DETERMINATIVE SENTENCING LAWS: UNDERSTANDING THE LAW AND ETHICAL CONCERNS

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Under the Fourteenth Amendment, a defendant is guaranteed the right to equal protection before the law.\(^1\) Equal protection extends to each defendant’s rights to be heard, to have a fair trial, and to be sentenced accordingly. “All criminals have a fundamental right to be protected against sentencing procedures that are inherently arbitrary and capricious.”\(^2\) Sentencing laws throughout history have been transformed and altered to be more fair, just, and ethical to protect the rights of those being sentenced.

Determinative Sentencing Laws (DSL) are a system in which the judge sentences the defendant to a specific amount of time. The DSL’s in California are ethically and

\(^1\) Editor-In-Chief, Trinity Law Review, Trinity Law School, J.D. Candidate, 2009; Texas A&M University, B.S. Political Science, 2005.
\(^1\) U.S. CONST. amend. XIV.
constitutionally unjust because similarly situated defendants are not treated equally in the sentencing phase, thus causing their Constitutional rights to be violated. Based on the Fourteenth Amendment, a person is similarly situated if they fall within the same class of persons. This creates a problem when two defendants, charged with the same crime, are sentenced differently. This leads to many ethical issues including fair sentencing and who has the right to sentence a defendant under the United States Constitution. Recently, the Supreme Court has ruled on cases involving the sentencing of defendants under determinative sentencing laws. Their decisions will have a tremendous impact on how future defendants will be sentenced, as well as those already sentenced under current law. The courts must not only change the law to be legally fair, but the legislative body and the courts have a moral obligation to make sentencing laws ethical.

II. HISTORY OF DSL

In the mid-nineteen seventies, California sought to change their system from an indeterminate sentencing system to a scheme that would treat those who committed a crime equally by sentencing them to similar sentences. “Under the prior regime, courts imposed open-ended prison terms (often one-year to life), and the parole board--the Adult Authority--determined the amount of time a felon would ultimately spend in prison.” From the legislation itself the intent of determinative sentencing is clear: each crime committed should have a similar punishment and a prison term shall be served by the defendant.

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5 People v. Black, 113 P.3d 534 (Cal. 2005).
The legislation finds and declares that the purpose of imprisonment from crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the trial court with specified discretion.6

California sought to change indeterminate sentencing for a number of reasons. This drew complaints from both conservatives and liberals. Conservatives felt that indeterminate sentences were not successful because sentences could be reduced, thus causing early release for many harsh offenses.7 Liberals felt that with no end in sight for sentences caused some offenders prison terms to be extended arbitrarily for long periods.8 California sought reform to the offender-based system.9 “The jurisprudence of determinate sentencing is explicitly offense-based, so that the specific term of imprisonment should be dominated not by who the offender is but rather by what he or she has done.”10

California enacted determinative sentencing laws “to negate the perceived injustices of indeterminate sentencing and parole board power.”11 Enactment of the new sentencing structure created additional problems involving who should make the determination of the sentence, when are defendants similarly situated, and how should the factors in raising or lowering the system be treated.

6 FRANKLIN E. ZIMRING ET AL, PUNISHMENT AND DEMOCRACY 112.
7 Id. at 111.
8 Id.
9 Id. at 114.
10 Id.
11 Id. at 112.
A. HOW DETERMINATIVE SENTENCING LAWS WORK IN CALIFORNIA

In California, when a defendant is convicted in a criminal trial, a judge has the ability to raise or lower the sentence under the state’s determinative sentencing law.\textsuperscript{12} Under California Penal Code Section 1170,\textsuperscript{13} most crimes carry three terms which include lower, middle, and upper terms. The judge considers mitigating and aggravating factors that are not considered by a jury or outlined in the defendant’s plea.\textsuperscript{14}

In exercising his or her discretion in selecting one of the three authorized prison terms referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing.\textsuperscript{15}

Under California’s DSL the judge is obligated to the middle sentence unless mitigating or aggravating factors are found.\textsuperscript{16} The judge can then decrease or increase the sentence based upon information that has not been heard by a jury. The factors weighed by the judge are set forth in the post-sentencing hearing and only need to be proven by a preponderance of the evidence.\textsuperscript{17} Increasing the sentence to the upper term can be imposed after considering all relevant facts and if the circumstances surrounding the aggravating factors outweigh the mitigating factors.\textsuperscript{18} The sentence can be decreased if the judge determines the mitigating factors outweigh the aggravating factors.\textsuperscript{19} Any determination of raising or lowering the sentence is solely the judge’s discretion.

