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# Reconsidering Rehabilitation

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## RECONSIDERING REHABILITATION

MICHAEL VITIELLO\*

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## I. INTRODUCTION

In 1972, the *New York Times* quoted the New York City Correction Commissioner as follows: " 'All men are redeemable. Every man can be rehabilitated, and it's up to us in the community and in the field of criminal justice to see that this is done.' " <sup>1</sup> Today, few public officials would make such a statement. <sup>2</sup> Further, few corrections officials consider themselves in the business of rehabilitating offenders.

Beginning in the 1960s and culminating in the 1970s, influential judges <sup>3</sup> and scholars <sup>4</sup> urged the abandonment of rehabilitation as a goal of punishment. Critics focused on both the philosophical and the factual failures of rehabilitation. They challenged the underlying assumption of rehabilitation that criminals were sick and in need of treatment. They criticized the practices spawned by the model, like indeterminate sentencing that allowed incarceration as long as necessary to "cure" the offender. They urged the abandonment of parole because it led to uncertainty about an actual release date and to unfairness since parole decisions were not based on meaningful guidelines. Critics frequently cited studies of rehabilitation programs and urged that rehabilitation did not work. <sup>5</sup>

In less than two decades, almost everyone involved in the criminal justice system has rejected the rehabilitative ideal, described less than twenty years ago as the predominant justification of punishment. <sup>6</sup> By the mid-1980s, a major criminal law

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1. Tolchin, *Malcolm, a Black, Named Correction Chief by Mayor*, N.Y. Times, Jan. 20, 1972, at 1, reprinted in M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 91 (1973).

2. President Bush's use of the Willie Horton issue in his presidential campaign demonstrates the public's view of rehabilitation and the potential political cost of advocating early release for criminal offenders. For a discussion of the role of the Willie Horton advertisements in the 1988 presidential election campaign, see J. GERMOND & J. WITCOVER, *WHOSE BROAD STRIPES AND BRIGHT STARS?: THE TRIVIAL PURSUIT OF THE PRESIDENCY*, 1988, at 10-12 (1989) (describing the Bush campaign's use of its perception of Governor Dukakis as soft on crime).

3. See, e.g., M. FRANKEL, *supra* note 1, at 86-102.

4. See generally J. FEINBERG, *DOING AND DESERVING JUSTICE* (1970); R. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* (1979); THE TWENTIETH CENTURY FUND TASK FORCE ON CRIM. SENTENCING, *FAIR AND CERTAIN PUNISHMENT* (1976) [hereinafter *FAIR AND CERTAIN PUNISHMENT*]; A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976).

5. See discussion *infra* notes 55-111 and accompanying text.

6. W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 23 (1972) ("There has been more of a commitment to the 'rehabilitative ideal' in recent years than to other theories of punishment.") (citation omitted).

treatise concluded that "retribution . . . 'is suddenly being seen by thinkers of all political persuasions as perhaps the strongest ground . . . upon which to base a system of punishment.'"<sup>7</sup>

Critics of rehabilitation have succeeded in the legislature as well. Initially begun in the late 1970s, efforts to abandon indeterminate sentences and parole succeeded in 1984 when Congress enacted the Sentencing Reform Act,<sup>8</sup> which set up a federal sentencing commission to promulgate sentencing guidelines. Similar guidelines were already in place in a number of states.<sup>9</sup> Several states have even enacted laws making parole unavailable for those convicted of certain offenses, thereby lengthening the minimum sentence to be served.<sup>10</sup>

This Article urges that we rethink our rejection of the rehabilitative ideal. In the first section, I review some of the major texts that led to the abandonment of the rehabilitative ideal and highlight the major arguments against the rehabilitative model. In the second section of the Article, I challenge the factual assertion that rehabilitation does not work. An emerging body of expert opinion demonstrates that the picture is more complex than portrayed by those who urged the abandonment of rehabilitation and parole. In fact, rehabilitation works in certain settings with some offenders. In the third section of the Article, I attempt to make a positive case for rehabilitation and parole. Critics of the rehabilitative model equated it with a deterministic medical model, its modern manifestation, and argued that it was inconsistent with other justifications of punishment. This Arti-

7. W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 26 (2d. ed. 1986) (quoting Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 784).

8. The Sentencing Reform Act of 1984 was enacted as chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988 (1984) (codified as amended at 18 U.S.C. §§ 3551-3586, 3621-3625, 3742 (1988) & 28 U.S.C.A. §§ 991-998 (West Supp. 1990)).

9. See, e.g., MINN. STAT. ANN. § 244.09 (West Supp. 1989); WASH. REV. CODE ANN. § 9.94A.010-.910 (1988 & Supp. 1989); see also R. SINGER, *supra* note 4, at 137-94 (canvassing state sentencing reform).

10. See, e.g., LA. REV. STAT. ANN. § 40:966 (West 1989) (life imprisonment for distribution of heroin without benefit of parole); MONT. CODE ANN. § 45-9-101 (1990); see also R. SINGER, *supra* note 4, at 57-58 (canvassing state sentencing reform, he observes that "[e]ven a casual glance at the statutes that have already been passed in some states . . . will demonstrate the acuity of those who mistrust legislative sentencing" because legislators are likely to enact Draconian provisions to assure re-election), 137-94. Some scholars warned that urging sentencing reform based on a theory of just desert would give legislatures an invitation to increase punishment. See, e.g., Clear, *Correctional Policy, Neo-Retributionism and the Determinate Sentence*, 4 JUST. SYS. J. 26 (1978).

cle argues that the rehabilitative model, as demonstrated by its origin in Quaker moral thought, is not synonymous with the medical model that led to its excesses. I argue that punishment and human transformation or rehabilitation are not philosophically incompatible. Critics of rehabilitation argued correctly that we imprison for social goals other than concern for the incarcerated.<sup>11</sup> To recognize that we punish for purposes other than rehabilitation, however, is not to admit that rehabilitation or transformation of a prisoner is irrelevant to how long we continue to punish that person. This Article urges that we reconsider rehabilitation, not as a justification for punishment, but more modestly, as relevant to how long we punish a reformed person. Further, I conclude that leaving open the possibility for the transformation or reform of a prisoner is consistent with our most fundamental moral and religious principles.

## II. THE ATTACK ON THE REHABILITATIVE MODEL

In the first edition of LaFave and Scott's criminal law treatise, published in 1972, the authors stated that "[t]here has been more of a commitment to the 'rehabilitative ideal' in recent years than to other theories of punishment."<sup>12</sup> Retribution was in disrepute: "This is the oldest theory of punishment, and the one which is least accepted today by theorists (although it still commands considerable respect from the general public)."<sup>13</sup>

A mere fourteen years later, Professor LaFave wrote that "skepticism regarding the rehabilitative model began developing in the mid-1960's, and about ten years later there came 'an explosion of criticism . . . calling for restructuring of the theoretical underpinnings of the criminal sanction.'"<sup>14</sup> Of retribution, he now wrote that "[a]lthough retribution was long the theory of punishment least accepted by theorists, it 'is suddenly being seen by thinkers of all political persuasions as perhaps the strongest ground . . . upon which to base a system of punishment.'"<sup>15</sup>

The change in our discourse about punishment was not merely the result of a hard political turn to the right. Many

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11. See, e.g., Gaylin & Rothman, *Introduction* to A. VON HIRSCH, *supra* note 4, at xxxviii-xxxix; N. MORRIS, *THE FUTURE OF IMPRISONMENT* 14-15 (1974).

12. W. LAFAVE & A. SCOTT, *supra* note 6, at 23 (citation omitted).

13. *Id.* at 24.

14. W. LAFAVE & A. SCOTT, *supra* note 7, at 28-29 (omission in original) (quoting Gardner, *supra* note 7, at 781).

15. *Id.* at 26 (quoting Gardner, *supra* note 7, at 784).

conservatives were no doubt delighted when they were joined by liberals and radicals in calling for the abolition of the rehabilitative model.<sup>16</sup> For example, Senator Kennedy wrote in 1978 that “[s]entencing in America today [under a scheme dominated by a rehabilitative philosophy] is a national scandal. Every day our system of sentencing breeds massive injustice.”<sup>17</sup> Kennedy’s statement echoed the strong indictment found in the radical Quaker document *Struggle for Justice*.<sup>18</sup> Despite the Quakers’ early role in establishing the rehabilitative model in America, the authors wrote that “[a]fter more than a century of persistent failure, this reformist prescription is bankrupt.”<sup>19</sup>

The critique of the rehabilitative model focused on a number of its manifestations: “The objects of this attack are sentencing discretion, the indeterminate sentence, the parole function, the uses of probation in cases of serious criminality, and even allowances of ‘good time’ credit in the prisons.”<sup>20</sup> By the late 1970s, a startling number of books and articles endorsed a retributive, just-deserts model of punishment and rejected the rehabilitative model.<sup>21</sup> Authors disagreed about a variety of themes, including whether an offender’s background was relevant to measure his culpability, whether just deserts could be carefully computed into fixed sentences, and whether a just-deserts model imposed a moral obligation to punish or was merely a limiting principle.<sup>22</sup> But the authors agreed that rehabilitation did not work and that retribution in one manifestation or another was relevant to why we punish.<sup>23</sup>

In this section, I do not intend to canvass the ongoing debate among those advancing the argument in favor of a theory of just deserts. Instead, I want to highlight the common critique

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16. In their introduction to *Doing Justice*, Willard Gaylin and David J. Rothman observe that the rehabilitative model has “always [been] under attack from the conservative community, to which it had appeared as a mollicoddling, bleeding-heart outrage, and now we [prominent liberals] find ourselves, for different reasons, with different motives, joining the argument for its abandonment.” Gaylin & Rothman, *supra* note 11, at xxxvii.

17. Kennedy, *Introduction to Symposium on Sentencing* (pt. 1), 7 *HOFSTRA L. REV.* 1, 1 (1978).

18. See *STRUGGLE FOR JUSTICE* 8 (1971).

19. *Id.*

20. F. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 8 (1981).

21. See, e.g., sources cited *supra* note 4; see also N. MORRIS, *supra* note 11; *STRUGGLE FOR JUSTICE*, *supra* note 25.

22. See, e.g., R. SINGER, *supra* note 4, at 11-34 (discussing different philosophical justifications and variations of just-desert theories).

23. W. LAFAVE & A. SCOTT, *supra* note 7, at 28-29; see also F. ALLEN, *supra* note 20, at 65-66 (identifying decline of rehabilitative ideal and lack of new paradigm).

of the rehabilitation model by reference to some of the early and influential texts taking the model to task.

A. *The Rehabilitative Model*

The rehabilitative model has not always been associated with a deterministic medical model of human behavior. But by the 1960s, a growing faith in psychiatry and science had strongly influenced penology.<sup>24</sup> Based on a perception of the criminal as sick and in need of treatment or rehabilitation, legislatures entrusted to judges wide latitude in imposing indeterminate sentences: if the offender is ill and in need of treatment, his sentence ought to be conditioned on his cure.<sup>25</sup> Parole boards, in effect, helped to administer indeterminate sentences by determining when the "patient" was cured.<sup>26</sup>

In the current debate, the medical model seems readily open to attack.<sup>27</sup> Nonetheless, that it was recently a powerful model of criminal behavior is demonstrated by the Supreme Court's opinion in *Powell v. Texas*.<sup>28</sup> In *Powell*, the Court was faced with a claim that the eighth amendment prohibited a state from criminalizing a defendant, suffering from chronic alcoholism, for being "found in a state of intoxication in a public place."<sup>29</sup>

In a four-Justice dissent, which appears to have been drafted initially as a majority opinion,<sup>30</sup> Justice Fortas argued first that alcoholism is a disease and that "alcoholism is not

24. Gaylin & Rothman, *supra* note 11, at xxxvii; F. ALLEN, *supra* note 20, at 7.

25. M. FRANKEL, *supra* note 1, at 89-90; R. SINGER, *supra* note 4, at 1-2; STRUGGLE FOR JUSTICE, *supra* note 18, at 10 ("Instead of building pride and self-confidence, [the rehabilitative process] tries to persuade its subjects . . . that they are sick."); *see also id.* at 40-41.

26. M. FRANKEL, *supra* note 1, at 87.

27. *See, e.g.*, F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 25-41 (1964); M. FRANKEL, *supra* note 1, at 89-90.

28. 392 U.S. 514 (1968).

