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## ORDERING THE PURPOSES OF SENTENCING: A PROLOGUE TO GUIDELINES

ERNEST W. SCHOELLKOPFF\*

The Sentencing Reform Act of 1984<sup>1</sup> recognizes retribution, deterrence, incapacitation and rehabilitation in equal measure as the purposes of punishment.<sup>2</sup> It also establishes the United States Sentencing Commission<sup>3</sup> which will promulgate presumptive sentences for criminal offenses according to the seriousness of the crime and the defendant's criminal history. These sentencing guidelines must comport with the recognized purposes of sentencing.<sup>4</sup> However, Congress has failed to assign priorities to those purposes, but instead has left the application of sentencing rationales to the Commission and to the discretion of the sentencing judge. This failure undermines the practical aims of determinate sentencing—namely, to structure discretion in sentencing and to provide consistency and fairness across the range of sentencing practices. Insofar as the Act lacks rational distinctions among the purposes of sentencing, it affords no real mandate for just and efficient sentencing and ultimately no real guidance for the sentencing judge. A statement of purpose should definitively establish priorities among the arguments for punishing criminals and indicate how each rationale should figure in the sentencing decision. So much is a fitting and necessary prologue to fair and rational sentencing practices and to the elimination of unwarranted disparity in sentencing.

Determinate sentencing corresponds to the modern retributivist theory of punishment, which assumed much of its political popularity as it purported to supplant the scientific theory of rehabilitation as a dominant purpose of sentencing. While rehabilitation has been thoroughly discredited as a basic justification for criminal punishment, retribution, whether

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1. Pub. L. No. 98-473 §§ 211-239, 98 Stat. 2022 (1984) (to be codified in sections scattered between 18 U.S.C. §§ 3551-3673, and at 28 U.S.C. §§ 991-998).

2. 18 U.S.C.A. § 3553(a)(2) (West 1985).

3. 28 U.S.C.A. §§ 991-998 (West Supp. 1985).

4. *See id.* §§ 991(b)(2), 994(a)(2).

it entails the mere denunciation of prohibited acts or expiation for crimes committed, proves deficient on moral and policy grounds as a central justifying purpose. The real value of retribution lies in the limitations it can provide in a criminal justice system based on deterrence and incapacitation—setting the bounds within which sanctions may be imposed. As such, retribution remains the basic concept underlying the substantive sentencing guidelines. Still, the central justifying aims of sentencing may be appropriately found in the context of crime control, the immediate aim of the criminal code reform and of criminal law as a whole.

Accordingly, the purpose section of the Sentencing Reform Act should be amended, or refined by a policy statement of the Sentencing Commission, to recognize deterrence and incapacitation as the primary justifications for sentencing. These relate directly to the prevention of crime, the *raison d'être* of the criminal law. Moreover, sanctions should be limited by retributivist considerations inasmuch as they are enacted in the sentencing guidelines. The utilitarian principle of parsimony, requiring the least punitive sanction necessary to attain desired social ends, and the availability of restitutionary remedies together should further limit the severity of particular sentences. Rehabilitation should be relegated to an expressed policy consideration which may merely guide the reasoning of a sentencing judge. Finally, the need to treat like cases alike (*isonomy*) should serve as an important guiding principle.

Thus ordered, the purposes of sentencing will provide sentencing judges with a viable framework for implementing the sentencing guidelines and the policy statements of the Sentencing Commission, as well as a rationally conceived starting point from which principled sentencing practices might ensue.

## I. SENTENCING PURPOSES AND THE NEW FEDERAL LAW

### A. *The Statutory Scheme*

The new federal criminal code comprehensively revamps the law of sentencing. The sentencing reform provisions establish the Sentencing Commission, an independent commission within the judicial branch. On September 10, 1985, President Reagan appointed the seven voting members of the Commission.<sup>5</sup> The Attorney General, or his designee, serves

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5. The appointees include Federal District Judge William W. Wil-

as an *ex officio*, non-voting member.<sup>6</sup>

Congress has explicitly set forth the purposes of the Commission. First, it must establish sentencing policies and practices that "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code."<sup>7</sup> That section recognizes retribution, deterrence, incapacitation and rehabilitation as legitimate aims of criminal punishment. A second concern is to provide certainty and fairness in achieving those aims: to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."<sup>8</sup> This practical concern arises as the criminal justice system attempts to live up to its broader justificatory purposes; the system must balance the desirability of treating like cases alike with the countervailing objective of tailoring sentences to individual offenders.

Third, sentencing policies and practices ought to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."<sup>9</sup> To this effect, the Commission must keep abreast of and foster society's effort to understand criminal behavior and to arrive at effective means of confronting it—a terribly elusive objective which deserves a commitment of such societal proportions as have never been attained or even attempted.

To aid its own efforts, the Commission is to "develop means of measuring the degree to which the sentencing, pe-

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kins, Jr. of South Carolina (nominated to be the panel's chairman); Judge Stephen G. Breyer of the Court of Appeals for the First Circuit; District of Columbia Circuit Judge George E. McKinnon; Paul H. Robinson, professor of Law at Rutgers University; Irene Nagel, professor of law at Indiana University; Michael K. Block, associate professor of management and economics at the University of Arizona; and Helen G. Corrothers, the United States Parole Commissioner for the Western Region of Arkansas. N.Y. Times, Sept. 11, 1985, at A15, col. 1. The Sentencing Reform Act had required that the Commission include at least three *active* federal judges selected from a list of six recommended by the Judicial Conference of the United States. 28 U.S.C.A. § 991(a). Subsequent legislation allows the President to appoint senior as well as active federal judges. Pub. L. No. 99-22, 99 Stat. 46 (1985).

6. 28 U.S.C.A. § 991(a) (West Supp. 1985).

7. *Id.* § 991(b)(1)(A).

8. *Id.* § 991(b)(1)(B).

9. *Id.* § 991(b)(1)(C).

nal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2)."<sup>10</sup> In sum, the Act entrusts the Commission with the onerous but necessary responsibility of implementing the purposes of punishment in sentencing practice, the results of which should be generally consistent and equitable while evincing a regard for individual offenders and cases, and which will be open to criminological advances. Moreover, the Commission is required not only to issue sentencing guidelines, but also to promulgate general policy statements regarding the application of those guidelines, "or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2)."<sup>11</sup>

Hence, the purposes of sentencing are central to all the work of the Commission. Unfortunately, section 3553(a)(2) is an unsatisfactory starting point. The provision bears no marks of an attempt to analyze the purposes of sentencing in a manner which might prove of any guidance to a sentencing judge. The court will simply consider the need for the sentence imposed:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

### B. *Understating the Purposes of Sentencing*

On its face, the subsection simply states the four popularly accepted justifications for criminal punishment: retribution, deterrence, incapacitation and rehabilitation, respectively. The provision neither gives greater weight to one purpose than to another, nor defines the extent to which the purposes may overlap. In fact, Congress deliberately eschewed stating a preference for one purpose over another "in the belief that different purposes may play greater or

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10. *Id.* § 991(b)(2).

11. *Id.* § 994(a)(2).

lesser roles in sentencing for different types of offenses committed by different types of defendants."<sup>12</sup> The Senate Committee on the Judiciary Report continues: "The intent of subsection (a)(2) is to recognize four purposes that sentencing in general is designed to achieve, and to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case."<sup>13</sup> At face value, the Committee's understatement of the purpose section recoils even further from the notion of an ordered statement of purpose designed to provide affirmative guidance for sentencing judges, in spite of the provision's centrality within the statute itself. Rather, the Sentencing Commission may evaluate the extent to which each purpose is to be served as it prescribes a presumptive sentence for each particular offense. For certain while collar offenses, the Commission might emphasize deterrence rather than rehabilitation or incapacitation. By contrast, incapacitation may emerge as the chief rationale in cases involving repeat violent offenders.<sup>14</sup>

Nowhere does the statute discuss how these purposes relate to each other, particularly as the judge will apply them in a particular case to a particular offender. As they stand, the court might employ each of the stated rationales as it sees fit, and in any of their myriad formulations and combinations. The purposes of the Act may contradict each other; after all, their respective merits have been debated by moral philosophers throughout history. In the worst situation, the judge might ignore the purposes of sentencing and rely exclusively on the relatively certain mechanical application of the guidelines, contrary to the intentions of Congress in drafting the new sentencing code.<sup>15</sup> Such a result may obtain under Congress' eclectic statement of sentencing purposes. Variations in sentencing rationales may be appropriate when the judge exercises his structured discretion and makes individual sen-

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12. S. REP. NO. 223, 98th Cong., 1st Sess. 74 (1983).

13. *Id.*

14. *Sentencing Reform: The Probable Effect on the Federal Justice System of Abolition of Indeterminate Sentences and Parole in the Context of a Sentencing Guidelines System* (Dep't of Justice memorandum), in *Reform of the Federal Criminal Laws: Hearing before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary on S. 1437 and S. 31, S. 45., S. 181, S. 204, S. 260, S. 888, S. 979, and S. 1221—Part XIII, Sentencing and General Codification*, 95th Cong., 1st Sess. 9200, 9205 (1977) [hereinafter cited as *Hearing*].

