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DISQUISITION ON THE NEED FOR A NEW MODEL FOR CRIMINAL SANCTIONING SYSTEMS*

M. KAY HARRIS**

The time is ripe for a major restructuring of our criminal sanctioning systems. Pressures for change are arising from many sources. As crime rates continue to rise and public fear of crime grows apace, thoughtful persons from many walks of life are more strongly articulating the need to find a different method of dealing with those convicted of violating the criminal law. The criminal prosecutions and dispositions arising from Watergate and related cases have brought many of the issues of unequal justice into the thoughts of American citizens. Proposals for criminal and penal code revision await action in legislatures throughout the country. Judges find a growing percentage of their workload being devoted to hearing and attempting to resolve complaints from convicted offenders concerning the nature of their sentences, the conditions of their confinement, and the procedures by which their lives are governed.

This article will highlight some of the major problems, sources of confusion, and matters of controversy that surround present sanctioning practices. The subject areas to be addressed include sentencing discretion, lack of clarity or consensus regarding the purposes to be served in imposing criminal sanctions, disparity in sentencing, the acceptability of current sanctions by humanitarian and legal standards, and the parole release function as a part of sentencing. A number of officers, institutions, and forces impinge upon or influence the nature and duration of sanctions. This article will focus primarily on the legislature, judiciary, and paroling authorities as they impact on the sanctioning process, excluding discussion of a number of other critical actors.¹ The problems that will

*Although an earlier version of this article was prepared for the ABA's Commission on Correctional Facilities and Services, the views expressed herein are the author's and do not necessarily reflect those of the American Bar Association or any component thereof.

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¹ For a compact overview of the importance of the discretionary decisions left to police, prosecutors, magistrates or trial judges, and jurors in regard to arrest, indictment, pre-trial diversion, pre-trial release or detention, and trial, see Motley, "Law and Order" and the Criminal Justice System, 53 J. CRIM. L. & C. 259 (1973).

be highlighted in these three areas reflect flaws that are endemic throughout the criminal justice process. The article will also summarize the major types of reform that have been suggested in the last ten or fifteen years.

This review of the problems that characterize present sanctioning practices and of proposed remedies is not intended to be fully exhaustive of the subjects raised. Rather, the intent is to reiterate the flaws in the system, already catalogued in much greater detail elsewhere, as a prelude to addressing the inadequacy of most of the existing proposals for change. Many of our present sanctioning practices are performed in ways, or result in ends, that are unlawful, unjust, ineffective, and inhumane. Decisions regarding where and how thousands of persons may spend years of their lives are left to individuals whose discretion is unguided by clear objectives and virtually unchecked by procedural requirements or further review. In view of the awesome power embodied in sanctioning decisions and their critical impact on American citizens, the current state of the criminal sanctioning process is appalling. Complete restructuring of our sanctioning practices is necessary, requiring a reconceptualization of both the purposes that a criminal sanctioning system should be designed to serve and the most sensible practices for achieving the desired goals. Social change seldom arises simply from presentation of facts showing that the status quo is ineffective. This may be a necessary condition for change, but it is not a sufficient one. What is needed is a vision of a new way—a vision that is compelling enough to attract sufficient number of adherents to achieve its implementation. This article is designed to assemble the major arguments concerning why a new model for criminal sanctioning is needed and to offer some directions such a model might follow.

I. SENTENCING DISCRETION

The formal model of the criminal justice process assigns to the legislative branch the power and responsibility to establish and declare the public policy for dealing with convicted law violators—the ends sought and the means allowed. In practice, however, legislatures have failed to provide a coherent sentencing policy. Statutes provided little guidance in terms of what the sentencing courts are expected to accomplish through the imposition of a criminal sanction. The law authorizing various sentencing alternatives is chaotic. Penal codes are silent or vague as to the criteria to be used in determining specific sentences.

Such legislative abdication of fundamental responsibilities concerning the sentencing process forces sentencing judges to decide the purpose and the manner that state power over convicted offenders will be exercised. Each time a criminal sanction is imposed, the sentencing judge must decide the purposes to be served, the available sentencing options to be chosen, and the criteria to be taken into account.

It appears safe to say that judges have not been any more successful than legislators, philosophers, or the general public in resolving the long-standing debates regarding the proper purpose or purposes of criminal sanctions. In the United States today judges appear to be predominantly utilitarian and forward-looking in the sentences they impose. They are committed to the social goals of "protecting society" or reducing the likelihood of future crime on the part of both particular offenders and the general public. Thus, they see their role as maximizing by their sentences the purposes of individual and general deterrence, incapacitation, and reformation. At the same time, concern remains with limiting the nature or length of sanctions by considerations of the offender's "just desserts." There is notable confusion as to how all of the purposes seen as proper can be reconciled with each other and achieved.

The results of an exhaustive sentencing study, even though conducted in Canada, are suggestive of the variations judges reveal in weighing the diverse purposes in imposing sentences.² Seventy-one magistrates were asked to indicate how much importance they attached to each of the classical purposes of sentencing: reformation, general deterrence, individual deterrence, incapacitation, and punishment. The results indicated that while reformation was rated highest among the group, different magistrates attached significantly different degrees of importance to the various purposes and few completely ruled out any of the classical purposes of sentencing.³ The researcher concluded that "[m]arked inconsistency in the principles of sentencing [was] thus revealed."⁴ In addition to simply asking the magistrates to rate the importance of the varying purposes in the abstract, they were asked to score sheets indicating their purposes each time they sentenced. The results indicated that while tending to give verbal support to the purpose

² J. HOGARTH, *SENTENCING AS A HUMAN PROCESS* (1971).

³ *Id.* at 70-73.

⁴ *Id.* at 70.

of reformation, the magistrates' actual sentencing seemed to be more closely tied to the purposes of retributive punishment and individual deterrence.⁵

Sentencing judges are also given considerable discretion in selecting a sanction to serve the purposes they see as primary. Although some statutes provide mandatory terms, in most cases judges must decide among a number of options. They may impose a fine, at least for certain offenses, and within prescribed limits may use their discretion regarding amount and manner of payment. They may sentence probation for most offenses. They may suspend the sentence, with or without special conditions, and they may commit to an institution for a term within prescribed limits. Except in some states,⁶ sentences imposed within legal limits are ordinarily not reviewable by higher courts.

This list of the general options available to sentencing judges does not begin to exhaust the choices that must be explored each time an offender is sentenced. In the United States federal district courts, for example, there are three major types of statutory sentencing procedures available: the Federal Juvenile Delinquency Act, the Federal Youth Corrections Act, and the regular and indeterminate sentence designated for defendants prosecuted as adults.⁷ Using only the latter category for illustrative purposes, federal sentencing statutes for adults include the options of fine, imprisonment, probation with its various types of sub-groups (immediate probation, split sentence, delayed probation, and pro-

⁵ *Id.* at 288-91.

⁶ ALASKA STAT. § 12.55.120 (Supp. 1972); ARIZ. REV. STAT. ANN. § 13-1717 (1956); ARK. STAT. ANN. § 27-2144 (1962); CAL. PENAL CODE § 1260 (Deering 1971); COLO. REV. STAT. ANN. § 40-1-509 (Supp. 1971); CONN. GEN. STAT. ANN. §§ 51-194 (1960), §§ 51-195 to -196 (Supp. 1975); HAWAII REV. STAT. § 641-24 (1968); IDAHO CODE § 19-2821 (1948); ILL. ANN. STAT. ch. 110A, § 615(b) (Smith-Hurd 1968); IND. ANN. STAT. § 9-2321 (1956); IOWA CODE ANN. § 793.18 (1950); KAN. STAT. ANN. § 22-3605 (1974); ME. REV. STAT. ANN. tit. 15, § 2141 (Supp. 1974); MD. ANN. CODE art. 17, § 645JA (Supp. 1974); MASS. ANN. LAWS ch. 278, § 28A (Supp. 1974); MO. R. CRIM. P. 27.04, 27.05, 27.06; MONT. REV. CODES ANN. §§ 95-2501 to -2504 (1947); NEB. REV. STAT. § 29-2308 (1965); *State v. Johnson*, 67 N.J. Super. 414, 170 A.2d 830 (App. Div. 1961); N.Y. CODE CRIM. PRO. § 470.15 (McKinney 1971); OHIO REV. CODE ANN. § 2953.07 (Page 1954); OKLA. STAT. ANN. tit. 22, § 1066 (1958); ORE. REV. STAT. § 138.050 (1973); PA. STAT. tit. 17, § 211.504 (Cum. Supp. 1974); *Brooks v. State*, 187 Tenn. 361, 215 S.W.2d 785 (1948); WIS. STAT. ANN. § 251.17 (1971). See also *Criminal Sentencing: An Overview of Procedures and Alternatives*, 45 MISS. L.J. 782 (1974).

⁷ ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS 1971, at 29 (1973).

bation without supervision), and imprisonment or probation plus a fine.⁸ In addition, deportation may be ordered following conviction in the case of an alien; sentence may be suspended; or the court may fix the maximum sentence allowable by law and order the offender committed for a period of study and observation before being returned to the court for affirmation or alteration of the original sentence.⁹

Adults who are sentenced to imprisonment are further divided into groups that indicate when they will be eligible for release from incarceration. Most sentences to imprisonment are described as "regular." The sentence is for a definite term within statutory limits, with parole eligibility set at one-third of the maximum sentence. The imprisonment group also includes adults receiving indeterminate sentences whereby the court sets a maximum term and may or may not fix a minimum term. When the minimum term is set by the court under federal law, the Board of Parole may consider release on parole after the minimum term has been served. When no minimum is set by the court under federal law, the Board of Parole may consider release on parole at any time.¹⁰

As an additional option, adult offenders may be sentenced under Title II of the Narcotic Addict Rehabilitation Act of 1966. These commitments are made to the Attorney General for an indeterminate period of ten years. Another category of sentences involving imprisonment are those referred to as mixed sentences. Defendants so sentenced have not only a term of imprisonment to complete, but also a term of probation following completion of the term of imprisonment or any portion of the term that is served under supervision in the community on parole.¹¹

The probation statute, Title 18, United States Code, Section 3651, provides four classifications to describe types of probation. "Immediate probation" occurs when the court places the defendant on probation without any intervening imprisonment. A "split sentence" refers to a term of imprisonment not to exceed six months combined with a probation term of up to five years. "Delayed probation" takes place when persons are serving previous federal or state sentences and must therefore be given a postponement before they can begin serving their new probation term. This

⁸ *Id.* at 33, 34.

⁹ *Id.* at 31.

¹⁰ *Id.* at 33.

¹¹ *Id.* at 34.

type of sentence is similar to a mixed sentence, except that the probation term imposed usually arises from a separate and completely unconnected conviction. Finally, some individuals may be designated to serve a term of "probation without supervision."¹²

These examples are indicative of the complex variety of alternatives facing a sentencing judge. Viewed from another perspective, however, it can be argued that available sentencing alternatives are all too few, if quality, rather than quantity, is used as a yardstick. Judicial decisions today are more involved with length, definiteness, and choice between probation or incarceration than with a variety of kinds of sanctions. While statutes in some jurisdictions are beginning to allow sentencing to community facilities ("half-way in" houses), day-care programs, or community service obligations, sanctions such as week-end jail sentences have been authorized for many years, and they are seldom used. Judges as a rule continue to limit themselves to the far from perfect standbys of incarceration and probation.

In trying to choose among the sentencing options open to them, the sentencing judge must decide the factors relating to the offense and the offender that will be taken into account. Some idea of the volume and nature of information the judge is expected to consider can be derived from examining suggested standards for the contents of presentence investigation reports. For example, the Model Sentencing Act provides, in part, that whenever an investigation is required:

the probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. . . .¹³

After being presented with this information, judges must then decide the questions they will try to answer with it, that is, the criteria that will be used in selecting the sanction. In trying to assimilate and evaluate the material provided in the presentence reports, judges often look to the probation staff who have collected the information to suggest how it should be put to use in arriving

¹² *Id.*

¹³ THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT § 3 (2d ed. 1972).

at a sentence.¹⁴ At a sentencing institute held in 1973 for federal judges of the First and Second Circuits, a representative of the United States Probation Service was asked to comment on the factors that are taken into account in preparing presentence reports and recommendations.¹⁵ In discussing the type of offenders who "seldom merit probation" from the Probation Service's point of view, the following factors were mentioned:

First of all, the non-addict drug seller who sells drugs for money; the professional criminal whose life pattern has been one of criminal activity; the educated white collar offender who has taken advantage of people less fortunate and less educated and who has been engaged in criminal activities largely because of greed.

[Among those offenders not likely to respond to probation even though their offenses were not serious and they have no prior criminal record] there is the anti-establishment, anti-authority person who looks upon persons in authority with suspicion. Attempts to show kindness or understanding are looked upon by them as weaknesses, and they take advantage of such attempts at every opportunity.

Another type are those who believe that everything and everyone has a price, that everything goes, and the only crime is the crime of getting caught. Those persons with a psychotic background or history are usually not suitable for probation. Whether due to brain damage or personality makeup, the fact that something might trigger off a psychotic episode makes them poor probation risks.

We sometimes feel that those young people with no adult criminal record but a long juvenile record of thefts and violence make poor probation risks.

Another type are those persons who have little or no work history.¹⁶

It is evident from such comments that at least some practitioners in the field—and one could reasonably surmise that the

¹⁴ Several studies have documented that sentencing judges follow the recommendation of probation officers with regard to sentence in upwards of eighty percent of the cases in which such reports are prepared, suggesting a major role for probation officers in sanction selection. *See, e.g.,* R. CARTER & L. WILKINS, *Some Factors in Sentencing Policy*, in PROBATION AND PAROLE 140-44 (R. Carter & L. Wilkins eds. 1970).

¹⁵ JUSTICE IN SENTENCING: PAPERS AND PROCEEDINGS OF THE SENTENCING INSTITUTE FOR THE FIRST AND SECOND UNITED STATES JUDICIAL CIRCUITS 20 (L. Orland & H. Tyler eds. 1974) [hereinafter cited as JUSTICE IN SENTENCING].

¹⁶ *Id.* at 20-21.

number is fairly large—find it not only plausible, but also desirable, that the sentencing decision should be based on an almost infinite list of attitudes, tendencies, personality traits, beliefs, and experiences that are to be somehow “diagnosed” or identified in offenders or their histories quite apart from any more objective aspects relating to the crime.

Even accepting that such “criteria” should play a part in selection of sentence, there is little agreement, even among “experts,” concerning the kind of information about offenders that is useful for the purpose of sentencing or as to how it should be utilized. The Canadian sentencing study¹⁷ found that “there were significant differences in the weight that different magistrates attached to different types or categories of information, particularly in relation to the relative weights given to information concerning the offender, the offense, and the criminal record.”¹⁸ This study concluded that “[m]agistrates chose certain kinds of information selectively, interpreted this information selectively, ascribed importance to certain features of the case to the exclusion of others, and selected among the various purposes in sentencing those which were most consistent with their personal values and subjective ends.”¹⁹ This illustrates that the sanction may be based on any factor the particular judge deems relevant—*any* factor, because the judge does not have to justify or even explain the selection.

Judge Marvin Frankel has eloquently captured and criticized the present status of procedures for making the critical determination as to the length and severity of sentence:

[O]ur practice in this country, of which I have complained at length, is to leave that ultimate question to the wide, largely unguided, unstandardized, usually unreviewable judgment of a single official, the trial judge. This means, naturally, that intermediate questions as to factors tending to mitigate or to aggravate are also for that individual's exclusive judgment. We allow him not merely to “weigh” the various elements that go into a sentence. Prior to that we leave to his unfettered (and usually unspoken) preferences the determination as to what factors ought to be considered at all, and in what direction

As I have urged already, there is no valid reason for leaving to the individual judges their varying rules on what factors ought to be *material* and to what effect. To say something is

¹⁷ HOGARTH, *supra* note 2.

¹⁸ *Id.* at 303.

¹⁹ *Id.* at 378.

