Washington Law Review

Volume 51
Number 3 Symposium: Law and the Correctional Process in Washington

7-1-1976

Good Intentions Gone Awry—A Proposal for Fundamental Change in Criminal Sentencing

Christopher T. Bayley

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Law Enforcement and Corrections Commons

Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wlr/vol51/iss3/5

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
GOOD INTENTIONS GONE AWRY—A PROPOSAL FOR FUNDAMENTAL CHANGE IN CRIMINAL SENTENCING

Christopher T. Bayley*

Within the American criminal justice system, one theory—that of rehabilitation—has emerged from traditional principles of sentencing as the dominant theme in criminal dispositions. Characterized as the "individual treatment model," it suggests that tailoring the sentence to the offender's individual needs will result in rehabilitation and will thereby facilitate society's ultimate goal of public protection. This fundamentally optimistic social theory assumes that the individual is not responsible for his criminality, but that he is suffering from a combination of social and personality disorders which have led to criminal acts and which can be overcome by stimulating inherent positive qualities. Proponents of this theory link the criminal act to such


1. The most frequently articulated justifications for criminal sentencing are deterrence, rehabilitation, and retribution. See generally S. Kadish & M. Paulsen, Criminal Law and Its Processes 1, 6-39 (3d ed. 1975).


3. Former Attorney General Ramsey Clark has reflected on this model:

   Rehabilitation must be the goal of modern corrections. Every other consideration should be subordinated to it. To rehabilitate is to give health, freedom from drugs and alcohol, to provide education, vocational training, understanding and the ability to contribute to society.

   Rehabilitation means the purpose of law is justice—and that as a generous people we wish to give every individual his chance for fulfillment. The theory of rehabilitation is based on the belief that healthy rational people will not injure others, that they will understand that the individual and his society are best served by conduct that does not inflict injury, and that a just society has the ability to provide health and purpose and opportunity for all its citizens. Rehabilitated, an individual will not have the capacity—cannot bring himself—to injure another or take or destroy property.

factors as the offender's home life, education, peer group interaction, vocational skills, and racial experience. Thus, the model is virtually medical, identifying crime as a larger social and personal disorder that can be identified, isolated, and cured. This article will discuss the individual treatment model and analyze the fallacies of current sentencing practices and philosophies. Concluding that the treatment model is inappropriate because it fails to consider fundamental principles of justice and the purposes of the criminal law, it will offer an alternative proposal for sentencing that is not dependent on the theory of rehabilitation.

I. THE INDIVIDUAL TREATMENT MODEL

At each stage of the correctional process the focus of the individual treatment model is on fashioning a remedy to meet the offender's needs. Initially, a judge employing this philosophy attempts to amass as much data as possible about the defendant. With the information available, the judge makes the first crucial decision: whether to create a "program" of probation, with conditions and expectations to be fulfilled by the offender, or whether to implement the sentence by incarceration of the individual.

Theoretically, selection of probation results from an understanding of the defendant and the conclusion that completion of the prescribed program will mean the amelioration of the underlying disease or conditions which led to the criminal act. The judge, interpreting the accumulated data, then analyzes how the defendant's life should be reshaped to prevent him from committing future crimes. Once sentenced to probation, the offender is required to follow its terms under threat of traditional punishment. The prescribed cure is expected to work either because the defendant is anxious to be granted the opportunity of probation, or because he is coerced to comply with its conditions, notwithstanding his attitude toward them. For a probationer, punishment is the ultimate threat, but it is viewed as "a tool" to insure rehabilitation rather than as a goal or purpose of the sentence.

4. See generally Ringold, supra note 2, for a discussion of defendant characteristics considered by a judge in imposing a sentence.

5. For a description of these initial "sentencing" decisions see Comment. A Perspective on Adult Corrections in Washington, 51 WASH. L. REV. 495 (1976).

6. The Honorable Donald J. Horowitz, King County Superior Court judge, writes: "Punishment does have a place in the system, but not as a goal; rather as a tool to correct." Protection of the Public, 29 WASH. B. NEWS July/August 1975, at 10, 14.
Proposal for Criminal Sentencing

If the offender is imprisoned, parole boards and prison personnel have their own individual treatment mechanism—the indeterminate sentence. Under this system of sentencing, the offender is incarcerated for an unspecified length of time; release prior to the legislatively prescribed maximum term is conditioned upon his responsiveness to the environment or evidence of cure. Under this theory, the “quickly rehabilitated” prisoner should not continue to suffer in an institution, and the recalcitrant person who can not or will not change should remain institutionalized. Release prior to the expiration of the maximum term can occur only when “rehabilitation has been complete.”

Thus, the individualized treatment model views imprisonment and punishment as strategies for behavioral modification. There is little consideration of punishment as an expression of public denunciation for antisocial acts or of deterrent purposes of the law. A growing number of critics have emerged, however, to challenge this model and its assumptions. They suggest that the individual treatment model is dangerous and fundamentally unfair to offenders, that it has failed to rehabilitate, and that it sacrifices the deterrent value of the criminal law.

A. The Justice Argument

The rehabilitative ideal and the acceptance of a philosophy of criminal disposition that concentrates almost exclusively on the needs of the individual offender conflict with certain fundamental principles of justice. Society has eagerly embraced a seemingly more humane system of criminal law that no longer explicitly punishes the criminal for his crime but attempts to cure him of his criminality. In so doing, however, issues such as the need to limit the powers of the state over the individual and the requirements of consistency and objectivity in sentencing have largely been ignored. The notion of punishment carries harsh connotations of revenge and pointless cruelty. It is certainly more comfortable to speak of treatment, correction, or even “ware-
housing for the protection of society” than it is to speak of punishment. This approach, however, introduces a note of hypocrisy into the system and leads to dangerous expansion of the power of the state over the individual.

1. Treatment as punishment

The simple labeling of sentences as “treatment” does not necessarily mean that they cease to be punishment as well. As one commentator has suggested:

It has become fashionable to reject the unpleasant word “punishment” when talking about rehabilitation. . . . However benevolent the purpose of reform, however better off we expect its object to be, there is no blinking the fact that what we do to the offender in the name of reform is being done to him by compulsion and for our sake, not for his. Rehabilitation may be the most humane goal of punishment, but it is a goal of punishment so long as its invocation depends upon finding that an offense has been committed, and so long as its object is to prevent the commission of offenses.

Thus, treatment under coercion intrinsically involves an element of punishment. This does not imply that all treatments are inhumane. Because they are all coerced, however, it is inappropriate to use the benevolent rhetoric of treatment terminology.

If treatment inescapably involves this element of punishment, the question arises as to the appropriateness of punishing individuals according to society's perception of their needs. The critical flaw in this treatment model is that it removes from punishment the essential element of “just desert.” As noted criminologist Norval Morris points

---

10. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 53-54 (1969) (emphasis in original). Another commentator illustrates the seductive use of rehabilitation nomenclature: “In the same spirit some prisons are now called ‘therapeutic correctional communities,’ convicts are ‘clients of the correctional system,’ solitary confinement and punishment cells have become ‘adjustment centers,’ ‘seclusion,’ or, in Virginia, ‘meditation.’” J. MITFORD, KIND AND USUAL PUNISHMENT 6 (1973). Too often, however, the infliction of punishment is disguised as treatment. See generally id. chs. 7 & 8; AMERICAN FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE (1971) [hereinafter cited as AMERICAN FRIENDS SERV. COMM.].

11. As one critic of such self-delusion observed: “Can the subject take it or leave it? If he takes it, can he leave it any time he wants? If the answer to any of these questions is ‘No,’ then the wolf is still under the sheepskin.” AMERICAN FRIENDS SERV. COMM., supra note 10, at 24.

12. C.S. Lewis, the noted English social critic, has observed: “[T]he concept of desert is the only connecting link between punishment and justice. It is only as de-
Proposal for Criminal Sentencing

out: "[T]he link between established crime and deserved suffering . . . is a central precept of everyone's sense of justice or, to be more precise, of everyone's sense of injustice . . . ."\textsuperscript{13}

Proponents of the individualized treatment model respond to this argument by challenging the appropriateness of the "just desert" concept. Many dismiss questions of justice as mere abstract and irrelevant theorizing. Psychiatrist Karl Menninger, one of the fathers of the modern treatment model, characterizes "justice" as, at worst, a construct which has been manipulated to tyrannize the criminal population, and at best, an unnecessary and outmoded barrier to the abilities and aims of behavioral science.\textsuperscript{14}

Menninger, however, fails to acknowledge the need to establish limits to the coercive power of the state. He writes: \textsuperscript{15}

That he or she has broken the law gives us a technical reason for acting on behalf of society to try to do something that will lead him to act more acceptably, and which will protect the environment in the meantime. And this is exactly what the present system based on the concepts of justice and precedent fails to do.

For Menninger, this "technical reason" gives society virtually unlimited license to subject the offender to cure. It is not clear, however, that society can rely on the benevolence of behavioral scientists, judges, prosecutors, and other correctional officials who are willing to

\textsuperscript{13} N. MORRIS, THE FUTURE OF IMPRISONMENT 75 (1974) [hereinafter cited as MORRIS]. It is also worth emphasizing, as Morris does, that the term "desert" as used in discussions of sentencing does not refer to a "salvation or ethics, admission to the company of heaven or of men of virtue." \textit{Id.} at 73. Rather, it is used in the social context, as an assessment of "the minimum of punishment the convicted offender must suffer if he is to be reaccepted as a member of society" and the maximum punishment which could be considered proportional to the harm caused by the crime. \textit{Id.} at 74.

