL CODE § 16 (West 1970).

33. CAL. PENAL CODE § 19c (West 1970):

An infraction is not punishable by imprisonment. A person charged with an infraction shall not be entitled to a trial by jury . . . [or] to have the public defender or other counsel appointed at public expense to represent him unless he is arrested and not released on his written promise to appear, his own recognizance, or a deposit of bail.

34. CAL. PENAL CODE § 19 (West Supp. 1986): "Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both."

35. CAL. PENAL CODE § 19a (West 1970); see *supra* note 3. There are certain offenses which are classified as misdemeanors for which no jail sentence may be imposed, such as possession of less than 28.5 grams of marijuana. CAL. HEALTH & SAFETY CODE § 11357(b) (West Supp. 1986).

36. CAL. PENAL CODE § 17(a) (West Supp. 1986): "A felony is a crime which is punishable with death or imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions."

determine that one class of crimes is more "heinous" and therefore deserving of more severe penalties.³⁷ The California classification follows the classic hierarchy of criminal offenses and comports with the general understanding that misdemeanors are "offenses lower than felonies."³⁸ Additionally, there exists a subgroup of offenses commonly called "wobblers" which may be classified as either felonies or misdemeanors depending on the discretion of the prosecutor in the first instance and later the trial judge.³⁹ The trial judge may reduce a "wobbler" charged by the prosecutor as a felony to a misdemeanor, but the trial judge may not increase a "wobbler" to a felony.⁴⁰ "Wobblers" include offenses such as burglary, grand theft, forgery, receiving stolen property, battery against a police officer with injury, or against anyone with serious bodily injury, assault with a deadly weapon, and vehicular manslaughter. As misdemeanors, "wobblers" carry a maximum sentence of one year in county jail; as felonies, the sentence range is generally sixteen months, two years, or three years in state prison.⁴¹

It has long been held that a municipal court can impose consecu-

37. *People v. Smith*, 218 Cal. 484, 489, 24 P.2d 166, 168 (1933).

38. BLACK'S LAW DICTIONARY 900 (5th ed. 1979).

39. CAL. PENAL CODE § 17(b).

When a crime is punishable in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

- 1) After a judgment imposing a punishment other than imprisonment in the state prison.
- 2) When the court, upon committing the defendant to the Youth Authority, designates the offense to be a misdemeanor.
- 3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.
- 4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his arraignment or plea objects to the offense being made a misdemeanor in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.
- 5) When, at or before the preliminary examination or prior to filing an order pursuant to section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

40. *Id.*

41. CAL. PENAL CODE § 489 (West Supp. 1986) (grand theft); *id.* § 461 (burglary); *id.* § 473 (forgery); *id.* § 496 (recovering stolen property); *id.* § 243(c),(d) (battery against a police officer with injury; battery against any person with serious bodily injury); *id.* § 245 (assault with deadly weapon); *id.* § 193(c) (vehicular manslaughter). See also *id.* § 18 (punishment for felony not otherwise prescribed). There are, as with misdemeanors, a few unusual exceptions to the general rule. For instance, willful failure to provide child support, *id.* § 270, carries a misdemeanor sentence of one year in county jail, but a felony sentence of one year and one day in state prison. Spousal rape, *id.* § 262, carries a one year jail sentence as a misdemeanor and a range of three, six, or eight years as a felony. *Id.* § 264.

tive sentences totaling in excess of the one year jurisdictional limit for a single offense.⁴² However, the Appellate Department of the Los Angeles Superior Court recently held that a municipal court may not impose an aggregate consecutive sentence for "wobblers," all charged as misdemeanors, that exceeds the maximum sentence authorized had all the offenses been charged as felonies.⁴³ Dicta in the same case, as well as reason and equal protection principles, suggest that consecutive sentences for "straight" misdemeanors may not exceed the same maximum.⁴⁴ Nonetheless, no statutory or case law limit exists which places a "cap" on the aggregate length of consecutive misdemeanor sentences. Even if it is assumed, as the authors of this article have, that equal protection precludes aggregate consecutive misdemeanor sentences totalling more than six years (the maximum for "wobblers" sentenced as felonies), there still exists an anomalous situation in which an offender convicted of crimes which are less serious is subject to a sentence that on its face is equal to the maximum allowable for more serious offenses and therefore harsher relative to the class of offenses. It should also be pointed out, in terms of the actual sentence served, that the misdemeanant sentenced to six years in county jail may serve up to one-third more time in custody than the felon sentenced to the same term in state prison.⁴⁵

42. *People v. Carr*, 6 Cal. 2d 226, 228, 57 P.2d 489, 489 (1936); *People v. De Casaus*, 150 Cal. App. 2d 274, 280, 309 P.2d 835, 839 (1957) (section 19a not intended to limit imprisonment to one year where several misdemeanors were committed and sentences ran consecutively); *People v. Blume*, 183 Cal. App. 2d 474, 428, 7 Cal. Rptr. 16, 22 (1960) (misdemeanor sentences on several counts running consecutively constitute a single sentence). See also *United States v. Manjarrez-Arce*, 382 F. Supp. 1047, 1049 (S.D. Cal. 1974).

43. *People v. Powell*, 166 Cal. App. 3d Supp. 12, 212 Cal. Rptr. 454 (1985). CAL. PENAL CODE § 1170 (West Supp. 1986). In *People v. Powell*, the defendant pleaded guilty to thirteen counts of grand theft. See CAL. PENAL CODE § 489 (West Supp. 1986). The trial court sentenced him to six months in the county jail for each count, with the sentences to run consecutively, and placed him on probation for an additional six and one-half years. Grand theft under section 489 is a "wobbler" calling for a sentence of one year maximum in county jail as a misdemeanor and a sentence of either sixteen months, two years, or three years in state prison as a felony. *Powell*, 166 Cal. App. 3d Supp. at 16, 212 Cal. Rptr. at 457. Had all counts been charged as felonies, and maximum sentences imposed, the maximum sentence the defendant could have received would have been six years.