“material” means it is legally significant. We know what is legally significant by consulting *the law*. We do not allow each judge to make up the law for himself on other questions. We should not allow it with respect to sentencing.²⁰

Our system of laws attaches elaborate, rigorous, and inviolate procedural safeguards all the way through the criminal justice process to the point of conviction. When the question of sanctions is reached, however, such considerations are abandoned almost entirely. It is interesting to note, for example, that the recently adopted Federal Rules of Evidence for the United States Court and Magistrates, established “to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined,”²¹ expressly exclude sentencing proceedings from applicability.²² This situation is all the more puzzling when one considers that courts have increasingly recognized the necessity for procedural safeguards when a convicted offender’s status after sentencing is significantly altered. Parole and probation revocation proceedings, inter- and intra-state prison transfers, institutional disciplinary proceedings, even intra-prison classification proceedings—in each, it can be argued, the procedural safeguards are becoming more rigorous than those that attach to the sentencing process.²³

The fourteenth amendment guarantees to every person within the jurisdiction of a state the equal protection of the laws. However, that guarantee has seldom been interpreted to mean that no one shall be subjected to any greater or different punishment for the same offense than that to which others are subjected. Only in rare cases has this principle been so applied. One of the main underpinnings of the Supreme Court’s decision holding the death penalty, as then implemented, unconstitutional²⁴ was the unequal

²⁰ M. FRANKEL, *CRIMINAL SENTENCES* 112 (1972).

²¹ FED. R. EVIDENCE 102.

²² FED. R. EVIDENCE 1101(a)(3).

²³ In recent years the Supreme Court has dealt with each of these areas except the last—in-prison classification procedures. *See* *Gomes v. Travisono*, 418 U.S. 910 (1974), *vacating and remanding* 490 F.2d 1209 (1st Cir. 1973) (interstate transfer procedures); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (prison disciplinary procedures); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation procedures); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation procedures); *Newkirk v. Butler*, 499 F.2d 1214 (2d Cir.), *cert. granted sub nom.* 95 Sup. Ct. 172 (1974) (intrastate transfer procedures).

²⁴ *Furman v. Georgia*, 408 U.S. 238 (1972).

application of the penalty. The decisions barring imprisonment of indigents who are unable to pay fines also reflect application of the equal protection requirement.²⁵ Beyond these few exceptions, however, sentencing is governed more by people than by laws. Sentences are far from uniform and far from the goal of equality. "The courts have said that the right to equal treatment under the law governs sentences; but it is almost never applied to them despite numerous appeals by convicted offenders on exactly this ground, often well supported factually."²⁶

The wisdom of continuing to rely on a sentencing system characterized by such vast discretion must be seriously questioned. Instead of letting the judge decide an appropriate sentence, the law could specify the exact penalty for each offense. *Struggle for Justice*, a report prepared for the American Friends Service Committee,²⁷ advocates just such an elimination of discretion, not only in sentencing, but throughout the criminal process. While it acknowledges that cases of injustice would arise, the report argues rather persuasively that, on the whole, the oppressed and non-conforming groups in our society would benefit.²⁸

Against those who argue that it is not possible to formulate sentencing law with sufficient precision to eliminate or greatly reduce discretion, *Struggle for Justice* points to "the area of property, inheritance tax or business law or any area, for that matter, in which the affairs of the more powerful and rich segments are being regulated. In these areas the specificity of the law is extreme. Little margin is left for discretion."²⁹ One can imagine the public reaction that would attend a proposal that personal income tax assessments be left to the discretion of local Internal Revenue agents. Although there may be limits to the precision attainable in the formulation of criminal penalties, current criminal statutes do not begin to approach these limits. Sentencing statutes that require considerable discretion in implementation do not well serve either the legislature or the public. If legislators will not reduce their desires to words, how are police or prosecutors or judges or parole authorities to intuit what is wanted? Open-ended

²⁵ See *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970).

²⁶ S. RUBIN, *THE LAW OF CRIMINAL CORRECTION* VIII (2d ed. 1973).

²⁷ WORKING PARTY OF THE AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE* (1971) [hereinafter cited as *STRUGGLE FOR JUSTICE*].

²⁸ *Id.* at 124-44.

²⁹ *Id.* at 135.

sentencing laws almost guarantee that the legislative mandate, if indeed there is one, will be thwarted.

Those who continue to place reliance on discretion in sentencing argue that judges, parole boards, and correctional authorities require a considerable degree of flexibility to tailor a disposition to the unique and infinitely variable circumstances of each case. It is asserted that the legislature is too far away in time and place from any individual offender to foresee and weigh all of the significant variables. It is argued that only the sentencing judge, with the defendant standing before him or her, can make the appropriate choice of sentence. Nevertheless, if the significant variables surrounding individual offenders and specific offenses are so complex and numerous as to prevent the legislature from indicating their importance in terms of some explicit purpose or purposes, what is the point of allowing them to influence the sentence? Even assuming that the judge in fact has available all of the relevant information, how is the individual judge to translate this data into a specific sentence?

The extent to which consistency is now found in dispositions probably stems from the fact that relatively few variables are being considered. This is suggested by findings that reveal that most decision-makers are unable to assimilate and utilize more than limited amounts of information.³⁰ If only a few variables are actually being used in decision-making, why cannot those that are deemed reasonable and proper be written into the law? This would guarantee to all whatever leniency is bestowed on some. If legislators cannot find an unambiguous way to distinguish two actions or variables, it may be better to treat them as if they were alike than to leave the distinction for others. As Judge Sobeloff expressed several years ago, sentencing by judges is necessarily capricious, and it is thus unwise and unfair to repose in a single person, without the possibility of appellate review, the grave responsibility for such a vital function as sentencing. It is inconsistent with our traditional notions of human freedom to give any one person such a vast and unreviewable power over another, even after criminal conviction.³¹

³⁰ See, e.g., Wilkins, *Information Overload: Peace or War With the Computer*, 64 J. CRIM. L. & C. 190-97 (1973). "[T]he human intellect, no matter how intelligent the individual, can process only very small quantities of information." *Id.* at 190. See also H. SCHRODER, M. DRIVER & S. STREUFERT, *HUMAN INFORMATION PROCESSING: INDIVIDUALS AND GROUPS IN COMPLEX SOCIAL SITUATIONS* (1966).

³¹ Sobeloff, *Appellate Review of Sentences*, 32 F.R.D. 249, 265-68 (1962).

II. PURPOSES OF CRIMINAL SANCTIONS

There are deep and continuing conflicts about the proper philosophy upon which sentencing and dispositional decisions should rest. Apparently unable to reach consensus on a philosophical base for sentencing decisions, legislators tend to leave this determination to the discretion of criminal justice personnel on a case by case basis. The muddle that surrounds various views concerning the proper purposes of sentencing has been given respectability by a declaration that our sentencing systems reflect the "integrative" or "inclusive" approach to the philosophies of punishment. According to this view, there are a number of valid philosophies that may properly be taken into account in the sentencing process.³² At a recent sentencing institute for example, those in attendance were advised by a judicial colleague to

[b]ear in mind that there is no single accepted objective of sentencing. Wiser heads than ours over the centuries have agreed that, to use the classical formulation, general deterrence, special deterrence, retribution, rehabilitation and protection of society are properly purposes which the public asks sentencing courts to keep in mind. Whatever your views may be of one or more of these objectives, the judicial response on a given occasion may in large part depend upon the particular needs of the public, the victim and the offender. This means that all legitimate objectives of sentence must be kept in mind at all times.³³

The degree of acceptance of the integrative approach to sentencing is also illustrated by the statements of purpose set forth in three major proposals for reform of the Federal Criminal Code.

The National Commission on Reform of Federal Criminal Laws (the Brown Commission) stated the general purposes of its proposed criminal code as follows:

[T]he provisions of this Code are intended, and shall be construed to achieve the following objectives:

(a) to insure the public safety through (i) vindication of public norms by the imposition of merited punishment; (ii) the deterrent influence of the penalties hereinafter provided; (iii) the rehabilitation of those convicted of violations of this Code;

³² For one of the earliest statements of this view see *Williams v. New York*, 337 U.S. 241, 248 (1949). See also J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 307-08 (2d ed. 1960).

³³ Tyler, *Some Guideposts for the Compleat Sentencer*, in *JUSTICE IN SENTENCING*, *supra* note 15, at 201-02.

and (iv) such confinement as may be necessary to prevent likely recurrence of serious criminal behavior³⁴

Another proposed bill for reform of the criminal code listed the following objectives:

This code seeks to promote the general security through deterrence by giving due notice of the offenses and sanctions prescribed by law, and where this proves ineffective, by the rehabilitation of the corrigible offender or the appropriate incapacitation of the incorrigible offender.³⁵

The proposal drafted by the Department of Justice, as its proposed implementation of the Brown Commission report, listed the following general purposes:

(a) to define conduct which indefensibly causes or threatens harm to those individuals or public interests for which federal protection is appropriate;

(b) to prescribe sanctions for engaging in such conduct which will:

(1) assure just punishment for such conduct;

(2) deter such conduct;

(3) protect the public from persons who engage in such conduct; and

(4) promote the correction and rehabilitation of person who engage in such conduct³⁶

These general statements indicate either a belief that each code can be all things to all persons, or that no one can decide what purpose is to predominate or which purpose is to govern on a specific occasion. There is little guidance provided in any of these proposals regarding how a sentencing judge is to balance these complex and perhaps conflicting purposes in making individual dispositions. Nor is there explanation of how the various sentencing alternatives, sentence lengths, or sentencing categories comprising the remainder of the proposals were developed in reference to those purposes. Consideration of the respective merits of the three proposals inevitably bogs down in discussions of whether the allowable sentence for an offense category should be five or ten years or whether a fine should be allowed up to ten thousand dollars or one hundred thousand dollars. It is curious that the

³⁴ FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1971) pt. A, ch. 1, § 102.

³⁵ S. 1, 93d Cong., 1st Sess. § 1-1A (1973).

³⁶ S. 1400, 93d Cong., 1st Sess. § 102 (1973).

debate regarding the proposals can even take place in the absence of the more specific and rational conceptual framework that would seem to be an essential guide to shaping specific provisions. Indeed, such legislative endorsement of a broad range of purposes with virtually no further elaboration amounts to no legislative guidance at all. As Judge Marvin Frankel notes, we continue to suffer from unconscionable lawlessness in sentencing.

A Supreme Court opinion in 1958 made the obvious point that the "apportionment of punishment," its "severity," "its efficacy or its futility," are all peculiarly questions of legislative policy. Fully agreeing that this *ought to be so*, I have been saying at some length that the legislature has for too long abdicated this basic function. To begin at the elementary beginning, we have an almost entire absence in the United States of legislative determinations—of "law"—governing the basic questions as to the purposes and justifications of criminal sanctions.³⁷

Of primary importance in any effort to bring rationality and effectiveness to American sentencing is the development of a model for a criminal sanctioning system that rests on a sound and consistent philosophical base. A compelling vision of a new method is needed. Construction of such a model will not be an easy task. As indicated earlier, conflicts regarding the proper purpose or purposes of a criminal law system and of criminal sanctions are of long standing and appear to resist resolution. Each of the existing philosophies has its stong advocates. Similarly, each has been subjected to eloquent criticism. The major positions on both sides in respect to the classical formulations of sentencing purposes will be briefly summarized below and an attempt made to suggest a basis on which the conflicts might be settled. The nature of change suggested will be elaborated in the concluding section of this article.

A. Incapacitation

Incapacitation or preventive restraint as a justification for a criminal sanction reflects the utilitarian desire to prevent, or reduce, the likelihood of future crime by restraining the person in such a way as to make it much less likely that another offense will be committed during the period of restraint. The form that this restraint can take varies in severity and nature. The revocation of a driver's license from one who has been convicted of drunken

³⁷ M. FRANKEL, CRIMINAL SENTENCES 105 (1972).

driving may be viewed as incapacitation as may the disbarment of an attorney who has abused his or her trust. In common usage, however, the term incapacitation tends to be equated with more severe forms of restraint, particularly incarceration. The popularity of incapacitation as a justification for sanctions appears to increase as the rate of crime, or fear of it, increases. The "common sense" foundation of this justification is plain—let those who have shown their propensity for offending against our laws be shut away from us to prevent their doing so again.

The most elementary level of criticism of incapacitation as a justification for criminal sanctions is directed toward its feasibility or efficacy. Unless we are willing to execute or hold in solitary confinement for life far greater numbers of persons than at present, preventive confinement can only be considered efficacious in the short term and then only if the danger to other prisoners during confinement is disregarded. Given our historical preference for liberty and the dollar and social costs of execution or confinement for life, it seems unlikely that this country will opt for general or substantial increases in the use of either.

A second level of criticism of incapacitation can be characterized as a technological one. It is argued that our present ability to predict future behavior is so inaccurate that any system of preventive confinement will mistakenly deprive many persons of their liberty who would not in fact commit another crime if released. Some of those who utilize this criticism would not be bothered by confining persons if there were relatively greater certainty that the individuals so confined would actually commit any crime, or a crime of a certain (often unspecified) level of severity, if released, but see the confinement of individuals who would commit no further crimes, or crimes of a relatively trivial nature, as inefficient, if not unjust. Many, if not most, of those who criticize incapacitation on these grounds urge the expenditure of more time and money towards improving our ability to predict future behavior.

A more fundamental level of criticism is based on the view that even if we could predict future criminality accurately, it is unjust to deprive a person of liberty on the basis of something that has not yet occurred.³⁸ A criminal justice system that imposes specified punishments for specified crimes gives us some degree of as-

³⁸ See, e.g., N. MORRIS, *THE FUTURE OF IMPRISONMENT* 62-73, 81-84 (1974); von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 *BUFFALO L. REV.* 717 (1972).

surance that we can plan our lives within the framework of the laws. A system of preventive confinement depends not upon the nature and quality of an individual's chosen acts, but upon the state's determination of the individual's proclivities. Some would dismiss such an argument on the grounds that preventive confinement should be applied only to those who have been convicted of a criminal offense and have thereby forfeited their claim to many, if not all, of the protections available to citizens in general. Such a view is now generally discredited, however, and runs afoul of such basic tenets of our criminal jurisprudence as proportionality, prohibition of ex post facto laws, and finality. Furthermore, when a justification of criminal sanctions is based upon almost purely preventive considerations, as incapacitation is, the danger grows that preventive confinement will have less and less to do with past proven criminality, eventually extending to preventive confinement of persons never convicted of having committed a criminal offense, but believed likely to do so in the future. Such a practice would be clearly inconsistent with basic concepts of individual liberty. Yet such a possibility is by no means purely academic. Upon reflection, our present practices of confining juveniles who have committed no act that would be considered criminal for adults or civilly committing adults believed to be "dangerous" to themselves or others can be seen as preventive confinement. Such practices, as well as laws that provide for extended terms or otherwise harsher treatment for convicted persons believed to be "dangerous," "habitual offenders," or "defective delinquents" depart from dealing with the individual for past proven acts and move to the realm of punishing for behaviors that are not only unproven, but are not even alleged to have taken place. While the practice of preventive confinement has a long history,³⁹ it must be re-examined and, unless some clear connection to justice can be found, abandoned as a basis for extending the length of confinement or otherwise increasing the severity of a criminal sanction.

