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RECENT TRENDS IN AMERICAN CRIMINAL SENTENCING THEORY

ANDREW VON HIRSCH*

A description of current American thinking about criminal sentencing may be useful, both as a backdrop and a basis for comparison, for this volume discussing European sentencing developments. Ideas on sentencing have been so much in ferment in this country during the last decade, that those of us involved in the debate scarcely have had the opportunity to attempt a summing up.¹ I was given that opportunity in early 1981, when I was asked by the Max-Planck Institute for Foreign and International Criminal Law in Freiburg, West Germany, to lecture on recent trends in American sentencing theory.² The lecture evolved into an article published in German³ — of which this is the English version.⁴ This article is thus an account designed originally for an overseas audience; but I hope it can also provide some perspective for American readers.

American penologists visiting the Federal Republic of Germany soon learn that German sentencing theory, since von Liszt a century ago, has represented a compromise between classical and positivist elements. That compromise is readily apparent in Para. 46 of the German Penal Code, which declares that (1) the degree of guilt of the offender is the basis for measuring his sentence, and yet (2) the effect of the sentence on the offender's future conduct in the community is to be taken

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1. One such summing-up is to be found in F. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981). My own comments and reservations about Allen's account are set forth in von Hirsch, Book Review, 131 U. PA. L. REV. No. 3 (1983) (forthcoming) [hereinafter cited as von Hirsch, Book Review].

2. The lecture was given at the Max-Planck Institute on May 12, 1981. I would like to express my appreciation to Prof. Dr. Hans-Heinrich Jeschek, Director of the Institute, for making the Institute's facilities available to me, and for encouraging me to write the resulting article, and to my German colleagues Johannes Feest, Joachim Herrmann, Barbara Huber, Karl Schumann, and Thomas Weigend for their useful comments.

During that year, I also gave somewhat different versions of this lecture at the Institute of Criminal Science of the University of Copenhagen, The Institute of Criminology of the University of Oslo, and the Law Faculty of the University of Stockholm; and I wish to thank my colleagues at those institutions for their suggestions.

3. The German article is von Hirsch, *Gegenwärtige Tendenzen in der Amerikanischen Strafzumessungslehre*, 94 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 1047 (1982).

4. This English version has been revised somewhat from the German article.

into account.⁵ There is, notoriously, a tension between these elements: the sentence that would be fairly commensurate with the gravity of the offender's conduct is not necessarily the same as the sentence that optimally would prevent future criminality on the offender's part.⁶ Thus, it is not surprising that there was heated debate a decade ago during the drafting of the current version of the German Penal Code about the relative weight that should be given to notions of blameworthiness and of special prevention.⁷ That debate continues today.⁸

It may be useful to look at other countries where the debate between "neoclassical" and "positivist" sentencing rationales is now occurring. That debate has been particularly active in Scandinavia and America. Until recently, positivism had the upper hand both in the Nordic countries and in the United States: the ideal for a sentencing system was, in greater or lesser degree, that of rehabilitating offenders, and of restraining those deemed likely to commit future crimes. In the past ten or fifteen years, however, penologists in both Scandinavia⁹ and the United States have become disenchanted with traditional positivist sentencing approaches. Scandinavians have been moving toward support for a "neoclassical" sentencing philosophy that emphasizes proportionality in punishment.¹⁰

In the United States, the development has been more complex. The decline of positivist thinking has been accompanied by the rise of at least three new approaches: first, a "neopositivist" penal ethic; second, a neo-Benthamite cost-benefit theory emphasizing deterrence and incapacitation; and finally, a school of thought similar to much current Scandinavian thinking, which gives primacy to notions of blameworthiness and proportionality. It is this American debate which I shall examine in this article.

I. THE OLD POSITIVIST CONSENSUS

During the end of the nineteenth century and the beginning of the

5. STRAFGESETZBUCH [StGB] § 46(1).

6. See W. HASSEMER, EINFÜHRUNG IN DIE GRUNDLAGEN DES STRAFRECHTS 270-74 (1981).

7. See Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37 (1983).

8. See, e.g., Seelmann, *Neue Entwicklung beim Strafrecht-dogmatischen Schuldbegriff*, 1980 JURA 505.

9. See, e.g., N. CHRISTIE, LIMITS TO PAIN 20-26 (1981).

10. See, e.g., NATIONAL SWEDISH COUNCIL FOR CRIME PREVENTION, A NEW PENAL SYSTEM: IDEAS AND PROPOSALS (1978) (English Summary); von Hirsch, "Neoclassicism," *Proportionality and the Rationale for Punishment: Thoughts on the Scandinavian Debate*, 29 CRIME & DELINQ. No. 1 (1983) (forthcoming) [hereinafter cited as von Hirsch, "Neoclassicism"]. See also PENAL CODE OF FINLAND, ch. 6, § 2 (1976).

twentieth, American ideas about sentencing developed differently from German thought. Instead of attempting to synthesize classicism and positivism, Americans espoused a thoroughly positivist ideology. This ideology emphasized special prevention rather than ideas of proportionality: although the defendant was convicted for the crime he had committed, the sentence was to be directed toward preventing him from committing future crimes.

This dominant sentencing ideology stressed two themes: rehabilitation and prediction of future criminality.¹¹ The judge was supposed to fashion the sentence to promote the offender's resocialization. The sentence also was supposed to reflect the likelihood of the offender's offending again: if his prognosis was favorable, he should be given a sentence in the community; if unfavorable, he should be separated from the community as long as he remained a risk.

According to this ideology, the degree of blameworthiness of the actor's conduct was relatively unimportant. Someone convicted of a serious crime could be given a mild sentence if the likelihood of his recidivism seemed slight, or if such a response appeared to promote his reintegration into society. Similarly, someone convicted of a lesser offense could be imprisoned for a considerable time if his criminal record or social background indicated a high probability of recidivism. The nature of the offender's crime was considered significant chiefly to the extent that it provided clues about his amenability to treatment or the risk of his future criminality. Proportionality—the notion of punishment commensurate with the gravity of the offender's criminal conduct—was deemed no ideal. One saw such “retributive” thinking as impractical and unprogressive, because it meant that some offenders could continue to be punished long after they had been successfully rehabilitated, whereas others would have to be released (having completed their “deserved” sentences) even though they remained a danger to society.¹²

Linked with these ideas was the notion of sweeping discretion for deciding the quantum of sentence. In Germany, the Penal Code gave sentencing judges wide leeway, but in America that leeway was wider still. Typically, American statutes set only the maximum penalties for

11. See D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 43-201 (1980); MODEL PENAL CODE § 7.01 (1962); MODEL SENTENCING ACT, art. 1, § 1 (1963); NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS (1971). For readings and bibliography on the American positivist model, see SENTENCING 42-186 (H. Gross & A. von Hirsch eds. 1981).

12. See D. ROTHMAN, *supra* note 11.

different crimes — and those maxima were so high that they were of little practical significance in normal cases. The judge normally had the choice of *any* sentence within this high limit: he could impose a fine, probation, or a shorter or longer prison sentence. If the offender was imprisoned, then an administrative body — the parole board — could release him at any time after a specified fraction (in most states, one-third) of his sentence had elapsed. There were no specific standards or guidelines governing sentencing judges' and parole boards' decisions, and those decisions ordinarily could not be appealed. This wide discretion was supposed to serve the system's special-preventive aims. It was designed to permit officials familiar with the particular case to choose a disposition tailored to the offender's need for treatment and his likelihood of returning to crime.¹³

The resulting conception of sentencing, although drawn more from American than from European intellectual sources,¹⁴ came remarkably close to the Italian positivist ideology. Enrico Ferri's Inaugural Lectures, given at the University of Naples in 1901,¹⁵ reflect these same theses: an emphasis on rehabilitation and prediction, a downgrading of notions of proportionality, and wide judicial discretion.

The ideology was able to attract a broad consensus in America because it suited the interests of various constituencies. Liberal reformers saw the positivist scheme as a humanitarian one, because it purported to treat offenders as potentially useful and salvageable persons, who should be reintegrated into the community as soon as their criminal tendencies had been abated. Conservative politicians could support (or at least, not actively oppose) the scheme because it permitted seemingly dangerous offenders to be imprisoned and to remain in confinement as long as they remained risks. Corrections commissioners and prison wardens — an influential group in criminal policy matters — could support the ideology as a way of promoting order in the prison; disruptive behavior on the part of a prisoner could be diagnosed as a sign of lack of "progress" toward cure, and thus penalized by longer confinement.¹⁶

Practice did by no means wholly fit the theory. The system's wide discretion permitted judges to consider other purposes (deterrence, or

13. A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 27-32 (1976) [hereinafter cited as VON HIRSCH, *DOING JUSTICE*].

14. See D. ROTHMAN, *supra* note 11, at 43-81; D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971).

15. *THE POSITIVE SCHOOL OF CRIMINOLOGY: THREE LECTURES BY ENRICO FERRI* 95-112 (S. Grupp ed. 1968).

16. For an analysis of this consensus, see D. ROTHMAN, *supra* note 11, at 159-201.

whatever else they preferred) in their everyday decisions, without having to explain why they were departing from the prevailing ideology. But this flexibility also helped to preserve the system, for it left some freedom in practice for judges to use such other ideas — without need to challenge openly the dominant positivist notions. And dominant these notions were: when one reads influential sources of the time — for example, the American Law Institute's Model Penal Code of 1962¹⁷ — the emphasis on treatment, prediction, and discretion is apparent.