15. SENATE COMM. ON THE JUDICIARY, COMPREHENSIVE CRIME CONTROL ACT OF 1983, S. REP. NO. 225, 98th Cong., 1st Sess. 52-53, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3235-36. [hereinafter cited as SENATE COMM.].

tencing decisions, but they are not appropriate at the very core of a statute devised to facilitate fair and consistent sentencing practices. Commenting on the issue of uniformity, the English Court of Appeal has noted the difference concisely: "We are not aiming at uniformity of sentence; that would be impossible. We are aiming at uniformity of approach."<sup>16</sup>

To avoid an abdication of the judicial role in sentencing, purposes of sentencing should be refined to reflect a legal cognizance of the complexities involved in reaching a truly just sentencing decision, and to provide judges with far more guidance as they attempt to adhere to those purposes. The report of the Yale Law School Sentencing and Parole Study recommended that Congress assign priorities to the specific, declared goals of the sentencing process, and not delegate this matter to sentencing judges or the Sentencing Commission.<sup>17</sup> Congress definitely should have confronted the purposes of punishment with less propitiation toward their respective proponents. Specifically, the hearings indicate that rehabilitation may have been included among the stated purposes of sentencing only because there are those who feel that rehabilitation cannot be dismissed, regardless of its deficiencies as a moral theory of punishment and its practical inefficacy.<sup>18</sup>

### C. *The Need to Structure Discretion Through Priorities*

The confusion among the purposes of sentencing has posed a seemingly irremovable obstacle to the administration of criminal justice. The Model Penal Code of 1962 proposed eight general purposes to govern the sentencing and treatment of offenders.<sup>19</sup> But the commentary expressly shunned

16. *The Queen v. Bibi*, 71 Crim. App. 360, 361-62 (1980), *quoted in* McIntyre, *Sentencing: Time for Clear Standards*, 27 CRIM. L.Q. 212, 213 (1984).

17. *Hearing*, *supra* note 14, at 8909-10 (statement of Pierce O'Donnell, Michael J. Churgin and Dennis E. Curtis).

18. *See id.* at 8874-75, 8883 (testimonies of Hon. Marvin E. Frankel and Norman A. Carlson).

19. The Model Code provides:

The general purposes of the provisions governing the sentencing and treatment of offenders are:

- (a) to prevent the commission of offenses;
- (b) to promote the correction and rehabilitation of offenders;
- (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;

the prescription of a formula for applying those purposes:

The section is drafted in the view that sentencing and treatment policy should serve the end of crime prevention. It does not undertake, however, to state a fixed priority among the means to such prevention, i.e. the deterrence of potential criminals and the incapacitation and correction of the individual offender. These are all proper goals to be pursued in social action with respect to the offender, one or another of which may call for the larger emphasis on a particular context or situation.<sup>20</sup>

Uncertainty has pervaded judicial attempts to enliven the purposes of sentencing, with the ultimate and apparently unavoidable resort to discretion. In *State v. Ivan*,<sup>21</sup> the defendant appealed the imposition of the maximum fine of \$5,000 and a prison term of one to two years on grounds that the trial judge entertained a preconceived policy that a bookmaking conviction merited the sentence imposed without regard to the circumstances of the individual offender. The Supreme Court of New Jersey affirmed the judgment of the trial court in view of the defendant's involvement in the larger operation of organized crime, which demanded stern treatment for deterrent purposes. Chief Justice Weintraub commented:

No single aim or thesis [of sentencing policy] can claim scientific verity or universal support. Agreement can hardly be expected until much more is known about human behavior. Until then, the sentencing judge must deal with the complex of purposes, determining in each situation how the public interest will best be served . . . . There can be no precise formula. The matter is embedded deeply in individ-

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(d) to give fair warning of the nature of the sentence that may be imposed on conviction of an offense;

(e) to differentiate among offenders with a view to a just individualization in their treatment;

(f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;

(g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;

(h) to integrate responsibility for the administration of the correctional system in a State Department of Correction [or other single department or agency].

MODEL PENAL CODE § 1.02(2) (Proposed Official Draft 1962).

20. MODEL PENAL CODE § 1.02 commentary at 5 (Tentative Draft No. 2 1954).

21. 33 N.J. 197, 162 A.2d 851 (1960).



ual discretion.<sup>22</sup>

Beyond the constraints of due process<sup>23</sup> and the eighth amendment's prohibitions of excessive bail, excessive fines, and cruel and unusual punishment,<sup>24</sup> discretion has lacked any clear, substantive definition. With a determinate sentencing policy, Congress sought to structure individual discretion by authorizing the Sentencing Commission to formulate guidelines rather than a precise formula for arriving at a sentencing decision. An ordered statement of the purposes of sentencing would provide an infrastructure for the operation of those guidelines. Moreover, it can unravel the general confusion of sentencing purposes<sup>25</sup> yet leave the discretion of the sentencing court intact. Moreover, an ordered statement would facilitate the exercise of discretion by channeling it according to priorities and interrelationships among the stated purposes.

For all its detail, the Sentencing Reform Act appears beset with what British penologist Nigel Walker perceives as a fear of incorporating philosophy into the penal system, a fear shared by lawyers, administrators, prison staffs, probation officers, penal reformers, and even penologists.<sup>26</sup> At first glance, a mandate that the law of sentencing reflect the utmost in academic sophistication would appear thoroughly unworkable at all levels of the criminal justice system. However, it is not unreasonable to demand from the system a sincere effort to spell out its purposes so that each component of the

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22. *Id.* at 201, 853.

23. "[I]t is now clear that the sentencing process . . . must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion per Stevens, J.).

24. *See infra* note 47 and accompanying text.

25. This confusion of purposes needs to be unraveled and the precise social justification for a particular confinement should be forthrightly recognized. It is only in this manner that we can think clearly about the conditions and extent of confinement, and rationally evaluate our response to disturbing behavior that warrants societal intervention. Of course, more than one purpose may be served by a particular confinement. But we should be clear as to which purpose justifies which punitive or rehabilitative action.

*Hearing, supra* note 14, at 8909 (statement of Pierce O'Donnell, Michael J. Churgin and Dennis E. Curtis, quoting Hon. David L. Bazelon).

26. N. WALKER, *SENTENCING IN A RATIONAL SOCIETY I* (1969). *See also* N. WALKER, *PUNISHMENT, DANGER AND STIGMA*, at viii (1980); Moore, *The Moral and Metaphysical Sources of the Criminal Law*, in *CRIMINAL JUSTICE, NOMOS XXVII* 11, 25 (J.R. Pennock & J. Chapman eds. 1985) [hereinafter cited as *CRIMINAL JUSTICE*].

sentencing process might be infused with a greater understanding of its function. Above any sort of uniform procedures and guidelines, a strong consensus regarding the details and interrelationships of the purposes of punishment will be the first step toward eliminating unjustified disparity and general uncertainty in sentencing. In Section IV of this article, I propose a delineation of those purposes so as to facilitate a consistent and rational sentencing methodology.

Guidelines represent legitimate attempts to mitigate overall disparity in sentencing, to provide a judge with objective, quantified data, to separate the sentencing result from the vagaries of each judge, and to persuade the offender that his punishment is the result of a rational process rather than chance.<sup>27</sup> The new federal law requires the Sentencing Commission to design guidelines with an essentially normative approach, as opposed to a strictly empirical one. Nonetheless, empirical data will prove indispensable in the formulation of the guidelines. Average sentences handed down in past cases serve as a starting point from which the Commission may develop a sentencing range that is consistent with the stated purposes of sentencing.<sup>28</sup>

In general terms, the sentencing guidelines system seeks to eliminate unwarranted sentencing disparity by providing a suggested sentencing range for a particular offense committed by a defendant with a particular history and characteristics. The judge may impose a sentence outside the guidelines range only in light of a significant aggravating or mitigating factor, and such a sentence is subject to appellate review. The guidelines may also eliminate disparity among sentencing practices of different judicial districts, as well as disparity caused by the differences in the sentencing statutes which apply to regular adult offenders, youthful offenders and drug addicts.<sup>29</sup>

Essentially, the guidelines are means of facilitating the purposes of sentencing. Insofar as the statute inadequately

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27. Yanoff, *Mathematics: An Aid to Sentencing*, STATE CT. J., Spring 1983, at 4, 12.

28. 18 U.S.C.A. § 994(m) (West Supp. 1985). By contrast, Massachusetts, Philadelphia and Denver have attempted a purely empirical approach (the Albany method) which does not supply an analytical framework for judging and modifying past practices. See von Hirsch, *Constructing Guidelines for Sentencing: The Critical Task for the Minnesota Sentencing Guidelines Commission*, 5 HAMLINE L. REV. 164, 173-74 (1982).

29. *Hearing*, *supra* note 14, at 9207-08 (Dep't of Justice memorandum).

describes those purposes, the guidelines will not substantially aid the development of more equitable sentencing practices.

Kenneth Feinberg has criticized the federal law of sentencing previous to the 1984 Act for having no agreed-upon philosophy of criminal sanctions. Because Congress failed to place its imprimatur on one or more purposes of sentencing, judges were able to impose a sentence in a particular case with any combination of philosophical justifications in mind.<sup>30</sup> The new law does not improve matters much by simply authorizing four purposes of sentencing. Judges and administrators can still make capricious decisions as long as they can channel their reasoning into any or all of those four pigeon holes. What is needed, then, is a coherent statement delineating the purposes of sentencing to be implemented through the guidelines, especially as the purposes relate to each other, to the need for even-handed sentencing practices, and to society's advances in the understanding of criminal behavior.