B. Deterrence

The concept of deterrence is another utilitarian justification for imposition of criminal sanctions. The term is used to refer either to general deterrence—sanctions imposed for the purpose of threatening or educating potential offenders to stay within the

³⁹ See, e.g., Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law—Part I: The English Experience*, 43 U. CINN. L. REV. 1 (1974).

law—or specific or individual deterrence—sanctions imposed for the purpose of preventing a specific offender from committing the same or another offense in the future. Since both forms of deterrence are preventive in intent, much of the study of their role in the selection of sanctions has focused on the extent to which it can be documented that certain sanctions have the effect of restraining particular individuals or citizens at large from engaging in crimes. Thus, most of the debate as to the role deterrence should play has centered around the validity of empirical findings concerning the efficacy of sanctions in preventing or reducing crime.⁴⁰

A somewhat more philosophical perspective, however, requires consideration regarding whether it is proper, in selecting a sanction for a particular law violator, to base that determination on whether the sanction will have a deterrent effect either on that offender or on others. If deterrence is considered a proper objective of sentencing, are we not again entering the sphere where prediction must dominate over established fact? In fact, have we not complicated matters beyond the problems attached to prediction for the purpose of incapacitation, by now inquiring into not only what effect the sanction selected is likely to have on a particular offender, but also into the presumed effect of the sanction on some vague body of others (*i.e.*, potential offenders)? In all justifications where prediction is involved, we depart from punishing for past proven criminality and move to punishing for the purpose of promoting some supposed larger social good. That is, we cease to punish this offender for the crime committed and begin to use him as a means to attain other social goals.⁴¹ In this case, what happens to a particular law violator depends not on the nature and quality of his or her chosen acts, but upon a determination as to the proclivities of the individual or of others and how they can be altered. To the extent that a criminal sanction for a particular individual is extended or otherwise made more harsh for the purpose of deterrence, justice is no longer being done to the individual.

C. Rehabilitation

Over the last few decades, sentencing policy has come to be dominated by proponents of rehabilitation as a major factor in

⁴⁰ See, *e.g.*, Tulloch, *Does Punishment Deter Crime?*, 36 *THE PUBLIC INTEREST* 103 (1974).

⁴¹ See, *e.g.*, F. ZIMRING, *PERSPECTIVES ON DETERRENCE* 20-25 (NIMH Monograph, Public Health Service Pub. No. 2056, 1971).

selecting a sanction for all but a few categories of offenders. The thinking behind a rehabilitative purpose is that in light of high recidivism rates, crime can best be reduced by offering offenders opportunities or services that will produce a reorientation toward society's values. It is assumed that most offenders suffer from some sort of lack or defect in their personality or their life experiences and that proper "treatment," education, or training can set them on a course involving lawful behavior.

Originally, the rehabilitative ideal was dominated by a medical model in which criminal behavior was viewed as a result of some pathology within the individual that could be diagnosed and treated. More recently, the language of rehabilitation has begun to change to an emphasis on "resocialization" or "reintegration," in which both offenders and the communities from which they came are seen as contributing to crime. Regardless of the term used to describe them, however, most sanctions imposed for a "corrective" purpose still involve attempts to change the offender to function in ways seen as acceptable by the larger community and are, like the purposes discussed above, utilitarian and preventive in intent.

On one level, the rehabilitative purpose of sanctions is criticized due to growing research evidence of the ineffectiveness of current programs in achieving the desired result.⁴² The acceptance of rehabilitation as a major purpose of sentencing has also been deemed responsible for the growth of indeterminate sentences, increased discretion for criminal justice personnel throughout the criminal process, increased sentence lengths, expanded use of the criminal sanction to bring less serious behaviors within its sweep, and numerous other problems that characterize our current sanctioning practices.⁴³ Not the least of such other ills is a tendency throughout the criminal system to allow practices labeled "rehabilitative" which would be prohibited if labeled "punitive."

The use of such "aversive stimuli" as electric shocks to the arms, feet, or groin⁴⁴ and drugs that produce fifteen minutes to one hour of uncontrollable vomiting⁴⁵ has been rationalized as necessary and humane "therapy." Numerous courts have accepted the

⁴² For more elaboration on this point, see the section of this article on parole, *infra*.

⁴³ See generally STRUGGLE FOR JUSTICE, *supra* note 27.

⁴⁴ "Behavior Mod" Behind the Walls, TIME, March 11, 1974, at 74 (Connecticut State Prison).

⁴⁵ Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973).

line of reasoning that challenges to such "treatments" as violative of the eighth amendment's ban on cruel and unusual punishment cannot succeed since by definition the treatment is not punishment and obviously cannot, therefore, be "cruel and unusual punishment." A majority in *Novak v. Beto*⁴⁶ upheld solitary confinement in Texas by linking isolation to rehabilitation. "Our role as judges," insisted the court, "is not to determine which of these treatments is more rehabilitative than another."⁴⁷ The judiciary has continued to approve indeterminate sentences to Patuxent, Maryland's institution for "defective delinquents," even when this means that persons committed there can stay behind walls under similar conditions and longer than if they had been sentenced criminally. The courts have insisted that confinement in Patuxent is civil, not criminal (*i.e.*, therapeutic, not punitive) since the legislature so defined it.⁴⁸ Indeed, the majority of the highest court appears to have accepted the rehabilitative ideal to a remarkable extent. In *Wolff v. McDonnell*, the Supreme Court paid serious attention to the "utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution."⁴⁹

The United States Bureau of Prisons justified its controversial START (Special Treatment and Rehabilitative Training) program that involved deprivations, like those associated with "the hole,"⁵⁰ on the grounds that the Bureau's own regulations on punitive segregation did not apply; START was not punishment, but treatment.⁵¹ Similarly, the infamous "Adjustment Centers" of the California Department of Corrections have continually been described and defended as therapeutic rather than punitive.⁵²

⁴⁶ 453 F.2d 661 (5th Cir. 1971).

⁴⁷ Cited in Rothman, *Decarcerating Prisoners and Patients*, 1 THE CIVIL LIBERTIES REV. 25 (1973).

⁴⁸ See, e.g., *McDonough v. State*, 253 Md. 547, 253 A.2d 517 (1969); *Blann v. Director of Patuxent Institution*, 235 Md. 661, 202 A.2d 722 (1964), *cert. denied*, 380 U.S. 955 (1965).

⁴⁹ 418 U.S. 539 (1974). *But see* 418 U.S. at 580 (Marshall, J. dissenting) and 418 U.S. at 593 (Douglas, J. dissenting).

⁵⁰ "The hole" is a fairly common correctional term among inmates and correctional staff that refers to the worst type of punitive isolation.

⁵¹ *Sanchez v. Ciccone*, No. 20182-4, 3061-4 (W.D. Mo. 1973) (Plaintiffs' Motion for Partial Summary Judgment, Jan. 7, 1974), *cited in* Opton, *Psychiatric Violence Against Prisoners: When Therapy is Punishment*, 45 Miss. L.J. 637 (1974). The Federal Bureau of Prisons has announced its intention to terminate the challenged START program for "economic" reasons.

⁵² Opton, *supra* note 51, at 620-21, 632-35. See also ASSEMBLY SELECT COMMITTEE ON PRISON REFORM AND REHABILITATION, ADMINISTRATIVE SEGREGATION IN

The hard fact is that "treatment" in prisons is often indistinguishable from punishment. As one critic of the "treatment" ideal has asserted:

The impossibility of differentiating some therapies from some punishments indicates not too close a similarity, but an identity. Punishment has long been acknowledged an important tool of psychiatric therapy and it remains well-recognized, though controversial today. Therapy and its synonyms, "corrections," "rehabilitation," and "treatment," are prime motives of those who design and operate the punitive institutions of society.

Over the years, Americans have become very considerably less willing to permit torture and other extremely severe punishments in their penal institutions. The first, fourth, fifth, eighth, and ninth amendments to the Constitution place some limits on legal punishments, and feeble as these limitations are in practice, they do exist and they are slowly acquiring real force and effect. Penal administrators turn, therefore, to therapy-as-punishment to carry out acts which, if named punishment, would be clearly illegal and immoral.

The courts have been exceedingly slow to see through this subterfuge. Only those practices most shocking to the conscience have been prohibited, and those often only on appeal. Other practices which would be shocking indeed if they were called punishment remain legal.⁵³

The disturbing uses to which the rehabilitative ideal can be put are not limited to the more extreme or painful treatment/punishments. There are more fundamental objections to the concept of ordering imprisonment for rehabilitation. In the words of C.S. Lewis:

To be taken without consent from my home and friends, to lose my liberty, to undergo all those assaults on my personality which modern psychotherapy knows how to deliver, to be remade after some pattern of "normality" hatched in a Viennese laboratory to which I never professed allegiance, to know that this process will never end until either my captors have succeeded or I have grown wise enough to cheat them with appar-

CALIFORNIA'S PRISONS (1973).

⁵³ Opton, *supra* note 51, at 643 (footnotes omitted). For examples when higher courts have looked behind the semantics, see *Knecht v. Gillman*, 488 F.2d 1136, 1136-37 (8th Cir. 1973); *Adams v. Carlson*, 368 F. Supp. 1050 (E.D. Ill. 1973); *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966).

ent success—who cares whether this is called punishment or not.⁵⁴

The logic of cure inevitably leads toward forms of treatment that involve changes in persons made against their will. The danger in this is most apparent in those cases where the subjects of our therapy do not regard their actions as sick, but believe that what they have done is “right.” When we begin treating persons for actions that *have been chosen*, we do not lift from them something from which they have been suffering, but we change them to function in a way regarded as normal by the current therapeutic community. In doing this, we display a lack of respect for the moral status of individuals—a lack of respect for the reasoning and choices of individuals. It is one thing to exact a penalty for what a person *did*, and quite another to do so for what he or she *is*. In the first instance, we say that the individual has incurred a debt, and there is a finite price to be paid. In the second case, we say that he or she is a deficient person and must become a better one before being accepted by us.

Those who follow this line of argument do not necessarily reject the provision of programs and services for offenders. The point is that these services must be voluntary, and the only way to insure that utilization is truly voluntary is to disassociate any sanctions or penalties from non-utilization. Federal District Judge Lawrence Pierce has proposed a model in which short, flat prison sentences for most offenders, retributive in purpose, would be followed by assignment for a definite period of time to a non-coercive program of assistance in the community. Lack of coercion would be guaranteed by the fact that non-utilization of the offered services would carry no sanction. The specified period in the community would represent a fixed entitlement to services, not a requirement that they be used. There would be no special conditions attached and no supervision. Only conviction of a new crime would carry sanctions, as is true for citizens in general.⁵⁵ Such a model would seem to go a long way toward eliminating the dangers now associated with the provisions of services to offenders.

⁵⁴ Lewis, *The Humanitarian Theory of Punishment*, reprinted in 2 CRIME AND JUSTICE 45 (L. Radzinowicz & M. Wolfgang eds., 1971).

⁵⁵ Pierce, *Rehabilitation in Corrections: A Reassessment*, 38 FED. PROBATION 14-19 (June, 1974).

D. Retribution

It has traditionally been argued that retribution as a purpose of criminal sanctions rests on moral rather than pragmatic grounds. "Retributive conceptions of criminal punishment rest essentially on the inherent propriety of punishment as a consequence of wrongdoing, that is, it amounts to an obligation to be settled in an accounting among the offender, the victim, and society."⁵⁶ "The retributive view rests on the idea that it is right for the wicked to be punished: because man is responsible for his actions, he ought to receive his just deserts."⁵⁷ In trying to apply a moral principle to development of a sanctioning system, however, utilitarian purposes often enter in. Most commonly, it is asserted that the criminal law system must punish law-breakers in order to avoid the "greater harm" of private retribution. Similarly, the argument that imposition of sanctions must follow law violations in order to uphold the declaratory and condemnatory functions of the criminal law reflects addition of utilitarian concepts to what otherwise appears to be a retributive approach.

Among the major purposes offered for criminal sanctions, retributive punishment is least subject to debates as to the feasibility of being accomplished. It is almost universally agreed that prisons do succeed in exacting suffering. It is argued by some, however, that current sanctions other than imprisonment do not constitute sufficient retribution compared to harm done, while on the other hand, others argue that imprisonment imposes more pain or suffering than is deserved by many of the offenders who are sent there. In fact, one of the major criticisms of retribution is the assertion that it is not possible for mortals to determine with any precision how much punishment is merited for any particular offense by a given offender. This line of debate also reflects the fact that the terms "retribution," "vengeance," and "punishment" are commonly used interchangeably. This author, however, prefers to distinguish among these terms and to differentiate them from the term "sanctions."

Throughout this article, the term "sanction" is used to mean a penalty imposed. It may be imposed for purposes of punishment, retribution, protection, deterrence, or treatment. The notion of "sanction" is broad enough to include such dispositions as condi-

⁵⁶ STRUGGLE FOR JUSTICE, *supra* note 27, at 48.

⁵⁷ H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 37 (1968).

tional or absolute discharge—penalties that can hardly be described as either punishment or treatment. In the sense that they take note of wrong done, sanctions have a value in themselves.⁵⁸ “Retribution” is used herein to refer to the simple concept that wrongdoing or law violation merits punishment. Thus, it is a more purposive term than “sanction,” referring as it does to a justification for the imposition of penalties. The use of the term “vengeance” is generally eschewed here as a term that is too heavily value-laden to enhance calm analysis. Where it is used, it refers to the traditional concepts of desire for revenge in the “eye for an eye” sense with a somewhat blood-thirsty overtone. The term “punishment” is used in the narrow sense of a sanction imposed for the purpose of giving adequate expression to the seriousness of the offense and concern over damage done to individual rights and social interests. In reflecting the need to right the wrong and to relate the disposition to the seriousness of the offense, “punishment” may contain elements of a limited retribution.⁵⁹

These distinctions are important in examining the concept of retribution, since it is usually discussed in terms that imply that “vengeance” is at its forefront. Retribution as a purpose of criminal sanctions is often attacked on the grounds that the imposition of suffering for suffering’s sake does not befit a civilized society. Those who hold what has been characterized as the “humanitarian” view assert that to impose a sanction on a person simply because it is deserved is mere revenge—harsh and self-righteous and therefore barbarous. They maintain that the only legitimate motives for imposing sanctions are to mend the criminal, deter others, and protect society at the same time. Thus, persons holding retributive views tend to come head-to-head with proponents of the other major purposes for criminal sanctions in that retribution is not primarily concerned with promoting some larger social good, whereas incapacitation, deterrence, and rehabilitation are predominantly utilitarian. In recent years, the utilitarians have by popular consensus tended to predominate over retributivists by such a margin that one might almost conclude that the debate had ended. Yet the utilitarian purposes continue to be plagued by the problems discussed with each of them above, perhaps the most

⁵⁸ These definitions are drawn from those set forth in LAW REFORM COMMISSION OF CANADA, *THE PRINCIPLES OF SENTENCING AND DISPOSITION*, ix-x (Working Paper No. 3, March 1974) (available from Law Reform Commission of Canada, 130 Albert Street, Ottawa, Ontario, K1A 0L6, Cat. No.: J-32-1/3-1974).

⁵⁹ *Id.*

fundamental of which is their tendency to remove from our sanctioning practices the concept of "desert."

But the concept of desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust. . . . There is no sense in talking about a "just deterrent" or a "just cure." We demand of a cure not whether it is just but whether it succeeds. Thus when we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a "case."⁶⁰

This author contends that current American sanctioning practices do indeed bear all too little connection to justice, and in order to re-infuse justice as a dominant force of the system, the utilitarian purposes of sanctioning must be placed in a different perspective to the system.

E. Toward A New View of Sanctioning Purposes

It is of utmost importance to the equitable administration of justice that the disputes be resolved regarding the proper goals of a sanctioning system and the principles that are to guide its administration. In trying to select a purpose or purposes on which to build a criminal sanctioning system, it may be useful to make a distinction between justifying a practice or a system of rules and justifying a particular action falling under the practice or system. It is here asserted that utilitarian arguments are appropriate with regard to questions about the purposes of a criminal sanctioning system, while punitive or retributive arguments should be used to apply particular rules to particular cases within that system. Thus, we might decide to develop a system of laws and sanctions because we thought it would have the consequence of furthering the interests of society. Our criminal laws and penalties for violations thereof would be developed for utilitarian reasons: to condemn actions that injure or impose hardships on others, to deter crime, to protect society, and so forth. Furthermore, in designing a system of sanctions, we would want to consider the consequence or effects of the sanctions selected. Thus, we would not wish to establish sanctions that involved unnecessary suffering, misery, degradation, or death—unnecessary in the sense that other, less drastic

⁶⁰ Lewis, *supra* note 54, at 43-44.

practices would serve as well. Nor would we want to establish sanctions that were unduly expensive compared to alternatives or that were of a nature that required creating facilities or bureaucracies that would be resistant to change should more attractive alternatives come to light. We would also be concerned, in developing a system of sanctions, with compensation or restitution for harm done.