29. *Id.* at 517 (quoting TEX. PENAL CODE ANN. art. 477 (Vernon 1952) (current version at TEX. PENAL CODE ANN. § 42.08 (Vernon 1974))).

30. As developed below, although Justice White concurred in the judgment of the Court, he agrees with the central thesis of the dissent, that a state violates the eighth amendment when it punishes a person for yielding to an irresistible compulsion. *Powell*, 392 U.S. at 548 (White, J., concurring). Hence, a majority of the Court subscribed to the critical aspects of the theory of the dissent, suggesting that Justice White may have changed his vote on narrow grounds after initially agreeing with the dissent. That view is supported by the style of the plurality and dissents. Justice Marshall's plurality opinion is shaped by his efforts to respond to the positively stated thesis of the dissent. Unlike the usual majority and dissent, the clear statement of the facts and issue are found in the dissent, rather than in the plurality.

within the control of the person involved.’”<sup>31</sup> Further, he read the Court’s earlier holding in *Robinson v. California*<sup>32</sup> as having held that “[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change,” and he characterized the addict in *Robinson* as “powerless to choose not to violate the law.”<sup>33</sup> While *Robinson* addressed a statute that criminalized a person for the status of being an addict,<sup>34</sup> Justice Fortas would have extended its holding to *Powell* because “the particular defendant was accused of being in a condition which he had no capacity to change or avoid.”<sup>35</sup> The dissent did not limit the eighth amendment prohibition to status offenses. According to the dissent, an offender could raise an eighth amendment challenge if he could show that the act he committed is “part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease.”<sup>36</sup>

Justice White’s concurring opinion demonstrates that a fifth vote may have been close at hand: “For some . . . alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible.”<sup>37</sup> If those alcoholics were criminalized for that conduct, Justice White would have found a violation of the eighth amendment. He, too, was ready to accept the view that strongly compelled conduct, the product of a disease but short of insanity, could not be criminalized.<sup>38</sup> He found the record inadequate to show that Powell “was unable to stay off the streets on the night in question.”<sup>39</sup>

Other evidence demonstrates the strong hold that at least the myth of the medical model held for many observers of the criminal justice system. During the 1950s and until the late 1960s, the D.C. Circuit initially expanded,<sup>40</sup> and then experi-

31. *Id.* at 562 (Fortas, J., dissenting) (quoting A. ULLMAN, TO KNOW THE DIFFERENCE 22 (1960)).

32. 370 U.S. 660 (1962).

33. *Powell*, 392 U.S. at 567 (Fortas, J., dissenting).

34. *Robinson*, 370 U.S. at 660-61 n.1 (citing CAL. HEALTH & SAFETY CODE § 11,721 (West 1964) (repealed 1972) (current version at CAL. HEALTH & SAFETY CODE § 11,550 (West 1983))).

35. *Powell*, 392 U.S. at 568 (Fortas, J., dissenting).

36. *Id.* at 569.

37. *Id.* at 551 (White, J., concurring).

38. *Id.* at 551-52.

39. *Id.* at 554.

40. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), *overruled in United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).



mented<sup>41</sup> with, the appropriate role of psychiatric testimony in cases involving the insanity defense. The court also faced other challenges that demonstrated the currency of the medical model.<sup>42</sup>

Probably because of limited resources and doubt about the validity of coerced therapy,<sup>43</sup> we never fully implemented treatment programs in prison. Even in the era that demonstrated great public interest and confidence in rehabilitation, actual resources remained minimal.<sup>44</sup> Given high hope and few resources, corrections officials experimented with drug therapy, psychosurgery, and behaviorial conditioning<sup>45</sup>—"methods which [would] alter criminal behavior patterns but which [were] minimally dependent on prisoner cooperation."<sup>46</sup>

Despite a lack of commitment of resources, the medical model had powerful sway within the criminal justice system. It influenced legal doctrine, from the role of the forensic psychiatrist to the meaning of the eighth amendment. Further, it influenced legislation and penology.

## *B. The Critique of Rehabilitation and the Medical Model*

### *1. The Plurality in Powell v. Texas*

Justice Marshall's plurality opinion in *Powell v. Texas*<sup>47</sup> articulated the concerns of those who later rejected the medical, rehabilitative model. He urged caution when the law attempts to import "scientific and medical models into a legal system generally predicated upon a different set of assumptions."<sup>48</sup> Absent an available, proven, effective treatment, a chronic alcoholic

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41. See, e.g., *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967) (attempting to define "product" of mental disease to prevent medical experts from dominating the determination about insanity); *Carter v. United States*, 252 F.2d 608, 617 (D.C. Cir. 1957) (establishing "but for" requirement for "product" test).

42. See, e.g., *United States v. Moore*, 486 F.2d 1139 (D.C. Cir.) (en banc) (rejecting argument that it was unconstitutional to convict the appellant of possession of heroin because he had "an overpowering need to use heroin"), *cert. denied*, 414 U.S. 980 (1973); *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.) (rejecting claim that defendant's lack of control, caused by his "rotten social background," but short of legal insanity, should be a defense), *cert. denied*, 409 U.S. 1044 (1972).

43. Gobert, *Psychosurgery, Conditioning and the Prisoner's Right to Refuse "Rehabilitation,"* 61 VA. L. REV. 155, 158-60 (1975).

44. *Id.* at 158-59 (citing such practices as teaching only obsolete job skills).

45. *Id.*

46. *Id.* at 161.

47. 392 U.S. 514 (1968) (plurality opinion).

48. *Id.* at 526.

might find himself civilly committed for treatment for an indefinite period, awaiting treatment that cannot be provided.<sup>49</sup> A prisoner gained little by having crime converted to disease if he could be incarcerated and treated until cured, especially given the imperfect art of treatment.<sup>50</sup>

Marshall doubted what appeared to be an underlying assumption of the dissent that *the* purpose of penal sanctions was rehabilitation. He articulated a doubt that would soon become obvious to all: "it can hardly be said with assurance that incarceration serves [therapeutic or rehabilitative] purposes . . . for the general run of criminals."<sup>51</sup>

Ultimately, the criminal law's flirtation with the medical model proved too much. While the dissent suggested that it would limit its rule to a chronic alcoholic's compulsion to drink,<sup>52</sup> Justice Marshall was quick to challenge the dissent's attempt to limit its own principle. He characterized the dissent's statement that its principle would not be applied, for example, "in the case of offenses such as driving a car while intoxicated, assault, theft, or robbery," as "limitation by fiat."<sup>53</sup> The medical model attempts to explain behavior in causal terms without reference to the individual's will. But if all aberrant behavior is caused by "compulsion" or "exceedingly strong influence," there is little room left for the traditional assumptions of the criminal law. At root, the plurality was not ready to "cast aside . . . concepts . . . [of] moral accountability."<sup>54</sup>

The concerns articulated in Marshall's plurality opinion would soon be picked up by a wide range of critics of the rehabilitative model.

## 2. *Struggle for Justice*: The Modern Quaker View

*Struggle for Justice*,<sup>55</sup> a widely read and influential working paper prepared for the American Friends Service Committee, presented a radical attack on the rehabilitative model. While

49. *Id.* at 527 ("There is as yet no known generally effective method for treating the vast number of alcoholics in our society.").

50. *Id.* at 529.

51. *Id.* at 530.

52. *Id.* at 558-59 (Fortas, J., dissenting).

53. *Id.* at 534 (quoting *id.* at 559 n.2 (Fortas, J., dissenting)).

54. *Id.* at 535-36; see also, e.g., S. KADISH, BLAME AND PUNISHMENT 103 (1987) (rationality of the actor provides basis for blame even where compulsion to violate the law is strong).

55. STRUGGLE FOR JUSTICE, *supra* note 18.

their Quaker ancestors had been instrumental in developing the rehabilitative model, the authors repudiated that position in no uncertain terms. For example, in commenting on the work of Quaker prison reformer Elizabeth Fry, *Struggle for Justice* stated that "[although] we share her faith in the importance of . . . human reaching out to those in dire trouble[, t]his admiration . . . must not keep us from an honest evaluation of the long-range significance of the institutional reforms she promoted."<sup>56</sup> That evaluation was harsh:

Her work and its outcome is a paradigm of the drama that critics and administrators of the penal system have played over and over again: the critic attacks, devising something that seems better; the administrator co-opts the critic and implements the idea in ways and for ends quite at odds with the original intention. . . .

. . . Much penal reform has been infected with . . . paternalistic motives, which probably goes far to explain why most reform programs are so easily adapted to serve the perpetuation of the system.<sup>57</sup>

More specifically, the system of indeterminate sentences and parole failed because "managers of the correctional establishment" used indeterminacy "as a tool of institutional control."<sup>58</sup> Further, they used indeterminacy to increase "the power of the state to lengthen a prisoner's sentence."<sup>59</sup>

The authors identified a class bias in a scheme that emphasized making the penalty fit the criminal, not the crime: society thought the most serious forms of criminality involved, in part, the "challenge to the cultural norm[s]."<sup>60</sup> The authors argued that "the significance of conventional crime — theft, killing, pickpocketing, prostitutions[,] robbery — lay less in the violent or acquisitive act itself than in its challenge to the cultural norm."<sup>61</sup>

The authors saw the rehabilitative model as a product of a class society. That model ignored a retributive theory of justice

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56. *Id.* at 17.

57. *Id.* at 17-18. As developed below, much the same thing might be said for the reformist goals of the drafters of *Struggle for Justice*. Their efforts led to the abandonment of rehabilitation as a goal, but rather than less incarceration, we face calls for more punitive sanctions. See *infra* text accompanying notes 96-99.

58. STRUGGLE FOR JUSTICE, *supra* note 18, at 28.

59. *Id.*

60. *Id.* at 29.

61. *Id.*

because lower class crime was "petty in its direct costs" by comparison to white-collar crime, committed by "exploiters, who extracted hundreds of thousands of dollars from the defenseless."<sup>62</sup> A treatment-oriented system allowed the moral hypocrites to mollycoddle upper- and middle-class criminals because, although they are "morally weak and psychologically deficient, . . . they are not revolutionaries."<sup>63</sup> Surely, a fallen member of the ruling class will need less reformatory treatment than a member of the lower class who has not had the same advantages. *Struggle for Justice* thus aligned radicals with law-and-order advocates in their distaste for parole and rehabilitation. For radicals, these systems were shams through which society favored the rich over the poor.

Efforts at reform were viewed as paternalistic and coercive. By what moral right did a corrupt society attempt to reform revolutionaries?<sup>64</sup> Many observers were quick to agree: we witnessed the criminalization of civil rights workers in the South and draft resisters throughout the United States.<sup>65</sup> These were people of conscience, political dissidents with the strength of conviction to face violence and imprisonment based on profound religious and moral convictions. Such people of conscience might be willing to accept their just deserts for violating the law, but they certainly were not suitable subjects for reformation and rehabilitation. *Struggle for Justice* did not attempt to distinguish crimes of violence, like robbery, from crimes of conscience.<sup>66</sup>

What made *Struggle for Justice* a compelling document, cited by numerous less radical commentators who picked up its reformist spirit,<sup>67</sup> was not only its passionate political critique. After all, it was advocating abandonment of a positive view of humanity, the belief in our capacity for reform or transforma-

62. *Id.* at 30. The analysis ignores the psychological cost of crimes of violence against the victim. The 1970s and 1980s also saw heightened attention to the victims of violent crime, powerful voices that would increase pressure to punish criminal offenders. See, e.g., F. CARRINGTON, *THE VICTIMS* (1975); S. ESTRICH, *REAL RAPE* (1987); L. WALKER, *THE BATTERED WOMAN SYNDROME* (1984).

63. *STRUGGLE FOR JUSTICE*, *supra* note 18, at 30.

64. See, e.g., *id.* at 100-23 (discussing repressive function of the criminal law).

65. See, e.g., Gaylin & Rothman, *supra* note 17, at xxxiii; R. SINGER, *supra* note 4, at 6.

66. See *STRUGGLE FOR JUSTICE*, *supra* note 18, at 29-31 (analysis on basis of class, rather than on whether crime had a victim).

