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A Model of Criminal Dispositions: An Alternative to Official Discretion in Sentencing

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A MODEL OF CRIMINAL DISPOSITIONS: AN ALTERNATIVE TO OFFICIAL DISCRETION IN SENTENCING

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Professor Palmer proposes a new model of criminal dispositions which would replace official discretion at sentencing with judicially created standards for sentencing officials. In Part I he outlines the role of the appellate judiciary in developing an interest analysis to enunciate standards to guide criminal dispositions. In Parts II and III he examines the roles of administrative agencies and legislatures in perfecting the dispositional process under standards initially articulated by the judiciary. Professor Palmer emphasizes the concept of individual liberty as a central value of society and shows how a new system of criminal dispositions can enhance that value as a goal of the criminal law.

INTRODUCTION

A man shouting "holdup" may set in motion the machinery of state intervention through the criminal process, leading to the conviction and detention of the robber. Appellate courts then may be asked to resolve a host of legal issues dealing with events occurring before and after the shout to determine whether continued state control over the robber is legitimate. For instance, an appellate court may decide that a hearing is needed to determine the admissibility of the victim's sworn testimony

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that the convicted robber was the man who held him up[1] and might explore such factors as the lighting at the scene of the holdup or the nature of any police line-up.[2] More frequently, in modern American criminal law, appellate courts will be asked to determine the legality of police investigative practices in the particular case. Did the police arrive soon enough after the shout to be in hot pursuit? Was the search of the entire house proper under the circumstances? Was the seizure of items of the robber's clothing as well as weapons supposedly used in the holdup proper? If the seizure of the items was improper according to some legal standard, the ultimate question on appeal will be whether the items should have been admitted at trial and whether the conviction may stand.[3]

While the articulated goal of the appellate review described above might be the protection of some notion of individual liberty,[4] ironically, none of the courts reviewing the trial judge's many decisions were concerned that our robber, who was convicted of armed robbery, was sentenced to 14 years in prison. Nor did the fact that other judges in the same jurisdiction might have sentenced him to five or 20 years raise a legal issue for appellate court resolution.[5] Assuming that the 14 year sentence is appropriate, a prison official could initiate, without appellate review, a psychiatric examination process leading to indefinite confinement of our robber in a special institution for treatment.

A simple explanation of this state of affairs in American criminal law is that, despite the urging of many commentators,[6] sentencing is not generally subject to appellate review. Given the close judicial scrutiny of pretrial events and of the trial itself, some explanation of the prevailing practice of unreviewability of sentencing and other post-conviction matters is in order. If the seizure of the robber's clothing by the police presents a reviewable issue, so should the decision to imprison him for

1 *See* Gilbert v. California, 388 U.S. 263, 272 (1967); United States v. Wade, 388 U.S. 218, 227 (1967).

2 *See* Neil v. Biggers, 409 U.S. 188, 196-99 (1972).

3 *See* Warden v. Hayden, 387 U.S. 294, 300 (1967).

4 *Id.* at 312 (Fortas, J., concurring). "I fear that in gratuitously striking down the 'mere evidence' rule, which distinguished members of this Court have acknowledged as essential to enforce the Fourth Amendment's prohibition against general searches, the Court needlessly destroys, root and branch, a basic part of liberty's heritage." *Id.*

5 *See generally* Coburn, *Disparity in Sentences and Appellate Review of Sentencing*, 25 RUTGERS L. REV. 207 (1971); Levin, *Urban Politics and Judicial Behavior*, 1 J. LEGAL STUDIES 193 (1972).

6 *See generally* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES, Appendix D, 158-60 (Approved Draft, 1968) [hereinafter cited as ABA STANDARDS]; Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 26 (1972).

14 years rather than place him on probation.[7] Similarly, decisions concerning our robber's parole or his transfer to a special treatment facility should be subject to judicial review. The degree of inattention to our robber's post-conviction treatment has led one commentator to characterize the prevailing practice as "lawlessness in sentencing." [8]

The prevailing practices exist in part because of the legal system's willingness to tolerate a coexistence of free agents and legally bound agents. The police and, to a degree, the trial judge legally are bound to follow rules in their treatment of our robber. In contrast, the officials involved in post-conviction decision making virtually are unrestricted by legal rules in their dealings with our robber. This dichotomy is a reflection of the conflicting goals that our legal system pursues. We acknowledge that the criminal should be subject to social control since he held up the victim, but we also are concerned that we protect his individual rights, particularly before labelling him a "criminal." As a result the legally bound agents are required to follow narrowly prescribed rules in dealing with the robber in order to protect him, but the free agents are allowed broad discretion to insure that he gets the punishment he deserves.

Thus, the trial judge is given broad discretion to sentence and to "individualize" or tailor punishment to fit our robber. An argument to justify this discretion is that the individualization of punishment through the creation of free agents best achieves the dual goals of "reformation and rehabilitation." [9] If the sentence is ill-suited to the individual defendant, the trial judge always is subject to reversal for abuse of discretion;[10] but,

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[7] The maximum term of imprisonment for armed robbery in Maryland is 20 years. MD. ANN. CODE art. 27, § 488 (1957). The judge is authorized to impose probation despite the fact that a minimum three year term is applicable to the general robbery statute. *See id.* §§ 486, 643. More than one-half of all persons under state criminal control are placed under supervised release in the community rather than incarcerated. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 27 (1967). *See also* R. CARTER & L. WILKINS, PROBATION AND PAROLE 18 (1970).

[8] *See* FRANKEL, *supra* note 6, at 26; *cf.* K. DAVIS, DISCRETIONARY JUSTICE 127-41 (1969). *But see* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 139-45 (1968) [hereinafter cited as H. PACKER].

[9] *See* Williams v. New York, 337 U.S. 241, 247-50 (1949).

[10] *See* Leach v. United States, 353 F.2d 451, 452 (D.C. Cir. 1965); United States v. Wiley, 278 F.2d 500, 503 (7th Cir. 1960). The trial court's use during sentencing of inaccurate information regarding the defendant's prior criminal record has long been held a violation of due process of law. *See* Townsend v. Burke, 334 U.S. 736, 740-41 (1948). The scope of the attack on the process of sentencing can be expanded to require a code of sentencing procedure. *Cf.* Mempa v. Rhay, 389 U.S. 128, 135-36 (1967); Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View From Mempa v. Rhay*, 47 TEXAS L. REV. 1, 5-6 (1968); Pugh & Carver, *Due Process and Sentencing: From Mapp to Mempa to McGautha*, 49 TEXAS L. REV. 25 (1970).

in order to maintain the free agency system, such instances of appellate court intervention should be extremely rare. Belief in the efficacy of trial judge discretion in sentencing logically leads to the creation of other free agents. Thus, correction officials are given broad discretion in their application of penal policies to our robber, and legal doctrines have developed effecting judicial reluctance to influence or modify the actions of prison and parole officials.[11] A further argument in support of nonreviewability is that the adoption of any particular penal policy to control the free agents in their dealing with our robber simply is not a judicial function but rather that specific policies to guide correction officials or judges should be formulated by the legislature.[12] The result of the prevailing practice, however, is that our robber probably will be treated haphazardly by the various free agents.

While we close the curtain on our robber and leave him in the introduction, the events occurring after his conviction are the focus of the pages that follow. The position taken is that his post-conviction treatment must be the subject of legal review by the appellate courts. Our robber justifiably is subjected to society's control, but that does not require the uncontrolled use of free agents pending legislative action. Furthermore, the convicted individual is not truly protected by the practice of "individualized" punishment which only obscures the real issues of post-conviction treatment. The entire legal method developed from the doctrine of trial judge discretion needs to be replaced with a new mode of analysis compatible with modern notions of the goals of the criminal law.

The alternative proposed is a method of legal analysis called "A Model of Criminal Dispositions" and is grounded on the belief that the legitimacy of post-conviction treatment demands that sentencing officials be governed by legal standards. The model is based upon three assumptions about modern American criminal law. First, trial judge sentencing is essentially part of a broader category of legal decisions which may be termed "dispositions." The feature common to all dispositions is that an official is authorized by the legal system to exercise direct control over individuals. The model will focus on the broad category of criminal dispositions, with a preference for minimizing the use of such controls.[13]

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

[12] *See* People v. Moore, 53 Cal. 2d 451, 348 P.2d 584, 2 Cal. Rptr. 6, *cert. denied*, 364 U.S. 895 (1960); Mack v. State, 203 Ind. 355, 180 N.E. 279 (1932). *But see* People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972); State v. Laws, 51 N.J. 494, 242 A.2d 333 (1968).

[13] The term "dispositions" is broader than "sentencing" since individuals are deprived of their liberty by some "civil" processes. *See* notes 186-224 *infra* and accompanying text.

Second, since dispositions will be assumed to serve a different function from the adjudication of criminality, the same legal standards may not be useful for both; indeed as will be seen, different legal standards should govern the two types of decisions. Third, decisions concerning adjudication and disposition should be connected by overall goals or interests promoted by the criminal law. A subsidiary of this third assumption is that the judiciary is the appropriate agency to articulate these interests in the area of dispositions as it already does through review of adjudications. This will require the courts to engage in an "interest analysis" [14] by looking to the legislative policy behind the delineation of criminal offenses as well as the policies underlying the court-developed constitutional limitations on criminal adjudication. After the appellate courts have developed this basic analysis for rule making in the area of dispositions, the goal of judicial intervention in the correctional process should be the development of standards of judicial review of what are, in effect, criminal administrative agencies.[15]

The rules of disposition developed under the model are applicable to some of the unresolved problems of "sentencing." Within the area of trial judge sentencing, the model offers standards and accompanying policies to govern the decision to grant probation, the use of prior convictions, the imposition of multiple sentences, and the effect of an individual's non-cooperation. These rules of decision making for appellate and trial judge sentencing will be developed in Part I. Once the individual is within the state confinement process, there are at least two areas —the administration of intra-prison discipline and parole determinations —where the model suggests standards which would protect individuals from improper exercise of administrative discretion. Part II will demonstrate how the judiciary and correction officials should share this decision making responsibility.

By legislative directive the purpose of some of the state confinement processes may be articulated specifically as "non-criminal." Under the analysis proposed, however, the commitment of any individual by legal process involves a disposition. The analysis proposes some rules that would protect individuals within these specialized processes, regardless of the legislatively articulated goal of disposition. The Federal Youth Corrections Act, indeterminate sentencing schemes for women, a "family offense" statute, and several civil commitment processes are examined in light of the model's broad goal of minimizing the use of coercive legal

As the criminal law is but one form of social and legal control, less coercive methods should be employed whenever possible.

[14] *See* notes 31-35 *infra* and accompanying text.

[15] *See* notes 157-185 *infra* and accompanying text.

power to control individuals. Part III thus offers an opportunity to observe the appellate judiciary in its suggested role as catalyst for reform.

Within the three broad assumptions developed above concerning the criminal law, the model essentially is an attempt to relate the disposition of the individual case and the interests which the criminal law is designed to promote. The model recognizes that courts, legislatures, and criminal administrative agencies make dispositional decisions from their particular institutional perspective. Underlying the legal standards proposed, however, is an assumption that all decision makers should acknowledge the disutility of criminal dispositions for all individuals whose conduct ordinarily would lead to an adjudication of "criminality." [16] Part IV will conclude with a discussion of issues left unresolved by the article but which are capable of resolution under the analysis proposed.

PART I

QUESTIONS OF JUDICIAL DISPOSITIONAL POLICY

CONSTITUTIONAL FRAMEWORK FOR DISPOSITIONS

At a time when official discretion in dispositions is the rule and modifications are proposed, a constitutional framework for dispositions performs two important functions. An appellate court restricted by constitutional doctrine constantly must confront the question of the limits of its institutional role in modifying present sentencing practices. Furthermore, such a framework will reemphasize the important function of the appellate court in questioning "inferior" decision makers, a role which the Supreme Court undertook in the recent death penalty case of *Furman v. Georgia*.[17] The eighth amendment, which addresses itself directly to the issue of limitations on dispositions,[18] and the fourteenth amendment provide the framework for determining the limitations on the legal system in its post-conviction treatment of individuals.[19]

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16 Professor Hart defines criminality as that conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community. Hart, *The Aims of the Criminal Law*, 23 LAW AND CONTEMP. PROB. 401, 416 (1958).

17 408 U.S. 238 (1972). The nine divergent opinions in *Furman* reflect the difficulty the Court had in imposing a constitutional analysis on an area theretofore guided principally by discretion; the failure of the decisions to articulate more specific limitations on dispositions, therefore, should not be surprising.

18 The eighth amendment provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

19 The thirteenth amendment may also provide a broad principle of limitation. "Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject

One possible analysis of the eighth amendment is a determination of what the Founding Fathers deemed an appropriate mode of disposition upon conviction.[20] Under such an historical analysis, corporal punish-

to their jurisdiction." *Id.* amend. XIII, § 1. While sentencing or disposition may have been from the minds of the Framers, the "duly convicted" language could be given a new interpretation and become an important source of principles in view of modern notions of what constitutes legitimate exercise of state power over individuals. Justice Brennan of the Michigan Supreme Court has indicated his belief that the thirteenth amendment limits judicial discretion. *See* People v. Payne, 386 Mich. 84, 98, 191 N.W.2d 375, 382 (1971) (Brennan, J., dissenting), *rev'd on other grounds*, 41 U.S.L.W. 4671 (U.S. May 21, 1973). In the course of his separate opinion Justice Brennan stated:

> I believe, however, that the United States Supreme Court was very, very wrong—dangerously, and illiberally wrong—in concluding that a harsher penalty could be imposed upon a defendant for '. . . conduct . . . occurring after . . . the original sentencing . . . .'
>
> Courts are empowered to mete out sentences for the conduct of which the defendant stands convicted. That conduct, and only that conduct, has been established factually in the manner required by constitutional due process.
>
> Any other, subsequent, conduct with which the defendant has not been duly charged and of which he had not been duly convicted according to the Constitution and laws of the State and the Nation simply *cannot* be made the basis for depriving a person of his liberty.
>
> The Thirteenth Amendment makes the point perfectly and abundantly clear.

Id. at 98, 191 N.W.2d at 382. *But see* Holt v. Sarver, 309 F. Supp. 362, 369-72 (W.D. Ark. 1970), *aff'd*, 442 F.2d 304, 306 (8th Cir. 1971) (claim by state prisoners that thirteenth amendment limited correction official's discretion rejected).

At a minimum, the thirteenth amendment might be used by a court to support its claim of the institutional capacity to promulgate rules, of constitutional and non-constitutional dimension, concerning dispositions.

[20] The history of punishment in this country during colonial times discloses an attitude towards those who deviate from society's norms which still persists today. Prior to the adoption of any constitutional limitation on dispositions, the sanctions inflicted upon the deviant were designed to achieve a perceived social purpose. During the colonial period, the deviant or offender was viewed primarily as a sinner. To the Puritan mind, crime and sin were synonymous. The frequent use of sanctions that made the offender-sinner a participant in the "punitive process" can be explained in terms of a desire to reform the offender-sinner. *See* G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 206 (1968). It was thought that sanctions that worked directly on the individual's conscience were most effective. While some forms of deviance might require ouster from the community, banishment was utilized primarily for religious heretics whose consciences could not be reformed. The legally authorized dispositions for non-capital offenses, primarily corporal punishment and a system of fines, were designed for an identifiable group that was viewed as capable of sufficient reform to return to the society. *Id.*

During the revolutionary era, society's attitude about the function of the criminal law changed. While formerly the criminal law was viewed as a means of preserving religious morality, its purpose grew to include the protection of property on non-religious grounds. With the development of different attitudes towards crime, the legal system increasingly treated the offender as an outcast of society. Newer forms of dispositions gradually developed to replace the two revolutionary dispositions—corporal punishment and monetary fines. Imprisonment at hard labor became the basic form of disposition for non-

ment, although not now widely used, may be viewed as permissible under the eighth amendment if legislatively authorized.[21] The constitutional amendment, therefore, performs its proper function by exercising a restraining influence upon the legislature which authorizes dispositions.[22]

An alternative analysis of the eighth amendment gives it a modern function in light of the two themes in the history of American punishment. Under this analysis, for example, a legislatively authorized death penalty would be impermissible even though death, like corporal punishment, was utilized widely as the disposition for convictions of certain crimes at the time of the Founding Fathers. The "in light of contemporary human knowledge" [23] and "the dignity of man" [24] standards could be utilized by the judiciary to declare the legislatively authorized penalty unconstitutional.[25]

A majority of the Justices could not agree upon any particular functional analysis of the eighth and fourteenth amendments in the recent death penalty case.[26] Nonetheless, recent prevailing opinions will have two important effects upon decision making in the area of dispositions. They establish that the judiciary has the institutional capacity to declare a legislatively authorized disposition illegal.[27] Furthermore, the per curiam opinion of the *Furman* majority opens up a legal debate over dispositions generally and the punishment of death in particular.[28] That debate will

capital offenses by 1805. With state incarceration as the ultimate disposition, procedural protections for the individual became more important as the infliction of incarceration involved a process of the state versus the individual. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U.L. REV. 450, 451, 458-66 (1967).