On the other hand, once a system of laws and sanctions had been designed, based on their intended beneficial consequences for society, and we were faced with an individual who had been convicted of a criminal act, it would be appropriate only to impose a sanction for what had been done, as predetermined by the structure of our sanctioning system. No assessment of the benefit to be derived from the sanctioning of this individual would be appropriate. We could not punish whenever or in whatever way some official thought would benefit society. This would prohibit us from considering predictions of future criminality or potential for rehabilitation. In summary, in *designing* a system of laws and sanctions for their violation, we should look forward to the future effects upon society. In *imposing* a particular sanction, however, we should look only backward, to the act committed.

III. SENTENCING DISPARITY

A large measure of the criticism that has been attached to discretion in sentencing has been based on the assertion that discretion leads to unwarranted disparity in dispositions. Since "equal treatment of those similarly situated with respect to the issue before the court is a deep implicit expectation of the legal order,"⁶¹ any hint that this expectation is not being fulfilled is disturbing.

It is generally granted that for disparity to exist, differences in sentences must be unwarranted or improper. Thus, while differences in treatment can be measured directly, these differences must be evaluated in terms of other external factors to determine whether they amount to disparity. Such evaluation is complicated, however, by a fundamental problem. The assertion that differences in dispositions are permissible if related to rational and legal factors assumes the existence of some set of explicit regulations or standards regarding the factors that are rational and legal, but no such set of standards is universally recognized.

⁶¹ E. CAHN, *THE SENSE OF INJUSTICE* 14 (1949).

Measuring disparity is also complicated by other factors. Disparity can be differentially defined and measured at different stages of the criminal justice process and among the various decision-makers (law enforcement, prosecutors, probation staff, parole boards, and correctional staff) who impact directly or indirectly on the disposition and how it is carried out. Disparity can also be measured at different levels within one stage; for example, a judge can be inconsistent with his or her own usual standards or inconsistent with the actions of other judges, or a group of judges can be inconsistent with a statewide standard.

Disparity may arise in the length of a sentence, its nature (definite or indeterminate), where the sentence is to be served (the community, jail, or prison), who will make the release decision (judge, correctional authority, or parole board), the statute chosen for sentencing, the information available to the judge and the accused in sentencing, the information actually relied upon in sentencing, pre-trial disposition (release or detention)—the list goes on and on. Disparity may be based on race, age, sex, demeanor, counsel, economic status, the time of day or the mood of the judge, or simply the randomness that predictably abounds when a process is standardless.

Recent national events have focused the public eye on the type of disparity that involves differences in dispositions based on social or economic status. The Watergate-related cases and the Agnew case have raised questions about "the class consciousness in our system of justice, a system in which the white-collar criminal generally gets the break and the 'common' criminal gets the book."⁶²

The attention of the judiciary has also been kept to the issue of disparity by recent publication of a report detailing an experiment engineered by some of their colleagues.⁶³ Fifty federal district court judges in the Second Circuit engaged in a simulation study of their sentencing practices. While the report on the study acknowledged that there are methodological problems with general-

⁶² Miller, *Respectability Helps If You're a Crook*, *The Washington Post*, July 7, 1974, at B1, cols. 2-3. See also *Sentencing Study, Southern District of New York by the U.S. Attorney's Office* [1972], in *JUSTICE IN SENTENCING*, *supra* note 15, at 157. "There are plain indications that white collar defendants, predominantly white, receive more lenient treatment as a general rule, while defendants charged with common crimes, largely committed by the unemployed and under-educated, . . . are more likely to be sent to prison." *Id.* at 159-60.

⁶³ A. PARTRIDGE AND W. ELDRIDGE, *FEDERAL JUDICIAL CENTER, THE SECOND CIRCUIT SENTENCING STUDY* (FJC Pub. No. 74-4, Aug., 1974).

izing from a simulation to actual courtroom practices, it nonetheless concluded that the disparity exhibited in the study was a reasonably good approximation of what really happens in the courtrooms of the circuit.⁶⁴ Each of the judges participating in the study examined the same set of presentence reports and indicated the sentence he or she would impose in each case. A wide range of disagreement was found to exist concerning the appropriate sentences in the cases examined. This was true both as to length of sentence and as to whether incarceration was appropriate. The study thus supported the conventional wisdom that a defendant's sentence depends on the judge he or she gets or, stated differently, that defendants who are similarly situated do receive dissimilar treatment from different judges.⁶⁵

Accounts appear relatively frequently in which the charge of sentencing disparity is supported by the assertion that blacks and whites on the average receive different sentences for like offenses in a particular jurisdiction or that average sentence lengths vary widely from judge to judge or from judicial district to judicial district.⁶⁶ This has contributed to the conventional wisdom that there is considerable disparity in the sentencing dispositions of offenders. A number of studies have been conducted with the intent of documenting disparity. In general, the studies have selected one or two factors of current popular interest and related them to sentences received. While some of the findings would support a need for further inquiry, the anecdotal approach of assuming that the defendants compared on one such factor are otherwise compa-

⁶⁴ *Id.* at 20-21.

⁶⁵ *Id.* at 9-11.

⁶⁶ The 1972 Southern District of New York Sentencing Study cited a report submitted in June, 1972, to the United States Senate Subcommittee on Criminal Law and Procedure by the National Institute of Law Enforcement and Criminal Justice, which concluded that there are "considerable variations in sentence length" in the United States District Courts that occur both between and within districts. The National Institute study also focused on variations in sentences according to race of the defendant, and recapitulating the findings in this regard, the Southern District study stated that "[a]mong the more remarkable findings was that 28% of white defendants convicted of interstate theft were sentenced to prison during the four-year period [of the study], while 48% of black defendants convicted of the same offense were sentenced to prison. For postal theft, the imprisonment rate was 39% for white defendants and 48% for black defendants. In other categories of offenses the variation between racial groups was not so significant . . ." but nonetheless the percentage of black defendants given prison sentences was higher than for white defendants for all crimes except income tax violation. JUSTICE IN SENTENCING, *supra* note 15, at 158-59.

rable has been sharply criticized by researchers in the field.

Edward Green, for example, reviewed eleven studies, ten of which found judicial sentencing disparity.⁶⁷ He criticized each on the grounds that they failed to account for factors concerning the seriousness of the offense. His own study indicated that disparity was generally not evident when the seriousness of the offenses was considered, although some judges nevertheless were systematically more severe than others, especially for crimes of moderate severity. Green observed:

[T]he complexity of the sentencing process, not to mention the process of human judgment, has been all but submerged in simplistic interpretations based upon fragmentary data. The neglect, in comparing the sentences of various groups of cases, to impose statistical controls appropriate to the subject of inquiry has resulted in a circularity of reasoning—the lack of proper and uniform criteria for sentencing is inferred from the disparities in sentences; and these in turn are attributed to the lack of adequate criteria.⁶⁸

Two reviews of sentencing research literature by Hermann Mannheim are likewise pervaded by the attitude that these studies left much to be desired in sophistication, particularly the earlier ones.⁶⁹ Michael Hindelang's review of eight studies concerning disparity on racial grounds cited three factors in explaining the differing conclusions reached by the studies: whether the courts were southern or northern, the care taken in partialling out relevant non-racial factors concerning the seriousness of the offense, and the historical time period from which the cases were collected. Like Mannheim, he found that methodological shortcomings were not as prevalent in more recent studies.⁷⁰

John Hogarth briefly reviewed several studies as a prelude to his analysis of sentencing in Ontario. Only one study that he reviewed (Green's) did not find judicial sentencing disparity, and Hogarth criticized each, including Green's, on the grounds that they failed to consider all relevant variables.⁷¹

⁶⁷ E. GREEN, *JUDICIAL ATTITUDES IN SENTENCING* 8-20 (1961).

⁶⁸ *Id.* at 20.

⁶⁹ Mannheim, *Some Aspects of Judicial Sentencing Policy*, 67 *YALE L.J.* 961, 974-80; Mannheim, *Sentencing Re-visited*, in *CRIME AND CULTURE* 349, 368-73 (M. Wolfgang ed. 1968).

⁷⁰ Hindelang, *Equality Under the Law*, 60 *J. CRIM. L.C. & P.S.* 306 (1969).

⁷¹ J. HOGARTH, *SENTENCING AS A HUMAN PROCESS* 6-12 (1971).

These reviews of studies conducted on sentencing disparity are often intended to indicate flaws that the reviewer plans to remedy in his or her own study, and they are often followed or preceded by an impassioned assertion of the need for more and better research. While it may be worthwhile to increase our understanding of how an existing phenomenon operates and to what effect it operates, there may be a point at which continuing inquiry is a luxury, or even counterproductive. For example, it might be much more valuable if the energy expended on documenting disparity could somehow be transferred to revising sentencing legislation and rules. Given the fact that remedies are available that will greatly reduce the *possibility* that objectionable variables will be utilized in selecting a sentence, why wait for further documentation that such variables are now effecting sentencing decisions?

While few studies have conclusively demonstrated to all reviewers that unwarranted sentencing disparities exist, this fact cannot be attributed only to poor research designs or even to the inadequacy of available data; nor does it convince us that disparity does not exist. The core of the problem is that it is exceedingly difficult to measure whether impermissible or illegal factors have weighed heavily in sentencing when no rules, guidelines, laws, regulations, procedures, or court interpretations have made clear the factors that are permissible and the weight each should be accorded in any given instance. There is, however, sufficient evidence to suggest that at least some of the factors that effect sentencing decisions would be regarded widely as objectionable if made explicit. The alternative is clear, and clearly preferable: more careful and precise legislation and rules that greatly decrease discretion.

IV. ACCEPTABILITY OF SANCTIONS

Reexamination of current sanctioning practices cannot end with discussion of discretion, lack of clear purpose, and disparity. There is another consideration which, while seldom mentioned, is fundamental: the acceptability of current sanctions by humanitarian and legal standards. Even though public and judicial attention to prison conditions recently have increased dramatically, such scrutiny rarely reaches back to sentencing.

A recent jail case⁷² found that the government breached its

⁷² *Brown v. United States*, 374 F. Supp. 723 (E.D. Ark. 1974).

duty to use reasonable care in providing for the safety of a federal prisoner by confining him "in a facility that it knew or reasonably should have known was so inadequate that he could not be adequately protected from the foreseeable risk of assaults by fellow prisoners."⁷³ Undoubtedly judicial immunity would insulate sentencing judges from being found similarly liable for any such breach of duty regarding their knowledge of the adequacy of facilities to which they order persons confined. Should not sentencing judges, however, be held accountable for the welfare of persons that they know, or reasonably should know, are being sent to places that jeopardize their well-being?

Certain judges have commented at the time of sentencing about their dissatisfaction or even abhorrence of the sanctions realistically open to them in imposing sentence. A few judges have decried incarceration in many of our prisons and jails as ineffective, counterproductive, and ruinous and have refused to sentence persons to them. Yet, most judges continue to sentence to incarceration persons they fear will be harmed by the experience, pleading that they have no alternative. Is this really the case, or are we seeing judicial action (or inaction) that amounts to an abdication of judicial responsibility? Judges need not wait until our sanctioning systems are restructured by law. Judges can demand evidence that no lesser alternative, no less drastic conditions and restraints, and no less dehumanizing environment will serve the state's purposes prior to imposition of a sentence of confinement. Judges can devise, or require development of, more humane alternatives. It is past time for more judges to refuse to sentence convicted persons to confinement until they are convinced that their sentences will be carried out in an acceptable fashion. This is not to say that we should abandon punishment, but it seems that we have almost come to the point of equating punishment with incarceration and incarceration with the deprivations that currently characterize our prisons and jails. These are unnecessary and unfortunate equations.

There has been considerable confusion surrounding efforts to improve or reform prisons or their conditions and the relationship of these activities to punishment. Many of the leading prison reformers have been concerned not with punishment but with its accessories. It is a remarkable commentary on our acceptance of

⁷³ *Id.* at 728.

that to which we are accustomed that we continue to abide all manner of deprivations on top of the actual sentence that are in no way authorized by the sentence, by statute, or by the requirements of humanity. It is really not the sentence, but the accessories that are attached to it that appall us. As Karl Menninger has stressed:

Jails *ruin* young men. Can't the public grasp this indisputable fact? How can a decent prison attempting a rehabilitation program do anything for a boy who comes to it from a jail where he has been raped, battered, vomited and urinated upon, mauled and corrupted by some of the old-timers in the bullpen?

Even without the abuse and harrassment of other inmates, the horrible confinement in hot, stuffy, crowded, dark, vermin-infested iron cages is a terrible experience—literally a form of torture. When one considers that this is all illegal, since the law does *not* stipulate these iniquitous concomitants of detention in *any* sentence, our sinfulness in permitting the situation to continue in our society, and *at our expense*, seems very evident and very great.⁷⁴

Those who argue against elimination of the deprivations and brutality that characterize our prisons and jails on the grounds that every such reform diminishes the punishment have a distorted view of the criminal law. When a person is sentenced to imprisonment, he or she is not sentenced at the same time to suffer partial starvation, to endure physical brutality, to live in vermin-infested cells, or to be exposed to substandard medical care. The essence of imprisonment is deprivation of liberty. Deprivation of food or of health or of books is unjust.

Legislatures and judges must begin to make clear not only what their sentences require, but also what they do *not* embody or authorize. As one district court judge has noted:

Obviously, among the states and within a particular state, places of confinement vary widely in terms of the physical plant, the size and quality of the staff, the nature of the program and regulations within the place of confinement, and the characteristics of the inmate population. Generally speaking, when the legislature prescribes imprisonment as the punishment for a crime, it does not undertake to define imprisonment.

⁷⁴ K. MENNINGER, *WHATEVER BECAME OF SIN?* 59 (1973). Dr. Menninger makes a distinction between prisons and jails. While jails are undoubtedly the greatest blight on the correctional—indeed perhaps on the American—scene, many prisons continue to be close competitors.

Generally speaking also, when a court sentences a defendant to imprisonment, it does not undertake to define imprisonment. Of course, both legislators and judges are usually generally aware of the nature of the various places of confinement. Typically, however, it is administrators, by regulation, who determine the day to day, month to month, year to year reality which lies within the skin of the word "imprisonment."⁷⁵

With the evidence now overwhelming that jail after jail and prison after prison are determining imprisonment in implementation to include unlawful deprivations of protected rights, it is clearly time for the courts and legislatures to make themselves more explicit.

As the movement to insure that the rule of law prevails behind prison walls has gained strength and as standards and codes of prisoner rights have been formulated, some have cried "coddling of criminals." Those who so fear should come out clearly into the open and incorporate whatever starvation, disease, and brutality they think necessary *into the sentences they propose*. Others have cried, "You can't run a prison that way." Indeed, they may be right. If they are, that may not mean that the protected rights must be modified or eliminated, it may mean that the prison must be modified or eliminated. As Judge Doyle has argued:

In my view, in passing upon these challenges to the rules for institutional survival, the balance must be struck in favor of the individual rights of the prisoners. That is to say, if one of these rules of institutional survival affects significantly a liberty which is clearly protected among the general population, and if its only justification is that the prison cannot survive without it, then it may well be that the Constitution requires that the prison be modified.

Specifically if the functions of deterrence and rehabilitation cannot be performed in a prison without the imposition of a restrictive regime not reasonably related to those functions, it may well be that those functions can no longer be performed constitutionally in a prison setting. . . .⁷⁶

V. DEFERRED SENTENCING: PAROLE

As a noted author in the field of corrections has observed, "to limit an analysis of sentencing to what goes on in courtrooms would

⁷⁵ *Morales v. Schmidt*, 340 F. Supp. 544, 551n.7 (W.D. Wis. 1972), *rev'd* 494 F.2d 85 (7th Cir. 1974).