\textsuperscript{14} He writes:

The very word \textit{justice} irritates scientists. No surgeon expects to be asked if an operation for cancer is just or not. No doctor will be reproached on the grounds that the dose of penicillin he has prescribed is less than \textit{justice} would stipulate.

Behavioral scientists regard it as equally absurd to invoke the question of justice in deciding what to do with a woman who cannot resist her propensity to shoplift, or with a man who cannot repress an impulse to assault somebody. This sort of behavior has to be controlled; it has to be discouraged; it has to be \textit{stopped}. This (to the scientist) is a matter of public safety and amicable coexistence, not of justice.

K. MENNINGER, THE CRIME OF PUNISHMENT 17 (1968) (emphasis in original). It should be noted, however, that Dr. Menninger perhaps overestimates the effectiveness and "exactness" of behavioral science.

\textsuperscript{15} \textit{Id.} at 18 (emphasis in original).
substitute "a technical reason for acting on behalf of society" for the concept of justice and our historic concern for individual liberties. Questions such as how much "treatment" a shoplifter must undergo, and what the limits to forms of cure will be, indicate the potential dangers of benevolence combined with coercion.

Examples of the application of the rehabilitative ideal to the parole decision in indeterminate sentencing systems have been documented and criticized by numerous commentators, and the injustices which can result have been clearly evidenced in Washington. Less obvious,

16. A significant danger to American legal norms may be presented by those who combine benevolence with coercion:

The obligation of containing power within the limits suggested by a community's political values has been considerably complicated by the rise of the rehabilitative ideal. For the problem today is one of regulating the exercise of power by men of good will, whose motivations are to help not to injure, and whose ambitions are quite different from those of the political adventurer so familiar to history. There is a tendency for such persons to claim immunity from the usual forms of restraint and to insist that professionalism and a devotion to science provide sufficient protection against an unwarranted invasion of individual rights.


"There seems to be a touching belief among certain Ph.D's in sociology that Ph.D's in sociology will never be corrupted by power. Like Sir Galahad's, their strength is the strength of ten because their heart is pure—and their heart is pure because they are scientists and have taken six thousand hours of social studies."

Id. quoting A. HUXLEY, BRAVE NEW WORLD REVISITED 34-35 (1958).


18. Such injustices can be seen by contrasting the case of Bobbie Miller with other recent sentencing dispositions. Miller was convicted of riding in a stolen motor vehicle, knowing it to be stolen. He was 16 years old and had a history of delinquent acts but had never been convicted of a crime as an adult. He was sentenced to an indeterminate term of not more than ten years on March 21, 1958. Both the prosecuting attorney and the sentencing judge recommended a minimum term of 18 months. The Board of Prison Terms and Paroles, stating no reasons, set a minimum term of four years. Through administrative action resulting from numerous violations of prison rules by Miller (none of which involved a conviction for any new crime), his minimum term was then extended to the full ten years. Only through legal action was Miller able to secure his release after nine years in a reformatory and prison. Seattle Post-Intelligencer, Jan. 13, 1975, § A, at 7, col. 2 and March 18, 1975, § A, at 9, col. 2.

In contrast, the computer records of the King County Prosecutor show that of the 56 persons charged with taking and riding in 1975 who were later sentenced, 52 were granted probation and four went to prison. Of those probationed, 30 did some jail time (16 of these for less than 30 days) and 22 did no jail time at all. Criminal Sentencing Analysis for the Year 1975 (1975) (computer compilation on file with the King County Prosecuting Attorney). In addition, Department of Social and Health Services (DSHS) data indicate that for those paroled in 1973, the median length of stay for auto theft offenders was 15.3 months. Wash. Dept of Social and Health Services.
but perhaps equally insidious, are probation conditions which attempt to change the lifestyle of the offender to bring about a more acceptable, less crime-prone pattern. A court may proscribe association with friends, demand steady employment, education, difficult confrontative therapy, or abstinence from alcohol as conditions of probation. Aside from the practical problems of enforcing such conditions and their highly questionable effectiveness in controlling crime, these "creative sentences," arising from the paternalistic view that the judge or other agent of the court knows what is best for the defendant, may result in undesirable, authoritarian invasion of private lives. In focusing on the limits of the criminal law to coerce change consistent with individual liberty, Morris notes that "[t]he rejection of [the treatment model] as a part of crime control flows not from lack of power or competence to influence the criminal's behavior but from historical evidence about the misuse of power and from more fundamental views of the nature of man and his rights to freedom."\(^\text{19}\) Somewhat paradoxically then, the position is here taken that the treatment model is dangerous to the rights of the offender and that in the guise of enlightened treatment and rehabilitation the traditional limitations of justice have been overstepped.

2. **Equal justice**

A second but equally important problem evolving indirectly from the acceptance of the treatment model is the disparity in sentences for offenders committing similar crimes. This disparity has been documented and denounced throughout the United States.\(^\text{20}\) One study involving the federal courts found significant sentence disparity among individual judges in the same judicial district as well as among those in different geographical areas.\(^\text{21}\)

---


21. Orland & Tyler, *supra* note 20, at 171–76. In cases of postal theft by postal employees, the percentage of defendants receiving prison sentences from judges in the same judicial district ranged from 4% by one judge to 50% by another judge. *Id.* at
Similar disparity can be found in Washington, where the percentage of defendants committed to prison from the various counties varies widely.\textsuperscript{22} The convicted criminal is left to devise his own explanation for such disparities and the end result is often to instill in him a deep sense of the unfairness of the system.\textsuperscript{23} Because the primary goal of the treatment model is rehabilitation, the term served must be determined according to the perceived needs of each offender and not primarily upon consideration of the criminal acts.\textsuperscript{24} The treatment model encourages judges to concentrate on factors such as family background, job training, education, economic stability, psychiatric diagnosis, and drug or alcohol problems.\textsuperscript{25}

\textsuperscript{22} In 1974, 17.5\% of the defendants convicted of felonies in King County were committed to prison. \textit{Wash. Dep't of Social and Health Services, Office of Research, Adult Corrections Populations Data} 20, 105, June 1975 (copy on file with the King County Prosecuting Attorney). In the same year, 32\% of the felony defendants convicted in Pierce County were so sentenced while in Snohomish County 14\% were so sentenced. \textit{Id.} at 30, 34, 115, 159.

\textsuperscript{23} As Judge Constance Baker Motley has stated:

\begin{quote}
It is fair to say that the individualized prison sentence is the first blow to a defendant's integrity and self-esteem in a process which, through the prison and parole regime, will deal him many more blows before his release. By punishing the defendant for what he is, rather than for what he has done, some sentencers loosen what may already be a fragile tie between the defendant and society. \textit{"Law & Order" and the Criminal Justice System}, \textit{64 J. Crim. L. & Criminology} 259, 269 (1973).
\end{quote}

\textsuperscript{24} The Model Sentencing Act openly rejects differences between offenses as a primary basis for sentencing.

The Model Sentencing Act diminishes the major source of disparity—sentencing according to the particular offense... It makes available, for the first time, a plan that allows the sentence to be determined by the defendant's makeup, his potential threat in the future, and other similar factors, with a minimum of variation according to the offense.

\textsuperscript{25} See generally Ringold. \textit{supra} note 2. One commentator has pointed out the fallacies of this approach:

Punishment is often imposed not so much for the specific offense which the defendant has committed as because of the defendant's social background, his failure to have a job, or his lack of education. When punishment is imposed in this manner, it loses its force as a symbol of society's disapproval of the defendant's criminal conduct. Instead, the punishment tells the defendant that so-
tion of these variables, however, will clearly yield different determinations for defendants who commit the same crime. The convicted individual with a stable family, a place to stay, and a job may get probation, whereas another man convicted of the same crime and with a similar criminal background, but from an unstable family and without a job, may be diagnosed as unstable and therefore be sent to prison. Consideration of such "social" factors by judges can result in requiring the most drastic forms of rehabilitation for those who come from the lower socioeconomic levels of society.\textsuperscript{26} Thus, not only are the interests of equal justice ignored by this system, but a practice that society deplores, discrimination on the basis of race and socioeconomic level, is a partial result.

Another flaw in the concept of individualized justice is that judges, although internally consistent in making their decisions, differ in their diagnoses based upon their differing values and philosophies.\textsuperscript{27} In 1971, the Superior Court Judges Association of Washington sponsored a research project to examine the factors affecting judicial discretion in felony sentencings.\textsuperscript{28} The results of the study "seriously


26. The Orland & Tyler study yielded the following data: In interstate theft cases, 48\% of the black defendants were sentenced to prison, while only 28\% of the white defendants were so sentenced. Similarly for postal theft, the imprisonment rate was 39\% for white defendants and 48\% for black defendants. During fiscal year 1970, the average sentence for whites entering federal prisons was 42.9 months, while the average sentence for black defendants during the same time period was 57.5 months. Orland & Tyler, \textit{supra} note 20, at 158–59. Bureau of Census statistics indicate that 31.4\% of black persons in the United States were below the low income (poverty) level in 1974, whereas the comparable figure for white persons was 8.9\%, and for all persons was 11.6\%. \textit{STATISTICAL ABSTRACT OF THE UNITED STATES}, Table No. 652, at 399 (1975). For an explanation of low income level see \textit{id.} at 378.