44. *Powell*, 166 Cal. App. 3d Supp. at 26, 212 Cal. Rptr. at 464. But see *In re Valenti*, 224 Cal. Rptr. 10 (2d Dist. Ct. App. 1986). See *infra* notes 79-87 and accompanying text.

45. This result is based on the fact that felons in State prison may earn up to one-half off their sentence by participation in a work or education program, CAL. PENAL

III. CALIFORNIA MISDEMEANOR SENTENCING

Virtually none of the protective rules or procedures which apply to felony sentencing applies to misdemeanor sentencing, nor are there corresponding provisions relating solely to misdemeanors. The imposition of a misdemeanor sentence has a "Wild West" tenor in which the judge has a broad range of choice as to jail time, generally from zero days up to 180 or 365 days or anywhere within that range.⁴⁶ There is no requirement that the sentencing judge make any statement of reasons for imposing a particular misdemeanor sentence, nor are there any formal guidelines for choosing an appropriate sentence. Some municipal courts appear to impose maximum sentences as a matter of course if probation is not granted or is rejected. Some courts will routinely impose and suspend execution of a less than maximum sentence as a condition of probation; some will suspend imposition of sentence only, thereby retaining the ability to sentence the defendant to the maximum term should the defendant violate probation.⁴⁷ The decision whether consecutive sentences should be imposed is likewise devoid of regulation by formal guidelines or restrictions other than the prohibition against double punishment for the same act.⁴⁸ Just as there is no requirement that reasons be stated for the imposition of any particular sentence, there is no requirement that reasons be stated for the imposition of consecutive sentences. Neither is there any prohibition against using the same factors to impose both maximum and consecutive sentences.

The decision to impose maximum consecutive sentences usually appears to be the subjective perception of the sentencing judge that the defendant has had enough chances (for example, by prior probation grants), has not learned a lesson (since defendant is a repeat offender), and therefore is not entitled to any leniency. Indeed, many of the very long misdemeanor sentences result when a defendant appears on one or more newly charged offenses along with several violations of probation based on the new offense. The defendant in such a case is consecutively sentenced to the maximum sentence for all offenses and violations. The same result most likely could not occur in a felony matter since the consideration of events subsequent to a grant of probation is prohibited in determining the appropriate term

CODE § 2933 (West Supp. 1986), whereas a county jail inmate may only earn a maximum of one-third off of this sentence for work or good conduct. *Id.* § 2900.5.

46. There are a few misdemeanor offenses which carry minimum mandatory sentences, most notably repeat drunk driving offenses and narcotics use offenses. *See, e.g.*, CAL. VEH. CODE, §§ 23165, 23166, 23170, 23171, 23175, 23176 (West 1985); CAL. HEALTH & SAFETY CODE § 11550 (West Supp. 1986).

47. These observations are based upon the experience of the authors and others familiar with the practices of various southern California municipal courts.

48. CAL. PENAL CODE § 654 (West Supp. 1986).

of imprisonment and whether or not to impose enhancements upon a revocation of probation.⁴⁹ In such circumstances, the felony sentencing judge is confined to making those decisions based upon the "circumstances existing at the time probation was granted."⁵⁰ Almost certainly the judge would not have granted probation in the first instance if the case were aggravated enough to justify a maximum sentence. Once a misdemeanant commences service of a nonprobationary jail sentence, the sentencing court is without jurisdiction to modify that sentence even if the sentencing judge wishes to do so.⁵¹

One can only speculate as to the reasons why the legislature has chosen to impose such stringent and pervasive limitations and review procedures on consecutive felony sentencing but has virtually ignored misdemeanors. Undoubtedly the state is justified in making provision for greater protection to persons who are in greater jeopardy, if not indeed compelled to do so. In most instances, the defendant charged with a felony is most at risk. Felony convictions not only carry significantly longer potential sentences individually, but also result in certain civil disabilities such as loss of the right to vote⁵² and the right to possess firearms.⁵³ Felony convictions may also be used in the future to impeach testimony and to enhance sentences for subsequent crimes.⁵⁴

It may be that misdemeanors are considered sufficiently "insignificant" not to warrant the same consideration. That perception may in large part be due to the fact that misdemeanors are generally not newsworthy. Moreover, appeals from misdemeanors are heard by

49. CAL. RULES CT. 435(b)(1):

If the imposition of sentence was previously suspended, the judge shall impose judgment and sentence after considering any findings previously made and hearing and determining the matters enumerated in rule 433(c). The length of the sentence shall be based on circumstances existing at the time probation was granted; and subsequent events may not be considered in selecting the base term nor in deciding whether to strike or specifically not order the additional punishment for enhancements charged and found.

50. *Id.*

51. *People v. McAllister*, 15 Cal. 2d 519, 526, 102 P.2d 1072, 1075 (1940). *But see* *People v. Thomas*, 52 Cal. 2d 521, 534, 342 P.2d 889, 897 (1959) (providing an exception to the rule).

52. CAL. CONST. art. II, § 4; CAL. ELEC. CODE § 707 (West Supp. 1986).

53. CAL. PENAL CODE § 12021 (West Supp. 1986). Section 12021 provides in part that "[a]ny person who has been convicted of a felony . . . who owns or has in his possession . . . any pistol, revolver, or other fire arm . . . is guilty of a public offense"

54. CAL. CONST. art. I, § 28(f).

the appellate departments of the superior court in proceedings in which judges are not required to render written opinions.⁵⁵ Therefore, misdemeanor cases very rarely result in opinions published in the official reports.