## II. DETERMINATE SENTENCING: THE FLIGHT FROM REHABILITATION TO JUST DESERTS

### A. *Political Disillusionment with the "Treatment Model"*

With its presumptive sentencing scheme and administrative sentencing guidelines, the Sentencing Reform Act abolishes the indeterminate sentence and parole release. The political renunciation of the indeterminate sentence began in the early 1970's and was precipitated by a resurgence among scholars of the retributivist justification for punishment. One of the leading proponents of retribution or "just deserts," Andrew von Hirsch, encapsulated the credo: "Someone who infringes the rights of others . . . does wrong and deserves blame for his conduct. It is because he deserves blame that the sanctioning authority is entitled to choose a response that expresses moral disapproval: namely, punishment."<sup>31</sup>

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30. Feinberg, *Sentencing Reform and the Proposed Federal Criminal Code*, 5 *HAMLIN L. REV.* 217, 226 (1982).

31. A. VON HIRSCH, *DOING JUSTICE* 48-49 (1976). See also D. FOGEL, *WE ARE THE LIVING PROOF* (1975). Von Hirsch recently reaffirmed his position that punishment should focus on the crime and not the criminal in light of the debate over dangerous offenders.

Desert theorists claim that punishment is essentially a condemnatory institution and, hence, that penalties should be distributed according to the degree of blameworthiness of the criminal conduct. In order to reflect blameworthiness, the system should observe the

The return to retribution signified a scholarly and also a popular dissatisfaction with inconsistencies in the setting and administration of criminal penalties, and with the goal of rehabilitation as a central justifying purpose of sentencing. Modern rehabilitative penology arose in the latter half of the nineteenth century and has incorporated indeterminate sentences as an integral part of its scheme. In 1870, the National Congress on Penitentiary and Reformatory Discipline recommended complete indeterminacy of sentences, which would leave the authorities unlimited time to reform prisoners.<sup>32</sup> The modern statement of the rehabilitative ideal has grown out of the behavioral sciences and their attempts to describe and manipulate the relationships between individuals and society.<sup>33</sup>

To bring scientific treatment of an offender to fruition, advocates of rehabilitation have advocated indeterminate sentences. Supposedly, the date of release depends upon the individual's progress and hence cannot be forecast in advance.<sup>34</sup> David J. Rothman has thus compared the indeterminate sentence with the flexible, extended and open-ended schedule the psychiatrist uses.<sup>35</sup>

The treatment model does not include aspects of moral rehabilitation which lie at the heart of traditional expiatory retribution, but the idea of rehabilitating offenders need not lack the virtues of utility and mercy. Jeremy Bentham, the father of modern utilitarianism, stated: "It is a great merit in a punishment to contribute to the *reformation of the offender*, not only through fear of being punished again, but by a change in his character and habits."<sup>36</sup> However, Bentham would counsel against a view of punishment as part of an ide-

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ordinal requirements of desert: to punish equally reprehensible criminal conduct equally, and to grade punishments so that their severity comports with the rank ordering of seriousness of crimes.

A. VON HIRSCH, *PAST OR FUTURE CRIMES* 41-42 (1985).

32. National Congress on Penitentiary and Reformatory Discipline, *Statement of Principles*, in *TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE* 541-547 (1871).

33. See F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 25-41 (1964).

34. See B. WOOTTON, *CRIME AND THE CRIMINAL LAW* 111 (2d ed. 1981).

35. Rothman, *Doing Time: Days, Months and Years in the Criminal Justice System*, in *SENTENCING* 374, 380-81 (1981). Rothman argues for shortened sentences and for pursuing alternatives to imprisonment from "the failure model" of incarceration.

36. J. BENTHAM, *THE THEORY OF LEGISLATION* 338-39 (C. Ogden ed. 1931).

alistic plan to transform the human race.<sup>37</sup> These grand aspirations are an integral part of traditional retributivism. Sir Francis Palgrave linked the penal philosophy of the medieval churchmen to rehabilitation. Punishment was not to be "thundered in vengeance for the satisfaction of the state, but imposed for the good of the offender: in order to afford the means of amendment and to lead the transgressor to repentance, and to mercy."<sup>38</sup>

While the traditional retributivists emphasized moral rehabilitation, their modern counterparts have addressed the potential horrors of a therapeutic state governed by principles of scientific rehabilitation. If one further perceives rehabilitation as an attempt to adjust the criminal law to positivist, scientific or secular humanist theories of punishment—in effect, to substitute medicine for morals—then the shift to a retributivist approach becomes expedient and attractive. A system of social hygiene can squelch individual responsibility and free will, and result not only in the depersonalization of the criminal, but also in a loss of individual freedom through systematic manipulation.<sup>39</sup>

Rehabilitation raged as a paramount justification for criminal punishment into the 1960's and found approval in the Model Penal Code of 1962, in which the sentencing provisions heavily emphasize the prospects of reforming offenders and containing those who present a danger to society.<sup>40</sup> The first determinate sentencing laws constituted a significant departure from the rehabilitative model. In fact, determinate sentencing connotes the abandonment of clinical rehabilitation as a major purpose of imprisonment.<sup>41</sup>

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37. *Id.* at 359.

38. G. DALZELL, *BENEFITS OF CLERGY IN AMERICA AND RELATED MATTERS* 13 (1955).

39. Taylor, *Retribution, Responsibility and Freedom: The Fallacy of Modern Criminal Law from a Biblical-Christian Perspective*, *LAW & CONTEMP. PROBS.*, Spring 1981, at 51. See also Lewis, *The Humanitarian Theory of Punishment*, 6 *RES JUDICATAE* 224 (1953); Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968).

40. See especially sections 6.06, 6.07, 6.08, 6.09, 6.13, 7.01, 7.03, 7.04, 7.07 and respective commentaries. Note, however, that deterrence and retribution are mentioned as important considerations in these sections and other places in the Model Code.

41. Fogel, *Justice, Not Therapy: A New Mission for Corrections*, 62 *JUDICATURE* 373, 374 (1979).

### B. *The Legislative Responses*

California and Indiana were first to enact laws creating determinate sentences. Since the California sentencing code was enacted in 1976, a number of bills have been passed to lengthen the prescribed terms for various crimes. The legislature has also acted to restore some of the judicial and parole discretion removed by the legislative sentencing provisions and to widen the range between the presumptive term and the aggravated term. These piecemeal additions have been criticized sharply: they were made with little apparent concern for proportionality or consistency among the penalties for different crimes, or for the new penalties' impact on a correctional system having limited prison capacity.<sup>42</sup> Von Hirsch has assailed Indiana's sentencing code for prescribing draconian penalties for many felonies. Despite its alleged aim of limiting discretion, it gives wide discretion to judges in their choice of aggravated or mitigated term, and to correctional administrators to confer or withdraw the fifty percent good-time allowance.<sup>43</sup> A judge is permitted to increase but not decrease a sentence on rehabilitative grounds—that is, if the defendant is “in need of correctional or rehabilitative treatment that can best be provided by his commitment to a penal facility.”<sup>44</sup> This limitation on judicial discretion has been attacked as unwarranted and as a hard-line, punitive law-and-order approach—statutory reform with a vengeance.<sup>45</sup> These provisions may amount not only to ill-considered public policy, but also to violations of the eighth amendment. It has been proposed that these determinate sentencing statutes are constitutionally defective because their penalty terms have been fixed arbitrarily by legislatures without giving adequate and systematic consideration to the offense and to the severity of the punishment.<sup>46</sup>

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42. Von Hirsch, *supra* note 28, at 167.

43. *Id.* at 167.

44. IND. CODE ANN. § 35-38-1-7(b)(3) (Burns Supp. 1985).

45. Orland, *Is Determinate Sentencing an Illusory Reform?*, 62 JUDICATURE 381, 386-87 (1979).

46. Dora Nevares-Muniz cites the Supreme Court's holding in *Weems v. United States*, 217 U.S. 349 (1909), that the eighth amendment's prohibitions of excessive bail, excessive fines, and cruel and unusual punishment impose a requirement of proportionality in criminal sentencing, and contends that the determinate sentencing statutes fail the test of proportionality. Nevares-Muniz, *The Eighth Amendment Revisited: A Model of Weighted Punishments*, 75 J. CRIM. L. & CRIMINOLOGY 272 (1984). The proportionality requirement has been upheld most recently in *Solem v. Helm*,

Von Hirsch has suggested that these jurisdictions' choice of rulemaker, the legislature, is partially responsible for the perceived inadequacies.<sup>47</sup> By contrast, Oregon has given the task of establishing sentencing guidelines to its parole board.<sup>48</sup> Finally, Minnesota, Pennsylvania and Washington have followed the suggestion of former United States District Court Judge Marvin E. Frankel<sup>49</sup> and established sentencing commissions to draft and effectuate appropriate guidelines. To date, only Minnesota has developed and implemented a system of guidelines.<sup>50</sup>

The new federal criminal code follows the route of sentencing guidelines and concomitantly rejects rehabilitation as a justification for imprisonment: "Almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and is now quite certain that no one can really detect whether or when a prisoner is rehabilitated."<sup>51</sup> Feinberg has commented on the 1982 version of the Act<sup>52</sup> and applauded the elimination of the indeterminate sentence as a waste product of the outmoded rehabilitative rationale:

It is ironic that the well-intentioned purposes underlying the rehabilitation model and the indeterminate sentence have, in reality, promoted the type of arbitrariness and unfairness that have served as a catalyst for recent sentencing reform efforts. Once one concludes that the idea of rehabilitation is fundamentally flawed, one is led to the conclusion that sentencing reform must begin with a direct broadside attack on the heart of the existing system—the indetermi-

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463 U.S. 277 (1983) (sentence of life imprisonment without parole for uttering a no account check for \$100 held disproportionate and violative of the eighth amendment, despite defendant's extensive history of minor felonies). See also *Enmund v. Florida*, 458 U.S. 782 (1982); *Rummel v. Estelle*, 445 U.S. 263 (1980); *Hutto v. Finney*, 437 U.S. 678 (1978); *Coker v. Georgia*, 433 U.S. 584 (1977); *Ingraham v. Wright*, 430 U.S. 651 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion).