27. \textit{See W. GAYLIN, PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING} 89 (1974). At one point Gaylin, a psychiatrist and lawyer who conducted a number of in-depth interviews with judges, notes:

Judge Garfield is a fair man, as fair as we are likely to find. He will treat all his charges with equity. But even had he no measure of personal bias (an impossibility), he, in his person, would introduce a depressing inequity into the legal system, because one must juxtapose his attitude about incarceration against an unknown Judge Y's. What kind of equity or justice exists in a system where the luck of location, time of event, or even change of docket—not nature of offense—determines which judge the offender appears before, and, therefore, at which end of the broad spectrum of potential punishments the deliberation will begin?

\textit{Id.} For an example of one judge's sentencing philosophy see Ringold, \textit{supra} note 2.

challenge the underlying assumption of indeterminate and discretionary sentencing that it is possible to individualize a sentence for a particular offender." 29 The researchers found that individualized sentences were "directly dependent upon the judge's background and unconscious biases rather than upon the defendant's needs." 30 Such punishment loses its force as a symbol of society's disapproval and becomes merely "a reflection of the judge's estimate of him as a person." 31

These inconsistencies undermine fundamental precepts of our legal system. The Anglo-American judicial tradition has evolved elaborate rules to determine the circumstances under which a court may exercise its power over the individual in the context of criminal proceedings, i.e., the determination of guilt or innocence. These rules have been designed to protect the rights of the defendant, to establish firm limits of power, and to ensure equal justice without bias or prejudice under the law. This process may be imperfect, but there is at least general agreement on the principles to be followed and the goals to be attained. On the issue of the sanctions to be imposed, however, the court has become a diagnostician, presuming a kind of paternalistic and virtually unlimited authority over the individual. 32

Not only does the present system fail to protect citizens from possible prejudice and bias in the sentencing decision, but in a deeper sense it is antithetical to the rule that society will be governed by prescribed law. Although the system does follow the canon nullum crimen, nulla poena, sine lege—"there can be no crime and no punishment except as a law prescribes it"—with respect to the definition of crimes, as one commentator states, that standard "is generally ignored in the portions of the same laws prescribing the range of permissible punishments. As to the penalty that may be imposed, our laws characteristically leave to the sentencing judge a range of choice that should be unthinkable in a 'government of laws, not of men.' " 33 As Justice Douglas stated: "'It is unfair to inflict unequal penalties on equally guilty parties . . .' " 34

29. Id. at 872 (emphasis in original).
30. Id.
31. Motley, supra note 23, at 269.
33. M. FRANKEL, supra note 20, at 5.
Proposal for Criminal Sentencing

B. The Effectiveness of Individualized Punishment

It is not enough to argue on moral and philosophical grounds that the treatment model is inherently unjust and an infringement on individual freedom; the model must also be dealt with on its own terms. Advocates of the rehabilitative view of criminal law never claimed that it would meet the traditional, rather abstract demands of "justice." They argued simply that it would be effective in reducing crime and protecting the public. As one author observed:35

The age of therapy deemed itself capable of dispensing with what it viewed as an anachronistic vestige of retributivism. "Criminals are sick," claimed the apostles of the new criminology. "They must be treated, not punished." And treatment, unlike punishment, the argument went, cannot be bounded by considerations of justice. Effectiveness, not fairness, has been the hallmark of this age.

There are two strong indications, however, that the promise of effectiveness in reducing crime has not been met. The first is the dramatic increase in the crime rate experienced over the last ten years. The second is a growing number of studies that indicate that the programs introduced to carry out rehabilitation have generally failed to have any measurable effect on recidivism rates.

1. Rising crime rates

The problems involved in interpreting crime rates are numerous. Published crime rates may be based on unreliable statistics and may be affected by many social factors.36 Changes in the age structure of the population and trends toward increased urbanization affect crime incidence.37 Reporting techniques of police departments and differing rates of reporting offenses affect crime rates without necessarily re-

36. Even the FBI's Uniform Crime Reports, one of the best official sources of crime reporting, have been questioned and may be affected by reporting or administrative factors. See, e.g., Zeisel, F.B.I. Statistics—A Detective Story, 59 A.B.A.J. 510 (1973).
reflecting the actual increase or decrease in crimes committed.\textsuperscript{38} Despite these technical problems, the statistics do suggest that criminal activity has increased at a rate greater than can be accounted for by population changes or reporting factors.

From 1965 to 1974 the incidence of robbery in Seattle increased 400 per cent, and both burglary and aggravated assault increased over 300 per cent.\textsuperscript{39} While the increase may be explained by improved reporting procedures, it would then be expected that the murder rate, the most accurately reported crime, would not follow a similar trend. This was not the case. Although the percentage increase was not as dramatic, the murder rate for the same period increased 250 per cent.\textsuperscript{40}

One might argue that the increases in crime are the expected result of a greater number of young people in the population. While this may explain some of the increase, reports indicate that the increases in crime are disproportionately large when compared to increases in the youth population.\textsuperscript{41}

Admittedly, present crime rates do not give a precisely accurate measure of the increase in crime. But to acknowledge that crime statistics are inaccurate is not to deny that, taken together and correcting for factors that tend to affect the figures, they still offer convincing evidence that crime has increased dramatically in the last 10 years and that the individualized treatment model has not met its promise of crime reduction through rehabilitation. This is not to imply that the policies of treatment and rehabilitation have been directly responsible for the increase in crime; the causes of such an increase are complex and defy simplistic explanations. It does appear, however, that the present policies are an inappropriate response to a very real and immediate problem.

\begin{thebibliography}{99}
\bibitem{38} See generally \textsc{President's Comm'n on Law Enforcement & Administration of Justice, The Challenge of Crime in a Free Society} (1967).
\bibitem{39} Interview with Hal Clausen, Seattle Police Dep't Office of Research, in Seattle, Wash., May 1976. The rate per 100,000 for robbery in Seattle increased from 93 in 1965 to 403 in 1974. \textit{Id.}
\bibitem{40} \textit{Id.} The murder rate per 100,000 was 4.3 in 1965 and 10.8 in 1974.
\bibitem{41} See J. \textsc{Wilson}, \textsc{Thinking About Crime} 15–20 (1975). Wilson notes a District of Columbia study indicating that "[w]hile the number of persons between the ages of sixteen and twenty-one in the District of Columbia increased by 32 percent between 1960 and 1970 ... the rate of serious crime went up by over 400 per cent ...." \textit{Id.} at 16. Another study conducted by A. Barnett at the Massachusetts Institute of Technology estimated that "the increase in the murder rate ... was more than ten times greater than what one would have expected from the changing age structure of the population alone." \textit{Id.} at 17.
\end{thebibliography}

540
Proposal for Criminal Sentencing

2. Research evidence

In addition to crime rate data, there is a growing body of research by sociologists indicating that the rehabilitation programs introduced during the 1950's and 1960's have had little effect on offender recidivism rates. The most impressive and influential of these reports is a survey of studies done by Professor Robert Martinson.

The disturbing conclusion of Martinson's first report is that "[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." In his article, Martinson systematically summarizes the four major types of "in-prison" treatment programs included in his survey—educational and vocational training, individual and group counseling, attempts to transform the institutional environment, and medical treatment—and concludes that they are generally ineffective in reducing recidivism. Arguably, such findings may indicate that treatment programs outside institutional confines would be a possible and more viable method for the rehabilitation of offenders. Yet in reviewing community milieu therapy and psychotherapy programs, Martinson found no evidence of a significant reduction in recidivism.


44. Martinson was commissioned in 1966 by the State of New York to assess existing correctional research and to determine what methods successfully reduced recidivism. From the body of research surveyed, Martinson discovered only 231 studies containing interpretable findings, i.e., those which had utilized some control group, that had sufficient samples and provided adequate data and statistical tests from which to draw conclusions. See Lipton, supra note 42, at 3–21. Martinson's conclusions were so disturbing that the state not only refused to publish the report, but also refused to give the author permission to publish it himself. The report first became available to the public when it was subpoenaed from the state. Martinson, supra, at 23.

45. Id. at 25–36. See also Lipton, supra note 42, at 184–96, 437–81.

46. Of the three major studies of milieu therapy programs reviewed by Martinson, two concluded that the elaborate programs produced no significant reduction in recidivism, and the third found that not only was there no significant improvement, "but that the longer a boy participated in the treat-
Even more important is Martinson's review of studies which attempted to test the effectiveness of probation by comparing parole and probation outcomes. In one study probation was found to produce lower recidivism rates than imprisonment for first offenders, but this improvement disappeared with repeat offenders.47 Another study found a slight increase in recidivism rates for offenders placed on probation.48 A more recent study of adult recidivism in Denver also failed to find support for the belief that offenders who go to prison are more likely to commit new crimes than are those who receive sentences to probation.49 Special parole and probation services were also found not to significantly affect recidivism,50 thus answering in part the argument of judges and professionals who maintain that probation cannot be effective before the quality is improved and the case loads reduced.

47. "[F]or offenders with one prior felony, and offenders with two or more prior felonies, there was no significant difference between the violation rates of probationers and parolees." LIPTON, supra note 42, at 60.

48. A British study compared recidivism rates from a court with a higher than average use of probation with rates from other jurisdictions. It found a slight but not statistically significant increase in reconviction rates. Martinson, supra note 43, at 41. See also LIPTON, supra note 42, at 61. A 1964 Israeli study compared probation sentences with one year prison sentences. In this study "only first offenders under 20 years of age did better on probation; those from 21–45 actually did worse." Martinson, supra note 43, at 41 (emphasis in original).

