

Fall 1989

## Understanding Penal Reform: The Dynamic of Change

Samuel H. Pillsbury

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Samuel H. Pillsbury, Understanding Penal Reform: The Dynamic of Change, 80 J. Crim. L. & Criminology 726 (1989-1990)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

# UNDERSTANDING PENAL REFORM: THE DYNAMIC OF CHANGE

SAMUEL H. PILLSBURY\*

## I. INTRODUCTION

The story of penal reform in the United States is an old and discouraging one. From the development of the penitentiary in the late eighteenth and early nineteenth centuries, to the determinate sentencing movement of the last two decades, penal "reforms" in this country have led to few real improvements in the practice of punishment. Even if the reforms alleviate past problems, in so doing they create new ones, requiring further reforms which lead to new abuses, and so on. Now that we are approaching the end of a reform cycle, that centering on determinate sentencing, the time is ripe for a general reconsideration of penal reform. Why do reforms fail? Will anything work?

This Article seeks to answer these questions by developing a general model of the reform process. Drawing from the examples of three different reform movements—the creation of the penitentiary in the late eighteenth and early nineteenth centuries; the formation of the modern correctional system in the late nineteenth and early twentieth centuries; and the determinate sentencing movement of approximately the last fifteen years—the Article identifies the three basic forces which shape penal change from suggestion through implementation.

Reform begins with the proposal of a scheme for penal improvement. In most instances it is suggested by an idealist who links the proposed penal reform to a view of the ideal society prominent at the time. The idealist promotes a penal ideology<sup>1</sup> which empha-

---

\* Associate Professor of Law, Loyola Law School, Los Angeles; J.D., University of Southern California, 1983; A.B., Harvard College, 1976. I would like to thank my colleagues Lawrence Solum and Donald Brosnan and my wife Linda Pillsbury for their suggestions concerning this paper as well as the staffs of the Loyola Law Library and the Huntington Library for their research assistance.

<sup>1</sup> Ideology here means a coherent set of ideas and values about an aspect of public life. Thus, ideology is not used in the Marxist sense of a mythic (and usually false)

sizes the rightness or goodness of the proposed change in terms of society's relation to the criminal offender. Such reformers are primarily concerned with justice in the broadest sense.<sup>2</sup> The moral idealism which inspires them constitutes the first of the three major forces which shape penal change.

The second major influence upon reform is what may be termed society's need for order. Punishment serves not only the needs of justice but also society's need to suppress crime and maintain civil order. The historical examples demonstrate that a program of reform wins acceptance in part because the proposed change promises more effective suppression of crime. The selling of penal reform thus includes appeals to the values of stability and civic peace; it also includes a sometimes explicit, sometimes implicit, emotional appeal to retribution. The need for order inspires a desire for harsher as well as more effective punishment. A new penal method is more likely to win approval if it can satisfy the emotional need of a criminally victimized people to strike back at criminals in exemplary fashion.

In the early stages of the reform process, reform may seem to satisfy both the need for order and the goals of moral idealism. The new method or approach may credibly promise both a more moral and a more effective means of punishment. In some instances, reformers simultaneously tout the justice and crime suppressant qualities of reform. During the implementation process, when resources are limited and political pressures for harsh punishment mount, however, idealistic concerns prove less influential.

The interests of those employed in penal institutions comprise the third and least recognized force affecting penal reform. Regardless of how punishment is conceived, its practice depends upon human execution. Institutional players such as prison officials, parole boards, judges, and prosecutors have their own professional interests in shaping punishment. All are necessarily preoccupied with the efficient operation of penal machinery. This goal of efficiency may effectively override all other penal aims, especially in the context of insufficient resources, a nearly endemic condition in American punishment.

Overall, the model of reform<sup>3</sup> demonstrates that while particu-

---

conception of the world. Cf. Introduction, From the Special Issue Editors, *Special Issue: Law and Ideology*, 22 *LAW & SOC'Y REV.* 629, 630 (1988).

<sup>2</sup> Thus, as we will see, the idealist view of punishment may be utilitarian or deontological.

<sup>3</sup> Use of the word model is not meant to suggest a structure accounting for all variables. The model presented accounts for only a few basic influences which are de-

lar reforms are commonly associated with the idealists who first propose them, penal reform is better understood as change produced by the confluence, compromise, and competition of the basic influences of moral idealism, need for order, and institutional interest. The pluralist nature of the forces shaping penal change helps explain why reforms rarely produce their originally intended results. Those who define the original goals play but one part in a complicated process. This raises the question of whether any coherent plan for penal improvement can succeed. It raises the possibility that reform activity is actually counter-productive. For example, if one is a moral idealist, one might conclude that, however it is originally defined, "reform" generally results in practices which serve crime-suppressant and institutional interests more than those of justice, and is thus a counterproductive endeavor.

This Article concludes that although the sort of ideological triumph normally envisioned by reformers is probably impossible, reform remains a meaningful endeavor. The pluralist nature of punishment suggests, however, the need for different reform strategies and a different definition of successful reform. Since punishment necessarily represents the compromise of the three major influences, we should view successful reform not as the complete victory of a single element, but the compromise between rival interests which will best accomplish our ideological goals over the lifetime of the institution or practice to be reformed.

By the standards of traditional criminal justice commentary, the main thrust of the Article's analysis is non-normative: the Article examines the gap between reform intentions and results, without regard to whether the intentions are worthy. The Article deliberately avoids analysis of the merits of different penal ideologies. In another sense, however, the Article has a normative thrust because it defends the basic endeavor of trying to improve penal practices and institutions, even while demonstrating how difficult that is.

## II. HISTORICAL EXAMPLES—THE CREATION OF THE PENITENTIARY, 1790-1830 AND THE CREATION OF THE CORRECTIONAL SYSTEM, 1870-1920

Americans generally seem to prefer ahistorical approaches to

---

scribed at a level of great generality. The model should be taken as a beginning to an understanding of reform, rather than an attempt to explicate completely. Similarly, although the historical examples reviewed suggest a general chronologic pattern to reform, the Article leaves this pattern suggestive. For example, although idealist enthusiasm generally seems to precede reform's appeal to the need for order, this may not be true in all instances.

problem-solving. Our enthusiasm for new ideas discourages a thorough examination of historical experience, which is itself discouraging. This has certainly been true in most penal reform movements. It is not that penal reformers are ignorant of the past; to the contrary, they generally present a vivid account of past practices—and past evils—which the current reform will cure. This view of history, however, is a narrow one, defined entirely by current reform concerns. The only questions asked about past experience are those which the proposed change may answer.

This Article presents a broader view of penal change, one divorced from the ideology of reform.<sup>4</sup> The Article seeks to analyze common patterns in the divergence between reform goals and the penal practices which follow reform. The historical account provided is necessarily a broad-scale and sketchy view of past events, more the statement of an historical hypothesis than a proof. The Article does not seek to explain each reform movement in its full complexity. Instead, it seeks to identify and understand the main, recurrent influences upon penal change. I proceed in the belief that present needs for a broad perspective on past penal reforms outweigh the obvious hazards of a schematic and suggestive approach to history.<sup>5</sup>

#### A. THE CREATION OF THE PENITENTIARY, 1790-1830

In the history of American punishment, the most dramatic change in penal methods came in the creation of the penitentiary in the years following the American Revolution. Replacing the gallows, whipping post, stocks, and pillory which had stood at the center of American towns and villages throughout the colonial era were massive structures, built in urban and rural areas, designed for the collective incarceration and reform of a region's criminals. This change, concentrated between 1790 and 1830, represented the first major penal reform movement in America and was one of the more

---

<sup>4</sup> By ideology of reform I mean the set of assumptions involved in the belief that certain penal changes will necessarily improve the overall state of punishment.

<sup>5</sup> The historical discussions rely almost entirely on secondary sources and, for that reason, depend for their depth and coverage upon the extent of work already done in the field. For the creation of the penitentiary, this presents relatively few problems as the period generally and the process of penal reform in particular has been well-documented and analyzed. In contrast, the development of the correctional system in the nineteenth century, with one important exception, has been largely neglected by modern historians. See *infra* note 54. With regard to contemporary developments, recent scholarship has illuminated some aspects of penal reform but many issues remain to be explored. See *infra* note 159.

important penal reforms of the Western world.<sup>6</sup>

The creation of the penitentiary also provides a clear example of the basic dynamic of penal reform. The penitentiary was originally hailed as a symbol of progressive political and religious ideas. Instead of tormenting wrongdoers, the penitentiary would effect their moral reformation. The penitentiary also filled a more basic need. The new nation, founded upon ideals of a virtuous citizenry, found that the old penal methods were inadequate to keep many of its citizens virtuous. The penitentiary represented a new and more effective means of suppressing crime. Perhaps the most important influence upon the nature of the new punishment had nothing to do with the goals of punishment, though—it was institutional. After a period of disorder within the new jails and prisons, New York prison wardens developed a system of harsh institutional discipline designed to maintain order within the prison at the least cost to the state. This system, adopted in most institutions across the nation, ensured that the penitentiary was a place, not of benevolent rehabilitation, but of often brutal repression.

The creation of the penitentiary occurred in two phases. The first phase, from approximately 1790 to 1815, witnessed both a legislative shift from corporal punishment to incarceration as the primary criminal punishment and the opening of the first institutions for penal incarceration.<sup>7</sup> During this period, reformers emphasized the ideal of prisoner reformation. The second phase, from 1815 to 1830, saw the construction of mass penal institutions and the development of a new disciplinary regime. Change during this period

---

<sup>6</sup> Good modern accounts of the rise of the penitentiary may be found in the following: M. IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750-1850* (1978) (on the rise of the penitentiary in England); W. LEWIS, *FROM NEWGATE TO DANNEMORA: THE RISE OF THE PENITENTIARY IN NEW YORK, 1796-1848* (1965); B. MCKELVEY, *AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS* (1977); D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* (1971). Earlier, but still useful, works on the subject include the following: H.E. BARNES, *THE REPRESSION OF CRIME* (1926) and *THE STORY OF PUNISHMENT* (1930); R. CALDWELL, *THE PENITENTIARY MOVEMENT IN DELAWARE* (1946); O.F. LEWIS, *THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845* (1922) and N. TEETERS, *THEY WERE IN PRISON: A HISTORY OF THE PENNSYLVANIA PRISON SOCIETY* (1937). Notable contemporary accounts from foreign visitors in the nineteenth century include the following: G. DE BEAUMONT & A. DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* (1833); W. CRAWFORD, *REPORT ON THE PENITENTIARIES OF THE UNITED STATES* (1835).

<sup>7</sup> Americans had used carceral institutions before, but primarily as debtor's prisons and to hold prisoners awaiting trial or the imposition of punishment. Occasionally, imprisonment was ordered as punishment for minor offenses. See H.E. BARNES, *THE REPRESSION OF CRIME*, *supra* note 6, at 58-90; E. POWERS, *CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS*, 233-41 (1966).

was characterized by a much tougher rhetoric, which emphasized repression instead of reformation.

### 1. Moral Idealists

Of all American penal reform movements, that which followed the American revolution was perhaps the most idealistic. The penitentiary, which today stands as the symbol of so many social ills, was during the early years of the republic a symbol of the nation's greatest hopes. The penitentiary was founded upon the ideals of republicanism and evangelical humanitarianism.