21 State v. Cannon, 55 Del. 587, 190 A.2d 514 (1963); *accord*, Foote v. Maryland, 59 Md. 264 (1883) (disposition of seven lashes as well as a short jail term upheld where statute allowed trial judge to determine the number of lashes); Gracia v. New Mexico, 1 N.M. 415 (1869) (disposition of 30 lashes for horse theft upheld).

22 *See* Furman v. Georgia, 408 U.S. 238, 397, 399-400, 403-04, 426, 429-30, 466-68 (1972) (Burger, C.J., Powell, & Rehnquist, JJ., dissenting).

23 Trop v. Dulles, 356 U.S. 86, 101 (1958).

24 Robinson v. California, 370 U.S. 660, 667 (1962).

25 People v. Anderson, 6 Cal. 3d 628, 647, 493 P.2d 880, 893, 100 Cal. Rptr. 152, 164-65 (1972); *see* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1777-98 (1970). *But see* Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1073-74, 1078 (1964); Wheeler, *Towards a Theory of Limited Punishment After Furman v. Georgia* (pt. II), 25 STAN. L. REV. 62, 66 (1972).

26 *See* Furman v. Georgia, 408 U.S. 238 (1972).

27 *See id.* at 239-40; Robinson v. California, 370 U.S. 660, 664-67 (1962). *Robinson* was only a substantive limitation on the promulgation of rules describing illegal conduct; in the sense of this article, this is a limitation on the adjudicatory stage. *See* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1801 n.123 (1970). *But see In re* De La O, 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489 (1963).

28 The highest courts of Delaware and North Carolina recently have held that *Furman* requires that the "mercy statutes" permitting the jury or the trial judge not to impose

involve a two-fold inquiry: (1) for crimes in general, what are the permissible dispositional policies and the permissible means of decision making to implement those policies;[29] and (2) for what purposes and according to what standards can the administrators of dispositional processes change the terms and conditions of an individual's confinement?[30]

AN "INTEREST ANALYSIS" OF THE CRIMINAL LAW

An analysis of the particular interests the criminal law is intended to promote is the first step in the development of standards for disposition. The four broad categories of interests or values of the society promoted by the criminal law are security of the person's body, private property, state processes, and a concept of individual liberty.[31]

Whether the fourth interest, a concept of individual liberty, is or ought to be a goal of the criminal law has sparked considerable debate.[32] It is given equal weight here since its conceptualization as a goal serves to integrate the substance and process of modern criminal law. Judicially

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the death penalty for capital offenses are invalid. These decisions impose a mandatory death penalty scheme by judicial interpretation in both states. *See* State v. Dickerson, — Del. —, —, 298 A.2d 761, 764, 768 (1972); State v. Talbert, — N.C. —, —, 194 S.E.2d 822, 826 (1973); State v. Wadell, — N.C. —, —, 194 S.E. 2d 19, 28-29 (1972).

[29] *See* State v. Ward, 57 N.J. 75, 82-83, 270 A.2d 1, 5 (1970) (first offenders in marijuana possession cases should receive suspended sentences); Bonnie & Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1138-39 (1970); notes 60-86 *infra* and accompanying text; *cf.* McGautha v. California, 402 U.S. 183, 248 (1971) (Brennan, J., dissenting). *See also In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972); People v. Lorentzen, 387 Mich. 167, 194 N.W.2d 827 (1972); People v. Sinclair, 387 Mich. 91, 134, 194 N.W.2d 878, 928 (1972) (Brennan, J., concurring).

[30] *See* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (infliction of whipping by inmate-foreman under court ordered regulations and procedures held violative of eighth amendment); *In re* Birdsong, 39 F. 599 (S.D. Ga. 1889) (court used attachment for contempt to prevent jailkeeper from disciplining detainee by chaining him to the grating of his cell on a diet of bread and water because the jailkeeper lacked power to select arbitrarily any punishment to discipline detainees). *See generally* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972); Note, *Recent Applications of the Ban on Cruel and Unusual Punishments: Judiciary-Enforcement Reform of Non-Federal Penal Institutions*, 23 HAST. L.J. 1111 (1972).

[31] At least the first three proposed interests have been discussed elsewhere. *See* Kadish, *The Crisis of Over-Criminalization*, 374 ANNALS 157 (1967).

[32] *See* H. PACKER 14-16. Professor Packer recognizes that a concept of individual liberty or autonomy ought to qualify the interest of the criminal law in crime prevention, but he does not place individual liberty on an "equal footing with the prevention of crime . . . the primary purpose of the criminal law." *Id.* at 14.

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

fashioned due process limitations are essentially new ways in which individuals within the criminal process can force the legal system to consider certain challenges to the legality of state control.[33] Prior to the criminal law's "constitutionalization," the broad principle of legality was the only doctrine which recognized these interests.[34] The inclusion of a concept of individual liberty as a factor of equal weight in the analysis merely recognizes the need to articulate those characteristics or interests of individuals that should be factors in criminal law decision making.

This concept of individual liberty as an interest to be considered at dispositions is not synonymous with freedom from governmental interference.[35] As a factor of analysis at disposition, the concept of individual liberty refers only to limitations on the state's interference with individuals adjudged "criminal" to the extent necessary to achieve the state's dispositional goals. As an independent factor, the concept of individual liberty is, in addition, a starting point for rules of disposition where the goals sought in the promulgation of certain laws and the adjudication of certain conduct as criminal are in doubt.

FOUR AREAS OF APPELLATE COURT RULE MAKING FOR TRIAL JUDGE SENTENCING

With an interest analysis as a tool for the development of rules of disposition, an appellate court is ready to assume its often advocated role as reviewer of trial judge sentencing decisions. The rules developed should be capable of justifying the differing treatment of individuals by the legal system[36] by reference to the dispositional goals of that system.[37]

Four problem areas of trial judge sentencing are ripe for appellate court resolution through primary rule making under the analysis proposed. The decision to grant or deny probation in a given case should be viewed and resolved by the appellate court as the question of incarceration versus non-incarceration. The proper use of prior convictions in trial judge sentencing is badly in need of appellate court guidance. Ap-

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[33] *See* H. PACKER 163-73.

[34] J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 27-69 (2d ed. 1960); G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 575-608 (London ed. 1961).

[35] If, however, the question is whether the concept of liberty prohibits the state from using the criminal process, the concept of liberty appropriately might be defined as freedom from governmental interference. *See* Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process"*, 44 S. CAL. L. REV. 490 (1971); *cf.* Roe v. Wade, 410 U.S. 113, 169-70 (1973) (Stewart, J., concurring).

[36] *Cf.* Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853, 864-65 (1963).

[37] *See* Coburn, *Disparity in Sentences and Appellate Review of Sentencing*, 25 RUTGERS L. REV. 207, 208-09 (1971).

pellate courts should develop rules for the disposition of individuals found guilty of more than one offense, since legislative guidelines or standards for dispositions in such cases have tended to ignore the functioning of the criminal law as a coherent process. Finally, appellate courts should develop criteria to determine the proper effect of an individual's non-cooperation with the processes of the criminal law. Once the primary rules of dispositions are promulgated by the appellate court, the penal policy appropriate to achieve the dispositional goal can be formulated.

Incarceration v. Non-incarceration. The grant or denial of probation, or of any other permissible disposition not involving incarceration, and the disparity of dispositions between two individuals found guilty of the same offense, particularly where one receives probation and the other is incarcerated, have long been recognized as problems most in need of the guidance of appellate court rules. On the assumption that minimizing governmental interference is one of the goals sought in the development of rules for dispositions, individuals should be presumed to prefer probation over incarceration.[38] The legal standards that govern this primary decision justify why certain individuals are incarcerated while others receive probation.

The shift from the prevailing analysis to the proposed one as a means of deciding who should be granted probation involves three steps. First, the criteria suggested as a guide to the trial judge's grant or denial of probation must be tested against modern concepts of individual liberty. The second step involves a determination of the proper scope of the appellate judiciary's policy making role in disposition, a role generally ignored under the existing analysis. Finally, dispositional decisions should be cast in terms of overall dispositional policy so that appellate opinions in sentencing cases will contain principles of law, which can be used as authority in deciding future cases by appellate and trial courts alike.

The recent codification movement in the United States has produced some suggested criteria for trial judge sentencing in the American Law Institute's *Model Penal Code*.[39] In addition to enacting a general presumption against incarceration, the *Model Penal Code* provides for 11 different types of factors that should be weighed by the trial judge in

[38] Some individuals convicted of crimes in fact may prefer incarceration, but their reasons should be considered pathological and should not affect the adoption of particular legal standards.

[39] ALI MODEL PENAL CODE § 7.01 (1962); *see* Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1450-56 (1968); Wechsler, *Sentencing, Correction and the Model Penal Code*, 109 U. PA. L. REV. 465 (1961).

his determination to grant or deny probation.[40] Those recommended criteria are a product of the prevailing analysis, and an examination of one of the factors for sentencing demonstrates that the criteria probably are unworkable as there is no overall framework for legal decision making included in the *Code*.

Section 7.01(2)(f) of the *Model Penal Code* provides that the judge should consider whether the defendant has compensated or will compensate the victim of his crimes.[41] This criterion is likely to be significant if used by trial judges in cases involving the variety of crimes that threaten private property. If willingness to reimburse assumes an ability to reimburse, the inappropriateness of the criterion can be demonstrated by comparing its effects upon two individuals. Assume that both individuals have been convicted of one of the offenses against private property and that one of them, *A*, is willing and able to reimburse the victim, but the other, *B*, is willing but unable to reimburse the victim.

Without any other information about *A* or *B*, the use of section 7.01(2)(f) as a standard probably increases *B*'s risk of incarceration as compared to *A* because of their respective economic situations. Viewing *B*'s crime as one against private property, his greater risk of incarceration

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[40] The *Code* provides in pertinent parts:

> (2) The following grounds, while not controlling the discretion of the Court, shall be accorded weight in favor of withholding sentence of imprisonment:
>
> (a) the defendant's criminal conduct neither caused nor threatened serious harm;
>
> (b) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm;
>
> (c) the defendant acted under a strong provocation;
>
> (d) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
>
> (e) the victim of the defendant's criminal conduct induced or facilitated its commission;
>
> (f) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he has sustained;
>
> (g) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;
>
> (h) the defendant's criminal conduct was the result of circumstances unlikely to recur;
>
> (i) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;
>
> (j) the defendant is particularly likely to respond affirmatively to probationary treatment;
>
> (k) the imprisonment of the defendant would entail excessive hardship to himself or his dependents.

ALI MODEL PENAL CODE § 7.01 (1962).

[41] *See id.* § 7.01(2)(f); note 40 *supra*.

can be justified if the dispositional goal is to keep individuals with fewer economic resources from taking from those with greater resources in an unlawful manner. *A* is allowed to decrease his risk of incarceration by reimbursement on the more general theory that offenses against private property are concerned primarily with misappropriation of resources, so that reallocation through reimbursement of the victim by the offender furthers this broad interest sought by the criminal law through dispositional policy.

Equalizing the risk of incarceration of *A* and *B* by disallowing section 7.01(2)(f) as a factor in trial judge sentencing could be justified by a different theory of the goals behind laws that protect the interest in private property. The proliferation of offenses in this category is in response to a recognition by the criminal law that individuals in a society originally built upon a concept of private wealth are tempted to allocate the resources of others to themselves.[42] If this explanation is accurate, the goal at disposition should be to promote among all individuals, regardless of their economic resources, the notion that there are illegitimate means of utilizing the resources of others. When illegitimate means are chosen, the society will intervene through the criminal process against the individual who is in effect an illegitimate entrepreneur.[43]

Equalization of the risk of incarceration of *A* and *B* is the proper dispositional policy in modern American criminal law. The law's policy that an individual's economic status should not adversely affect the adjudication of his criminality must be viewed as within the concept of individual liberty at disposition.[44] Under this analysis, the appellate court would rule that the use of willingness to pay as a factor in the trial judge's determination concerning probation is impermissible in offenses against private property. The court's rationale would be that the use of the standard violated the concept of individual liberty since its use increases risk of incarceration on the basis of economic status. In a case involving an individual in *B*'s position, even without a person like *A* as a co-defendant, the court could make the ruling as a matter of dispositional policy without having to determine what the proper criteria for granting probation in the particular case should be.

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[42] The recognition of the traditional "claim of right" defense in most common law crimes involving theft might be justified on this theory. *Cf.* Morissette v. United States, 342 U.S. 246 (1952); Hart, *supra* note 16, at 431 n.70.

[43] *Cf.* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1124-27 (1972).

[44] *See* Morgan v. Wolford, 472 F.2d 822 (5th Cir. 1973) (requirement of restitution as a condition of probation justiciable on equal protection grounds); *cf.* Tate v. Short, 399 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

Where appellate courts do rule that probation is to be granted, the reasoning employed should establish standards that are appropriate guides for trial judge decisions in future cases and consistent with the appellate court's broad rule making power. For example, sentencing decisions in selective service cases at both the appellate and trial court levels raise troublesome questions of the proper exercise of trial judge and appellate court discretion in dispositional decisions.[45]

The reasoning in the recent case of *United States v. Daniels*[46] demonstrates the need for principled decision making by appellate courts. The defendant, a conscientious objector, failed to comply with an order of his local board to report for instructions to commence his alternative service. The appellate court previously had remanded the case for a new sentence upon affirming Daniels' conviction for violating the selective service law.[47] Upon remand the district judge once again sentenced Daniels to the five year maximum term. On the second appeal the court relied upon what it viewed as Daniels' individual characteristics in entering a probation order in its mandate to the district judge.[48]

The appellate court's order, however, went beyond merely mandating probation and the term of probation. Daniels was a Jehovah's Witness who apparently was willing to comply with a judicial order to present himself for civilian work but not an order from his selective service board. The appellate court's order accommodated Daniels' individual religious scruples against cooperating with the selective service system by requiring him to perform civilian work determined by the probation department.[49]

While the five year maximum sentence may have been excessive in Daniels' case, the important question not addressed by the court was whether any period of incarceration was appropriate for the offense. If the interest protected by the substantive offense is the state processes, particularly the process of selecting those individuals who must do combatant service, civilian service, or no service,[50] it is difficult to understand why the court utilized its powers and resources to put Daniels into the civilian service slot when another specialized state agency was authorized to and had already done the same thing. Daniels' individual

[45] *See* FRANKEL, *supra* note 6, at 108 n.32; *cf.* Note, *Sentencing in Cases of Civil Disobedience*, 68 COLUM. L. REV. 1508 (1968).

[46] 446 F.2d 967 (6th Cir. 1971).

[47] United States v. Daniels, 429 F.2d 1273 (6th Cir. 1970).

[48] 446 F.2d at 972. Such action by the appellate court rather than remanding has been characterized as unprecedented in commentaries on the case. *See* 23 CASE W. RES. L. REV. 430 (1972); 42 U. CIN. L. REV. 195 (1972).

[49] 446 F.2d at 972.

[50] *Cf.* Gillette v. United States, 401 U.S. 437 (1971).

religious beliefs had been considered when he was classified as a conscientious objector by the selective service board. The legislatively-prescribed duty for a conscientious objector was to perform civilian work as ordered by the local board, and failure to comply with that order results in criminal liability. The apparent explanation for the court's action was that Daniels' religious beliefs justified this highly individualized treatment. Such an explanation ignores the difficult type of fact finding trial judges might be encouraged to make if religious belief is to be a factor for distinguishing the disposition of individuals.[51]

The appellate court stated that Daniels' sole motivation for refusing to obey the order was his religious belief,[52] but the court failed to consider whether individual motivation is a relevant criterion to guide the primary stage of disposition—the decision concerning incarceration—or whether motivation for disobeying the order is relevant in adjudicating the criminality of Daniels' conduct. If religious motivation is the controlling factual element, the individual whose motivation is found by the sentencing judge to be simple contrariness could be sentenced to five years.