47. Von Hirsch, *supra* note 28, at 167-168.

48. OR. REV. STAT. §§ 144.110-125, 144.775-790 (1981). See A. VON HIRSCH & K. HANRAHAN, *THE QUESTION OF PAROLE* 92-96, 123-29 (1976).

49. M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 118-23 (1972).

50. Minnesota Sentencing Guidelines and Commentary, 16 MINN. STAT. ANN. ch. 244 app. at 244 (West Supp. 1985) [hereinafter cited as *Minn. Guidelines*].

51. SENATE COMM., *supra* note 15, at 38, 41.

52. S. 1630, 97th. Cong., 1st Sess. (1981).

nate sentence and parole release.<sup>53</sup>

Although the 1984 Act includes rehabilitation as a purpose of sentencing, section 994(k) removes that purpose from the possible reasons for imposing a prison term: "The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." Also, section 994(s) states that rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason for sentence reduction.

These limitations on the role of rehabilitation reflect an awareness that the average prison is by no means conducive to the reform of criminals. Prisons are demoralizing<sup>54</sup> and often appallingly dangerous.<sup>55</sup> To expose a convicted offender indefinitely to an environment which cannot realistically help the offender become a better person is practically misguided, economically wasteful and ethically outrageous, particularly when such punishment is inflicted under the pretext of rehabilitation. On the other hand, to separate utterly notions of rehabilitation and reform from prison policy might produce an even more inhumane prison setting:

The abandonment of rehabilitation and the return to a punishment rationale may have a profound effect on prison staff. It can lead to the ascendancy, once again, of custodial and punitive perspectives. More seriously, it could lead to abandonment of what little impact rehabilitative, humanistic treatment approaches has [sic] had on prison staffs.<sup>56</sup>

In a similar vein, it has been observed that "[g]iving up entirely on the possibility of rehabilitation would be unwise and un-Christian."<sup>57</sup>

Determinate sentencing is by and large a legislative reac-

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53. Feinberg, *supra* note 30, at 222.

54. See A. ROSETT & D. CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* 145-59 (1976).

55. See Engel & Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoner's Rights, and Violence*, 7 HARV. J.L. & PUB. POL'Y. 413 (1984). The authors demonstrate that humanitarian reforms within prisons have actually contributed to unrest and violence among inmates. See also Wilson, "What Works?" *Revisited: New Findings on Criminal Rehabilitation*, PUB. INTEREST, Fall 1980, at 3.

56. Orland, *supra* note 45, at 385.

57. Reese, *Demythologizing Crime*, 151 AMERICA 213, 215 (1984).



tion to the failure of rehabilitation as a primary, justifying principle of criminal punishment. As determinate sentencing enlivens the rationale of just deserts, it tends to advance that rationale toward preeminence in the order of sentencing purposes. Such preeminence should properly forward the efficient and equitable administration of criminal justice, but it should also serve to vindicate the act of punishment in general and as it is imposed in a particular case. Just deserts fails on these latter counts. The aims of punishment must be structured in view of the common objective of all criminal prohibitions—the prevention of the sanctioned behavior itself.<sup>58</sup>

The utilitarian policies of deterrence and incapacitation are essentially forward-looking justifications, assessing punishment in terms of its propensity to modify the future behavior of the criminal (as in incapacitation and special deterrence) and of others who might be tempted to commit crimes (as in general deterrence), while the retributive view looks backward and focuses upon the offense as the crucial determinant of punishment.<sup>59</sup> Because the sentencing decision must be justified in terms of the consequences it will hold for the offender, the penal system and society at large, retribution fails as a comprehensive rationale for punishment. On the other hand, deterrence and incapacitation properly take account of the criminal act in the context of the imminent social policy of crime prevention. In their concern to eliminate disparity in sentencing along with any appreciable reliance on the treatment model, just deserts theorists have overstated the moral capabilities of the retributive principle. Fixing the legal inquiry upon the criminal act alone may be a convenient solution to the disparity problem, but it will leave unaddressed the many questions about the individual and social consequences of particular sentencing practices—questions which go to the heart of the sentencing process.

### C. *Traditional Expiatory Retribution and Moral Reform*

A shift from rehabilitation to retribution entails a divorce between those two concepts, which were unified in the traditional moral view of punishment. Traditional retributivist justifications for punishment were aimed at the reform

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58. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 62-70 (1968).

59. See *id.* at 11.

of the offender, albeit from a moral rather than a scientific perspective. St. Thomas Aquinas maintained that natural equity demands that a man should be deprived of the good against which he acts, for he thereby renders himself unworthy of that good.<sup>60</sup> Wrongdoing is the misuse for an evil purpose of a power which belongs to man for the attainment of good. Because an offender has misused such a power, the offender deserves to be deprived of it or restrained in the use of it through imprisonment.<sup>61</sup>

Kant's view of punishment, as elaborated by Hegel and English Hegelians Bradley and Bosanquet, stressed two highly paradoxical ideas: first, that a criminal is honored by his punishment, since punishment is an implicit tribute to his status as a morally responsible person; and second, that the offender must have consented somehow to his own punishment as essential to his spiritual welfare.<sup>62</sup> Sir Walter Moberly notes the connection between the Kantian theory and two biblical passages:<sup>63</sup>

Whom the Lord loveth He correcteth; even as a father the son in whom he delighteth.<sup>64</sup>

If ye endure chastening, God dealeth with you as with sons . . . but if ye be without chastisement, whereof all are partakers, then are ye bastards, and not sons.<sup>65</sup>

Finally, Pope Pius XII suggested a necessary relationship between retribution and rehabilitation. The meaning and purpose of punishment are to bring the violator back into the order of duty by compelling the criminal to suffer.<sup>66</sup> Vindictive punishment helps the offender toward a definitive rehabilitation, "provided man himself does not raise barriers to its efficacy, which, indeed, is in no way opposed to the purpose of righting and restoring disturbed harmony."<sup>67</sup> Liberation from guilt ensues, and only then does the transgressor become reunited with his society and his God. In sum, the

60. ST. THOMAS AQUINAS, *SUMMA CONTRA GENTILES* bk. 3, ch. 145 (J. Rickaby trans. 1950).

61. Hawkins, *Punishment and Moral Responsibility*, 7 *MOD. L. REV.* 205, 208 (1944).

62. W. MOBERLY, *THE ETHICS OF PUNISHMENT* 113 (1968).

63. *Id.* at 114.

64. *Proverbs* 3:12.

65. *Hebrews* 12:7-8.

66. Pius XII, *Crime and Punishment*, 6 *CATH. LAW.* 92, 94 (1960).

67. *Id.* at 97.

traditional moral view of punishment assumes a rational and morally responsible offender, and an institution of criminal punishment that can offer the offender the opportunity to make himself morally whole, or at least to rectify (on some metaphysical level) the universal relations which the criminal has disturbed by his misdeed.

The traditional conception of retributive justice, then, is an idealistic one and intimately related to spiritual reform. Unfortunately, there are untold barriers to the spiritual and moral efficacy of vindictive punishment. To begin with, if we are concerned with the personality of the offender, should not punishment properly focus on rehabilitation rather than retribution? A.C. Ewing has argued so in terms of Kantian imperatives: "Retributive justice may be a very good thing, but the saving of souls is a much better thing."<sup>68</sup> Furthermore, considerations of public policy may be paramount in any particular sentencing decision, and even more important in a system of guidelines to be applied across the entire range of criminal acts and offenders subject to adjudication. Deterrence and incapacitation are almost always primary considerations in the imposition of criminal sanctions. However, inadequate resources and poor rehabilitative climates have defeated the therapeutic aims of traditional retributive justice, just as these problems have rendered scientific rehabilitation a failure as an operative principle.

The traditional expiatory form of retribution makes a further unrealistic assumption that the defendant will commit himself to moral reform. Moberly concludes: "In short, retribution, when fully understood, includes the moral amendment of the wrongdoer. Where there is no such amendment, retribution remains incomplete and unsatisfying."<sup>69</sup> The ability of punishment to reform presumes that the offender has some rudimentary conscience, some latent sense of guilt and some respect for the court which punishes him.<sup>70</sup> But here again, the present criminal justice system cannot promote the expiatory requirements of the retributive theory. In prison, the offender faces strong possibilities of homosexual rape, drug addiction, total demoralization and a stigma which may never depart. Typically, prisons offer little hope of amendment. They only exacerbate the alienation that the offender has experienced through the criminal act. On balance, incar-

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68. A.C. EWING, *THE MORALITY OF PUNISHMENT* 18 (1929).