\textsuperscript{12} \textit{CA. PENAL CODE ANN.} \textsection 288.5(a) (West 2006).
\textsuperscript{13} \textit{See generally} \textit{CA. PENAL CODE ANN.} \textsection 1170(a) (West 2008) (For more information concerning specifics of the California DSL).
\textsuperscript{14} \textit{Cunningham}, 127 S.Ct. 856.
\textsuperscript{15} \textit{CAL. R. CT.} 4.420(b).
\textsuperscript{16} \textit{Cunningham}, 127 S.Ct. 856.
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{CAL. R. CT.} 4.420(e).
\textsuperscript{19} \textit{Id.}
B. When and Why the Courts Came into Play

Courts became involved when defendant’s appealed the trial court’s decision of choosing to enhance their sentence.\(^{20}\) Legally the issue was that of a Constitutional violation; the defendant was claiming an Equal Protection violation because they were not treated fairly during the sentencing phase. A judge made the final decision regarding the defendant’s sentence instead of a jury. Therefore, defendants were also claiming a Sixth Amendment violation. At the heart of the appeal was an ethical violation. Each defendant, who had their prison sentence increased from the middle term, felt they were being treated unfairly when compared to those who were sentenced for the same crime and received a shorter sentence. To better understand these violations it is necessary to see how the court handled sentencing issues.

III. Determinative Sentencing in Action

A. Cunningham v. California and Questions Arising from Its Decision

In the case of Cunningham v. California\(^{21}\) the defendant, John Cunningham was convicted of abusing a child under the age of fourteen.\(^{22}\) Based on the DSL, the judge was required to impose the middle term which was twelve years.\(^{23}\) The trial court judge had the ability to weigh aggravating and mitigating factors and thus impose the higher or lower sentence.\(^{24}\) In Cunningham, the judge determined there were six aggravating factors and one mitigating factor.\(^{25}\) The aggravating factors found by the judge included

\(^{20}\) See generally Cunningham, 127 S. Ct. 856; Blakely, 524 U.S. 961; and Apprendi, 530 U.S. 466.
\(^{21}\) Cunningham, 127 S. Ct. at 863.
\(^{22}\) Id. at 860.
\(^{23}\) Id.
\(^{24}\) Id.
\(^{25}\) Id. at 861.
the vulnerability of the victim and the violent conduct on the part of Cunningham, leading him to be deemed a serious harm to society. Cunningham did not have a prior criminal record which was found to be his sole mitigating factor. The trial court judge could use his discretion to sentence Cunningham to six years, twelve years, or sixteen years. By a preponderance of the evidence, Cunningham was sentenced to sixteen years because the judge decided the six aggravating factors outweighed Cunningham’s lack of a prior criminal record. The jury never considered these factors found by the judge and the jury was not on the record during the sentencing phase. Under California law, when Cunningham was sentenced the judge had full discretion over the imposition of his sentence and the factors used to determine his punishment.

B. THE CORRECT METHOD OF SENTENCING: Apprendi v. New Jersey

California’s DSL does not conform to past Supreme Court decisions. In Apprendi v. New Jersey, the Court concluded any factor that increases a defendant’s sentence, other than a previous conviction, should be heard by a jury, not a judge. The Apprendi Court held facts must be proved beyond a reasonable doubt. Based on precedent, anything less than this standard was a violation of the defendant’s constitutional rights. Relying on the Apprendi decision, the Supreme Court held Cunningham unconstitutional.