49. See DENVER ANTI-CRIME COUNCIL, DENVER HIGH IMPACT ANTI-CRIME PROGRAM: CHARACTERISTICS AND RECIDIVISM OF ADULT FELONY OFFENDERS IN DENVER (1974) (on file with the King County Prosecuting Attorney). The study analyzed recidivism, considering rearrest, reconviction, and reincarceration based on a random sample of 679 felony offenders convicted between 1968 and 1970. It also calculated recidivism rates on both a one year and two year follow-up time period. It concluded:

This study provides evidence that probation is a case disposition used most frequently in the offender's criminal career, but is just as likely to result in failure in terms of recidivism as incarceration. The probability of reconviction during two years of follow-up was actually higher for probationers than for those incarcerated.

Id. at 164. Such studies indicate that probation as a disposition does not produce lower recidivism rates.

50. Martinson reviewed a series of major studies conducted in California to test the effectiveness of special probationary services by comparing the performance of offenders given such services with the performance of those subjected to detention and then released to regular supervision. Martinson, supra note 43, at 42. The reported findings of the project stated that juveniles who were released directly to probationary status with extensive probationary services had a significantly lower failure rate than did identical juveniles who were assigned to regular detention and then released to supervision. This study has been cited many times to support arguments that probation with intensive supervision and special treatment is more effective than incarcer-
Proposal for Criminal Sentencing

In essence, Martinson's study suggests that not all treatment programs have failed, but that the successes are isolated and offer no clear direction for future policymakers interested in reducing recidivism rates. In commenting on the significance of this finding, one observer stated:51

Not only have rehabilitative efforts failed to produce appreciable effects on recidivism, but it is highly unlikely that any systematic application of any kind of rehabilitative program will seriously reduce the recidivism of the offender population to which it may be applied.

The net effect of such research is clear: there is little empirical support for continued reliance on treatment programs, either in or out of prison, as the answer to the crime problem.

Although these conclusions are not encouraging, those charged with administering a criminal justice system must attempt to develop effective approaches for dealing with crime. Unfortunately, effective alternatives have been obscured by the prevalence of the rehabilitative model. In making this observation, Martinson hypothesized:52

Our present treatment programs are based on a theory of crime as a "disease"—that is to say, as something foreign and abnormal in the individual which can presumably be cured. This theory may well be flawed, in that it overlooks—indeed, denies—both the normality of crime in society and the personal normality of a very large proportion of offenders, criminals who are merely responding to the facts and conditions of our society.

This view of crime as a natural phenomenon suggests the need to reexamine the rationality of the criminal offender and the effectiveness of deterrence as a method of crime control. The dominance of the rehabilitative ideal has tended to preclude serious discussion of

52. Martinson, supra note 43, at 49.
deterrence theory, and has thus neglected the role of punishment in deterring criminal behavior and reinforcing societal standards of conduct. In light of society's present experience with rehabilitative concepts, it is time for a reexamination of the theory of deterrence.

II. DETERRENCE REVISITED

The notion of deterrence, burdened as it is with ideological overtones, has until recently been largely ignored in research literature. Most social scientists have preferred to talk about treatment and rehabilitation while dismissing deterrence as "a derived rationalization of revenge." The theoretical roots of deterrence can be traced to two classical theorists, Cesare Beccaria and Jeremy Bentham. Beccaria, in his remarkable 1764 treatise On Crimes and Punishments, visualized deterrence as an end to tyranny and unnecessarily severe punishment. He argued that punishment should be certain rather than severe, and proportional to the gravity of the offense rather than conditional on the whims of the executor. It is ironic, considering the reputation of deterrence theory in recent years, that scholars credit Beccaria's treatise with having done more than any other work to end the barbarous practices of the 18th century criminal law.

Deterrence has generally been subdivided into special and general deterrence. The theory of special deterrence suggests that punishment of an offender tends to reduce the possibility that he will repeat the offensive behavior; the focus is on the effects of actual punishment on the individual deviant. On the other hand, general deterrence refers to the effects of threatened punishment on society as a whole. Analysis

---

53. One author, noting that the field of inquiry had been narrowed, wrote: [1]n no other period has the rehabilitation ideal so completely dominated theoretical and scholarly inquiry, to such an extent that in some quarters it is almost assumed that matters of treatment and reform of the offender are the only questions worthy of serious attention in the whole field of criminal justice and corrections.


55. See also J. Bentham, The Rationale of Punishment (1830).


Proposition for Criminal Sentencing

of these concepts and the effects of incapacitating criminals suggests their viability in a modern correctional system.

A. Special Deterrence

Critics of deterrence theory frequently cite the seemingly high recidivism rates of offenders coming out of prison to support the proposition that punishment does not deter crime. Such data, assuming their accuracy, suggest only that imprisonment does not deter convicted criminals from committing further crimes. Even this more limited hypothesis, however, may be challenged.

Careful analysis of recidivism rates does not support the notion that treatment is necessarily more effective than imprisonment in reducing recidivism. The notion that most criminals are totally irrational is unsupported. Criminals may be more rational than society admits;

---

58. See studies cited in Tittle, Punishment and Deterrence of Deviance, in THE ECONOMICS OF CRIME AND PUNISHMENT 85–86 (Simon Rottenberg ed. 1973) [hereinafter cited as Tittle].

59. The statement that high recidivism rates indicate that punishment does not deter crime mistakenly combines general deterrence and special deterrence. As Herbert Packer has indicated in discussing the two discrete concepts:

These two are quite different although they are often confused in discussion of problems of punishment. For example, it is sometimes said that a high rate of repeat offenses, or recidivism as it is technically known, among persons who have already been once subjected to criminal punishments shows that deterrence does not work. The fact of recidivism may throw some doubt on the efficacy of special deterrence, but a moment's reflection will show it says nothing about the effect of general deterrence.

H. PACKER, supra note 10, at 39 (emphasis in original; footnote omitted).

60. As one author has noted:

While there are many variations and complexities, the available follow-up data suggest that instead of the widely believed 65 percent to 83 percent return-to-prison rate, only about 35 percent actually return. And, a recent FBI study suggests that legal sanction may be more of a specific deterrent than even the FBI is willing to admit. By means of arrest reports, all offenders released from custody in 1963 were followed for six years. Although 65 percent were re-arrested on some charge during the follow-up period, only 23 percent, or 40 percent of those rearrested during the first four years, had been reconvicted by the end of the fourth year. Furthermore, extrapolation indicates an overall reconviction rate for the remainder of the offenders' lives somewhat below 35 percent.

Tittle, supra note 58, at 89 (1973) (footnotes omitted). For statistics on the recidivism rate for Washington inmates see Comment, supra note 5.

61. James Q. Wilson writes:

There is scarcely any evidence to support the proposition that would-be criminals are indifferent to the risks associated with a proposed course of action. Criminals may be willing to run greater risks (or they may have a weaker sense of morality) than the average citizen, but if the expected cost of crime goes up without a corresponding increase in the expected benefits, then the would-be criminal—unless he or she is among that small fraction of criminals who are utterly irrational—engages in less crime, just as the average citizen will be less likely to
and, if the costs of crime are sufficiently high, even criminal repeaters may be deterred from future criminal activity. The argument that punishment does not deter criminals presupposes only that socially and morally acceptable punishments seem ineffective. Society could, in all probability, design punishment draconian enough to be effective. While it is fortunate that the range of acceptable punishments is limited, those arguments which declaim the effectiveness of punishment as a special deterrent can be used in support of increasing its severity as well as in calling for its abandonment.

B. General Deterrence

Even if it were true that traditional criminal punishments do not affect recidivism rates, the theory of general deterrence, which emphasizes threatened rather than actual punishment, would not be discredited. The purpose of punishment under this theory is to lend credibility to the threat of law. The notion seems intuitively correct. Society's rules, codified in the law, are not obeyed simply because they coincide with natural desires, but at least partly because people fear the consequences of disobedience. These fears are in some measure
take a job as a day laborer if the earnings from that occupation, relative to those from other occupations, go down.

62. Anthony Burgess has outlined an effective mechanism for eliminating deviant behavior through the use of punishment in a futuristic society. See A. Burgess, A Clockwork Orange (1962).

63. Norwegian scholar Johannes Andenaes underscores the importance of this point: General deterrence (or general prevention) is sometimes defined as the restraining impact which the punishment of offenders has on others. This is an unfortunate definition, since it concentrates upon actual punishment in isolation from the threat of the law. The threat of law is the point of departure; from a general deterrence perspective the main function of actual punishment is to make the threat of the law credible. Andenaes, supra note 57, at 342 (emphasis in original; footnote omitted). To avoid confusion which he feels inheres in the term “general deterrence.” Andenaes uses “general prevention.” He states:

When objections are made to this definition of general deterrence as the effect of punishment on others, it is not only because the definition is found to be analytically misleading, but also because it tends to engender a feeling that somebody is being sacrificed for the purpose of instilling fear in others; that the use of the deterrence mechanism is, therefore, in some way unjust or improper. While there are certainly ethical problems involved in deterrence, the answers should not be biased by the use of inaccurate terminology.