Furthermore, while the total legal system protects the individual's religious beliefs under the first amendment, serious questions arise as to the proper function of criminal law and the fairness of its administration when religious beliefs are used to justify what otherwise would be viewed as criminal conduct. It is no defense to a charge of bigamy, for instance, that the individual's religion permits or promotes polygamy.[53] Whenever the law attempts to exempt certain individuals from the criminal law, as in the case of peyote use by certain American Indian religious sects, the question arises as to why newer "religious" groups cannot claim the exemption from criminal sanctions for use of different drugs for allegedly religious purposes.[54]

If violation of the order of a local selective service board is viewed as a crime against state processes, the proper issue in *Daniels* is whether the sole objective in having such a crime is to encourage individuals in general to cooperate with a state regulatory process of fairly selecting individuals for state obligations. Assuming that protection of the system of selection is the proper legislative goal in defining the conduct as

[51] Whether the legislature should consider broadening the category of inquiry into an individual's belief is a separate question. *Cf.* Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L. J. 1053, 1068-69 (1968).

[52] 446 F.2d at 968.

[53] *See* Reynolds v. United States, 98 U.S. 145 (1878).

[54] *See generally* Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

criminal,[55] the issue is whether that goal can be furthered at disposition by the imposition of some period of incarceration. Without deciding whether the maximum penalty was excessive by some appropriate principle,[56] the decision concerning incarceration should not turn solely on what the court views as an individual's religious principles. To be fair to the individual who violates the law without religious motivations or any other apparent motivation, the legal system should minimize its inquiry into religious beliefs.[57]

The technique applied by the *Daniels* court of categorizing the individual offenders to arrive at broad dispositional policy is a practical result of the prevailing analysis' stated goal of individualizing sentencing decisions.[58] Such an analysis, however, will not bring about the desired result of principled decision making in sentencing. An appellate court using such an analysis has decided that gambling offenders ordinarily should be incarcerated,[59] but that first time offenders convicted of possession of marijuana should receive probation.[60] The court was able to reach the latter result without any explicit consideration of its previous holding as to gambling offenses or any attempt to reconcile the results in terms of overall dispositional policy.[61]

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[55] *Cf.* United States v. O'Brien, 391 U.S. 367, 377-80 (1968).

[56] *See* Note, *supra* note 45, at 1511-14.

[57] *See* Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 446-47 (1969); note 51 *supra.*

[58] A recent study of the appellate process of sentencing in England indicates that the growing acceptance of individualization of disposition did not mean the end of sentences of incarceration. The framework of sentencing policy developed by the English Appellate Court of Criminal Appeal allows two primary modes of disposition—individualization or incarceration. Under this analysis individualization includes dispositions which include confinement in state institutions either for training or preventive custody of certain supposedly identifiable groups of individuals. The analysis demonstrates that there are four types of individuals for whom individualized dispositions are appropriate: young offenders, indeterminate recidivists, inadequate recidivists, and mentally disordered offenders.

This notion of individualization assumes that the goal of the legal system in these cases is treatment or reformation of individuals so disposed. D. THOMAS, PRINCIPLES OF SENTENCING 3-31 (1970). However, when the goal of disposition is non-criminal, the practice in the United States has been to use "civil" commitment procedures. These dispositional processes must include principles that protect individuals from confinement. These civil dispositional processes have been affected in the United States by the due process revolution. *See* notes 186-225 *infra* and accompanying text.

[59] State v. Ivan, 33 N.J. 197, 162 A.2d 851 (1960).

[60] State v. Ward, 57 N.J. 75, 270 A.2d 1 (1970); *see* [1966] New Jersey Laws ch. 313, § 24: 18-47(c)(1) (1966).

[61] The court in *State v. Ward* did state, however, that it considered its determination to suspend sentences to be consistent with a legislative policy of leniency toward first offenders. *See* 57 N.J. at 82-83, 270 A.2d at 5-6.

Under the proposed model, any distinction between the dispositional policies for gambling and drug offenses[62] in terms of the four broad interests promoted by the criminal law[63] would be inappropriate. Both offenses are "vice crimes" and should be analysed in terms of the fourth interest of a concept of individual liberty, since neither of the offenses fits within the first three interests. To develop a policy of disposition in terms of a concept of liberty is to define the meaning of "individuality" for the purpose of legal decision making. Such a definition begins with a comparison of the various attitudes towards the offending conduct.[64]

Drug users and gamblers probably would define individual liberty to mean freedom from governmental interference.[65] From their perspective, the criminal law should not be employed to regulate the specific conduct in question. The proposed analysis, however, cannot ignore the effect on non-gamblers and non-drug users of having criminal laws prohibiting the conduct. Assuming the latter groups are in the majority, the use of the criminal law to prohibit the conduct could be viewed as beneficial to the society's concept of individual liberty. A particular notion of individual physical and mental health—that the free man is unshackled by the vices of gambling or drugs—is promoted by discouraging the conduct. If drug users or gamblers are becoming at least a substantial minority, then a wide divergence of views as to the meaning of individuality exists within the society.[66]

The majority is presumed to share with the minority a desire to be free from unnecessary governmental interference. The use of the law's most coercive form of social control, however, allows the majority to use the criminal law and its disposition to impose its view of individuality on a substantial minority. None of the other three social interests sought through the criminal law—security of the body, private property and state processes—is at stake. Thus an appellate court could conclude that the promulgation of the prohibition and the adjudication of the conduct

62 The discussion will concern only the criminal offense concerning marijuana. Other types of drugs such as heroin present other dispositional problems. *Cf. In re* De La O, 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489 (1963) (challenge to civil commitment of individuals addicted to heroin).

63 *See* note 31 *supra* and accompanying text.

64 The use of such a comparison to develop a legal rule is a form of utilitarian analysis. *See* Packer, *supra* note 35, at 496.

65 *See generally* State v. Kantner, — Hawaii —, 493 P. 2d 306 (1972); Bonnie & Whitebread, *supra* note 29; Packer, *supra* note 35.

66 The present analysis does not decide whether the legal system could establish a system of control or regulation over certain types of drugs and gambling. Nor does the present legal analysis require a decision as to what forms of taxation on the use of drugs and gambling may be legally permissible were drugs and gambling to be decriminalized. *Cf.* H. PACKER 332-42.

as criminal probably have an adverse effect upon the society's concept of individual liberty and that incarceration therefore is inappropriate.[67]

The appellate court rule requiring that probation ordinarily should be imposed in both gambling and drug offenses is established in the interest of minimizing governmental interference with individuals.[68] The rule is furthermore a frank acknowledgment by the judiciary that the utility of the criminal law as means of regulating these forms of conduct is in doubt. As a more generalized principle of disposition, the standard should be that where the social control goal is in doubt under the interest analysis, decision making is weighted in favor of promoting a concept of individual liberty.

Yet the trial judges specifically were instructed by the appellate court to impose custodial sentences in gambling offenses.[69] The New Jersey Supreme Court went even further in the interest of minimizing disparity and instructed that a single judge in each district should sentence gambling offenders.[70] The justification for imposing custodial dispositions for a bookmaking offense was that the goal was to cope effectively with organized crime. As one court stated, "[w]hen the offense serves the interests of a widespread conspiracy, it would be a mistake to think of the defendant as an isolated figure."[71] Even if the appellate court is strongly of the persuasion that organized crime exists, the result of the court's dispositional rule is to allow the sentencing judge to engage in impermissible adjudication. At sentencing the trial judge is allowed to treat the individual as if the legal system in fact had adjudicated him guilty of a conspiracy—a group crime. In fact, in the case where the court established the rule of custodial offenses, everything that the sentencing judge knew about the defendant's criminal activity came from a pre-sentence report since the defendant had been allowed to plea no contest or *non vult*.[72] One implicit purpose of the rule is to reflect in the defendant's sentence criminal activity of others.[73] To justify the dis-

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[67] *See generally* H. HART, LAW, LIBERTY AND MORALITY (1963).

[68] While section 7.01(b)(1) of the *Model Penal Code* suggests that whether conduct caused serious harm is relevant to the decision not to incarcerate, the present interest analysis arrives at the same result by determining that the social goal to be promoted by criminalization is questionable. The concept of individual liberty is considered to determine the degree of "harm."

[69] *See* note 59 *supra* and accompanying text.

[70] *See* State v. De Stasio, 49 N.J. 247, 254-55, 229 A.2d 636, 640 (1967).

[71] State v. Ivan, 33 N.J. 197, 202, 162 A.2d 851, 854 (1960).

[72] *See id.* at 198, 162 A.2d at 852. Whether individuals should be required to plead not guilty so that the legal system would have in all cases of disposition some type of adjudication or fact finding process raises a host of other legal issues. *Cf.* United States v. Jackson, 390 U.S. 570 (1968).

[73] *See* State v. De Stasio, 49 N.J. 247, 254-55, 229 A.2d 636, 640 (1967).

positional policy on the grounds that the custodial sentence will force individual defendants to come forward with information about their supposed superiors raises a further issue of whether the individual right of non-cooperation has been infringed.[74]

Perhaps the functional mistake in the court's analysis is the use of rules of disposition to achieve the investigative goals of other state officials. When the argument was made to the court that the custodial sentence was not necessary "because the public wants to gamble," [75] the court could have developed a dispositional policy in accordance with an interest analysis so that individuals need not suffer incarceration for providing a gambling service that members of the public apparently desire. If gambling is a criminal offense because "it wrecks homes and destroys men" and because it "spawns embezzlement, larceny and crimes of violence," [76] the question remains why the legislature in the state has legalized gambling in some instances.[77] The existence of a vice crime in fact may increase the power of the syndicate,[78] and the actual total impact upon the legal system can be viewed as another disutility of the offense. While investigation of criminal activity is a legitimate state function in criminal law, the use of the dispositional rule to achieve this purpose is at the very least questionable.

In selecting a dispositional policy for the first time marijuana offender, the court rightly refused to follow what the interest analysis suggests is a wrongly decided precedent in the gambling case, but did so without explanation. Rather, the court distinguished the cases, but the distinctions did not justify the difference in dispositions employed. Since the actual defendant in the case had admitted smoking marijuana, the first time offender status may have been a result of the fact that this was the first time that he had been apprehended.[79] Nonetheless, the court stated "still there is no suggestion that the defendant was a seller or inducer." [80]

The last sentence, assuming some notion of principled decision making, might suggest the rule that a seller of marijuana might be incarcerated. But in two subsequent decisions, the lower appellate court remanded the cases for resentencing where the defendants had been convicted of sell-

74 *See* notes 138-156 *infra* and accompanying text.

75 State v. DeGeorge, 113 N.J. Super. 542, 544, 274 A.2d 593, 594 (App. Div. 1971).

76 33 N.J. at 202, 162 A.2d at 854.

77 *See* N.J. STAT. ANN. §§ 5:8-1 to -130, 5:9-1 to -25 (1973) (establishing New Jersey state lottery).

78 H. PACKER 347-54.

79 *See* 57 N.J. at 81, 270 A.2d at 4.

80 *Id.* at 82, 270 A.2d at 5.

ing small amounts of marijuana.[81] Even though sale of drugs is a different offense, the court suggested that the "non-commercial" seller should receive probation. The suggestion that the non-commercial seller is somehow less culpable than the economically successful dealer is based on assumptions about the drug culture which have little sociological validity and less factual support.

The courts' articulated goal of rehabilitation for possessors and some sellers of drugs obscures the consequences of its rulings. Without any consideration by the court of the actual capability of the probation service to reform drug users as opposed to gamblers, the court allows an anomaly to exist. This anomaly exists because the prevailing analysis does not provide for explicit precedential decision making by appellate courts in sentencing. The idea that the gambling case might contain a principle of decision making that should or should not be extended to other cases probably would not occur to an appellate court operating under the present method of analysis.

The proposed analysis, without pretending to be exhaustive at this juncture, has established two primary rules to be developed by appellate courts to guide trial judge determination of probation. First, where the interest promoted by the substantive offense is in doubt, trial judges should be told to grant probation[82] unless some secondary rule would require some period of incarceration. Secondly, in offenses against state processes such as selective service offenses and wilful evasion of federal income tax,[83] the trial judge should be told by the appellate courts to refuse probation unless some secondary rule would require probation. The apparent penal policy underlying such a rule of incarceration is the deterrence of others.[84] Exceptions to either rule, if any, should be drawn narrowly. Secondary rules for any offense where the primary rule is incarceration or non-incarceration might involve factors of mitigation or aggravation.[85] To the degree that the particular explicit policy of in-

81 State v. Breenan, 115 N.J. Super. 400, 279 A.2d 900 (App. Div. 1971); State v. Dennery, No. A-1446-69 (N.J. App. Div. July 16, 1971). *See generally* 3 RUTGERS L.J. 370 (1971).

82 Non-incarceration or probation as conditional liberty is still a state process of control that may be challenged by the individual. *Cf.* Gagnon v. Scarpelli, 41 U.S.L.W. 4647 (U.S. May 14, 1973). The development of decisional rules to define roles for probation officers and lawyers or to exercise legal control over them awaits further development. For a discussion of rules of decisions for a process of conditional liberty see notes 186-225 *infra* and accompanying text.

83 *See* United States v. Whitfield, 401 F.2d 480 (9th Cir. 1966); United States v. Pendergast, 28 F. Supp. 601 (W.D. Mo. 1939).

84 Solomon, *Sentences in Selective Service and Income Tax Cases*, 52 F.R.D. 481, 484 (1970). *See generally* ZIMRING, PERSPECTIVES ON DETERRENCE (1971).

85 *See* notes 87-110 *infra* and accompanying text.

carceration or non-incarceration enraged the public, the legislature might be moved to reconsider the appropriateness of the substantive offenses as well as the policy of disposition.[86]

The Consequences of Prior Adjudication of Criminality. Appellate courts which do review sentences have used evidence that a convicted individual previously has been convicted of an offense to uphold the imposition of long periods of incarceration.[87] The justification offered for the use of such data to increase sentences is that convicted individuals with prior convictions pose a greater danger to society than convicted individuals without prior convictions. The inadequacy of the present approach to the use of prior convictions in sentencing will be demonstrated under the proposed analysis by a redefinition of the issues for appellate decision making and through the development of policies and rules to replace the existing approach.

Under the due process model of the criminal law developed by Professor Herbert Packer in *The Limits of the Criminal Sanction*,[88] the two values reinforcing the legality of the guilt determination and thus the legitimacy of state control over an individual are a fair trial with counsel and appellate review.[89] Those Supreme Court opinions that appear to implement these two values at sentencing are actually analyses dealing with constitutional limitations on adjudication. An interest analysis, however, may be used to develop rules for the use of prior convictions in sentencing to implement these values in the context of dispositions. Recent pronouncements by the Supreme Court have altered the constitutional framework for reviewing the legality of the use of prior convictions in sentencing without offering a guide to proper sentencing policy when prior convictions are involved.

In *North Carolina v. Pearce*[90] the Court dealt with the effect of sentencing practices on the unrestrained utilization of the appellate process

86 The argument that the judiciary should await legislative responses to the dysfunctional state of the law of criminal dispositions is based on the assumption that legislatures will respond rationally to the core problems. However, if recent responses of educated and well informed members of the public and the legal profession to problems of the criminal law are indicative of popular response to crime, the assumption is unwarranted. *See generally* Lehman, *Crime, the Public and the Crime Commission: A Critical Review of* The Challenge of Crime in a Free Society, 66 MICH. L. REV. 1487 (1968).

87 *See* People v. Jackson, 95 Ill. App. 2d 193, 228 N.E.2d 196 (1968). Where the evidence of prior convictions is unreliable, its use is subject to attack on constitutional grounds. *See, e.g.*, Townsend v. Burke, 334 U.S. 736 (1948); Baker v. United States, 388 F.2d 931 (4th Cir. 1968); United States v. Myers, 374 F.2d 707 (3d Cir. 1967).

88 *See* H. PACKER 149-73.

89 *Id.* at 229-38.