67. See, e.g., R. SINGER, *supra* note 4, at 8 n.22; FAIR AND CERTAIN PUNISHMENT, *supra* note 4, at 98 n.20; A. VON HIRSCH, *supra* note 4, at 4 n.6; Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 301 n.8 (1974).

tion from evil to good, reflected in the early conception of rehabilitation. Ultimately, *Struggle for Justice* was compelling because it could point to the empirical proposition that parole and rehabilitation simply did not work.<sup>68</sup>

### 3. Judge Frankel's *Criminal Sentences*: A Moderate Critique

Judge Marvin Frankel's *Criminal Sentences*<sup>69</sup> espoused many of the same themes articulated in *Struggle for Justice*, but in a more moderate voice. He did not articulate the same assumptions about the class structure of the criminal justice system. But he too used powerful rhetoric to describe the rehabilitative system. He portrayed "evils [that] . . . are grim[,]. . . unbearable by any society that styles itself civilized."<sup>70</sup>

The first evil was "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences[,] . . . intolerable for a society that professes devotion to the rule of law."<sup>71</sup> Sentencing judges were not only given wide latitude in choosing a sentence, but they were also given no guidance in how to exercise that discretion.<sup>72</sup>

*Criminal Sentences* tied the lack of guidance to a fundamental failure of Congress and state legislatures to ask "the most basic of the questions affecting criminal penalties, the questions of justification and purpose."<sup>73</sup> Thus, judges were free to determine a sentence based on their own ideas about why we punish. Frankel and others have doubted that judges have adequate training or time to make principled sentencing decisions.<sup>74</sup> The result of the then-applicable scheme was not surprising: "untrained, untested, unsupervised men armed with great power will perpetrate abuses."<sup>75</sup> Potential for abuse was further compounded by "walls of silence," "[t]he absence of any explanation

68. See STRUGGLE FOR JUSTICE, *supra* note 18, at 83-99.

69. M. FRANKEL, *supra* note 1.

70. *Id.* at ix.

71. *Id.* at 5.

72. *Id.* at 7.

73. *Id.* Even where legislatures do state purposes of punishment, problems remain: for example, a sentencing judge or commission must deal with situations in which those purposes conflict. One of the best examples of such a conflict is found in an articulate opinion by Judge Frankel in *United States v. Bergman*, 416 F. Supp. 496 (S.D.N.Y. 1976). Frankel found no need to incarcerate for specific deterrence, but felt compelled by other purposes of punishment to sentence the 64-year-old defendant to a term of imprisonment.

74. M. FRANKEL, *supra* note 1, ch. 2.

75. *Id.* at 17.

or purported justification for the sentence."<sup>76</sup>

Frankel singled out indeterminate sentences for special criticism. While recognizing that "[t]he case for the indeterminate sentence rests . . . upon a laudable concern for each unique individual,"<sup>77</sup> he rejected the idea of criminals as "sick" and in need of a "cure," as "genetically flawed and malformed."<sup>78</sup> He disputed the idea that many normal criminals are fit candidates for treatment. More importantly, he doubted the existence of a cure for the disease, making suspect indeterminate sentences that incarcerate until the sick prisoner is cured.<sup>79</sup> Lacking a treatment, society is simply warehousing prisoners, who instead of being cured, are made worse.<sup>80</sup>

Frankel identified the cynical belief among prisoners that the system of parole was largely political. That concern was especially true in light of the lack of guidelines for parole officers, who are "assigned without guidance to answer unintelligible questions . . . . We charge [parole boards] to make indeterminate sentences determinate, but we give them no conceptual or other tools to work with. We set them lofty goals of rehabilitation, but with no directions or means of achievement."<sup>81</sup> The result is rage and cynicism among the "alleged beneficiaries of the rehabilitative ideal."<sup>82</sup> The system leaves them unable to plan their time or to discover the rules on how to secure their release.<sup>83</sup>

Judge Frankel did not deny the possibility that some offenders might be rehabilitated. But he rejected the idea that all prisoners were capable of redemption or transformation.<sup>84</sup>

Having portrayed a system sufficiently arbitrary to raise questions about its constitutionality,<sup>85</sup> Judge Frankel devoted his final chapter to a proposal for legislative reform. His specific proposals provided a game plan for Congress when it eventually created a sentencing commission and empowered it to set up

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76. *Id.* at 42-43.

77. *Id.* at 89.

78. *Id.*

79. *Id.* at 90-91.

80. *Id.* at 93.

81. *Id.* at 95.

82. *Id.* at 96.

83. *Id.* at 97.

84. *Id.* at 91.

85. *Id.* at 103.

sentencing guidelines.<sup>86</sup> Judge Frankel urged articulation of purposes of punishment,<sup>87</sup> adoption of weights and measures of factors to determine a sentence,<sup>88</sup> and creation of a permanent sentencing commission.<sup>89</sup> Unlike Congress when it eventually passed sentencing reform,<sup>90</sup> and unlike many commentators including the authors of *Struggle for Justice*,<sup>91</sup> Frankel did not urge wholesale abandonment of indeterminate sentences. He specifically observed that in limited contexts rehabilitation and indeterminate sentences serve a function.<sup>92</sup>

#### 4. *Doing Justice*

By the mid-1970s, a strong coalition was in place that would soon challenge the supremacy of the rehabilitative, medical model. Picking up many of the themes in *Struggle for Justice* and *Criminal Sentences*, *Doing Justice* set the framework for the debate about punishment over the past decade.

The committee that prepared *Doing Justice* consisted of some of the day's most influential liberals.<sup>93</sup> Although done with regrets, they recommended the abandonment of the rehabilitative model.<sup>94</sup> They did so for several reasons. The model was riddled with internal inconsistencies. They preferred a just-deserts model because "[c]ertain things are simply wrong and ought to be punished."<sup>95</sup> It is doubtful, however, that they would have abandoned the rehabilitative model on philosophical grounds alone. They hesitated to turn their backs on "considerations [of] generosity and charity, compassion and love,"<sup>96</sup> that they believed were reflected in the rehabilitative ideal.

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86. Lindeman, *Opening the Federal Sentencing Guidelines to Alternatives*, 15 WM. MITCHELL L. REV. 555, 556 (1989).

87. M. FRANKEL, *supra* note 1, at 106.

88. *Id.* at 111-15.

89. *Id.* at 118-24.

90. 18 U.S.C.A. § 3624(b) (West Supp. 1990). At the same time that Congress rejected rehabilitation as the sole basis for sentencing policy, it recognized rehabilitation as a valid purpose of punishment. *Id.* § 3553(a)(2)(D). But in the scheme developed by Congress, amenability to treatment is assessed at the time of sentencing and the scheme rejects considerations of events subsequent to conviction and incarceration.

91. STRUGGLE FOR JUSTICE, *supra* note 18, at 144 (urging fixed sentences, thereby eliminating "discretion in setting sentences").

92. M. FRANKEL, *supra* note 1, at 99-100.

93. See Gaylin & Rothman, *supra* note 11, at vii-ix (listing members of the committee).

94. *Id.* at xxxvii.

95. *Id.* at xxxix; see also A. VON HIRSCH, *supra* note 4, at 45-55.

96. Gaylin & Rothman, *supra* note 11, at xxxix.

The committee was deeply troubled by pragmatic considerations. The rehabilitative model "produced unexpected abhorrent consequences and numerous unpredicted side effects that were less humane or liberal than its proponents had anticipated."<sup>97</sup> Outward benevolence led to exploitation of prisoners in practice. The model led to gross inequities in the length of criminal sentences for similar conduct.<sup>98</sup> Perhaps most telling in the committee's view was "[t]he simple fact . . . that the experiment has not worked out."<sup>99</sup>

The committee's chapter on rehabilitation programs was almost as pessimistic as the view of *Struggle for Justice*. They rejected the idea that we can blame the failure of rehabilitation on a lack of resources. Results were discouraging even in jurisdictions like California where programs were "seriously thought-out and well financed."<sup>100</sup> The committee reviewed a comprehensive list of treatment programs and concluded not only that "[t]he quality of many programs has been poor," but that even where that has not been the case, results have not been encouraging.<sup>101</sup> They reached their conclusions by examining their own study, as well as published reports, including the widely cited works of Robert Martinson.<sup>102</sup> They also doubted the efficacy of intrusive behavior-control methods and rejected them on moral grounds even if those methods proved effective.<sup>103</sup>

The committee rejected rehabilitation as the primary justification of punishment. They argued that deterrence was not a sufficient justification of punishment, although it was indeed relevant "in justifying the existence of the criminal sanction."<sup>104</sup> Ultimately, they endorsed the notion of just deserts and concluded that "[t]hose who violate others' rights deserve punishment."<sup>105</sup>

When they turned to the question of allocation of punish-

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97. *Id.* at xxxvii.

98. A. VON HIRSCH, *supra* note 4, at 101.

99. Gaylin & Rothman, *supra* note 11, at xxxviii.

100. A. VON HIRSCH, *supra* note 4, at 13.

101. *Id.* at 15.

102. *Id.* at 152-53 n.4; see also R. SINGER, *supra* note 4, at 7 (discussing Martinson's works); FAIR AND CERTAIN PUNISHMENT, *supra* note 4, at 74 n.16 (discussing Martinson's conclusion that little works).

103. A. VON HIRSCH, *supra* note 4, at 17.

104. *Id.* at 61.

105. *Id.* at 54.



ment, as opposed to the justification for punishing, the committee again argued for a theory of just deserts.<sup>106</sup> Unlike retributivists who would look only to the harm caused,<sup>107</sup> they believed that the punishment should be commensurate with the seriousness of the wrong and that it was to be measured "by the act and . . . the degree of the actor's culpability."<sup>108</sup> *Doing Justice* argued that commensurate deserts determined upper and lower limits of punishment. To use a theory of just deserts as setting only an upper limit would create unfairness by treating some offenders too leniently.<sup>109</sup>

The just-deserts model, according to the committee, is at odds with rehabilitation. Punishment is moralistic and judgmental, while the rehabilitative model demonstrates mercy and leniency.<sup>110</sup>

The texts discussed were not the only influential texts urging a re-examination of punishment and rehabilitation.<sup>111</sup> They do, however, reflect the unusual political alliance that soon led to the abandonment of the rehabilitative ideal. They also reflect the common themes in the argument against rehabilitation: treated as synonymous with the medical model, it was based on mercy, not justice and, therefore, was inconsistent with the criminal law. The model was thus grounded on an erroneous philosophical premise: we do not punish out of beneficence, but because the punishment is deserved. The rehabilitative model had also led to indecent inequities in sentencing. Equally important, the common perception was that rehabilitation was a cruel joke because efforts at rehabilitation were inadequate and, even when provided, those efforts simply did not work.

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106. *Id.* at 66-76.

107. *Id.* at 68. For an insightful discussion of the role of resulting harm in substantive criminal law and in sentencing policy, see generally Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

108. A. VON HIRSCH, *supra* note 4, at 69. Demonstrating the popular appeal of this view of retribution or just deserts, the Supreme Court has adopted a similar view of eighth amendment proportionality. See *Solem v. Helm*, 463 U.S. 277, 284-86 (1983).

109. A. VON HIRSCH, *supra* note 4, at 73.

110. Gaylin & Rothman, *supra* note 11, at xxxvii-xl.

111. A bibliography of other related texts can be found in R. SINGER, *supra* note 4, at 205-11.

### III. LEGISLATIVE ABANDONMENT OF THE REHABILITATIVE MODEL

#### A. *The Federal Sentencing Guidelines*

By the end of the 1970s, efforts at sentencing reform were underway.<sup>112</sup> Within the federal system, after an unsuccessful attempt to pass legislation in the late 1970s, Congress enacted the Sentencing Reform Act (the Act) as part of the 1984 Comprehensive Crime Control Act.<sup>113</sup> That legislation reflects the critical view of the rehabilitative model and indeterminate sentencing developed above.

In place of the previous individualized sentencing approach, the act establishes more determinate or presumptive sentences.<sup>114</sup> For a given category of offense committed by a given category of offender, the judge is required to rely on sentencing guidelines to determine an appropriate kind and range of sentence.<sup>115</sup> The court may deviate from that range only if it finds aggravating or mitigating circumstances not considered in the guideline formulation.<sup>116</sup> If the judge imposes a sentence disparate with the guidelines, he must state the reasons for which he imposed the sentence.<sup>117</sup> The sentence then becomes subject to appellate review.<sup>118</sup>

Also in line with the criticism of the rehabilitative model, Congress eliminated parole.<sup>119</sup> Because the impetus for the Act was to make the offender's sentence more definite, retention of parole would re-introduce an element of uncertainty that the system was designed to eliminate.<sup>120</sup> Critics of rehabilitation had argued that prisoners were victimized by uncertainty about their release date and were subjected to arbitrary treatment because parole board decisions were unguided by standards.<sup>121</sup>

112. An earlier effort at reform is discussed in Kennedy, *supra* note 17.

113. The Sentencing Reform Act of 1984 was enacted as chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988 (1984); see *supra* note 8.