69. W. MOBERLY, *supra* note 62, at 120.

70. *Id.* at 136.

ceration has the effect of excluding the criminal from truly reformatory influences and leaves the criminal angry, despondent, frighteningly impressionable and unregenerate.<sup>71</sup>

By and large, the claims of the traditional retributivists have been far too ambitious, just as the objectives of rehabilitation have proved unworkable in penal systems as we have come to know them. Furthermore, the nature of retributive theory in itself may place it outside the scope of legitimate social legislation. Jeffrie Murphy suggests that strong positive retributivism — the view that desert values function as the primary justifying reasons for punishment — does not amount to a goal which is the state's proper business to pursue. Instead, weak positive retributivism, or the view that retributive values function as secondary components of the general justifying aim of punishment, is the most that could ever be defended:

In constitutional terms, the pursuit of retributive values might represent a permissible or even rational state interest. It might be difficult to demonstrate, however, that the pursuit of such values could be a compelling state interest — the only kind of interest sufficient to justify the encumbrance of fundamental rights involved in the practice of punishment.<sup>72</sup>

Realistically, retributive purposes can properly serve only as subordinate principles to the justifying aims of punishment. Those aims must represent a compelling state interest in furtherance of the substantive criminal law (which must also pass constitutional muster), the breach of which has occasioned a penalty. The compelling state interest rightly encompasses nothing other than the goals of deterring the offender from future prohibited acts, of incapacitating him if it is necessary to prevent further criminal acts on his part, and of deterring others from illegal conduct.

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71. See *id.* at 137-38. Overcrowded and generally atrocious prison conditions also form strong arguments for the increased use of probation and alternative sentences. See Anderson, *Probation: Its Unfulfilled Potential*, 152 AMERICA 281 (1985); Andrews & Kanner, *Tailoring the Sentence to Fit the Criminal*, UPDATE ON LAW-RELATED EDUC., Winter 1982, at 18; Rothman, *supra* note 35.

72. Murphy, *Retributivism and the State's Interest in Punishment*, in CRIMINAL JUSTICE, *supra* note 26, at 156, 162.

### III. JUST DESERTS: INHIBITING CRIME PREVENTION

#### A. *Hedonism and Skepticism: Deforming Sentencing Policy*

Modern just deserts theorists ignore the realities of our legal and penal system to a degree not approached by their traditional counterparts and at a time when these realities should be all the more earnestly attended to. Just deserts advocates have thrown out the reformist aspect of retribution altogether and have fallen back on the mere disapproval of criminal conduct as sufficient grounds for punishment. Von Hirsch's statement of the theory of commensurate deserts is susceptible to this criticism.<sup>73</sup> Deriving a sanction proportionate to the crime committed from the assumption that most human behavior is volitional amounts to an incomplete and unsatisfying response. Current retributivist thought attempts to vindicate an ultimately hedonistic expression of society's disapproval and is thus fraught with moral skepticism just when the exigencies of criminal justice demand intelligent, pragmatic decisions from sentencing courts. Ethically, just deserts may amount to little more than a sophisticated way of licensing vengeance—hardly a basis for socially responsible sentencing practices.

The just deserts rationale is hedonistic in its focus on fulfilling the desires of the punishing society and in its apparent disregard for the broad consequences which the institution of criminal punishment holds for society itself. Moreover, just deserts reflects moral skepticism in its attempt to confer moral legitimacy to an impassioned response to a social problem.

John Dewey criticized Jeremy Bentham's brand of utilitarianism (particularly his description of welfare in units of pleasure and pain) for confusing utilitarianism with hedonism.<sup>74</sup> Dewey noted that John Stuart Mill "brought utilitarianism in closer accord with the unbiased moral sense of man-

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73. See *supra* note 31 and accompanying text. AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 145 (1971) presents a well-intentioned but likewise insufficient retributivist response to unbounded judicial discretion in sentencing. The authors suggest that the law should deal only with the individual's criminal behavior and ignore extralegal circumstances. See also A. DERSHOWITZ, FAIR AND CERTAIN PUNISHMENT 24 (1976). For a general discussion of retributivist responses to sentence disparity, see Forst, *Sentencing Disparity: An Overview of Research and Issues*, in SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY 15-21 (M. Forst ed. 1982) [hereinafter cited as SENTENCING REFORM].

74. J. DEWEY, THEORY OF THE MORAL LIFE 94-101 (1960).

kind when he said that 'to do as you would be done by and to love your neighbor as yourself, constitute the ideal perfection of utilitarian morality.'"<sup>75</sup> Avoiding a skeptical position, a morally just response to crime must take serious account of social welfare:

Since this hedonistic element is that which renders utilitarianism vulnerable in theory and unworkable in practice, it is significant to know that one conception of regard for social (that is widespread and impartially measured) welfare may be maintained as a standard of approbation in spite of historic utilitarianism's entanglement with an untenable hedonism. . . .

Institutions are good not only because of their direct contribution to well-being but even more because they favor the development of the worthy dispositions from which issue noble enjoyments.<sup>76</sup>

#### B. *Pragmatism and Progress in the Jurisprudence of Sentencing*

Curiously, the policies of just deserts appear to counsel a formalistic approach to sentencing — the kind of formalism against which pragmatic legal theorists reacted in the late nineteenth and early twentieth centuries.<sup>77</sup> Pragmatic philosophers rejected not only the metaphysical views (characteristic of expiatory retribution) postulating the existence of a reality beyond human experience, but also other formalistic methods relying on strict verbal solutions, *bad a priori* reasons, fixed principles, closed systems, and pretended absolutes and origins.<sup>78</sup> To the extent that just deserts theory imposes a sentence strictly from an assumption that a certain criminal action must meet with a certain predetermined sanction, that theory divorces the sentencing decision from the social realities which spawned the need to sentence the offender in the first place.

The theory also separates the field of sentencing from the social sciences and developing technology, in light of the fact that the chief attempt to implement scientific developments — rehabilitation programs in prisons — proved a misguided failure. Rehabilitation failed because prisons, as they

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75. *Id.* at 97.

76. *Id.* at 100-01.

77. See R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 26-28, 33, 136-75 (1982).

78. *Id.* at 31-33.

have been maintained in this century, are horrendously inappropriate vehicles for rehabilitating offenders. Nonetheless, the current state of affairs should by no means dissuade legislators and prison officials from pursuing alternative, non-treatment methods of removing tendencies toward criminal behavior.<sup>79</sup>

Dewey's writings provide a fruitful background for legislative and administrative efforts to improve the sentencing process. Dewey applied scientific method to ethics itself in order to arrive at a morally just course of action. Following Dewey's brand of pragmatism, we must look to the consequences of imposing a particular sentence in order to discover the significance of criminal punishment. Ultimately, morally just sentencing policies must be intelligent attempts to find proper means of dealing with offenders. Dewey's general theory of moral reconstruction can be tailored to broad sentencing schemes as well as individual sentencing decisions. It is at least a sound ethical starting point:

the primary significance of the unique and morally ultimate character of the concrete situation is to transfer the weight and burden of morality to intelligence. It does not destroy responsibility; it only locates it. A moral situation is one in which judgment and choice are required antecedently to overt action. The practical meaning of the situation — that is to say the action needed to satisfy it — is not self-evident. It has to be searched for. There are conflicting desires and alternative apparent goods. What is needed is to find the right course of action, the right good. Hence, inquiry is exacted: observation of the detailed makeup of the situation; analysis into its diverse factors; clarification of what is obscure; discounting of the more insistent and vivid traits; tracing the consequences of the various modes of action that suggest themselves; regarding the decision reached as hypothetical and tentative until the anticipated or supposed consequences which led to its adoption have been squared with actual consequences. This inquiry is intelligence. Our moral failures go back to some weakness of disposition, some absence of sympathy, some one-sided bias that makes us perform the judgment of the concrete case carelessly or perversely. Wide sympathy, keen sensitiveness, persistence in the face of the disagreeable, balance of interests enabling us to undertake the work of analysis and decision intelli-

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79. See F. CULLEN & K. GILBERT, *REAFFIRMING REHABILITATION* (1982).

gently are the distinctively moral traits — the virtues or moral excellencies.<sup>80</sup>

This theory argues strongly for individualized and flexible sentencing practices and for guidelines directed toward making those practices sound ones. To this end, sentencing policies must include an examination of all the relevant circumstances of a crime and the offender, judgment as to which elements of a particular case are worth addressing through the sentencing process, an explanation of the consequences of all available sentencing alternatives, and the realization that sentencing decisions do not definitively match an offender with the punishment he has merited, but are rather deliberate attempts to find the best way of dealing with offenders.

Robert Summers has classified Dewey—along with Oliver Wendell Holmes, Jr., Roscoe Pound, John Chipman Gray, Walter Wheeler Cook, Herman Oliphant and Felix Cohen—as a pragmatic instrumentalist. These theorists were pragmatic in their concern to serve practical ends through the complexities of the legal system.<sup>81</sup> For the most part, they believed that values in general and the goals of rules and other legal precepts stem from prevailing wants and interests which are evaluated in quantitative terms only. The general aim is to maximize the realization of as many wants and interests as possible at the least cost.<sup>82</sup> Justice Holmes expressed this conventionalist theory of value when he wrote that the “first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.”<sup>83</sup> Holmes’ view reflects the classical empiricism of the eighteenth century and the skepticism of David Hume.

In the absence of a commitment to intelligent use of sentencing, desert-based sentencing guidelines admit of an essentially skeptical view and fit well within Hume’s moral analysis. The value of the sentencing decision may be determined politically through sentiment, not reason: “Morals excite passions, and produce or prevent actions. Reason of itself is utterly unimportant in this particular. The rules of morality,

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80. J. DEWEY, RECONSTRUCTION IN PHILOSOPHY 163-64 (1920).

81. See R. SUMMERS, *supra* note 77, at 20-21.

82. *Id.* at 43.