Id. at 343 (emphasis in original; footnote omitted).
Proposal for Criminal Sentencing

proportional to the credibility of the threats of punishment attached to them. Although there are complexities and limitations to deterrence theory, its general validity seems clear. As Morris states: "If the criminal law is not in part a mechanism of deterrence, aiming to inhibit criminal conduct by the threat and actuality of punishment, why do we keep it at all?" 64

The difficulty arises in attempting to measure the deterrent, or preventive, impact of punishment. Modern techniques of statistical analysis have now made it possible to control some of the variables related to crime and to attempt to isolate the relationships between the imposition of sanctions, their severity, and the crime rate. One economist's study comparing the crime rates among areas having different probabilities of punishment examined 14 crime-related variables and concluded: "[T]he rate of specific crime categories, with virtually no exception, varies inversely with estimates of the probability of apprehension and punishment by imprisonment . . . and with the average length of time served in state prisons." 65 In surveying the work of economists as a whole, one commentator noted: "The evidence convincingly demonstrates that crime rates are reduced by higher probabilities of punishment." 66

Sociologists using somewhat different techniques have reached similar conclusions. 67 Much of the research has focused on the interrelationship between certainty and severity of punishment as they affect crime. One author suggests that although it cannot be concluded from present research that certainty of punishment is effective independent of its severity, it would appear that "the use of imprisonment acts as a

64. Morris, Forward to J. Andenaes, Punishment and Deterrence v (1974).
66. M. Silver, Punishment, Deterrence, and Police Effectiveness, A Survey and Critical Interpretation of the Recent Econometric Literature 30, February 1974 (on file with the King County Prosecuting Attorney).
67. See, e.g., Gibbs, Crime, Punishment and Deterrence, 48 SOCIAL SCI. Q. 515 (1968); Tittle, Crime Rates and Legal Sanctions, 16 SOCIAL PROBLEMS 409 (1969); Gray & Martin, Punishment and Deterrence: Another Analysis of Gibbs' Data, 50 SOCIAL SCI. Q. 389 (1969); Bean & Cushing, Criminal Homicide, Punishment and Deterrence: Methodological and Substantive Reconsiderations, 52 SOCIAL SCI. Q. 277 (1971); Phillips & Votey, Jr., An Economic Analysis of the Deterrent Effect of Law Enforcement on Criminal Activity, 63 J. CRIM. L.C. & P.S. (1972); Logan, General Deterrent Effects of Imprisonment, 51 SOCIAL FORCES 64 (1972). Andenaes notes that, aside from certain differences in statistical methods, the key distinction between a sociological and economic approach is that economists tend to see crime as an economic activity, involving rational choice, while the sociologists envision a much more complex psychology behind deterrence. Andenaes, supra note 57, at 340.
deterrent for traditional crimes and, secondly that the differences in the length of imprisonment, at the levels of use in the United States, do not seem to have much impact on crime.68

Individually such studies neither conclusively prove the efficacy of general deterrence theory nor sharply define the interaction between crime and punishment, but taken as a whole such studies do indicate an inverse relationship between crime rates and probability of punishment. Deterrence research remains in its early stages and requires more refinement, particularly in statistical methodology, before a clear picture of the ramifications of the deterrence process can emerge. It is presently evident, however, that such a process does, to some extent, affect crime. Furthermore, one must consider where the burden of proof lies with such arguments. Although it is an excellent principle of social science to question assumptions until they are supported by statistical evidence, it does not mean "that we should not base social policy on that assumption until the scientists have pronounced it confirmed,"69 especially when common sense seems to place the presumption in favor of deterrence theory.

An inherent conflict exists between a sentencing policy that sets rehabilitation as its primary goal and one that seeks to provide a general deterrent to crime. By focusing upon the causes of crime rather than condemning the criminal act, the treatment model obscures moral judgment and makes punishment unpredictable and seemingly random. No clear message is transmitted to potential offenders. General deterrence, on the other hand, depends upon the certain imposition of an undesired sanction so that others will not take the risk of such punishment. Furthermore, the consistent application of sanctions clearly delineates socially acceptable behavior. It is difficult to interpret society's position regarding crime when sanctions are inconsistent

68. Andenaes. supra note 57, at 347 (emphasis in original). Thus, even if no correlation exists between certainty and severity, incarceration does constitute a deterrent. Other studies reinforce the conclusion that punishment deters crime. One group of researchers attempted to estimate the relative influence of social factors compared with the working of the criminal justice system and found that the activities of the criminal justice system account for about one-third of the variations in crime rates. Within that one-third, the workings of the police and sentencing stages were found to have a greater impact on the crime rate than the pretrial and conviction stages. S. Kobrin, E. Hansen, S. Lubeck & R. Yeaman, The Deterrent Effectiveness of Criminal Justice Sanction Strategies 257–63 (Public Systems Research Institute, U. So. Cal. 1972). For a discussion of other categories of research see Andenaes. supra note 57, at 339–40, 344–57.

Proposal for Criminal Sentencing

or when their imposition implies understanding rather than disapproval.

C. Effects of Incapacitation

Aside from potential long-term special and general deterrent effects, a system emphasizing more certain punishment could have a more immediate impact on crime reduction as a result of the incapacitation of offenders. The incapacitation argument postulates with remarkable simplicity that an offender cannot commit crimes, at least in the society at large, while confined. This argument presupposes that most serious crime is committed by repeat offenders. A major research project supports this supposition and provides strong evidence that, in fact, a majority of major crimes are committed by a relatively small number of repeat offenders.\(^7\) This study of the criminal histories of offenders suggests that penalties scaled to the seriousness of the offenses and to the criminal histories of offenders will result in the longest confinement for those who create the most serious societal problem and in a commensurate reduction in the number of crimes committed as a result of their incapacitation.\(^7\)

The incapacitation and deterrence arguments should not be oversimplified. There are certainly factors other than punishment rates that affect crime. Society must decide how to get the best return for its money. Programs dealing with the causes of crime (e.g., welfare and treatment programs) and provisions for more certain punishment are not mutually exclusive. But the message as it relates to the sentencing

\(^7\) See M. Wolfgang, R. Figlio & T. Sellin, Delinquency in a Birth Cohort (1972). This work, known as the Philadelphia Cohort Study, traced the criminal careers of all males born in 1945, living in Philadelphia between their 10th and 18th birthdays. Of this original cohort of almost 10,000 individuals, it was found that a group of 627, labeled "chronic recidivists," committed over half the offenses (and approximately two-thirds of the violent offenses) perpetrated by the entire group. Id. at 105.

\(^7\) One study has attempted to estimate this effect in a juvenile context using Wolfgang's statistics. It concludes that given average incarceration periods of nine months, the return on crime not committed could be as high as one index crime per period of incarceration. While stressing the expense of incarceration and the fact that such prevention would not register dramatically on crime rates, the author notes that "[t]he number of points and offenses prevented is quite appreciable in terms of all juvenile offenses . . . ." Clarke, Setting 'Em Out of Circulation: Does Incarceration of Juvenile Offenders Reduce Crime? 65 J. CRIM. L. & CRIMINOLOGY 528, 534 (1974). The study is encouraging; $1,100 [Clarke's figure] is not an unreasonable price to pay for prevention of a murder, rape or robbery, particularly if the period of incarceration can be morally justified by the offender's prior criminal behavior.
process is clear. The hope for crime reduction, slight as it may be, lies not in the direction of continued inconsistency, inequality, and ineffectiveness of individualized justice, but in the direction of consistent and moderate punishment proportional to the seriousness of the crime. As one author notes:72

With the collapse of the rehabilitative ideology and the acceptance of the reality of general prevention, the perspective on criminal law and law enforcement changes. In my view, rehabilitation as well as incapacitation has a legitimate place in the criminal justice system, but the primary foundation is general prevention, combining the components of fear and moral persuasion, and keeping within the limits prescribed by considerations of justice, decency and compassion.

III. A CONCRETE PROPOSAL

A. A Statement of Purpose

The lack of clear, uncontradictory, articulated purposes constitutes one of the greatest flaws in the present scheme of criminal sentencing. Therefore, any new statutory effort should begin with a definite statement of purpose in order to rectify the present confusion in this vital area of public policy and, more importantly, to define and rationalize the use of the state's ultimate power over its citizens.

It is the author's view that the primary purpose of imposing a criminal penalty is to punish the adjudicated offender for his or her proscribed conduct. This is the retributive aim of the law; society extracts a threatened penalty for failure to comply with its rules. Retribution, incorporating aspects of deterrence and the limitations of just desert, primarily involves two significant characteristics. First, and most importantly, it is concerned solely with the past proven criminal behavior of the individual. Secondly, it is closely tied to the concept of proportionality, which dictates that the punishment should be commensurate with the seriousness of the offense.

The prevalent confusion of retribution with notions of personal vengeance and revenge has obscured a fundamental objective of criminal sanctions.

72. Andenaes, supra note 57, at 362.
Proposal for Criminal Sentencing

Unlike vengeance, retribution is imposed by the courts after a guilty plea, or a trial, in which the accused has been found guilty of committing a crime. Prescribed by the law broken, and proportioned to the gravity of the offense committed, retribution is not inflicted to gratify or compensate anyone who suffered a loss... but to enforce the law and to vindicate the legal order.

Thus, retribution is distinct from the notion of revenge or vengeance, and its purpose is to uphold and reinforce the legal order.

In addition to recognizing this purpose of the law, a system of sentencing that establishes and enforces penalties primarily based upon the gravity of the offense can be more humane and less dangerous to individual freedom than the present system with its focus on identification of the dangerous offender, independent of his crimes, and on his rehabilitation. Neither of the objectives of the present rehabilitative system provides a basis upon which to determine appropriate punishments nor do they suffice to justify its imposition. Both notions leave open the possibility of dispensing punishment above what is deserved by the crime or below what is rightfully expected by the society. On the other hand, a system providing greater certainty of punishment would both reduce the existent inequities of the individualized treatment model and acknowledge society's rightful interest in retribution.