90 395 U.S. 711 (1969).

by convicted persons. The Court assumed that a convicted defendant would be deterred from taking an appeal if, having won a retrial, he not only might be reconvicted but also might be given a longer sentence without explanation of the grounds for the increased term. In *Pearce*, therefore, the Court held that a successful appellant who is convicted on retrial may not be given a greater sentence than he originally received unless the trial judge can justify his action.[91] Then the sentence may be increased if the trial judge bases it on "identifiable new conduct." [92]

Some courts and commentators suggest that *Pearce* prohibits the trial judge from using new or additional evidence about the nature of the original offense to justify a harsher punishment upon retrial and reconviction.[93] If this interpretation of *Pearce* is adopted by the Supreme Court, the *Pearce* doctrine would seem to mean that a legally proper conviction or adjudication authorized the imposition of a sentence that cannot be increased except for reasons having nothing to do with the original trial process. Apparently, the *Pearce* doctrine primarily is concerned with protecting the value of appellate review of a criminal conviction, as opposed to adjudication in the broad sense used in this article, since a harsher sentence can be imposed by a trial judge after a trial *de novo*[94] or by a jury.[95] As long as the individual has counsel who could invoke the appellate process, the Court will permit the harsher sentence following a trial *de novo* to stand.[96]

In *Tucker v. United States*,[97] the Court, reflecting Packer's second value of a fair trial with counsel, held that a sentencing judge should not consider a prior conviction obtained in violation of *Gideon v. Wainwright*.[98] Thus, the Court arguably altered the constitutional framework for determining the legality of the use of prior convictions. The most important aspect of *Tucker* is the Court's willingness to develop a

91 *Id.* at 725-26.

92 *Id.* at 726.

93 People v. Payne, 386 Mich. 84, 94-96, 191 N.W.2d 375, 379-81 (1971), *rev'd on other grounds*, 41 U.S.L.W. 4671 (U.S. May 21, 1973); Alpin, *Sentence Increases On Retrial After North Carolina v. Pearce*, 39 U. CIN. L. REV. 427, 444 (1970).

94 Colten v. Kentucky, 407 U.S. 104 (1972). *But see* Alpin, *supra* note 93, at 455-59.

95 Chaffin v. Stynchcombe, 41 U.S.L.W. 4662 (U.S. May 21, 1973).

96 Whether an individual can be retried with counsel solely to change a fine or probation to a jail sentence under *Argersinger v. Hamlin* is not discussed. *See* 407 U.S. 25 (1972). Some courts, adopting a similar formula to *Argersinger* for counsel in lower courts, have indicated new trials for the purposes of imprisonment are appropriate. *See* Rodriquez v. Rosenblatt, 58 N.J. 281, 277 A.2d 216 (1971). But a determination of that issue should also depend upon an interpretation of the meaning of *Gideon* for sentencing.

97 404 U.S. 443 (1972).

98 *Id.* at 448-49; *see* Gideon v. Wainwright, 372 U.S. 335 (1963).

doctrine at sentencing to implement the value of a fair trial. This willingness is particularly dramatic in that the Court's decision required a resentencing in a 20 year old case that had reached the Supreme Court by way of a post-conviction relief petition.[99] There is no need to consider whether the defendant in fact was guilty of the prior conviction since under the Court's analysis of *Gideon*, the prior guilt determination without counsel automatically is infirm.[100] The Court, however, fails to indicate how an appellate court is to determine whether the trial judge, in sentencing or resentencing, has used the infirm prior conviction to enhance punishment in violation of the *Tucker* rules. One possible resolution of this issue is to develop a standard similar to the Court's doctrine governing the jury's consideration of prior convictions obtained in violation of *Gideon* in making its determination of guilt.[101] The Court could assume that a sentencing judge, like an adjudicating jury, may place undue emphasis on the evidence of prior convictions. In the case of a tainted jury verdict, however, the defendant is entitled to a new trial by a new jury where the infirm prior convictions cannot be admitted. With a sentencing judge no such easy solution is available, although some courts have assumed that *Tucker* requires limited disclosure to defense counsel of prior convictions contained in presentence reports,[102] apparently on the theory that counsel then will be able to determine if any of the prior convictions had been obtained in violation of *Gideon*.[103]

Were the implementation of the *Tucker* rule to reach the Supreme Court, the Court might be tempted to experiment with rules about disclosure of presentence reports or use the technique of presumptions of individual response to trial judge sentencing behavior as it did in *Pearce*. A better approach to the issue would be for the Court to look at *Tucker* and *Pearce* together in order to begin the tentative outline of a theory of due process for sentencing. The Court could see that the two cases,

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[99] *Id.* at 445.

[100] *See* Carnley v. Cochran, 369 U.S. 506 (1962).

[101] *See* Burgett v. Texas, 389 U.S. 107, 109 (1967).

[102] *See* United States v. Picard, 464 F.2d 215 (1st Cir. 1972); United States v. Janiec, 464 F.2d 126 (3d Cir. 1972).

[103] The issue has begun to trouble some courts. One court has determined that a federal hearing is not required if the sentencing judge thinks the original sentence is still appropriate. *See* Lipscomb v. Clark, 468 F.2d 1321 (5th Cir. 1972). Another court, holding that *Argersinger* is not retroactive, cited as its reasoning the effect of retroactivity on parole, probation and resentencing. *See* Potts v. Superintendent, 213 Va. 432, 192 S.E.2d 780 (1972). A third court has held that retroactivity of *Leary v. United States* invalidates a prior conviction obtained in violation of *Leary*. The invalidation of the prior conviction meant the commitment under the state's habitual offender statute was invalid. Taylor v. United States, 472 F.2d 1178 (8th Cir. 1973); *Ex parte* Taylor, 484 S.W.2d 748 (Tex. Crim. App. 1972); *see* Leary v. United States, 395 U.S. 6 (1969).

read together, involve the implementation of Professor Packer's two values of the due process model. For the purpose of developing rules that deal directly with the questions of sentencing, the Court should treat the two values of fair trial and appellate review as involving one value or interest. That value is the form of adjudication in modern criminal law. Under this approach, the defendants in *Tucker* and *Pearce* are permitted to challenge the legality of their sentences because the basic form of the decision making in criminal law is at stake. If the Court is willing to define litigable issues at sentencing in terms of previous involvements with criminal adjudication, the Court should determine that the individuals within the criminal process have a cognizable interest in that form of adjudication.

To assert that individuals can litigate their prior involvement with the criminal law at sentencing is not to formulate a sentencing policy for the use of prior convictions. However, by redefining the issue involved in the use of prior convictions in terms of prior adjudication, the sentencing policy could be stated as a presumption that punishment may be inflicted solely on the basis of the offense for which the individual has been convicted in the instant case. That is the only conviction for which the sentencing judge can be sure that there has been a proper adjudication in the broadest sense. Such a dispositional policy could be articulated as a constitutional principle of due process.[104] Alternatively, the policy could be grounded in an interpretation of the thirteenth amendment. Functionally, the amendment could be read to create such a presumption by an interpretation of the words "duly convicted." [105] In conjunction with notions of due process the thirteenth amendment could be read to mean that trial judges should not be required to determine whether any prior conviction was obtained in conformity with constitutionally required standards. Rather the trial judge should be authorized to sentence for the convicted offense as the only one for which the individual has been "duly convicted."

The suggestion that trial judges at sentencing cannot assume that individuals with prior convictions are more dangerous than those without prior convictions does not mean that the legal system should not differentiate between the two classes of persons. The proposed rule recognizes a distinction between them by allowing first offenders to mitigate their sentences. The proposed analysis prohibits the trial judge from increasing sentences on the basis of prior convictions simply as a means

[104] *See generally* Cohen, *supra* note 10; Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962); Pugh & Carver, *supra* note 10.

[105] *See* note 19 *supra*.

of questioning the assumption of greater dangerousness. Recidivist statistics, while impressive to some public officials, do not prove the assumption.[106] In effect the legal system must make a value determination, and the proposed analysis strikes the balance in favor of minimizing the amount of state interference. Legislation is required for the legal system to be authorized to impose special dispositions for persistent offenders. Existing habitual offender statutes may be inadequate as the policy underlying such statutes is not clear.[107] The legislatures are limited in the types of assumptions they can make concerning the dispositions that should flow from legislatively prohibited conduct.[108] More importantly, if the legislature wants to mandate dispositions based on assumptions about criminal behavior, as trial judges have done, it would be required to develop standards for predicting future behavior. This task presents difficulty since criminal adjudication in the modern sense generally is engaged in a process of determining what events occured in the past.[109] If, however, the legislature were willing to make clear that an habitual offender statute exists for the purpose of retribution, the courts would then be faced with the issue of whether the policy of retribution is a justification for the disposition and accompanying process of decision making.[110]

Dispositional Criteria for Multiple Convictions. The present manner of handling the problem of multi-count convictions under a single indictment is itself a demonstration of the need for new sentencing standards. Development of alternative standards requires a functional analysis by the appellate courts. Using such an analysis, the courts first should ascertain the legislative purpose in providing for various statutory schemes proscribing similar or related forms of conduct. Second, the analysis should generate hypotheses for the existence of a requirement of multiple count prosecutions in modern criminal law. Third, an inter-

106 H. PACKER 46-47.

107 *See In re* Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (aggravated penalty for second conviction of indecent exposure unconstitutional). *Compare* Marshall v. Parker, 470 F.2d 34 (9th Cir. 1972), *cert. granted sub nom.*, Marshall v. United States, 93 S.Ct. 1429 (1973) *with* Watson v. United States, 439 F.2d 442 (D.C. Cir. 1970).

108 *See* notes 186-225 *infra* and accompanying text.

109 *Cf.*, Goldstein & Katz, *Dangerousness and Mental Illness—Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225, 233-37 (1960).

110 *Compare* Furman v. Georgia, 408 U.S. 238, 304 (1972) (Brennan, J., concurring) (retribution not justified) *with id.* at 306 (Stewart, J., concurring) (retribution permissible). While habitual offender laws have withstood legal attack in the past, such acts may be reconsidered. *See* Katkin, *Habitual Offender Laws: A Reconsideration*, 21 U. BUFF. L. REV. 99 (1971).

est analysis of all the counts of conviction should be used to determine whether consecutive sentences, concurrent sentences or a general sentence should be imposed upon conviction.

Even where appellate courts assume that they have no general power to review sentences, they have attempted to develop some standards for the trial judge sentencing in multiple conviction situations.[111] The existence of multiple offenses within a statutory scheme proscribing similar conduct has not been treated as indicative of a legislative purpose to authorize trial judges to impose several sentences either consecutively or concurrently upon conviction. Rather, the appellate courts have used canons of statutory construction to develop standards for sentencing. Given a legislative scheme that allows for the prosecution and conviction of an individual on several counts or offenses under a single indictment, the appellate court can choose between the rule of leniency[112] and the rule of harshness in determining legislative intent. The rule of leniency has been employed to require that the trial judge impose only a single sentence where the legislative intent as to multiple punishment is in doubt or where the intent was to provide alternative avenues of prosecution or to create alternative classes of wrong doers differentiated by graduations of punishment.[113] However, the rule of harshness is used if the appellate court perceives a clear legislative sentencing policy to authorize multiple punishments in the enactment of the statute.[114] As a result of the use of the two canons of construction, a person convicted of various federal narcotic violations under a single indictment formerly was subject to consecutive sentences,[115] while a person convicted of multiple counts under the federal bank robbery statute was subject to only a single sentence. The justification offered for this disparity in treatment is based on the two kinds of perceived legislative policies towards sentencing in the enactment of the offenses.

The harshness-leniency distinction leads to haphazard applications[116] since the distinction assumes, in line with the existing analysis, that the development of standards for sentencing is essentially a legislative prerogative. Under the proposed model, the principles of dispositions for multiple convictions should be developed through an interest analysis

111 *See, e.g.*, Ladner v. United States, 358 U.S. 169 (1958); Prince v. United States, 352 U.S. 322 (1957); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952).

112 Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 313 (1965).

113 *But see* Gore v. United States, 357 U.S. 386, 391 (1957).

114 *Id.*

115 *Id.* at 388.

116 *See* Heideman v. United States, 281 F.2d 805 (8th Cir. 1960) (six forged money orders—six convictions); Carlson v. United States, 274 F.2d 694 (8th Cir. 1960) (forged checks—four years for each of four checks).

The goal of such principles is to define the limits of the trial judge's authority to impose what should be viewed as unnecessary judicial multiplication of punishment. The multiple disposition dilemma under the federal bank robbery statute presents an example of the inadequacy of present attempts to develop appropriate standards under a statutory scheme which defines several ways in which an offense can be committed.[117]

In *United States v. Prince*[118] the Supreme Court held that, for purposes of sentencing, the conviction of an individual for both entering with intent to rob and armed robbery constituted one offense. The Court reasoned that the lesser offense merged into the more aggravated count[119]

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[117] The federal bank robbery statute reads in part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing in value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or
>
> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> (c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

18 U.S.C. § 2113(a)-(d) (1970).

[118] 352 U.S. 322 (1957).

[119] *Id.* at 328.

and therefore vacated the trial judge's 20 and 15 year consecutive terms and ordered resentencing.[120]

The logical extension of the Court's merger theory, however, necessarily will not prevent the multiplication of punishment if the trial judge has imposed a greater term under section 2113(a) than under section 2113(d) of the federal bank robbery statute.[121] Such was the case in *United States v. Corson*[122] where the trial judge under a three count indictment had sentenced the defendant to 10 years under Count I for violation of section 2113(a) to be followed by a five year term for the violation of section 2113(a) charged in Count II. The defendant also was sentenced to five years probation under Count III for violation of section 2113(d), to run consecutively after the expiration of the prior 15 year term. Two years after his imprisonment, the defendant filed a motion under rule 35 of the *Federal Rules of Criminal Procedure* providing for the correction of an illegal sentence at anytime.[123] The court faced a dilemma because of previous interpretation of the scope of the trial judge's power to modify a sentence under rule 35,[124] and a logical interpretation of the merger theory meant that the only count that survived the merger was Count III.[125] A desire for strict symmetry in the supposedly rational theory of merger of counts did not prevent the court from realizing the absurdity of allowing the defendant suddenly to be on probation or "set free" as the dissent urged.[126] The court's solution was to require a general sentence on all counts rather than a single sentence on any particular count,[127] thereby preserving the right of the defendant to appeal the conviction on any one count[128] and preventing the multiplication of punishment. However, the court had modified existing practice without explicit discussion. Because the imposition of consecutive or concurrent sentences under the bank robbery statute had been viewed as a technical error, a motion under rule 35 previously had not required the presence of the defendant for correction.[129] Here the appellate court viewed the entire sentencing process as illegal since it was the culmination of sentencing that was error. Thus an order vacating the sentence on any particular count recently approved by the higher

120 *Id.* at 329.

121 *See* note 117 *supra.*

122 449 F.2d 544 (3d Cir. 1971).

123 FED. R. CRIM. P. 35.

124 *See* Heflin v. United States, 358 U.S. 415 (1959).

125 *See* United States v. Corson, 449 F.2d 544, 552 (3d Cir. 1971) (Hastie, J., dissenting).

126 449 F.2d at 550-51.

127 *Id.* at 552.

128 *Id.* at 550.

129 *See* United States v. Phillips, 403 F.2d 963 (6th Cir. 1968).

court would not correct the error. The appellate court required the presence of the defendant and required a resentencing, apparently with the presence of counsel over four years after his original sentence had been imposed.[130]

The result in the case is correct under the analysis proposed, but the court refuses to acknowledge that despite hundreds of opinions dealing with the *Prince* doctrine, multiple sentences still exist.[131] The court should have faced the issue of trial judge discretion directly. The heretofore technical error in sentencing is evidence of an improper exercise of judicial discretion. The error is an indication that the judge has failed to understand that the legislature grants him limited authority to sentence.[132] A trial judge who ignores the implications of *Prince* in his sentencing has failed to understand the narrow federal interest in defining the conduct as criminal and the narrow scope of his dispositional power. The appellate court should articulate that, in terms of an interest analysis, the federal bank robbery statute promotes the federal government's interest in private property. Such an analysis would allow an appellate court to generate the other sentencing questions such as whether as a general rule a term of incarceration should be imposed for a violation of the statute, and if so, how long a period of incarceration is ordinarily necessary.

The interest analysis could be applied more generally when an appellate court faces a situation of multiple convictions. A state with complete administrative sentencing such as California would want to take into consideration the fact that another state agency would decide the period of incarceration in setting parole eligibility periods.[133] A state with a more conventional minimum and maximum indeterminate sentencing scheme should move towards a system of general sentences based on the interest sought in the counts adjudicated. If the crimes are unrelated in terms of an interest analysis a single sentence for each interest might be permissible.