83. O.W. HOLMES, THE COMMON LAW 41 (1881), *quoted in* R. SUMMERS, *supra* note 77, at 46.



therefore, are not conclusions of our reason."<sup>84</sup> For Hume, approval of a certain punishment would render it virtuous. This sympathy is objectified in artificial virtues, which become associationally linked with natural virtues. Natural virtues are those of which humans simply tend to approve. Moral significance arises in the criminal justice system when the instinctive desire to punish is transferred from natural to artificial virtues, supported by sympathy for the general good. It follows that punishment, like justice, is a moral virtue, an artificial invention for the good of mankind.<sup>85</sup>

Like Hume, the just deserts theorists have subordinated conceptual empiricism to an inductive skepticism intended to raise doubts concerning the operations of human understanding.<sup>86</sup> However useful and interesting these doubts may be with regard to the working of the human imagination, moral skepticism hardly provides a measure of guidance in the sentencing decision. A sentencing policy based on the mere approval of certain punishments for certain crimes would not begin to address the problems of overcrowded prisons, recidivism, poor administration, and other problems which beset the current criminal justice system. Just deserts introduces skepticism into sentencing policy. A more pragmatic approach could conceptually eliminate the concern over unwarranted sentence disparity *and* begin to deal with ways to improve the penal system from the vantage point of the sentencing judge. A good first step for policymakers would be to formulate judgments about the perceived goals of the sentencing process — to order the purposes of sentencing and thereby express judgments about those purposes in light of society's experience with their implementation. As Dewey proposes: "*Judgments about values are judgments about the conditions and the results of experienced objects; judgments about which should regulate the formation of our desires, affections and enjoyments.*"<sup>87</sup>

Moreover, in a pragmatic sentencing scheme, the purposes of sentencing will not serve as fixed ends for the sentencing process now and for all time. "Ends are foreseen consequences which arise in the course of activity and which are

84. D. HUME, A TREATISE OF HUMAN NATURE 457 (L.A. Selby-Bigge 2d ed. 1978).

85. *See id.* at 477-84.

86. On Hume's "doxastic empiricism" and his consequent elevation of the imagination, see R. FOGELIN, HUME'S SKEPTICISM IN THE TREATISE OF HUMAN NATURE 53-63 (1985).

87. J. DEWEY, THE QUEST FOR CERTAINTY 265 (1929).

employed to give activity added meaning and to direct its further course. They are in no sense ends of action. In being ends of *deliberation* they are redirecting pivots in action."<sup>88</sup> The purposes of sentencing provide ways of defining, limiting and guiding sentencing practices, and the further classifications in the sentencing guidelines system, viewed pragmatically, offer specific guidance in dealing with individual crimes and offenders. "Classifications *suggest* possible traits to be on the lookout for in studying a particular case; they suggest methods of action to be tried in removing the inferred causes of ill. They are tools of insight; their value is in promoting an individualized response in the individual situation."<sup>89</sup>

In this manner, sentencing guidelines can function as vehicles for improving the efficacy of criminal punishment vis-à-vis perceived social objectives, with a particular concern for individualized sentences. The very existence of the guidelines and the requirement that the sentencing judge must act in light of the purposes of sentencing will almost certainly curtail unwarranted sentence disparity. However, the Sentencing Reform Act necessarily sets the stage for far more significant legal developments. The Act states the purposes of sentencing and provides for appeal from sentences which violate the law, deviate from the guidelines, or are not addressed within the scope of the guidelines.<sup>90</sup> The Act contemplates the beginnings of a federal jurisprudence of sentencing. In pragmatic terms, the foregoing sentencing practices may be refined through judicial deliberation. Sentencing decisions will produce rules to supplement the Sentencing Reform Act and the work of the Federal Sentencing Commission. Courts will reevaluate the principles of sentencing as the ultimate means of judging suggested courses of action.<sup>91</sup>

### C. *Implementing the Guidelines: The Judicial Role*

Determinate sentencing policies, therefore, may be based on politically determined "deserved punishments", but cannot properly hamper the judicial role in dispensing individualized sentences. The advocates of rehabilitation have argued that the sentencing process should focus on the offender rather than the criminal act.<sup>92</sup> A suitable justification for

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88. J. DEWEY, HUMAN NATURE AND CONDUCT 225 (1930).

89. J. DEWEY, *supra* note 80, at 169.

90. 18 U.S.C.A. § 3742 (West 1985).

91. See J. DEWEY, *supra* note 74, at 141.

92. Fogel, *supra* note 41, at 374.

punishment should take both into account. The sentencing court must support its decision not simply in terms of a prescribed, "deserved" punishment, but more broadly in terms of the consequences that that sentence will hold for the offender, for those immediately affected by his behavior, for the penal system, and for the prospective social needs and goals to be served by criminal justice. Walter Evans and Frank Gilbert have described the importance of the judicial role in unqualified terms:

The court is the institution to which society brings its ills for treatment and resolution, where justice is prescribed both for society and for the individual. To the extent that the court is limited in its discretion, it is prevented from achieving that goal. It is simply not possible to legislate specific solutions for all peculiarities and outcroppings of mankind's social problems. Any attempts to do so may well create a new problem of disparity through an inability to dispense justice in widely varying circumstances. Only through an insightful understanding of both the offense and the offender by an impartial observer can safe, intelligent decisions be made. Arbitrary, mandatory sanctions portend a frightening failure for a civilized society.<sup>93</sup>

Furthermore, D.J. Galligan has argued that a strict just deserts approach will keep the range of penalties high in the interests of uniformity, and that many non-dangerous offenders will get longer sentences in order to assure that the dangerous offender is severely punished. Also, such an approach would remove a judge's discretion to treat offenders toward the bottom of the offense category more leniently than their deserts might require, in the hope that they might be diverted from a life of crime and incarceration. In short, just deserts might increase significantly the prison population.<sup>94</sup>

Congress has recognized that sentencing guidelines serve to structure judicial discretion, not to supplant it. The Senate Committee on the Judiciary addressed this matter quite succinctly:

The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant

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93. Evans & Gilbert, *The Case for Judicial Discretion in Sentencing*, 61 JUDICATURE 66 (1967).

94. Galligan, *Guidelines and Just Deserts: A Critique of Recent Trends in Sentencing Reform*, 1981 CRIM. L. REV. 297, 304-05.

factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences. Indeed, the use of sentencing guidelines will actually enhance the individualization of sentences as compared to [previous] law.<sup>95</sup>

Such language hardly evokes the spirit of just deserts, which limits the inquiry into the defendant's individual circumstances to criminal history, chiefly on the grounds that it is offensive to punish a criminal *more severely* in respect of his home life or his employment or educational status (a possible effect of rehabilitation).<sup>96</sup> However, there is just as strong a possibility that such factors could militate in the other direction and reduce the severity of the penalty. In any case, they help to form a clear picture from which the sentencing judge can render a fair and impartial decision within coherently formulated sentencing goals.

While the philosophy of just deserts may have generated the reform which has culminated in the formation of the Sentencing Commission, retribution should play only a subordinate role when the purposes of punishment are effected in the guidelines and as the sentencing judge sets out to apply those guidelines. The traditional retributive theory manifests at least a formal respect for rights, dignity and autonomy. However, Marxian critics have successfully exposed the inapplicability of this formal respect in the world as we know it:<sup>97</sup> "Moral relations and moral restraint are possible only in genuine communities characterized by bonds of sympathetic identification and mutual aid resting upon a perception of common humanity . . . . In the absence of reciprocity in this rich sense, moral relations among men will break down and criminality will increase."<sup>98</sup> Indeed, idealistic retribution reflects a Christian world view that has not translated well in capitalist society. Retribution will not suffice as an all-encompassing justificatory purpose of sentencing.

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95. SENATE COMM., *supra* note 15, at 52-53, 55-56.

96. A. VON HIRSCH, *supra* note 31.

97. J. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973).

98. *Id.* at 235 (paraphrasing Willem Bongers's *Criminality and Economic Conditions* (1916)).

The retributivist's difficulty is that he wants the crime itself to indicate the amount of punishment, which it cannot do unless we first assume a scale of crimes and penalties. But on what principles is the scale to be constructed, and how are new offenses to be fitted into it? These difficulties admit of no solution unless we agree to examine the consequences to be expected from penalties of different degrees of severity: i.e., unless we adopt a utilitarian approach.<sup>99</sup>

The best approach is more appropriately termed a pragmatic or scientific one — one which will foster continuing judicial inquiry into the consequences of certain kinds and degrees of punishment. Legislators, though, seem to have embraced just deserts as part of the disassociation from the treatment model. The complex problems in sentencing demand a greater degree of legislative rationality and candor, as well as a comprehensive evaluation of the alternative sentencing rationales.

#### IV. STRUCTURING THE PURPOSES OF SENTENCING TO PROMOTE THE INTEGRITY OF THE CRIMINAL LAW

##### A. *The Case for Limiting Retributivism*

The more sensitive philosophical inquiries of recent times have subordinated retribution to the forward-looking principles of deterrence and incapacitation. John Braithwaite has insisted that there is a "fundamental irony" between such utilitarian policies and just deserts: while the latter sets out with the stronger preoccupation with justice, empirical realities make retribution in practice the source of profound injustice.<sup>100</sup> "The difference is that whereas our attainment of utilitarian goals is very imperfect, the quest for just deserts is worse than imperfect; it is counterproductive. Social structural realities allow us to impose desert only when desert is least deserved."<sup>101</sup> While this critique may be somewhat overstated, it underscores the need for principled restraint in sentencing—applying the utilitarian principle of parsimony and choosing the least punitive sanction necessary to achieve defined social purposes.<sup>102</sup> By itself, the expiation theory treats

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99. S. BENN & R. PETERS, *THE PRINCIPLES OF POLITICAL THOUGHT* 219 (1965).