⁷⁶ *Id.* at 554.

be to play games with words.”⁷⁷ If a prison sentence means the length of time that is served, judges have less and less to do with that ultimate determination. Parole boards, parole agents, and prison administrators to a growing extent decide how much, or how little, time a convicted offender will remain confined. In 1966, sixty-one percent of adult felons who left prison were released by parole;⁷⁸ in 1970, seventy-two percent were so released.⁷⁹ A 1965 survey found over 112,000 offenders under parole supervision and estimated that this number would grow to more than 142,000 by 1975.⁸⁰

Sentencing structures have been modified to allow for the role of paroling authorities to a point where all jurisdictions utilize indefinite or indeterminate sentences. These sentences provide a fixed term beyond which an offender cannot be confined but place with an administrative agency the authority to release offenders before the expiration of the maximum term and after any minimum term that may have been imposed has been served. Paroling authorities also have vested in them by statute the authority to re-confine persons released on parole at any time before the original sentence has expired.⁸¹ In both of these roles, paroling authorities fulfill what were formerly exclusively judicial functions—making the decision as to time spent in confinement before release and the decision to re-incarcerate upon revocation of a conditional release status. This discussion will focus mainly on the parole release function, as opposed to parole revocation or parole supervision and services, since it is the component of parole that is most closely related to, or is in fact a part of, sentencing.⁸²

⁷⁷ Foote, *The Sentencing Function*, in A. PROGRAM FOR PRISON REFORM 17, 18 (Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, sponsored by the Roscoe Pound-American Trial Lawyers Foundation, Cambridge, Mass., 1972).

⁷⁸ FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS: PRISONERS IN STATE AND FEDERAL INSTITUTIONS FOR ADULT FELONS, 1966, at 43 (1966).

⁷⁹ FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS: PRISONERS IN STATE AND FEDERAL INSTITUTIONS FOR ADULT FELONS, 1970, at 43 (1970).

⁸⁰ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 8 (1967).

⁸¹ See, e.g., RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERVICES, ABA COMM'N ON CORRECTIONAL FACILITIES AND SERVICES, SENTENCING COMPUTATION LAWS AND PRACTICES: A PRELIMINARY SURVEY (1974).

⁸² For an overview of recent changes in parole revocation proceedings (largely as a result of judicial action) see RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL

In the past several years, criticisms of the parole system have increased substantially. Few informed observers are satisfied with the parole process as it presently operates. Many critics focus on procedural failings, contending that present parole procedures lack the safeguards necessary for fair and accurate decision-making. Other critics believe that the present parole system creates a level of anxiety and frustration among confined populations that is counter-productive in terms of institutional management and the correctional process. A smaller, but growing, number of critics are questioning the wisdom of having a parole system at all, contending that the system is not, and perhaps cannot be, effective in achieving its stated goals.

The first level of criticism involves the procedures used in making parole release decisions. Such procedures vary considerably among the state and federal systems. In most jurisdictions the paroling authority at least conducts an interview, if not a hearing. Some states utilize hearing examiners; some states use single parole board members. Other jurisdictions employ the full board, and still others utilize a combination of hearing examiners and board members to make the initial or final decision. Most jurisdictions bar the use of counsel, do not permit the inmate to present witnesses in his or her own behalf, do not record the reasons for the decision, keep no verbatim record of the proceedings, and do not inform the inmate directly of the decision.⁸³ The decision-making process is one almost totally devoid of the due process protections usually required of deliberations affecting substantial interests.

There are some signs of voluntary action on the part of a few parole boards to introduce more regularity, openness, or procedural guarantees into the parole release decision. The United States Board of Parole has recently undertaken a number of organizational and procedural changes designed to enhance equity and effectiveness and to increase policy control.⁸⁴ At least ten states are

SERVICES, ABA COMM'N ON CORRECTIONAL FACILITIES AND SERVICES, SURVEY OF PAROLE REVOCATION PROCEDURES (1973). For discussion of the assertion that the current admixture of supervision and services in parole should be replaced by unsupervised street release with voluntary access to services, see Pierce, *Rehabilitation in Corrections: A Reassessment* 38 FED. PROBATION 14-19 (June, 1974) and STRUGGLE FOR JUSTICE, *supra* note 27, at 143-44.

⁸³ V. O'LEARY & J. NUFFIELD, THE ORGANIZATION OF PAROLE SYSTEMS IN THE UNITED STATES xxix-xxxix (2d ed. National Council on Crime and Delinquency, Hackensack, N.J., 1971).

⁸⁴ 28 C.F.R. § 2.1 *et seq.* (1974).

now experimenting with "contract parole," referred to as "Mutual Agreement Programming."⁸⁵ While such agreements or contracts were not designed specifically to deal with due process concerns, they are designed to clarify the behavior or activities that are expected in order to obtain parole and to increase the certainty of release if the "contract" is fulfilled. Whether they in fact accomplish these objectives is still an open question.

The overall picture of parole release in the United States, however, remains one of systems unguided by rules, policy statements, or explicit decision-making criteria, unbounded by requirements for statements of findings or reasons, unilluminated by a system of precedents, shrouded in secrecy, devoid of procedural safeguards, unchecked by administrative review, and, until recently, seldom subject to judicial review.⁸⁶ In fact, all of the criticisms and deficiencies attached to procedures extant in judicial sentencing apply with equal force to the parole release process.

Another level of criticism involves the counter-productive consequences of parole. Those who argue on this ground cite the high level of tension and frustration that the parole process, with its uncertainties and irrationalities, arouses in prisoners.⁸⁷ Parole, as

⁸⁵ See PAROLE—CORRECTIONS PROJECT, AMERICAN CORRECTIONAL ASSOCIATION, RESOURCE DOCUMENT No. 3, THE MUTUAL AGREEMENT PROGRAM (1973).

⁸⁶ Although courts remain divided on the issues, they have recently shown greater willingness to intervene in regard to an inmate's due process rights at parole release hearings, primarily around the issue of the right to have reasons given when parole is denied. For cases in which courts have reasoned that parole release effects the same interests as parole revocation (*i.e.*, incarceration or conditional freedom), and thus applicants are entitled to certain due process protections, see *United States ex rel. Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.*, *Regan v. Johnson*, 95 Sup. Ct. 488 (1974); *Childs v. United States Bd. of Parole*, 371 F. Supp. 1246 (D.C. 1973); *Candarini v. Attorney General*, 369 F. Supp. 1132 (E.D.N.Y. 1974); *Solari v. Vincent*, 77 Misc. 2d 54, 353 N.Y.S.2d 639 (Sup. Ct. 1974); *Cummings (Michael) v. Regan*, 76 Misc. 2d 357, 350 N.Y.S.2d 842 (Sup. Ct. 1973); *Cummings (Thomas) v. Regan*, 76 Misc. 2d 137, 350 N.Y.S.2d 119 (Sup. Ct. 1973). For cases in which courts have rejected all claims of due process rights at parole hearings, see *Scarpa v. United States Bd. of Parole*, 477 F.2d 278 (5th Cir.), *vacated as moot*, 414 U.S. 809 (1973); *Wiley v. United States Bd. of Parole*, 380 F. Supp. 1194 (M.D. Pa. 1974); *Rankin v. Christian*, 376 F. Supp. 1258 (V.I. 1974); *Ornitz v. Robuck*, 366 F. Supp. 183 (E.D. Ky. 1973); *Barrandale v. United States Bd. of Paroles & Pardons*, 362 F. Supp. 338 (M.D. Pa. 1973); *Harrison v. Robuck*, 508 S.W.2d 767 (Ky. 1974). *But see* *Ridley v. McCall*, 496 F.2d 213 (5th Cir. 1974).

⁸⁷ See, *e.g.*, ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 93-98 (1972).

the primary means of access to the community short of serving the full sentence, dominates the minds and hearts of prisoners. It also "epitomizes for most inmates a system of whim, caprice, inequity, and nerve-wracking uncertainty."⁸⁸ The hostility and frustration engendered by the parole system lead to substantial problems for prison management. Instead of enhancing "appropriate" conduct, the parole system can be the fuel for demonstrations, work stoppages, and other forms of protest and ventilation. It can also be counter-productive to stated penal objectives in that it may foster manipulative and deceitful behavior, since "playing to the parole board" and "winning release" can come to predominate over any meaningful voluntary program participation or course of conduct.

A third level of criticism is more basic, as it attacks the very existence of parole. The Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy recommended that "[u]ntil such time as the present parole system is eliminated by short definite prison terms, due process should apply to both the initial granting and revocation of parole or good conduct time."⁸⁹ Virtually an identical conclusion was reached in the *Report on New York Parole* by the Citizen's Inquiry on Parole and Criminal Justice, Inc.⁹⁰ The Working Party of the American Friends Service Committee concluded that unsupervised street release should replace parole without the caveat that due process could attach to the current parole structure to serve in the interim.⁹¹

The growing evidence that prisons not only fail to "rehabilitate" those whom they hold captive but in fact impede that process has been the primary catalyst to the growing doubts raised regarding the validity of parole. The achievability of the "rehabilitation" of offenders through imprisonment is an essential premise upon which parole systems function. Before an offender can be released on parole, presumably several things must occur between the time sentence is imposed and the maximum date of release. First, either

⁸⁸ Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U.L. REV. 477, 488 (1973).

⁸⁹ A. PROGRAM FOR PRISON REFORM 15 (Final Report of Annual Chief Justice Earl Warren Conference on Advocacy in the United States, sponsored by the Roscoe Pound-American Trial Lawyers Foundation, Cambridge, Mass., 1972) (emphasis added).

⁹⁰ CITIZEN'S INQUIRY ON PAROLE AND CRIMINAL JUSTICE, INC., REPORT ON NEW YORK PAROLE 295-98 (1974) (available from the Citizens' Inquiry, 84 Fifth Avenue, N.Y., N.Y. 10011) [hereinafter cited as REPORT ON NEW YORK PAROLE].

⁹¹ STRUGGLE FOR JUSTICE, *supra* note 27, at 143-44.

the fact of incarceration or the program and services available at a given institution must induce a change in an offender that enhances the probability of law-abiding behavior upon release. Second, the paroling authorities must have the technology and ability to both detect and monitor such changes in an offender's behavior and attitude to determine the optimal point of release to the community. If either of these two elements is missing, that is, if a corrective process either cannot or does not take place in prisons or if paroling authorities lack either the means or the technology to relate these changes to future behavior, then parole has failed to meet both its statutory and philosophical mandate. In the words of the American Correctional Association, "[U]nless it could be illustrated that parole is the best known method of release there would be little justification for its continued use."⁹²

There are still large numbers of persons who cling fervently to the hope that a rehabilitative process can occur in America's prisons.⁹³ Increasingly, however, the realization that "prisons do change offenders" but that "the change is more likely to be negative than positive"⁹⁴ has produced reexamination of the entire system of dealing with convicted law violators. In fact, the overwhelming evidence is that prison programs and services, where existent, are totally ineffective in reducing recidivism. As the Citizen's Inquiry on Parole in New York has stated:

Imprisonment in and of itself is an exercise in punishment and repression. Donald R. Cressey describes treatment as "a residual program—what is left over in prisons when punitive and restrictive programs and practices are subtracted." It might be even better described as a "residual illusion." Most

⁹² AMERICAN CORRECTIONAL ASSOCIATION, *MANUAL OF CORRECTIONAL STANDARDS* 133 (3d ed. 1972).

⁹³ A few critics argue that the institution of parole should be abolished—especially if it were effective in fulfilling its current mandate—because it is inextricably connected with goals that are philosophically objectionable.

In studying the criminal justice system we have found few things to be thankful for, but the ineffectiveness of correctional treatment may be one of those few. The only kind of morality the sticks-and-carrots regime of indeterminate treatment in correctional institutions can teach is the externally imposed variety. If such correctional methods really did work, it might be more success than a free society could endure.

STRUGGLE FOR JUSTICE, *supra* note 27, at 45. See generally the discussion on purposes of criminal sanctions in the text accompanying notes 38-55 *supra*.

⁹⁴ NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *CORRECTIONS 1* (U.S. Gov't Printing Office 1973).

offenders have little or no exposure to treatment programs. "The great majority of all institutional personnel were and are assigned to custodial and service tasks."⁹⁵

Even in instances where offenders do participate in a program designed for their "treatment," there is no reliable data from any of the treatment programs evaluated that there is any substantial impact on future criminal behavior. Research studies conducted in the California system concluded that "[t]here is no evidence to support any program's claim of superior rehabilitative efficacy."⁹⁶ Likewise, a survey of one hundred treatment outcome studies that have been published between 1940 and 1960 concluded that "evidence supporting the efficacy of correctional treatment is slight, inconsistent, and of questionable reliability."⁹⁷ Yet another survey that examined 435 treatment studies published since 1945 found that "the evidence from the survey indicated that the present array of correctional treatments has no appreciable effect—positive or negative—on the rates of recidivism of convicted offenders."⁹⁸ With the debunking of rehabilitation as "one of the greatest myths of twentieth-century penology," has come the painful realization that parole boards are searching for a non-existent cure.

It has been argued that notwithstanding the failure of institutions to change offenders for the better, parole boards could still perform a meaningful function by predicting the likelihood of future criminality by using indicators not related to "rehabilitation" or its absence. Examples of factors that have been suggested for parole boards' consideration include (1) the offender's pre-incarceration history (for example, previous criminal record, crime for which convicted, age, race, facts and circumstances of the offense, personal and social history); (2) the readiness of the community to receive the offender and the availability of community services to assist him or her (for example, family attitude, attitude of law enforcement officials, community bias, parole plan); (3) the offender's institutional adjustment and achievements (for exam-

⁹⁵ REPORT ON NEW YORK PAROLE, *supra* note 90, at 272 (footnotes omitted).

⁹⁶ Robison and Smith, *The Effectiveness of Correctional Programs*, 17 CRIME AND DELINQUENCY 67, 80 (1971).

⁹⁷ Bailey, *An Evaluation of 100 Studies of Correctional Outcome*, in THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 733, 738 (N. Johnston, L. Savitz & M. Wolfgang eds. 1970).

⁹⁸ Martinson, *The Paradox of Prison Reform—II: Can Corrections Correct?* THE NEW REPUBLIC, April 8, 1972, at 14.

ple, educational achievement, disciplinary infractions, personality changes and developments); and (4) certain other specialized factors such as existence of detainers, length of time spent in prison, or impressions gathered from a hearing with the offender.

There are a number of problems in attempting to transform the role of parole boards from assessors of the extent of "rehabilitation" to compilers of facts to be used in making predictions. The first and fourth categories consist almost entirely of data known at the time of sentencing or controllable by the sentence. What is the value of maintaining a separate agency to relate such facts to future outcome? If any of these factors can be shown to be relevant to post-release success or are otherwise legally important, why should the sentencing judge not apply them as authorized by the legislature? The second category of factors consists of items that are inappropriate for consideration (e.g., attitudes of law enforcement officials and the community), even if it were assumed that they could be measured, and items that speak to the failings of the correctional system in paving the way for a releasee's transition back to the community (e.g., parole plan, suitable residence). The offender should not be penalized when the correctional system fails to do its job. The third category of factors is based on the notion of prisons as a beneficial experience for the inmate and disregards the evidence that these institutional factors are not related in any significant way to post-release outcome.

Another problem with the suggestion that parole boards should turn to using prediction factors other than evidence of rehabilitation relates to our primitive ability in predicting human behavior. Actuarial tables probably represent the most sophisticated ability to predict now available, but these tables have been criticized since they produce disturbingly high false-positive rates. That is, they mis-identify an unacceptably high percentage of persons as likely to engage in criminal behavior.⁹⁹ Thus, were they to be used extensively, parole boards would tend to impose unnecessarily long periods of incarceration on too many people. With the most fundamental of our rights, liberty, at stake, society can ill afford to permit "guesswork" to control who is to remain in prison and who is to be released.