The proposed analysis, however is insufficient at this juncture to suggest a policy to deal with multiple sentence problems involving two jurisdictions,[134] as where a defendant serving a sentence in state *A* is before a sentencing judge in state *B*. The analysis does suggest, however, that an appellate court seeking to develop such a policy should recognize that

130 *Id.* at 964-65. It is not clear what function counsel performs at this resentencing other than protecting against an increased sentence, assuming an increase is impermissible in this situation. *Cf.* United States v. Chapman, 448 F.2d 1381 (3d Cir. 1971).

131 *See* United States v. Shelton, 465 F.2d 361 (4th Cir. 1972).

132 United States v. Welty, 426 F.2d 615, 618 (3d Cir. 1970).

133 *See generally* Johnson, *Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine*, 58 CALIF. L. REV. 357 (1970).

134 *See* R. DONNELLY, J. GOLDSTEIN, & R. SCHWARTZ, CRIMINAL LAW 377-395 (1962).

the sentencing problem relates to the two states' policy or lack of policy on detainers. A broader question which also must be resolved where an individual faces multiple punishment in different jurisdictions is the degree of state control the total legal system may impose upon any one individual.[135]

While the proposed analysis cannot suggest a clear path of reform to deal with all the problems of multiple punishment, appellate courts should begin to use the interest analysis to develop policy for multiple sentences. Judicially developed policy can distinguish the problems of multiple prosecution from the problems of multiple punishment although they are related under the interest analysis. Of particular importance are the emerging principles that will require a joinder of factually related claims in a single prosecution.[136] Furthermore, judicially developed criteria can take into account the possible effects of multiple sentences upon individuals in other parts of the dispositional process. While the adverse effect of multiple sentences on parole release now is postulated rather than demonstrated,[137] the judicial policy can evolve as decisions of correctional officials become more visible to the judiciary. The failure of the proposed analysis to offer more guidance to appellate courts attempting to deal with the problems of multiple sentences in part is attributable to the failure of courts and commentators to develop legal rules to deal with the primary issues of single count sentencing.

The Effect of the Individual's Refusal to Cooperate with the Legal System. The proposed analysis postulates that one of the interests promoted by the criminal laws is a concept of individual liberty, although that concept may be only a policy from which to generate specific principles and rules[138] and its implications for criminal law decision making are far from clear. However, the definition of the concept of liberty for some purposes may be derived from the fifth amendment insofar as the amendment embodies a right of individual non-cooperation with the criminal process.[139] Despite some attempt to extend such a right beyond adjudication to the disposition decision, a defendant's refusal to cooperate with the legal process by refusing to come forward

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135 *Id.*

136 *See* Schaefer, *Unresolved Issues of the Law of Double Jeopardy*, 58 CALIF. L. REV. 1391, 1398 (1970); Note *Multiple Prosecution and Punishment of Unitary Criminal Conduct—Minn. Stat. § 609.035*, 56 MINN. L. REV. 646, 660 (1972).

137 *See generally* Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403 (1969).

138 *See* Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

139 But for other government purposes the fifth amendment is not defined in such a fashion. *Cf.* Meltzer, *Privileges Against Self-Incrimination and the Hit-and-Run Opinions*, 1971 SUP. CT. REV. 1.

with information about the nature of his crime still may be used to justify the imposition of a harsher sentence than if the defendant had cooperated. Under the proposed analysis, appellate courts should review the application of fifth amendment principles and, therefore, must define the scope of the individual's right to refuse to cooperate with the legal system at disposition.

Where the guilt or innocence of the individual is being adjudicated, the legal system defines the concept of individual liberty to mean that the individual has a right not to cooperate with the adjudicatory process. As a principle of constitutional dimensions, this right often is embodied in the concept underlying the fifth amendment that the government should shoulder the entire burden of adjudication.[140] In the investigative phase of the criminal process, the fifth amendment has been interpreted to mean that government officials have an obligation to inform the individual of his right to silence or non-cooperation.[141] This right extends through trial, and the judge and the prosecutor may not even comment on the accused's silence for fear that the jury might infer guilt from the accused's failure to testify.[142] Finally, the Supreme Court has evaluated the effect of various statutory sentencing schemes on the accused's right of non-cooperation and has invalidated schemes that tended to encourage individuals to forfeit such rights.[143]

For appellate courts even to suggest that the fifth amendment means that the individual has the same right not to cooperate at sentencing as he has during adjudication demonstrates the need to distinguish between adjudication and disposition. The essence of any disposition compels the individual's cooperation. In fact, the fifth amendment embodies a right not to cooperate at adjudication because the result of the adjudicatory process is disposition. By maintaining the distinction between disposition and adjudication, the goal of minimizing state control could mean that some limits to the state's power to compel individual cooperation may exist. Before any such interest analysis is possible, however, overall standards for disposition must be developed. To be able to articulate standards for sentencing, the appellate courts must isolate the purpose of disposition in the given case. With a purpose of disposition in mind, a court then is able to decide what minimal amount of individual cooperation must be required in order to achieve the dispositional goal.

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140 *See* United States v. Kastigar, 406 U.S. 441 (1972); Murphy v. Waterfront Comm'n of New York, 378 U.S. 52 (1964).

141 *See* Miranda v. Arizona, 384 U.S. 436 (1966).

142 *See* Griffin v. California, 380 U.S. 609 (1965).

143 *See* United States v. Jackson, 390 U.S. 570 (1968).

Courts committed to the existing approach to sentencing recognize the need for some evidence on which to base their disposition decisions, and the practice of using pre-sentence reports thereby has developed. In their attempts to individualize sentencing, courts have relied on a wide range of evidence which concerns the convicted persons. Because the trial judge has complete discretion in the use of this information in his decision, the defendant and his lawyer have had little need to examine the report.

A few courts have recognized some danger in the use of pre-sentence reports and require that the report be disclosed to the defendant's lawyer.[144] Consistent with the existing analysis, the lawyer is given an opportunity to demonstrate the inaccuracy or unreliability of the information in the report.[145] The idea that the lawyer might use the information gained through disclosure to request the application of a particular rule of sentencing has not yet been developed. Furthermore, the rule of trial judge discretion in sentencing through the use of pre-sentencing reports in at least some instances is equivalent to a rule of probation officer discretion, since it is the probation officer who gathers the information used by the judge. The legal system, however, provides no guidance as to what kinds of information are relevant since no rules currently exist for the grant or denial of probation. The need to control probation officers has been indicated by some courts, but without explicit discussion of sentencing policy.

When the probation officer exceeds his admittedly wide latitude in gathering information about the defendant, the sentence imposed by the trial judge constitutionally is invalid if the judge relied upon the information.[146] The rule apparently is that a confession—information from the individual about to be sentenced—not legally admissible at adjudicative stages may not be used as evidence in sentencing. The purpose behind the rule appears to be to keep the probation officer from asking improper questions of the defendant and is not an attempt to overturn an incorrect sentence. Clearly, therefore, there currently is no way to ensure the imposition of a proper disposition at resentencing. The ineffectiveness of the rule demonstrates the need to develop standards that determine what evidence is relevant and rules that prevent probation officers from exercising more coercive power over an individual's fate than is necessary.

144 *See* State v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969).

145 *See* Note, *Disclosure of Presentence Reports: A Constitutional Right to Rebut Adverse Information by Cross-Examination*, 3 RUT. CAMDEN L.J. 111 (1971).

146 *See* United States *ex rel.* Brown v. Rundle, 417 F.2d 282 (3d Cir. 1969).

More generally, guidelines are needed for determining what are the proper means of gathering evidence for the sentencing decision.[147]

Under existing analysis, some appellate courts have discussed the relationship of plea bargaining to the trial judge sentencing policy. When a trial judge indicated on the record, perhaps foolishly under present standards, that he gave the defendant a harsher sentence because the defendant had pleaded not guilty after his codefendant pleaded guilty, an appellate court invalidated the sentence.[148] The appellate court thought that the effect of such a policy of differentiation at sentencing tended to discourage other defendants from pleading not guilty. In another decision, a trial judge indicated that he had imposed a harsh sentence because the defendant had pleaded not guilty; the appellate court invalidated the sentence, but without defining the parameters of the defendant's fifth amendment right not to cooperate at sentencing.[149] In most cases, appellate courts have no evidence on which to invalidate the trial judge's sentence because trial judges generally are not required to state the grounds for the sentence they impose.[150] The appellate decisions discussed

147 Existing analysis is inadequate to determine what means of gathering evidence for the sentencing decisions are proper. *Compare* United States v. Verdugo, 402 F.2d 599, 616 (9th Cir.) (Browning, J., separate opinion), *cert. denied,* 397 U.S. 925 (1968) (indication that an individual's "right" of privacy is violated by the use of illegally seized evidence at sentencing) *with* United States v. Schipani, 315 F. Supp. 253 (E.D.N.Y.), *aff'd,* 435 F.2d 26 (2d Cir. 1970), *cert. denied,* 401 U.S. 983 (1971) (refusal to reduce a sentence where the judge has used evidence illegally obtained by the police in the original sentence). Using the concept of liberty as a tool of analysis rather than the broad notions of an exclusionary rule or rights of fairness, it is apparent that the Second Circuit result is the correct view. The important issue at sentencing is control over a particular state official—the probation officer—whose conduct will affect the individual directly. To the degree the concept of liberty is viewed as embodying the notion of non-cooperation, the rule requiring a resentence where the probation officer questioned improperly is a correct one. *See* United States *ex rel.* Brown v. Rundel, 417 F.2d 282 (3d Cir. 1969). However, if the primary purpose of the fourth amendment is to protect individuals from unreasonable government intrusion, the supervision by the probation officer is a form of government control that entails some intrusions upon the individual.

Any attempt to develop legal rules for disposition should recognize that a dispositional official like a probation officer, who is of most immediate concern to the convicted individual, may make intrusions upon the individual that an investigative agent cannot. Similarly, the dispositional official cannot perform the functions of an investigative agent. Thus the probation officer in charge of a halfway house can search an inmate's room without a warrant but cannot question the inmate about the crime without legally required warnings. State v. Williams, 486 S.W.2d 201 (Mo. 1972).

What types of constitutional infirmity in a prior conviction render its use as evidence at sentencing illegal has also divided courts. *Compare* United States v. Penta, 475 F.2d 92, 96 (1st Cir. 1973) (Aldrich, J., concurring) *with* Beto v. Stacks, 408 F.2d 313 (5th Cir. 1969).

148 *See* United States v. Scott, 419 F.2d 264 (D.C. Cir. 1969).

149 *See* United States v. Thomas, 368 F.2d 941 (5th Cir. 1966).

150 *See* Frankel, *supra* note 6, at 9.

above simply may encourage trial judges not to give any indications as to the reasons for their decisions, thus decreasing the amount of evidence available for appellate review.

The failure of the courts to articulate the impact on sentencing of the accused's right not to cooperate with the legal process, as recognized at adjudication, has led to a dilemma for the criminal law. A defendant who received the maximum sentence for the crime he had committed argued that his fifth amendment rights had been violated where the trial judge indicated that the sentence had something to do with the failure of the defendant to come forward with more information about the nature of his crime.[151] Consistent with the proposed analysis, the trial judge had reasoned that the crime was one of public corruption which was a crime against state processes. The apparent sentencing policy was deterrence of others.[152] Furthermore, the judge specifically stated that where the crime of public corruption was involved, he was under no obligation to consider rehabilitation as a possible goal of sentencing.[153] Because the defendant refused to identify others who may have been involved with the public corruption, the trial judge reasoned that there was no reason to mitigate the sentence.[154] On review, the appellate court simply dismissed the defendant's fifth amendment claim on the grounds that the defendant's right of appeal had not been infringed and that the sentence was within the trial judge's discretion.[155] The trial judge's opinion explicitly had raised a serious issue of sentencing policy concerning whether sentencing may be used as an investigative tool to expose the alleged criminal activity of others. Under the proposed analysis, the appellate court should have decided whether such sentencing policy constituted too much legal control over the particular individual who happened to be apprehended and convicted.[156] By sidestepping these issues, the appellate court failed to develop sentencing standards badly needed by the lower courts.

A rule for dispositions that the trial judge should not consider mitigation of the sentence in a crime of public corruption unless the defendant

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151 United States v. Sweig, 454 F.2d 181 (2d Cir. 1972).

152 *See id.* at 182 n.2.

153 *Id.*

154 If the defendant later cooperated, the parole board might mitigate the sentence at that time. *See* United States v. Vermeulen, 436 F.2d 72 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971).

155 454 F.2d at 183-84.

156 Admitting the morality of deterrence of others as a legitimate goal of sentencing of a given individual does not lead necessarily to the conclusion that the legal system should use the particular individual to apprehend other suspected individuals. *See generally* Andenaes, *The Morality of Deterrence*, 37 U. CHI. L. REV. 649 (1970).

comes forward to identify his cohorts may well be compatible with the proposed approach. The interest analysis attempts to limit state control over convicted individuals to the minimum extent necessary to achieve the state's dispositional goal. Rules for sentencing thus must strike a balance between the government's need for information to pursue its dispositional goal and the individual's right of non-cooperation. In this context, the goal of promoting a concept of individual liberty plays a large role in criminal law decision making.

The selection of the permissible range of dispositions that is authorized upon any adjudication of criminality is, of course, a legislative function. Even under the interest analysis some judicially developed rules for sentencing, particularly those replacing the latitude traditionally granted to trial judges, similarly would be subject to legislative modification or reversal. Nevertheless, such legislative review would have to be guided by some judicially-imposed limitations since the judiciary has the power to declare some legislatively authorized dispositions illegal. Other judicially developed rules might reflect policies so fundamental to modern criminal law that they would have a constitutional basis not subject to direct legislative modification. If the legislature disagreed with a particular penal policy articulated in court opinions developing or applying rules of sentencing, it should reformulate the policy only after careful consideration of the implications of the court's policy for legal rule making.

PART II

ALLOCATING DECISION MAKING RESPONSIBILITY BETWEEN THE JUDICIARY AND CRIMINAL ADMINISTRATIVE AGENCIES

The extension of the due process revolution to sentencing has ended the era of judicial reluctance to review inmates' complaints against correction officials' decisions.[157] Courts no longer speak in terms of "grace" or "privilege" [158] when reviewing constitutional challenges to correction decisions concerning internal prison discipline and parole. However, unless all decisions by correction officials are to involve constitutional issues for judicial resolution, principles of limitations on judicial review must be found to guide courts in deciding the question of which decisions may be left to the discretion of correction officials and which must be approved or disapproved by the judiciary.

The answer to that broad question lies in a legal analysis that allocates decision making between the judiciary and criminal administrative agen-

[157] *See* Haines v. Kerner, 404 U.S. 519 (1972); McGinnis v. Royster, 332 F. Supp. 973 (S.D.N.Y. 1971), *rev'd*, 410 U.S. 263 (1973); *cf.* Preiser v. Rodriguez, 411 U.S. 475 (1973).

[158] *See* Morrissey v. Brewer, 408 U.S. 471, 474 (1972).

cies. The analysis previously proposed to develop standards for trial judge sentencing begins with the concept of individual liberty embodying the overall goal of minimizing the amount of state control over convicted individuals. This concept should begin the analysis of post-sentencing problems as well. An equally important goal, but one which potentially conflicts with the goal of minimizing state control, is that of maintaining state control over convicted individuals. This continuing control should be justified because, if the proposed approach to sentencing in Part I is adopted, there should be some assurance that the individuals in prison are those whose incarceration will promote the goals of the legal system. Another point of departure is the distinction between adjudication and disposition. The effect of the distinction in the post-sentence area is that it permits courts to recognize that parole and prison officials are not, and should not be, the same kind of decision makers as judges, and that the rules developed should reflect this difference. The present analysis used in judicial review of intra-prison discipline practices and parole decisions often has achieved the proper allocation of decision making responsibility, but the courts have not always recognized explicitly the issue of proper allocation. The proposed analysis makes explicit the issue of allocation and raises questions for judicial resolution if the present trend of judicial review of correction decisions continues.

LIMITATIONS ON THE ADMINISTRATION OF SANCTIONS WITHIN THE STATE INCARCERATION PROCESS

Legislatures have delegated to a variety of agencies the authority to control inmates confined in penal institutions.[159] Like most administrative bodies, these agencies have implicit rule making powers that include the power to promulgate rules of conduct. The penal institutions are unique among criminal administrative agencies in that the penal officials may develop formal and informal processes to impose sanctions for breaches of rules and regulations. Prison officials may impose sanctions by altering the terms upon which an inmate receives food, clothing, and medical care, and even by limiting the social intercourse available with other inmates. Applying the concept of liberty, a court should determine whether the limitations on individual freedom which these sanctions represent are rational in terms of the purposes of the confinement.