#### a. Republicanism

The movement to replace the traditional English corporal punishments in America was inspired by Enlightenment thought, in particular by that strand of philosophy known as republicanism. Republicanism, as employed here, designates a particular public policy ideology influential in a wide variety of social and political debates in late eighteenth century America.<sup>8</sup> Its rhetoric featured dramatic dichotomies between the values of rationality, moderation, and liberty associated with republics, and those of passion, excess, and tyranny associated with monarchies. In the eyes of American republicans, the assaultive corporal punishments of English law and its excessive reliance upon capital punishment made it characteristic of the monarchical *ancien regime*. Using the rhetoric of Montesquieu and Beccaria, American reformers attacked the severity and irrationality of English penal law.<sup>9</sup> Corporal punishment lay at the heart of the debate; an angry and cruel method of punishment in republican eyes, it was decried as a physical representation of the monarch's tyrannical oppression of his subjects.<sup>10</sup>

---

<sup>8</sup> There is a considerable literature on republicanism as an historical phenomenon. Essential works include the following: B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT* 506-52 (1975); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969). This should be distinguished from recent legal scholarship drawing on republican ideas for modern law. E.g., *Symposium: The Republican Civic Tradition*, 97 YALE L. J. 1493 (1988).

<sup>9</sup> See BECCARIA, *OF CRIMES AND PUNISHMENTS* (D. Young trans. 1986); MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1899). During the colonial era American penal practices were generally more moderate than those of England. Ironically, English criminal justice served as the model of justice for eighteenth century continental observers, because English punishments were more moderate and procedure more progressive than on the continent. For example, see Montesquieu's discussion of torture, comparing continental and English practices. MONTESQUIEU, *supra*, at 91.

<sup>10</sup> See the following from W. BRADFORD, *AN INQUIRY ON HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA* 5 (1793), quoted in O. LEWIS, *supra* note 6, at 10:

Incarceration presented a solution to these evils. Here was a punishment which operated primarily upon the mind and not the body of the offender, a punishment without violence. It was, by contrast with punishments such as branding and whipping before a howling mob, a calm and moderate punishment, and one which could be rationally apportioned to severity of crime according to utilitarian principles of deterrence. The penitentiary provided a solution to a basic moral challenge facing the new nation. Republics, many believed, depended upon the virtue of their citizens. Criminal activity raised questions about that virtue and about how a virtuous citizenry would punish public offenses.<sup>11</sup> The penitentiary, by its emphasis on offender reformation, would cause the offender to realize his virtuous potential and so provide an enlightened solution to both dilemmas.<sup>12</sup>

#### b. Evangelical Humanitarianism

Religious belief also played an important role in the move from the whipping post to the penitentiary. Early American penal reformers tended to be pious men, many of them Quakers, who had rejected the determinist worldly gloom of Calvin for a vision of Christianity which required heroic efforts to save their fellow man. Their approach to penal reform was inspired by the life and example of John Howard, the English jail reformer of the late eighteenth century.<sup>13</sup> After being appointed Sheriff of Bedford, England in

---

"[O]n no subject has government, in different parts of the world, discovered more indolence and inattention than in the construction or reform of the penal code. . . . Hence sanguinary punishments, contrived in despotic and barbarous ages, have been continued when the progress of freedom, science and morals renders them unnecessary and mischievous: and laws, the offspring of a corrupted monarchy, are fostered in the bosom of a youthful republic."

See also B. RUSH, *AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS AND UPON SOCIETY* (1787); M. GLENN, *CAMPAIGNS AGAINST CORPORAL PUNISHMENT* 55-56 (1984).

<sup>11</sup> See Masur, *The Revision of the Criminal Law in Post-Revolutionary America*, 8 CRIM. JUST. HIST. 21, 28-29 (1987).

<sup>12</sup> C. LOWNES, *AN ACCOUNT OF THE ALTERATION AND PRESENT STATE OF THE PENAL LAWS OF PENNSYLVANIA, ETC.* (1792); B. RUSH, *supra* note 10; N. TEETERS, *supra* note 6, at 9-45. For a brief account of early criminal law reforms inspired by republican thought, see L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 280-82 (2d ed. 1985).

<sup>13</sup> See H. BARNES, *THE REPRESSION OF CRIME*, *supra* note 6, at 94; M. IGNATIEFF, *supra* note 6, at 47-59. Although Quakers predominated in the reform movement in Pennsylvania, an Episcopalian bishop was the first president of the state's reform society and many non-Quakers were also active in penal reform. See BARNES, *Introduction* to Teeters, *They Were in Prison*, *supra* note 6, at x. Quakers were also influential in early New York reform. See S. JAMES, *A PEOPLE AMONG PEOPLES: QUAKER BENEVOLENCE IN EIGHTEENTH CENTURY AMERICA* 289-91 (1963). A second generation of religious reformers, exemplified by Louis Dwight of the Boston Prison Society, espoused their own evangelical Christian faith. See B. MCKELVEY, *supra* note 6, at 15; see also *infra* note 18.



1773, Howard discovered the appalling condition of English jails and took up a personal crusade of institutional inspection, reporting, and reform agitation. His detailed, scientific accounts of tours of the jails of England and continental Europe combined with his reform recommendations<sup>14</sup> laid much of the political groundwork for the penitentiary movement in both England and America.

Like Howard, many of the early American reformers saw penal reform as part of their Christian duty to fellow man. The constitution of the first post-Revolution American penal reform group, the Philadelphia Society for Alleviating the Miseries of Public Prisons, provided: "When we consider that the obligations of benevolence, which are founded on the precepts and example of the author of Christianity, are not cancelled by the follies or crimes of our fellow-creatures . . ." and considering the suffering of prisoners, "it becomes us to extend our compassion to that part of mankind, who are the subjects of these miseries."<sup>15</sup> The object of criminal punishment must be reformation of the offender "without indulging in vindictive feelings."<sup>16</sup> Offenders were viewed as unhappy, unfortunate creatures in need of moral guidance. They were people.<sup>17</sup>

The only form of punishment which could reflect these moral truths was incarceration, usually with an emphasis upon solitary confinement. Although the jails and prisons of the late eighteenth century past were horrific, humanitarian reformers envisioned carceral places of cleanliness, health, and penance—tough monasteries for wayward souls. Here was a punishment which could be benevolent, which could save the sinner instead of damn him.<sup>18</sup>

---

<sup>14</sup> See J. HOWARD, *THE STATE OF THE PRISONS* (1929).

<sup>15</sup> Constitution of the Philadelphia Society for Alleviating the Miseries of Public Prisons (May 8, 1787).

<sup>16</sup> R. CALDWELL, *supra* note 6, at 218 (quoting REPORT OF DELAWARE HOUSE COMMITTEE ON PENAL REFORM (Jan. 1818)).

<sup>17</sup> *E.g.*, "Some seem to forget that the prisoner is a rational being, *of like feelings and passions* with themselves," C. LOWNES, *supra* note 12, at 10. Dr. Benjamin Rush, another Quaker Philadelphia reformer, wrote that criminals "possess souls and bodies composed of the same materials as those of our friends and relations. They are bone of their bone, and were originally fashioned with the same spirits." B. RUSH, *supra* note 10, at 7.

<sup>18</sup> See T. DUMM, *DEMOCRACY AND PUNISHMENT: DISCIPLINARY ORIGINS OF THE UNITED STATES* 87-105 (1987). The "humanitarian" aspect even of humanitarians can be exaggerated, however. Several scholars have noted that the humanitarian movement was in many ways a conservative one, designed to enforce traditional behaviors by elite members of society who had much to lose from a more open and less structured society. See C. GRIFFIN, *THEIR BROTHERS' KEEPERS: MORAL STEWARDSHIP IN THE UNITED STATES, 1800-1865* (1960); Lewis, *The Reformer As Conservative: Protestant Counter-Subversion in the Early Republic*, in *THE DEVELOPMENT OF AN AMERICAN CULTURE* 64-91 (S. Coben & L. Ratner eds, 1970).

## 2. *The Need for Order*

While the idealistic ideologies of republicanism and humanitarianism were clearly influential in its rise,<sup>19</sup> the penitentiary also won acceptance because of its promise as a powerful new institution of state coercion. America's need for order in the decades following the Revolution was in part psychological. Americans were acutely aware of the experimental nature of their national undertaking and the extent to which they had abandoned the traditional stabilizing forces of state church, aristocracy, and king. The nation also experienced the destabilizing effect of significant demographic change. Immigration, urbanization, and migration presented concrete threats to order in the republic.<sup>20</sup>

During the eighteenth century the population of the colonies grew and changed in makeup and distribution. The greatest growth came from low-status immigrants, such as slaves, transported criminals, indentured servants, and laborers. These persons were widely blamed for increased criminal activity.<sup>21</sup> American cities saw dramatic growth prior to the Revolution, a growth accompanied by increased crime.<sup>22</sup> In the years before the Revolution, the colonial criminal justice system showed signs of increasing stress. Throughout the eighteenth century the prosecution of moral offenses such as gambling, drunkenness, and sexual misconduct declined in most colonies while the prosecution of crimes of violence and against property increased.<sup>23</sup> Meanwhile, there was a general increase in the severity of punishments authorized by law and those actually inflicted.<sup>24</sup> This pattern, in combination with contemporary complaints about the rise in crime, suggests that the criminal justice system was forced by circumstance to concentrate upon more serious criminal threats than it had previously encountered.<sup>25</sup> Even Massachusetts, whose population had been among the most stable

---

<sup>19</sup> For example, the failure of the South to implement the penitentiary on a widespread basis may be linked, in part, to the relative lack of appeal of both of these ideologies in that region. See M. HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767-1878* (1980).

<sup>20</sup> See L. FRIEDMAN, *supra* note 12, at 298-99.

<sup>21</sup> Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 352 (1982).

<sup>22</sup> See C. BRIDENBAUGH, *CITIES IN REVOLT: URBAN LIFE IN AMERICA, 1743-1776* 110-13, 299-303 (1955) (discussing the rise of professional crime in pre-Revolution cities).

<sup>23</sup> Greenberg, *Crime, Law Enforcement, and Social Control in Colonial America*, 26 AM. J. LEGAL HIST. 293 (1982); Preyer, *supra* note 21, at 341-43.

<sup>24</sup> Masur, *supra* note 11, at 22; Preyer, *supra* note 21, at 339.

<sup>25</sup> See Greenberg, *supra* note 23, at 315; D. GREENBERG, *CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776* 223 (1974); Preyer, *supra* note 21, at 337-345.

and homogeneous and had enjoyed the most effective criminal justice systems of the colonies, suffered a significant crime problem after the 1750s.<sup>26</sup>

After the Revolution, the situation became worse. Many Americans realized that the criminal justice system they had inherited from the English was inadequate for the basic task of deterring crime.<sup>27</sup> Part of the problem was that demographic change had undermined the effectiveness of the traditional, community-based punishments. Corporal methods punished not only through physical pain but through public humiliation. They relied upon the power of community approbation. These methods lost impact when wayward community members could simply pick up and move to another community following punishment.<sup>28</sup>

In the first stage of penal reform, from 1790 to approximately 1815, the need for order remained a secondary theme in penal reform. Legislatures altered penal codes to replace or supplement corporal punishments with a proportioned scale of prison terms. The presumption of reformers was that reform of the law would be sufficient to cure most penal ills. During this period reformers celebrated the benevolence and moral enlightenment of penal change.<sup>29</sup> By 1815, however, even reformers took a darker view of the penal problem.