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26 Id. at 860.
27 Id.
28 Id.
29 Id.
30 Id.
31 Id.
32 Apprendi, 530 U.S. 466.
33 Id.
34 Id.
35 Cunningham, 127 S.Ct. 856.
Another question arises in similar cases that deal with what is considered the statutory maximum. The judge may sentence a defendant to the statutory maximum based on information obtained from the jury verdict and from the defendant’s plea. The statutory maximum, as explained by the Supreme Court, is “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” The question of what is considered the statutory maximum is important in Cunningham because if the upper term is considered the statutory maximum then the judge could sentence without violating the Sixth Amendment. The statutory maximum under the rule of Apprendi is the maximum sentence a judge may impose without having to consider additional facts. Based on the precedent established in Apprendi, the statutory maximum under California law is the middle term which must be imposed before weighing mitigating and aggravating factors.

C. United States v. Booker: Determinative Sentencing at the Federal Level

Federal courts have their own form of determinative sentencing laws which differ significantly from state courts. Booker was charged with possession of crack cocaine with intent to distribute at least fifty grams. The evidence presented showed Booker had ninety-two-and-a-half grams of crack and the jury found him guilty under 21 U.S.C. § 841(a)(1).

36 Id. at 865.
37 Blakely, 524 U.S. 296.
38 Apprendi, 530 U.S. 466.
39 Id.
41 Id. at 227.
42 Id.
The judge was required to choose a sentence between 210 but not more than 262 months in prison.\textsuperscript{43} The base terms of 210 months and 262 months were found under the sentencing guidelines based on the evidence presented to the jury of Booker’s prior criminal history and the amount of crack he possessed.\textsuperscript{44} Relying on the facts presented and proved by the jury, the judge could have sentenced Booker to 262 months.\textsuperscript{45} During sentencing the judge:

concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice. Those findings mandated that the judge select a sentence between 360 months and life imprisonment; the judge imposed a sentence at the low end of the range.\textsuperscript{46}

Booker was sentenced to 360 months.\textsuperscript{47} The defendants’ counsel appealed on the precedent set by \textit{Apprendi} stating that the judge incorrectly sentenced Booker because he used information not found by the jury to increase Booker’s sentence.\textsuperscript{48}

The Supreme Court granted certiorari and sought to determine if the enhanced sentence set by the judge was unconstitutional based on the defendants Sixth Amendment right and if the guidelines were constitutional.\textsuperscript{49} In deciding the first issue the Supreme Court held based on common law and the Constitution that a defendant has the right to have every element of the crime proven by a jury trial. The Court concluded: “[t]hese basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.”\textsuperscript{50} The

\textsuperscript{43} Id. at 227.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 228.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
majority opinion held the judge did not have the right to increase Booker’s sentence based on facts not heard by the jury.\footnote{9}

In a separate opinion written by Justice Breyer, the Court ruled the guidelines were not unconstitutional.\footnote{51} The federal determinative sentencing laws gave the judge the discretion to sentence the defendant within a specific range as seen in \textit{Booker}.\footnote{53} This differs from the California system where the judge must choose one of three sentences. In the federal system, the discrepancy in sentencing can be much larger. The Court in \textit{Booker} was not concerned with the amount of time to which defendants were sentenced but it was concerned with whether the sentencing law was mandatory or merely advisory.

In reference to this question the Court held the guidelines as used in \textit{Booker} are constitutional as long as they are not mandatory.\footnote{54} The Court stated “most of the statute is perfectly valid” only overruling two provisions.\footnote{55} One provision concerned appeals which noted “the relevant sentencing rules . . . [are] mandatory and impose binding requirements on all sentencing judges.”\footnote{56} This holding allowed the federal sentencing laws to now be advisory rather than imposed on every defendant.

Finally, the Act without its “mandatory” provision and related language remains consistent with Congress’ initial and basic sentencing intent. Congress sought to “provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted.”\footnote{57}

Today, the federal determinative sentencing scheme remains intact with the exception that it is now optional.