The judiciary should modify its present constitutional analysis of the wide variety of sanctions used in prison. The courts first should limit the rule making power of the prison administration to the promulgation of

[159] *See, e.g.*, 18 U.S.C. §§ 4001, 4002 (1970); ARK. STAT. ANN. § 46-131 (1964); CONN. GEN. STAT. ANN. § 18-81 (Supp. 1973); FLA. STAT. ANN. §§ 944.09, 944.14 (1973).

rules that articulate what conduct will subject an individual to some sanction. Second, a proceeding to determine whether the proscribed conduct has occurred should be required to insure the legitimacy of the imposition of any sanctions. Third, the courts should limit the form and nature of the sanctions available to prison officials.

Limits on Promulgation. Judicial limitations on the authority of prison officials to proscribe conduct through prison rules serve two purposes. First, such limitations are a means of requiring a logical nexus between conduct sanctioned by prison rules and the purpose of confinement in the particular institution. Prison officials should not be able to proscribe conduct which, had it occurred outside the institution, would have been adjudicated in the criminal process. "Low visibility" prison fact finding cannot perform all of the functions of criminal adjudication, especially to the extent that criminal adjudication is the means of articulating the fundamental interests of modern criminal law. Second, the proposed limitations on the rule making power of prison officials force such officials to consider the implications of the concept of individual liberty within the prison. In devising a prison disciplinary code under these limitations, the prison officials still have the option of reviewing the offending conduct in an intra-prison fact finding process, subjecting the accused inmate to a criminal adjudication, or of not applying any legal machinery to the situation. When the last option is chosen, a concept of liberty is promoted within the state confinement process in that the conduct cannot further be sanctioned by any state official.

The first limitation that the judiciary should impose upon the correction officials' rule making power is that there must be written rules.[160] Within the broad goal of protecting the security of the particular institution, the prison officials should devise rules to protect the inmates and prison employees from invasions of their persons and private property. However, the scope of these rules should be limited so as to minimize overlap with the protections provided by the criminal process for bodily security and private property.

The proper exercise of this rule making power may be demonstrated in the development of prison rules concerning assaults in a maximum security prison. Simple assaults between inmates should be governed by rules which recognize that when individuals live together in close proximity, some interference with bodily security is inevitable. The rules also must recognize that, despite the goal of protecting bodily security in the criminal law, there are instances where the legal system chooses not to

160 *See* L. FULLER, THE MORALITY OF LAW 46 (rev. ed. 1969).

use its most coercive sanctions against an individual guilty of assault, as in the case of simple assaults between family members.[161] By analogy, the occurrence of conduct in the prison that otherwise might lead to a minor criminal conviction need not require criminal adjudication if the intra-prison discipline process serves some minimal social function. By "sanctioning" the simple assault within the prison, the legal system promotes the security of the prison through the use of the least coercive instrument.

The allocation to prison officials of responsibility to define a simple assault allows the scope of the category to be determined at the appropriate level. Thus, a minimum or medium security prison may have a broader category of simple assaults than a maximum security institution. The goal of maintaining prison security may be given a different emphasis in each kind of institution. By delineating the question for rule making, the judiciary simply would be recognizing that the matter is within the expertise of the prison officials who can best determine what risks they are willing to take in devising rules of conduct within the range of sanctions available.

However, if the charge against an inmate is aggravated assault against a prison guard or fellow inmate, the intra-prison discipline system may be an inappropriate agency to apply sanctions. The alleged conduct is sufficiently serious to invoke the criminal process, and the prison procedures lack the legitimization necessary to justify the imposition of major dispositions. The courts should limit the rule making power of the prisons where serious crimes are involved, thereby preserving the adjudicative functions of the criminal law and avoiding serious constitutional questions.

Another broad limitation on the rule making power of prisons which already has been adopted by some courts is the application of a "standard of necessity" in reviewing prison officials' decisions.[162] The proposed analysis would articulate the necessity standard in terms of the concept of individual liberty and protection of prison security. For instance, one court recently held that an inmate could not be sanctioned for writing a letter critical of the prison administration to someone outside the pris-

161 *See* notes 222-225 *infra* and accompanying text.

162 *See, e.g.*, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Ramsey v. Ciccone, 310 F. Supp. 600 (W.D. Mo. 1970); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966); Commonwealth *ex rel.* Bryant v. Hendrick, 444 Pa. 83, 280 A.2d 110 (1971). *See also* Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904 (1962).

on.[163] Although the court spoke solely in terms of the inmate's right of free expression,[164] an equally significant consideration was that the conduct presented no threat to prison security.[165]

In another decision, prison officials were not permitted to punish an inmate for kissing his wife good-bye while on work release.[166] While the court spoke in terms of the adverse effects upon rehabilitation in limiting social intercourse, the result should have been justified on the basis of the standard of necessity and the requirement of pre-existing rules. There is no clear necessity to prohibit the inmate's ordinary social intercourse while on work release. Furthermore, the court could have decided the case by holding that conduct which does not violate any specific pre-existing rules cannot be sanctioned. The latter rationale does not require the court to endorse a particular penal policy and thereby allows leeway for the development of specific rules by prison officials to govern the conduct. The prison administration might be able to justify a specific rule prohibiting or limiting social intercourse on work release on the basis of some policy behind the work release program, and such a rule might prohibit the kissing. The purpose of forcing legal distinctions to be made on the basis of the policies behind work release rather than the harm or value in kissing is to minimize the direct interference by the state with normal social intercourse.

Legitimizing the Imposition of Prison Sanctions. Courts have begun to apply principles of "rudimentary due process" [167] to the review of sanctions imposed by prison administrators, leading to a requirement that some legitimizing process take place before the inmate is made to suffer "grevious loss." [168] Under the approach, grevious loss to the inmate involves denial of the benefits of normal social intercourse in prison or collateral consequences such as loss of good time credit.[169] The legitimizing process under current practice most frequently involves the following features:

1) Notice of accusation and of the evidence against the accused inmate;
2) An opportunity to rebut the evidence presented;

163 *See* Morales v. Schmidt, 340 F. Supp. 544 (W.D. Wis. 1972), *rev'd*, 12 CRIM. L. REP. 2378 (7th Cir., Jan. 17, 1973).

164 *See id.* at 544-45.

165 *Id.* at 553-54; *see* Note, *Prison Mail Censorship and the First Amendment*, 81 YALE L.J. 87, 108-11 (1971).

166 Colen v. Norton, 10 CRIM. L. REP. 2358 (D.C. Conn. 1972).

167 Cluchette v. Procunier, 328 F. Supp. 767, 781-85 (N.D. Cal. 1971).

168 *Id.* at 784-85.

169 McGinnis v. Royster, 332 F. Supp. 973 (S.D.N.Y. 1971), *rev'd*, 410 U.S. 263 (1973).

3) A hearing before a person not directly involved in the alleged incident of misconduct; and
4) A written decision.[170]

Such a fact finding process would better serve its purposes of legitimizing the imposition of a prison sanction if its scope were defined by a limitation on the power of the prison to promulgate disciplinary rules. The potential for such a limitation was ignored when one of the many courts which engaged in rudimentary due process analysis held that the presence of counsel is required at a prison disciplinary hearing whenever the alleged offending conduct also could lead to a criminal prosecution.[171] The court also required adequate notice, cross examination of adverse witnesses, a decision based on submitted evidence, a decision by an unbiased fact finder, and a right to appeal to afford the inmate due process.[172] The court should have analyzed the issue in terms of the competence of the prison disciplinary hearing to adjudicate conduct that might lead to the imposition of another prison term. The proposed analysis suggests that an aggravated assault on a prison guard should not be treated as a violation of a prison rule, but rather that the regular criminal process should be invoked. The court should have enjoined the prison from conducting any disciplinary proceeding and ordered a speedy trial for the inmate. Had this approach been taken, the judiciary could have developed a rule for allocating decision making which recognized that the adjudication of criminality is a judicial function.

In general, the existing rudimentary due process analysis of prison disciplinary hearings should be viewed in terms of allocating decision making. So viewed, administrative review of the prison's imposition of sanctions also should be required. If each prison has its own disciplinary rules and process of determining violations, the right to appeal to the department of corrections further legitimizes prison decisions. Overall penal policies in a given jurisdiction would be developed by the department and applied in its review of prison decisions. These policies should be explicitly articulated, and the department should be required to give written reasons for its approval or modifications of prison decisions. For

170 *See* Landman v. Royster, 333 F. Supp. 621, 653-54 (E.D. Va. 1971); Cluchette v. Procunier, 328 F. Supp. 767, 781-85 (N.D. Cal. 1971).

171 *See* Cluchette v. Procunier, 328 F. Supp. 767, 783 (N.D. Cal. 1971). Alternatives to requiring the presence of lawyers should be considered in selecting the means to protect inmates' rights. *Compare* Hooks v. Wainwright, 352 F. Supp. 163 (M.D. Fla. 1972) *with* Cluchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971). A "lay advocate" or law student could be used as a decision maker in the criminal law for some purposes. *Cf.* Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (Brennan, J., concurring); Johnson v. Avery, 393 U.S. 483, 491 (1969) (Douglas, J., concurring).

172 328 F. Supp. at 782-84.

instance, a department of corrections might approve a prison's hearing procedures which were modeled on the mediation method of resolving disputes. An articulation of the reasons for a department's approval of such a procedure in terms of overall policy also would increase the likelihood of judicial approval if the procedure were questioned by any inmate.[173]

Judicial review would be necessary to correct possible mistakes of the prison fact finding process. The scope of judicial review should be limited to review of the decisions and the rules enunciated by the department of corrections. However, the judiciary also might have to intervene to protect constitutional rights by directing that an individual's conduct be adjudicated either through the regular criminal process or the intra-prison disciplinary process. Ideally the courts should intervene to determine the proper forum before any adjudication takes place; however, this intervention more likely will be an after-the-fact determination that the individual was properly or improperly processed. The litigable issues before the courts increasingly should become whether the factual determination was supported by the evidence and whether the processes of promulgation and adjudication conform to the purposes of intra-prison disposition.

Limits on the Nature of Disposition. The process of delineating the scope of sanctions prison officials may impose already has begun under existing analysis. The use of corporal punishment, other forms of physical abuse,[174] and overly restrictive diets[175] have been declared impermissible dispositions for the violation of prison disciplinary rules. The total control exercised over the individual by the prison institution requires a careful delineation of sanctions. The use of segregation as a sanction for violating a prison rule against assault may be permissible, but the denial of medical care while in solitary may not be. The loss of recreational privileges or work privileges may be appropriate for lesser violations such as possession of contraband or theft of prison property or the property of other inmates. Given the broad scope for the promulgation of rules by the institutions and the nature of intra-prison adjudication, the dispositional devices available to correctional officials should be limited. Wide discretion in the maximum and minimum number of days in solitary confinement would tend to lead to arbitrary use of official state power. The process of promulgation properly should include con-

173 *See* Note, *Bargaining in Correctional Institutions: Restructuring the Relation Between the Inmate and the Prison Authority*, 81 YALE L.J. 726, 729-34 (1972).

174 *See* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

175 *See* Landman v. Royster, 333 F. Supp. 621, 627-28 (E.D. Va. 1971).

sideration of whether mandatory penalty schemes for an intra-prison discipline system would tend to promote more rational dispositions.[176]

THE DECISION TO RELEASE ON PAROLE

The existing analysis of parole decisions should be redefined in terms of allocating decision making responsibility between the judiciary and what is in effect another criminal administrative agency in order to develop standards for parole decisions. The judiciary should require some standards for parole board decision making since the status of parole is a form of conditional liberty that all inmates are presumed to prefer to incarceration. Under the proposed analysis, the development of standards for these decisions involves drawing distinctions that effectuate the fundamental interest in a concept of liberty. Although the existing approach permits an inmate to seek judicial review of a denial of parole,[177] it fails to provide standards for either the parole decisions or judicial review to determine which denials are arbitrary.

In articulating standards for review, the courts should recognize that some legitimate considerations in parole decision making may differentiate it significantly from judicial decision making. First, the particular nature of the legislative mandate to the parole board will influence the kinds of standards that are developed. Second, the courts must take into consideration the particular agency that will administer the standards promulgated by the court to achieve its goals. Thus, the standards applied to a criminal administrative agency in its choice of penal policy should be less restrictive than those applicable to a trial judge at sentencing. Third, the courts should recognize that their role essentially is one of review, so that their decision not only affects the outcome of the particular case under review but also encourages a particular decision making policy by the parole board.

The actual wording of the typical legislative mandate to a parole board provides little guidance to the parole board in its decision to grant or deny parole. The statute usually prohibits the use of certain criteria for granting parole, such as good conduct, unless the board believes the convict will become a law-abiding citizen on release.[178] Despite the

176 *Cf.* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 147-48 (1971).

177 *See* Monks v. New Jersey State Parole Bd., 58 N.J. 238, 277 A.2d 193 (1971). The parole board may even be required to give written reasons for a denial. *Id.* at 246-49, 277 A.2d at 197-99.

178 A typical statute provides that:

> No prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties assigned while under sentence, but only if the board is of the opinion that there is reasonable probability that, if such prisoner is released, he will assume his proper and rightful place in

statute's failure to provide criteria for the denial of parole, the courts could interpret the statutory scheme as mandating that parole board decision making consist of a risk analysis of the likelihood that an individual will or will not violate the criminal law if released.[179] A legislative mandate of a decision based on risk analysis means that the parole board rather than the judiciary should be the principal decision maker. The court's influence on the standards that the board might develop should be limited to requiring that the denials not be arbitrary. In effect this becomes a requirement that the denial should be rational in terms of the purposes of parole. Given the present uncertainty as to the purposes of parole, however, the reviewing court should approve the board's decision so long as some purpose has been articulated and made the basis for the grant or denial of parole.

The board should be free to choose between the penal policies of restraint, reform, rehabilitation, or reintegration in articulating the purpose of parole which underlies its decisions. While the terminology used to describe the various policies is borrowed from the disciplines of criminology and penology, these policies are essentially different perspectives on the broad purposes of state confinement and correction process generally.[180] The terminology's utility to the development of legal standards is that the variety of policies represents different views of the necessity of incarceration to achieve the particular purpose of state control deemed appropriate. A board, for instance, might adopt the policy of restraint for those confined in maximum security institutions and the policy of reintegration for those confined in minimum security institutions. Under the proposed analysis a reviewing court should give effect to the board's differentiation in its determination that a denial was or was not rational. However, the tentative decision as to the appropriate penal policy is for the parole board.[181]

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society, without violation of the law, and that his release is not incompatible with the welfare of society.

N.J. STAT. ANN. § 30:4-123.14 (1964); *see* D. Glaser and V. O'Leary, Dept. of H.E.W., Personal Characteristics and Parole Outcome (1966) (sociological survey of personal characteristics as they relate to parole outcome; a "handy" booklet for the decision maker, but one which fails to refer to criteria as being legally permissible).

179 Since the board is a criminal administrative agency, it should restrict its analysis to the likelihood of violations of the criminal law rather than the mores of society in general.

180 *See* Duffee & O'Leary, *Models of Correction: An Entry in the Packer-Griffiths Debate*, 7 CRIM. L. BULL. 329, 339-45 (1972).

181 Since the choice of penal policy may determine the rationality of parole denials, an understanding of the similarities and differences between the four possible policies is vital. All four policies permit the parole board to engage in the kind of risk analysis that is prescribed by the legislature. However, the policies of restraint and reform place greater emphasis in decision making on the social interest in controlling the individual

After the parole board has chosen a policy, the criteria it should consider in denying or granting parole are the totality of the inmate's criminal conduct, the psychiatric or other penological evaluation, and the individual's intra-prison discipline record.[182] The importance of any one factor will vary with the particular policy chosen by the board. The totality of the inmate's criminal conduct should be considered since the legislative mandate directs the parole board to judge the individual's risk of recidivism. For the purposes of parole decision making past conduct can be used as a factor in determining the risk of future misconduct.[183] Psychiatric or other expert evaluations are relevant because the parole decision is essentially a predictive judgment about future human behavior. These expert opinions, while not determinative, clearly merit consideration. The individual's intra-prison record is a permissible criteria only if the intra-prison discipline process operates under the previously suggested methods. The disciplinary record is relevant in that the inmate's ability to conform his behavior to a system of rules within the state incarceration process might aid in predicting his ability to conform to the rules in the larger community.