II. THE ATTACK ON THE POSITIVIST CONSENSUS

Beginning in the early 1970's, the consensus began to crumble. The theoretical justification for positivist sentencing came under attack, and simultaneously, the ideology's political foundations weakened.¹⁸

A. *The Disappointments of Rehabilitation*

After decades of rhetoric about rehabilitation, American criminologists began in the fifties and sixties to test treatment methods systematically. The results of such studies came slowly but by the early 1970's several surveys of treatment studies had been published. The results were disappointing indeed. Although many offenders showed "improvement" (that is, did not return to crime), this tended to occur as often among untreated as among treated individuals in the samples studied: the treatment itself had little perceptible influence.¹⁹

There have been two main interpretations of these studies. The pessimistic view (best known through Robert Martinson's work, but adopted by Bailey, Robison, and Greenberg as well) has been that virtually no rehabilitative program has been shown to succeed. The "optimistic" view (espoused, for example, by Ted Palmer) has been that *few* programs have worked, not none: a select minority of treatment programs indeed have succeeded, when they were limited to certain of-

17. MODEL PENAL CODE § 7.01(1) (1962).

18. For an account of these political developments, see Rothman, *Decarcerating Prisoners and Patients*, 1 CIV. LIB. REV. 8 (Fall 1973), reprinted in SENTENCING, *supra* note 11, at 130.

19. For a bibliography of these studies, see SENTENCING, *supra* note 11, at 186. It also appeared that the studies which claimed success tended to be flawed in one of two ways: the members of the experimental group were more carefully screened than those of the control group, so they could have been expected *ab initio* to have a lower probability of recidivism, irrespective of the treatment; or else, the criterion of recidivism that was used — rearrests, new convictions, parole revocations—involved official decisions that were vulnerable to distortion through officials' desire to have the treatment programs succeed. See Zimring, *Measuring the Impact of Pretrial Diversion from the Criminal Justice System*, 41 U. CHI. L. REV. 224, 228 (1974); P. LERMAN, COMMUNITY TREATMENT AND SOCIAL CONTROL (1974).

fender subpopulations whose characteristics had been carefully matched to the program type.²⁰

In an effort to reconcile these different views, the National Academy of Sciences established a panel of experts to review the literature. The panel's conclusions, published in 1979, tended to side with the pessimists.²¹ Since then, there have been occasional claims of success for particular intervention techniques for dealing with particular offender types,²² but no serious researcher has been able to claim that rehabilitation *routinely* could be made to work for the bulk of offenders coming before the courts. The positivists' hope of building a sentencing system on a rehabilitative base thus has proven illusory. Similar Scandinavian studies have shown equally negative results.²³

B. *Questions About Prediction*

The forecasting of criminal behavior has been a focus of research among American criminologists since E.W. Burgess published his prediction tables in 1928. Sheldon and Eleanor Glueck's prediction studies of juvenile delinquency achieved worldwide prominence.²⁴ The criterion for success, however, was one-sided: it was concerned only with the prediction techniques' ability to identify those who subsequently would offend again. The obverse side — the problem of *overprediction* — was seldom considered: what proportion of those identified as future recidivists subsequently would *not* have offended again, had they been permitted to remain at large? When prediction is relied upon to determine whether and how long an offender should be imprisoned, an erroneous forecast that he will recidivate has grave consequences — the possible loss of his liberty.²⁵

When researchers finally turned their attention to the overprediction problem in the early 1970's, its formidable dimensions became apparent. Although prediction methods had a limited success in identifying subgroups of offenders having a higher-than-average statistical probability of recidivism, these methods showed a disturbing inci-

20. For references to these works, see SENTENCING, *supra* note 11, at 186.

21. See THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS 3-118 (L. Sechrest, S. White & E. Brown eds. 1979).

22. See, e.g., Wilson, *What Works? Revisited: New Findings on Rehabilitation*, THE PUB. INTEREST, No. 61, Fall, 1980, at 3.

23. See Bishop, *Nordic Criticism of Treatment Ideologies*, in CRIME AND JUSTICE 411-19 (L. Radzinowicz & M. Wolfgang 2d ed. 1977).

24. See von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717, 730 (1972), reprinted in SENTENCING, *supra* note 11, at 154 [hereinafter cited as von Hirsch, *Prediction of Criminal Conduct*].

25. von Hirsch, *Prediction of Criminal Conduct*, *supra* note 24, at 730-44.

dence of *false positives* — that is, persons *mistakenly* predicted to be recidivists.²⁶

The rate of false positives was particularly high when forecasting serious criminality such as violent crimes. John Monahan has compared and analyzed the results of four major studies that tested the accuracy of clinical predictions of violence among convicted offenders and mental patients. In some of these studies, the prognosis was made with considerable care: the researchers employed trained psychologists who used psychological tests and extensive family and social histories when making their judgments. Nevertheless, the false positives substantially outnumbered the violent recidivists accurately identified: between sixty and eighty-five percent of those predicted to be violent were *not* subsequently found to have committed further violent acts. Nor were statistical techniques for predicting violence any better: Monahan cites two studies, in one of which the false positives rate was sixty percent, and in the other even higher.²⁷

This tendency to overpredict is not easily remediable because it results from the rarity of the conduct to be forecasted. Serious crimes, like acts of violence, are statistically rare events. The rarer the event, the greater will be the incidence of false positives. When the conduct to be predicted occurs infrequently among the sample, and when the prediction method relies (as it must) on rough correlations between criminals' observed characteristics and their subsequent lawful or unlawful behavior, the forecaster will be able to spot the actual violators only if he includes a large number of false positives. It is like trying to shoot at a small, distant target with a blunderbuss: one can hit the target only if much of the discharge hits outside it.²⁸

C. *Discretion and Disparity*

Researchers also began to recognize that wide sentencing discretion allows discrepant decisions. When judges and parole boards are free to decide the quantum of punishment without standards or guidelines and without appreciable control by appellate courts, they will decide similar cases differently. A much-publicized study illustrated this problem. During a conference of federal judges of the Second Circuit, researchers selected the facts of numerous cases from the files, and asked each of the fifty judges present to state what sentence he or she

26. *Id.*; Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL ED. 24 (1970); N. MORRIS, *THE FUTURE OF IMPRISONMENT* 62-73, 80-84 (1974).

27. J. MONAHAN, *PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES* 73-80, 101-104 (1981).

28. von Hirsch, *Prediction of Criminal Conduct*, *supra* note 24, at 735-738.

would have imposed. Striking disparities resulted. In one case, a crime that drew a three-year prison sentence from one judge drew a *twenty*-year term *plus* a \$65,000 fine from another judge. Such discrepancies could not be attributed to differences in the cases being decided, because each judge was *ex hypothesi* dealing with the same set of facts.²⁹

Research did show that most courts, even when acting with wide discretion, tended to develop well-established average sentences — “going rates” — for various classes of crime and criminals. But these tariffs were merely statistical averages, so that individual decisionmakers remained free to deviate from them when they chose. This freedom constitutes the real problem of sentencing disparity: it is not the lack of a statistical norm, but the risk that the decisionmaker in a particular case will depart from that norm without having to give adequate reasons why a departure is appropriate.³⁰

D. *Lack of a New Consensus*

By the mid-seventies, it became apparent that the traditional positivism was no longer sustainable. *Something* had to change. Two points, particularly, became widely accepted.

First, rehabilitation should not be used as the basis for sentence choice—or in any event, should be given this role sparingly.³¹ Researchers should continue to experiment with rehabilitative programs, and offenders who are sentenced to prison might be offered treatment during their prison terms. But the offender should not be incarcerated *in order* to receive treatment, as the Model Penal Code had proposed,³² when sufficient other grounds for confining him are lacking. Treatment methods, it was understood, are simply too little developed to warrant making rehabilitation the ground for the sentence.

Second, sentencing decisions should be made subject to the rule of law. The wide, unstructured discretion hitherto granted to sentencing judges and parole boards must in *some* fashion be narrowed.³³

This development, however, reflected only a negative consensus — on what features of the old ideology ought *not* be retained. There has been no new affirmative consensus on what the rationale of a sentenc-

29. See generally A. PARTRIDGE & W. ELDRIDGE, *THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO JUDGES OF THE SECOND CIRCUIT* (1974). See also VON HIRSCH, *DOING JUSTICE*, *supra* note 13, at 19-26.

30. Gottfredson, *Sentencing Guidelines*, in *SENTENCING*, *supra* note 11, at 310-14.

31. See, e.g., F. ALLEN, *supra* note 1.

32. MODEL PENAL CODE § 7.01(1)(b) (1962).

33. See generally M. FRANKEL, *CRIMINAL SENTENCING: LAW WITHOUT ORDER* (1972). See also *infra* Section VI.

ing system should be. Instead, three major schools of thought have developed, each having markedly different philosophical and penological assumptions. Let me, then, describe these views and add some of my own (admittedly partisan) comments about them.