Recognizing these considerations, the following proposal envisions a utilitarian model, premised primarily on considerations of deterrence—working strictly within (and limited by) the framework of a

74. This aim of criminal sanctions has long been recognized. Hobbes wrote, "[C]ovenants, without the sword, are but words, and of no strength to secure a man at all." T. HOBBS, LEVIATHAN 109 (M. Oakeshott ed. 1946). Van den Haag reflects this thinking as well:

The laws legislated by society are not self-enforcing. They become effective only when society does for them what nature does for its laws... or inflicts punishment, which makes defying them dangerous, disadvantageous, painful, and, above all, odious.

Van den Haag, supra note 73, at 19. In this author's view, it is not a mark of inhumanity to expect lawbreakers to suffer for their crimes. Much of the recent dissatisfaction with sentencing practices stems from the fact that society has denied the legitimacy of retributive justice. The concept of "just desert," see note 12 supra, indicates that society may expect a wrongdoer to suffer in proportion to his or her crime. This does not mean that personal revenge against the wrongdoer need be a factor.

75. This does not mean that rehabilitation and the isolation of dangerous offenders are not desirable effects of punishment; they are legitimate goals, but only when the nature and degree of the punishment are first established on the basis of what is deserved by the criminal behavior.
moral model based on considerations of proportionality and desert. Common sense suggests the efficacy of a system based upon deserved punishment. Such a system should not have only a general deterrent effect but, more importantly, should be fairer than the existing one. Deserved punishment treats individuals equally and fairly, yet recognizes the common expectation that criminal conduct will be punished. At the same time, it rejects any notion of personal vendetta and limits punishment to what society considers fair in relation to the seriousness of the crime. In addition, this philosophy of sentencing will enable the system to send out a clear and unambiguous signal that convicted offenders will be punished, rather than the weak and confusing signal transmitted by the present system. In contrast with current sentencing practices that have given rise to public disenchantment, a sentencing policy based on deserved punishment should enjoy broad public support because it is based upon commonly understood precepts.

B. Dealing with Discretion

Washington has fully embraced the indeterminate sentencing system with its allowance of broad discretion in the hands of those who sentence and its narrow judicial review of correctional decisions. This broad discretion is essential to the operation of indeterminate sentencing, and it is this dependence that makes the current system vulnerable to criticism.

Any proposal to abandon the indeterminate sentence raises the issue of dealing with discretion. Two of the alternatives now being discussed are mandatory minimum terms and so-called "flat sen-

76. The Washington judge may commit the convicted offender to a state institution or county jail, stay or suspend the sentence, or place him on probation. See Wash. Rev. Code §§ 9.92.010-0.020, 9.92.050-0.060, 9.95.200 (1974). After commitment to a state institution, the Board of Prison Terms and Paroles will determine a minimum sentence and may release the offender prior to the expiration of his maximum term. See id., ch. 9.95. The Board's decision is not subject to judicial review, although the determination of the trial court may be reviewed if the record fails to reveal a basis for the exercise of the court's discretion and it can be said that "no reasonable man would take the view adopted by the trial court." State v. Hurst, 5 Wn. App. 146, 148, 486 P.2d 1136, 1138 (1971). See also State v. Douglass, 66 Wash. 71, 118 P. 915 (1911).

Proposal for Criminal Sentencing
tencing.\textsuperscript{78} Washington is familiar with the former, as present law mandates minimum terms for certain cases of repeat drug sale offenses,\textsuperscript{79} felonies committed while using a firearm,\textsuperscript{80} and rape.\textsuperscript{81} In flat sentencing, the legislature sets a specific sentence for each crime which the judge must impose. President Ford has called for study of this alternative as a method to eliminate federal sentencing disparities.\textsuperscript{82} The most serious fallacy in these proposals is their over-response to problems of excessive discretion. The solution is not to abandon discretion altogether, but to bring it under control: to regularize, channel, and structure it. Discretion exists because no one can foresee every possibility. Even if it were possible to prohibit the exercise of discretion, it would be unwise to do so.\textsuperscript{83} It is beyond society's collective competence to define prospectively specific rules which will always serve justice when viewed retrospectively. Acknowledging the need for discretion, however, does not require abandoning the rule of law. A balance must be struck.\textsuperscript{84} The key to attaining this essential balance is

\begin{itemize}
\item \textsuperscript{78} See, e.g., Illinois Law Enforcement' Comm'n, Proposal: Reestablishment of Determinate Sentencing 24, January 23, 1975 (proposed amendment to ILL. REV. STAT. ch. 38 §§ 1001 et seq.; copy on file with the King County Prosecuting Attorney); S.B. 42, Calif., Regular Sess. (1974); S.B. 253, Fla., Regular Sess. (1976).
\item \textsuperscript{79} WASH. REV. CODE §§ 69.50.410(2), (3) (1974).
\item \textsuperscript{80} Id. § 9.41.025.
\item \textsuperscript{81} Id. § 9.79.170(2) (Supp. 1975) (three year minimum term for rape in the first degree).
\item \textsuperscript{82} Address by President Ford, Yale Sesquicentennial Convocation Dinner, April 25, 1975 (copy on file with Washington Law Review).
\item \textsuperscript{83} When attempts are made to eliminate discretion by statutes, the results are frequently far from what was intended. Discretion does not disappear but rather is internalized or is transferred to other decision makers who are not prohibited from exercising it, thereby frequently increasing their power. See generally D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial, 112–30, 178–84 (1966).
\item \textsuperscript{84} In his seminal work, Kenneth Culp Davis effectively makes this point:
\begin{quote}
Discretion is a tool, indispensable for individualization of justice. All governments in history have been governments of laws and of men. Rules alone, untempered by discretion, cannot cope with the complexities of modern government and of modern justice. Discretion is our principal source of creativeness in government and in law.
Yet every truth extolling discretion may be matched by a truth about its dangers: Discretion is a tool only when properly used; like an axe, it can be a weapon for mayhem or murder. In a government of men and of laws, the portion that is a government of men, like a malignant cancer, often tends to stifle the portion that is government of laws. Perhaps nine-tenths of injustice in our legal system flows from discretion and perhaps only one-tenth from rules.
And every truth warning of dangers or harms from discretion may be matched by a truth about the need for and the benefits from discretion.
Let us not overemphasize either the need for discretion or its dangers; let us emphasize both the need for discretion and its dangers.
\end{quote}
\end{itemize}

the creation of a legal structure for sentencing which openly acknowledges and accepts discretion but confines its use within boundaries set by law. Its essence is to view discretion as the ability to vary, with proper justification, from the norm created by law, but to allow review of those variations.

1. Establishment of ranges of authorized punishment

The legislature should establish a standard or presumptive sentence surrounded by a range of authorized variations to guide judges in sentencing. These sentences would be determined by the nature of the particular crime and the criminal history of the defendant. Judges would be authorized to depart from the standard or presumptive sentence to the extent allowed by the surrounding range, only if specific legislatively defined aggravating or mitigating factors were found to

85. It is not necessary, and, in fact, it may be undesirable for the legislature itself to undertake the detailed task of drafting these sentences and ranges. Any delegation, however, must be subject to the continuing review of the legislature. Determining the appropriate punishment for criminal behavior is clearly a legislative function in a free and democratic society. For a recommended mechanism to implement such ranges see note 90 and accompanying text infra.

86. Norval Morris argues that the notion of increasing penalties for repeat offenders is justified by a combination of retributive and deterrence theories. He argues that the measure of deserved punishment is a product of our experience. Thus he writes: “Fear may well condition the retributive upper price a community places on a given crime . . . It looks backward to what has been done by others or to the brutal or mitigating details of what this criminal has done.” N. Morris. supra note 13, at 76. But he also employs general deterrent aims as a justification of increasing penalties: “[T]he criminal law must keep its retributive promises, although it need not be precipitate in moving to its heavy weaponry.” Id. at 80.

Society has a greater fear of (or perhaps anger toward) multiple offenders and therefore demands a higher retributive price with each repeat offense. Andrew von Hirsch sees the concept as an element of desert in that the offender is more culpable and therefore more deserving of punishment. Doing Justice 85 (1976). Without trying to resolve this philosophical problem, it seems clear that not only does such a practice meet the test of “fairness” (whether it derives from the notion that the first offender “deserves” leniency or that the multiple offender “deserves” severity), but it is also compelled by the utilitarian need to protect ourselves against those who have demonstrated a propensity to repeat their offenses. Society will continue to attempt predictions of future criminal behavior, but these predictions must be based solely on factors related to the offender’s past criminal behavior. Although the offender’s age, sex, race, employment status, and drinking habits may be useful indicators of the likelihood of recidivism, they are not criminal states or acts and therefore must not become a basis for imposing punishments. The prior criminal record does provide some indication of the likelihood of future behavior; and even though it may not be the most accurate indicator, it at least has the virtue of allowing the offender to define himself by his acts and maintains the essential connection between punishment and crime while pursuing the goal of community protection.
Proposal for Criminal Sentencing

exist. The ranges would allow variation as to each element of the presumptive sentence but within a relatively narrow degree. The punishment prescribed would primarily be "loss of liberty," a phrase that would be defined as the physical custody of an individual for a substantial portion of every day, with release from custody allowed only for certain delineated reasons such as work or education.