114. *Mistretta v. United States*, 488 U.S. 361, 367-68 (1989).

115. S. REP. NO. 225, 98th Cong., 2d Sess. 51, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3234.

116. 18 U.S.C.A. § 3553(a)-(b) (West 1985 & Supp. 1990).

117. 18 U.S.C. § 3553(c) (1988).

118. 18 U.S.C.A. § 3742(a)-(b) (West 1985 & Supp. 1990).

119. *Id.* § 3624(a)-(b) (a prisoner must complete his sentence, reduced only by limited "good" time).

120. S. REP. NO. 225, *supra* note 115, at 53, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3236.

121. L. GOODSTEIN & J. HEPBURN, DETERMINATE SENTENCING AND

Advocates of the Act argued that parole was inconsistent with both deterrence and a theory of just deserts. The fixed guidelines assured punishment commensurate with the offender's just deserts. Parole, it was argued, leads to a belief among offenders that if sentenced to prison, they will be released quickly on parole. The legislative history also demonstrates the belief that "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting."<sup>122</sup> Finally, once indeterminacy was abandoned and fixed sentences established, the parole board was no longer needed to equalize otherwise unfair sentences that might result from misguided or unguided judges acting under the old scheme of discretionary sentencing.<sup>123</sup>

In many ways, the federal scheme tracks the scheme proposed by critics of the rehabilitative model. Indeterminate sentences and parole are gone. Following the sentencing guidelines should lead to less inequality among offenders.

The guidelines focus on some individual characteristics of the offender.<sup>124</sup> This emphasis, however, is distinguished from the individualized "treatment" under a rehabilitative model. Further, the just-deserts model can be distinguished from the disfavored retributive model, which looks only or primarily to the harm caused by the offender, in that the just-deserts model considers the culpability of the offender.<sup>125</sup> Hence, some individual characteristics are relevant in assessing the offender's culpability under the federal scheme, but Congress, like many of the critics of the rehabilitative model, rejects the offender's response to punishment or to treatment as relevant in determining his

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IMPRISONMENT 18-19 (1985); P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 10-13 (1977).

122. S. REP. NO. 225, *supra* note 115, at 38, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3221.

123. *Mistretta v. United States*, 488 U.S. 361, 366-67 (1989); see also Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 553 (1978).

124. For example, the federal sentencing guidelines adjust the sentence according to some factors relating to offender culpability, like the individual's role in the specific offense and the acceptance of responsibility. UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL ch. 3 (1988). Also relevant is the offender's prior criminal history. *Id.* ch. 4. Some relevant factors are specifically excluded from consideration by the court. See *id.* ch. 5, pt. H (excluding such factors as age, education, vocational skills, mental condition, family ties, previous employment record).

125. A. VON HIRSCH, *supra* note 4, at 68-69.

release date.<sup>126</sup>

One area in which liberal reformers did not prevail was in actual sentence length. *Doing Justice*, for example, argued that one evil resulting from the rehabilitative model was excessive incarceration.<sup>127</sup> Although it did not present a precise agenda for sentencing, the committee favored alternatives to incarceration and short periods of incarceration in all but the most serious cases if imprisonment was necessary.<sup>128</sup> Because of the procedures used by the federal sentencing commission, sentences imposed under the guidelines are roughly equivalent to actual sentences served under the preguideline scheme.<sup>129</sup>

### B. Other Sentencing Reforms

The reform movement has had an effect on state sentencing practices as well. But in some instances, state legislatures used the reformist program to increase sentences.<sup>130</sup> That result probably could have been anticipated.<sup>131</sup> The reformist movement aligned radicals and liberals with conservative critics of rehabilitation. Yet the reformist platform, reflected in documents like *Doing Justice*, included important limitations on punishment. Once freed from the constraints of the rehabilitative model, law-and-order proponents could advance their own brand of retributive justice. Quite predictably, they would urge longer sentences.<sup>132</sup>

Law-and-order retributive justice can be seen in numerous statutes that impose long sentences for a host of crimes. Legislatures have imposed life sentences for a variety of crimes,<sup>133</sup> and they have eliminated all sentencing discretion in other cases,<sup>134</sup> thereby focusing on the harm, not on the culpability of the

126. 18 U.S.C.A. § 3624(b) (West Supp. 1990).

127. Goodell, *Preface to A. VON HIRSCH, supra note 4*, at xvii.

128. A. VON HIRSCH, *supra note 4*, at 91-94.

129. See Lindeman, *supra note 86*, at 559-60.

130. See R. SINGER, *supra note 4*, at xvi-xvii, 57-58.

131. See Clear, *supra note 10*, at 37-41.

132. *Id.* But see R. SINGER, *supra note 4*, at 58-59 (defending *Doing Justice* author von Hirsch from claim that liberal reformers were partially responsible for trend towards longer sentences).

133. See, e.g., IDAHO CODE § 37-2732(a)(1)(A) (1977 & Supp. 1991); MO. ANN. STAT. § 195.200(1), (4) (Vernon 1978) (repealed 1989) (both permitting life imprisonment for distribution of heroin).

134. See, e.g., LA. REV. STAT. ANN. § 40:966 (West 1989) (mandatory life imprisonment for distribution of heroin).

offender.<sup>135</sup> They have also relied on sentence enhancement in cases in which a crime is committed in a particular manner,<sup>136</sup> again largely by reference to the harm caused by the offender, rather than to the offender's culpability. Legislatures, intent on convincing the public that they have gotten tough on crime,<sup>137</sup> have also combined long sentences with unavailability of parole in a variety of contexts.<sup>138</sup> In the recent past, we have also witnessed shrinking resources for programs to rehabilitate prisoners.<sup>139</sup>

Liberal and radical critics of the rehabilitative model did not endorse increased sentences and lack of rehabilitative programs within prisons. The sources discussed above, while abandoning the rehabilitative model as a justification for punishment, specifically urged that prison officials retain training and skill programs for inmates.<sup>140</sup>

At least in retrospect, the shrinking resources for inmate rehabilitation can be traced to the attack on the rehabilitative model. While *Doing Justice* and *Struggle for Justice* specifically urged humane services for inmates, they added to the overwhelming public perception that rehabilitation did not work.<sup>141</sup>

135. Despite the argument that LA. REV. STAT. ANN. § 40:966 did not allow consideration of the culpability of the offender, the United States Court of Appeals for the Fifth Circuit held that § 966 does not violate the eighth amendment. See *Terrebonne v. Butler*, 848 F.2d 500 (5th Cir. 1988) (en banc), cert. denied, 489 U.S. 1020 (1989).

136. See, e.g., 21 U.S.C.A. § 841(b) (West Supp. 1990) (providing for increasing penalties depending on amount of drugs involved and on prior convictions of the same offense); *id.* § 845 (increasing penalty if offender distributes controlled substance to person under 21 years old); *id.* § 845(a) (increasing penalty for distribution of controlled substance within 1000 feet of school or within 100 feet of a playground).

137. See, e.g., S. REP. NO. 225, *supra* note 115, at 225, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 3437.

138. See, e.g., 21 U.S.C.A. § 841(b) (prescribing mandatory life without release after two or more convictions under §§ 841, 845, 845(a) or 845(b)); LA. REV. STAT. ANN. § 40:966 (West 1989) (mandatory life imprisonment for distribution of heroin).

139. See, e.g., Glidden, *Put Inmates to Work, Make Prisons Produce*, L.A. Times, Apr. 1, 1990, at M4, col. 1 (corrections system is full of retribution without reform); *For the Record*, Wash. Post, Mar. 8, 1990, at A26 (overcrowded prisons prevent most prisoners from developing skills that can make them productive citizens upon release); *Imprisonment Inequities*, Boston Globe, Mar. 3, 1990, at 18 (once incarcerated, prisoner has little hope of developing skills); see also Kraar, *How to Win the War on Drugs*, FORTUNE, Mar. 12, 1990, at 70 (attention to "war" on drugs, rather than to prospect of treating drug addiction).

140. See, e.g., STRUGGLE FOR JUSTICE, *supra* note 18, at 99 (urging availability of resources to criminal offenders on a voluntary basis). Hirsch has recently argued that "[t]he sentencing-guidelines movement has . . . paid relatively little heed to community sanctions." Von Hirsch, Wasik, & Greene, *Punishments in the Community and the Principles of Desert*, 20 RUTGERS L.J. 595, 596 (1989).

141. See Clear, *supra* note 10, at 26.

In the setting of the 1980s, few legislators or prison officials would clamor for more rehabilitation in the climate of wide condemnation of rehabilitation that we have witnessed.<sup>142</sup> However, the central themes of the critique of the rehabilitative model were only that the model was a failure and that rehabilitation was not a justification of punishment.<sup>143</sup>

Our current situation is disastrous. We have doubled our prison population.<sup>144</sup> The current debate centers on whether to privatize prisons or whether to invest billions of dollars in prison construction.<sup>145</sup> President Bush has urged a major war on drugs that will predictably lead to longer prison sentences and greater numbers of inmates.<sup>146</sup> Occasionally commentators argue that we cannot have a coherent antidrug policy without greatly expanded treatment facilities.<sup>147</sup> But most of the discussion is tough talk about making war, not about treating or rehabilitating.<sup>148</sup>

In defense of the committees that drafted *Doing Justice* and *Struggle for Justice*, one might argue that their criticisms have been taken out of context—that their reforms have been co-opted.<sup>149</sup> Had their complete agenda been adopted, we would

142. That would appear to be one of the lessons of Governor Dukakis's unsuccessful presidential campaign. President Bush successfully labelled Dukakis as soft on crime. See J. GERMOND & J. WITCOVER, *supra* note 2, at 10-12.

143. See *supra* text accompanying notes 16-111.

144. Taylor, *Ten Years for Two Ounces*, AM. LAW., Mar. 1990, at 65 (federal prison population has doubled in the past decade); see also Domanick, *A Whole Generation is Being Lost*, L.A. Times, Mar. 7, 1990, at B7, col. 1 (prison population in California has more than tripled in the past decade); McKee, *Expert Says Prison Overcrowding Growing and Guard Recounts Prison Riots* (UPI wireservice, Mar. 7, 1990) (NEXIS, Current file) (prison population in Pennsylvania up 111% in past decade).

145. See, e.g., *Testing the Private Prison Idea*, Chi. Trib., Mar. 26, 1990, at 12; O'Connor, *County Warned of \$63-Million Deficit in the Next 2 Years*, L.A. Times, Mar. 14, 1990, at B1, col. 5; Page, *Can We Rent a Social Conscience?*, Chi. Trib., Mar. 11, 1990, at C3.

146. See *Remarks of President George Bush* (Fed. News Serv., Mar. 19, 1990) (NEXIS, Current file); Kraar, *supra* note 139, at 70 (suggesting alternatives to building more prisons); *Attorneys General Ask Bush for More Money to Fight Drugs*, L.A. Times, Mar. 20, 1990, at A16, col. 1; Healy, *Pentagon Plans \$877-Million Anti-Drug Effort*, L.A. Times, Mar. 10, 1990, at A2, col. 1. Congress has already responded by increasing penalties for various drug violations. See *supra* notes 136-38 and accompanying text; see also Taylor, *supra* note 144, at 65 (describing case of defendant given mandatory ten-year prison sentence for peripheral role in small drug deal).

147. See, e.g., Kraar, *supra* note 139, at 70.

148. See, e.g., *Remarks by President George Bush*, *supra* note 146; Healy, *supra* note 146, at A2, col. 1.

149. See, e.g., R. SINGER, *supra* note 4, at 57-58. Ironically, *Struggle for Justice* observed that earlier reforms have typically been "co-opted" by prison administrators for

indeed have had a different landscape from the one we now face. My purpose is not to assess blame for the current state of affairs. Instead, I want to re-examine the arguments against the rehabilitative model and to argue that we should recommit ourselves to parole and to rehabilitative programs.

#### IV. THE REHABILITATION OF REHABILITATION

The attack on the rehabilitative model focused on three primary themes: one, that rehabilitation simply did not work; two, that rehabilitation was philosophically unsound; and three, that the model led to inequality. In the remainder of this Article, I will examine each of those claims and will conclude that we should recognize a role in our punishment scheme for rehabilitation and parole.