The judiciary should review parole denials in such a manner as to encourage parole boards to use the three above mentioned factors in their decisions. To some extent this could be accomplished if reviewing courts

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offender than do rehabilitation and reintegration. The penal policy of restraint would lead to parole decisions that emphasized the community's attitude towards the violator and parole would be granted only to those deemed acceptable to the community. Duffee & O'Leary, *supra* note 180, at 344.

The policy of reform similarly emphasizes community attitudes, but a board operating under such a policy would look to the inmate to see if he evidences that he has adopted community norms while incarcerated. *Id.* at 341. The risk analysis dictated by a policy of reform would seek to ascertain a convergence of individual and community values. Such an analysis probably would lead to an inquiry into whether an inmate is likely to lead a productive life rather than whether he will violate the criminal law. *Id.* at 340.

The other two possible policies—rehabilitation and reintegration—both place great emphasis on the particular characteristics of the individual. A board committed to rehabilitation would focus on the issue of the inmate's response to the institution's program of treatment. *Id.* at 343. Such treatment programs might involve either institutional work programs or psychotherapy. The board also would rely on medical or psychological evaluations of the inmate. Once the program of treatment was completed the individual would be released. The policy of reintegration would seek to restore the inmate to the larger community through the use of as many resources as possible in the outside community. A board adopting reintegration as the guiding policy for its decisions would rely as much as possible on social processes within the larger community to prevent future breaches of the criminal law. Such reliance in some cases might require a decision to release without any specific evidence of the efficacy of social processes to prevent future criminal behavior for the particular individual involved.

182 These factors reflect all four penal policies and provide inputs from the various institutions that influence parole decision making.

183 The statute may also suggest these criteria. *See* note 178 *supra*.

explicitly delineated the criteria which cannot influence a decision to deny parole. Such factors as the inmate's employment prospects, time served, and extent of participation in institutional programs, for example, should not be considered. Using the inmate's lack of employment prospects as a reason for denying parole would violate the overall goal of diminishing the influence of an individual's economic status on the outcome of criminal decision making.[184] Consideration of the length of time served tends to multiply the effect of the prior determination to incarcerate on the subsequent parole decision involving individual liberty. The time served simply is reflective of sentencing policy, and the board instead should look to the nature of the criminal conduct which led to the decision to incarcerate. Finally, consideration of the lack of participation by the inmate in non-mandatory institutional programs as a factor in denial of parole compels the individual to cooperate with the state incarceration process without articulating any specification of a reason for the compulsion.

Clearly, however, factors which may not be used to deny parole may be relevant to a decision to grant it. Under any of the various penal policies, a board could justify the parole of an individual who has been active in voluntary institutional programs, has served a long period of incarceration, or has a job awaiting his release. Nothing suggested here should prevent an individual from presenting these factors as evidence to the parole board to justify release. The proposed analysis, however, focuses on those decisions that interfere with individual liberty and thus is concerned only with denials of parole.

The reviewing court can encourage the board to use the proper factors in making parole decisions by clearly articulating the court's own view of "rationality." Thus, the court can encourage the board to choose proper penal policies by making clear that a particular decision may be rational under one policy but irrational, and therefore subject to reversal, if another has been chosen. Perhaps the only absolute limitation on the board's freedom of choice, however, is that all individuals within one institution must be deemed to be under the same policy. The court also can encourage the parole board and the legislature to improve decision making by adopting a rebuttable presumption on review in favor of parole, regardless of the policy chosen by the board. The court then should hold that, in the absence of evidence to explain the result in terms of the board's stated policy, a denial of parole is improper. Such a standard allows for review based on evidence in the record to justify the denial. In most cases, if proper criteria are used and some evidence is present,

184 *See* note 44 *supra* and accompanying text.

most denials will be upheld since the estimation of the risks involved in the individual case is essentially a parole board decision.[185]

PART III

DISPOSITIONAL CRITERIA FOR AUTHORIZED DISPOSITIONS TO AVOID THE CRIMINAL RESULT

Legislatures have authorized confinement processes that purport to reform or rehabilitate individuals brought into the criminal process. In one category of cases the legislatures have adopted a "medical model" for the civil confinement of persons deemed in need of treatment in order to function properly in society.[186] In another category of cases, a legislature has provided special dispositions to reform or rehabilitate individuals with a particular social status.[187] Criteria for commitment must be developed that both protect the individual from arbitrary state control and promote greater understanding of human behavior within these confinement processes.

CONCEPTS OF LIBERTY IN CIVIL COMMITMENT PROCESSES

The first category of cases includes various forms of civil commitment, accompanied by a myriad of articulated rationales.[188] These civil commitment processes recently have come under scrutiny by the Supreme

[185] Whether a parole board must constitutionally give a reason for a denial is not discussed. *See* Scarpa v. United States Parole Bd., 13 CRIM. L. RPTR. 2138 (5th Cir. Apr. 2, 1973) (en banc); Beckworth v. Parole Bd., 62 N.J. 348, 301 A.2d 729 (1973).

[186] *See generally* Dershowitz, *Psychiatry in the Legal Process: "A Knife that Cuts Both Ways,"* 51 JUDICATURE 370 (1968).

[187] D.C. CODE ANN. § 24-601 to -615 (1967). As both types of compulsory state confinement processes have come under judicial scrutiny, the lack of expertise and resources at these special institutions has become clear. *See* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

[188] Consider the Supreme Court's perhaps belated realization of the problem:

> The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States. The particular fashion in which the power is exercised—for instance through various forms of civil commitment, defective delinquency laws, sexual psychopath laws, commitment of persons acquitted by reason of insanity—reflects different combinations of distinct bases for commitment sought to be vindicated. The bases that have been articulated include dangerousness to self, dangerousness to others, and the need for care or treatment or training. Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated.

Jackson v. Indiana, 406 U.S. 715, 736-37 (1972).

Court in a trilogy of cases involving a sexual psychopath statute,[189] a commitment on grounds of incompetency to stand trial,[190] and a confinement pursuant to a defective delinquent statute.[191] The Court did not invalidate any of the three statutory schemes. However, employing fourteenth amendment due process and equal protection analysis, the Court articulated three principles which the judiciary must apply to confinement. First, the individual must be given an opportunity to adjudicate whether the legislature is making irrational and arbitrary distinctions between individuals convicted of crimes and those not convicted of crimes. Second, the nature of confinement must bear some relationship to the purpose of confinement. Third, the duration of confinement must be related to progress toward the purpose of confinement to prevent an indefinite life term under the fiction that treatment is continuing but has not yet succeeded.

Humphrey v. Cady[192] involved a broad constitutional attack on a state sex crime act by means of a federal habeas corpus petition. The district court had dismissed the petition, but the Supreme Court held that the petitioner was entitled to an evidentiary hearing on whether his recommitment to a sexual psychopath institution was invalid because the commitment of other allegedly mentally ill persons had been determined by a jury.[193] Without deciding whether a jury determination is appropriate in the commitment process, the effect of the decision is to allow individuals greater ability to adjudicate the constitutionality of legislatively-created classifications. A prior decision had required that a mentally ill person convicted of a crime must be committed through the same processes as a non-criminal mentally ill person.[194] *Humphrey* allows an individual to adjudicate whether the legislature can make distinctions based on the symptomatology of the allegedly mentally ill individual since the sex crimes commitment procedure existed solely for those convicted of certain types of crimes.[195]

Jackson v. Indiana[196] not only established that the nature of confinement must bear some relation to the purpose of confinement, but also demonstrated that due process principles are not limited in application to dispositional processes which follow an adjudication of criminality.

189 Humphrey v. Cady, 405 U.S. 504 (1972).
190 Jackson v. Indiana, 406 U.S. 715 (1972).
191 McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972).
192 405 U.S. 504 (1972).
193 *Id.* at 508.
194 *See* Baxtrom v. Herold, 383 U.S. 109 (1966).
195 *See* Humphrey v. Cady, 405 U.S. 504 (1972); *cf.* Specht v. Patterson, 386 U.S. 605 (1967).
196 406 U.S. 715 (1972).

In *Jackson* the Court invalidated the confinement of an individual who had been charged with a crime but who was declared incompetent to stand trial. The case questions directly the power of the state to confine an individual without any "due process" adjudication of his conduct. The dilemma in *Jackson* was that the state did not want to proceed criminally against the accused because of his inability to participate in an adjudicatory process. A substantial possibility existed that the individual would never be able to understand the legal proceedings,[197] and the Court left it to the state either to determine if the individual would be able to understand the proceedings in the foreseeable future or to seek some form of civil commitment.[198]

Were the state to seek civil commitment upon remand, the *Jackson* decision required it to explore the possibility of commitment under the general civil commitment statute as well as the commitment procedures for those alleged to be feeble-minded.[199] Apparently, under the *Humphrey* rationale, Jackson's attorney would be entitled to argue for commitment under the statutory scheme with the most liberal release standards or with the least stringent confinement process.[200] Were Jackson found incompetent to stand trial, some aspects of the criminal process such as motions for pretrial dismissal of the indictment might occur.[201] The possibility existed that the allegation of Jackson's criminal conduct never would be adjudicated within the criminal process.[202] If Jackson were confined under these circumstances, his disposition would not be criminal.[203]

Finally, *McNeil v. Director, Patuxent Institution*[204] held that it is a denial of due process to indefinitely confine a petitioner on the basis of an ex parte order committing him merely for observation; the term of confinement must be related to the purpose for which the individual was committed.[205] Following a criminal conviction and prior to the expira-

197 Jackson apparently was a 27 year old deaf mute who was unable to read or write. One doctor even had suggested that petitioner was unable to communicate in sign language. *Id.* at 719.

198 *Id.* at 739-41.

199 *Id.* at 728 n.6.

200 *See* notes 192-195 *supra* and accompanying text.

201 406 U.S. at 740-41.

202 Jackson's right to a speedy trial under the sixth amendment specifically was not decided by the Court. *Id.* at 740.

203 The discussion assumes that Jackson is in need of some form of state confinement. Nothing should prevent Jackson's counsel from showing that no state confinement process is appropriate because Jackson is untreatable and is not in need of custodial care. *See* Burt & Morris, *A Proposal For the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66, 70 (1972).

204 407 U.S. 245 (1972).

205 *Id.* at 250.

tion of his sentence, McNeil was sent to an institution for "defective delinquents" for an examination[206] to determine whether the officials at the institution should seek judicial commitment of him as a defective delinquent. One year after the expiration of his original sentence, McNeil still had not been brought before a judge to determine if he was in fact a defective delinquent. The Supreme Court relied on *Jackson v. Indiana* to invalidate his continued confinement on the grounds that the officials at the institution in effect had changed the purpose of his confinement from observation and examination to simple confinement.[207]

In a companion case, the Court dismissed its grant of certiorari in a case directly questioning the scope and purpose of the defective delinquent dispositional process as defined by the legislature.[208] Some of the individuals involved were entitled to some relief under existing law, while the others would have an opportunity to demonstrate eligibility for more stringent commitment standards and more liberal release provisions for individuals not convicted of crimes under the principles established in *Jackson* and *Humphrey*.[209] More importantly, the court invited the state legislature to reconsider its entire compulsory confinement process in light of the court's recently developed principles.[210]

SPECIAL DISPOSITIONS BASED ON SOCIAL STATUS

In another category of cases legislatures have authorized special dispositions which only can be rationalized in terms of the social status of the individuals selected for these special processes. For example, in establishing a system of dispositions under the Federal Youth Corrections Act,[211] Congress has assumed that a youth convicted of a crime is in need of specialized disposition because of his age.[212] Likewise, indeterminate sentences for women who commit the same offense for which men receive definite terms represent similar legislative assumptions about the causes of female crime that justify specialized dispositions. The notion

206 *See* MD. ANN. CODE art. 31B, §§ 5,9(b) (1971).

207 407 U.S. at 249-50. The Court specifically did not reach McNeil's claim that his fifth amendment privilege against self-incrimination had been violated by the effect given to his refusal to submit to psychiatric and psychological testing. To have invalidated the commitment on fifth amendment grounds would have required the Court to define the scope of an individual's right not to cooperate with a dispositional process which requires him to cooperate in receiving treatment. Whether the state may use the contempt power to force the individual to submit to the examination likewise was not decided by the Court. *See id.* at 250-51.

208 *See* Murel v. Baltimore City Crim. Ct., 407 U.S. 355 (1972).

209 *Cf. id.* at 357-58.

210 *Id.* at 358.

211 18 U.S.C. §§ 5005-26 (1970).

212 *See id.* § 5010 (sentencing).

of a family offense that is adjudicated and disposed of outside the criminal process is based on conceptions of how both the assaulter and the victim view the conduct because of their social status as members of the same family unit.

Three fundamental issues are presented by these specialized dispositional schemes. If the legislature is allowed to assume that an individual adjudged guilty of a crime is entitled to a special form of disposition, the question arises whether the discretion of other dispositional officials must be restricted or expanded. Second, if the social status of the individual presents a legal basis for the state intervention and, upon a proper adjudication, state control, the issue then becomes whether the whole process of criminal adjudication should be avoided. If the criminal process is avoided, then rational criteria should be developed both in terms of the reasons for diverting individuals from the criminal process and the purpose of the state processes in which the individual finds himself. Third, while the criminal dispositional processes might be utilized to promote a concept of individual liberty, the differentiation of dispositional processes on the basis of an individual's social status raises the issue of the limits on processes which seek to promote a societal definition of the individual.

Indefinite commitments for women offenders and for youthful offenders into adulthood[213] present the issue of the need to expand or contract the discretion of other dispositional officials to achieve the legislative goal. Judicial response in the case of youthful offenders has been to limit the discretion of judges and correctional officials to further the legislative goal. The courts apparently are sympathetic to the legislative view that when the criminal offender is young, he is presumptively a candidate for reform. The judicial response to indeterminate terms for women without legally mandated parole eligibility reflects the increasingly questionable status of legal distinctions based on sex. The court in *Commonwealth v. Daniels*[214] viewed the evil in indeterminate sentencing for women to be the lack of trial judge discretion to "individualize" the sentence.[215] Although the court invalidated the scheme on the basis that there was no rational basis for the distinction in sentencing based on sex, the court seemingly desired only to replace board discretion with discretion in the trial judge.

Without considering the broader implications of sex as a basis for a

213 *See id.*

214 430 Pa. 642, 243 A.2d 400 (1968).

215 *Id.* at 647, 243 A.2d at 403.

legal distinction, a better approach to the sentencing scheme is to require that the state bear the burden of justifying a separate sentencing scheme for women. Such a requirement forces the dispositional officials to present to the judiciary a credible penal policy and evidence to justify it before the court passes on the validity of the legislative judgment that women should be sentenced differently than men. In addition, the requirement also allows the dispositional officials to demonstrate to the judiciary that good faith efforts are being made toward achieving the penal goals set by the legislature.[216]

The criteria developed for special dispositional processes might be modeled on those adopted for the Federal Youth Correction Act by the District of Columbia courts,[217] where the correctional officials have become part of the sentencing process under a four step procedure.[218] An individual within the statutory age limits is presumptively a candidate for the specialized disposition unless the judge can show that the youth is not a fit subject for special sentencing.[219] On the basis of the presumption, the judge must order a 60 day study to see if the individual is, in the opinion of his future custodians, a fit subject for the specialized disposition. Next, the correctional officials must present their plan of treatment and establish the period of confinement necessary. Finally, the court must be furnished with certification that adequate space in an appropriate facility exists for the individual. The apparent impetus for these procedures was the lack of adequate facilities in the District of Columbia. The court went further and directed the utilization of other federal facilities throughout the country.[220]

Before individuals are placed in specialized facilities, the dispositional criteria must seek to insure that the facilities can make at least a good faith effort toward their legislatively prescribed goals of disposition. The effect of the process developed in the District of Columbia may be to have some young persons incarcerated in reformatories or penitentiaries. A more important aspect of the procedures is to question whether officials given a special dispositional function have the resources to achieve their goals. Until the courts invalidate the specialized dispositions for youths as they already have begun to do for women, the judicially developed procedures are necessary to insure that the specialized processes

216 *See* State v. Chambers, 68 N.J. 287, 307 A.2d 78 (1973); State v. Costello, 59 N.J. 334, 282 A.2d 748 (1971).

217 *See* United States v. Alsbrook, 336 F. Supp. 973 (D.D.C. 1971).