Whatever the reason, it is obvious that the arena of misdemeanor sentencing is much more susceptible than the arena of felony sentencing to sentences that are disparate, not only in comparison with other misdemeanor sentences, but also in comparison with many felony sentences. It seems highly doubtful that the legislature intended to eliminate disparity in felony sentencing and encourage or even permit it in misdemeanor sentencing. The fact that such disparate misdemeanor sentences are not only possible, but are in fact imposed on a regular basis, compels the conclusion that a problem exists. Should the problem be addressed on an ad hoc basis or is a formalized generally applicable solution indicated? If a generally applicable solution is needed, how should it be constructed?

IV. THE PROBLEM OF A SOLUTION

The authors believe that the current "Wild West" environment of misdemeanor sentencing is a problem that requires solution. That belief is based on the conviction that the differentiation in the classification of crimes between misdemeanor and felony not only is a considered legislative decision that the crimes designated as misdemeanors should not be punished as or more harshly than felonies, but also is based on the historical definition of those classifications and notions of proportionality and equal protection.

A. Constitutional Issues

The problem of disparate misdemeanor sentencing has constitutional dimensions. Article I section 7 of the California Constitution provides that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."⁵⁶

Two cases in the Appellate Department of the Los Angeles Superior Court have considered equal protection issues in disparate misdemeanor sentencing. In the first, the court upheld consecutive misdemeanor sentences amounting to four years and three months on numerous convictions of driving under the influence of drugs and/or alcohol, but acknowledged in dicta that misdemeanor sentences "clearly" or "proportionately in excess of sentences for more serious

55. CAL. RULES CT. 106.

56. The California constitutional provision mirrors the due process protection of amendments V and XIV to the United States Constitution.

offenses" would raise equal protection concerns.⁵⁷ In the second case, the court found a violation of the equal protection rights of the defendant in imposition of consecutive sentences amounting to six years and six months for "wobblers" charged as misdemeanors, a longer sentence that would have been possible under the Determinate Sentencing Law had the "wobblers" been charged as felonies.⁵⁸

Two cases in the California Courts of Appeal, one decided in March 1986 and one pending at the time of this article's writing, also confront the unequal sentencing misdemeanants receive. In the first of these cases, a Ventura County court refused to find any violation of a misdemeanant's rights under the California Constitution in sentences totaling three years and six months even though, according to the petitioner's calculations, if the limitations applicable to felonies under the Determinate Sentencing Law had been applied, the maximum sentence imposed would have been limited to two years.⁵⁹ In the second case, arising in San Joaquin County, the misdemeanant sought a sentence limited by the "one-third the middle term" provision applicable to felony sentencing.⁶⁰

Clearly the equal protection concerns appear ripe. In addition to the equal protection issue, additional questions are raised under the eighth amendment to the United States Constitution and Article I section 17 of the California Constitution which provide that "cruel or unusual punishment may not be inflicted."⁶¹

57. *People v. Haendiges*, 142 Cal. App. 3d Supp. 9, 12, 191 Cal. Rptr. 785, 788 (1983). See *infra* notes 67-69 and accompanying text.

58. *People v. Powell*, 166 Cal. App. 3d Supp. 12, 212 Cal. Rptr. 454 (1985). See *infra* notes 75-78 and accompanying text.

59. *In re Valenti*, 224 Cal. Rptr. 10 (2d Dist. Ct. App. 1986). The Second District Court of Appeals had previously denied the misdemeanant's petition for writ of habeas corpus, and he sought relief from the California Supreme Court. On November 20, 1985, the California Supreme Court granted review in *In re Valenti* on habeas corpus and transferred the matter to the same court with instructions to issue an order to show cause. That order to show cause was heard February 19, 1986. Despite the California Supreme Court's intervening action, the appellate court again denied the petition for writ of habeas corpus and discharged the order on March 5, 1986. For the previous holding in *In re Valenti*, see 153 Cal. App. 3d Supp. 35, 200 Cal. Rptr. 862 (1984). See also *infra* notes 79-87 and accompanying text.

60. *People v. Hyde*, No. 3 Crim. 14917 (3d Dist. Ct. App. heard May 19, 1986), ordered before decision to the Third District Court of Appeal from the Appellate Department of the San Joaquin County Superior Court. *Hyde* was set for hearing in the court of appeal on May 19, 1986. As of the date of this article, that court has issued no decision.

61. CAL. CONST. art. I, § 17. See also U.S. Const. amend. VIII.

1. Equal Protection

To challenge a legislative enactment on equal protection grounds, it is first necessary to demonstrate that the challenged provision treats two similarly situated groups unequally.⁶² In this case, the two identified groups are misdemeanants and felons.⁶³ Courts have held that since felons and misdemeanants are confined for the same purpose, punishment for crime, they are therefore "similarly situated" with respect to their "liberty interest."⁶⁴ The California Supreme Court has repeatedly held that "liberty" is a fundamental interest under both the United States and California Constitutions.⁶⁵ Once it is determined that the right affected is a fundamental right, the state must show that there exists a compelling interest to justify the different treatment of two similarly situated groups,⁶⁶ and that the dis-

62. *In re Eric J.*, 25 Cal. 3d 522, 530, 601 P.2d 549, 553, 159 Cal. Rptr. 317, 320 (1979). *Cf. In re Rogers*, 19 Cal. 3d 921, 934, 569 P.2d 1286, 1294, 141 Cal. Rptr. 298, 306 (1977) (application to a juvenile setting).

63. With the extension of Penal Code section 1170.1 to juveniles and mentally disordered sex offenders, either of those two groups may be compared with misdemeanants. *See infra* note 105 and accompanying text. However, for purposes of comparison of sentencing, it must be taken into account that felons/misdemeanants as a group and juveniles or mentally disordered sex offenders are confined for different reasons. The purpose of confinement for felons/misdemeanants is punishment. CAL. PENAL CODE § 1170 (West Supp. 1986). In the case of juveniles, "minors adjudged wards of the courts are committed . . . for the purposes of treatment and rehabilitation." *In re Eric J.*, 25 Cal. 3d 522, 531, 601 P.2d 549, 553, 159 Cal. Rptr. 317, 321 (1979). On the basis of this difference, the court in *In re Eric J.* held that minors adjudged wards of the juvenile courts and adults in prison (felons) were *not* "similarly situated." The protection of section 1170.1 was afforded juveniles by the court because section 726 of the Welfare and Institutions Code expressly referenced it. *In re Eric J.*, 25 Cal. 3d at 536, 601 P.2d at 557, 159 Cal. Rptr. at 325 (citing CAL. WELF. & INST. CODE § 726 (West Supp. 1986)).