##### A. *Rehabilitation May Work*

The literature urging the abandonment of parole and rehabilitation argued that rehabilitation did not work. Critics of the model frequently cited the works of Robert Martinson in support of that view.<sup>150</sup> A review of those texts,<sup>151</sup> Martinson's subsequent work,<sup>152</sup> and more recent studies by other scholars<sup>153</sup> demonstrates that opponents of rehabilitation grossly overstated the case against rehabilitation.

Martinson's article *What Works?*<sup>154</sup> was widely cited for the view that "nothing works" to reduce criminal recidivism.<sup>155</sup> Martinson's conclusion, however, was not that nothing works, but that "[w]ith few and isolated exceptions, the rehabilitative

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their own purposes. STRUGGLE FOR JUSTICE, *supra* note 18, at 17. Arguably, that is exactly what has happened with recent efforts at sentencing reform. On the nature of the political compromise that led to the federal sentencing guidelines, see Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

150. See sources cited *supra* note 102.

151. See generally D. LIPTON, R. MARTINSON, & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975); Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22 (1974).

152. Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979).

153. See sources cited *infra* at notes 169-92.

154. Martinson, *supra* note 151, at 48.

155. See Martinson, *supra* note 152, at 254 ("I protested at the slogan used by the media to sum up what I said — 'nothing works.'"). More scholarly sources also quoted Martinson for the view that rehabilitation did not work. See sources cited *supra* note 105.

efforts that have been reported so far have had no appreciable effect on recidivism."<sup>156</sup> That conclusion was drawn from the evaluative research that he and his co-authors examined in *The Effectiveness of Correctional Treatment*.<sup>157</sup> In that work, they concluded that "[w]hile some treatment programs have had modest successes, it still must be concluded that the field of corrections has not as yet found satisfactory ways to reduce recidivism by significant amounts."<sup>158</sup>

By the late 1970s, at a time when Martinson's work had become influential in the debate about rehabilitation, Martinson retracted the conclusions of his earlier research. In *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, Martinson suggested that a different research procedure from that used in his earlier works was necessary.<sup>159</sup> Evaluative research, used in *Effectiveness*, aims to discover causal relationships between particular treatments and rehabilitation by comparing the effect of the treatment on an experimental group with that of non-treatment on a control group. The researchers did not vary the conditions under which the various treatment methods were delivered. Both groups received standard processing and the experimental group received some additional form of treatment.<sup>160</sup> Martinson originally concluded that treatment added to the criminal-justice system did not reduce recidivism.<sup>161</sup>

His study in *New Findings* compared the reprocessing rates of groups receiving experimental treatment with groups that were similar but that received the standard treatment given to the majority of offenders nationwide.<sup>162</sup> The new study was not limited to evaluative research, and it included data from all post-World War II research studies containing a verifiable reprocessing rate for a group of ten or more offenders.<sup>163</sup>

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156. Martinson, *supra* note 151, at 25 (emphasis omitted).

157. D. LIPTON, R. MARTINSON, & J. WILKS, *supra* note 151.

158. *Id.* at 627.

159. Martinson, *supra* note 152, at 252.

160. For a description of evaluative research, see D. LIPTON, R. MARTINSON, & J. WILKS, *supra* note 151, at 19.

161. Martinson, *supra* note 152, at 252-53 (citing D. LIPTON, R. MARTINSON, & J. WILKS, *supra* note 151, at 14-20).

162. *Id.* at 253.

163. *Id.* at 250. *The Effectiveness of Correctional Treatment* was based on information provided by 231 research studies completed between 1945 and 1967; Martinson's article was based on information derived from 555 research studies published between 1945 and 1978. Martinson, *supra* note 152, at 244 n.6, 252.



Martinson concluded that no criminal treatment program in use was inherently helpful or harmful.<sup>164</sup> In contrast to his original works, Martinson was able to examine conditions under which treatments had appreciable effects. The new study provided a reliable indication of the circumstances under which treatment may have a substantial effect on reprocessing rates. Martinson could thus predict which combinations of treatment and other conditions were helpful, harmful, or neutral.<sup>165</sup>

In *New Findings*, Martinson specifically denounced the "nothing works" label often attributed to his writings.<sup>166</sup> Further, he urged sentencing reform on the basis of his new findings.<sup>167</sup> Characterizing the movement to abolish parole release and supervision as "the most extreme case of radical tinkering with the system of criminal justice," he urged that parole supervision be extended to more criminal offenders as part of a definite sentence because "[t]he evidence that parole supervision works . . . is more convincing than the bare assumption that it does not."<sup>168</sup>

Martinson's later work was not the only study that contradicted the dismal view of parole and rehabilitation which dominated the discussion about punishment. James Q. Wilson criticized Martinson's earlier works for failing to identify patterns that emerged from his data.<sup>169</sup> Wilson argued that some offenders are more amenable to treatment than others; hence, treatment has a markedly different effect depending on the offender's amenability to treatment.<sup>170</sup> Consistent research findings demonstrate that treatment programs tend to make "non-amenable" commit more crimes than they would have without treatment.<sup>171</sup> Martinson's original studies showed no change in offenders' behavior because any improvement in those amenable to treatment was offset by the increased criminality of nonamenable offenders.<sup>172</sup> The success of a rehabilitative program would

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164. Martinson, *supra* note 152, at 254.

165. *Id.* at 257-58.

166. *Id.* at 254.

167. *Id.* at 258. For a discussion of the correspondence between conditions of treatment and patterns of reprocessing, both above and below the mean reprocessing rate for standard treatments, see *id.* at 254-56.

168. *Id.* at 257 (emphasis in original).

169. Wilson, "What Works?" *Revisited: New Findings on Criminal Rehabilitation*, 61 PUB. INTEREST 3 (1980).

170. *Id.* at 8-9.

171. *Id.* at 8.

172. *Id.* at 11.

depend on the ability of corrections officials to identify amenable from nonamenable offenders.<sup>173</sup>

Other researchers criticized Martinson's original works for using an inappropriate measure of recidivism. Martinson defined "recidivism rate" as "proportion who fail."<sup>174</sup> In a 1979 study, Charles Murray and Louis Cox contended that a more appropriate understanding of recidivism would require focusing not just on whether an offender committed an additional offense, but also whether an offender continued to commit new crimes at the same frequency after contact with the criminal justice system.<sup>175</sup>

The Murray and Cox study of juveniles found that about eighty percent of the group studied were re-arrested during the follow-up period.<sup>176</sup> That rate was not affected by the penalty imposed. But re-arrest rates varied significantly. Wilson has argued that the Murray and Cox study demonstrates that "how strictly the youth were supervised . . . had the greatest effect on the recidivism rate" and that "the more restrictive the degree of supervision practiced . . . the greater the reduction in arrest rates."<sup>177</sup>

Other researchers have been able to identify offenders who present a low risk of recidivism. James Bonta and Laurence Motiuk have argued for improved classification and identification of low-risk offenders for diversion from overcrowded, high-security facilities into less crowded halfway houses.<sup>178</sup> Their recommendations were based on Canadian studies that relied on Level of Supervision Inventory (LSI), an objective classification system.<sup>179</sup> Initially developed in the late 1970s as a parole classification instrument and later adopted for inmate classification in Ontario, the LSI compares favorably to other classification systems in reliability and validity.<sup>180</sup>

Bonta and Motiuk suggested that the correctional system

173. *Id.* at 10.

174. *Id.* at 11.

175. C. MURRAY & L. COX, *BEYOND PROBATION: JUVENILE CORRECTIONS AND THE CHRONIC DELINQUENT* (1979), reviewed by Wilson, *supra* note 169, at 10-14. For a similar discussion, see D. GLASER, *EVALUATION RESEARCH AND DECISION GUIDANCE* 24-26 (1988).

176. C. MURRAY & L. COX, *supra* note 175, at 42.

177. Wilson, *supra* note 169, at 13 (emphasis omitted).

178. Bonta & Motiuk, *The Diversion of Incarcerated Offenders to Correctional Halfway Houses*, 24 J. RES. CRIME & DELINQ. 302, 302 (1987).

179. *Id.* at 303.

180. *Id.* at 305.

tends to overclassify offenders.<sup>181</sup> Overclassification has an unfavorable effect on low-risk offenders who "show a shift in procriminal attitudes and behavior upon exposure to higher-risk offenders in institutions."<sup>182</sup> Low-risk offenders placed in institutions ended up with higher re-incarceration rates than similar low-risk offenders who were placed in halfway houses. Length of incarceration also increased the risk of recidivism. The authors concluded that "if we fail to divert low-risk inmates from continued imprisonment we may actually increase the risk for future recidivism."<sup>183</sup>

Daniel Glaser has made a similar case for the use of actuarial statistical guidelines to assist corrections officials in deciding inmate placement, in assessing readiness for parole release, and in setting the level of supervision during probation and parole.<sup>184</sup> Glaser found that actuarial statistical research has consistently yielded more accurate predictions than those made on the basis of individual impressions by agency officials.<sup>185</sup>

The federal sentencing commission rejected many of the factors found to be reliable in actuarial statistical research.<sup>186</sup> Also, unlike the federal scheme, which rejected any post-conviction data, Glaser argued that the method could be used to estimate the probability of an offender's amenability to rehabilitative programs, success or failure under reduced supervision, readiness for release, and post-release criminality.<sup>187</sup>

Central to the argument against parole was the claim that predictions of future dangerousness are notoriously inaccurate.<sup>188</sup> A prisoner's demonstrated change in attitude, which may weigh in favor of parole, may "be merely an insincere attempt to curry favor with . . . the Parole Board . . . or just another example of a recidivist prisoner's practice of getting through a prison sentence . . . quickly and quietly . . . without

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181. *Id.* at 311.

182. *Id.* at 312.

183. *Id.*

184. See generally D. GLASER, *supra* note 175.

185. *Id.* at 3, 69-70.

186. The Federal Sentencing Commission found that a series of factors, like the offender's age, education, vocational skills, family ties, and previous employment record ordinarily are not relevant to the sentencing decision. UNITED STATES SENTENCING COMM'N, *supra* note 124, ch. 5, pt. H. Glaser argues that some of those factors are relevant in predicting an offender's likely recidivism upon release. D. GLASER, *supra* note 175, at 70.

187. *Id.* at 70.

188. See *supra* notes 77-83, 121 and accompanying text.

any real intention of avoiding crime on release.'"<sup>189</sup> In response to that criticism, Glaser has argued that periods of reduced supervision—like that provided by parole or by incarceration in a halfway house—allow for an adequate test to predict future criminality. He argues that this is true because “the subject, although still somewhat constrained, is exposed to the temptations and opportunities for misconduct in the free community.”<sup>190</sup>

Results from Wisconsin's parole system support Glaser's argument. Using a set of assessment factors, parole officials determine the parolee's risk level and, based on the score, place him into a high, medium, or low supervision group. Reported crime and misconduct rates declined significantly, even for high-risk parolees as long as they were strictly supervised.<sup>191</sup> Wisconsin parole officials also assess parolees' needs as related to risk of recidivism. That scale, developed through extensive consultation between researchers and experienced agents, was designed to determine how well the needs that most affect criminal propensities have been met. The study of the Wisconsin system suggests that when parolees' needs were met, they were less likely to commit additional crimes.<sup>192</sup>

In the early and middle 1970s, based on then-current studies, one might have argued that rehabilitation was ineffective. Efforts at sentencing reform, underway since the 1970s, proceeded on that assumption. Ironically, by the time Congress enacted sentencing reform, new studies were available that should have made reformers rethink their attack on rehabilitation. Apart from past mistakes, legislatures and commentators ought to rethink the rehabilitation question based on more recent studies. More sophisticated research techniques demonstrate that some offenders are amenable to rehabilitation and that social scientists can identify those offenders by use of objective criteria, at least some of which relate to post-conviction behavior.

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189. Metchik, *Parole Decisionmaking*, 32 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 233, 243 (1988) (quoting 1979 REPORT OF THE PAROLE BOARD FOR ENGLAND AND WALES 32).

190. D. GLASER, *supra* note 175, at 151.

191. *Id.* at 132.

192. *Id.* at 128-30.

*B. Rethinking the Philosophical Attack on Rehabilitation*

## 1. Confusion Over the Rehabilitative Model

I do not intend to canvass all of the different philosophical arguments for a just-deserts or retributive model or to assess the background assumptions about the criminal law. Instead, even conceding the underlying assumptions of the just-deserts model, I want to argue that rehabilitation and parole are not inconsistent with that position.