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\begin{itemize}
  \item \textit{Id.} \footnote{51}
  \item \textit{Id.} at 249. \footnote{52}
  \item \textit{Id.} at 251. \footnote{53}
  \item \textit{Id.} at 245. \footnote{54}
  \item \textit{Id.} at 259. \footnote{55}
  \item \textit{Id.} \footnote{56}
  \item \textit{Id.} at 260. \footnote{57}
\end{itemize}
IV. ETHICAL CONSIDERATIONS: DEALING WITH ETHICAL CONCERNS ARISING FROM DETERMINATIVE SENTENCING

Determinative sentencing laws bring about numerous ethical concerns. “Justice has been at the heart of morality from the early Greeks and Hebrews through today’s descendants of the Enlightenment.”\(^{58}\) To better understand the role of determinative sentencing laws and the ethical problems arising from their imposition, it is best to look to prior established moral philosophers and philosophical views on punishment throughout history. Recognizing the different views and theories on punishment will help to interpret how legislatures and judges might handle the issue of determinative sentencing. Understanding the history of punishment will also help to prove the thesis of this paper that similarly situated individuals should be punished fairly and equally. It will also aid in the understanding to which ethical problems arise from a determinative sentencing system and what benefit the system tries to provide.

A. KANT

Immanuel Kant (1724-1804) was a German philosopher who helped to move the philosophical movement from the older views to a more modern approach.\(^{59}\) Kant’s theory of punishment is clear.

[I]t is wrong to punish people for utilitarian reasons. Legal punishment must always be a response to guilt. If the core motive in punishing someone is to deter others, or to protect society, or to set an example, then the person punished is wronged; their humanity has not been respected. So punishment must always be in response to guilt, but Kant in effect goes further: the suggestion that seems to come through this reading is not only that guilt is a necessary condition for punishment, but that the guilty must be punished or else justice and equality, the only proper foundations for

\(^{58}\) THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR. LAWYERS, CLIENTS AND MORAL RESPONSIBILITY 62 (3rd prtg. 2002).

\(^{59}\) See generally SHAFFER ET AL., LAWYERS, CLIENTS AND MORAL RESPONSIBILITY 160-161.
the law, will not have been served. Equality is the principle that must be used in selecting a punishment. Kant uses a metaphor. He refers to the principle of equality as the one by which the pointer of the scale of justice is made to incline no more to one side than to the other.60

Determinative sentencing is based on the guilt of the individual and their punishment is simply prison time. Based on the above, Kant’s theory of legal punishment conforms to determinative sentencing laws. Cunningham was sentenced in response to being convicted of his crime. It can be inferred that based on Kant’s view of punishment, he would say punishing Cunningham for his crime is just.

The problem arises from Cunningham’s sentence being increased from the middle term. The principle of equality for Kant means the sentence for Cunningham must be equal to that of the crime.

One is the familiar idea of “an eye for an eye.” The evil that a wrongdoer inflicts is the measure of how severely s/he should be punished. Kant points out: we do not need to require that people who are assaulted should be assaulted, for example. What is required is that the pain inflicted on the criminal should be equivalent to the pain inflicted on the victim.61

Based on this philosophy, Cunningham should be sentenced equivalently to the pain inflicted on his victim. That is similar to what the courts are trying to do through determinative sentencing laws. A California judge establishes aggravating factors which will increase the defendant’s sentence to match that of the crime and the victim’s pain. If it is deemed Cunningham’s crime has inflicted such a severe pain on the victim based on the standard of aggravating factors, then he should be punished accordingly, meaning an increased sentence. Kantian theory can be used to support determinative sentencing laws if they are imposed equally on each defendant.

61 Id.
If each defendant is sentenced and the sentence increases or decreases when the
issues are properly proven, then the Kantian theory of punishment will support the DSL
scheme. If a judge fails to find an increase or decrease where it is necessary, then the
defendant’s humanity has been violated because he has not been sentenced fairly.

When looking at this, it is clear there is no way to police if each judge or jury is
imposing the correct amount of punishment for each individual defendant. With only
three options of punishments, it would be hard to fit each defendant in a specific
category. Based on this, the Kantian theory would best support the federal scheme of
DSL which allows the judge to have a choice to use the law and to sentence within a
range or punishments rather than the three select sentences used by the state.

B. ARISTOTLE

Aristotle [383 – 322 b.c.] distinguishes between two types of justice.\(^{62}\) He
describes distributive justice as “the just distribution of good within a society.”\(^{63}\) The
second type of justice is corrective, described as “placing the parties where they were
before one wronged the other.”\(^ {64}\) Determinative sentencing laws concentrate on
distributive justice.\(^ {65}\) Distributive justice concerns the just distribution of punishment
among those in a similar position.