100. Braithwaite, *Challenging Just Deserts: Punishing White Collar Criminals*, 73 J. CRIM. L. & CRIMINOLOGY 723, 724 (1982).

101. *Id.* at 758.

102. See N. MORRIS, *THE FUTURE OF IMPRISONMENT* 60-61 (1974).

all crimes as if they were financial transactions. Herbert L. Packer condemns the idea that it is simply right to inflict punishment on offenders in payment for their misdeeds as "nothing more than dogma, unverifiable and on its face implausible"<sup>103</sup> — whether that notion stems from mere denunciatory retribution or from expiation.

There are strong arguments for employing just deserts as a limiting principle in an operative statement of sentencing rationales. H.L.A. Hart has suggested that retribution is important primarily in the distribution of punishment, rather than as a general justifying aim; that is, retribution helps to determine who may be punished and to what extent.<sup>104</sup> Hart asserts that "there is, for modern minds, something obscure and difficult in the idea that we should look in choosing punishment to some right intrinsic relation which it must bear to the wickedness of the criminal's act, rather than the effect of the punishment on society and on him."<sup>105</sup> However, employing the retributive impulse as a limit to the punishment that society may inflict to prevent future crimes may insure that an offender receives no greater penalty than he has merited, while desirable social objectives are pursued. The reformative aspect of traditional retribution, in comparison to the policies of deterrence and incapacitation, simply does not answer as a forward-looking, action-guiding principle that might elevate retribution to a central justifying aim of sentencing.

In his book, *Madness and the Criminal Law*, Norval Morris takes Hart's observations one step further and argues that justice does not in fact "require identity or equality of punishment of the equally deserving; it requires only that they be punished within a just range of punishments fitted to their desert."<sup>106</sup> As he downplays the notion that like cases should be treated alike, Morris allocates the purposes of punishment through a highly plausible framework and argues that utilitarian values of deterrence are defining purposes of punishment, whereas desert is a limiting principle which prescribes the other bounds of leniency and severity.<sup>107</sup> Equality of sen-

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103. H. PACKER, *supra* note 58, at 38-39.

104. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 8-13 (1968).

105. *Id.* at 163.

106. N. MORRIS, MADNESS AND THE CRIMINAL LAW 181 (1982).

107. *But see* SENTENCING IN A RATIONAL SOCIETY, *supra* note 26, at 21. Walker rejects retribution as a limiting principle because he sees the utilitarian humanitarian principle (the principle of parsimony) as a more felicitous limiting principle and believes that there is little point in adopting

tencing, however, is but a guiding principle which must give way to limiting and defining considerations when there is conflict among such principles.<sup>108</sup>

However, Morris does not explain fully his distinction between defining and limiting principles of punishment. Semantically, the two terms are virtually indistinguishable, and it may well be said that just deserts "defines" punishment by reference to the gravity society imputes to a particular offense. Just deserts also provides a practical definition of punishment by setting limits on the use of a particular sanction.

### B. *Primary Justifications for Punishment: Deterrence and Incapacitation*

Appropriately termed, deterrence is a justifying principle of punishment, as Hart, Packer and Walker have recognized. In its broad sense, deterrence refers to the inhibiting effect that punishment, either actual or threatened, will have on the actions of those who are otherwise disposed to commit crimes. In turn, the concept of deterrence is usually divided into two separate aspects: after-the-fact inhibition of the person being punished, or special deterrence, and inhibition in advance by threat or example—that is, general deterrence.<sup>109</sup> According to Packer, general deterrence

is the only utilitarian goal of punishment that affords a generalized *a priori* justification for the infliction of punishment. It is the only goal we can accept in advance for punishing all crimes committed by all persons, without scrutinizing the facts of the particular case in which punishment may be imposed . . . . In contrast, intimidation [or special deterrence], incapacitation, and rehabilitation are all partial and fragmentary goals, and their relevance in any given case is always at issue.<sup>110</sup>

But unlike the tenuous rehabilitation rationale, special deterrence and incapacitation are directly related to the pervasive objective of crime control. Their application is not directly appropriate to all cases; they seem peculiar grounds for send-

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both. But insofar as retribution is a legitimate purpose of sentencing, it finds its proper expression as a limiting principle (along with parsimony in punishment and also restitution, where possible) in the structure of sentencing purposes.

108. N. MORRIS, *supra* note 106, at 182-83.

109. H. PACKER, *supra* note 58, at 39.

110. *Id.* at 63.

ing a perjurer or a tax evader to prison, for example,<sup>111</sup> since imprisonment itself cannot prevent repeat offenses in these cases. Generally, though, the need to restrain the offender through the intimidation of punishment as well as through the very fact of the criminal sanction applies to the imposition of sentences for all offenses—subject to the constraints of just deserts, to the utilitarian principle of parsimony, and to possibilities for restitution. This focus brings special deterrence and incapacitation within the primary justification of sentencing, pursuant to the essentially preventive scheme of the criminal law. After all, crime control is the focal point of the Comprehensive Crime Control Act of 1984.<sup>112</sup> In 1968, Hebert Packer fruitfully expounded the preventive function of the state:

Law, including the criminal law, must in a free society be judged ultimately on the basis of its success in promoting human autonomy and the capacity for individual human growth and development. The prevention of crime is an essential aspect of the environmental protection required if autonomy is to flourish. It is, however, a negative aspect and one which, pursued with single-minded zeal, may end up creating an environment in which all are safe but none is free. The limitations included in the concept of culpability are justified not by an appeal to the Kantian dogma of "just deserts" but by their usefulness in keeping the state's powers of protection at a decent remove from the lives of its citizens.<sup>113</sup>

The limits on the utilitarian goals of punishment set what Packer calls "an integrated theory of criminal punishment"<sup>114</sup> apart from the strict utilitarian position that punishment must simply achieve more benefit than the harm it produces; it must have a comprehensive purpose to be considered just.<sup>115</sup>

A theory of criminal punishment which focuses on the preventive aspect of the criminal law and allows for anisomorphic sentences surpasses the traditional retributive theory in moral value, particularly as it seeks to effect a flexible and pragmatic concern for the social welfare in the sentencing

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111. *See id.* at 52.

112. Pub. L. No. 98-473, 98 Stat. 1837 (1984).

113. H. PACKER, *supra* note 58, at 65-66.

114. *Id.* at 62-70.

115. *See* F. ZIMRING, PERSPECTIVES ON DETERRENCE 21 (1971).



process. A system which provides for mercy and clemency over and above justly deserved penalties will promote "the embracing and pervasive charity of the Christian ethic"<sup>116</sup> far better than any attempt to emulate the Kantian hierarchies for the purposes of confronting practical social problems. Morris alludes to the parable of the prodigal son in *Luke* 15:11-32 and to Pope John Paul II's recent commentary:

The prodigal son, having wasted the property he received from his father, deserves—after his return—to earn his living by working in his father's house as a hired servant and possibly, little by little, to build up a certain provision of material goods, though perhaps never as much as the amount he had squandered. This would be demanded by the order of justice.<sup>117</sup>

### C. *The Limits of Restitution and Desert*

The Pope's words evoke another concept which should not be ignored in the discussion of sentencing rationales—restitution.<sup>118</sup> Section 3556 of the Sentencing Reform Act authorizes restitution orders from the sentencing court. However, restitution demands more fundamental recognition as a sentencing principle. Restitution can provide constructive alternatives to prison terms,<sup>119</sup> especially since the Supreme Court has held that a law which imposes a jail term for people who cannot afford to pay the statutory fine is unconstitutional.<sup>120</sup> For example, a creative sentence might allow a burglar to retain his job or to perform community service so he might earn enough to support his family and to atone for the damage he has caused. Inside prisons, restitutionary programs could aid the penal system in achieving its rehabilitative purposes as part of prison industries. At any rate, restitution is an important limiting principle of criminal justice.

Sentencing guidelines based on the just deserts model will serve as limitations from which the sentencing judge should not depart except to serve the purposes of sentencing

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116. N. MORRIS, *supra* note 102, at 206.

117. *Id.* at 205 (quoting John Paul II, *Rich in Mercy (Dives in Misericordia)* (1980)).

118. See C. ABEL & F. MARSH, *PUNISHMENT AND RESTITUTION* (1984). The authors argue ingeniously and persuasively for a criminal justice system based on restitution.

119. Andrews & Kanner, *supra* note 71, at 18.

120. *Tate v. Short*, 401 U.S. 395 (1971).

in situations not adequately comprehended by the guidelines. Such guidelines may often lack precision, but they ground the sentencing system in the historical facts of offenses and in the offenders' criminal record—information that the average citizen can understand and that Courts of Appeals can verify and evaluate. By contrast, an incapacitative guideline system focuses on propensities for future conduct and employs a technology that is becoming increasingly incomprehensible to citizens and courts alike.<sup>121</sup> The Minnesota sentencing guidelines are based on the desert model and are fine exemplars for the Federal Sentencing Commission's task. The presumptive sentences, calculated from the severity score ascribed to the offense and considered with the defendant's criminal history, are attempts to arrive at retributive limits to punishment.<sup>122</sup>

#### D. *An Amendment to Section 3553(a)(2)*

More essential to the equitable administration of criminal justice than the existence of the guidelines is a rationally ordered statement of the purposes under which the court is to apply the guidelines and hand down a determinate sentence. To this end, section 3553(a)(2) should be amended to direct the court, in determining the particular sentence to be imposed, to consider:

- (2) the purpose of its sanctions in affording adequate deterrence to criminal conduct and in protecting the public from further crimes of the defendant, as limited by the need to—
  - (A) punish the defendant commensurately with the seriousness of the crime;
  - (B) choose the least punitive sanction necessary to

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121. Ozanne, *Judicial Review: A Case for Sentencing Guidelines and Just Deserts in Sentencing Reform*, in *SENTENCING REFORM*, *supra* note 73, at 177, 206.