Apart from grave concerns about the actual performance of the rehabilitative model, critics, like the drafters of *Doing Justice*, argued that punishment is deserved.<sup>193</sup> Their model, moralistic and judgmental, is premised on the argument that actors are blameworthy because they are capable of choosing whether to commit a crime.<sup>194</sup> That an actor may have great difficulty conforming his behavior to the requirements of the criminal law because of causes beyond his control does not prevent moral condemnation. Condemnation is appropriate as long as the actor is capable of rational judgment, even if that judgment is overcome during the commission of the offender's crime.<sup>195</sup>

Critics characterized the rehabilitative model as deterministic and medical, inconsistent with the moral judgments of the criminal law. Attempts to treat and to cure the "sick" offender were seen as misguided efforts based on mercy and leniency.<sup>196</sup> That a person deserved to be punished cast doubt on the morality of excusing his conduct.<sup>197</sup> Initially, the arguments against the rehabilitative model started from the erroneous premise that it was synonymous with the medical model that predominated during the 1950s and 1960s. In the post-World War II era, the "mental hygiene movement" cast rehabilitation in the medical framework.<sup>198</sup> But rehabilitation has a much longer history than its modern medical variation.

The debate between proponents of retributive justice and rehabilitation has roots dating back at least to the colonial period. In Puritan America, the law was used to advance the

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193. A. VON HIRSCH, *supra* note 4, at 54, 69-73.

194. *Id.* at 44.

195. See also S. Kadish, *supra* note 54, at 98-105; Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1248-54 (1976).

196. See *supra* text accompanying notes 97-110.

197. See generally Murphy, *Mercy and Legal Justice*, in PHILOSOPHY AND LAW 1-14 (J. Coleman & E. Paul eds. 1987).

198. F. ALLEN, *supra* note 20, at 5.

dominant religious beliefs and to enforce "proper standards of moral behavior."<sup>199</sup> Based on the Calvinist belief in the innate depravity of human beings, the criminal law served to keep people from temptation. Punishment was not intended to save the criminal; because humans were inherently sinful, only God could save them. Punishment served to keep the rest of the community from temptation. The law, as God's word enacted on earth, gave the Puritans the right to represent God's justice by punishing criminals.<sup>200</sup>

Quaker views contrasted sharply with the Puritan conception of the criminal law. Early in our history, the Quakers led a movement away from capital and corporal punishment to a system of workhouses and prisons. Viewed as grim in retrospect, that system was generally enlightened by comparison to earlier treatment of criminals.<sup>201</sup> At root, it was based on an optimism about human capacity for transformation.<sup>202</sup>

Like proponents of the medical model, Quakers believed that crime was the product of society, rather than a result of inherent sinfulness.<sup>203</sup> But the method chosen for transformation was not "treatment." Instead, they believed that the offender could be reformed through a process of rationality. Freed from the corrupting influences and permitted to reflect on moral questions, the offender could be "restored to fellowship with God and humanity."<sup>204</sup>

Around the time of the American Revolution and the adoption of the Constitution, Quaker idealism was a powerful force in penology. It led to the establishment of penitentiaries, first in Pennsylvania where Quaker influence was strongest. Modeled on monastic prisons of the Middle Ages, the penitentiary used solitary confinement, religious instruction, and hard labor to facilitate repentance.<sup>205</sup>

Early prison reformers also stressed the community's responsibility for corrupting the individual. For example, one Boston clergyman inquired, "How can it be justice to punish as a crime that which the institutions of society render unavoida-

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199. G. MCHUGH, CHRISTIAN FAITH AND CRIMINAL JUSTICE 32-33 (1978).

200. *Id.* at 33-34.

201. FAIR AND CERTAIN PUNISHMENT, *supra* note 4, at 85-86.

202. *Id.*; see also F. ALLEN, *supra* note 20, at 13; STRUGGLE FOR JUSTICE, *supra* note 18, at 16.

203. G. MCHUGH, *supra* note 199, at 34-35.

204. *Id.*

205. *Id.* at 36-39.

ble?"<sup>206</sup> Recognition that social conditions were a cause of crime did not render society incapable of punishing the offender, but it created a moral imperative to offer the offender a chance at moral transformation. Nor was the prescription mollicoddling; devices that look unabashedly punitive, like hard labor, were believed to have the beneficial effect of aiding the transformation of the offender.<sup>207</sup>

## 2. Suffering, Retribution, and Rehabilitation

Whether public officials ought to adopt one vision of punishment over another should depend ultimately on the merits of the argument. But I want to speculate in this subsection on the yearnings that help to explain, if not justify, the attraction of a just-deserts or retributive model. Human beings yearn for divine or cosmic justice—I think that rehabilitation is based on similar hopes.

Retribution has primitive roots. For example, Paul Ricoeur, philosopher and cultural anthropologist, suggests that primitive societies saw what he calls defilement, forms of human suffering, in moral terms.<sup>208</sup> Pain and suffering in such societies are interpreted in quasi-moral terms: "Ethics is mingled with the physics of suffering, while suffering is surcharged with ethical meanings."<sup>209</sup>

Human suffering in our modern view has no obvious relationship to human intent or to human causality—one may suffer a bad fate for no understandable reason. But Ricoeur suggests that if suffering and pain are not interpreted as punishment, our suffering is meaningless and our world view is without reason or control: "When [humankind] first wished to express the order in the world, [it] began by expressing it in the language of retribution."<sup>210</sup> The search for moral causality thus preceded the search for physical causality.

Within the religious context, either suffering is related to human worth, or God (or the holy reality) is unjust or capricious. The challenge for the faithful is to explain God's good-

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206. F. ALLEN, *supra* note 20, at 14 (quoting H. SACKS & C. LOGAN, DOES PAROLE MAKE A DIFFERENCE? 80 (1979) (quoting Boston clergyman Theodore Parker)).

207. G. MCHUGH, *supra* note 199, at 39-41; *see also* C. THOMAS, CORRECTIONS IN AMERICA: PROBLEMS OF THE PAST AND THE PRESENT 65 (1987).

208. P. RICOEUR, THE SYMBOLISM OF EVIL 26-27 (1967).

209. *Id.* at 31.

210. *Id.* at 30.

ness and at the same time to explain how the evil prosper and the just suffer.<sup>211</sup>

This tension is reflected in the Book of Job in which Bildad, Job's comforter, responds when Job suggests that his suffering is out of proportion to his guilt:

Does God pervert justice? Or does the Almighty pervert the right? If your children have sinned against him, he has delivered them into the power of their transgression. If you will seek God and make supplication to the Almighty, if you are pure and upright, then surely he will rouse himself for you and reward you with a rightful habitation.<sup>212</sup>

Bildad thus urges that the pure and upright will in fact receive rightful habitation. To believe that the just prosper and the wicked suffer required that the Israelites deny the reality of much of their experience. But if the just prosper, they could avoid the conclusion that God was unjust or indifferent to human suffering.

Christianity faces a similar challenge, to explain the death of Christ without calling into question the goodness of God. If Jesus dies as vicarious punishment for human sin, Jesus's message of the loving God is false. Christian thinkers explain the death of Jesus in radically different ways.<sup>213</sup> But at a minimum, the event must be explained, as must all suffering, in a way that allows order in the world and security and hope: "Man confessed this ineluctability [of moral causality in the universe] long before he recognized the regularity of the natural order."<sup>214</sup>

For many, retribution or just deserts is tied up with that desire for moral order. Even if one agrees that Job's fate in this life was unjust, there is hope for an accounting in the afterlife.

211. The same problem, responding to the idea that the evil man prospers and the just man suffers, must be answered in all religions. For example, the doctrine of "karma," the Hindu and Buddhist teaching about moral causality, preserves for Indian thought moral rationality in the universe. Suffering in this life is because of evil deeds in a former life, and a higher caste in the next life will be the reward for good deeds in this life. The need to interpret one's fate in terms of moral causality is a cardinal principle of Hindu thought. Pugh, *Astrology and Fate: Hindu and Muslim Experiences*, in *KARMA: AN ANTHROPOLOGICAL INQUIRY* 138 (C. Keyes & E. Daniel eds. 1983). While it helps to rationalize the status quo, it must reflect a profound yearning for moral order and justice in the universe to have survived in India with such tenacity for 2600 years.

212. *Job* 8:3-6 (New Oxford Annotated).

213. See P. RICOEUR, *supra* note 208, at 325; see also Gregson, *The Faces of Evil and Our Response: Ricoeur, Lonergan, Moore*, in *RELIGION IN CONTEXT* (T. Fallon & P. Riley eds. 1988).

214. P. RICOEUR, *supra* note 208, at 30.



Ricoeur argues that the failure to find meaning in suffering in this life led us to look elsewhere for that accounting, "whether at the end of history, in a Last Judgment, or in some exceptional event, such as the sacrifice of a victim offered for the sins of the world."<sup>215</sup> He explicitly argues that our retributive penal philosophy comes out of the same need for explaining human suffering:

conscience, not *finding* the manifestation of the law of retribution any longer in real suffering, *looked for* its satisfaction in other directions, whether . . . by means of penal laws elaborated by society with the intention of making the penalty proportionate to the crime, or by means of a wholly internal penalty, accepted as penance.<sup>216</sup>

The penal law thus parallels our hope for more lasting justice. While the law has never attempted to reward the good, it at least attempts to punish the evildoer according to his deserts. Retributive justice is based on the premise that we are free moral agents and that punishment is appropriate for wrong moral choices.<sup>217</sup> At least as early as the twelfth century, that notion of punishment was formalized as part of the canon law.<sup>218</sup>

A philosophy of just deserts thus responds to one of our most profound yearnings: a need to understand human suffering. But the hope for human transformation, or for our capacity to overcome our own failure or sin, is a similarly profound theme in religion and philosophy.

Judaism, for example, "does not overlook the fact of sin."<sup>219</sup> Because we are not merely part of nature, because we have open to us "the infinite and indeterminate possibilities of [our] freedom,"<sup>220</sup> we are capable of moral evil, "the dreadful ills inflicted by man upon himself and his fellow-men."<sup>221</sup> While recognizing that we are finite and flawed, Judaism is not hopelessly pessimistic.

At the core of Judaism is the fellowship between God and man. Sin creates a barrier between man and God.<sup>222</sup> But through repentance and atonement, we can regain fellowship

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215. *Id.* at 42.

216. *Id.* (emphasis in original).

217. M. WALZER, *EXODUS AND REVOLUTION* 83 (1985).

218. G. MCHUGH, *supra* note 199, at 22.

219. W. HERBERG, *JUDAISM AND MODERN MAN* 73 (1951).

220. *Id.* at 72.

221. *Id.* at 73.

222. *Id.* chs. 8, 11.

with God. Salvation in Judaism does not await our death.<sup>223</sup> Instead, it is achieved when we abandon our “delusive self-sufficiency so as to turn to God” and when God gives us “the power to break the vicious circle of sin and turn to the divine source of [our] being.”<sup>224</sup>

Judaism is paradoxical on the nature of salvation, for God is both Judge and Father, dispenser of justice and mercy. Two recurring questions must be answered. Do we earn God’s forgiveness and grace; that is, God as giver of justice suggests as much. Or, as forgiving and loving Father, does God give us His grace without regard to our deserts?<sup>225</sup> If so, does it cheapen God’s grace and make it available to the undeserving? The answer appears paradoxical or at least involves some mix of mercy and justice. The sinner must repent; the sinner must overcome the delusion of self-sufficiency and, in that sense, he must ready himself for God’s grace. But “[i]t is God who saves.” “In the final analysis, despite the initiative and activity required of him, man cannot save himself; . . . God, the divine spirit goes out to meet and to purge [the repentant sinner].”<sup>226</sup>

The process of atonement is at the core of Judaism. Atonement is a form of new beginning, “‘the creation of a new being, a sort of being who is born again, the breaking of the barrier between sinful man and his Maker.’”<sup>227</sup> In an honest recognition of human frailty, Judaism recognizes that once we have atoned, we will become self-absorbed again and need to return to God’s grace. It is a battle that must be constantly refought.<sup>228</sup>

Christian theologians struggle with the same dilemma concerning God’s grace. While the concept of redemption is fundamental throughout Christianity, denominations and theologians differ on how this concept works itself out within the context of life on earth. Problems arise when they attempt to develop the relationship between grace, redemption, and punishment.<sup>229</sup>

223. *Id.* at 123-26.

224. *Id.* at 121.

225. *Id.* at 122-23.

226. *Id.* at 123.