By the second decade of the nineteenth century demographic change had accelerated. The cities grew dramatically. From 1790 to 1830 Philadelphia's population tripled; New York's population grew even faster, rising from 33,000 to 215,000.<sup>30</sup> As before, crime centered in urban areas<sup>31</sup> and was blamed on immigrants from overseas.<sup>32</sup> The disorders of the city were especially disturbing to a peo-

---

<sup>26</sup> Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1220-30 (1982).

<sup>27</sup> See O.F. LEWIS, *supra* note 6, at 9.

<sup>28</sup> Hirsch, *supra* note 26, at 1232-34. Contemporaries tended to blame the problem on persons from outside the local community — those who came from other localities or from overseas; there was an increase in the numbers of both, especially after 1750. *Id.* at 1229-31. See also Kealey, *Patterns of Punishment: Massachusetts in the Eighteenth Century*, 30 AM. J. LEGAL HIST. 163, 185 (1986). It is also possible that corporal punishment lost effectiveness as it became seen as a barbarous method. For a similar argument with regard to the English use of whippings and brandings during the late eighteenth and early nineteenth centuries, see M. IGNATIEFF, *supra* note 6, at 90-91.

<sup>29</sup> See *supra* notes 10-18.

<sup>30</sup> P. BOYER, *URBAN MASSES AND MORAL ORDER IN AMERICA, 1820-1920* 4 (1978) (citing Taylor, *American Urban Growth Proceeding the Railway Age*, 27 J. ECON. HIST. 309, 311 (1967)).

<sup>31</sup> See G. DE BEAUMONT & A. DE TOCQUEVILLE, *supra* note 6, at 16-17.

<sup>32</sup> E.g., S. KNAPP, *THE LIFE OF THOMAS EDDY* 65-66 (1976) (quoting New York reformer Eddy as blaming an increase in crime in the early nineteenth century on growth

ple who had pegged their hopes for the moral virtue of the republic on a Jeffersonian rural society. Contemporaries saw another threat to general stability in the mass migration of citizens from the civilized East to the wilderness West.<sup>33</sup> In the East, ordering institutions were weak; in the West they were virtually nonexistent.

The penitentiary's potential as a stabilizing force in early American society was substantial. It represented the modern state's first major expansion of power over the individual.<sup>34</sup> While England still relied on the terror of harsh, unpredictable penalties to keep a restive population in order,<sup>35</sup> America devised a method for mass removal of wrongdoers from society to places where punishment was not only painful, but lengthy. The penitentiary centralized the state's power, bringing punishment under the state's direct control instead of diffusing it among the cities, towns, and villages. The penitentiary replaced corporal punishment's brief encounter between offender and state with a penalty that could last for years. In theory at least, the penitentiary gave the state the ultimate power over criminal offenders—the power to remake them.

The penitentiary also satisfied the public's emotional need for tough and dramatic retaliation against criminals. By the second decade of the nineteenth century, reform rhetoric turned harsh.<sup>36</sup> Even the most optimistic reformers agreed on the need for ruthless measures to crush the spirit of prisoners. And now the voices of those who did not believe in prisoner reformation, but emphasized punishment as retaliation, grew louder.<sup>37</sup>

Developments in the state of New York, which became the nation's leader in penal reform, illustrate the trend. New York's prisons represented a major governmental problem. A mutiny at New York City's Newgate prison prompted the legislature in 1819 to take the critical step of authorizing corporal punishment to maintain prison discipline.<sup>38</sup> This allowed prison authorities to use whips, prison irons, stocks, and other corporal measures to keep prisoners

---

in population, increase in wealth, and large number "of indigent and vicious emigrants from Europe and the West Indies.")

<sup>33</sup> See P. BOYER, *supra* note 30, at 6.

<sup>34</sup> See M. IGNATIEFF, *supra* note 6; M. FOUCAULT, *DISCIPLINE AND PUNISH* (A. Sheridan trans. 1977); D. ROTHMAN, *supra* note 6.

<sup>35</sup> See Hay, *Property, Authority and the Criminal Law*, in *ALBION'S FATAL TREE* 17 (D. Hay ed. 1975).

<sup>36</sup> Hirsch, *supra* note 26, at 1259; see also Heale, *Humanitarianism in the Early Republic: The Moral Reformers of New York, 1776-1825*, 2 J. AM. STUD. 161, 171-72 (1968).

<sup>37</sup> W. LEWIS, *supra* note 6, at 82-83.

<sup>38</sup> See M. GLENN, *supra* note 10, at 11; W. LEWIS, *supra* note 6, at 46.

in order. A major distinction between the new order and the old had been erased.

Meanwhile, the state opened a major new prison at Auburn, New York which was to become a model for penitentiaries throughout the country. The most influential legislators in the creation of Auburn, Stephen Allen and Samuel M. Hopkins, took a harsh view of punishment. Allen claimed that criminals " 'had not the same claim upon our commiseration that the honest and unfortunate part of our species have,' " and that " 'the reformatory plan, or the system of attention, kindness, and forbearance has failed, and will fail, wherever, or whenever it is put into operation.' " <sup>39</sup> Allen admired Connecticut's prison, a converted copper mine where inmates were held in dungeons deep in the earth.<sup>40</sup> Hopkins strongly believed that inmate life in the state's prisons was too easy and should produce more terror and suffering.<sup>41</sup> The Auburn prison fulfilled Allen and Hopkins' penal vision.

New York penal authorities initially experimented with a particularly harsh form of solitary confinement at Auburn, but when that proved disastrous,<sup>42</sup> authorities were forced to create their own system of prison discipline. This was supplied, not by persons concerned with the salvation of prisoners or the larger issues of punishment, but by the men charged with running the prison—Warden Elam Lynds and his second in command, John D. Cray. Lynds and Cray created an extraordinary system of mass repression as their solution to the prison crisis. Under their silent, or congregate, system, prisoners labored together during the day in absolute silence under the unceasing surveillance of guards. They wore distinctive striped clothing. Prisoners moved through the prison in lockstep, a kind of mass shuffle with prisoners' heads turned to the side and hands placed on the shoulders of those before them to maintain rank and prevent conversation. So rigidly was this enforced that some prisoners released after many years continued to move in lockstep by force of habit. At night prisoners were housed in solitary cells, the rules of silence still in force. The regimen was

---

<sup>39</sup> W. LEWIS, *supra* note 6, at 82 (citing J. HARDIE, *THE HISTORY OF THE TREAD-MILL* (1824) (quoting Stephen Allen)).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 83.

<sup>42</sup> The rigors of this experiment illustrate the changing attitudes toward incarceration. Some 80 "hardened" criminals were placed in a specially designed wing of the prison for more than a year and a half, during which time they had no human contact, although they were provided with food, water, and medical care. By the time of their release, several had gone insane, a number had died and one prisoner attempted suicide immediately upon being let out of his cell. *See id.* at 68-70.

maintained by generous applications of corporal punishment.<sup>43</sup>

Auburn provided the disciplinary model for most American penitentiaries.<sup>44</sup> Its main rival was the Pennsylvania, or separate, system. Under the separate system inmates worked and slept in solitary confinement. Advocates believed that physical separation better prevented inmates from corrupting each other. The great pride of the separate system was its shunning of the whip as a disciplinary tool, but the methods used in its stead were also corporal and severe. Prison officials could punish wayward prisoners with repeated outdoor dunkings with buckets of cold water in all weather, confinement in a "tranquilizing chair" (a kind of stocks which caused severe swelling of the arms and limbs), use of straitjackets which were laced so tight that necks and faces turned black with congealed blood, and by gagging prisoners with an iron device that could be life-threatening.<sup>45</sup> Throughout the reform period, promoters celebrated the penitentiary as a benevolent development, but those consigned to its walls, under both the New York and Pennsylvania systems, found it a far more severe punishment than the "barbarities" it replaced.<sup>46</sup>

### 3. *Institutional Interests*

Although the transformation of the penitentiary from a benevolent to a repressive institution reflected a change in public philosophy, much of the change may be attributed to the pragmatic concerns of penal officials. Especially in the second phase of the penitentiary's creation, the most important influence upon the practice of American punishment may have been the need to maintain order *within* penal institutions. The nation's first prisons featured overcrowding and riots. In order to regulate prison populations and maintain order, governors liberally granted pardons to prisoners. Meanwhile, few offenders left prison reformed. Although costly additions to state and local budgets, prisons appeared to do

---

<sup>43</sup> Auburn and especially Sing Sing, the next New York prison built, became infamous for guards' liberal use of the whip against disobedient prisoners. See M. GLENN, *supra* note 10, at 34-36; O.F. LEWIS, *supra* note 6, at 94-96, 113-15; W. LEWIS, *supra* note 6, at 87-100, 136-156.

<sup>44</sup> B. MCKELVEY, *supra* note 6, at 28-30. It was celebrated not only by prison administrators, but by penal reformers. Its greatest proponent was Louis Dwight, a New England Congregational preacher and founder of the Boston Prison Society. Dwight personified the connection between the humanitarian movement and the conservative, crime suppressant theme in Jacksonian penal reform. See Lewis, *supra* note 18, at 83. Dwight sought to extend the Auburn model of discipline to a wide range of nonpenal institutions. *Id.*

<sup>45</sup> O.F. LEWIS, *supra* note 6, at 220-23.

<sup>46</sup> LIEBER, *Preface* to G. DE BEAUMONT & A. DE TOCQUEVILLE, *supra* note 6, at xvii-xix.

little more than educate their inmates in crime and harden them to a criminal career.<sup>47</sup>

The disciplinary system inaugurated at Auburn was geared more to institutional needs than reformation or even crime deterrence. Lynds' main concern was to render the prisoner docile and pliable during his prison stay. What happened to the prisoner after release was of less moment.<sup>48</sup>

Institutional economics played a critical role in shaping the nature of incarceration. Prisons cost a great deal more than corporal punishment, unless they could be made to pay for themselves through convict labor. Although prison reformers argued bitterly over the relative humanity and reformatory effectiveness of the Auburn and Pennsylvania systems, Auburn's most convincing claim to superiority was simply that it cost less.<sup>49</sup> Despite reformers' appeals to the ideal of reformation, political leaders proved loathe to spend public money on criminals, even for religious or educational training.<sup>50</sup> The success of a prison administration depended not on prisoner reformation, but on the institutional balance sheet. A warden who could make his prison pay its own way or, better yet, turn a profit, was widely celebrated. One means of turning a profit was to hire out prisoners to private employers. Such employers had no interest in, nor made any effort to achieve, convict reformation.<sup>51</sup>

By the mid-nineteenth century, most states had penitentiaries, but as institutions they differed greatly from the visions of the first American reformers. While in design and rhetoric they were dedicated to the benevolent reformation of their inmates, life within them was dominated by the custodial needs of the institution.<sup>52</sup> Prisoners could be punished for institutional infractions at the whim of guards in a fashion as brutal as most corporal punishment used during the colonial era. Punishment had been dramatically

---

<sup>47</sup> See *id.* at 35; T. DUMM, *supra* note 18, at 106; W. LEWIS, *supra* note 6, at 56-63; D. ROTHMAN, *supra* note 6, at 93-94.

<sup>48</sup> W. LEWIS, *supra* note 6, at 100-03. See G. DE BEAUMONT & A. DE TOCQUEVILLE, *supra* note 6, at 199-205 (conversation with Mr. Elam Lynds).