218 *Id.* at 979-80.

219 *See* United States v. Waters, 437 F.2d 722, 724 (D.C. Cir. 1970).

220 336 F. Supp. at 981.

are administered in such a manner as to protect a concept of individual liberty within the legislatively defined dispositional goals.[221]

Even where the legislature substitutes non-criminal processes for criminal adjudication, the state processes still must be administered to protect an individual from the arbitrary exercise of state power. The Family Offense Act of New York provides for the transfer of certain cases of simple assault between members of a family to family court.[222] In exercising its discretion to hear a case, however, the family court must employ criteria which prevent one family member from forcing another into the more coercive criminal process. Thus, due process might be violated if family court jurisdiction were based solely on whether the victim of the alleged assault wanted reconciliation.[223]

More importantly, the Act recognizes the potential for resolving conflicts in non-criminal institutions and for restoring social order without utilizing the criminal processes of adjudication and disposition.[224] Family court processes, unlike criminal adjudications, view the alleged assaulter in the context of a social function—father, husband, wife, or mother. The assumption behind the Family Offense Act could lead to a generally different view of criminal disposition if a family model of the criminal process were adopted. If the presumption of reconciliation between the victim and perpetrator of the crime of the family offense scheme is carried over into the criminal context, a criminal process could be built on the assumption of ultimate reconcilability of interest between the state and the individual accused and convicted of the crime.[225] Rather than assuming that a new type of criminal process can be achieved solely through ideological innovation, the family offense scheme does serve as a reminder that societal goals in implementing criminal processes do not dictate necessarily that the most coercive forms of state control be employed. If restoring the social order in terms of the individual offender and the state is what is meant by reform or rehabilitation, the dispositional policy maker will have to consider the ability of society to reestablish its norms without criminal disposition.

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221 *But see* United States v. Lowery, 335 F. Supp. 519 (D.D.C. 1971).

222 The Act provides in part: "The family court has exclusive original jurisdiction . . . over any proceeding concerning acts which would constitute disorderly conduct, harassment, menacing, reckless endangerment, an assault or an attempted assault between spouses or between parent and child or between members of the same family or household." N.Y. FAMILY COURT ACT § 812 (McKinney Supp. 1972).

223 *See In re* Montalvo v. Montalvo, 55 Misc. 2d 699, 286 N.Y.S.2d 605 (Family Ct. 1968).

224 *See* People v. Allen, 27 N.Y.2d 108, 261 N.E.2d 637, 313 N.Y.S.2d 719 (1970).

225 *See* Griffiths, *supra* note 32, at 373.

PART IV

A SUMMARY AND SOME UNANSWERED QUESTIONS

The proposed analysis would replace official discretion at sentencing with judicially created standards for sentencing officials. No single legal standard can replace the doctrine of official discretion since sentencing involves a variety of officials with different legal functions. As demonstrated in this article these officials are judges, administrators, and legislators. Since sentencing is viewed more broadly as a form of legal decision making, it is possible to summarize the recommended standards and acknowledge the unanswered questions in terms of the officials engaged in sentencing.

JUDICIARY

Assuming that the legislature has established a maximum and minimum range of dispositions upon conviction,[226] four problem areas have been delineated as appropriate for appellate rather than trial judge decision making.

Incarceration versus Non-incarceration. Appellate courts should employ an interest analysis to develop dispositional policy to guide the decision to grant or withhold probation. If the interest at stake in dispositional policy is the concept of individual liberty, there should be a presumption favoring the grant of probation at sentencing. If the interest is that of protecting the state processes, the trial judge presumptively should sentence the offender to some period of incarceration.[227] Narrowly drawn secondary rules might be developed to mitigate or aggravate the sentence when the primary decision is probation or incarceration.[228] Appellate courts can use a system of primary and secondary rules to explain the differences in sentences in terms of overall dispositional policy. Furthermore, the system of articulated appellate rules will guide trial judge decisions in cases which will not require appellate review.

Use of Prior Convictions in Trial Judge Sentencing. The recommended use of prior convictions at sentencing demonstrates how a

226 It should be noted that even in the California system, the decision to incarcerate could be governed by rules of disposition. *See In re* Minnis, 7 Cal. 3d 639, 498 P.2d 997, 102 Cal. Rptr. 749 (1972).

227 The article does not discuss the crimes against private property and bodily security directly. The basic analysis could be used to develop rules for probation. However, with so many crimes in these broad categories the analysis might be more crime-specific. For instance, probation might be appropriate for simple assault but not for aggravated assault.

228 *See* D. THOMAS, PRINCIPLES OF SENTENCING 35-70.

system of articulated rules can change present practice. The use of prior convictions to enhance the disposition of an individual should be eliminated. However, an individual should be allowed to use the lack of prior convictions as a secondary rule of mitigation. Thus, where the primary decision already has been made in favor of incarceration, the individual should be able to argue to the trial judge and to the appellate court that he should not receive the maximum penalty because of the lack of prior convictions. If some decision maker is to assume that the prior convictions are evidence of individual dangerousness, the legislature must establish the appropriate system of disposition for such individuals.[229]

Multiple Sentences. An interest analysis should be used when individuals have been convicted under a multiple-count indictment. A single general sentence is the recommended disposition where multiple counts represent violations of one particular interest of the criminal law.[230]

Privilege of Non-Cooperation. A major purpose of sentencing rules is to clarify whether a particular dispositional policy interferes with an individual's right of non-cooperation. By construing rules so that they do not infringe on the individual's right not to cooperate with state processes, the courts can use sentencing rules to influence the conduct of other officials in the criminal law process. Although this article has not attempted to define the scope of the fifth amendment privilege at sentencing, the analysis has demonstrated that the issue of non-cooperation is part of dispositional decision making.[231]

Some Unanswered Questions. In what might be called the "process" aspects of the model, at least two types of questions remain unresolved. Assuming that some of the broad policy decisions recommended were adopted by an appellate court, the nature of the hearing which takes place before the sentencing judge still must be delineated. The adversary notion of adjudication is not necessarily required since the model assumes a distinction between criminal adjudication and criminal disposition. Nor is the standard of proof used in criminal adjudica-

229 *See* note 110 *supra* and accompanying text.

230 The article has not discussed the problems of the defendant charged with crimes in two or more jurisdictions and how that individual should be handled in the legal system. Whether there should be rules of disposition to govern this case as there are rules of adjudication is not discussed. *Cf.* Smith v. Hooey, 393 U.S. 374 (1969) (state with a pending charge against an individual is required to provide a speedy trial upon demand).

231 *See* Williams v. United States, 295 A.2d 503 (D.C. Ct. App. 1972).

tion appropriate for dispositional decision making.[232] The form of a sentencing hearing might depend upon further exploration of whether disclosure of all or portions of the pre-sentence reports is required. Furthermore, if one of the rules of sentencing has been violated by a trial judge, the issue of whether the appellate court should mandate the appropriate sentence or remand for resentencing has not been resolved. The choice between the two courses of action might depend upon the nature of the particular rule violated or whether the appellate court has the pre-sentence report as part of the record on appeal.

The model has left vast areas of the substance of rules of disposition unexplored. The secondary principles, particularly those that should govern the length of incarceration within the statutory maximum, have not been discussed.[233] However, the analysis suggests that appellate rule making must consider what the judiciary has done or should do to the correction process. In addition, the court should consider what new alternatives to incarceration the legislature may have created. Were an appellate court willing to adopt a new policy for disposition, the question of the retroactivity of the new rule would have to be resolved. Under the analysis offered, however, the court would not be bound by the constitutional doctrines of retroactivity developed for adjudication.[234]

ADMINISTRATIVE AGENCIES

While the role of the judiciary in the correction process recently has increased, instances of judicial intervention would be rare if administrative decisions were guided by creative judicial decision making. The responsibility could be shifted back to the criminal administrative agencies without diminishing the importance of a concept of individual liberty within the state confinement processes.

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232 Justice Douglas, who dissented in *Murel*, cited *In re Winship* and suggested that the burden of proof necessary to commit under the Maryland statute should be proof beyond a reasonable doubt. Murel v. Baltimore City Crim. Ct., 407 U.S. 355, 359-65 (1972) (Douglas, J., dissenting); *see In re* Winship, 397 U.S. 358 (1970). But to the degree that the majority opinion in *Winship* established proof beyond a reasonable doubt because that standard of proof gave foundation to the presumption of innocence, Justice Douglas' analysis of *Winship* is faulty. If the use of the defective delinquent statute assumes a valid conviction, meaning the presumption of innocence has been overcome, why protect that presumption at disposition? This is not to suggest that the commitment standards of the defective delinquent statutes may not be invalid for other reasons, nor is it meant to suggest the problems of appropriate standards of proof for disposition generally have been resolved.

233 *See* People v. Tanner, 387 Mich. 683, 199 N.W.2d 202 (1972).

234 *See* Michigan v. Payne, 41 U.S.L.W. 4671 (U.S. May 21, 1973) (*North Carolina v. Pearce* held not retroactive).

Intra-Prison Discipline. A court should require that the system of intra-prison discipline proposed in this article be adopted. A state-wide department of corrections could provide appellate review for each institution's disciplinary system. Each institution, however, should be required to establish its own rules so that the intra-prison system could perform a socializing function when infractions occur. As a reviewing agency of the first instance, the department may be able to correct abuses of individual officials in given cases and review challenges to the rules themselves. The role of courts would be somewhat more limited. The courts would review the operation of the total system and the rules to correct improper interferences with an individual's liberty.

Parole Board Decisions to Deny Release. Judicial review of parole decision making should encourage the development of rational criteria for denial of parole. The decision to deny parole could be justified in terms of the totality of the individual's criminal conduct, his record of intra-prison disciplinary action, and the psychiatric or other expert prognosis of parole success or failure. The interjection of a concept of individual liberty into this decision making process justifies a more active judicial role than with other administrative agencies. The criteria used by the board are not the only important considerations for review by the judiciary; the process by which cases are decided—particularly doubtful cases—is of equal importance. The courts should not force any particular view of the correction process upon parole boards, but rather must emphasize the law's concern that the concept of individual liberty be maximized in deciding doubtful cases.

Some Unanswered Questions. The limitations proposed on administrative criminal discretion do not require that every decision within the correction process be conducted in accordance with the analysis suggested. For instance, a decision refusing to grant the status of work release might not be cognizable by the judiciary. Judicial review might tend to destroy the use of a risk analysis in the selection of inmates who merit work release, and a judicial requirement of written reasons for the denial and criteria for the decision may be unwise. The state-wide department of corrections, however, may be justified in reviewing the denial under limited conditions. If, for instance, the state-wide department were trying to determine what types of individuals were successful on work release, review of the institutional decisions might be a means of gathering information.

Similarly, the question might arise whether work release status, once granted, can be revoked without reasons or without standards for the

decision. If judicial review of this revocation were viewed as interfering with the type of risk analysis legislatively mandated in the original decision to grant work release, such review should not be undertaken. When the decision is alleged to be on impermissible grounds, such as the religious practices of certain inmates, the judiciary may be required to review the particular decision in order to protect one of the individual's cognizable rights.

A constitutional analysis cannot address all the issues surrounding parole denials. Other kinds of rules based on the various policies should be developed to determine the circumstances under which a refusal to submit to a psychiatric diagnosis can justify a denial of parole.[235] Similarly, some standards for determining the reliability of the information used by the parole board should be developed.[236] These standards must be designed to control the work of officials who prepared the reports.

ROLE OF THE LEGISLATURE

The major role for the legislatures under the model of criminal disposition is to develop alternatives to present dispositions. The first challenge to the legislature is to reconstruct the variety of civil commitment processes to conform to the notions of protecting individual liberty already promulgated by the judiciary.

A second challenge to the legislatures willing to accept the view that criminal dispositions have limited utility is to consider establishing dispositions that use the resources of the larger society. A program to establish some community-based institutions for certain legislatively defined groups of individuals is ripe for legislative consideration under the model's assumptions. The model's usefulness to a legislature considering new proposals is the emphasis placed on establishing appropriate criteria in the definition of the group that might qualify for disposition under community-based programs or new alternatives of lesser forms of state control.[237]

Whether the legislature should concern itself with modifying the judicial rules of disposition which are not of constitutional dimension depends upon one's view of the efficacy of the legislative process. My own view is that were the legislature dissatisfied with any specific judicial rule of disposition, it would have to reconsider the nature of the substantive of-

235 *See* McNeil v. Director, Patuxent Institution, 407 U.S. 241, 252 (Douglas, J., concurring).

236 *Cf.* State v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969).

237 Legislatures could consider authorizing forms of non-incarceration other than probation supervision, perhaps even to the extent of not applying state control in some cases. In such cases, the criminal adjudication would be viewed as having served the societal need for control.

fense under the interest analysis proposed. Legislative dissatisfaction with rules of judicial disposition provides an opportunity for reexamination of the substantive crime to insure that the conduct should be controlled through the criminal law or has been properly classified by the judiciary in the establishment of judicial dispositional policy.

The aim of this article has been to develop alternatives to the doctrine of judicial discretion in sentencing. What has been proposed is a new mode of legal analysis, a model of criminal dispositions. As a method of scholarship, the view of legal decision making advocated by this article has three advantages. By illuminating the unique features of sentencing as a legal decision, the model aids in determining what type of legal principles are appropriate to achieve the law's purposes. Legal scholarship, with a better functional understanding of the legal rules of criminal disposition, should be better able to use information and perspectives from other disciplines.[238] Furthermore, the rules and principles recommended as alternatives under the model combine substance and procedure since the doctrine of trial judge discretion represents a certain institutional resolution. The recommended realignment of institutional responsibility gives a prominent role to the appellate judiciary,[239] while increas-

238 The influence of economic reasoning might be applied usefully to some problems of criminal dispositions. *See* Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUDIES 259 (1972). But such an integration of law and economics first assumes a functional understanding of law and legal rules as Professor Calabresi and Mr. Melamed have demonstrated in their analysis of the variety of legal rules that might be applied to the problem of pollution. Calabresi & Melamed, *supra* note 43. Of particular interest is the authors' discussion of why the legal system needs criminal sanctions to protect interests such as property interests when civil rules also protect those interests. *Id.* at 1124-27. *But see* Frankel, *Preventive Restraints and Just Compensation: Towards a Sanction Law of the Future*, 78 YALE L.J. 229, 256-67 (1968). Professor Frankel suggests that a unitary view of the civil and penal systems of confinement should lead to compensation to those involuntarily committed to mental institutions to protect the public from deprivation of their liberty. *Id.* at 257. But if persons are compensated for deprivations of liberty, would this lead to the extinction of what Professor Calabresi and Mr. Melamed call "property rules" and rules of "inalienability?"

Legal philosophy would appear to be of great relevance to a further study of sentencing. But until the broad school of legal philosophies allows the unique feature of a legal system, legal decision making, to enter its debates, the influence of legal philosophy on sentencing will be small. Professor Graham Hughes, without specific references to the problems of sentencing, has noted the failure of legal philosophers to examine the nature of legal reasoning and decision making. *See* Hughes, *Rules, Policy and Decision-Making*, 77 YALE L.J. 411, 439 n.22 (1968). A meaningful integration of legal philosophy and judicial dispositional rules is beyond the scope of this article although certainly worthy of further study. After all, Judge Frankel's characterization of the present practice of sentencing as "lawlessness" assumes we know what we mean by "law."

239 *See* United States v. Bradley, 93 S.Ct. 1151 (1973). This is one example of the interplay of legislative, judicial, and administrative functions in criminal dispositions. The Court interpreted the effect of the saving clause of the new Federal Comprehensive Drug

ing the responsibility of the legislative and administrative branches in some areas. Finally, although the model of criminal dispositions is recommended as the alternative, the model does not solve all the important questions of sentencing. Perhaps the model's greatest contribution as a new mode of legal analysis is its ability to generate new questions and define the perimeters of their resolution.

Prevention and Control Act of 1970 that would have eliminated the mandatory sentence of incarceration in petitioner's case. The petitioner had been sentenced after the effective date of the new act. However, the Court, in holding that petitioner was properly sentenced under the old act, reasoned that sentencing was part of the prosecution, the operative word of the saving clause of the new act. The Court left open the question of whether the more stringent parole requirements of the old act would apply to the petitioner's case, apparently on the theory that prosecution may not include the correctional process. *Id.* at 1156 n.6; *see* United States v. De Simone, 468 F.2d 1196 (2d Cir. 1972).