227. *Id.* at 125 (quoting C.G. MONTEFIORE & H. LOEWE, A RABBINIC ANTHOLOGY 230 (1938)).

228. *Id.* at 126.

229. For example, early Christianity, influenced by the Old Testament tradition, emphasized relationship to the community. It demonstrated concern for the spiritual implications of the offense as against the “soul” of the community. The Christian society sought the offender’s reconciliation with both God and the community. G. MCHUGH, *supra* note 199, at 15. Despite Augustine’s emphasis on the city of God separate from the

Christianity accepts the premise that the individual who sins can be reconciled with God and society. The Gospel imperative, to "love one's enemies," implies that to consider someone as an enemy is not wrong, and may even be an appropriate response to that person's criminal and sinful actions. Nonetheless, the concept of enmity implies the possibility of reconciliation. "[T]o consider people who commit crimes as enemies . . . , rather than as 'criminals' . . . , is to presuppose that they and society can be reconciled; . . . that their relationship can change from one of opposition and conflict to one of solidarity and peace."<sup>230</sup> Loving one's enemy does not prevent Christian society from punishing the wrongdoer, but rather requires that Christians keep open the possibility of the criminal's eventual reconciliation with that society.

Implicit in Jesus becoming a man is the notion that God's covenant, the promise of redemption, is open to all humanity. In Wolfhart Pannenberg's words, "[t]hrough the message of Jesus, God gives to humans the assurance of fellowship with him, the fulfillment of their destiny, their salvation. But it is basic that he gives it to everyone . . . ."<sup>231</sup> As in Judaism, that fact creates a central tension in Christian doctrine. If redemption is available to all, it is not earned.

For some theologians, repentance is a necessary condition for redemption. That is how we experience God's grace at work in human life. For example, Hendrikus Berkof has argued:

The knowledge of grace and the knowledge of sin go together; they presuppose and reinforce each other. Without repentance . . . the gospel is changed from a marvelous message

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earthly city, he recognized the relevance of Christianity to decisionmaking in the earthly city: " 'Fulfill, Christian judge, the duty of an affectionate father; let your indignation against their crimes be tempered by considerations of humanity . . . .' " *Id.* at 19 (quoting Letter from Augustine to Marcellinus (A.D. 412), in 1 *The Confessions and Letters of St. Augustine*, Letter CXXXIII, in Ambrose, *Duties of the Clergy*, in 10 NICENE AND POST-NICENE FATHERS 470-71 (P. Schaff & J. Wace eds. 1896)). The judge should not seek revenge, but should " 'be moved by the wounds [the offenders' crimes] have inflicted on their own souls to exercise a desire to heal them.' " *Id.* Other Christians have not been as concerned with the offender as with social order. While John Calvin believed that the purpose of the state and the law was to promote " 'the religious purpose of the maintenance of the true religion,' " *id.* at 25 (substantially quoting 2 E. TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* 615 (O. Wyon trans. 1931)), punishment did not serve a role in redemption because humans were inherently sinful and could be saved only by God. Nothing in human experience could bring about redemption. See J. GUSTAFSON, *THEOLOGY AND CHRISTIAN ETHICS* 172-73 (1974).

230. G. MCHUGH, *supra* note 199, at 148.

231. W. PANNENBERG, *ETHICS* 51 (trans. 1981).

of liberation into a more or less self-evident ideology of cheap grace. If repentance falls away, the amazement and joy over God's free grace also fall away.<sup>232</sup>

Grace without repentance is "cheap" grace; repentance is "the abiding undertone of all the Christian life."<sup>233</sup> Free grace cannot be received until individuals have readied themselves through repentance.

Judaism and Christianity must struggle with the same question: given universal human frailty, are we capable of salvation? Although individual religions often hold out preconditions, like membership in their religious group, the possibility of grace is open to all. No one can avoid sin. All may repent.<sup>234</sup> The availability of salvation makes religion enormously powerful and appealing to its adherents.

At this juncture, I should make clear that I am not urging that our system should give special recognition to prisoners who find Jesus or religion during their incarceration. Anyone familiar with prisons knows that "conversions," especially if finding Jesus may impress the parole board, are quite common and often quite meaningless as a measure of transformation.<sup>235</sup> In fact, urging that the state give special recognition to religious conversions would raise obvious establishment clause problems.

I have attempted instead to demonstrate that the rehabilitative model finds support in many sources other than the modern medical deterministic view of behavior.<sup>236</sup> I also have attempted to suggest an analogy between the rehabilitative model and the powerful religious themes of salvation and redemption. At the core of the two predominant religious beliefs in this country is the view of man as sinner, yet capable of returning to grace.<sup>237</sup> I would like to see that same model preserved within our view of punishment.

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232. H. BERKHOF, *CHRISTIAN FAITH* 433 (trans. 1985) (emphasis omitted).

233. *Id.*

234. See 4 K. BARTH, *CHURCH DOGMATICS: THE DOCTRINE OF RECONCILIATION* 18 (1956).

235. See *STRUGGLE FOR JUSTICE*, *supra* note 18, at 88-89 (discussing prisoner cynicism and shamming to impress parole officials).

236. See *supra* text accompanying notes 198-207.

237. I have focused on our religious traditions in part because of recent re-assertion of those values in our public debate. See Mack, *Liberalism, Neutralism, and Rights*, in *RELIGION, MORALITY AND THE LAW* 46 (J.R. Pennock & J. Chapman eds. 1988). I believe that secular humanists demonstrate similar faith in the capacity for human transformation and moral development. See, e.g., B. RUSSELL, *What is an Agnostic?*, in *BERTRAND RUSSELL ON GOD AND RELIGION* 76-77 (A. Seckel ed. 1986).

### 3. A False Dichotomy: Rehabilitation and Just Deserts

At this point, one might expect a rehabilitation of rehabilitation which urges that, even though inconsistent with notions of just deserts, retribution should be scrapped in favor of a rehabilitative model. I am not going to make that argument. Instead, I want to argue for a more modest position: that a criminal is transformed through punishment is relevant to how much punishment the offender deserves.

To rehabilitate rehabilitation as a justification for punishment is to answer a different question than the one I want to pose in this section of the Article. Much of the criticism of the rehabilitative model over the past fifteen years attempted to show that it is inappropriate to imprison in order to rehabilitate.<sup>238</sup> We imprison in order to punish because the offender deserves the punishment.<sup>239</sup> Even if it is inappropriate to incarcerate to rehabilitate, it does not follow that we should continue to punish the prisoner who demonstrates a transformation.

Supporters of the just-deserts model suggest that because punishment is deserved, relieving an offender from serving part of his sentence demonstrates mercy and not justice.<sup>240</sup> Three important premises are hidden in that argument: that just deserts can be quantified; that mercy may be morally inappropriate; and that a prisoner's response to punishment is irrelevant to how much punishment he deserves.

Prior to the penitentiary movement, when we were willing to punish the offender in kind,<sup>241</sup> one might more readily identify

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238. See, e.g., *United States v. Bergman*, 416 F. Supp. 496, 498-99 (S.D.N.Y. 1976) (emphasis in original):

The court agrees that this defendant should not be sent to prison for "rehabilitation." . . . [T]his court shares the growing understanding that no one should ever be sent to prison *for rehabilitation*. That is to say, nobody who would not otherwise be locked up should suffer that fate on the incongruous premise that it will be good for him or her. Imprisonment is punishment. . . . But the goal of rehabilitation cannot fairly serve in itself as grounds for the sentence to confinement.

239. See A. VON HIRSCH, *supra* note 4, at 66-76.

240. See, e.g., Gaylin & Rothman, *supra* note 11, at xxxvi-xxxix.

241. See M. FOUCAULT, *DISCIPLINE AND PUNISH* 44-45 (A. Sheridan trans. 1977):

There was the use of 'symbolic' torture in which the forms of the execution referred to the nature of the crime: the tongues of blasphemers were pierced, the impure were burnt, the right hand of murderers was cut off; sometimes the condemned man was made to carry the instrument of his crime. . . .

There were even some cases of an almost theatrical reproduction of the crime in the execution of the guilty man—with the same instruments, the same gestures.

the punishment deserved by the offender: the eye for an eye might make sense at least in a case in which the offender did violence to the victim and the offender was lashed in retaliation. Even that is problematic. What if, for example, a violent and hardened offender emotionally terrorized his victim, but only struck her once? Even if we were to accept punishment in kind, we would have difficulty determining what the precisely equivalent punishment would be.<sup>242</sup>

Obviously, when we imprison in order to punish or use other forms of deprivation, the quantification of the deserved punishment becomes at best a rough approximation.<sup>243</sup> Initially, proponents of just deserts and retribution generally disagree on what the relevant factors are in assessing the deserved punishment.<sup>244</sup> Once past that difficult assessment, they also disagree wildly on the appropriate length of prison sentences.<sup>245</sup> Most proponents of just deserts, though, recognize that a wide array of factors help to determine the deserved punishment.

Harm alone is an insufficient measure of the punishment deserved.<sup>246</sup> At a minimum, *mens rea* is relevant.<sup>247</sup> But beyond that, our law has traditionally recognized a variety of offender characteristics that are relevant to the offender's culpability.<sup>248</sup>

242. Even Immanuel Kant, generally associated with a strong retributivist position, argued against full equivalency of crime and punishment. Thus in *The Philosophy of Law*, Kant argued that while a murderer should be executed, "[h]is death . . . must be kept free from all maltreatment that would make the humanity suffering in his person loathsome or abominable." I. KANT, *THE PHILOSOPHY OF LAW* (W. Hastie trans. 1887), reprinted in S. KADISH & S. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 138 (1989).

243. See L. WEINREB, *NATURAL LAW AND JUSTICE* 217-18 (1987). Responding to the argument that retributive theory offers no definite guidelines for determining what punishment fits each crime, Weinreb recognizes that desert is "insistently individual." *Id.* at 211. As a result, sentencing laws will necessarily be only dull approximations of the desert of each criminal.

244. See R. SINGER, *supra* note 4, at 11-34.

245. *Id.* at xvi-xvii (discussing different legislative responses to the "commensurate deserts" "rallying cry"), 137-94 (reviewing variety of state legislative responses).

246. *Id.* at 24-27; see also *Solem v. Helm*, 463 U.S. 277 (1983) (in assessing whether punishment is grossly disproportionate to the offense, the Court considers a balance of the harm caused by the offender and the offender's culpability). For a compelling argument that the actual harm resulting does not correspond to the offender's blameworthiness, see generally Schulhofer, *supra* note 107.

247. Professor Singer has argued that *mens rea* ought to be the controlling question on the offender's culpability. He rejects the idea that the law should inquire into additional characteristics of the offender. R. SINGER, *supra* note 4, at 18-24. His views contrast sharply with, for example, those of Professor Weinreb, who argues that the process of assessing an offender's desert is infinitely complex according to the unique and subtle pattern of the offender's personal history. L. WEINREB, *supra* note 243, at 217-18.

248. L. WEINREB, *supra* note 243, at 217-18.

In urging the abandonment of parole, proponents of just deserts argued that postincarceration changes were irrelevant to just deserts.<sup>249</sup>

One might argue that because we cannot say with precision what punishment is deserved, a parole system for rehabilitated offenders gives us the flexibility to rethink our earlier, overly punitive attitude towards the offender. Early release of the offender, however, might appear to be an act of mercy. Some proponents of just deserts have argued that such an act of mercy is inconsistent with a philosophy of deserved punishment.<sup>250</sup>

Our attitude towards criminal offenders, especially violent offenders, has begun to change in part because we have begun to hear the voices of their victims more clearly than we once did.<sup>251</sup> Feminists and others concerned with family violence and violence directed against women help to identify quite dramatically some of the moral concerns raised by forgiveness and mercy when we excuse an offender from serving the full punishment that he has deserved.<sup>252</sup>

I want to draw an analogy between an abusive spouse and a violent offender who, if early release from detention is considered an act of mercy, is released from custody before he has paid his debt and so has not been punished according to his just deserts. Within an abusive relationship, the abused wife is usually faced with increasing episodes of violence. After the first violent encounter, the abuser is contrite and promises never to harm his wife again. Confronted by the loving mate whom she may remember from courtship and whom she is acculturated to forgive, she does not leave the marriage, but recommits herself to the relationship. In so doing, she has psychologically reinforced the abuser's violent behavior.<sup>253</sup> At a cognitive level, the message to the abuser may be quite cynical. He has devalued his wife through victimizing her and he has gotten away with it.