III. NEOPOSITIVISM

One response, developed by former adherents to positivism, has been to try to amend and to refurbish that doctrine. The emphasis would remain upon preventing the individual defendant from returning to crime. Certain limits would be imposed, however, aimed at correcting the worst anomalies of the old scheme. This view has been discussed by several recent writers³⁴ and has been set forth in systematic fashion in the 1979 report on sentencing policy of the American Bar Association.³⁵ Its advocates have not given this doctrine a name, but given its similarity to the traditional American positivist view, I shall entitle it "neopositivism."

The neopositivist view — as expressed, for example, by the American Bar Association report³⁶ — contains three main elements:

1. Rehabilitation, for the reasons already discussed, should not be used as the basis for the choice of sentence.

2. Proportionality should not be disregarded entirely in sentencing decisions, as it tended to be under the old doctrine. Gross disproportion in leniency or severity, the neopositivists recognize, presents problems of justice. Persons convicted of lesser or intermediate-level offenses should not face the possibility of lengthy imprisonments, even if their estimated likelihood of recidivism is high, and those convicted of the gravest offenses should not receive probation even if their prospect of recidivism is small. Such sanctions are simply too disproportionate, and thus would offend common-sense notions of justice. The concept of proportionality, however, would serve only as a "side constraint" or (in Norval Morris's words) a "limiting principle."³⁷ Rather

34. See, e.g., M. SHERMAN & G. HAWKINS, IMPRISONMENT IN AMERICA: CHOOSING THE FUTURE 96-109 (1981), reviewed in von Hirsch, Book Review, *supra* note 1; Coffee, *Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L. J. 975, 1056-1105 (1978); Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1409-20 (1979).

35. AMERICAN BAR ASSOCIATION, TASK FORCE ON SENTENCING ALTERNATIVES AND PROCEDURES, SENTENCING ALTERNATIVES AND PROCEDURES (2d ed. 1979) [hereinafter cited as SECOND ABA SENTENCING REPORT].

36. *Id.*

37. Morris, *Punishment, Desert, and Rehabilitation*, in SENTENCING, *supra* note 11, at 257-71 [hereinafter cited as Morris, *Punishment, Desert, and Rehabilitation*]. While using

than determining what the appropriate sentence level should be, it would set only certain wide outer bounds, beyond which any penalty would seem manifestly unjust.

3. Within these broad upper and lower bounds, the sentence would continue to be determined primarily by the defendant's predicted likelihood of recidivism. Convicts most likely to offend again should be incarcerated to protect the public from harm. Those offenders least likely to return to crime should be given a sentence in the community — under a degree of supervision designed to reflect the risk of recidivism. The major focus of sentencing research therefore should be on predicting future criminality (or, in the present jargon, on "selective incapacitation").³⁸ But the predicted criminal behavior should be reasonably serious, if the person is to be imprisoned on predictive grounds.³⁹ Further, some neopositivists assert that the predictions should not, as a matter of social equity, rely on such class-related status factors as education or employment history.⁴⁰

Having done so elsewhere,⁴¹ I shall not attempt a detailed critique of the neopositivist view in this article. One problem remains that of overprediction. The neopositivist scheme continues to rest primarily on forecasts of the defendant's future criminal behavior, and such forecasts are plagued with false positives. Because the emphasis now is on predicting the defendant's likelihood of *serious* criminality, the rate of false positives for such statistically rare events is apt to be particularly great.⁴² It would not be possible for the neopositivists to adopt the precautions that Monahan has proposed for reducing the false positives rate, i.e., to restrict the temporal duration of the prediction to a short period, and to limit the use of predictions to carefully selected subpopulations where the "base rate" of serious criminality is particularly high.⁴³ Monahan's precautions would have the effect of permitting pre-

Morris's idea of proportionality as only a limiting principle, the neopositivists have not accepted his earlier-stated strictures on the use of prediction in sentencing. See N. MORRIS, *supra* note 26.

38. See, e.g., P. GREENWOOD, *SELECTIVE INCAPACITATION* (1982). See also J. CHAIKEN & M. CHAIKEN, *VARIETIES OF CRIMINAL BEHAVIOR: SUMMARY AND POLICY IMPLICATIONS* (1982). The National Institute of Justice of the U.S. Department of Justice has recently been providing extensive funding for such prediction research.

39. SECOND ABA SENTENCING REPORT, *supra* note 35, § 18-2.5(c)(i).

40. *Id.* at 75-76; Underwood, *supra* note 34, at 1434-42; but see P. GREENWOOD, *supra* note 38.

41. von Hirsch, *Utilitarian Sentencing Resuscitated: The American Bar Association's Second Report on Criminal Sentencing*, 33 RUTGERS L. REV. 772 (1981) [hereinafter cited as von Hirsch, *Utilitarian Sentencing Resuscitated*].

42. See *supra* text accompanying note 27.

43. J. MONAHAN, *supra* note 27, at 123-28, 143-69. But see P. GREENWOOD, *supra* note 38. Greenwood has emphasized high-risk offender subgroups in his research, but he sug-

dictions to be used only in exceptional cases, whereas the whole aim of the neopositivists is to make prediction the normal basis for sentencing.

Another, more fundamental, problem concerns the peripheral role assigned to the principle of proportionality. Treating proportionality as a mere "side constraint" means that those offenders whose crimes are equally blameworthy can receive substantially unequal punishments. Severities will not even be rank ordered: a person who commits the worse crime would receive the more lenient sentence if he is deemed a better risk.⁴⁴ In such a scheme, penalties are distributed in a manner that largely disregards the blaming implications of the criminal sanction.⁴⁵

A third, also troublesome, question about neopositivism is whether it offers anything really new. Neopositivism would base sentencing decisions chiefly on predictions, rather than on treatment considerations. But the abandonment of rehabilitation as the basis for sentencing was virtually inevitable, once the discouraging research findings about treatment became known. The theory also would give the idea of proportionality a limited role in supplying peripheral outer limits on sentences, but the more sophisticated positivists have long been prepared to make this last, easy concession. The Model Penal Code, for example, provides statutory maxima based on the felony-classification of the crime, thus barring extremely lengthy prison sentences for lesser felonies.⁴⁶ It thus is hard to see much innovation in neopositivism, other than to put a more plausible (or less implausible) face on traditional positivist notions.⁴⁷

A patched-together compromise such as this between ideas of prevention and those of equity would be likely to satisfy neither those preoccupied with crime prevention, nor those concerned seriously with questions of justice. If the assumed purpose is to reduce crime, then one may well ask whether a prediction-oriented strategy is a comprehensive enough way of achieving this objective. Might not an optimally effective system concentrate on inducing potential offenders generally to commit fewer crimes? On the other hand, if one finally has conceded that sentencing involves issues of justice, perhaps those issues should be taken more to heart than the neopositivists have taken them.

gests a much more sweeping use of a predictive rationale. Among convicted robbers, for example, he proposes a strategy whereby a prediction score such as his own *chiefly* would determine the choice of penalty. *Id.*

44. For a fuller discussion, see von Hirsch, *Utilitarian Sentencing Resuscitated*, *supra* note 41, at 783-89.

45. *See infra* Section V.

46. MODEL PENAL CODE § 6.06 (1962).

47. von Hirsch, Book Review, *supra* note 1.

It is thus not surprising that two other schools of thought have been developed in the United States: one emphasizing deterrence of crime, the other stressing proportionate and fair punishments.

IV. THE DETERRENCE-INCAPACITATION SCHOOL

According to the “deterrence-incapacitation” view, sentencing has one overriding goal: reducing the crime rate. Markedly conservative in their political outlook, the leading deterrence-incapacitation theorists — Richard Posner, James Q. Wilson, and Ernest van den Haag⁴⁸ — have felt no compunction in emphasizing the social control features of the penal system.

This view also draws heavily from economics and econometrics. Traditionally, criminal justice has been perceived as being within the competence of jurists, sociologists, and psychologists. But beginning about a decade ago, economists (largely those of the Chicago school) began to assert that crime could usefully be viewed as an activity whose frequency may be made to vary with the costs imposed on it.⁴⁹ Many of the proponents of the deterrence-incapacitation model are professional economists or those trained in economics, and their writings are reminiscent of economics texts. Thus Richard Posner writes: “The function of the criminal law, viewed from an economic standpoint, is to impose additional costs on unlawful conduct where the conventional damages remedy alone would be insufficient to limit that conduct to the efficient level.”⁵⁰

If one is asking why the institution of punishment should exist at all, general deterrence is surely a useful notion. As the Norwegian legal scholar Johannes Andenaes has said, “it is still a fundamental fact of social life that the risk of unpleasant consequences is a very strong motivational factor for most people in most situations.”⁵¹ Crime rates are admittedly substantial today, but they would probably be much higher if acts of theft, force, and fraud went completely unpunished. One reason for the existence of a system of criminal sanctions is that it

48. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 163-73 (2d ed. 1977); J. WILSON, *THINKING ABOUT CRIME* 162-82, 198-209 (1975); van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 *RUTGERS L. REV.* 706, 706-20 (1981). The Posner and Wilson selections are reprinted in *SENTENCING*, *supra* note 11, at 204-12, 213-27. For a bibliography, see *id.* at 236.

49. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. POL. ECON.* 169, 207-09 (1968).