The initial establishment of the presumptive sentence for each crime will be a difficult but important task. The legislature, after ordering crimes by their seriousness (a task it has largely accomplished in the new criminal code), should mandate that an existing or newly created administrative body undertake the task of establishing detailed sentence ranges within the legislatively defined priorities. The administrative proposals would be presented to the legislature for adoption, modification, or rejection. If no action were taken, they would automatically go into effect.

In addition, this body should be required to review periodically the prescribed sentence ranges and to prepare appropriate modification for the legislature. This approach would allow gradual evolution of the ranges in keeping with changes in the attitudes of society, while preserving the democratic control which is fundamental in our society.

2. Exceptions

Under the system proposed herein, there must be a process to allow for sentences outside the prescribed ranges. Although several possibili-

87. The presence of aggravating or mitigating factors would be determined at a sentencing hearing.
88. Other forms of punishment would not be excluded under this proposal, but in dealing with serious crime, loss of liberty seems the fairest and most appropriate punishment. The use of monetary fines raises problems of dealing equally with defendants who have committed the same crimes. Obviously a $1,000 fine is a far different punishment to a person earning $100 a week than for one earning $1,000 a week. There may be methods to equalize this disparate effect by calculating fines in terms of days of labor and by basing the amount of the fine on the amount of the loss or gain involved in the crime. See Wash. Rev. Code §§ 9A.20.020–.030 (Supp. 1975).

In appropriate cases, restitution would be required, but not as punishment. Restitution represents an obligation to the victim for the damages inflicted, wholly independent of the punishment deserved. Discharge of this private debt does not discharge the public debt created by the violation of the criminal law and vice versa.
89. See generally id. tit. 9A.
90. States have introduced comprehensive mandatory minimums or flat sentencing by adopting time periods in the initial legislation. See, e.g., note 78 supra. Nevertheless, it is this author's view that this approach would focus debate on the specific time periods rather than on the procedural structure itself and thus would be undesirable.
ties for regulating such exceptions exist, it is the author's belief that the simplest and most effective system would be to require two preconditions to allowance of a sentencing exception. These requirements would be:

1. A statement of reasons for the exception by the sentencing judge;
2. Review by a designated administrative tribunal at the request of either the defendant or the prosecutor.

Together these prerequisites would provide the requisite flexibility without sacrificing necessary certainty and consistency in sentencing.

The requirement of enumerated reasons for an exception is essential to test adequately the validity of a sentence that varies from the established norm. Allowing discretionary variance from the prescribed ranges without requiring reasons and review would be inviting return to the present system of excessive individual discretion.

The proposed sentence review mechanism would not consist of a traditional system of judicial review. All systems of appellate review recently implemented or proposed utilize traditional judicial review, either by the general appellate courts, by a special appellate panel which hears only sentence appeals, or by a panel of trial court judges with appellate powers. It is the author's view that the respon-

91. Other possibilities for dealing with variations from the norm include variations on the sentencing panel concept. For example, a judge desiring to sentence outside the prescribed range could be required to convene a panel of three judges, with the concurrence of two of the three being necessary to allow the exception. Although such a requirement would be a substantial improvement over our present system, it has a number of problems. First, it would not foster the development of a common law of sentencing, as would an administrative appellate tribunal. Secondly, it would raise the problem of undue deference to the original judge. Thirdly, it would be impractical in the 22 judicial districts in Washington that have fewer than three judges. See Wash. Rev. Code §§ 2.08.061-065 (1974).

92. The author can attest to the effectiveness of requiring written reasons as a barrier to arbitrary decisions. Since 1971, the author has required that every deputy prosecuting attorney who declines prosecution on a case state his reasons for that decision in writing. A copy is given to the law enforcement agency that presented the case, and a copy is filed after it is reviewed in our office. Law enforcement agencies use the statement as the basis for review of the decline decision via the chain of command of the Criminal Division. This requirement has had a salutary effect, both in regularizing the exercise of this important part of prosecutorial discretion and in minimizing the misunderstanding and resentment that inevitably result when one person or agency passes judgment on the work of another. See also Korbakes, Criminal Sentencing: Should the "Judge's Sound Discretion" be Explained? 59 JUDICATURE 185 (1975).


Proposal for Criminal Sentencing

sibility for review of sentences should be placed on the same administrative agency that was responsible for creating the initial presumptive sentence and ranges, rather than on the traditional appellate system.\textsuperscript{97} Several reasons support this allocation of responsibility. First, the type of review envisioned, applying legislatively articulated sentencing philosophy to a particular set of facts, is not strictly "legal" in nature and could be more readily accomplished by an agency which would represent a broader range of societal values than would any appellate court. Secondly, a nonjudicial reviewing tribunal would not be encumbered by the barnacles of traditional judicial review procedures. Meaningful sentence review must be immediate; allowing months and sometimes years to pass before the process is complete would defeat the purposes of review.\textsuperscript{98} The new system should require no more than 30 days to complete review of a sentence.\textsuperscript{99}

Under this system, both the defendant and the state\textsuperscript{100} would have

\textsuperscript{97} Appellate review within the administrative structure would survive a constitutional test, if there were a right of access to the appellate courts for review of errors of law after exhaustion of the administrative procedure. Washington's administrative procedure for indeterminate sentencing has been held not to be a delegation of judicial power. State v. Mulcare, 189 Wash. 625, 66 P.2d 360 (1937); Ex parte Behrens, 55 F. Supp. 460 (E.D. Wash. 1944). The proposed system here should similarly be upheld.

\textsuperscript{98} In 1975, the average judicial appeal in the Washington courts of appeal and the supreme court took more than 12 months to complete. See Wash. Office of Administrator for the Courts, Nineteenth Ann. Rep. Relating to Judicial Administration in the Courts 1975, at 27 (on file with the King County Prosecuting Attorney).

\textsuperscript{99} In order to accomplish review within this time frame, only material presented to the sentencing judge should be considered by the administrative tribunal. In addition, counsel should be permitted to present only oral argument rather than written briefs. Finally, review could be provided by traveling panels of the tribunal in the judicial district where the sentence was imposed.

\textsuperscript{100} This would ensure that the too lenient, as well as the too severe, sentence is subject to review. There may be argument, however, that such a provision violates the constitutional prohibition against double jeopardy. This issue in this particular context would appear to be one of first impression. The Supreme Court in United States v. Benz, 282 U.S. 304 (1931), was confronted with the question of whether a federal district court had power to shorten a defendant's prison term after it had already imposed a term which the defendant had begun to serve. Answering in the affirmative, the Court in dictum distinguished the situation in which a court could amend a sentence upward. It stated:

"For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. \ldots"

282 U.S. at 308, quoting In re Lange, 85 U.S. (18 Wall.) 163, 173 (1874).

There appear to be two methods by which the force of the above dictum can be dis-
the right to seek review only of sentences imposed outside the prescribed ranges. Thus, the sentencing judge's power to vary from the standards would always be subject to review, and the administrative tribunal would not be overwhelmed by appeals. In cases of review, the tribunal would be limited to either affirming the exception made by the sentencing judge or substituting a sentence within the prescribed range. The purpose of this review would be to ensure compliance with the legislative scheme, not to provide for resentencing. The tribunal would be required to articulate reasons for its decisions and would

sipated or found inapplicable to the statutory scheme suggested in the text. The first is suggested by State v. Brunn, 22 Wn. 2d 120, 154 P.2d 826 (1945), in which the Washington Supreme Court commented extensively on WASH. CONST. art. I, § 9, which provides: "No person shall . . . be twice put in jeopardy for the same offense." The court in Brunn approved of Justice Holmes' dissenting opinion in Kepner v. United States, 195 U.S. 100 (1904), in which the argument was put forth that the verdict of a jury (or determination of guilt by a judge) need not be the end of a trial for:

[I]t is within the legislative power to prescribe the method by which guilt or innocence shall be established with finality [and] the legislature may provide that the trial may be continued in a reviewing court in order to insure that the final determination of the defendant's guilt or innocence is free from legal error.

22 Wn. 2d at 130, 154 P.2d at 831. The right of the legislature to prescribe the manner in which persons charged with crimes are to be tried is limited by due process and right to jury trial considerations, but outside such constitutional limitations "its power to regulate the criminal procedure is plenary." Id. at 140, 154 P.2d at 836. Whereas the Constitution does not mandate the exact form of trial procedures required of every state, if Washington statutes identified review by an administrative body as necessary for finality of judgment in certain circumstances, jeopardy would not attach prior to such review and the mandate of the state and federal constitutions would not be violated.

Alternatively, the recent U.S. Supreme Court case of United States v. Wilson, 420 U.S. 332 (1975), suggests that the double jeopardy clause will not be violated by an appeal by the government if a retrial of the case is not required. In Wilson, the defendant was indicted and prosecuted for embezzling funds and was found guilty by jury verdict. The federal district court dismissed the indictment on the ground of prejudicial pre-indictment delay and the government sought to appeal. The Court of Appeals for the Third Circuit held that the double jeopardy clause barred review. The U.S. Supreme Court, 7-2, reversed. The appeal was brought under the Criminal Appeals Act of 1970, 18 U.S.C. § 3731 (1970), which the Court interpreted as an act by Congress to remove all statutory bars to government appeals wherever the Constitution permitted. Looking to the history of the adoption of the double jeopardy clause, the Court concluded that government appeals were barred only where there was danger of subjecting the defendant to a second trial for the same offense; thus, the protection would not attach to a post-verdict correction of an error of law which would not grant the prosecution a new trial or subject the defendant to multiple prosecution. The scheme contemplated in the body of the text would not require a retrial at the sentence review stage but only brief examination of one discrete issue, based on the evidence already gathered at the trial stage. See note 99 supra. Thus, the defendant would not be twice tried or punished because all proceedings would be extensions of the first trial process, and in no event would the defendant receive a punishment increased beyond the statutorily prescribed maximum for the specific crime for which he was convicted.
thus develop a body of precedents to guide sentencing judges in exercising their discretion to vary from the prescribed ranges.\textsuperscript{101}

A sentencing system built on articulated reasons and on review of exceptions would provide the basis for a truly rational system of criminal sentencing. It would allow the limited flexibility necessary to deal with exceptional cases, while placing firm constraints on variations to prevent the exceptions from consuming the rules.