122.

The offense of conviction determines the appropriate severity level on the vertical axis. The offender's criminal history score . . . determines the appropriate location on the horizontal axis. The presumptive fixed sentence for a felony conviction is found in the Sentencing Guidelines Grid cell at the intersection of the column defined by the offense severity level. The offenses within the Sentencing Guidelines Grid are presumptive with respect to the duration of the sentence and whether imposition or execution of the felony sentence should be stayed.

Minn. Guidelines, *supra* note 50, at 264.

achieve the purposes of deterrence and incapacitation or of any other social policy to be served by the criminal justice system; or

- (C) provide restitution to victims of the defendant's crime.

This section now establishes deterrence and incapacitation as the justificatory purposes of sentencing, with just deserts, the principle of parsimony and restitution as explicit limitations on the distribution of punishment. The effect of each limitation should be absolute. For instance, should restitution dictate a far less severe punishment than either of the others, then that least severe alternative must be selected.

Furthermore, the guiding principle of equality or isonomy, is clearly expressed in section 3553(a)(6), which addresses "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." However, the Commission would do well to clarify the status of equality as essentially a guiding consideration and declare rehabilitation of the defendant a guiding principle apart from the immediate purposes of sentencing in section 3553(a)(2). In the context of sentencing and the criminal justice system at large, rehabilitation might be understood best as the effect of punishment in turning the offender away from criminal activity. This effect is none other than the aim of special deterrence. In appropriate cases, it may prove useful for penal agencies to approach the effect in terms of treatment and rehabilitation. Hence, rehabilitation is a policy which might be used in selected cases to supplement the comprehensive justificatory and limiting principles of punishment.

Deterrence and incapacitation have assumed the primary position among sentencing rationales because these objectives are the chief ways in which sentencing can contribute to crime control. One may question this outcome in view of the fact that empirical evidence has not soundly confirmed the effectiveness of either deterrent or incapacitative policies in reducing crime rates.<sup>123</sup> However, it is important to separate the empirically observable efficacy of the deterrence doctrine<sup>124</sup> in the present criminal justice system from the role

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123. See PANEL ON RESEARCH ON DETERRENT AND INCAPACITATIVE EFFECTS, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978).

124. See Morris & Miller, *Predictions of Dangerousness*, 6 CRIME & JUST. 1 (1985). The authors indicate the pervasiveness of prediction in the crimi-

which legislators may freely ascribe to it in prospective social policy.<sup>125</sup> Criminal prohibitions (such as the one against murder) as well as prescriptions (such as the burden of filing a tax return) share the aim of compelling socially desired behavior and discouraging conduct which contradicts the peaceful operation of a humane and morally upright society.

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nal justice system and sentencing in particular, and establish a preference for actuarial predictions over clinical ones which rely on intuitive judgments by psychiatric professionals. Actuarial predictions may be used in sentencing, subject to Morris' limiting retributivism, "as a verifiable, scientific tool to distinguish between people already subject to the state's power on other grounds." *Id.* at 45. See also PUNISHMENT, DANGER AND STIGMA, *supra* note 26, at 112-13.

Morris and Miller note that in *Barefoot v. Estelle*, 463 U.S. 880 (1983) (psychiatric testimony of dangerousness admissible under Texas death penalty statute), both the Supreme Court majority and dissentients accepted the limits on predictive accuracy in J. MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* (1981): "the 'best' clinical research currently in existence indicates that *psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past . . . and who were diagnosed as mentally ill.*" *Id.* at 47-49, quoted in *Barefoot*, 463 U.S. at 900 n.7.

See also J. FLOUD & W. YOUNG, *DANGEROUSNESS AND CRIMINAL JUSTICE* (1981); J. GIBBS, *CRIME, PUNISHMENT, AND DETERRENCE* (1975).

Some recent medical studies have suggested that at least 90% of excessively violent persons are afflicted with brain dysfunction and neurological defects, and that predictions of dangerousness may have legitimate bases in strictly biological evidence. *N.Y. Times*, Sept. 17, 1985, at A17, col. 1.

125. This point also indicates why strict economic approaches to criminal justice have not gained much credence from policymakers. For example, Richard Posner's positivist approach purposely excludes moral costs. He assumes that criminal punishments are probability-scaled for efficiency and that they should reflect the uncertainty of apprehension and conviction for each particular crime. In particular, where the probability of apprehension and conviction is close to zero, penalties should be fixed far below the cost of the offense regardless of the proportionality between crime and punishment. R. POSNER, *THE ECONOMIC ANALYSIS OF LAW* 167 (2d ed. 1977).

Much of the impersonality of the economic view flows from its peculiar conceptual distinction between crimes and torts. Supposedly, tortfeasors are more easily identified and sued than criminals are apprehended and indicted. Therefore, a measure of punishment far beyond the compensation of victims of crimes is required. This reasoning has been sharply criticized: "In exchange for our credulity we are offered a panorama of the law, both civil and criminal, which totally suppresses its moral values and elevates the maximization of cash value to the position of the legal system's sole *raison d'etre*." Adelstein, *Institutional Functions and Evolution in the Criminal Process*, 76 *Nw. U.L. REV.* 1, 61 (1981). For a discussion of libertarian views on the tort-crime distinction, see Drane & Neal, *On Moral Justifications for the Tort/Crime Distinction*, 68 *CAL. L. REV.* 398 (1980).

The federal sentencing reform is part of a comprehensive crime control act. Rationally consistent sentencing principles should at the very least conform to those aims which motivate the substantive provisions of the criminal law—namely, the means of crime prevention. Crimes are not denominated as such because society feels that offenders should be punished; rather, society sanctions criminal behavior in order to further goals otherwise impeded by such behavior. A criminal, then, should be punished primarily because his behavior must be prevented, and not because he simply deserves to be punished. An arsonist should be sent to jail not to appease a collective conscience which has somehow determined that he has merited incarceration, but ultimately to prevent property from being burned up intentionally all over town. The connection between igniting buildings and a prison term is nowhere to be found in logic, whereas it is quite logical that the threat and actuality of punishment will curtail future occurrences of arson. Whether society realizes this effect is another story and depends on factors which cannot be discerned readily though positive analysis, let alone be brought about through prospective legislation.

Nevertheless, legislators can attempt forthrightly to order the purposes of sentencing so as to indicate a sincere commitment toward implementing sentencing policy rationally, fairly, and in direct conjunction with crime prevention. For if the purposes of sentencing are randomly selected, sentencing practices might as well be too.

The purposes of punishment expressed in the proposed amendment reflect the concern that sentences bear a rational relationship to crime control but burden the offender no more or less than justice, tempered by mercy, demands in light of his transgression.<sup>126</sup> The statement recognizes what sentencing policy can feasibly achieve and what it should entertain only secondarily. Hence, before the United States Sentencing Commission promulgates measures to ensure more equitable and more responsible sentencing practices, it might do well to adopt such a realistically ordered statement of the purposes of sentencing so that federal sentencing judges and all connected with the sentencing process will understand their functions clearly and act accordingly.

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126. For a discussion of the deterrence rationale in the context of crime prevention and social control, see F. ZIMRING & G. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* (1973).

## V. CONCLUSION

The Sentencing Reform Act represents Congress' attempt to instill coherence among sentencing practices, and the guidelines to be developed by the Federal Sentencing Commission will provide a practical means to that goal. Beyond the guidelines, Congress has laid the seeds for a new jurisprudence of sentencing by stating the purposes of sentencing and requiring that the guidelines adhere to those purposes.

In view of the ponderous mandate which the new criminal law propounds, the Sentencing Commission should reconsider the stated purposes of sentencing (retribution, deterrence, incapacitation and rehabilitation) in light of what criminal punishment can and should accomplish, and what it cannot and should not. The purposes of sentencing should be ordered to reflect that society's punishment is justified primarily through its interest in deterring offenders (potential and convicted) from crime and in incapacitating those offenders who present a risk of harm to society if they are left unfettered. These concerns are implicit in the substantive criminal law and merit foremost attention in the sentencing decision. The concept of desert is denoted in presumptive sentences and serves as a limitation for the imposition of penalties for particular criminal acts and offenders. The utilitarian principle of parsimony and opportunities for restitution are likewise boundaries beyond which an essentially disutilitarian sentence should not stray. However, the notions that like offenders be treated alike and that there be a link between punishment and rehabilitation are appropriate guiding considerations, but these may be cast aside where they conflict with the requirements of justice in a particular case, and especially where they defeat the pervasive social objective of crime control.

Within this theoretical framework, the sentencing guidelines and other reforms within the Act can operate together as a pragmatic enterprise which can accommodate society's need to vindicate the institution and practice of punishment, along with the desire to morally rehabilitate offenders, without forfeiting the aim of doing justice for the individual offender in each case.