50. R. POSNER, *supra* note 48, at 163.

51. Andenaes, *The Morality of Deterrence*, 37 *U. CHI. L. REV.* 649, 664 (1970), reprinted in *SENTENCING*, *supra* note 11, at 191-202. See also *infra* text accompanying notes 80-81.

deters crimes, in the sense of securing more law-compliance than there would be if there were no criminal penalties at all.

Deterrence theorists, such as Posner and van den Haag, however, wish to go further: to decide the quantum of sentence by weighing the deterrent returns of penalties against the "costs" of punishing. Punishment prevents harm by deterring crimes; it also inflicts harm by making punished offenders suffer, and has additional costs through the resources it absorbs. The proper sentence, these writers suggest, is the one that yields the optimum balance of aggregate benefits (crime prevented) over aggregate costs (the pain inflicted on offenders, and the financial costs of the criminal justice system).⁵²

Viewed from this perspective, the traditional positivist approach of imprisoning the potential recidivists while treating the "good risks" mildly is said to be inefficient. That approach creates the hope among prospective offenders that, if apprehended and convicted, they may be among the more fortunate individuals who receive milder punishments. A rational deterrence strategy, supposedly, would make it more certain that all criminals convicted of major felonies would receive, at a minimum, a substantial punishment — thus eliminating this hope of leniency. Mandatory minimum prison sentences are thus proposed for such violations.

Such a strategy, James Q. Wilson has claimed, would have incapacitative benefits as well. Most major crimes, he asserted, are committed by a small number of repeaters who, because of the large number of offenses they commit, sooner or later are caught and convicted. If prison sentences (even of modest duration) invariably were imposed on those convicted of such crimes, the payoff would be substantial: society would be removing from circulation the most active criminals for at least a portion of their criminal careers.⁵³ And society would no longer need to predict which individual convicts were dangerous. Instead, a rule would be established that conviction of certain crimes results in at least so much imprisonment. "Were we to devote [our] resources to a strategy [that is] well within our abilities — namely, to incapacitating a larger fraction of convicted serious robbers," Wilson claimed, "then not only is a 20% reduction [in robbery] possible, but even larger ones are conceivable."⁵⁴

It sounds simple and plausible: imprison most or all of those con-

52. R. POSNER, *supra* note 48, at 163-73.

53. J. WILSON, *supra* note 48, at 200.

54. *Id.* at 199. The model on which Wilson's calculations are based is set forth in Shinnar & Shinnar, *The Effects of the Criminal Justice System on the Control of Crime*, 9 L. & Soc'y REV. 581 (1975).

victed of major felonies—and thereby take them out of circulation and deter the others. One does not, Wilson suggested, even have to resort to very long prison terms—because, in a system with limited resources, the harsher prison terms are, the less likely it is that they regularly will be used.⁵⁵

The theory also was well attuned to the conservative, law-and-order mood that became so strong in some states in recent years. To citizens fearful and angry about rising rates of serious crime, a strategy of intimidating potential criminals and incapacitating convicted felons has undeniable attractions. It is not surprising that many state legislatures have adopted mandatory minimum penalties. In New York, for example, almost all major felonies have now become subject to such minima.⁵⁶

On closer analysis, however, the theory has serious evidentiary problems. To decide sentences on the basis of their general-deterrent effects, one would need information on how the rates of various crimes will be affected by changes in penalties. We are still far from having reliable information of this sort. Although there is reason to believe that some penalty deters better than none,⁵⁷ researchers are still unable reliably to measure the *magnitude* of deterrent effects. Those effects typically are measured by varying the penalty and tracing the effect on the crime rate. The crime rate, however, is affected not only by the penalty level but also by a host of other factors: the likelihood of criminals' being apprehended and punished, demographic changes, changes in economic conditions, increases or decreases in racial or intergroup tensions, and so forth. Techniques for identifying and controlling for the latter remain rudimentary. A National Academy of Sciences panel thus found, after surveying the American research, that little is known at present about the magnitude of deterrent effects.⁵⁸

Similar evidentiary difficulties plague Wilson's incapacitative claims. Those claims largely depend on the estimates that are made of

55. J. WILSON, *supra* note 48, at 179.

56. See von Hirsch & Hanrahan, *Determinate Penalty Systems in America: An Overview*, 27 CRIME & DELINQ. 289, 303 (1981) [hereinafter cited as von Hirsch & Hanrahan, *Determinate Penalty Systems*].

57. See Ross, *Science, Law and Accidents: The British Road Safety Act of 1967*, 2 J. LEGAL STUD. 1 (1973).

58. NATIONAL ACADEMY OF SCIENCES, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 15-63 (A. Blumstein, J. Cohen & D. Nagin eds. 1978) [hereinafter cited as DETERRENCE AND INCAPACITATION]. An even more critical assessment of recent econometric efforts to estimate deterrent effects is Brier & Fienberg, *Recent Econometric Modelling of Crime and Punishment: Support for the Deterrence Hypothesis?*, in INDICATORS OF CRIME AND CRIMINAL JUSTICE: QUANTITATIVE STUDIES 82 (S. Fienberg & A. Reiss eds. 1980).

the average rates at which offenders in the community commit criminal offenses—with the incapacitative payoff appearing to be substantial when those rates are assumed to be high, and much more modest when those rates are assumed lower. Little empirical evidence, however, is available to support any given estimate of those rates. Moreover, the incapacitative effects will disappear to the extent felonies are economically attractive enough so that removal of some offenders from circulation would lead to their replacement by new criminal recruits, and will disappear also if imprisonment lengthens an offender's probable criminal career. The National Academy of Sciences report thus makes much more conservative estimates than does Wilson of these incapacitative effects.⁵⁹

More disturbing still are the moral questions that the theory raises. The theory looks at aggregates — at how much total harm a species of crime does, and how much suffering must be inflicted on offenders in order to reduce its incidence. Any such aggregate cost-benefit comparison will tend to bypass questions of *justice*. Under such an analysis, the appropriateness of a severe penalty depends not on whether it is fair to those punished, but on the total law enforcement payoff involved.⁶⁰ Thus, there will be few principled limits on the amount of state intervention: if moderate sentencing policies fail to work, and if the state is prepared to invest the necessary resources, why not impose draconian policies?

V. PROPORTIONALITY AND THE DESERT RATIONALE

With the demise of traditional positivism, civil libertarians and

59. DETERRENCE AND INCAPACITATION, *supra* note 58 at 64-75. An interesting analysis by Albert Reiss suggests that the bulk of such major offenses as robbery are committed by *groups* of offenders. Where offenses are committed in groups, the incapacitative payoff of incarcerating a particular member of the group may be quite limited, and the rate of replacement of the withdrawn member by new recruits may be high. Reiss, *Crime Rates and Victimization: Understanding Changes in Crime Rates*, in INDICATORS OF CRIME AND CRIMINAL JUSTICE: QUANTITATIVE STUDIES 11-17 (S. Fienberg & A. Reiss eds. 1980).

60. von Hirsch, DOING JUSTICE, *supra* note 13, at 64-65; Goldman, *Beyond Deterrence Theory: Comments on van den Haag's "Punishment as a Device for Controlling the Crime Rate,"* 33 RUTGERS L. REV. 721, 721-22 (1981). Posner and van den Haag are untroubled by such questions, as their political philosophy is little concerned with individual rights. In his 1975 book, *Punishing Criminals*, van den Haag does make the principle of proportionality a significant theme. See VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION (1975). But in his later writings he largely dismisses the principle as derivative from and subordinate to the deterrence calculus. See van den Haag, *supra* note 48. Wilson in some of his writings does suggest that proportionality should serve as some kind of constraint on the deterrence-incapacitation calculus, but not as a very important one. Wilson, *Thinking About "Thinking About Crime,"* SOC'Y, March/April 1977, at 10, 19-20.

others concerned about the moral credibility of criminal justice had a longer road to travel. For them, small improvements in positivist doctrine were not enough, and Posner's and Wilson's deterrence-incapacitation schemes held still less appeal. What they needed was a sentencing theory that gave a central, not a peripheral, role to notions of equity and justice.

These concerns lead to borrowings from a different discipline: moral philosophy. Hitherto, penologists, as practical men and women, had seldom felt it necessary to consult that literature. But once the issue came to be seen as one of justice, perhaps the philosophers were worth attending. After all, Anglo-American analytic philosophers had written extensively (and readably) on such subjects.

The philosophical literature proved useful in several ways. First, it supplied a principled critique of aggregate cost-benefit thinking about social issues. Writers such as John Rawls and Bernard Williams showed how such reckonings were capable of sacrificing individual rights to serve majority interests.⁶¹ This argument gave the civil libertarians support for resisting the kind of utilitarian calculus proposed by deterrence-incapacitation theorists, and it fit with their own instincts about the primacy of individual rights. Second, the philosophers offered the notion of desert, i.e., of deserved punishments, proportionate to the blameworthiness of the conduct. Numerous articles in the philosophical literature suggested that the notion of deserving or desert, far from being retrogressive or arcane, is an integral part of everyday moral judgments involving praise or blame.⁶² Further, important essays such as H.L.A. Hart's *Prolegomenon to the Principles of Punishment* and Herbert Morris's *Persons and Punishment* suggested how desert notions might provide principled limits on the state's punitive power, and might treat those punished with more dignity than would purely preventive policies.⁶³

The new interest in the idea of desert also was made easier by the fact that historically it had not been the ideological property of the law-and-order right. Conservative theorists had, as we have seen, first been part of the positivist consensus, and then had opted for notions of incapacitation and deterrence. Desert — little explored hitherto by Ameri-

61. J. RAWLS, A THEORY OF JUSTICE 333-91 (1971); Williams, *A Critique of Utilitarianism*, in UTILITARIANISM: FOR AND AGAINST 75-150 (J. Smart & B. Williams eds. 1973).