64. In *People v. Powell*, 166 Cal. App. 3d Supp. 12, 22 n.9, 212 Cal. Rptr. 454, 462 n.9 (1985), with regard to the imposition of consecutive sentencing, the court held that felons and misdemeanants had identical liberty interests. In *In re Valenti*, 224 Cal. Rptr. 10 (2d Dist. Ct. App. 1986), the court agreed with *Powell* that the loss of liberty is "equally drastic" in terms of confinement for misdemeanants and felons, requiring application of a strict scrutiny standard. *Id.* at 12 n.2. In *People v. Sage*, 26 Cal. 3d 498, 611 P.2d 874, 165 Cal. Rptr. 280 (1980), felons and misdemeanants were held to be "similarly situated" with regard to allowed pre-trial conduct credits.

65. "[P]ersonal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions." *People v. Saffell*, 25 Cal. 3d 223, 228, 599 P.2d 92, 93, 157 Cal. Rptr. 897, 900 (1979) (quoting *People v. Olivas*, 17 Cal. 3d 236, 251, 551 P.2d 375, 384, 131 Cal. Rptr. 55, 64 (1976)).

66. "[O]nce it is determined that [a] classification scheme affects a fundamental interest or right the burden shifts; thereafter the state must first establish that it has a compelling interest which justifies the law and then demonstrate that the distinctions drawn by the law are necessary to further that purpose." *People v. Olivas*, 17 Cal. 3d 236, 251, 551 P.2d 375, 385, 131 Cal. Rptr. 55, 65 (1976). *Accord In re Valenti*, 224 Cal. Rptr. at 12, 12 n.2 (citing *Olivas*). *See generally In re Moye*, 22 Cal. 3d 457, 465, 584 P.2d 1097, 1103, 149 Cal. Rptr. 491, 497 (1978) (construing the personal liberty interest of a defendant committed to a mental institution due to a finding of not guilty by reason of insanity); *People v. Feagley*, 14 Cal. 3d 338, 355, 535 P.2d 373, 384, 121 Cal. Rptr. 509, 520 (1975) (construing the right to jury trial); *Serrano v. Priest*, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971) (wealth as a suspect classification).

inction in law is necessary to further that interest.

There appears to be no such compelling interest justifying the different treatment of felons and misdemeanants. In *People v. Haendiges*,⁶⁷ the Appellate Department of the Superior Court of Los Angeles affirmed a sentence of four years and three months in county jail based solely on a reluctance to overrule existing precedent.⁶⁸ However, the court acknowledged in dictum that "[a]ny interpretation of California's statutory scheme of punishment which would lead to potential misdemeanor sentences, which are either clearly in excess, or proportionately in excess, of sentences for more serious offenses, might well deny . . . equal protection."⁶⁹ The concept of equal protection requires that persons equally situated receive like treatment.⁷⁰

Misdemeanors are defined as "[o]ffenses lower than felonies."⁷¹ However, because the maximum statutory penalties prescribed for misdemeanors are severe in relation to the penalties ordinarily imposed for misdemeanor convictions, a possibility of unequal treatment is created that is compounded when a judge imposes consecutive sentences.⁷²

Aside from the basic inequity of sentencing a defendant who has committed a lesser offense to a longer term, thereby defeating the state's purpose for imprisonment of punishment proportional to the crime,⁷³ the misdemeanant sentenced to multiple consecutive terms ends up confined for an extended period in county jail, a facility built

67. 142 Cal. App. 3d Supp. 9, 191 Cal. Rptr. 785 (1983). Defendant was sentenced to four years and three months in county jail based on six violations of the Vehicle Code and violation of probation on three of those counts. He was also sentenced for probation violations stemming from offenses committed on four separate occasions in 1978 and 1979. *Id.*

68. *Id.* However, the court also indicated that no court had addressed this issue on equal protection or cruel and unusual punishment grounds up to that point in time. *Id.* at 26, 191 Cal. Rptr. at 797.

69. *Id.* at 24, 191 Cal. Rptr. at 795.

70. *In re Gary W.*, 5 Cal. 3d 296, 303, 486 P.2d 1201, 1207, 96 Cal. Rptr. 1, 7 (1971). Cf. Cal. Penal Code § 1170(a)(1) (West Supp. 1986) ("the purpose of imprisonment for crime is punishment . . . [and] this purpose is best served by terms proportionate to the seriousness of the offense.")

71. BLACK'S LAW DICTIONARY 901 (5th ed. 1979).

72. Johnson, *Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine*, 58 CALIF. L. REV. 357, 389 (1970). Professor Johnson argues that multiple concurrent sentencing is rarely prejudicial, whereas consecutive sentencing is the source of excessive punishment.

73. CAL. PENAL CODE § 1170(a)(1) (West Supp. 1986). See *supra* note 12 and accompanying text.

for the express purpose of short-term confinement.⁷⁴

The Appellate Department of the Superior Court of Los Angeles County finally confronted the equal protection issue in *People v. Powell*,⁷⁵ a case which addressed the constitutionality of consecutive sentencing in the case of “wobblers” charged as misdemeanors which exceeded the maximum permissible sentences had the “wobbler” offenses been charged as felonies.⁷⁶ The court found denial of the application of section 1170.1 of the Determinate Sentencing Law to be in violation of the equal protection rights of the defendant.⁷⁷ However, the court declined to rule on the constitutionality of consecutive sentencing as applied to all misdemeanants, although in dictum they indicated that similar results would be reached.⁷⁸ Nonetheless, it is the clear mandate of *Powell* that to bar the application of section 1170.1 to all misdemeanants is probably a violation of equal protection.