The abusive spouse has not been punished consistent with his just deserts. Violence within the relationship escalates and may lead to death. The show of mercy and forgiveness was part

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249. See *supra* text accompanying notes 59-65, 105-11, 189.

250. See, e.g., Gaylin & Rothman, *supra* note 11, at xxxvi-xxxix.

251. See sources cited *supra* note 62.

252. L. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 42-47 (1989) (describing cycle of violence in battering-spouse relationship, including the woman's yearning for rediscovery of the "good" man she originally married).

253. *Id.*

of the cycle of violence. It was morally inappropriate because it reflected the lack of value of the abuser's victim. Failing to punish out of mercy and forgiveness is pragmatically and philosophically bankrupt in my example.

In *Mercy and Legal Justice*, Jeffrie Murphy has argued that the exercise of mercy may be immoral.<sup>254</sup> "To be merciful to a person requires not merely that one change how one feels about that person but, also, requires a specific kind of action (or omission) — namely, treating that person less harshly than, in the absence of the mercy, one would have treated him."<sup>255</sup> Mercy involves the departure from justice and so viewed, is unjust, the product of dangerous sentimentality.<sup>256</sup> Mercy is also unjust when it leads us to treat like cases differently. But factors relating to an offender's culpability are morally relevant in assessing whether we are dealing with like cases.<sup>257</sup>

I think that a person's response to punishment is a morally appropriate factor in determining how much punishment to inflict on the offender. Philosopher Jean Hampton has characterized the relationship between offender and victim as follows:

By victimizing me, the wrongdoer has declared himself elevated with respect to me, acting as a superior who is permitted to use me for his purposes. A false moral claim has been made. Moral reality has been denied.<sup>258</sup>

Proportionate punishment is important to correct that false claim: "retributive punishment is the defeat of the wrongdoer at the hands of the victim . . . that symbolizes the correct relative value of wrongdoer and victim."<sup>259</sup>

If that is the retributivist's understanding of the purpose of punishment, he should recognize the relevance of the offender's transformation or reform. It suggests that there is no independent value to compelling a person to submit to a certain amount of punishment. Instead, punishment is to serve as a means of declaring or realigning relative moral worth.

I argued above that we make only a rough approximation about what punishment fits the crime.<sup>260</sup> But even more impor-

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254. Murphy, *supra* note 197, at 2-6.

255. *Id.* at 4.

256. *Id.* at 4-5.

257. *Id.* at 6-7.

258. Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY 125 (1988).

259. *Id.*

260. See *supra* text accompanying notes 241-45.



tantly, if punishment is to serve as a way to re-establish relative moral worth of victim and offender, the length of punishment may vary according to the offender's response to punishment. Even a short period of punishment may bring about the offender's recognition of the false moral claim that he has made. He may internalize the appropriateness of his being punished and may genuinely have atoned for his offense.<sup>261</sup>

I offer two possible transformed offenders. Metaphorically, the transformed offender becomes a new person. If the offender becomes truly a new person, "it is obviously a matter of justice that one not [continue to] punish one person for the crime of another."<sup>262</sup> I do not want to overemphasize the new-person metaphor. More probably, transformed prisoners are ones who grow up and are now more capable of mature moral reflection. They are the same, but a more developed, person. Yet in that instance, if the transformation has resulted from incarceration or other coercive intervention by the state, the offender has internalized the recognition of his false moral claim and has earned a right to request our forgiveness and mercy.<sup>263</sup> To continue to impose suffering on a transformed human being seems exces-

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261. At this juncture, if we recognize purposes of punishment in addition to retribution, we might want to incarcerate an offender past the point of his atonement to serve those additional goals. Alternatively, one might want to condition release on parole supervision to assure that the offender indeed has genuinely been reformed. My colleague David Gruning suggested an interesting dilemma: does a reformed prisoner demonstrate his transformation by accepting the justice of his punishment? If so, then how can one argue for early release of the offender? I agree that part of our motive in punishing is to effect the prisoner's acceptance of his own guilt and the justice of some punishment. But that is a separate question from whether he must accept the full punishment, often an extremely long term of imprisonment. *See, e.g., Terrebonne v. Butler*, 848 F.2d 500 (5th Cir. 1988) (en banc) (life imprisonment without benefit of parole for distribution of small quantity of heroin).

262. Murphy, *supra* note 197, at 9. (Murphy, though, expresses suspicion about "new person" talk.) In commenting on a draft of this Article, Professor Schulhofer asked whether a court could not then consider a defendant's prior crime after he had become a "new person." That the defendant continues to commit crimes may be evidence that we were wrong in our assessment that he has become a new person. It is also worth noting that the law of evidence (the common-law rule making inadmissible an accused's prior criminal acts to show a propensity to commit crime) is premised on the optimistic view of our capacity for transformation. The rule has been explained as follows:

It has to do with the optimistic belief, fundamental in our social system that people are not necessarily limited by their past acts, that the criminal can reform, and that once a criminal has "paid his debt to society" he should be taken for all purposes as an upstanding member of society . . . .

R. LEMPERS & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 219 (2d ed. 1983).

263. *Cf. supra* text accompanying notes 255-59.

sively cruel.<sup>264</sup>

I have not argued that we impose punishment solely for the benefit of the offender. Instead, I have argued that human transformation occurs sometimes in the institutional setting or as a result of another less restrictive setting that is nonetheless a form of punishment.<sup>265</sup> My argument is that when transformation occurs it is difficult to find a continued justification for imposing suffering on that offender.

### C. *The Problem of Inequality*

One of the most powerful objections to the rehabilitative model was that its reliance on indeterminate sentences led to inequality.<sup>266</sup> In this section, I must respond to obvious concerns that re-introducing consideration of a prisoner's postincarceration behavior may lead to the same inequity. Critics were concerned about different aspects of inequality. Commentators did not urge that the punishment for the same offense must necessarily be the same, but instead they argued that the offender's culpability is relevant to his just deserts.<sup>267</sup>

Once analysis focuses on the culpability of the criminal offender instead of exclusively on the harm done, two offenders who commit the same crime may appropriately be treated differently.<sup>268</sup> In effect, we cannot conclude that two offenders have been treated unequally until we decide what factors are relevant to how much punishment is appropriate. The equality question cannot be answered until we resolve the question about why we punish. And for those who urge that punishment relates to culpability, punishment will vary from offender to offender.<sup>269</sup> For

264. I think that insight underlies the emotional and moral force of classical tragic theater. For example, in Shakespeare's *King Lear*, reprinted in W. SHAKESPEARE, *KING LEAR* (K. Muir 9th ed. 1972), we first are outraged at his inhumane treatment of his daughter Cordelia. But what moves us and makes us grieve Lear's death is that he has finally understood and accepted his own moral responsibility.

265. People who work closely with prisoners and ex-convicts certainly report instances of genuine human transformation. See, e.g., Kell, *At S.F. Center, Ex-Cons Rebuild Desperate Lives*, *The Sacramento Bee*, Feb. 5, 1990, at 1, col. 5; Eig, *Board Asks Roemer to Spare Killer*, *The Times-Picayune* (New Orleans), Nov. 28, 1989, at B1, col. 5.

266. See M. FRANKEL, *supra* note 1, ch. 2; A. VON HIRSCH, *supra* note 4, at 27-32.

267. See *supra* text accompanying notes 244-48.

268. But see R. SINGER, *supra* note 4, at 18-24, 27-31, 35-39. Singer argues that the offender's *mens rea* is the only relevant consideration to assessing culpability. That is hardly the prevailing view. See, e.g., FAIR AND CERTAIN PUNISHMENT, *supra* note 4, at 37-47 (identifying relevant factors).

269. See, e.g., L. WEINREB, *supra* note 243, at 211.

example, even while abandoning parole, the federal *Sentencing Guidelines* consider whether an offender demonstrates an acceptance of responsibility significant.<sup>270</sup>

Most commentators who urged the abandonment of indeterminate sentencing recognized that conclusion.<sup>271</sup> Some variation in sentencing was appropriate, but indeterminate sentencing was unequal in part because it had no relationship to just deserts.<sup>272</sup> But the most important concern expressed by critics of indeterminate sentencing was the arbitrary, unguided discretion given to both sentencing judges and parole boards.<sup>273</sup>

I have argued earlier in this Article that an offender's transformation, like his culpability, is relevant to morally appropriate punishment.<sup>274</sup> If that conclusion is sound, then consideration of an offender's transformation is not impermissible on equality grounds.

Much of the doubt about using postincarceration behavior as a measure of release date turned on doubts about our ability to identify genuine human transformation<sup>275</sup> and about the bias and unfair treatment based on inappropriate factors like the prisoner's race.<sup>276</sup> Here, I am cautiously optimistic that we can articulate objective standards to guide parole board determinations. As discussed earlier in this Article, research over the past

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270. UNITED STATES SENTENCING COMM'N, *supra* note 124, § 3E1.1. The Model Penal Code (MPC) definition of "criminal attempt" offers another illustration when society recognizes an offender's conduct, after the commission of the crime, as relevant to the amount of punishment he deserves. Indeed, under the MPC approach, a defendant whose "conduct would otherwise constitute an attempt" has an affirmative defense if he can demonstrate that he made "a complete and voluntary renunciation of his criminal purpose." MODEL PENAL CODE § 5.01(4) (1985). Under the MPC, a defendant is not guilty if he has a change of heart immediately after attempting to commit a crime. Under the *Sentencing Guidelines*, he may reduce his punishment if he demonstrates remorse at the time of his sentencing. But by abandoning the opportunity for parole, society rejects the relevance of a prisoner's change of heart when it comes later rather than earlier in the proceedings.

271. *See, e.g.*, M. FRANKEL, *supra* note 1, ch. 9 (urging weights to be given to a wide range of relevant factors); FAIR AND CERTAIN PUNISHMENT, *supra* note 4, at 37-48 (examination of the crime of armed robbery to demonstrate factors relevant to assessing punishment); A. VON HIRSCH, *supra* note 4, at 80-82 (discussing some considerations relevant to offender culpability).

272. *See, e.g.*, Gaylin & Rothman, *supra* note 11, at xxxix.

273. M. FRANKEL, *supra* note 1, at 103-04 (suggesting that indeterminate sentencing as administered was sufficiently arbitrary to raise due process concerns).

274. *See supra* text accompanying notes 262-64.

275. A. VON HIRSCH, *supra* note 4, at 19-26 (raising concerns about ability to predict future dangerousness).

276. *See, e.g.*, STRUGGLE FOR JUSTICE, *supra* note 18, at 71-72 (criminal justice system is dominated by racism and cultural and class bias).

decade suggests that our earlier conclusions about recidivism, parole, and rehabilitation were unnecessarily pessimistic. A growing literature suggests that actuarial statistics lead to acceptably accurate predictions about an offender's likely recidivism.<sup>277</sup>

## V. CONCLUSIONS

I believe that rethinking rehabilitation and parole is timely. Popular perception about our need for severe punishment may reduce the political will for reform. But faced with the unacceptable cost of creating new prison facilities, we may be ready to consider a wide variety of alternatives to bricks and mortar.

I have not urged that we merely forget the debate of the past twenty years and re-introduce a medical, rehabilitative model. Instead, I have tried to rehabilitate rehabilitation and parole within the confines of the just-deserts model that is widely accepted today. Conceding that the criminal law is moralistic and judgmental, I have argued that the primary arguments against the rehabilitative model must be rethought.

First, insofar as the model was rejected because of the widely held belief that rehabilitation did not work, more recent research suggests that position was wrong. Earlier researchers were asking the wrong questions. More subtle examination of the data suggests that some programs do work well and that more sophisticated criteria are available to determine who may benefit from different kinds of rehabilitative programs.

Second, even if rehabilitation works, we might rightly reject it if it is morally or philosophically inappropriate. I have attempted to demonstrate that transformation or atonement, at the core of our religious traditions, does relate to how much punishment should be meted out to an offender.

Third, equality is not offended if we determine the amount of punishment deserved based on morally relevant criteria. If my second conclusion is correct, then it is appropriate to treat two offenders differently depending on their response to punishment. I have also argued tentatively that new research properly implemented as parole guidelines will allow parole decisions to be made objectively and without discrimination.

Finally, I want to urge a return to the optimism of earlier reformers who believed in human goodness and capacity for

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277. See *supra* text accompanying notes 179-85.

transformation. I do not urge that all offenders are capable of reform, but I would urge us to return to criminal offenders hope that their own efforts in prison can lead to renewal.