<sup>49</sup> W. LEWIS, *supra* note 6, at 109-10. The first mass institutions to implement the Pennsylvania system were extraordinarily costly. The state's model Cherry Hill facility cost \$1,648 per prisoner, a fearsome sum in the early nineteenth century. T. DUMM, *supra* note 18, at 106.

<sup>50</sup> See W. LEWIS, *supra* note 6, at 101-02.

<sup>51</sup> *Id.* at 153-55; B. MCKELVEY, *supra* note 6, at 21; Miller, *At Hard Labor: Rediscovering the 19th Century Prison*, reprinted in POLICE, PRISON, AND PUNISHMENT: MAJOR HISTORICAL INTERPRETATIONS 495, 501-02 (K. Hall ed. 1987).

<sup>52</sup> E.C. WINES & T. DWIGHT, REPORT ON THE PRISONS AND REFORMATORIES OF THE UNITED STATES AND CANADA (1973).

changed, but whether it had been reformed was, and is, a much more difficult question.

#### B. THE CREATION OF THE CORRECTIONAL SYSTEM, 1870-1920

The second major penal reform movement in the United States involved the transformation of a punishment system devoted to the incarceration of adult criminals for determinate sentences to a multi-faceted system which applied a range of discretionary penalties to a broad range of offenders. Like the punishments they replaced, the new penal methods were designed to effect the reformation of offenders and to protect society, but now punishment would be scientifically designed. As before, penal change began with the definition of a moral ideal. As before, the adoption of new penal methods owed much to the prospect that the new punishments would suppress crime more effectively than the old. As before, the implementation of the new methods was influenced more by the interests of penal institutions than any penal ideology.

The penal changes which comprised the creation of a correction system began in the latter part of the nineteenth century and occurred at an accelerated pace in the first two decades of the twentieth. During this period, the basic means of punishing crime evolved from a determinate sentence set by a judge, subject only to the executive's pardoning power, to an indeterminate sentence, where the precise term of incarceration depended upon administrative authorities. Such indeterminacy came in two forms: 1) the explicitly indeterminate sentence, where the sentencing judge set a minimum and maximum term and left the final decision on length of incarceration to penal authorities and 2) the implicitly indeterminate sentence, where the judge set a maximum prison term that was usually reduced by a parole board.<sup>53</sup>

By the end of the reform period, most adult prisoners faced a period of parole supervision after leaving prison. Reformers developed another noncarceral penalty—probation—which could replace or supplement penal confinement for adult or juvenile offenders. Reformers pushed the development of new varieties of carceral institutions, such as adult reformatories, juvenile reformatories, juvenile "homes," and detention centers. Finally, beginning at the

---

<sup>53</sup> Usually the administrative authority determining actual length of incarceration under an explicitly indeterminate scheme was also a parole board. The main difference between the two approaches was whether the indeterminacy of sentence was explicit or implicit. See Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. CRIM. L. & CRIMINOLOGY 9 (1926).



turn of the century, a number of jurisdictions developed separate juvenile justice systems to handle young offenders. By 1920, most jurisdictions had separate courts, probation officers, and detention centers for youths who committed crimes.<sup>54</sup>

### 1. *Moral Idealism—The Science of Punishment*

Many of those leading the fight for penal reform in the second half of the nineteenth century, and to a lesser extent in the early twentieth century, saw penal reform as part of their duty to bring Christian salvation to the unfortunate.<sup>55</sup> The reform ideology they espoused, however, was secular. The central appeal of the idealists who championed each of the correctional innovations was to the newest and brightest of intellectual lights—science.<sup>56</sup> Science gave substance to the new reformatory ideal.<sup>57</sup>

The predominance of science in nineteenth century public thought began after the Civil War with the work of Charles Darwin. In the late nineteenth century, Darwin's *The Origin of the Species* was taken as the basis for the widely influential social policies of Herbert Spencer and William Graham Sumner.<sup>58</sup> In addition, many of the social sciences, including sociology and psychology, trace their

---

<sup>54</sup> For a summary account of these changes, see S. WALKER, POPULAR JUSTICE 76-102 (1980). For essentially chronological accounts of the indeterminate sentence and parole, see Lindsey, *supra* note 53; 4 ATT'Y GEN. SURVEY OF RELEASE PROCEDURES, PAROLE 1-25 (1939). In contrast to the republican and Jacksonian periods, scholars have not thoroughly explored penal change in the late nineteenth and early twentieth centuries. In part, this lack of coverage may stem from the size of the subject. Instead of the development of a handful of prisons in several key states within a 40 year span, later reforms involved the creation of a variety of new penal methods and institutions in jurisdictions across the United States over some 65 years. As a result, this Article's historical discussion of this period rests upon a less secure historical footing than that of the creation of the penitentiary. The only modern historical analysis of the full range of correctional innovations is found in D. ROTHMAN, CONSCIENCE AND CONVENIENCE (1980). For juvenile justice, see R. MENNEL, THORNS & THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES, 1825-1940 (1973); A. PLATT, THE CHILD-SAVERS (1969); S. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF PROGRESSIVE JUVENILE JUSTICE, 1825-1920 (1977).

<sup>55</sup> For the combination of religious motivation and scientific emphasis in early reformers of this period, see, for example, Z. BROCKWAY, FIFTY YEARS OF PRISON SERVICE (1912); E.C. WINES, THE STATE OF PRISONS AND CHILD-SAVING INSTITUTIONS IN THE CIVILIZED WORLD 49-56 (1880).

<sup>56</sup> The emphasis upon science rather than upon religion became especially pronounced during the Progressive era when most reforms were adopted. See, e.g., H. BOIES, THE SCIENCE OF PENOLOGY 3-7 (1901); Wigmore, *General Introduction to the Modern Criminal Science Series*, in R. SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT v-ix (R. Jastrow trans. 1913). See also CORRECTION AND PREVENTION (C. Henderson ed. 1910).

<sup>57</sup> The reformatory ideal, later termed the rehabilitative ideal, is used here as a shorthand description of the penal vision of correctional reformers.

<sup>58</sup> R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 4-12 (1955).

modern origins to the establishment of new academic departments at American universities at this time. The newly trained social scientists urged the primacy of the scientific method in attacking all social ills.<sup>59</sup>

An even greater boost to the scientific outlook came from a fundamental transformation of medical and biological science. By the end of the nineteenth century, for the first time in the history of mankind, medical science could claim a clear superiority to all other methods of treating disease. Advances in microbiology in the 1860s and 1870s led to discoveries about the nature of disease transmission and infection, while the development of immunology transformed the fight against disease. The discovery of antiseptics, in combination with earlier work on anesthetics, radically altered the nature of surgery. Between 1870 and 1920, diseases such as smallpox, typhoid, tuberculosis, diphtheria, typhus, malaria, and yellow fever were either checked or eliminated in much of the Western world. Life expectancy for all age groups up to the age of forty-five significantly increased. With this record of success, it should be no surprise that when penal reformers sought an intellectual framework for punishment, they turned to science, and particularly the example of medicine.<sup>60</sup>

The rhetoric of penal reform during this period relied heavily upon that of medicine. Crime was described as a disease suffered by the offender; what followed conviction should be its cure. The offender was not a sinner but a sick person, a patient in the care of the physician state.<sup>61</sup> In its strongest form, idealist ideology of the period rejected the notion of criminal responsibility, arguing that crime was an act beyond the control of the criminal and that the

---

<sup>59</sup> See L. HARTSFIELD, *THE AMERICAN RESPONSE TO PROFESSIONAL CRIME, 1870-1917* 150-188 (1985); R. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* 121 (1967). For the link between social science development and criminal justice reforms, see Haney, *Criminal Justice and the Nineteenth-Century Paradigm: The Triumph of Psychological Individualism in the "Formative Era,"* 6 *LAW & HUM. BEHAV.* 191 (1982).

<sup>60</sup> R. SHRYOCK, *THE DEVELOPMENT OF MODERN MEDICINE* 304-327 (1936). The example of early penal reformer and prominent physician Benjamin Rush illustrates the swift advance of medical science during the nineteenth century. At the time of his death in 1813, Dr. Rush, who was one of the early leaders of the penitentiary movement, was also America's most respected physician. His research had led him to believe that humans suffered from but one disease, which came in many varieties, and which was best treated by blood-letting and purging. Within 30 years his work was dismissed as nonsense. *Id.* at 1-2. Although the Enlightenment had included important scientific advances, and the language of science was a central part of its rhetoric, its scientific achievements paled before those of the nineteenth century. The Enlightenment was not a scientific movement in the modern, popular sense. Cf. P. GAY, *THE ENLIGHTENMENT, AN INTERPRETATION: THE SCIENCE OF FREEDOM* (1969).

<sup>61</sup> See, e.g., D. ROTHMAN, *supra* note 54, at 56-57.

attempt to apportion punishment according to its severity was not only hopeless, but a throwback to the primitive retributivism of earlier times.<sup>62</sup> Idealists urged that punishment be forward-thinking and rational, and derided retribution's "passion" and past focus.<sup>63</sup>

Reformers argued that punishment should concentrate on the criminal, not the crime. Punishment should be individualized to effect the particular criminal's reformation. The new basis for judicial decisionmaking would be the presentence report, a social science document providing a wealth of information about the offender. Yet, whatever the judge decided was appropriate, his would not be the last word. Idealists successfully argued that the extent of punishment should be largely determined by social science experts, such as parole authorities.<sup>64</sup> Some penal "treatment" would not require incarceration. Reformers argued that probation and parole would permit the state to effect reformation without the recognized disadvantages of an institutional setting. For other offenders, reformers advocated treatment in new institutions, such as juvenile detention centers and reformatories and reformatories for young men and young women.<sup>65</sup>

Reformers acknowledged the difficulty of offender reformation. The roots of crime were deep and complex—in the urban environment, in psychology and in genetics. Yet, reformers had faith in the scientific method; rigorous study and analysis would eventually reveal all. In the meantime, they would act on what they did know.<sup>66</sup> This faith in science was instrumental; the scientific approach was best because it represented the means to the most peaceful and or-

---

<sup>62</sup> Any effort to apportion punishment to degree of guilt "is but organized lynch law" and the abandonment of retribution is "the first condition of a civilized criminal jurisprudence." Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17, 19 (1899). Science would guide to a humanitarian result. "While the unthinking still clamor for savage penalties in proportion to their ignorance and aloofness from the actual problem, those who see actual offenders in the light of science and the spirit of the Golden Rule, now see the futility of the old procedure." Lyon, *Editorial*, 16 J. CRIM. L. & CRIMINOLOGY 5, 15 (1926).

<sup>63</sup> Lewis, *supra* note 62, at 17-21; Lyon, *supra* note 62.

<sup>64</sup> Reformers argued that the law should place no restriction on quantity of punishment since the legal categorization of offense bore no relation to the need for or difficulty of rehabilitation. See, e.g., E.C. WINES, *supra* note 55, at 619-20; Lewis, *supra* note 62, at 18; Z. BROCKWAY, *supra* note 55, at 400; Butler, *The Released Prisoner*, in CORRECTION AND PREVENTION 301-39 (C. Henderson ed. 1910). All jurisdictions, however, placed some legal limit on the indeterminacy of sentencing. See Lindsey, *supra* note 53, at 52-58, 64-69.