⁹⁹ See, e.g., von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717, 730-39 (1972); N. MORRIS, *THE FUTURE OF IMPRISONMENT* 66-73 (1974).

A few factors have been found consistently to relate positively to post-release success. Other factors have also been identified as being closely correlated with how long a person will be held in prison. A recent study¹⁰⁰ traced some one hundred thousand offenders through their correctional experience. Among other findings, the study demonstrated that both commitment offense and prior record were associated with length of confinement and parole performance. The study supported the conclusion of other researchers that more serious commitment offenses were associated with greater likelihood of favorable parole outcome,¹⁰¹ but the study also supported the finding of other researchers that in the vast majority of cases, those who served the longest time did more poorly on parole relative to those held for briefer periods.¹⁰² Although the differences between those serving more or less time was slight, this finding does suggest that parole policies that serve to hold persons in prison for relatively more time may, in fact, increase the probability of future crime.

Studies of actual parole decision-making indicate that parole boards do not utilize findings such as these, apparently because minimizing recidivism is not the sole, or even the major, objective guiding their decisions. Most boards fully acknowledge that they try to serve other objectives in decision-making (e.g., retribution, deterrence, increasing equity). In fact, most statutes governing parole boards empower them to do so. The extent to which attempts to serve multiple objectives may be counterproductive to minimizing recidivism, however, has not been the object of much attention. We persist in examining individual offenders in seeking a "cure" for crime and seriously neglect the role that societal institutions and systems may play in increasing or reducing crime.

A recent study of parole decision-making in a midwestern state¹⁰³ focused on the relationship between variables thought to be important in parole decision-making and the actual decisions

¹⁰⁰ D. GOTTFREDSON, J. NUFFIELD, M. NEITHERCUTT & V. O'LEARY, *FOUR THOUSAND LIFETIMES: A STUDY OF TIME SERVED AND PAROLE OUTCOME* (National Council on Crime and Delinquency, Hackensack, N.J. 1974).

¹⁰¹ See, e.g. M. LEVIN, *THE IMPACT OF CRIMINAL COURT SENTENCING DECISIONS AND STRUCTURAL CHARACTERISTICS* 22-39, 53-60 (1973) (available from National Technical Information Service, U.S. Dep't of Commerce, Accession No. PB 220 710).

¹⁰² *Id.*

¹⁰³ Scott, *The Use of Discretion in Determining the Severity of Punishment for Incarcerated Offenders*, 65 J. CRIM. L. & C. 214 (1974).

made by a parole board. Thus, the study dealt not with the relationship between offender characteristics and post-release outcome, but rather with the relationship between offender characteristics and severity of punishment as determined by the parole board. The results reveal the factors which at least one parole board actually used in making decisions.

The major finding of the study was that "parole board decision-making appears to be based almost exclusively on one legal criterion, the seriousness of the crime, rather than on an inmate's institutional adjustment, or on an inmate's sociobiographical characteristics."¹⁰⁴ The study did find that certain other factors were significant in determining the length of incarceration, but much less so than the severity of the offense, and very few of the factors had the influence expected. For example, although the relationship between prior criminal involvement and length of incarceration was statistically significant when all other variables were controlled, they were related counter to that expected—for example, those with the most extensive records received the least punishment. This finding prevailed despite the fact that generally "the most useful guide to prediction of parole violation behavior is past criminal behavior"¹⁰⁵ and an inmate's overall institutional adjustment. The data indicated that when all variables were controlled, those inmates behaving the best while incarcerated were punished the most.¹⁰⁶ Again there is no little irony in this finding since the inmates who were denied parole were often encouraged by parole board members to join institutional programs, and in interviews conducted by the researcher, a majority of the board members indicated that an inmate's institutional adjustment was the second most important factor in determining whether parole should be granted.¹⁰⁷ The author attributed this rather remarkable inconsistency between knowledge about, or stated belief in, the importance of certain variables and the way in which they influenced or were absent from the parole decision as follows:

Because of the extensive workload, the parole boards generally spend very little time per case. In an effort to adequately gauge the decision time spent per case, the author spent one day

¹⁰⁴ *Id.* at 222.

¹⁰⁵ *Id.* at 217.

¹⁰⁶ *Id.* at 222.

¹⁰⁷ *Id.* at 219.

recording the amount of time the board spent discussing or examining material before reaching a decision on each case. The medium [*sic*] time per case was eight seconds. The time allocated to decision-making perhaps gives some indication why variables such as an inmate's institutional adjustment and prior criminal record, both of which are not quantified and which, therefore, require some time and effort to assess, have little effect on the predicted severity of punishment.¹⁰⁸

These findings raise strong questions regarding the viability of the parole release process. Parole boards were ostensibly created to evaluate the extent to which "rehabilitation," "reformation," or "change" had occurred within an incarcerated offender during a given period of time. They were further presumed to have the expertise to relate this "change" to a particular offender's propensity to be a law-abiding citizen in the future. Upon these premises, parole boards have been granted the discretion to release offenders short of their maximum sentence at the "optimal point" for their successful reentry into society.

It appears, however, that either parole boards do not give primary consideration to their espoused role of maximizing parole success or they do not know how, or are otherwise not able, to serve that goal. Parole decisions are dominated by concern with the legal seriousness of the crime, a concern that is more proper for the legislature and the sentencing judge. It further appears that the knowledge available from research findings is not utilized at all or is countermanded by parole policies. The logical conclusion is that "[i]f parole boards are not acting or functioning on any basis other than that available for the judiciary, it seems rather redundant, expensive, and ridiculous simply to append one more agency making decision [*sic*] with real consequences for individual lives."¹⁰⁹

Notwithstanding the growing consensus that parole systems cannot meet their fundamental function—protecting society by predicting potential criminality—it has been argued that the parole system should be maintained to fulfill still other objectives. While it will undoubtedly be difficult to simply expunge parole systems from the correctional scene, the subsidiary functions suggested could either be performed better by other elements of the criminal justice system or should not be performed at all.

¹⁰⁸ *Id.* (footnote omitted).

¹⁰⁹ *Id.* at 223.

One major role that the parole system performs now, and could continue to perform, involves helping institutions maintain control over prisoners. Numerous observers are now convinced that correctional administrators "bought" the rehabilitation ideal and the concept of the indeterminate sentence only after they realized the extent to which increased control over prisoners could result. Given that institutional staffs almost always supply the information utilized in considering applications for parole, staff power is immense.¹¹⁰ The threat of parole denial is routinely used to gain compliance with the daily regimen of prison life. Inmates may be "programmed" into work, education, training, counseling, or other activities on the grounds that the parole board will view such participation favorably.¹¹¹

Profound psychological pressures are created for inmates in trying to conform in behavior, attitude, and program participation to what will be viewed with favor by the parole board while having little direct knowledge of paroling policies or criteria. These pressures are substantially increased for the scores of inmates who try to conform to what is desired and nonetheless find that they are denied parole. Manipulation of inmate behavior by implicit or explicit promises of release, when the factors on which release decisions are made seldom have much connection to what an inmate has done in prison, is a dangerous game that harms not only the inmate, but also the public, which eventually must bear the brunt of the hostility engendered.¹¹²

A related function that parole boards could perform involves the statistics of prison populations. Economies of scale mean that underpopulated institutions may be unduly expensive to operate. Overpopulated institutions create morale, maintenance, and safety problems. The parole board can operate to help keep populations near desired levels. While this function is not usually made explicit, on occasion it may become so if a judge demands lower population levels or observers agree that an explosive situation could be alleviated by increasing release rates. In some instances parole boards have been attacked for supporting requests for new

¹¹⁰ See generally Milleman, *Due Process Behind the Walls*, in PRISONERS' RIGHTS SOURCEBOOK 79 (M. Hermann & M. Haft eds. 1973).

¹¹¹ There is a remarkable congruence between the "needs" of inmates and program availability or institutional needs in most institutions.

¹¹² See Greenberg & Stender, *The Prison As A Lawless Agency*, 21 BUFFALO L. REV. 799 (1972).

facilities by increasing the average length of time served and decreasing the proportion of those released through parole. Conversely, some correctional planners are working directly with parole boards to try to decrease the length of time served or increase the percentage released on parole in order that antiquated facilities may be closed or community-based programs expanded. While there may be considerable utility in having a mechanism for adjusting prison population levels, it is hard to see this alone as a justification for parole boards. More fundamentally, individual liberty is at stake, and the conversion of a process conceived as one to help inmates and protect the public into a statistical manipulation mechanism should not be allowed.

It has been suggested that parole boards could expand their role as de facto sentencing review boards. The role of such boards could be to reduce sentencing disparity and to mitigate the harshness of current sentences. While there is considerable evidence that the criminal justice system should pay more attention to unwarranted disparities in sentencing and to mitigating the harshness of many sanctions, allowing parole boards to continue to perform administrative correction of a systemic problem is inappropriate, even if it could be accomplished effectively. "Current sentencing theory, by maximizing everyone's discretion, causes the disparities in the first instance. If sentencing criteria were developed as they should be, and the discretion of the sentencing authority structured and limited as it should be, the disparities would not arise."¹¹³ For parole boards to try to fill these gaps after the fact would simply perpetuate the problem that the various sectors of the criminal justice system can evade responsibility for their actions.

VI. MAJOR EXISTING PROPOSALS FOR IMPROVING SENTENCING

This section will briefly outline the major existing proposals set forth by various authorities as necessary improvements to our system of criminal sanctioning. Coursing through each as a dominant theme is the identified need to either improve, guide, correct, restrict, shift, or eliminate the staggering amount of discretion that presently characterizes virtually every aspect of the sentencing process. The American Bar Association,¹¹⁴ the National Advisory

¹¹³ REPORT ON NEW YORK PAROLE, *supra* note 90, at 284-85.

¹¹⁴ See American Bar Ass'n, *Standards Relating to Sentencing Alternatives and Procedures* (Approved Draft 1968) in COMPENDIUM OF MODEL CORRECTIONAL

Commission on Criminal Justice Standards and Goals,¹¹⁵ the National Council on Crime and Delinquency,¹¹⁶ the American Law Institute,¹¹⁷ as well as a number of other corrections-related commissions, study groups, and individuals, have endorsed various of these remedies after having reached the conclusion that the system as presently constituted does not achieve equal justice for those who violate our laws and face sanction. This review of proposals for reform reveals not only what the respective advocates see as causes or contributions to disparate or unjust treatment of offenders in the sentencing process, but also strikingly highlights how little regulated that process is today.

A. Proposals for Improving the Exercise of Discretion

1. *Improvement of Sentencing Information and Hearing*

Many commentators have stated, and most model acts seem to agree, that improvement of the information upon which judges base their sentencing decisions will improve the exercise of discretion and yield more rational sentences. The National Advisory Commission,¹¹⁸ the Model Penal Code,¹¹⁹ and the ABA Project on Standards for Criminal Justice¹²⁰ all call for the expanded use of

LEGISLATION AND STANDARDS II-12 to II-42 (ABA Comm'n on Correctional Facilities and Services & Council of State Gov'ts, August 1972) [hereinafter cited as *ABA Sentencing Standards*]; American Bar Ass'n, *Standards Relating to Appellate Review of Sentences* (Approved Draft 1968) in COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS II-44 to II-50 (ABA Comm'n on Correctional Facilities and Services & Council on State Gov'ts, August 1972) [hereinafter cited as *ABA Sentence Review Standards*].

¹¹⁵ See NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS (U.S. Gov't Printing Office 1973) [hereinafter cited as N.A.C. CORRECTIONS REPORT]; NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME (U.S. Gov't Printing Office 1973); NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS (U.S. Gov't Printing Office 1973).

¹¹⁶ See National Council on Crime and Delinquency, *Model Sentencing Act* (1972 Revision) in COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS II-52 to II-60 (ABA Comm'n on Correctional Facilities and Services & Council of State Gov'ts, August 1972) [hereinafter cited as *Model Sentencing Act*].

¹¹⁷ See American Law Institute, *Model Penal Code—Sentencing Provisions* (1963) in COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS II-62 to II-79 (ABA Comm'n on Correctional Facilities and Services & Council of State Gov'ts, August 1972) [hereinafter cited as *MPC Sentencing Provisions*].

¹¹⁸ N.A.C. CORRECTIONS REPORT standard 5.14, at 184-85.

¹¹⁹ *MPC Sentencing Provisions* § 7.07, at II-76, 77.

¹²⁰ *ABA Sentencing Standards* part IV, at II-27 to II-30.

pre-sentence reports (except in simple or straightforward cases) and for stricter standards and quality control of the information presented.

Despite the growing number of recommendations regarding the desirability of utilizing pre-sentence reports, relatively few states today explicitly require an investigation before a sentence is imposed. Most statutes place the decision to make an investigation within the discretion of the sentencing judge. Further, most legislation dealing with pre-sentence reports is broadly constructed, indicating only that a report should be developed "promptly" and that the probation officer shall investigate the convicted defendant "fully." Other statutes are somewhat more specific in indicating the information to be presented, referring most often to the circumstances of the crime, the prior criminal record, occupational history, educational background, and so forth. As it stands today, pre-sentence reports are of uneven quality and often contain much potentially harmful information of dubious relevance and accuracy. Indeed, in one recent case a federal judge found that a classification study, that was required by statute for a youth offender prior to sentencing and was prepared by a team of professionals, was so gouged with misinformation and false assumptions as to be virtually useless as a sentencing aid and was dangerously misleading as well.¹²¹

Another proposal that relates to the quality of the information relied upon in imposing sentence concerns the disclosure of pre-sentence reports to the defendant and his or her counsel. Seldom do statutes establish the defendant's right to examine the report prior to the imposition of sentence. In those states where the statutes are silent on this question, it has been held that the sentencing judge has the discretion to decide whether some or all of the contents of the report may be disclosed. The various model acts take divergent approaches to this issue. The Model Sentencing Act provides for disclosure but allows the identity of the informant to be withheld if security would be endangered by disclosure.¹²² The ABA Sentencing Standards favor disclosure but permit the judge sufficient discretion in "extraordinary cases" to excise portions "which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, or sources of information which has [*sic*] been obtained on a promise

¹²¹ United States v. Norcome, 375 F. Supp. 270 (D.D.C. 1974).

¹²² Model Sentencing Act § 4, at II-54.

of confidentiality.”¹²³ The Model Penal Code requires the sentencing court to inform the defendant of the report’s factual contents and any conclusions drawn therein.¹²⁴ The National Advisory Commission, on the other hand, advocates full and complete disclosure of pre-sentence reports, finding that the arguments in opposition beg the essential question of substantive fairness in sentencing.¹²⁵

A final proposal in this category concerns extending the scope of the sentencing hearing to permit defense counsel the opportunity to challenge, through the traditional adversary process, the validity of any ex parte or unverified statements that may be contained in the pre-sentence report or otherwise used in sentencing determination. Both the American Bar Association¹²⁶ and the National Advisory Commission¹²⁷ endorse the concept of a sentencing hearing at which the defendant has full rights of confrontation, cross-examination, and representation by counsel in addition to the right of allocution.

2. *Statement of Reasons*

A related approach to improving the exercise of sentencing discretion involves requiring of sentencing judges a written or express statement of reasons for the sentence imposed:

The duty to give an account of the decision is to promote thought by the decider, to compel him to cover the relevant points, to help him eschew irrelevancies—and finally, to make him show that these necessities have been served. The requirement of reasons expressly stated is not a guarantee of fairness. The judge or other official may give good reasons while he acts upon outrageous ones. However, given decision-makers who are both tolerably honest and normally fallible, the requirement of stated reasons is a powerful safeguard against rash and arbitrary decisions.¹²⁸

The National Advisory Commission has recommended that a verbatim transcript of the hearing be made, that specific findings by the court be required, including the reasons for selecting the particular sentence imposed, and that a precise statement of the

¹²³ *ABA Sentencing Standards* § 4.4, at II-28, 29.