The first California Court of Appeal to consider equal protection issues in imposition of consecutive multiple misdemeanor sentences filed its opinion in *In re Valenti*⁷⁹ on March 5, 1986, rejecting a petition for writ of habeas corpus with respect to consecutive misdemeanor sentences totaling three years and six months for, *inter alia*, drunk driving, petty theft, violations of probation and violations of the Aeronautics Act.⁸⁰ Petitioner had argued that misdemeanants are denied equal protection of law because they are denied the considerations imposed on consecutive sentences for felonies by the Determinate Sentencing Law; under those limitations, the misdemeanant's maximum sentence would have been two years.⁸¹

The court explicitly recognized that application of a strict scrutiny standard was required.⁸² However, the court rejected petitioner's equal protection argument, because “[a] felon is uniquely burdened by a diverse collection of statutorily imposed disabilities long after

74. CAL. ADMIN. CODE tit. 15 § 1006. Without discussion, the court in *In re Valenti* refers to “significant difference in the quality and duration of punishment” resulting from conviction for a felony as opposed to conviction for a misdemeanor. 224 Cal. Rptr. at 12. However, the conditions of incarceration in county jail facilities, the subject of judicial sanctions and much publicity in the past year, suggest that the difference in the quality of punishment disproportionately affects the misdemeanant, not the felon. See, e.g., *Fischer v. Winter*, 564 F. Supp. 281 (N.D. Cal. 1983). See also L.A. Times, Mar. 29, 1986, § 2, at 1, col. 1.

75. 166 Cal. App. 3d Supp. 12, 212 Cal. Rptr. 454 (1985).

76. *Id.* See *supra* note 43.

77. *Powell*, 166 Cal. App. 3d Supp. at 15, 212 Cal. Rptr. at 456.

78. *Id.* at 26, 212 Cal. Rptr. at 464.

79. 224 Cal. Rptr. 10 (2d Dist. Ct. App. 1986).

80. *Id.*

81. *Id.*; CAL. PENAL CODE § 1170.1(a),(g) (West Supp. 1986). See *supra* notes 12-20 and accompanying text.

82. *In re Valenti*, 224 Cal. Rptr. at 12 n.2.

his release from prison"⁸³ and because "[t]he state has a compelling interest to protect its law abiding citizens by discouraging the criminal element from repeatedly violating its laws."⁸⁴

The court's conclusion that the governmental objectives of the Determinate Sentencing Law "are inapplicable in this case"⁸⁵ might be rationalized in the context of *Haendiges* and *Powell* by the relatively short sentence actually imposed and the relatively small disparity between the sentence imposed and the sentence that would have been imposed under the limits of the Determinate Sentencing Law. However, the crucial questions of legislative intent and the applicability of the objectives of the Determinate Sentencing Law are unaddressed by the court's opinion in *Valenti*. Post-release disabilities unique to felons are an encroachment on personal freedom, but they do not constitute the deprivation of liberty that is recognized as a fundamental liberty interest common to felons and misdemeanants who are confined for the same purpose, punishment for crime.⁸⁶ Moreover, the state's compelling purpose of discouraging repeated violations of its laws applies to felons as much as to misdemeanants, if not more.

The state itself saw fit to limit that objective with respect to felons by the Determinate Sentencing Law, declaring that "the purpose of imprisonment for crime . . . is best served by terms proportionate to the seriousness of the offense with provisos for uniformity in the sentences of offenders committing the same offense under similar circumstances."⁸⁷ Given this clear statement of legislative intent, the appellate court's apparent rejection of equal protection for all misdemeanants appears to be contrary to the constitutional and public policy bases the legislature had invoked. No compelling state interest is offered for *different* treatment of felons and misdemeanants; no distinction in law is necessary to further the state's interest in imposing punishment on felons and misdemeanants in proportion to their crimes and offenses.

2. Cruel And Unusual Punishment And Proportionality

The eighth amendment to the United States Constitution declares,

83. *Id.* at 13. See also *supra* note 74 and accompanying text.

84. *In re Valenti*, 224 Cal. Rptr. at 13. Cf. *Haendiges*, 142 Cal. App. 3d Supp. at 28, 191 Cal. Rptr. at 799 (1983) (Foster, J., concurring in part and dissenting in part); see *infra* note 114.

85. *In re Valenti*, 224 Cal. Rptr. at 13.

86. See *supra* notes 64-65 and accompanying text.

87. CAL. PENAL CODE § 1170.1(a) (West Supp. 1986); see *supra* note 12 and accompanying text.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁸⁸ "The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."⁸⁹ Article I, section 17 of the California Constitution provides the same protection, although the state is permitted to interpret its provision to provide even greater protection than that provided by the correlative federal provision.⁹⁰

Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.⁹¹ The most recent consideration of eighth amendment proportionality review by the United States Supreme Court outside the capital punishment realm has been in review of state recidivist statutes which impose life sentences following a certain number of separate felony convictions.

In *Rummel v. Estelle*,⁹² the Court upheld against a cruel and unusual punishment challenge a Texas statute which imposed a life sentence on William James Rummel following his third felony conviction. Rummel's three offenses were fraudulent use of a credit card to obtain \$80 worth of goods and services, passing a forged check in the amount of \$28.36, and obtaining \$120.75 by false pretenses. The Court noted that "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, . . . the length of the sentence actually imposed is purely a matter of legislative prerogative."⁹³

Three years after *Rummel v. Estelle*, the court reviewed a life sentence imposed pursuant to a state recidivist statute, this time South Dakota's, in *Solem v. Helm*.⁹⁴ Jerry Helm had been convicted of seven nonviolent felonies: three counts of third-degree burglary; one count of obtaining money under false pretenses, one count of grand larceny, one count of third-offense driving while intoxicated; and, finally, uttering a "no account" check for \$100. The last offense was charged under the recidivist statute, which resulted in a sentence of life imprisonment without the possibility of parole. In overturning Helm's sentence, the Court apparently felt that the unavailability of parole, which was available to Rummel in as "little" as twelve years, was the factor which tipped the proportionality scale and violated the

88. U.S. CONST. amend. VIII.

89. *Solem v. Helm*, 463 U.S. 277 (1983).