62. For a bibliography, see SENTENCING, *supra* note 11, at 300.

63. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 1-27 (1968); Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968). These selections are reprinted in SENTENCING, *supra* note 11, at 7-22, 93-109.

can penologists of any ideological stripe — was something of a *tabula rasa* in the United States.

The movement toward this position perhaps began in 1971, when the Quaker-sponsored American Friends Service Committee published its report, *Struggle for Justice*.⁶⁴ The report recommends moderate, proportionate punishments, and opposes reliance on rehabilitative and predictive considerations in sentencing. Several other proposals, embodying a similar implicit sentencing philosophy, appeared in the ensuing years.⁶⁵

The Friends Committee report, however, did not rely explicitly on the idea of desert as the basis for its proposals. That was left to subsequent writings, including the Australian philosopher John Kleinig's 1973 book, *Punishment and Desert*, and my own *Doing Justice: The Choice of Punishments*, published in 1976 on behalf of the Committee for the Study of Incarceration.⁶⁶ More recently, discussions of the desert philosophy have become prevalent in the American sentencing literature,⁶⁷ and that philosophy has influenced considerably sentencing policy in several American jurisdictions. Oregon, for example, has adopted legislation which requires the state parole board to set standards for duration of imprisonment, and provides that the primary objective of those standards should be "punishment which is commensurate with the seriousness of the prisoner's criminal conduct."⁶⁸ Similarly, Minnesota has established a sentencing commission to set guidelines for judicial sentencing decisions, and that body's guidelines explicitly reflect a desert rationale in modified form.⁶⁹ Most

64. AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE* 124-53 (1971).

65. See, e.g., TWENTIETH CENTURY FUND, TASK FORCE ON CRIMINAL SENTENCING, *FAIR AND CERTAIN PUNISHMENT* 19-29 (1976); Harris, *Disquisition on the Need for a New Model for Criminal Sanctioning Systems*, 77 W. VA. L. REV. 263, 321-26 (1975); D. FOGEL, *WE ARE THE LIVING PROOF* 179-265 (1975).

66. J. KLEINIG, *PUNISHMENT AND DESERT* (1973); VON HIRSCH, *DOING JUSTICE*, *supra* note 13.

67. See, e.g., R. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* (1979). For further bibliography, see *SENTENCING*, *supra* note 11, at 300.

Some tentative recommendations have been made to extend this rationale to the punishment of juvenile delinquents, but this issue has been less thoroughly explored. See TWENTIETH CENTURY FUND, TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, *CONFRONTING YOUTH CRIME* (1978); Wolfgang, *Seriousness of Crime and a Policy of Juvenile Justice*, in *DELINQUENCY, CRIME, AND SOCIETY* 267-86 (J. Short ed. 1976).

68. OR. REV. STAT. § 144.780(2)(a) (1977). For a brief description of the Oregon scheme, see von Hirsch & Hanrahan, *Determinate Penalty Systems*, *supra* note 56, at 309-12. Note Oregon's innovation of having a parole board utilize a desert rationale in its standards governing duration of confinement, instead of the rehabilitative one traditionally associated with parole.

69. Minnesota established its sentencing commission in 1978, see 1978 Minn. Laws ch. 723, and the commission's guidelines became effective in 1980. The guidelines' text is set

recently, the state of Washington has created a sentencing commission, and the guiding statement of purposes in the enabling legislation has a marked desert flavor.⁷⁰

A. *The Principle of Commensurate Deserts*

The central organizing principle of sentencing, according to this rationale, is the "principle of commensurate deserts." This principle requires that the severity of the sentence be proportionate to the gravity of the defendant's criminal conduct. The criterion for deciding the quantum of punishment thus should be retrospective: the seriousness of the violation the defendant has committed. Prospective considerations — the offender's need for treatment, his likelihood of offending again, or the deterrent effect of his punishment on others — should not affect the comparative quanta of penalties.⁷¹ In such a system, imprisonment, because of its severity, would be visited only upon those convicted of serious felonies. For nonserious crimes, penalties less severe than imprisonment would have to be used. Likewise, the degree of intrusiveness of these nonprison sanctions would be determined not by rehabilitative or predictive considerations, but by the degree of gravity of the conduct. Warnings, limited deprivations of leisure time, and fines are among the sanctions that could be used.⁷²

B. *Rationale for the Principle*

Why is the commensurate deserts principle so important a requirement of justice? The explanation derives from the condemnatory features of punishment.⁷³

The notion of desert or deserving involves the idea that the response to someone's behavior should depend upon that behavior's good or bad qualities. The concept is thus not directed to the future: by saying that *A* deserves *X*, one is not asserting that *A* (or someone else,

forth in Research Project, *Minnesota Sentencing Guidelines*, 5 HAMLINE L. REV. 293, 395 app. B (1982). Their rationale is described in the commission's January 1, 1980 report to the legislature, and is analyzed in von Hirsch, *Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing Guidelines Commission*, 5 HAMLINE L. REV. 164 (1982) [hereinafter cited as von Hirsch, *Constructing Guidelines for Sentencing*]. The commission has examined the guidelines' initial impact in MINNESOTA SENTENCING GUIDELINES COMMISSION, PRELIMINARY REPORT ON THE DEVELOPMENT AND IMPACT OF THE MINNESOTA SENTENCING GUIDELINES (1982).

70. See 1981 Wash. Laws ch. 137, and particularly § 1 thereof.

71. VON HIRSCH, DOING JUSTICE, *supra* note 13, at 66-76, 124-31. See also *infra* text accompanying notes 88-94.

72. VON HIRSCH, DOING JUSTICE, *supra* note 13, at 118-23.

73. For a fuller discussion, see *id.* at 66-76; von Hirsch, *Utilitarian Sentencing Resuscitated*, *supra* note 41, at 785-89.

or society in general) will necessarily be better off if he gets *X*. Rather, the concept is oriented retrospectively: one is saying that *X* is due *A* by virtue of what *A* has done.⁷⁴

Deciding what is just, in nonpenal contexts, often requires one to choose among competing possible criteria of justice. When speaking of economic justice, for example, one must decide whether desert or need is the appropriate criterion. What makes this choice so difficult — and what has made it so controversial — is that economic goods, on their face, do not indicate which criterion of justice should be preferred. There is nothing about material wealth per se that tells one whether it should justly be distributed according to who has earned it, to who needs it most, or equally.

Certain bestowals, however, by their very nature connote approval or disapproval. Prime examples are grades, rewards, and punishments. Given their overtones of praising or blaming, such things manifestly ought to be distributed according to the degree of praiseworthiness or blameworthiness of the actor's conduct.

Consider punishment in particular. Punishment consists of doing something painful or unpleasant to someone, because purportedly he committed a wrong, under circumstances and in a manner that convey society's disapproval of his actions. Treating the action as *wrongdoing*, Richard Wasserstrom has pointed out, is central to the concept of punishment.⁷⁵ The reason why punishment should be based on desert — on the degree of wrongfulness of the criminal conduct — derives from these condemnatory implications of the criminal sanction.

Where standards of substantive criminal liability are concerned, this point has been a familiar one to American jurists. The late Henry M. Hart made the point two decades ago in defending the law's requirement of *mens rea*. Because punishment ascribes blame, he argued, violations should not be punished unless the offender is at fault (i.e., he acted intentionally, recklessly, or negligently). Accidental violations should not be punished because they are not blameworthy.⁷⁶

Advocates of this sentencing model assert that the same idea carries over to the question of how much to punish.⁷⁷ The commensurate deserts principle follows directly from punishment's condemnatory overtones. Not only does the criminal sanction imply blame, but the

74. J. KLEINIG, *supra* note 66, at 49-64.

75. R. WASSERSTROM, *PHILOSOPHY AND SOCIAL ISSUES* 112-51 (1980). See also Feinberg, *The Expressive Function of Punishment* (1970), reprinted in *SENTENCING*, *supra* note 11, at 23-36.

76. Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 417-22 (1958).

77. See, e.g., VON HIRSCH, *DOING JUSTICE*, *supra* note 13, at 71-72.

quantum of punishment necessarily connotes the quantum of reprobation. Once the institution of criminal punishment is established, therefore, it becomes a requirement of *justice* to punish offenders according to the degree of blameworthiness of their conduct. Disproportionate punishments are unjust because they condemn the offender more than or less than his conduct warrants.

Some writers have contended that making punishments proportionate to the gravity of the offense is apt to enhance the punishment's general preventive effectiveness, particularly by strengthening citizens' respect for the legal order.⁷⁸ But the case for the commensurate-deserts principle does not rest on this factual claim. Even if proportionate sanctions were to contribute no more to crime prevention than disproportionate sanctions, the condemnatory implications of punishment remain. When the state punishes, it condemns or reproves the punished. When the state thus condemns, it is a requirement of justice, not merely of effective social control, that the severity of the penalty — and thereby the extent of the implicit reproof — comport with the gravity of the conduct.⁷⁹

This argument assumes criminal punishment exists in the first place. But why should this institution exist? H.L.A. Hart pointed out more than a decade ago that one can use notions of proportionality and desert to explain *how much* to punish, without being compelled to use those notions (or use them to the same extent) to justify punishment's existence.⁸⁰ There has been some discussion of the "Why Punish at All?" question in the American and Scandinavian literature, and this discussion has relied on Hart's distinction. As space is limited, let me just summarize two recent positions.