¹²⁴ *MPC Sentencing Provisions* § 7.07(5), at II-76, 77.

¹²⁵ N.A.C. CORRECTIONS REPORT standard 5.16, at 188-89.

¹²⁶ *ABA Sentencing Standards* § 5.4, at II-34.

¹²⁷ N.A.C. CORRECTIONS REPORT standard 5.17, at 190-91.

¹²⁸ M. FRANKEL, *CRIMINAL SENTENCES* 40-41 (1973).

terms of the sentence and of the purpose that sentence is meant to serve be made a part of the record.¹²⁹ Without a record of the sentence proceedings and the basis for the sentence, any meaningful appellate review of the decision is rendered a nullity. Indeed, it is ironic that in the few instances where a sentence has been overturned on appeal, it more often than not has been due to the gratuitous remarks of a judge that imputed some improper motive to the sentencing disposition. Thus, without a firm rule requiring explanation of sentences, judges are not ordinarily disposed to open themselves to appellate review and possible reversal. To counter this problem at least two state supreme courts have required their judges to set forth in writing the reasons for the sentences imposed. The Pennsylvania Supreme Court requires the trial judge, as soon as notified that an appeal has been taken, to file forthwith "at least a brief statement in the form of an opinion of the reasons for the . . . judgment . . ." ¹³⁰ The Supreme Court of New Jersey has adopted a rule requiring that trial judges shall attach to the pre-sentence report a brief statement of the basic reasons for the sentence imposed.¹³¹ In short, it is expected that a requirement of an explanation of the sentence selected will assist in bringing some rationality to sentences, in increasing consistency among judges, in providing a basis for reconsideration or for challenge on appeal, and in providing a more explicit mandate to correctional authorities in carrying out the sentence.

3. *Sentencing Institutes*

Another means of improving the sentencing decision involves expansion of an institution now fifteen years old in the federal system—the sentencing institute. Provided for by act of Congress in 1958,¹³² the institutes are held periodically to expose judges and prosecutors to the experience and insights of their colleagues as well as to those of correctional practitioners. Although the institutes have been criticized on the basis of infrequent meetings and failure to produce any significant or lasting changes in judicial attitudes about sentencing, they nevertheless have provided a forum for the exchange of ideas and for ventilation of some of the more obvious weaknesses of the sentencing process. The proceedings of the institutes are published in *Federal Rules Decisions* for

¹²⁹ N.A.C. CORRECTIONS REPORT standard 5.19, at 195-96.

¹³⁰ SUPREME COURT OF PENNSYLVANIA RULES OF COURT, R. 56.

¹³¹ N.J. CRIM. PRAC. R. 3:7-10(b).

¹³² 28 U.S.C. § 334 (1971).

the benefit of those unable to attend and for later consideration and study.

4. *Judicial Visits to Institutions*

Numerous bodies have recommended that judges should be required to periodically visit all institutions and facilities to which they may sentence offenders.¹³³ It is assumed that judges can make more intelligent and appropriate dispositional decisions when they are familiar with the atmosphere, conditions, programs, personnel, and so forth, that exist in the facilities within their jurisdiction. Such proposals also seek to provide a measure of continuity to the criminal justice process that is lacking. At this time, the only person who is exposed to each part of that process is the convicted defendant, who is not often consulted about how well the various elements mesh. Additionally, judges who impose a criminal sentence have a responsibility to satisfy themselves that the purposes for which the sentence was imposed have a reasonable chance of reaching accomplishment.

5. *Increased Feedback to Judges*

A final proposal for improving the exercise of discretion suggests that judges be regularly supplied with reports on sentences imposed in their court or district, accompanied by relevant information about those sentenced and their offenses. In addition, judges should receive follow-up information about defendants they have sentenced regarding the apparent effectiveness of sentences imposed. A more complicated approach would involve full-blown research on the outcome of various types of sentences for various categories of offenders on a wide-scale basis. It is argued that such reports would enable judges to compare and contrast their decisions, to initiate informal discussions among themselves, to modify their approach to the importance of certain criteria used in the sentencing decision, to learn the kinds of sentences that seem to work best for various kinds of offenders, and thus to "normalize" and improve decisions over time.

B. Proposals for Guiding or Regulating Discretion

1. *Joint or Collateral Decision-Making*

One approach to guiding the discretion of sentencing judges

¹³³ See, e.g., N.A.C. CORRECTIONS REPORT standard 5.10, at 175-76; *ABA Sentencing Standards* § 7.4, at II-41, 42.

involves setting up mechanisms by which they share the sentencing decisions with others. A Harvard criminologist, Sheldon Glueck, suggested over thirty-five years ago that sentences should be determined by a panel of three: (1) the judge, (2) a psychiatrist or psychologist, and (3) a sociologist or educator.¹³⁴ Although this inter-disciplinary approach to shared sentencing never gained acceptance, sentencing councils composed of judges of the same court exist in a few jurisdictions. Such councils were developed originally in the United States District Court for the Eastern District of Michigan.¹³⁵ The judges of that court meet regularly in panels of three to discuss pending sentencing decisions. The sentencing judge retains all responsibility for the ultimate sentencing decision, with his or her colleagues acting only in an advisory capacity. Experience in the eastern district and elsewhere indicates that three major benefits seem to flow from the use of councils. First, individual extremes of sentencing inclination tend to be tempered. Second, the sentencing judge often moves toward a sentencing stance reflecting the views of the other members. Third, there seems to be a net movement toward more lenient sentences.¹³⁶ However, a recent study conducted under the auspices of the Federal Judicial Center casts doubts on the theory that participation in sentencing councils tends to generate a common approach to sentencing by the judges involved.¹³⁷

2. *Development of Sentencing Guidelines*

Yet another approach to guiding or regulating discretion is development of what Judge Frankel describes as "codified weights and measures" or a "calculus" of aggravating and mitigating factors that would provide guidance to judges as they "brood[s] in a diffuse way towards a hunch that becomes a sentence."¹³⁸ Such a proposal might involve the use of empirical formulas based on evaluative studies of the interaction among varying offender/offense characteristics, dispositions, and outcomes. While sentencing judges would remain free to impose any sentence statutorily authorized, they would have the benefit of a "suggested sentence," or suggested sentence range, developed from long-term

¹³⁴ M. FRANKEL, *CRIMINAL SENTENCES* 74 (1973).

¹³⁵ *Id.* at 64-70.

¹³⁶ *Id.* at 70-71.

¹³⁷ A. PARTRIDGE AND W. ELDRIDGE, *FEDERAL JUDICIAL CENTER, THE SECOND CIRCUIT SENTENCING STUDY* 23 (FJC Pub. No. 74-4, August 1974).

¹³⁸ M. FRANKEL, *CRIMINAL SENTENCES* 113-14 (1973).

follow-up of prior offenders. This approach is not unlike the parole decision-making guidelines recently adopted by the United States Parole Board.¹³⁹

The Model Penal Code,¹⁴⁰ the National Advisory Commission standards,¹⁴¹ the ABA Sentencing Standards,¹⁴² and others move toward this approach in a somewhat less scientific manner than that envisioned by Judge Frankel by listing factors to be taken into account, some with an order of preference, in arriving at various dispositions. Several current attempts to draft capital punishment legislation to withstand Supreme Court review also take this approach by listing mitigating factors, the presence of any of which would eliminate a death sentence otherwise required.

3. *Improved Statutory Structure*

Proposals for improving the sentencing function by legislative action involve modification or improvement of the sentencing structure embodied in correctional or criminal codes and the introduction of more legislative guidance as to the purposes to be served in sentencing.

The inconsistencies and irrationalities characteristic of most criminal codes have occasioned lengthy discourse in many volumes. The fact that criminal penalties have been added and patched onto codes as new laws are passed has resulted in a confusing variety of sentence specifications that are often grossly dissimilar for basically similar conduct. Virtually every sentencing study conducted in the last ten years has recommended that states revise their criminal codes to enumerate a limited number of categories, each with its own set of alternatives, with each offense assigned to a particular category.¹⁴³ It is most often suggested that the categories be designed to reflect substantial differences in terms of gravity of the offense and that the range of allowable sanctions be differentiated among the categories by setting a maximum term for each category, except perhaps for the most serious offenses.¹⁴⁴

As stressed throughout this article, a more fundamental shortcoming to legislation dealing with the sentencing process is the

¹³⁹ See 28 C.F.R. § 2.1 *et seq.* (1974).

¹⁴⁰ MPC Sentencing Provisions § 7.01-7.06, 7.09, at II-70 to II-76, II-79.

¹⁴¹ N.A.C. CORRECTIONS REPORT standards 5.2-5.8, at 150-72.

¹⁴² ABA Sentencing Standards § 2.3-3.8, at II-14 to II-27.

¹⁴³ See, e.g., N.A.C. CORRECTIONS REPORT standard 16.7, at 567-68.

¹⁴⁴ *Id.*

consistent failure of state and federal legislators to clearly set forth the purposes and objectives to be served by the imposition of criminal sanctions. As damaging as this shortcoming may be, most existing proposals for change do not address it squarely, but continue to endorse all of the purposes traditionally suggested without providing further guidance as to how or when they are to be accomplished.¹⁴⁵

4. Standard Setting

As demonstrated by repeated reference, organizations and commissions such as the American Bar Association,¹⁴⁶ the American Law Institute,¹⁴⁷ the National Council on Crime and Delinquency,¹⁴⁸ and the National Advisory Commission¹⁴⁹ and others have undertaken to develop standards, guidelines, and models for important criminal justice issues in the hope that legislatures, agency administrators and operating personnel, courts in their rule-making authority, and so on, will adopt them as law or policy or, at a minimum, give careful consideration to the issues raised.

C. Proposal for Correcting Disparity—Appellate Review of Sentences

Appellate review of sentences has existed for two generations in England and now exists, in varying forms, in approximately one third of the American states. However, in most states and the federal system, sentencing power is vested solely with the trial judge and is unreviewable by the appellate courts absent compelling or unusual circumstances.¹⁵⁰ This situation exists despite the fact that appellate review has been endorsed in principle by the American Bar Association,¹⁵¹ the Brown Commission,¹⁵² the Katzenbach Commission,¹⁵³ and the National Advisory Commission.¹⁵⁴

¹⁴⁵ See text accompanying *supra* notes 32-37.

¹⁴⁶ See *ABA Sentencing Standards*, *supra* note 114.

¹⁴⁷ See *MPC Sentencing Provisions*, *supra* note 117.

¹⁴⁸ See *Model Sentencing Act*, *supra* note 116.

¹⁴⁹ See N.A.C. CORRECTIONS REPORT, *supra* note 115.

¹⁵⁰ See compilation of statutes, *supra* note 6.

¹⁵¹ See *ABA Sentence Review Standards*, *supra* note 114.

¹⁵² FINAL REPORT OF THE NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS 317 (U.S. Gov't Printing Office 1971).

¹⁵³ PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 145-46 (1967).

¹⁵⁴ N.A.C. CORRECTIONS REPORT standard 5.11, at 177-79.

Advocates of appellate review argue that its implementation would achieve the purposes set forth in the ABA Standards Relating to Appellate Review of Sentences:

The general objectives of sentence review are:

- (i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;
- (ii) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;
- (iii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and
- (iv) to promote the development and application of criteria for sentencing which are both rational and just.¹⁵⁵

Closely aligned to the question of appellate review of sentences is the already mentioned requirement that judges provide written or express reasons for the sentence imposed. Without such a record, review, and possible reversal, of a sentence that may be in error is much more problematic.

D. Proposals to Restrict Discretion

1. Decriminalization

Scholars and criminologists are asserting with increasing vigor and frequency the need to decriminalize certain types of prohibited conduct as inappropriate objects of criminal law.¹⁵⁶ There is considerable disagreement among judges over how to deal with certain non-violent "crimes" such as gambling, public drunkenness, private sexual acts between consenting adults, drug use, obscenity, and vagrancy, and hence, there is considerable disparity in how they are handled. Thus, it is argued that repeal of the statutes that make such behaviors criminal is a sensible way to end the unequal application that presently characterizes their enforcement. If such behaviors, often grounded on the status of an individual rather than on the commission of a specific criminal act, were removed from the criminal law, the system could concentrate on areas of consensus and would be less prone to disparity. By this reasoning,

¹⁵⁵ *ABA Sentence Review Standards* § 1.2, at II-45, 46.

¹⁵⁶ See, e.g., Dash, *Means and Methods Employed in Penal Law*, 10 CRIM. L. BULL. 571 (1974); R. CLARK, *CRIME IN AMERICA* (1970); N. MORRIS AND G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* (1970).

decriminalization is seen as an efficacious way of eliminating disparity in areas of the criminal law most susceptible to that ill.

2. *Mandatory Minimum Sentences*

This proposed remedy emphasizes taking a firmer stand on specific offenses or offender types, rather than rationalizing the sentencing structure. This proposal urges that legislatures should fix mandatory minimum terms, require incarceration without the possibility of probation, or otherwise restrict the discretion of the judge for offenses or offender types. Such statutes still might allow the judge to determine the maximum term or to choose sentence type and range more freely for some offense categories.

3. *Drastic Reduction of Discretion*

Several individuals and groups have proposed new models for sentencing that would drastically reduce discretion. United States District Judge Constance Baker Motley, for example, has proposed a sentencing system that would be based on retribution, preventive detention, and sometimes individual deterrence, except for youths and first offenders, where the goal would be to reintegrate them into society.¹⁵⁷ According to Judge Motley's proposal, graduated and relatively short, mandatory penalties would be provided except that every first offender would be granted a suspended sentence with an "appropriate period of probation,"¹⁵⁸ excluding "particularly heinous offenses such as premeditated murder and consumer poisoning."¹⁵⁹ In the case of monetary fraud, first offenders would also be required to make restitution. After the first offense, a short mandatory prison term of up to one year would be fixed by the legislature. For the third offense, a mandatory sentence of up to three years would be provided by law. For the fourth offense, a mandatory sentence of up to five years would be legislatively provided. For the fifth offense, and every offense thereafter, a mandatory sentence of five years would be imposed.¹⁶⁰ The only exceptions—aside from those provided for young offenders—would involve "exceptional or unusual mitigating circumstances, such as the imminent death of the defendant or his providing crucial testi-

¹⁵⁷ Motley, "*Law and Order*" and the Criminal Justice System, 64 J. CRIM. L. & C. 259, 266-68 (1973).

¹⁵⁸ *Id.* at 267.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

mony for the government,” and “heinous crimes like murder.”¹⁶¹ For the former, the sentencing judge could recommend a suspended sentence that would have to receive the approval of a reviewing panel. For the latter, first offenders would receive a mandatory sentence depending on the category of crime committed, and subsequent offenders would receive very long mandatory sentences.¹⁶² Under this proposal the length of sentence, with a few exceptions, would depend on the number of times a person was convicted of a crime and the seriousness of those crimes.¹⁶³

E. Proposals for Shifting Discretion

1. *Increased Discretion of the Correctional Authority*

As increasing use has been made of various kinds of community-based correctional programs, it has been suggested that the correctional agency must have greater authority to move offenders among the various programs. It is argued that as use increases of halfway-in and halfway-out houses, work release, study release, furloughs, day care programs, and so forth, the involvement of the sentencing judge or a parole board becomes unwieldy. Proponents of this view would retain varying levels of involvement for the judge and the parole board and would increase the flexibility of the corrections agency in making offender placements. Thus, the judge might retain the initial decision as to whether incarceration is indicated, and the parole board might hold a hearing early in an offender's term and approve a general course of progression involving increasing community activities. Within the broad parameters set by the judge and the parole board, the corrections agency would have discretion concerning where, how long, and under what conditions, offenders were supervised.¹⁶⁴

2. *Creation of a Specialized Disposition/Classification Agency*

Several proposals have been made to transfer dispositional and classification functions performed throughout the criminal justice process to one agency or body. Senator Percy, for example,

¹⁶¹ *Id.* at 267-68.

¹⁶² *Id.* at 267.

¹⁶³ *Id.* at 268.