In Aristotle’s Book V, he explains that for proportionality and justice there must
be four like ratios.\(^ {66}\) “As the terms A, then, is to B, so will C be to D, and therefore,

\(^{62}\) Shaffer et al., Lawyers, Clients and Moral Responsibility 62.
\(^{63}\) Id.
\(^{64}\) Id.
\(^{65}\) Id.
(1941).
alternando, as A is to C, B will be to D.\textsuperscript{67} Aristotle’s illustration is useful when looking at a real life scenario of determinative sentencing. Take for example, two defendants Tim and Tom. Both have been convicted of lewd and lascivious conduct with a minor under fourteen. The judge in each case found two mitigating factors and one aggravating factor. Tim was sentenced to the middle term under law and Tom’s sentence was reduced to the lower term. Was this just?

This is the question Aristotle would ask when theorizing the justness of determinative sentencing laws. Should Tim and Tom have received two distinctly different punishments? Based on Aristotle’s illustration above, Tim (A) and Tom (B) are equals and their punishments respectively (C) and (D) are unequal. Aristotle would conclude their sentences are not just because A, B, C, and D are not all held to be equal. “The conjunction, then, of the term A with C and of B with D is what is just in distribution and this species of the just is intermediate, and the unjust is what violates the proportion; for the proportional is intermediate and the just is proportional.”\textsuperscript{68}

If Tim and Tom, as similarly situation persons, receive different and unequal sentences, then under Aristotle’s theory of distributive justice their punishment is unjust. Since their punishments are not proportional the goods have not been distributed justly. Therefore, based on Aristotle’s theory of distributive punish, determinative sentencing laws are unjust.

\textsuperscript{67} Id. at 1007.
\textsuperscript{68} Id.
C. RAWLS

John Rawls [1921-2002] does not define justice specifically, though he created a theory of identifying justice.69 “Justice is that situation which rational people would agree to if they stood behind a veil of ignorance about their circumstances, i.e., they did not know whether the agreement would profit them or not.”70 Rawls’ theory has everyone beginning equally before any choices are made. This theory can be used to decipher if determinative sentencing is just. Using the example of Tim and Tom, prior to sentencing they are equals based on their situation and crime. “The original position is, one might say, the appropriate initial status quo, and thus the fundamental agreements reaching in it are fair.”71 Rawls would agree Tim and Tom are equals at this point.

Upon receiving two distinctly different sentences, the situation changes and their equal position no longer exists. Tim and Tom were given their due by being sentenced to jail time for their crimes. How does one come to terms with the sentences being different?

But what we can say is that, in the traditional phase, a just scheme gives each person his due: that is, it allots to each what he is entitled to as defined by the scheme itself. The principles of justice for institutions and individuals establish that doing this is fair.72

Breaking down Rawls’ theory and comparing it the outcome of the Tim and Tom scenario will help to decipher if determinative sentencing is just. Their punishments were defined in the scheme itself based on the crimes they committed. There is no distinction in Rawls’ theory for the increase or decrease in punishment since the law of

69 SHAFFER ET AL, LAWYERS, CLIENTS AND MORAL RESPONSIBILITY 67.
70 Id.
72 Id. at 276.
determinative sentencing sets forth the specifically mandated punishment. It seems as though under Rawls’ theory their sentences are just and fair based on their crime.

Rawls also argues one would choose a society which conforms to two basic principles.

Each person is to have an equal right to the most extensive basic liberty compatible with similar liberty for others. Social and economic inequalities are to be arranged so that they are both: a) reasonably expected to be to everyone’s advantage and b) attached to positions and offices open to all.73

The first principle is similar to Kant’s theory and is known as the “liberty principle” which, when boiled down, is that each person is to be treated equally.74 The second principle is known as the “difference principle.” This deals with the concept of all persons being morally equal but recognizing “that in the ‘real world’ there are significant differences between individuals that under conditions of liberty will lead to social and economic inequalities.”75 Rawls’ point under the two principles is that treating individuals equally on a moral level can be accomplished, but in the every day world in which we live and make decisions, treating two people exactly the same is near impossible because of the vast differences between given situations. As long as the scheme is set up to be an advantage and open to all, then it is fair process.