1. The Finnish penologist Klaus Mäkelä has asserted that the existence of punishment is justified on general preventive grounds: it helps to discourage certain sorts of undesired behavior by reinforcing people's sense that the behavior is wrong. To perform this function, punishment condemns. But a condemnatory sanction, consistently

78. See, e.g., Törnudd, *Deterrence Research and the Needs of Legislative Planning*, in NATIONAL SWEDISH COUNCIL FOR CRIME PREVENTION, *GENERAL DETERRENCE* 326-343 (1975). Törnudd's view is discussed in von Hirsch, "Neoclassicism," *supra* note 10. It should be noted that a desert model, even if not devised with crime prevention chiefly in mind, will visit substantial punishments on those convicted of serious crimes. Were Posner's and Wilson's surmises correct, see *supra* text accompanying notes 52-54, such punishments would collaterally have deterrent and incapacitative effects. For a fuller discussion of the collateral crime-control effects of a desert model, see von Hirsch, *Giving Criminals Their Just Deserts*, 3 CIV. LIB. REV. 23, 33-35 (1976).

79. von Hirsch, "Neoclassicism," *supra* note 10.

80. See H.L.A. HART, *supra* note 63.

with its blaming overtones, must be distributed as a matter of *justice* according to the requirements of proportionality. Desert, therefore, plays a central role in deciding how much to punish, but it is general prevention that explains punishment's existence.⁸¹

2. My own view, originally stated in *Doing Justice*⁸² and now somewhat revised in a recent paper,⁸³ is that general prevention is a necessary but not a sufficient reason for the existence of punishment. The institution of punishment involves two elements: (1) visiting pain or deprivation on an offender, in a manner that (2) implies the offender is to be condemned or censured. General prevention is needed to account for the pain-visiting feature of the criminal sanction. General prevention, however, does not sufficiently account for the second element: why a *condemnatory* sanction should be established as a response to injurious behavior. These condemnatory aspects of punishment, I argue, constitute a reflection of *moral* judgments about wrongfulness and blaming, which cannot be reduced merely to notions of reinforcing citizens' law-abiding inclinations.

C. *Exclusion of Prediction; Emphasis on Seriousness*

The desert model excludes reliance on prediction in sentencing on principle, and not merely because of the risk of inaccuracies (overprediction). The objection to predictive sentencing is, simply, that it is undeserved, and it would remain undeserved even if one could reduce the false positives rate. The use of predictions, accurate or not, would mean that those identified as future recidivists would be treated more severely than those not so identified, not because of differences in the blameworthiness of their past conduct, but because of crimes they supposedly *will* commit in the future. But punishment, as a blaming institution, is warranted only for past culpable choices, and cannot justly be levied for future conduct. Unless the person actually makes the wrongful choice he is predicted to make, he ought not be condemned for that choice and hence he should not suffer punishment for it.⁸⁴

81. See Mäkelä, *Om Straffens Verknningar*, VI JURISPRUDENTIA 233 (1975), discussed in von Hirsch, "Neoclassicism," *supra* note 10.

82. VON HIRSCH, *DOING JUSTICE*, *supra* note 13, at 45-55.

83. See von Hirsch, "Neoclassicism," *supra* note 10. That article attempts to explain the existence of punishment on the basis of the two ideas of general prevention and blaming, without relying on the Kantian benefits-and-burdens notion which I used in *Doing Justice*. See VON HIRSCH, *DOING JUSTICE* *supra* note 13, at 48-49.

84. VON HIRSCH, *DOING JUSTICE*, *supra* note 13, at 124-25. Excluding predictions raises the question of what weight, if any, should be given to previous convictions. George Fletcher and Richard Singer have argued that an offender's prior criminal record should not be considered at all in determining how much punishment he deserves. G. FLETCHER, RE-

The commensurate-deserts principle focuses, instead, on the "seriousness" of the defendant's criminal conduct. Seriousness, in turn, depends upon two major factors: (1) the degree of the conduct's harm or risk of harm, and (2) the extent of the actor's culpability in committing that conduct.⁸⁵ The model thus does not call for mechanical equality among all offenders convicted of a given species of crime. Differentiations would have to be made, depending on the particular circumstances, to account for variations in the extent of injury involved, and in the degree of the actor's culpability in inflicting that injury.

There is potential for disagreement about which crimes are serious and which are not, and the concept of seriousness needs fuller explication and analysis.⁸⁶ Yet assessments of seriousness — of how harmful the conduct is, and how culpable the offender has been — are practical and moral judgments akin to those we make in everyday life. It is a matter of assessing what the injurious consequences of the conduct are, judging the importance of the interests that are infringed by those consequences, and conducting reasoned argument about how much the offender in the circumstances should be held responsible for those results.⁸⁷ It may be easier to make such judgments than to surmise on shaky evidence how a given sentencing policy will prevent future crimes. Minnesota's sentencing commission, as well as rulemaking bodies in some other states, have created seriousness scales as part of their sentencing guidelines, and have assigned grades on that scale to the various offense categories.⁸⁸ This effort suggests that a responsible rulemaking body can reach agreement on such grading questions.

THINKING CRIMINAL LAW 459-66 (1978); R. SINGER, *supra* note 67, at 67-74; Fletcher, *The Recidivist Premium*, CRIM. JUSTICE ETHICS 54, 54-59 (Summer-Fall 1982). I have suggested that the prior record should be considered to a limited degree in a desert model. von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591, 595-604 (1981) [hereinafter cited as von Hirsch, *Desert and Previous Convictions*]. (This last-cited article somewhat revises my arguments on the subject in VON HIRSCH, *DOING JUSTICE*, *supra* note 13, at 84-88.) We agree, however, that *if* a criminal record is utilized in a desert model, it should be so only to the extent that it bears on the ascription of blame to the defendant — and should in any event carry considerably less weight than the seriousness of the current offense. On a predictive model, by contrast, the prior record would carry the *preeminent* weight, as the best known predictor of future criminality. See von Hirsch, *Desert and Previous Convictions*, *supra* at 617-29.

85. VON HIRSCH, *DOING JUSTICE*, *supra* note 13, at 77-83.

86. For a discussion of the still-to-be resolved issues in gauging the seriousness of crimes, see von Hirsch, *Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and their Rationale*, 74 J. CRIM. L. & CRIMINOLOGY No. 1 (Spring 1983) (forthcoming) [hereinafter cited as von Hirsch, *Commensurability and Crime Prevention*].

87. *Id.*

88. See von Hirsch, *Constructing Guidelines for Sentencing*, *supra* note 69, at 196-99; von Hirsch & Hanrahan, *Determinate Penalty Systems*, *supra* note 56, at 306, 309-10.

D. *Desert as a Limiting or Determining Principle?*

Does the commensurate-deserts principle merely limit the severity of punishment, or does it actually determine which level of severity to impose?⁸⁹ Here, it is useful to distinguish the internal structure of a penalty system from the penalty system's overall magnitude and anchoring points.

The *internal structure* of a sentencing system refers to how severely those convicted of various gradations of crime should be punished relative to each other. The commensurate-deserts principle requires that equally blameworthy conduct should be punished by equally severe penalties, and that penalties should be graduated in severity to reflect the relative seriousness of the criminal behavior involved. If desert were treated merely as setting upper and lower bounds on severity, within which a penalty could be decided on predictive or other utilitarian grounds, then these principles of parity and ordinality would be infringed. If *A* and *B* commit a given kind of crime under circumstances suggesting similar culpability, they deserve similar punishments. Imposing unequal punishments on them for utilitarian ends (as the neopositivists propose,⁹⁰ for example) unjustly treats one as though he were more to blame for his conduct than the other. Desert advocates thus would maintain that in decisions about the internal structure of the system, the commensurate-deserts principle is determinative and not merely limiting.⁹¹

Magnitude or Anchoring Points refers to the absolute dimensions of the penalty scale: how severe the severest penalty should be, how lenient the mildest, where the cutting line should be drawn between conduct that is serious enough to be punished severely (say, by imprisonment) and conduct that calls for lesser punishments. Desert requires that a reasonable proportion be maintained between the punishment level and the gravity of the conduct. An inflated scale will produce excessive condemnation, and an unduly deflated scale insufficient blame.⁹² It is easier, however, to recognize what would be clearly *disproportionate* than to decide on a specific norm of absolute proportion between crimes and their punishments. Once one decides, say, that prison sentences would be too severe for the low-ranking crimes, and that probation or fines would be too mild for the high-ranking offenses,

89. Norval Morris raised this question in Morris, *Punishment, Desert, and Rehabilitation*, *supra* note 37, at 264.

90. See *supra* text accompanying notes 38-40, 44-45.

91. See VON HIRSCH, *DOING JUSTICE*, *supra* note 13, at 72-74, 90-91; von Hirsch, *Utilitarian Sentencing Resuscitated*, *supra* note 41, at 783-89.