3. \textit{Effect on police and prosecutorial discretion}

It may be argued that the net effect of this proposal will not be to control and regularize discretion, but to shift it to an earlier point in the criminal process where it will continue to be exercised by the police and prosecutors. Any system will be frustrated by the failure of police to arrest and prosecutors to prosecute. The control of these "low visibility"\textsuperscript{102} decisions is complex and difficult; some observations and suggestions, however, can be made.

One of the major reasons for the exercise of the most important discretionary power of police and prosecutors—the power not to arrest and not to prosecute—is the desire to avoid what are perceived to be unduly harsh consequences that would follow from an arrest or prosecution.\textsuperscript{103} Washington's adoption of a new criminal code,\textsuperscript{104} which attempts to conform the substantive criminal law to modern values, will do much to avoid the perceived need for such negative decisions. Similarly, the adoption of moderate and proportional sentencing reform can substantially reduce the pressures on the police and prosecutors to use their discretionary powers to ameliorate harsh results.\textsuperscript{105}

\begin{enumerate}
  \item The test to be used by the tribunal in determining whether to overrule the sentencing judge could either be prescribed in the original statute or developed as part of the "common law" of sentencing.
  \item Beccaria, addressing this issue in 1764 wrote: "[O]ne ought to consider that clemency is a virtue of the legislators and not of the executors of the laws, that it ought to shine in the code itself rather than in the particular judgments." C. Beccaria, \textit{supra} note 56, at 59.
\end{enumerate}
The fundamental solution is to subject the exercise of discretion to rules through the process of internal rulemaking.\(^{106}\) Whether these rules are required by the courts,\(^{107}\) by the legislature, or are generated internally is less important than that they be developed. For too long those charged with the power to decide who is to be arrested and who is to be prosecuted have failed to take the initiative to articulate the standards upon which they exercise that discretion.\(^{108}\) The legislature should require that prosecutorial and police agencies develop and publish standards governing the exercise of their discretion.\(^{109}\) Such a


\(^{107}\) Professor Davis formulates a theory that would modify the traditional non-delegation doctrine of administrative law to require that when the legislature fails to prescribe meaningful standards for the exercise of discretion, the administrators would be required to prescribe the standards within a reasonable time. K. Davis, \textit{Discretionary Justice: A Preliminary Inquiry} 57-59 (1969). In his article on rule-making for police Davis articulates a due process right: "Any administrator with unguarded discretionary power violates due process if he fails to confine and structure his discretion to the extent required to avoid unnecessary arbitrariness in the choices made." Davis, \textit{An Approach to Legal Control of the Police}, 52 \textit{Texas L. Rev.} 703, 708 (1974).

\(^{108}\) Over the past year this author's office has undertaken the task of developing and promulgating standards governing the way in which discretionary decisions relating to charging and disposition of cases are made. See, e.g., King County Prosecuting Attorney, \textit{Standard Operating Procedure}, §§ 1050–55, Sept. 15, 1975. These standards deal with both the charging and the disposition of the cases handled. For example, they govern when certain charges will be reduced and also what sentence recommendations will be made. Exceptions from the standards are allowed but must be based on written reasons and approved by supervising deputies. As Judge McGowan points out: "There is something about the very process of having to write down on paper detailed guidelines for one's conduct which summons rationality and elevates principle." McGowan, \textit{supra} note 106, at 680. See generally F. Miller, \textit{Prosecution: The Decision to Charge a Crime} 186–90, 207–12 (1969); D. Newman, \textit{Conviction: The Determination of Guilt or Innocence Without Trial} 112–25, 177–82 (1966).

\(^{109}\) A major reason for reluctance on the part of police chiefs and prosecutors to promulgate standards is the fear that the standards will be the basis for external agencies—mainly the courts—to intervene in what has previously been an area without external supervision. It seems probable that once standards are promulgated, courts will require agencies to follow them. See, e.g., Billiteri v. United States Bd. of Parole, 400 F. Supp. 402 (W.D.N.Y. 1975). This should not be cause for concern, however, since administrators arguably should want their agencies to follow internally promulgated rules.

Additionally such agencies have not been as free from external supervision as is often believed. Police decisions are subject to review by prosecutors and later by the courts. Prosecutors are subject to control by the courts, both on a case-by-case basis and more broadly under ethical rules. See ABA Code of Professional Responsibility, Canon 7, DR 7–103. Even the negative decision to terminate prosecution cannot be made solely by a prosecutor. The common law rule giving a prosecutor the unreviewable right to dismiss a pending case has been abolished and prosecutors are now required to obtain permission of the court before dismissal. See \textit{Wash. Super. Ct.}
Proposal for Criminal Sentencing

requirement would help ensure that essential reforms of the sentencing process are not dissipated by uncontrolled police and prosecutorial discretion.

C. Rehabilitation and Release

In addition to prescribing punishment, the new scheme must deal with rehabilitation and the method by which a person being punished will be returned to society. As suggested earlier, rehabilitation is often seen as the purpose of the sentence and hence as coercive rather than facilitative. Similarly, the imprisonment duration is presently determined by the dubious process of attempting to predict the likelihood of criminal behavior in the community through observation of the prisoner's response to the prison environment.

To respond to these difficulties, a new approach is necessary. Initially, the term of the sentence should be fixed in advance so that the defendant will know from the outset how long he or she will be subject to the control of the state. “Control of the state” would not require that the entire period be spent in a total confinement facility. Instead, a graduated release plan could be adopted with the first portion of the sentence served in a total loss of liberty facility, the second portion in a partial confinement facility, and the final portion in the community under restrictions similar to present parole conditions. Violation of conditions in the second or third stages would result in return to total custody but in no event for a longer period than that fixed in the original sentence. Conversely, successful performance of any stage would not be a basis for a reduction in length of sentence.

In this way, rehabilitation could be facilitated within the framework of a certainty of punishment model. Defendants would know their exact status at all times and yet be without incentive to engage in

---


110. This would include the traditional penitentiary and jail-type facility but would also include the “mini-prison” and other governmentally operated institutions regardless of their security classifications.

111. This would include work or education release programs and the myriad of residential rehabilitation programs. Privately operated programs could qualify if they were subject to state-imposed standards and inspections.
the dramatic acts which so often characterize attempts to convince parole boards that rehabilitation has taken place.\textsuperscript{112} The opportunity for gradual reentry into society would exist because the defendant is entitled to it, but not because he or she has earned it.

**IV. CONCLUSION**

The present model of sentencing has failed in four ways. First, by attempting to design sentences to fit the rehabilitative needs and prospects of the offender, the limits of the coercive power of the state over the individual are not defined. Secondly, the treatment model depends on individualization and disparity in sentencing which is in direct conflict with our sense of fairness and equality of justice. Thirdly, aside from moral arguments, the treatment model has failed to fulfill its own promise of effectively "curing criminals." Finally, the present sentencing policy undermines the credibility and thus the deterrent effect of the threat of law.

The need to determine the limits of the criminal sanction calls for a return to certain moral considerations. The limits of coercive power are not to be found in medical analogies and tests of effectiveness, but rather in the principles of proportionality and desert. While the concept of desert alone may not suffice as a justification for punishment, it does serve as a guide in setting limits to its severity and distribution. The criminal justice system need not always impose the maximum deserved punishment, but it must never impose more than what is deserved by the criminal activity of the offender. While the setting of maximum penalties can answer some of the criticisms, establishment of certain prescribed minimum limits is also necessary. It is not true that the exercise of leniency is never a cause of injustice, because "the power to be lenient is the power to discriminate."\textsuperscript{113}

The proposal presented in this article attempts to reincorporate these principles into the sentencing process. In addition to its theoretical justification, however, this proposal should have a practical effect.

\begin{footnotesize}
\textsuperscript{112} For a discussion of the problems created by a parole system which requires inmates to participate in certain programs to obtain early release see Meyerson, *The Board of Prison Terms and Paroles and Indeterminate Sentencing: A Critique*, 51 WASH. L. REV. (1976).

\end{footnotesize}
Proposal for Criminal Sentencing

Both the evidence of the failure of the treatment model to reduce recidivism rates and the evidence of deterrence research suggest that a sentencing policy which sets punishments according to the seriousness of the crime and the criminal record and imposes those sentences with reasonable certainty would be more effective in controlling crime than our present system.

The solution proposed here is of necessity in outline form. Numerous details remain to be resolved, but the presentation of a philosophical framework in which they can be resolved should be useful. Problems permeate the entire criminal justice system, not merely one agency or discipline. Just as it is impossible to fix responsibility for the adoption of the individualized treatment model, so it is impossible to assign responsibility for reform to any one portion of our system. If there is to be reform, all parts of the system must accept the responsibility to analyze their roles, modify old doctrines, and adopt new policies when their present practices are found wanting.