<sup>65</sup> See A. PLATT, *supra* note 54, at 46-74. For a general overview of the theory of reformation, see H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY: THE AMERICAN CRIME PROBLEM* (1946).

<sup>66</sup> See D. ROTHMAN, *supra* note 54, at 45-47.

derly, the most compassionate and the most productive society imaginable. Scientific punishment would make the nation better.<sup>67</sup>

In making punishment more scientific, reformers also made it more discretionary and less bound by legal constraints. The main legal actor, the judge, would set only the outer bounds of punishment. The most important penal determinations would be made by nonlegal penal experts—parole and prison authorities. These officials would make decisions based upon their own scientific expertise, not legal principles. Judges headed the new juvenile justice system, but reformers envisioned that many of the important decisions would be made by nonlegal probation workers, and that the judge would operate more as a social worker than a legal functionary.<sup>68</sup> In the new correctional system, treatment would override legal process.

To a remarkable extent, the legal system acquiesced in these changes. Despite early court decisions which raised constitutional doubts about the indeterminate sentence<sup>69</sup> and discretionary juvenile justice,<sup>70</sup> courts soon accepted the rationale of reformation and legitimated the power of discretionary administrative authorities.<sup>71</sup> Appellate courts sanctioned the new punishments on the ground that they were for the benefit of those to be “treated.” Unfortunately, the new “treatment” frequently turned out to be a superficial reworking of the old ways of custodial incarceration.

## 2. *The Need for Order*

As had been true with the creation of the penitentiary, the correctional system filled a perceived need for new and more effective

---

<sup>67</sup> See *supra* note 56.

<sup>68</sup> See D. ROTHMAN, *supra* note 54, at 212-18.

<sup>69</sup> See, e.g., *People v. Cummings*, 88 Mich. 249, 50 N.W. 310 (1891) (striking down Michigan indeterminate sentence law).

<sup>70</sup> See, e.g., *People v. Turner*, 55 Ill. 280, 287-88 (1870) (laws providing for the commitment of minors who have committed no crime held unconstitutional). But see *Ex parte Crouse*, 54 Pa. 9, 11 (1838) (upholding juvenile commitment to House of Refuge on *parens patriae* grounds).

<sup>71</sup> On indeterminate sentence and parole, see the following: *George v. People*, 167 Ill. 447, 47 N.E. 741 (1897) (upholding Illinois indeterminate sentencing act); *Commonwealth v. Brown*, 167 Mass. 144, 45 N.E. 1 (1896) (upholding Massachusetts indeterminate sentencing); *State v. Peters*, 43 Ohio 629, 4 N.E. 81 (1885) (upholding Ohio parole law).

On commitments to juvenile institutions without full criminal trial, see the following: *In re Sharp*, 15 Idaho 26 (1908); *Petition of Ferrier*, 103 Ill. 367 (1882) (limiting previous decision in *Turner*, *supra* note 70); *Marlowe v. Commonwealth*, 142 Ky. 106 (1911); *State v. Ray*, 63 N.H. 406 (1885); *Commonwealth v. Fisher*, 213 Pa. 48 (1905); *Mill v. Brown*, 31 Utah 473, 88 P. 609 (Utah 1907); R. MENNEL, *supra* note 54, at 124-25, 144-47; D. ROTHMAN, *supra* note 54, at 231-35.

institutions to preserve civic order. As before, the main threats to disorder were an influx of immigrants combined with the growth of American cities. Although instances of disorder appeared to diminish during the time of correctional system reforms, changes in social expectations and the unsettling nature of demographic change, heightened demand for institutions that could enforce public order.

a. Threats to Order

Throughout the late nineteenth century, America experienced unprecedented immigration. From 1870 to 1900 more than eleven million immigrants came to America. Then immigration increased, with seventeen million new residents entering the country from 1900 through 1917.<sup>72</sup> The threat of the foreigner became a constant theme in political and social life.<sup>73</sup> Foreigners were also the focus of most criminal justice efforts. First and second generation immigrants comprised a disproportionate segment of prison populations by the turn of the century.<sup>74</sup>

What made the influx of immigrants particularly frightening to many Americans was their concentration in urban centers, accelerating the already disturbing trend toward urbanization. In the first two decades of the twentieth century, the basic geographic arrangement of the populace shifted. During this time New York City added 2.2 million residents, and Chicago added a million.<sup>75</sup> By 1920, for the first time in the nation's existence, more Americans lived in urban areas than rural. During the nineteenth century the city became enshrined in the American imagination as the center of poverty, corruption, and evil.<sup>76</sup> Violence and disorderly conduct, which had been prominent parts of the urban scene since the 1830s, continued to plague the cities and created a sense of urban menace in the minds of middle class Americans.<sup>77</sup> The foreign-born poor, packed into the cities' ghettos, comprised a "dangerous class," threatening to public order on a number of grounds.<sup>78</sup> By 1900, first or second generation immigrants comprised sixty percent of the population of the nation's twelve largest urban centers.<sup>79</sup>

---

<sup>72</sup> P. BOYER, *supra* note 30, at 189.

<sup>73</sup> See J. HIGHAM, *STRANGERS IN THE LAND* (1966).

<sup>74</sup> P. BOYER, *supra* note 30, at 189.

<sup>75</sup> See D. ROTHMAN, *supra* note 54, at 23-24.

<sup>76</sup> See P. BOYER, *supra* note 30.

<sup>77</sup> See *id.* at 125-130.

<sup>78</sup> See, e.g., C.L. BRACE, *THE DANGEROUS CLASSES OF NEW YORK AND TWENTY YEARS WORK AMONG THEM* (1872); L. HARTSFIELD, *supra* note 59.

<sup>79</sup> P. BOYER, *supra* note 30, at 123.

The urban-based foreigner did not represent the only threat to public order. Prominent in the pantheon of public enemies during the late nineteenth and early twentieth centuries was a new criminal type—the professional. Muckraking journalists, enterprising academics, and novelists targeted those who made a career of crime.<sup>80</sup> The public thrilled and trembled at the exploits of such evil-doers. The professional criminal, an individual dedicated to social disruption, seemed the most dangerous member of the dangerous classes.

At this juncture, it is important to distinguish between perceived and actual threats to order. Although statistics for the period make definitive judgment impossible, there is evidence of a decline in crime in America during the nineteenth century.<sup>81</sup> Certainly, the period of greatest reform activity, 1900-1915, was not a time of high crime, nor a period of particularly great fear of crime.<sup>82</sup> Instead, this period saw what has been called a “revolution of rising expectations,” in which Americans came to demand a more orderly society than they had previously known.<sup>83</sup> In many ways, from professional police to professionalized government to temperance, Americans sought to give the state more authority to maintain order.<sup>84</sup>

#### b. Addressing the Need for Order

Promoters of correctional reforms addressed the need for order in several ways. Reformers acknowledged that criminals were dangerous and that society had to protect itself against them. In fact, reformers made this an essential plank of their platform, arguing that penal “treatment” should focus solely upon dangerousness to the exclusion of legal concepts of responsibility. Offenders, they argued, should be neutralized and treated until they were rendered safe. Thus, while reformers insisted upon the primacy of reformation, they explicitly and without legal limitation accepted the need of society for order and the necessity of using punishment to suppress crime.

Reformers went further and acknowledged that a certain segment—a small segment, they contended—of the criminal population

---

<sup>80</sup> L. HARTSFIELD, *supra* note 59.

<sup>81</sup> See S. WALKER, *supra* note 54, at 104-05; R. LANE, *POLICING THE CITY: BOSTON, 1822-1885* 125-29 (1967).

<sup>82</sup> One historian of crime has argued that the ability of ordinary citizens to handle civic disorder during the nineteenth century declined, even as the amount of crime may have fallen. Disorder within the city center and the new professional crime presented threats beyond the means of citizen self-help, thus requiring increased state intervention. R. LANE, *supra* note 81, at 221-29.

<sup>83</sup> S. WALKER, *supra* note 54, at 104.

<sup>84</sup> See R. WIEBE, *supra* note 59.

was incorrigible and could not be reformed. These persons, they argued, should be confined indefinitely, regardless of their offense. They should be quarantined.<sup>85</sup> Reformers claimed the determinate sentence was an absurdity because it allowed the release of the dangerous: "as if one should cage a man-eating tiger for a month or a year, and then turn him loose."<sup>86</sup> On this point, reformers were only partially persuasive; although most jurisdictions employed some form of indeterminate sentence, all terms of incarceration were limited by legal maximums according to the offense committed.<sup>87</sup>

Juvenile justice reforms of the period provide particularly striking examples of the way "benevolent" reform responded to the need for order. The earliest innovation regarding juvenile delinquents was the "house of refuge," where delinquent and dependent children were sent for safekeeping and reform. New York District Attorney Hugh Maxwell hailed the creation of the first such refuge in 1825, because it provided a secure alternative to jail for juvenile offenders, and thus would discourage juries from their practice of acquitting young offenders in order to keep them out of adult jails.<sup>88</sup> The early proponents of separate juvenile facilities in Wisconsin at mid-century were criminal justice officials and newspapermen whose main concern was preventing crime, not child-saving.<sup>89</sup> At the turn of the century, criminal justice officials supported the new juvenile justice system in Chicago, where it originated, because of its potential for providing more effective criminal justice for the young than the adult system.<sup>90</sup> Fear of the "vicious" child was a powerful motivator for penal change for reformers and public officials.<sup>91</sup>

The creation of a separate juvenile justice system, with its own courts and carceral institutions, allowed the state to "treat" a wide range of young offenders who might otherwise have escaped the state's penal reach. Juvenile court jurisdiction even extended to the parents of the wayward young.<sup>92</sup> Proponents argued that the new powers were necessary to effect reformation; in practice they re-

---

<sup>85</sup> See D. ROTHMAN, *supra* note 54, at 71-72.

<sup>86</sup> Lewis, *supra* note 62, at 18; see also E.C. WINES, *supra* note 55, at 621.

<sup>87</sup> See Lindsey, *supra* note 53.

<sup>88</sup> S. SCHLOSSMAN, *supra* note 54, at 24. The house bore many of the markings of a penitentiary, with a daily routine and corporal punishments similar to those at New York's Auburn and Sing Sing prisons. *Id.* at 28-31.

<sup>89</sup> *Id.* at 86-88.

<sup>90</sup> See D. ROTHMAN, *supra* note 54, at 229-30.

<sup>91</sup> See R. MENNEL, *supra* note 54, at 31-34, 81-88.

<sup>92</sup> R. MENNEL, *supra* note 54, at 139-46; A. PLATT, *supra* note 54, at 137-40; S. SCHLOSSMAN, *supra* note 54, at 58-60, 168.

sulted in more punishment. Although reformers argued that the new juvenile justice system would end the placement of children in adult jails<sup>93</sup> and reduce the use of juvenile reformatories, there was no reduction in the numbers of juveniles incarcerated in institutions.<sup>94</sup> Young delinquents were still sent to state reformatories in large numbers,<sup>95</sup> but now the availability of local juvenile detention centers and probation officers permitted the state to impose penal sanctions on those who did not warrant full institutionalization. Previously, these cases might have been dismissed entirely.<sup>96</sup>

A subtext of juvenile justice reform was the forcible integration of the immigrant into American society. From the first juvenile justice innovation of the period to the last, the proponents of change were generally upper- and middle-class Protestants, while the targets of change were the foreign-born poor, often Catholic, and their children.<sup>97</sup> Like many other reforms of the Progressive era, the penal changes celebrated middle class, bureaucratic ideals.<sup>98</sup> The juvenile justice system promised to take the most troublesome and discordant of immigrant youth and remold them along native middle class lines. It was a way of enforcing the melting pot.