Based on Rawls’ theory, the way in which determinative sentencing should be viewed is that everyone sentenced for the same crime is equal in that they will receive the middle sentence, meaning they are all being treated equally. Any further distinction in their crime (either the increase or decrease) is morally based on the difference because no two situations can ever be fully equal and alike due to various social and economic

74 Id.
75 Id.
inequalities. Utilizing Rawls’ theory, determinative sentencing is a just and fair means of sentencing.

V. SUMMARY OF ETHICAL PROBLEMS

Determinative sentencing laws were enacted with the intent to create a system that would focus more attention to the seriousness of the crime, providing equal sentencing to those convicted of the crime. After applying this approach using the philosophical teachings of Kant, Aristotle, and Rawls, it is apparent that determinative sentencing has both positive and negative components. One positive aspect is that the discrepancy in sentencing among defendants is decreased. Another positive aspect is that defendants who have committed generally the same crime are treated in proportionality based on their sentence, at least in theory. This is manifested through Aristotle’s theory.

A negative aspect of determinative sentencing is the abuse of the system by over-zealous judges. This is evident in the theory presented by Kant. A serious issue with determinative sentencing is that no two defendants or situations are exactly equal. This is what Rawls’ theory proved. Both the positive and negative aspects of determinative sentencing need to be considered when accounting for the effect of Cunningham and implementing a new system.

IV. EFFECT OF CUNNINGHAM V. CALIFORNIA

The majority opinion in Cunningham calls for California to change their DSL system.\textsuperscript{76} The only guideline for changing the system given by the Supreme Court is to

\textsuperscript{76} Cunningham, 127 S.Ct. at 871.
follow other states’ lead to better conform to the Sixth Amendment.\textsuperscript{77} For California, the decision in \textit{Cunningham} brings about a few problems. California must implement a sentencing system that does not violate a defendant’s Sixth Amendment right to a jury trial.\textsuperscript{78} How this is done is left up to the state itself, but the Supreme Court notes that several states have altered their system by allowing the jury to find the aggravating and mitigating facts to elevate or decrease the sentence.\textsuperscript{79} It will be a grueling task for California to implement a new sentencing structure which will encompass the new defendants awaiting sentencing, the defendant’s who have been sentenced which are currently serving time, and for the defendant’s who have finished serving their sentence under the current structure. Each group of individuals, those yet to be sentenced, those currently serving, and those already released each have a different set of issues arising from the current system. To implement an ethical system means California must treat each group individually and handle their needs separately.

A. IMPLEMENTING A NEW SYSTEM

Putting into practice a new system is a necessity for California, not only to conform to Supreme Court precedent, but also to make sure the state implements the most ethical system available. There are seven states that have changed their sentencing systems in various methods.\textsuperscript{80} The first way states have changed their DSL law is allow the jury to find the mitigating and aggravating factors in a separate proceeding.\textsuperscript{81} California already utilizes juries to enhance the defendant’s sentence based on criminal

\textsuperscript{77} Id.
\textsuperscript{78} U.S. CONST. amend. VI.
\textsuperscript{79} \textit{Cunningham}, 127 S.Ct. at 871.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
history and criminal circumstances.\textsuperscript{82} California could expand the post-sentencing proceeding by allowing jurors to find mitigating and aggravating factors. Jurors could weigh the factors and if they find beyond a reasonable doubt that the necessary factors exist, the jury could increase or decrease the defendant’s sentence. Allowing jurors to do this would permit California to continue determinative sentencing, while not violating the defendant’s Sixth Amendment rights. “This court has repeatedly held that, under the [S]ixth [A]mendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely a preponderance of the evidence.”\textsuperscript{83}

Various states have changed the punishment range so that the judge is allowed discretion.\textsuperscript{84} This is similar to the federal system where the judge could sentence a defendant to serve a set time within the range based on the facts found. The range must be clearly defined before the judge can select a specific punishment.\textsuperscript{85} This does not violate the defendant’s Sixth Amendment right to have all facts found by a jury to increase punishment.\textsuperscript{86} As held in \textit{Booker}, a determinative sentencing system that utilizes a specific range must be advisory.\textsuperscript{87} California could change their determinative sentencing laws to model that of the federal system. Using \textit{Cunningham} as an example, the judge could have discretion to sentence him within a range of six years to sixteen years.