90. *People v. Brisendine*, 13 Cal. 3d 528, 549-52, 531 P.2d 1099, 1112-15, 119 Cal. Rptr. 315, 328-31 (1975).

91. See *Weems v. U.S.*, 217 U.S. 349 (1910).

92. 445 U.S. 263 (1980).

93. *Id.* at 274.

94. 463 U.S. 277 (1983).

eight amendment.⁹⁵

In light of the extreme sentence that had to be imposed before the United States Supreme Court would find that the eighth amendment had been affronted, it is not at all surprising that the Appellate Department of the Los Angeles Superior Court did not find cruel and unusual punishment in terms of disproportionality in the six and one-half year misdemeanor sentence in *People v. Powell*.⁹⁶ The court reached that result even though it found that the sentence imposed exceeded the maximum permissible sentence that could have been imposed had all the offenses been charged as felonies. It appears that constitutional provisions against cruel and unusual punishment have extremely high proportionality tolerances. It therefore seems quite unlikely that even the most disproportionate misdemeanor sentence, even if proportionality is measured against felony sentences, will result in a finding that the constitutional protections against cruel and unusual punishment have been violated.

B. Definitions

Any solution should proceed from the premise that the worst misdemeanor should not be punished as harshly, and certainly not more harshly, than the least felon. As premises go, that may not be hard to accept. However, going the next step beyond the premise immediately brings us to the problem of defining "least felon" and "worst misdemeanor." "Worst misdemeanor" is the easier of the two to define. We shall define "worst misdemeanor" to be a person who stands convicted of multiple counts of any misdemeanors carrying maximum sentences of one year in county jail. This choice is made because such misdemeanors represent the crimes that the legislature has deemed to be the most serious offenses which may be punished as misdemeanors.⁹⁷ One year is also the maximum sentence available for "wobblers" punished as misdemeanors. Not surprisingly, "wobblers" of this sort are also the offenses perceived by the general public as some of the most serious misdemeanors, and include such offenses as burglary, grand theft, forgery, receiving stolen property, battery on a police officer with injury, assault with a deadly weapon, and vehicular manslaughter; each such misdemeanor may be

95. *Id.* at 300-301. "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." *Id.* at 301.

96. 166 Cal. App. 3d Supp. 12, 212 Cal. Rptr. 454 (1985).

97. See *supra* notes 34-35 and accompanying text.

punished by a sentence of up to one year in jail.⁹⁸

Defining the "least felon" on the other hand presents difficulties. Failure to pay child support, a "wobbler" which is punishable as a felony by a state prison sentence of one year and one day, carries the lowest felony punishment.⁹⁹ However, because of the singularity of its punishment and the almost civil nature of the offense, it would not be a fair and representative example. The next gradation is the more typical "wobbler" punished as a felony, with a sentencing range of sixteen months, two years or three years in state prison.¹⁰⁰ Because of the option to designate these offenses as misdemeanors, they are the class of offenses best representing the "least felonies."

However, because of the three sentencing choices set forth for felonies and the fact that the choice of sentence is a direct consequence of the seriousness of the circumstances of the particular offense, the designation of "least felon" remains difficult. While it is tempting to designate as the "least felon" the one who receives the lowest authorized sentence, sixteen months, that temptation must be resisted for several reasons. First, case law which has recognized the apparent anomaly in misdemeanor sentencing when compared with felony sentencing has focused on the maximum authorized sentence for multiple felony "wobblers."¹⁰¹ Second, since it is not the sentence on an individual count that is under consideration, but rather multiple consecutive sentences, using the low term seems unrealistic. It is fairly rare for consecutive sentences to be imposed in conjunction with the lower base term sentence. Consecutive sentences are much more likely and justifiable when the base term is the middle or upper term. The use of middle base term cases, which have a maximum aggregate term of four years when consecutive sentences are imposed due to the double-the-base-term rule, is reasonable and probably most representative of the "least felon" who is also likely to get consecutive sentences. However, in the interest of consistency with the case law and out of a conservative approach to what will not seem to some like a conservative solution, we will avoid making a definitive designation, in favor of using both middle and upper base term cases as examples. As previously noted, consecutive sentences for felony "wobblers" with a two year base term result in a maximum four-year aggregate term; if the base term is three years the maximum is six years.¹⁰²

98. See *supra* notes 39-41 and accompanying text.

99. CAL. PENAL CODE § 270 (West Supp. 1986); see *supra* note 41.

100. See *supra* note 41 and accompanying text.

101. *People v. Powell*, 166 Cal. App. 3d Supp. 12, 212 Cal. Rptr. 454 (1985); *People v. Haendiges*, 142 Cal. App. 3d Supp. 9, 191 Cal. Rptr. 785 (1983).

102. See *supra* note 19 and accompanying text.

C. The Scope of the Problem

With definitions in hand, examples of absurdly disparate sentencing based on whether the offenses are felonies or misdemeanors are easy to provide. Take, for example, a defendant convicted of ten counts. If the convictions are all "wobblers" charged as felonies, the maximum sentence that may be imposed is six years in state prison. If, however, those same crimes are all charged as misdemeanors with a maximum sentence of one year for each, the defendant may be sentenced to a total of ten years in county jail. Although no case has dealt with this extreme situation where the misdemeanors had no alternative felony counterpart for sentencing, the cases suggest that any aggregate misdemeanor sentence in excess of six years would still be found to violate the equal protection clause of the Constitution.