The other correctional reforms of the period served the need for order in a similar fashion. The creation of probation and parole gave the state additional coercive powers over offenders.<sup>99</sup> Within the penitentiary, the indeterminate sentence and parole gave penal authorities more power over inmates. These sanctions, which were designed to assist reformation, did not reduce the amount of punishment inflicted. Sentence length appears to have increased under the new approach.<sup>100</sup> Even a seemingly innocuous innovation, like the presentence report, represented an extension of state power, providing new information about the offender which permitted sen-

---

<sup>93</sup> A. PLATT, *supra* note 54, at 123-33.

<sup>94</sup> D. ROTHMAN, *supra* note 54, at 254-58.

<sup>95</sup> Many were also sent to adult jails. A. PLATT, *supra* note 54, at 146-47.

<sup>96</sup> D. ROTHMAN, *supra* note 54, at 254-58. Once in operation, juvenile courts made liberal (and clearly punitive) use of short-term detention in juvenile detention centers followed by probation as a means of combatting delinquency. R. MENNEL, *supra* note 54, at 154-88; A. PLATT, *supra* note 54, at 140-141.

<sup>97</sup> R. MENNEL, *supra* note 54, at 5-6, 14-15, 31-32, 142, 200; A. PLATT, *supra* note 54, at 135; D. ROTHMAN, *supra* note 54, at 19-24. The introduction of the juvenile justice system depended especially upon the work of middle class women. See A. PLATT, *supra* note 54, at 75-100.

<sup>98</sup> See R. WIEBE, *supra* note 59.

<sup>99</sup> See Section IIb3 for a discussion of the institutional advantages of probation and parole.

<sup>100</sup> See D. ROTHMAN, *supra* note 54, at 194-97; S. WALKER, *supra* note 54, at 157-58.



tencing based on noncriminal factors.<sup>101</sup> Finally, all of the adult criminal justice innovations were motivated in part by their promise for handling the foreign-born. All were designed to allow authorities the chance to rework the immigrant poor according to the values of nativist middle-class America.<sup>102</sup>

For the most part, the correctional system reforms did not directly address the social need for punishment as symbolic retaliation. In fact, most of these innovations were symbolically benevolent. Where benevolence seemed generally appropriate, as with child offenders, innovation provoked little controversy.<sup>103</sup> Where harsh treatment was expected, the innovations proved more controversial, none more so than parole.<sup>104</sup> Yet, perhaps because the correctional system accommodated the social need for harsh punishment in most cases, the symbolic shortcomings of reform did not prove fatal.<sup>105</sup> Acceptance of the quarantine concept permitted the adoption of some particularly harsh penal schemes, such as the habitual offender statutes enacted in the 1920s, without jeopardizing the purportedly reformatory thrust of the system as a whole.<sup>106</sup> Finally, as set out below, institutional interests strongly supported the new correctional system, minimizing internal agitation for change.

### c. Institutional Interests

Perhaps no penal reforms have been more popular with, or more subject to cooption by, institutional interests than those which comprised the correctional system. The discretionary, nonlegal nature of the new sanctions was attractive to those who would employ them; it gave them considerable authority and prestige. The juvenile court judge, the probation officer, and the parole board member were treated as experts whose judgment was subject to few limits. Yet, because the new penal mechanisms depended so heavily upon institutional expertise, they were particularly susceptible to institutional redefinition. This was one reason the reforms were so attractive to penal officials. Prison wardens welcomed parole and

---

<sup>101</sup> See D. ROTHMAN, *supra* note 54, at 61-63.

<sup>102</sup> See *id.* at 77, 101-116.

<sup>103</sup> *Id.* at 229-35.

<sup>104</sup> *Id.* at 77-80.

<sup>105</sup> Reformers noted with satisfaction that prisoners subject to indeterminate sentence despised the punishment and vowed to move to determinate sentencing jurisdictions upon release. See, e.g., Butler, *supra* note 64, at 306. See D. ROTHMAN, *supra* note 54, at 80.

<sup>106</sup> See Kramer, *From "Habitual Offenders" to "Career Criminals": The Historical Construction and Development of Criminal Categories*, 6 LAW & HUM. BEHAV. 273, 276-82 (1982).

the indeterminate sentence as means of controlling prison populations, both in numbers and behavior.<sup>107</sup> Probation proved an attractive means to the plea-bargained resolution of many cases and so enhanced the efficiency of the court system.

Best of all, the new punishments promised to be relatively cheap. The juvenile justice system, with its reliance upon short-term detention and probation, appeared to provide an inexpensive alternative to building and maintaining additional reformatories.<sup>108</sup> Similarly, adult probation offered a means of offender control without the considerable expense of institutional confinement.

Once in place, the innovations were to some extent self-perpetuating. The correctional system literally created its own defenders: juvenile and adult probation officers, parole administrators and officers, and juvenile court judges all owed their livelihood to correctional reforms. They were not likely to question them too closely.

In practice, the reformatory ideal quickly succumbed to institutional needs with official discretion primarily informed by custodial concerns.<sup>109</sup> Juvenile institutions, because of the strength of their supposed commitment to reformation, represented the most obvious failures of the new ways. These institutions became often brutal and usually dreary places dedicated to human safekeeping.<sup>110</sup> Penal institutions generally suffered a dearth of resources and abundance of offenders. Parole, which originally was designed to allow individualized reformatory treatment, became primarily a means of regulating inmate populations, with releases decried by law enforcement officials on grounds of public danger and by reformers on grounds of inadequate treatment.<sup>111</sup> Probation became a means for courts and prosecutors to dispose of large numbers of cases through plea bargaining.<sup>112</sup> Probation and parole officers, often poorly trained, were overwhelmed by case loads far exceeding the optimum. Actual offender supervision was minimal.<sup>113</sup> In the new correctional sys-

---

<sup>107</sup> D. ROTHMAN, *supra* note 54, at 73.

<sup>108</sup> S. SCHLOSSMAN, *supra* note 54, at 63, 127.

<sup>109</sup> For a revealing look at one institution's progression from a reformatory to a custodial emphasis, see D. ROTHMAN, *supra* note 54, at 379-421.

<sup>110</sup> *Id.* at 268-83.

<sup>111</sup> Interestingly, parole was a more popular innovation than the explicitly indeterminate sentence. Prison administrators desired it for institutional reasons and it proved politically less controversial than the explicitly indeterminate sentence which was more closely tied to the reformatory ideal. See Lindsey, *supra* note 53; Messinger, *Introduction to A. VON HIRSCH & K. HANRAHAN, THE QUESTION OF PAROLE: RETENTION, REFORM OR ABOLITION?* xviii-xxvi (1979).

<sup>112</sup> See *id.* at 82-113.

<sup>113</sup> See D. ROTHMAN, *supra* note 54, at 176-77.

tem, the ideal of reformation proved the least important influence in the practice of punishment.<sup>114</sup>

The forces which shaped correctional reform in the late nineteenth and early twentieth centuries were not identical to those which had shaped the penitentiary nearly a hundred years earlier. The idealism of correctional reformers was more pragmatic than that which originally inspired the penitentiary. The most idealistic of correctional reformers recognized the shortcomings of traditional prisons and acknowledged society's need for order. The penal methods introduced by each movement were obviously different, as was the nation which experienced these reforms. Yet, the similarities between movements remain striking: both were inspired by moral ideals drawing from contemporary social ideology; both met the nation's need for order more effectively than their moral ideals; and both sets of reforms were quickly transformed by institutional interests. Again, the "practice" of reform differed greatly from the original vision.

### III. THE DETERMINATE SENTENCING MOVEMENT, 1976-1989

In the last fourteen years, many jurisdictions have moved to make punishment more determinate and more severe. Although recent reforms are not of the same dimension as the creation of the penitentiary or correctional system, they do signal a basic change in the nation's penal ideology. As with the reform movements already considered, the determinate sentencing movement began with a new vision of penal justice. Idealist reformers promoted an ideology of rights which justified punishment on a retributive, deontological basis instead of utilitarian principles. These idealists urged strict legal regulation of punishment to replace the discretionary methods of correctional reforms and to equalize and reduce the use of incarceration.

In contrast to earlier reforms, the need for order during recent years has focused almost entirely on criminal threats<sup>115</sup> and has inspired an explicit crime control<sup>116</sup> ideology which has challenged the idealism of early reform proponents. Crime control adherents have seen punishment as both a deterrent to, and a retribution for, criminal activity. Part of a conservative political movement, the ide-

---

<sup>114</sup> See *id.* at 130.

<sup>115</sup> But see text Section IIIB.

<sup>116</sup> See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968) for an early use of the term "crime control" as a general criminal justice philosophy. For a typical contemporary usage applied to punishment, see Thomas & Edelman, *An Evaluation of Conservative Crime Control Theology*, 63 NOTRE DAME L. REV. 123 (1988).

ology of crime control has emphasized the need to increase the severity of punishment as a response to rising crime.

Determinate sentencing reforms have been adopted when conservative crime control advocates and liberal idealists have found a common ground in their determination to change the discretionary, rehabilitative focus of punishment. In the competition between the two penal philosophies, however, crime control has proven the more influential, especially in recent years.

The institutional aspect of recent reform is complex. Many jurisdictions have acted to restrict the power of, or eliminate, certain institutions, particularly the parole board. Meanwhile, other institutional players, primarily prosecutors, legislatures and sentencing commissions, have gained considerable power. In terms of the influence of institutions, however, the most important impact is probably yet to come. Recent penal changes have contributed to an enormous expansion in prison populations. Prison demographics have already played an important role in shaping contemporary punishment as prison overcrowding has simultaneously undercut ideological goals and forced new prison construction. If current trends continue, prison demographics may force more important changes in the nature of punishment.

#### A. MORAL IDEALISM—FAIR PUNISHMENT UNDER LAW

The determinate sentencing movement's origins in the early 1970s may be traced to a new view of punishment which emerged during that time. In contrast to the earlier emphasis upon offender reformation (later called rehabilitation), the first proponents of determinate sentencing emphasized punishment's retributive and deterrent aspects. Instead of relying upon the informed discretion of penal experts, reformers have sought to legalize the imposition of punishment by promulgating determinate rules for sentence length. If late nineteenth and early twentieth century reformers were enthralled with the medical model, their successors have been equally taken with the legal model. As was true with the creation of the penitentiary and the correctional system, changes in the view of punishment grew out of larger ideological change in American society.

##### *1. The Ideology of Rights*

In retrospect, the early 1970s may have marked a watershed in American politics, a time when many of the basic liberal arguments first presented in the 1960s were at least superficially accepted by

establishment America. By this time, the main institutions of government, including the courts, elected officials, and even official bureaucracy, had accepted one of the main planks of the liberal agenda—the importance of minority rights. For perhaps the first time in the nation's history, the republican ideal of a democratic nation whose good was determined by utilitarian, majoritarian consensus was challenged. Political, social, and other leaders began to recognize the essential pluralism of American society. Public policy became less of a debate about national interests and more of a debate about the relationship between government and individuals, especially minorities. The notion of individual rights, always important in American law, was transformed from a libertarian view, designed to protect the self-directed, self-confident individual, to one emphasizing the protection of certain disadvantaged groups and their members.