¹⁶⁴ *See, e.g.,* N.A.C. CORRECTIONS REPORT, *supra* note 115, standard 7.4, at 244-46 and chapter 12, at 401-02.

has sponsored a bill¹⁶⁵ to reform the federal corrections system by creating a "Federal Circuit Offender Disposition Board" and "District Court Offender Disposition Boards" that would, respectively: (1) set national guidelines for decision-making regarding pre-trial release, pre-trial diversion, probation, parole, and other forms of release, and (2) perform pre-trial and pre-sentence investigation and report functions and carry out the functions relating to probation, parole, or other forms of release now performed by various other bodies. Under this proposal, sentencing would still be performed by the trial judges, but they would be provided with national guidelines and standard kinds of information about offenders. Dispositional decisions other than the imposition of sentence, however, would be made by the newly-created boards.¹⁶⁶

Other similar proposals would remove the imposition of sentence from the judge as well. Such suggestions tend to retain the various dispositional points at which discretion can be exercised but transfer responsibility for exercising it from the judge, the parole board, and others, to one body. It is argued that this would insure consistency of treatment throughout the criminal process and place discretion in the hands of persons selected for their professional competence to exercise it in decision-making of this kind.

3. *Return of Discretion Exercised by Others to the Judiciary*

A proposal to shift, and to a certain extent limit, discretion from paroling authorities back to the judiciary has been put forward by Richard McGee, president of the American Justice Institute and former director of corrections in California.¹⁶⁷ Under McGee's proposal, all sentencing, term fixing, releasing, discharging, and revoking of releases would be carried out by trial court judges subject to a revised legislative sentencing structure and to standards, guidelines, and review by a special division of the state court of appeal.¹⁶⁸ This proposal was designed specifically for the California system and would eliminate the indeterminate sentence as it presently operates by providing shorter ranges of possible

¹⁶⁵ See Percy, *The Federal Corrections Reorganization Act: Blueprint for a Criminal Justice System*, 11 AM. CRIM. L. REV. 65 (1972).

¹⁶⁶ *Id.* at 72-83.

¹⁶⁷ McGee, *A New Look at Sentencing: Part I*, 38 FED. PROBATION 3 (June 1974); McGee, *A New Look at Sentencing: Part II*, 38 FED. PROBATION 3 (Sept. 1974).

¹⁶⁸ McGee, *A New Look at Sentencing: Part II*, 38 FED. PROBATION 7 (Sept. 1974).

penalties (with the exception of first degree felonies) for a limited number of offense categories, with sentencing judges fixing the term at time of sentencing. All sentences involving institutional confinement would be automatically followed by a period of community supervision, the length of which would be determined by the class of sentence. All sentences involving a period of incarceration in excess of twenty-four months would be subject to automatic appellate review and, except for life sentences, terms in excess of four years would receive annual review after the fourth year to determine whether earlier release should be authorized. Sentences to incarceration of less than twenty-four months would be reviewable in the discretion of the review court upon application for an appeal. The proposal would give the responsibility for all decisions directly concerning the confinement or liberty of convicted felons to the judicial system while retaining the operational functions in the executive branch.¹⁶⁹

F. Proposals for Eliminating Discretion

1. *Elimination of Parole*

Recently the Citizens' Inquiry on Parole and Criminal Justice, Inc. issued a report on New York Parole in which they concluded "that parole in New York is oppressive and arbitrary, cannot fulfill its stated goals, and is a corrupting influence within the penal system. It should therefore be abolished."¹⁷⁰ The Citizens' Inquiry did not reject indeterminate sentences entirely; rather, they recommended that sentences should be of shorter length with a narrower range of indeterminacy. They stated further that criteria which could be properly used to determine the length of terms, and thus justify sentences of an indeterminate nature, must await further research, but that in any event sentences should not be based on rehabilitative purposes.¹⁷¹ Other observers urging elimination of parole have been appalled at the amount of discretion lodged with parole boards and by the seeming irrationality with which that discretion is exercised. Indeed, the McKay Commission in its *Attica Report* found that of all grievances expressed by prisoners, dissatisfaction with parole and its administration was the most pervasive.¹⁷²

¹⁶⁹ *Id.* at 7-11.

¹⁷⁰ REPORT ON NEW YORK PAROLE, *supra* note 90, at 290.

¹⁷¹ *Id.*

¹⁷² THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA, OFFICIAL REPORT 91-

The proposal referred to earlier¹⁷³ by United States District Judge Lawrence Pierce would also eliminate parole. Short, flat prison sentences (of four to eight months) for offenders who are convicted of crimes that do not involve violence or acts of moral turpitude would be followed by a fixed period of assignment to a noncoercive program of assistance in the community. The prison portion of the sentence would be primarily retributive and incapacitative while the community services component would represent society's attempt to compensate for whatever skill, educational, personal, legal, social, mental health, or other problems that might beset the offender.¹⁷⁴ In specifying that the use of services offered would be entirely voluntary, the proposal rejects the notion that post-conviction systems should be responsible for "rehabilitating" all of their clients. It also dispenses with discretionary release and revocation for most offenders.

2. Sentences Fixed by Law

Rejection of the rehabilitative ideal has led some to urge that all sentences should be fixed by law, leaving no discretion to the sentencing judge, the correctional agency, or a parole board. The Working Party of the American Friends Service Committee in *Struggle for Justice* recommends:

From this point on (after a predetermined number of community opportunities fail to prevent law violations and the offender is delivered to the punitive agency of the state), all offenders in a broad class—such as type of crime, but not according to the unique characteristics of the individual—are to be treated alike.

Whatever sanction or short sentence is imposed is to be fixed by law. There is to be no discretion in setting sentences, no indeterminate sentences, and unsupervised street release is to replace parole.¹⁷⁵

By advocating short, determinate sentences, advocates claim that both the retributive and general deterrent purposes of criminal sanctions would be better served than under the present system and that the disparity that now characterizes sentencing would all but be eliminated. More fundamentally, they argue that

92 (Bantam Books, 1972).

¹⁷³ See text accompanying note 55 *supra*.

¹⁷⁴ Pierce, *Rehabilitation in Corrections: A Reassessment*, 38 *FED. PROBATION* 3 (June 1974).

¹⁷⁵ *STRUGGLE FOR JUSTICE*, *supra* note 27, 144.

“individualized treatment,” as that term is now applied, is philosophically objectionable and in operation results in wide-scale injustice.

VII. OVERVIEW OF MAJOR EXISTING PROPOSALS

The major types of reform suggested illustrate varying levels of dissatisfaction with the status quo and differing views concerning the nature and depth of change required. Except for the few that contemplate fundamental changes in systems for dealing with convicted law violators (*e.g.*, sentences fixed by law), the reforms suggested are addressed more toward procedure than substance. Most of them accept the philosophical bases on which current practices rest but would realign emphasis among the major purposes, improve the quality of information, or redistribute discretionary power. Even those who decry rehabilitative purposes and reject a prediction of dangerousness as a basis for imposition of sanctions continue to accept deterrence as a proper purpose and continue to accept escalation of penalties based on prior criminality.¹⁷⁶ Such a stance seems to reflect acceptance of prediction of future behavior and other utilitarian objectives as appropriate considerations in some instances, while rejecting them in others. Such logical inconsistency seems to stem from deep-seated reluctance to relinquish the notion that what is done to the few law violators who are apprehended, convicted, sentenced, and processed through “correctional systems” should have a dramatic impact on public safety. “Crime in the streets” has become popularly linked to “dangerous, repetitive criminals” and fear of the former leads to using the latter as a means of obtaining a “solution” to national crime problems. Despite the proven inefficacy of any devised methods for controlling crime by the manner in which convicted offenders are handled, there is persistent unwillingness to examine the underlying assumptions and, hence, the alternative approaches that might be more successful. Political rhetoric only confounds the debate by concentrating on short-term palliatives—more jails, more judges, more police—and ignoring the more fundamental social issues and processes—income inequality, social disorganization, and so forth—that might yield long-run solutions. We are caught up in a truly vicious cycle. We have “bar-gained with the devil” to compromise our most basic values of

¹⁷⁶ See, *e.g.*, N. MORRIS, *THE FUTURE OF IMPRISONMENT* 58-84 (1974); *STRUGGLE FOR JUSTICE*, *supra* note 27, 48-66, 76-82, 147-48.

individual justice and liberty in hopes of obtaining relief from crime. When no relief is forthcoming, instead of reexamining the bargain, we levy increasingly heavier burdens on those we are willing to sacrifice.¹⁷⁷ Control of crime will not follow from wreaking inhumane suffering or attempting to coerce to virtue those who are processed through our post-conviction systems. Continuing to place our hopes there keeps us from devising and supporting alternative social actions and approaches that might have a real impact. It also keeps us far removed from having a criminal sanctioning system that resembles at all a "justice" system. Unpalatable as it may sound, crime control considerations must be divorced from the criminal sanctioning system in operation.

VIII. CONCLUSION: IMPLICATIONS FOR A NEW MODEL FOR CRIMINAL SANCTIONING SYSTEMS

The preceding sections of this article highlight some of the major ills that pervade our criminal sanctioning systems. It is not an exhaustive catalog of flaws, but those identified are basic. Most fundamentally, the legislative branch has failed to develop and declare a coherent public policy to govern the criminal sanctioning process. This failure has resulted in the present state of affairs in which the implementation of society's official responses to convicted law violators is almost totally discretionary in nature. Where there is no clear purpose, and discretion reigns, there can be little accountability, standards for acceptability or procedural safeguards cannot be meaningfully enforced, and "equity" and "justice" remain unapplied concepts. A new model for criminal sanctioning systems is needed.

In any attempt to develop an alternative sanctioning system, reconsideration of the purposes that the system should be designed to serve is fundamental. It was previously suggested¹⁷⁸ that in trying to select a purpose or purposes on which to build a criminal sanctioning system, it may be useful to distinguish between purposes that should apply to designing a system and those that should apply to a particular action under that system. The proposition was advanced that utilitarian arguments are appropriate with regard to questions about a criminal sanctioning *system*, while punitive or retributive arguments fit the application of par-

¹⁷⁷ Witness the many proposals for more mandatory extended prison terms and capital punishment.

¹⁷⁸ See text accompanying notes 32-60 *supra*.

ticular rules to particular cases within that system. These suggestions were summarized by stating that in designing a criminal sanctioning system, the focus should be on the future—on the desired consequences for society, while in operating the system, the focus should be on the past—on the offense for which the individual has been convicted in the instant case. Such a distinction carries numerous implications for future sanctioning goals and practices. A few of these will be outlined below.

If utilitarian considerations are utilized in designing a sanctioning system, an early determination will be made that the criminal law should be used with restraint. Society has an interest in minimizing use of the criminal process because it is drastic, costly, and productive of alienation, and because there are alternative means for promoting and protecting societal values. Society's interests in having certain values upheld can often be met by giving primary attention to the injured victim. Settlement, conciliation, restitution, and similar procedures should be utilized when neither justice nor utility warrant more dramatic exercise of state powers. Security of private property is particularly amenable to protection or redemption through civil rather than criminal processes. Where there is no victim, the utilitarian concern with minimizing state interference with an individual's life should result in removal from the sphere of the criminal law statuses or acts such as drunkenness, vagrancy, and other "victimless crimes" and behaviors prohibited only for children. A utilitarian emphasis supports the view that the power of the criminal law should be reserved to affirm, uphold, and protect core community values that cannot be promoted effectively otherwise.

A forward-looking perspective in designing a criminal sanctioning system should also insure consideration of the consequences or effects of the sanctions selected on *all* individuals who comprise the collectivity, since those who will be "offenders" under the system cannot yet be identified. This allows a useful test to be applied when considering various sanctioning practices for the system. The test of a suggested practice is whether every person would be willing to accept the practice in advance of knowing what role he or she would play. Concern would then center on a number of questions in regard to the suggested sanctioning practice, such as whether the innocent would be harmed, whether burdens and privileges would be apportioned evenly, whether the practice would be cruel, degrading, or inhumane, or whether some less drastic practice would serve as well. Thus, a utilitarian approach in designing

a system of sanctions should lead to concern with justice, fairness, and acceptability of the sanctioning practices proposed.

Once a system of criminal laws and sanctions has been designed, the orientation must change. Utilitarian considerations are inappropriate to the day-to-day operation of the system. Sanctions should be imposed on the basis of "just deserts," rather than on any presumed potential for future criminality on the part of the individual being sentenced or of others. It is unjust to deprive a person of liberty or otherwise enhance a penalty on the basis of something that has not occurred. Crime control considerations should play no role in the assignment of a sanction to a given offender for a particular offense. This orientation bears a number of ramifications that may be self-evident but that deserve brief explication, since they represent a dramatic departure from the status quo.

To say that the imposition of criminal sanctions should not be tied to predictions about the future or attempts to alter the future means that rehabilitative, incapacitative, and deterrent motives should not be allowed to influence the sanction. State intervention in individual lives through the criminal law should be stayed until some harm has been caused by a responsible actor, regardless of the potential for future harm. Criminal penalties should be definite, precluding extension or other alteration no matter how strongly preventive principles indicate the likelihood of another crime. Sanctions should be proportional to the offense, precluding adjustment to fit the presumed rehabilitative needs of the offender or society's presumed needs for protection.

A number of existing sanctioning practices do not satisfy these criteria. If a sanction is to be based on what is deserved for the instant crime, prior convictions and sanctions should have no effect. Statutes based on the concepts of "habitual," "persistent," "professional," or "dangerous" offenders or sentencing criteria that rely on past, already punished, criminality should be disallowed. If sanctions are to be final and definite, allegations of subsequent criminal acts, or of behaviors or attitudes thought to lead to crime, should not be allowed to effect the sanction for the instant offense for which the individual has been duly convicted. Thus, probation, parole, and other "conditional" sanctions, as presently conceived and operated, should be eliminated. Furthermore, if all vestiges of desire to obtain reduction of crime by physically restraining, or making the offender suffer because of a presumed deterrent effect on others, or "curing" those held captive, are to be

removed from the sanction selection process, the only remaining justification for use of incarceration as a sanction would be if such deprivation of liberty were viewed as the precisely appropriate way of expressing the most severe disapproval of the most severe of crimes. It seems unlikely that such a costly, dehumanizing, criminogenic practice would be heavily relied upon as a sanction if all preventive objectives were absent.

Perhaps the most difficult challenge to be faced, were such a new criminal sanctioning system to be developed, would be the operationalization of the concept of "just deserts." Most debate as to differing sanctions has focused on questions of length of terms and of incarceration versus non-incarceration from a utilitarian and preventive perspective. Most presently operating sanctions other than incarceration were designed to serve rehabilitative objectives. There is little precedent or expression of public sentiment in regard to sanctions such as monetary payments to victims, public service requirements, or purely punitive restrictions or penalties. Thus, development of a set of sanctions of varying form or nature for a system based on the principles set forth herein will be a formidable undertaking. The task of grading offenses according to relative severity or harm done and structuring sanctions proportional thereto will require difficult judgments and imagination.

Many of the propositions and implications suggested here will undoubtedly be met with resistance. The American public tends to maintain a tenacious belief in the ability of the state to conquer any social problem and in the inherent "rightness" of attempting to do so, particularly when appropriate balancing tests among competing values and objectives are infrequently raised. The assertion that post-conviction sanctions should be designed and administered to maximize individual liberty and justice necessarily requires abandoning reliance on many present practices ostensibly designed to reduce crime. However, in one sense a sanctioning system based on the premises suggested herein may do more to develop socially responsible citizens than any therapeutic approach could. A conception of the offender as volitional with responsibility for his or her behavior allows the growth of the individual's capacity for effectual and responsible decision. "Man learns wisdom in choosing by being confronted with choices and by being made aware that he must abide the consequences of his choice. . . . [I]t is the criminal law which defines the minimum condi-

tions of man's responsibility to his fellows and holds him to that responsibility."¹⁷⁹

¹⁷⁹ Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 410 (1966).