The Appellate Department of the Los Angeles Superior Court dealt with the situation of a defendant who was sentenced on "wobblers" charged as misdemeanors to an aggregate term of six and one-half years, six months more than would have been the case had the very same offenses been charged as felonies and a maximum prison term been imposed.¹⁰³ In holding that the sentence violated equal protection principles, the court suggested that the same cap would apply had the offenses been straight misdemeanors instead of "wobblers."¹⁰⁴ That is the same solution reached by the California Attorney General in an opinion as to the maximum term of commitment for mentally disordered sex offenders convicted of only misdemeanors.¹⁰⁵

103. *People v. Powell*, 166 Cal. App. 3d Supp. 12, 212 Cal. Rptr. 454 (1985).

104. *Id.* at 26, 212 Cal. Rptr. at 464. *In re Valenti*, 224 Cal. Rptr. 10 (2d Dist. Ct. App. 1986), holding to the contrary, is not persuasive, even if it is distinguished only on the length of the sentence involved, three years and six months. See *supra* notes 79-87 and accompanying text.

105. 63 Op. Cal. Att'y. Gen. 199 (1980). The opinion rejected a literal interpretation of the statute for sentencing mentally disordered sex offenders. The initial computation of the maximum term was made by referring to California Welfare and Institutions Code section 6316.1(c) which defined the "maximum term of commitment" as "[t]he longest term of imprisonment which could have been imposed for the offense or offenses of which the defendant was convicted, including the upper term . . . for enhancements and consecutive sentences . . . less any applicable credit . . ." CAL. WELF. & INST. CODE § 6316.1(c) (repealed by 1981 Stats. 3485). The Attorney General held that in the case of a "wobbler" the maximum term may not exceed the maximum term the mentally disordered sex offender would have received had the crimes of which he was convicted been determined to be felonies rather than misdemeanors. With misdemeanors with no alternative felony punishment, the mentally disordered sex offender's maximum term may not exceed the maximum he would have received

While a six year maximum for consecutive misdemeanor sentences would impose a limit where now no limit at all exists, it still does not eliminate the anomaly or address the lack of proportionality presented by six year misdemeanor sentences. A six year maximum is posited as merely the most that constitutional limits can tolerate. A six year imposed sentence is the gross sentence; the net sentence, or the amount of time the defendant actually spends in custody, is calculated by reducing the gross sentence by the application of work credits and good conduct credits. A misdemeanant may earn up to one-third off of his gross sentence; a felon in state prison may earn up to one-half off of his gross sentence.¹⁰⁶ On a six year sentence, therefore, the misdemeanant may actually serve a full year more in custody than the felon.

The differences in available credits for felons and misdemeanants have withstood a constitutionally-based equal protection challenge.¹⁰⁷ However, that single appellate court's answer to the constitutional challenge to credits available against time served begs the question of proportionality and fundamental fairness. The misdemeanant who serves four years of a six year sentence is probably not comforted by the knowledge that, even though he would serve only three years had he had the foresight to commit felonies, his constitutional rights are still intact. Although the legislature's declaration of intent contained in the Determinate Sentencing Law is limited to felonies, there is no reason to believe that the legislature did not also intend that misdemeanor sentences be proportionate to the seriousness of the offense and free from disparity.¹⁰⁸ When *individual* offenses are

had the misdemeanors been punishable under California Penal Code section 18, a determinate sentence of sixteen months, two years, or three years. 63 Op. Cal. Att'y Gen. at 207. The Attorney General's opinion also applies to the sentencing of persons found not guilty by reason of insanity.

In the juvenile setting, the California Supreme Court held that section 1170.1 of the Penal Code would be applicable to both misdemeanors and felonies in *In re Eric J.*, 25 Cal. 3d 522, 536-37, 601 P.2d 549, 556-57, 159 Cal. Rptr. 317, 324-25 (1979). The court based this language on the specific mandate of section 726(c) of the Welfare and Institutions Code, which provides: "If the court elects to aggregate the period of physical confinement on multiple counts, or multiple petitions . . . the maximum term of imprisonment shall be specified in accordance with subdivision (a) of § 1170.1 of the Penal Code." CAL. WELF. & INST. CODE § 726(c) (West 1984). The court erred, however, in commenting that the legislature's omission of misdemeanors in section 1170.1 was a clear statement of its intent not to put a cap on consecutive misdemeanor sentencing. Section 1170.1 was part of the Uniform Determinate Sentencing Act of 1976 which was enacted by the legislature as a total reform of felony sentencing laws. *See supra* notes 11-12 and accompanying text. Misdemeanor sentencing was not even considered in the preparation and passage of this act; accidental exclusion by omission should not be construed as an affirmative showing of legislative intent.

106. *See supra* note 45 and accompanying text.

107. *People v. Sage*, 26 Cal. 3d 498, 611 P.2d 874, 165 Cal. Rptr. 280 (1980).

108. *See also People v. Powell*, 166 Cal. App. 3d Supp. 12, 212 Cal. Rptr. 454 (1985). *Cf. CAL. PENAL CODE § 1170.1* (West Supp. 1986).

compared, there is nearly perfect proportionality in sentences. However, when multiple consecutive misdemeanor sentences are imposed, that proportionality is nowhere to be found and potentially absurd disparate sentencing becomes the rule, despite the example of the Determinate Sentencing Law and the absence of any support to be found anywhere in legislative intent.