92. VON HIRSCH, *DOING JUSTICE*, *supra* note 13, 91-94.

one would still face the problem of deciding where, between these extremes, one should draw the dividing line between prison and nonprison sentences. These issues scarcely have been explored, and need further attention. But it is my own view that desert is limiting rather than determinative here. The commensurate-deserts principle is imprecise enough to leave room for other considerations in deciding the precise anchoring points for the penalty scale within the bounds of proportionality that the principle imposes.⁹³

Nevertheless the desert principle does supply one critical limitation. Once the absolute dimensions of the penalty structure have been chosen — with whatever uncertainties this choice involves — then the *internal* scaling requirements of the principle become binding. Doubts or ambiguities about how to anchor the scale do not justify ignoring the requirements of parity and rank-ordering in deciding questions of *relative* severity among punishments within the scale. Nor do these doubts justify relegating these requirements to mere outer limits in the manner the neopositivists propose.⁹⁴

E. *Desert and Severity*

An important feature of the literature on desert in the United States is that, like its counterpart neoclassical movement in Scandinavia, it has emphasized moderation in punishment levels.⁹⁵ Neopositivists have debated desert advocates about which theory is more conducive to “parsimony” in punishment. Having discussed it elsewhere,⁹⁶ I shall not try to resolve this debate here. Suffice it to say that its existence confirms desert advocates’ desire not to escalate punishments. Those wishing tougher policies have preferred the deterrence-incapacitation model,⁹⁷ a theory emphasizing social control puts fewer

93. In VON HIRSCH, *DOING JUSTICE*, *supra* note 13, at 93-94, I suggested that general deterrence might play a limited role in deciding such overall magnitude issues, to the extent the commensurate-deserts principle leaves open a choice. (Note that such reliance on general deterrence would require no *internal* reordering of penalties on the scale, whereas use of predictive or treatment concerns would.) I now am beginning to doubt that we know enough about the extent of deterrent effects to enable us to use deterrence in this fashion. A further question is whether, and to what extent, the availability of penal resources could be considered. For discussion of this issue, see von Hirsch, *Commensurability and Crime Prevention*, *supra* note 86.

94. See von Hirsch, *Utilitarian Sentencing Resuscitated*, *supra* note 41, at 787-89.

95. The tendency has been to recommend a scaling down of punishment levels. VON HIRSCH, *DOING JUSTICE*, *supra* note 13, at 132-40; R. SINGER, *supra* note 67, at 42-48; NATIONAL SWEDISH COUNCIL FOR CRIME PREVENTION, *supra* note 10.

96. See von Hirsch, *Utilitarian Sentencing Resuscitated*, *supra* note 41, at 776-91; von Hirsch, *Book Review*, *supra* note 1.

97. See R. POSNER, *supra* note 48; van den Haag, *supra* note 48.

principled constraints on severity than a theory stressing fairness to those punished.

The tendency of a sentencing theory toward moderation of severity depends, however, on what auxiliary assumptions are made about the importance of the rights of those punished. Placing a high value on individual liberties, including the liberties of criminal defendants, will call for parsimony in the imposition of punishments: prison sanctions will be appropriate only to express society's grave disapproval of serious crimes. On the other hand, placing a lesser value on a defendant's personal rights, makes it easier to defend wider use of severe punishments.

F. *A Modified Desert Model?*

Might there be modifications in the desert model? There has been some discussion of the possibility of having desert play the preeminent role in determining relative severities of punishment, but with modest deviations permitted for future-oriented considerations.⁹⁸

The commensurate-deserts principle, as I have noted, requires that those whose criminal conduct is equally blameworthy be equally punished. A "modified" desert model would permit some relaxation of this requirement. Limited variations in punishment of the equally deserving would be permitted for the purpose of enhancing the incapacitative or rehabilitative usefulness of the sanction. The sentencer could consider, to a certain extent, the offender's likelihood of recidivism. If effective treatment methods were to become available, the sentencer could similarly consider treatment possibilities in choosing a sentence. But the starting point for setting a sentence would remain the gravity of the criminal conduct — and the amount of such deviations from the deserved sentence for predictive or treatment purposes would have to be modest. The modified desert rationale thus attempts a synthesis between desert and preventive considerations. But it is a synthesis in which the priorities are the opposite of those of neopositivism: the degree of blameworthiness of the defendant's conduct would be (as I believe justice minimally demands) the primary, although no longer the exclusive, determinant of the relative severities of punishments.⁹⁹

98. See, e.g., Monahan, *The Case for Prediction in the Modified Desert for Criminal Sentencing*, 5 INT. J.L. & PSYCHOLOGY 103 (1982).

99. For a fuller discussion, see von Hirsch, *Desert and Previous Convictions*, *supra* note 84, at 617-29.

VI. CONTROL OF SENTENCING DISCRETION: GUIDELINES FOR SENTENCING

Because of dissatisfaction with the unfettered sentencing discretion that hitherto had existed in the United States, the 1970's witnessed a widespread effort to establish standards or guidelines for sentencing decisions. As I have described elsewhere,¹⁰⁰ these efforts have varied enormously from state to state in the specificity of such guidelines, in the rationale sought to be implemented, in their moderation or severity, in the format used, and in the carefulness or crudity with which they have been drafted. They range from the complex standards adopted by Minnesota's sentencing commission,¹⁰¹ to the much cruder (and more severe) sentencing tariffs adopted by the legislatures of such states as Indiana and New Mexico.¹⁰²

In America, the advocates of *all three* major positions have supported constraints on sentencing discretion. For example, adherents to the deterrence-incapacitation position have supported minimum prison sentences for major felonies.¹⁰³ Similarly, the neopositivists, such as the authors of the American Bar Association report,¹⁰⁴ have recommended the establishment of sentencing guidelines based chiefly on predictive considerations. The desert advocates, including myself, have proposed standards designed to establish proportionate sanctions. According to the latter proposals, there are to be rules prescribing a "presumptive sentence," that is, a penalty that normally would apply to each gradation of seriousness of criminal conduct. Judges would normally be expected to apply the prescribed penalty, but could deviate from those prescriptions in special cases when they found aggravating or mitigating circumstances that affected the harmfulness of the conduct or the culpability of the actor.¹⁰⁵

There has been much debate recently about the workability of sentencing standards. Who should set the standards — the legislature, a special rulemaking commission, or the parole board? How can that rulemaking body effectively resist the political pressures present in so many American jurisdictions to escalate the prescribed penalties to unrealistic levels? How can such standards effectively control sentencing

100. von Hirsch & Hanrahan, *Determinate Penalty Systems*, *supra* note 56.

101. *See supra* note 69.

102. *See* von Hirsch & Hanrahan, *Determinate Penalty Systems*, *supra* note 56, at 297-303.

103. *See, e.g.*, J. WILSON, *supra* note 48.

104. SECOND ABA SENTENCING REPORT, *supra* note 35, at 60-72.

105. *See, e.g.*, VON HIRSCH, *DOING JUSTICE*, *supra* note 13, at 98-106; TWENTIETH CENTURY FUND, *supra* note 63, at 19-28; R. SINGER, *supra* note 67, at 49-56. For further readings and bibliography on sentencing standards, see SENTENCING *supra* note 11, at 304-35.

discretion, so long as prosecutors retain their wide charging and plea-bargaining powers.¹⁰⁶

Experience with sentencing guidelines is beginning to provide a few lessons. Judging from the information obtained during the Minnesota guidelines' first year of operation,¹⁰⁷ it appears that a set of explicit sentencing norms successfully can change judicial sentencing practice,¹⁰⁸ if those norms provide for moderate penalties consistent with available correctional resources, and if they are backed by fairly strict restrictions on noncomplaint sentences and by appellate review. Studies in other states suggest that guidelines with looser presumptions and weaker review mechanisms are apt to have a negligible impact.¹⁰⁹ But it will take considerably wider experience and study before we achieve any real understanding about what makes sentencing guidelines succeed or fail.

Let me emphasize, however, that the theories I have outlined are not *about* controlling discretion. Each theory calls for restraints on discretion of some kind, if the restraints are to be applied consistently. What these theories help explain is not whether there should be explicit norms for sentencing, but what form those norms should take, and particularly, what features of the criminal's conduct or his history should be chiefly determinative of sentencing outcome.

VII. CONCLUDING OBSERVATIONS: THE FUTURE OF THE SENTENCING DEBATE

Debates over sentencing policy in this country face a continuing hazard: that of exaggerated claims about reducing crime. This hazard is illustrated by some new claims about the efficacy of predictive sentencing strategies, which were published in the fall of 1982 just before the English-language version of this article went to press.¹¹⁰

106. For readings and bibliography on these issues, see SENTENCING, *supra* note 11, at 334-35.

107. MINNESOTA SENTENCING GUIDELINES COMMISSION, *supra* note 69.

108. Whereas Minnesota judges formerly tended to emphasize the offender's criminal record in deciding whether to imprison him, the guidelines put much more weight on the seriousness of the current crime and much less on the criminal record. The study found that, since the guidelines came into effect, there has been a marked increase in the imprisonment of offenders convicted of serious crimes, and a striking decrease in imprisonment of recidivists convicted of lesser offenses. *Id.* at 16-20. A shift toward emphasis on the current crime rather than the prior record in actual sentencing decisions was perceptible even after the effects plea-bargaining was taken into account. *Id.* at 62-63.