The civil rights movement provided the inspiration and model for ideological change. The acceptance first into law, and then into political life, of the truth that blacks had suffered a long history of majoritarian discrimination inspired a new way of seeing the nation's problems. Black civil rights leaders persuasively argued that racial equality would depend, not on the virtue or self-interest of the majority, but upon legal rights for minorities. In the 1960s, black activists and other minority representatives championed the positive value of differentness.<sup>117</sup> The good society, it now appeared, was not a compromise of all to majoritarian values, but a reconciliation of majority power with minority rights. The essence of this vision, which this Article terms the ideology of rights, was a basic value accorded the individual. Under this view, all individuals possess certain inherent powers against the government which may not be trumped by arguments about the greatest good for the greatest number. Even convicted criminals have rights.

## 2. *The Ideology of Rights and the Supreme Court*

The most influential proponent of the ideology of rights, has been the United States Supreme Court. Its origins can be found in the civil rights movement and the litigation which it brought before the Court.<sup>118</sup> During the 1960s and the early 1970s, the Court, under the leadership of Chief Justice Earl Warren, undertook a pro-

---

<sup>117</sup> See, e.g., E. CLEAVER, *SOUL ON ICE* (1968); M. X WITH A. HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965).

<sup>118</sup> See T. BRANCH, *PARTING THE WATERS* (1988); R. KLUGER, *SIMPLE JUSTICE* (1975); M. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION* (1987).

cedural revolution in American law. Employing the Constitution's Bill of Rights, a document which to modern eyes was suffused with the ideology of rights, the Court reworked the nation's basic law to protect a wide variety of groups and individuals against the abuses of government power. The Court expanded the protections of equal protection in the racial arena and beyond.<sup>119</sup> The Court utilized due process to work major changes in the civil law relationship between government and citizens.<sup>120</sup> The Court also revolutionized the nation's criminal procedure, creating a new and complex relationship between state and accused through a variety of federal constitutional rights.<sup>121</sup>

The Court also began to rethink the nation's punishment system. In 1964, the Supreme Court opened federal courthouses to prisoner litigation by holding that prisoners could bring constitutional actions through the Reconstruction-era civil rights statutes.<sup>122</sup> The federal courts, at both the district and appellate level, abandoned a long-standing policy of deference to prison administrators<sup>123</sup> and entertained a series of legal challenges which resulted in court intervention into prison administration.<sup>124</sup> Informed by the ideology of rights, the Supreme Court abandoned the deference to social science expertise which it had displayed earlier<sup>125</sup> and undertook a careful review of penal decisionmaking. The Court began to legalize decisionmaking throughout the penal system. The Court mandated full due process protections for probation and parole revocations.<sup>126</sup> Even the juvenile justice system, which had been the

<sup>119</sup> See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Baker v. Carr*, 369 U.S. 186 (1962); *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>120</sup> See, e.g., *Mathews v. Eldridge*, 425 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>121</sup> See, e.g., *Miranda v. Arizona*, 388 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>122</sup> *Cooper v. Pate*, 378 U.S. 546 (1964).

<sup>123</sup> See Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963). This note was widely cited by courts in the doctrinal shift.

<sup>124</sup> See, e.g., *Palmigiano v. Garrahy*, 443 F. Supp. 956 (D.R.I. 1974), *aff'd*, 616 F.2d 598 (1st Cir. 1980), *cert. denied*, 449 U.S. 839 (1980); *Hutto v. Finney*, 437 U.S. 679 (1978); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd*, *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). See generally, *Creatures, Persons and Prisoners: Evaluating Prison Conditions Under the Eighth Amendment*, 55 S. CAL. L. REV. 1099 (1982) (analyzing case law).

<sup>125</sup> See, e.g., *Williams v. New York* 337 U.S. 241 (1949).

<sup>126</sup> *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation).

stronghold of the discretionary, rehabilitative ideal, was partially legalized by the adoption of the beyond a reasonable doubt standard.<sup>127</sup>

### 3. *Retribution and the Ideology of Rights*

The Court's doubts about discretionary justice paralleled a growing skepticism about the rehabilitative ideal. In the early 1960s, several legal scholars noted the ways in which the rehabilitative ideal conflicted with the principle that all persons have certain legal rights which they may assert against the state.<sup>128</sup> Prison disturbances, especially the September 1971 uprising at Attica, New York and its bloody repression, triggered a closer examination of the state of American prisons and punishment in general.<sup>129</sup> In the early seventies, a handful of book-length attacks on the rehabilitative ideal in the criminal justice system appeared from a variety of sources: a prominent journalist,<sup>130</sup> a sitting federal district judge,<sup>131</sup> a former prison warden,<sup>132</sup> and a committee of the American Friends Services Committee.<sup>133</sup> All sources criticized the indeterminate sentence as unjust and advocated some form of determinate sentencing. By the mid-seventies, the outcry against the rehabilitative ideal and the call for determinate sentencing became even stronger.<sup>134</sup>

The early critics of the rehabilitative ideal generally argued that punishment should be limited by retributive goals. Offenders

---

<sup>127</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>128</sup> See Allen, *Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. & CRIMINOLOGY 226 (1959), reprinted in CRIME, LAW AND SOCIETY (A. & J. Goldstein eds. 1971); F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* (1964). The rehabilitative ideal had had earlier legal critics as well. See Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1012-14 (1940).

<sup>129</sup> S. WALKER, *supra* note 54, at 245-48. The uprising left 39 dead and 80 injured. See ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA xi (1973); T. WICKER, *A TIME TO DIE* 1 (1973).

<sup>130</sup> J. MITFORD, *KIND & USUAL PUNISHMENT* (1973).

<sup>131</sup> M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

<sup>132</sup> D. FOGEL, "... WE ARE THE LIVING PROOF...": *The Justice Model for Corrections* (1st ed. 1973).

<sup>133</sup> AMERICAN'S FRIENDS SERVICES COMMITTEE, *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (1971).

<sup>134</sup> See FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING (1976); ; N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); P. O'DONNELL, M. CHURGIN & D. CURTIS, *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM* (1977); A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); J. WILSON, *THINKING ABOUT CRIME* 181-204 (1975); see also A. VON HIRSCH & K. HANRAHAN, *THE QUESTION OF PAROLE: RETENTION, REFORM OR ABOLITION?* (1979); R. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT* (1979).

should be punished only in proportion to the severity of their offenses; that is, only to the extent that they deserve it. Early reformers argued that punishment should not be used for instrumental reasons such as rehabilitating an offender or indefinitely quarantining him from society. The key concept for this approach to punishment was justice. Reformers spoke of punishment under the justice model, justice-as-fairness,<sup>135</sup> and just deserts.<sup>136</sup> These idealist reformers argued that proportional sentencing might mean shorter prison terms overall; they agreed it should not result in more incarceration.<sup>137</sup>

The reform proposals celebrated legal values. The proposals relied on the idea that law provides certainty in decisionmaking, an assumption fundamental to law generally. They reflected a trust in legislative decisionmaking which is also reflected in the criminal law's legality principle.<sup>138</sup> The reformers' favorite penal theory, retribution, largely tracks the assumptions concerning individual responsibility made by Anglo-American criminal law. Thus, modern reformers sought to reintegrate punishment with the legal system and to reduce the criminal justice system's involvement with social science.<sup>139</sup>

The modern enthusiasm for retribution, a theory of punishment out of favor in academic and professional circles for most of the nation's history, did not result from any empirical discoveries. The traditional arguments arrayed against it—that its notion of proportionality cannot be reliably measured in most cases and that it assumes a measure of individual free will that does not exist in the real world—were addressed by moral, not factual, argument.<sup>140</sup> In fact, one of the great attractions of retribution was that it did not

---

<sup>135</sup> D. FOGEL, *supra* note 132, at xi.

<sup>136</sup> R. SINGER, *supra* note 134; A. VON HIRSCH, *supra* note 134, at 32.

<sup>137</sup> See, e.g., FAIR AND CERTAIN PUNISHMENT, *supra* note 134, at 32 (urging general reduction in prison time). See D. FOGEL, *supra* note 132, at 238-44; see generally A. VON HIRSCH, *supra* note 134, at 106-17 (urging minimal use of incarceration).

<sup>138</sup> See, e.g., Keeler v. Superior Court, 2 Cal.3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

<sup>139</sup> In retrospect, what is remarkable is how long the legal system espoused the rehabilitative ideal. The rehabilitative ideal was the product of social science and a determinist, medical approach to crime, an approach fundamentally at odds with the criminal law's emphasis upon individual morality and free will. For classic examples of the rehabilitative ideal in its early and late forms, respectively, see Lewis, *supra* note 62; K. MENNINGER, THE CRIME OF PUNISHMENT (1966). See also, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 392-98, 656-59 (1968).

<sup>140</sup> See, e.g., Davis, *How to Make the Punishment Fit the Crime in Criminal Justice*, 27 NOMOS 119 (1985).



rely upon empirical evidence for its validity. Nor does retribution make any claims about making tangible social improvements. It is a teleological, not instrumental, philosophy.

#### B. THE NEED FOR ORDER—THE CRIME CONTROL MODEL

More clearly than either of the earlier reforms considered here, recent penal changes have been driven by a perceived need for harsher punishment to restore civil order. No debate about punishment in recent years has been free of the tidal pressure to battle crime by increasing the severity of punishment.<sup>141</sup> With the exception of conservative "law and order" rhetoric during the 1960s and early 1970s, which embraced concerns about student and minority unrest,<sup>142</sup> most of those concerned with issues of order have focused upon crime control. The crime control model of criminal justice has presented a conservative alternative to the liberal ideals of most early reformers.<sup>143</sup>

The most important development in criminal justice during the 1960s and early 1970s was the rise in the nation's crime rate. All crime indicators during this period pointed up, and in dramatic fashion. According to the Department of Justice Uniform Crime Reports, the general crime rate—the risk that an individual would become a victim of a crime—rose seventy-four percent from 1966 to 1971. The total number of violent crimes reported increased ninety percent, and property crimes increased eighty-two percent.<sup>144</sup> Americans began to fear for their safety. By the mid-sixties, Americans perceived crime as one of the nation's most important issues, and many urban dwellers changed their living habits in direct response to their fears.<sup>145</sup> During the 1960s, however, as the rehabilitative ideal experienced a resurgence among correctional officials, the number of state and federal prisoners actually fell, from a total of 226,344 in 1960 to 198,831 in 1970.<sup>146</sup>

---

<sup>141</sup> See S. SCHEINGOLD, *THE POLITICS OF LAW AND ORDER* (1984); *THE POLITICS OF CRIME AND CRIMINAL JUSTICE* (E. Fairchild & V. Webb eds 1985).

<sup>142</sup> See Roesch, *Crime as an Issue in American Politics* in *THE POLITICS OF CRIME AND CRIMINAL JUSTICE* 25-29 (E. Fairchild and V. Webb, eds. 1985); S. WALKER, *supra* note 54, at 235-36.

<sup>143</sup> The terms liberal and conservative are used here as they are commonly used in contemporary political debate. See, Roesch, *supra* note 142; S. SCHEINGOLD, *supra* note 141.

<sup>144</sup> DEPARTMENT OF JUSTICE, *UNIFORM CRIME REPORTS* 2-5 (1971).

<sup>145</sup> CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 139, at 159-164.