V. A SOLUTION TO THE INEQUITY

The drafters of the Model Penal Code, whose felony sentencing scheme is strikingly similar to the Determinate Sentencing Law, recognized the potential problem with consecutive misdemeanor sentences and therefore proposed that a limit be placed on the aggregate length of such sentences.¹⁰⁹ New York takes a novel, but effective approach. Although there is no limit on the aggregate length of misdemeanor sentences which may be imposed, the defendant stays in jail until he has served his entire sentence with reduction for applicable conduct credits, or until he has served two years, whichever comes first.¹¹⁰ The explanatory notes to the New York statute declare that this is not a limit on the court's ability to sentence, but rather is merely direction as to the calculation of the service of the sentence.¹¹¹

Judge Vernon G. Foster of the Superior Court of the State of California for the County of Los Angeles offered another point of view in his concurring and dissenting opinion in *People v. Haendiges*.¹¹² His solution to the anomaly of consecutive misdemeanor sentencing is not to impose restrictions on misdemeanor sentencing, but to remove

109. When multiple sentences of imprisonment are imposed on a defendant for more than one crime . . . such multiple sentences shall run concurrently or consecutively as the Court determines at the time of sentence, except that . . . (b) the aggregate of consecutive definite terms shall not exceed one year; and (c) the aggregate of consecutive multiple terms shall not exceed in minimum or maximum length the longest extended term authorized for the highest grade and degree of crime for which any of the sentences was imposed . . .

MODEL PENAL CODE § 7.06(1) (1985).

110. The New York statute provides in pertinent part:

Where a person is under more than one definite sentence, the sentences shall be calculated as follows . . . (b) if the sentences run consecutively and are to be served in a single institution, the terms are added to arrive at an aggregate term and are satisfied by discharge of such aggregate term, or by service of two years imprisonment plus any term imposed for an offense committed while the person is under the sentences, whichever is less . . .

NEW YORK PENAL LAW § 70.30(2) (McKinney 1975).

111. See *id.* practice commentaries at 252.

112. 142 Cal. App. 3d Supp. 9, 26, 191 Cal. Rptr. 785, 797 (1983) (Foster, J., concurring in part and dissenting in part).

the restrictions from felony sentencing. While that solution would certainly eliminate the obvious anomaly of the statutes, it would require that the legislature abandon its goals of proportionality and the elimination of disparity in sentencing. Moreover, expanding the "Wild West" tenor of misdemeanor sentences to encompass felony sentencing would immediately result in a confrontation with well-established judicial concerns for proportionality and the elimination of disparity in felony sentencing. A more reasonable and workable solution would be the fixing of a limit on the length of the aggregate term which may be imposed or served for multiple misdemeanor convictions.

The New York limit of two full years in actual custody fits proportionally into California's sentencing scheme so exactly that it serves as a virtually perfect model. Accordingly, we propose a limit of two years, either imposed or served, for multiple misdemeanor convictions. Under present law, the maximum sentence for any single misdemeanor is one year, which is one-third of the maximum for most "wobblers" charged as felonies. The proposed two year limit on aggregate consecutive sentences is one-third of the maximum aggregate consecutive term for multiple "wobblers" charged as felonies. This limit also takes into consideration that county jails are designed for shorter term housing than are state prisons.¹¹³

Still, the internal logic and consistency of such a solution alone does not address the sentiment expressed by Judge Foster in *People v. Haendiges*:

[N]o one as yet has suggested a convincing reason why, if the purpose of sentencing is punishment, one who commits a series of crimes receives a full measure of punishment for only the first offense, but he is permitted to commit subsequent crimes at bargain rates until he amasses a sufficient number of them so that all additional crimes are "on the house."¹¹⁴

While there may be no "convincing" reasons, the simple reason is that the legislature has deemed such a scheme sufficiently punitive. Prior offenses may be used to enhance sentences in felonies¹¹⁵ and in some misdemeanors.¹¹⁶ A limiting cap on misdemeanor sentencing may justify sentence enhancement beyond the cap for certain misdemeanor prior offenses, or justify treating certain misdemeanors as felonies where prior offenses are present.¹¹⁷

Another disparity in misdemeanor sentencing which deserves cor-

113. See *supra* note 74 and accompanying text.

114. 142 Cal. App. 3d Supp. at 28, 191 Cal. Rptr. at 799 (Foster, J., concurring in part and dissenting in part). Cf. *In re Valenti*, 224 Cal. Rptr. 10 (2d Dist. Ct. App. 1986); see *supra* notes 84-87 and accompanying text.

115. CAL. PENAL CODE § 1170.1 (West Supp. 1986). See *supra* note 4.

116. See CAL. PENAL CODE § 666 (West Supp. 1986) (prior conviction of petty theft, grand theft, burglary or robbery).

117. STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURE Standard 6.2 commentary at 280 (1968).

rection is the inability of the sentencing court to reconsider its sentence once service is commenced. "Little would seem to be served by freezing a decision that later turns out to have been erroneous. Provisions that the sentencing court can undo what hindsight has demonstrated to have been a mistake seems the least that is due the victim."¹¹⁸ This is perhaps best demonstrated by noting that during fiscal year 1983-84 the Board of Prison Terms found disparate felony sentences in only forty-two cases out of over 16,000 reviewed.¹¹⁹ When it is realized that over forty percent of the state prison sentences are for twenty-four months or less,¹²⁰ it is likely that more than forty-two disparate misdemeanor sentences could be located in any one of the dozen most populous counties in the state even if the misdemeanors were compared for disparity with felonies. Accordingly, we propose that provisions for reconsideration and review of multiple consecutive misdemeanor sentences, comparable to those provided for felony sentences, be included in legislation addressing this problem.

California's felony sentencing scheme well serves the purposes intended by the legislature. The California courts that have considered the question whether equal protection requires that the "one-third the middle term" and "double base term" rules be applied to misdemeanors as well as felonies have disagreed. Whatever the result with pending appeals and cases still to come before the courts, the ultimate solution lies with and should come from the legislature. If uniformity and proportionality in sentencing and the elimination of disparity are truly the intent of the legislature, then it is time for our lawmakers to turn their attention to the kinds of sentences which make up the vast majority of those imposed in this state, the sentences for misdemeanors.

118. Cf. CAL. PENAL CODE §§ 666 and 484 (West 1982 & Supp. 1986).

119. REPORT, *supra* note 27, at 7, 31.

120. *Id.*