109. This was true, for example, of the judicially-developed guidelines used in Philadelphia and Denver. See W. RICH, L. SUTTON, T. CLEAR & M. SAKS, SENTENCING BY MATHEMATICS: AN EVALUATION OF SENTENCING GUIDELINES IN THREE COURTS (1982).

110. P. GREENWOOD, *supra* note 38.

It has long been known, since research on prediction of criminal behavior began in the 1920's and 1930's, that a limited ability to forecast risk does exist. Using a few familiar factors — the offender's criminal history, age, employment and drug history — the forecasters will to some extent succeed in identifying those offender subgroups more likely than others to return to crime. They will succeed, that is, in the restricted sense that these methods perform better (although not much better) than would random selection.¹¹¹ But, such forecasts are marred, as we have seen, by a strong tendency to overpredict, and the rate of false positives can be expected to be particularly high when one attempts to forecast violent conduct.¹¹²

Once one understands the capacity and limitations of prediction in this fashion, one can make a rational choice between a prediction-oriented and a desert-oriented sentencing strategy. A predictive strategy may perform marginally better in isolating offenders who are risks. But it does so at the expense of disregarding the condemnatory implications of punishment,¹¹³ and of confining false positives. The desert rationale may be slightly less efficient in isolating risks, but it distributes punishments in a manner that is more consistent with the blaming overtones of punishment, and it is not plagued by the false positives problem. Ultimately, the choice rests on the decisionmaker's values.

It is not plausible to suppose that any sentencing strategy palatable to a free society¹¹⁴ can have a large effect on overall crime rates. We have discussed already the deterrence-incapacitation school, and have seen how its claims of being able to produce large crime-rate reductions were exaggerated and have remained unconfirmed.¹¹⁵ There is no reason to believe that a selective-incapacitation (i.e., predictive) strategy can succeed in significantly lowering crime rates where collective-incapacitation has failed. However one selects which convicted offenders to confine, it must be borne in mind that the overwhelming bulk of major felonies do not result in the criminal's being apprehended and convicted for the crime committed. The criminal justice system successfully convicts in too small a percentage of criminal incidents to offer

111. See Gottfredson, *Assessment of Prediction Methods*, in *THE SOCIOLOGY OF PUNISHMENT AND CORRECTION* 745-71 (N. Johnston, L. Savitz, and M. Wolfgang 2d ed. 1970); D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, *GUIDELINES FOR PAROLE AND SENTENCING* 41-67 (1978); Monahan, *The Prediction of Violent Criminal Behavior: A Methodological Critique and Prospectus*, in *DETERRENCE AND INCAPACITATION*, *supra* note 58, at 244-69.

112. See *supra* text accompanying notes 24-28, 42-43.

113. See *supra* text accompanying notes 44-45.

114. The case might be otherwise in a dictatorship willing to make widespread use of drastic sanctions after summary trials.

115. See *supra* text accompanying note 59.

adequate leverage over crime rates. Levels of criminality respond, rather, to demographic and social factors such as the percentage of youthful males in the population—factors which cannot readily be influenced by the criminal justice system.¹¹⁶

Americans remain profoundly fearful of crime, however, and hence potentially attracted to any scheme that promises to diminish crime. This makes it tempting for advocates of one or another sentencing strategy to try to capture the initiative in the debate by promising vast crime-control gains. A new, much-publicized RAND study¹¹⁷ has made such promises. The study proposes criteria, derived from prisoner self-report studies, for identifying potentially violent criminals. Those criteria are familiar enough, because they resemble the criteria of earlier prediction research: they concern the offender's criminal record, drug involvement, and employment history.¹¹⁸ One assertion the study makes, and hardly a new one, is that such criteria help identify higher risks among convicted felons facing punishment.¹¹⁹

What is novel about this study, and what has attracted so much attention, is that it promises to reduce the net rates of serious crimes. The study projects a fifteen-percent decrease in rates of robbery offenses, without the need to expand (indeed, with the promise to reduce somewhat) prison populations.¹²⁰ These projections, however, are based on inferences about the number of offenders principally responsible for robberies in the community that are, according to any close scrutiny, poorly supported and not particularly plausible.¹²¹

116. Reiss, *supra* note 59, at 11.

117. This is the Greenwood study released in October 1982. P. GREENWOOD, *supra* note 38.

118. P. GREENWOOD, *supra* note 38, at xv-xvi.

119. *Id.*

120. *Id.* at xix.

121. Greenwood has studied a sample of incarcerated robbers. On the basis of their self-reports of crimes previously committed, he types robbers into low, medium, and high-rate offenders; assigns a robbery-rate to each group; and then (using these assumed rates and of figures on the aggregate number of robberies) estimates the number of low, medium, and high-rate robbers committing robberies in the community. By this technique, he "finds" that a limited number of high-rate robbers are responsible for a large share of robberies. Hence, identifying and incarcerating those he has identified as "high-risk" individuals would yield a large reduction in the overall robbery rate.

The manifest defect of this technique is that Greenwood has made no effort to study the activities of robbers in the community. He has merely studied the robbery rates of a small, and probably unrepresentative, sample of robbers: to wit, those who happen to be incarcerated, and whose histories can thus easily be obtained. The report indicates, *id.* at xvii, that the probability in California of arrest and conviction for robbery is .03, and the probability of incarceration if convicted is .86 — so that the probability of arrest, conviction, and incarceration for a given robbery is extremely small: only .0258. The sample Greenwood has studied thus may represent a minute portion of the general population of robbers.

I suspect that this newest claim eventually will wither under the critical examination it inevitably will receive, much as Wilson's earlier claims of being able to reduce robberies by twenty percent through collective incapacitation have lost credibility.¹²² But such assertions pose short-run dangers because they raise false expectations which distort sentencing policy while they are believed.¹²³ Until these new projections have survived the most rigorous critical scrutiny, I think we should be warned by that earlier experience to refrain from assuming that the proposed selective-incapacitation strategy will reduce significantly aggregate rates of robberies or other violent crimes.¹²⁴

Assuming we insist on a healthy skepticism about such claims, it is my expectation that current disagreements about sentencing policy will persist for some time. They will persist because they are rooted in differences not only of outlook about the nature of the criminal law, but also about deeper values.

The desert outlook concentrates on the condemnatory overtones of the criminal sanction. It treats citizens as autonomous persons responsible for their actions, who, if they offend, should be punished only to the extent that they may be faulted for their actions.¹²⁵ Because this theory links the quantum of punishment with the character of people's

Perhaps, as Greenwood supposes, committing more robberies may increase the probability of arrest, conviction, and incarceration — and hence of inclusion in his sample. But that surmise, if true, may *also* mean that the sample is highly *un*representative in its members' robbery rates. If that is the case, it is simply fallacious to estimate the number of robbers committing robberies in the community, and their offense rates, on the basis of the histories of members of this sample. It may, for example, be the case that a large number of robbers, having lower robbery rates than those of the various categories in Greenwood's sample, are responsible for the vast bulk of robberies. In that event — which Greenwood's research in no way has ruled out — the incapacitative payoff of imprisoning convicted "high-risk" robbers would be much smaller than Greenwood supposes, or non-existent.

Greenwood's method is reminiscent of the researcher who makes findings about the drug habits of addicts in a given community — and policy recommendations on the basis of those findings — by studying the drug histories of a small number of addicts confined in drug treatment centers. Those findings likewise would be worthless, because the incarcerated addicts may be wholly unrepresentative of the general population of drug users. For fuller discussion of these problems, see von Hirsch & Gottfredson, *Selective Incapacitation: Some Queries About Research Design and Ethics*, 12 N.Y.U. REV. L. & SOC. CHANGE No. 1 (1983, forthcoming).

122. See *supra* text accompanying note 59.

123. Wilson's views appear to have provided support for mandatory minimum sentence proposals pending before various state legislatures at the time.

124. A desert theorist would reject a selective-incapacitation strategy as unfair even if it were able to reduce aggregate crime rates somewhat. But a sentencing strategy that can claim substantial crime-control benefits will have obvious political advantages in attracting support among policy-makers.

125. See Richards, *Rights, Utility, and Crime*, in 3 CRIME AND JUSTICE 247-94 (M. Tonry & N. Morris eds. 1981).

own criminal choices, and because it seeks to limit the state's punitive powers by ethical concerns, it should maintain its attraction for civil libertarians and for others concerned about *justice* in criminal justice.

The more utilitarian philosophies I have discussed perceive the criminal sanction less as a condemnatory institution and more as a device simply for preventing harmful behavior. I suspect that these various preventive philosophies will, among themselves, enjoy continually shifting degrees of support. In the mid-70's, deterrence and collective incapacitation were the emphasized strategies; recently, they have been replaced in the limelight by prediction. A few years hence deterrence might enjoy a renewed vogue. These shifts will be brought about by changes of fashion and emphasis in crime-control research. Given the familiar cycle in which crime-control researchers bring forth optimistic projections that tend to deflate upon further inquiry, these shifts of emphasis are likely to continue. But behind them will lie a continuing preoccupation with social control rather than with equity. Such strategies, in one form or another, are likely to have continuing appeal in places where fear of crime is highest.