\textsuperscript{82} \textit{Id.} at 863.
\textsuperscript{83} \textit{Id.} at 864.
\textsuperscript{84} \textit{Id.} at 871.
\textsuperscript{85} \textit{Booker}, 543 U.S. 220.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{See generally} \textit{Booker}, 543 U.S. 220.
Another alternate way of eliminating the problem with California’s current system would be to make the upper term the statutory maximum. This would eliminate the problem because the Supreme Court has held that a judge can use their discretion to impose a sentence lower than the statutory maximum. In the case of *Cunningham*, California could make the upper term the statutory maximum or sixteen years. Then the judge would have the ability to sentence Cunningham to any sentence under the statutory maximum. This would eliminate inequalities because no defendant would be sentenced to a punishment above the statutory maximum such as the case of *Cunningham*.

California also has the ability to eliminate determinative sentencing altogether. Along with determinate sentencing California utilizes a three strikes system and an indeterminate system.\(^88\) “Whatever their defects, wide gaps between the minimum and maximum prison terms in indeterminate schemes provide an opportunity to increase periods of confinement for offenders who are considered habitual or career felons or are otherwise regarded as especially dangerous.”\(^89\) Indeterminate sentencing could be used in conjunction with an early release program for good behavior which would not only reward those who are “rehabilitated” but it would also save money for the state of California.\(^90\)

The Supreme Court has stated California can change its system in any way in which it desires, as long as it follows previous decisions.\(^91\) California can change its system to follow other states or do anything else to uphold the Sixth and Fourteenth

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\(^88\) See generally Franklin E. Zimring et al., *Punishment and Democracy* 110-116.

\(^89\) Id. at 114.


\(^91\) *Cunningham*, 127 S.Ct. at 871.
Amendment rights entitled to every criminal defendant. California has several alternative means to fixing their determinative sentencing statute. “California may follow the oaths taken by its sister States or otherwise alter its system, so long as the State observes Sixth Amendment limitations declared in this Court’s decision.”\(^{92}\) Plainly stated by Justice Ginsberg, “the ball lies in California’s court.”\(^{93}\)

**B. What System will be the Most Ethically Sound?**

The most ethical system for California to implement will be a system that is not only fair and just, but which allows each individual defendant the ability to be sentenced based on his or her individual situation while being rehabilitated. “Determinate sentencing makes the criminal justice system into one focused solely on punishment, and this fails to take into account that not every criminal is the same person.”\(^{94}\) Each defendant has the right to be treated equally before the law and to be fairly sentenced. What is fair for one defendant may not be fair for the next. “[B]y taking into account the fact that just because two individuals were prosecuted under the same statutes does not mean that they must serve the exact same sentence.”\(^{95}\) California must choose a system that will punish a defendant’s wrongdoing while allowing discretion to account for differences, and making sure each defendant is fully rehabilitated before release.

\(^{92}\) *Id.* at 871.

\(^{93}\) *Id.*


\(^{95}\) *Id.*
VII. CONCLUSION

The killer of Polly Klaas, who was a serial kidnapper, was released because of
determinative sentencing.\textsuperscript{96} Another man, who assaulted four people and threw the
infamous brick at Reginald Denny’s head in the Los Angeles riots, served less than four
years and was released because “determinate sentencing had cut the punishment for his
charged crimes to make the system fair.”\textsuperscript{97} Then governor and strong proponent of
determinative sentencing, Jerry Brown, now believes the system is an “abysmal
failure.”\textsuperscript{98} This paper set out to prove that determinative sentencing was unfair because it
did not treat those being sentenced under its scheme equally. The goal was to prove that
sentences were often arbitrarily increased due to a misunderstanding of the law by factors
presented only to the judge. This point was proven. However, the paper also established
that determinative sentencing laws are also unfair because it fails to take into account the
individuals need to not only be punished but also to be rehabilitated. Punishment and
rehabilitation, the two main factors in sentencing, cannot be accomplished by sentencing
each defendant to a lower, middle, or upper term as through determinative sentencing
laws.

\textsuperscript{96} Id. at 3.
\textsuperscript{97} Id.
\textsuperscript{98} Id.