<sup>146</sup> See M. CALAHAN, *HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984* 29 (1986); S. WALKER, *supra* note 54, at 234. The population figures are of the nation's prisons on the day of the population survey.

Crime rates increased through the 1970s. Finally, in the eighties, crime rates leveled off and, in some instances, declined.<sup>147</sup> By 1985 the chance that an American household would be touched by crime had declined ten percent from a decade earlier.<sup>148</sup> Yet, Americans' fear of crime appeared to increase during the decade.<sup>149</sup> Meanwhile, the eighties have seen an increase in prison population well beyond either the crime rate or general population increase.<sup>150</sup>

Rising crime provided one motivation for increasing the severity of punishment. Another came from a general discrediting of coerced rehabilitation. The rehabilitative approach had promised to suppress crime by forcibly changing the criminal propensities of those it treated. The system's ability to accomplish rehabilitation had always been disputed; by the mid-seventies, the suspicions were confirmed. The "Martinson Report," a comprehensive analysis of studies on rehabilitative programs issued in 1974, concluded that "'with few and isolated exceptions,'" forced rehabilitative programs had "'no appreciable effect on recidivism.'"<sup>151</sup> Although there had been earlier studies suggesting the same, this report provided the final blow to the rehabilitative ideal.<sup>152</sup>

The failure of rehabilitation allowed crime control proponents to promote another utilitarian view of punishment—that its fundamental purpose is to deter crime by means of harsh treatment of criminals. It deters the convict by incapacitation, it deters the public by the example of his punishment.<sup>153</sup> The first of these effects could not be doubted, as long as crimes committed in prison were not

---

<sup>147</sup> DEPARTMENT OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1973-1985 (annual reports).

<sup>148</sup> DEPARTMENT OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 14 (2d ed. 1988) [hereinafter REPORT TO THE NATION]. The chances of household victimization were still significant, however, declining from 32% to 25%.

<sup>149</sup> S. SCHEINGOLD, *supra* note 141, at 39. See generally *id.* for one explanation of this phenomenon.

<sup>150</sup> *Id.* at 104-05; see Section IID.

<sup>151</sup> Griswold & Wiatrowski, *The Emergence of Determinate Sentencing*, 47 FED. PROBATION 28, 29 (June 1983) (quoting Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22, 25 (1974). The full scholarly report was published in D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* (1975). But see Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979) (modifying somewhat Martinson's earlier conclusions).

<sup>152</sup> See also Greenberg, *The Correctional Effects of Corrections: A Study of Evaluations*, in CORRECTIONS AND PUNISHMENT (D. Greenberg ed. 1977). The inefficacy of the rehabilitative approach also made the justice arguments of idealist reformers more compelling. If rehabilitation worked, many might overlook the lack of relation between offense and time served. If it did not work, proportionality became the obvious alternative for determining sentence length.

<sup>153</sup> See J. WILSON, *supra* note 134; E. VAN DEN HAAG, *PUNISHING CRIMINALS* (1975).

considered. The second was more controversial but remains one of the basic assumptions of criminal justice. The crime control approach to assessing proper punishment emphasized the need for more severe punishment. Sentence disparity should be eliminated, proponents urged, because it allowed so many offenders to receive less punishment than was warranted.<sup>154</sup>

The institutional targets of crime control proponents were the same as those of idealist reformers: judges and parole boards. Crime control proponents perceived that these groups had been captured by the rehabilitative ideal and, as a result, were far too lenient in their treatment of offenders. Judges gave serious offenders minimal sentences and parole boards released dangerous criminals after they had served little time. As a result, society was seriously and needlessly endangered.<sup>155</sup>

Both the ideology of rights and retribution's new respectability served to legitimate punishment as retaliation. "The purpose of imprisonment for crime is punishment," California legislators declared.<sup>156</sup> The crime control model gave emotional and substantive content to the revival of penal retaliation. Fear of crime generated anger at offenders, which could now be openly expressed as a desire for harsher treatment of the convicted. Especially in those states with a serious crime problem, penal change often included a move to increase punishment's severity. For example, the first instance of determinate reform that might be cited was Governor Rockefeller's mandatory sentencing scheme for drug offenses in New York State in 1973. In one of the earliest legislative responses to the drug problem, the state provided for harsh minimum mandatory sentences for a variety of drug crimes along with a prohibition on plea bargaining.<sup>157</sup> Throughout the seventies and eighties, the passage of minimum mandatory penalties for particular crimes, from drug and sex offenses to violent crimes, represented a popular means of cracking down on crime.<sup>158</sup>

---

<sup>154</sup> See Hamm, *The Conscience and Convenience of Sentencing Reform in Indiana*, 7 BEHAV. SCI. & L. 107, 108-09 (1989); see also *supra* note 141 and *infra* notes 158-59.

<sup>155</sup> See Cullen, Bynum, Garret & Greene, *Legislator Ideology and Criminal Justice Policy: Implications from Illinois*, in THE POLITICS OF CRIME AND CRIMINAL JUSTICE, *supra* note 141, at 61-70; Forst, *Sentencing Disparity: An Overview of Research and Issues*, in SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY 21 (M. Forst ed. 1982); S. SCHEINGOLD, *supra* note 141, at 75-153, 169.

<sup>156</sup> Cal. Penal Code § 1170(a)(1) (West Supp. 1989).

<sup>157</sup> See S. SHANE-DUBOW, A. BROWN & E. OLSEN, *SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT AND EFFECT* 199-200 (1985).

<sup>158</sup> See *id.* at 280; A. HEINZ, *GOVERNMENTAL RESPONSES TO CRIME, LEGISLATIVE RESPONSES TO CRIME: THE CHANGING CONTENT OF CRIMINAL LAW* (1982) (tracing relation between volume of criminal enactments and political concern about crime).

## C. REFORM ENACTMENT

In contrast to earlier penal reform movements where the process of reform enactment remains poorly understood, we have considerable information about the manner in which determinate sentencing reforms have been adopted.<sup>159</sup> Virtually all determinate sentencing reform involved a basic agreement on the mode of punishment between moral idealists and crime control proponents. Where idealists and crime control proponents have differed, in determining the amount of punishment to be inflicted, crime control advocates have clearly predominated.

By the mid-1970s, almost all who called for penal change agreed on a few basic points. All agreed that the rehabilitative ideal had been discredited. All agreed that the worst aspect of the rehabilitative ideal was the enormous disparity in sentences which it produced, a disparity that went beyond the norm of individualized punishment.<sup>160</sup> Even within the prison system, there was a striking degree of consensus, with both prisoners and correctional officials complaining that unchecked discretion in decisionmaking led to unfairness.<sup>161</sup> Reformers even agreed on some general methods for eliminating disparity and curbing discretion. In order to make punishment more certain, more equal, more proportionate, and a more effective deterrent, it would have to be legalized. Only law, with its moral basis and emphasis upon certainty, could eliminate sentence disparity.<sup>162</sup> Punishment would be determined not by penologists

---

<sup>159</sup> Social scientists have examined penal reform in a number of jurisdictions. See, e.g., L. GOODSTEIN & J. HEPBURN, *DETERMINATE SENTENCING AND IMPRISONMENT — A FAILURE OF REFORM* (1985); Hussey & Kramer, *Issues in the Study of Criminal Code Revision: An Analysis of Reform in Maine and California*, in *DETERMINATE SENTENCING: REFORM OR REGRESSION?* 111-31 (1978); KU, *Case Studies of New Legislation Governing Sentencing and Release*, 4 AM. PRISONS & JAILS (1980); Martin, *Interests and Politics in Sentencing Reform: The Development of Sentencing Guidelines in Minnesota and Pennsylvania*, 29 VILL. L. REV. 21 (1983-84); Messinger & Johnson, *California's Determinate Sentencing Statute: History and Issues*, in *DETERMINATE SENTENCING: REFORM OR REGRESSION?* 13-58; Parnas & Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California*, 11 U.C. DAVIS L. REV. 29 (1978); RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (A. Blumstein ed. 1983) [hereinafter RESEARCH ON SENTENCING]; Travis, *The Politics of Sentencing Reform*, in *SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY* 59-85 (M. Forst ed. 1982).

<sup>160</sup> See, e.g., Remington & Newman, *The Highland Park Institute on Sentencing Disparity*, 26 FED. PROB. 3 (1962); *Pilot Institute of Sentencing*, 26 F.R.D. 231 (1959). For a general overview of sentence disparity research, see Forst, *supra* note 155, at 9-34.

<sup>161</sup> Forst, *supra* note 155, at 23; see also CALIFORNIA DEPARTMENT OF CORRECTIONS TASK FORCE TO STUDY VIOLENCE 35-37 (1974); MORRIS & HAWKINS, *Attica Revisited: The Prospect for Prison Reform*, 14 ARIZ. L. REV. 747 (1972); Report on Attica, *supra* note 129, at 3-95.

<sup>162</sup> The reformers' insistence on law as the safeguard of certainty is striking, given its intellectual context. Law was promoted as certain and determinate at a time when some

but by lawyer-dominated bodies: legislatures, sentencing commissions, and judges.

While the extent of reform consensus was impressive, it was incomplete in one important respect: there was little agreement on how severe the new sentences should be. Should sentences be equalized at the average present level, at a reduced level, or at a heightened level? Reformers were deeply split. Liberals charged that unchecked penal discretion had led to a penal system that was too harsh while conservatives charged it was too lenient.<sup>163</sup>

California, the first state to adopt a comprehensive determinate sentencing system,<sup>164</sup> provides a good example of the political dynamic of reform. Since 1917, California had operated one of the most indeterminate sentencing systems of any state. A judge would designate a broad sentence range, but the actual release date lay within the discretion of several correctional agencies. By the mid-1970s, the state's punishment system was under attack from groups ranging across the political spectrum—from civil liberties and prisoner's rights groups, to the state appellate courts, to law enforcement groups.<sup>165</sup>

Prompted by both court decisions holding the state's system of parole unconstitutional<sup>166</sup> and political outcry over a crime spree by

---

academics broadly acknowledged the indeterminacy and openness of much of legal language. See, e.g., Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989); Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987). Interestingly, the problem of sentence disparity had been long recognized. Forst, *supra* note 155, at 15; Travis, *supra* note 159, at 60-62. Only in the mid-seventies, when the disparity problem coalesced with other concerns about the criminal justice system, did it become a political issue.

<sup>163</sup> See S. SCHEINGOLD, *supra* note 141, at 150; S. WALKER, *supra* note 54, at 248. For, liberals saw the excesses of discretionary punishment as illustrated by *In re Rodriguez*, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975). In that case, the California Supreme Court ordered the release of a defendant who had served 22 years in state prison for a sex offense committed while he was a young man. Conservatives were more impressed by the dramatic criminal depredations of a recently released parolee. See Messinger & Johnson, *supra* note 159; Parnas & Salerno, *supra* note 159, at 31.

<sup>164</sup> Maine had earlier made a significant move toward determinacy, but in a less comprehensive fashion. Legislators who investigated penal reform decided the rehabilitative approach was too expensive fiscally and politically. Maine politicians recognized a growing public demand for harsher punishment and focused their reform efforts on the state parole board. The parole board was perceived as a collection of "ministers and dogooders" who were too liberal in releasing prisoners. S. SHANE-DUBOW, *supra* note 157, at 126-27 (quoting J. KRAMER, F. HUSSEY, S. LAGOY, D. KATKIN & C. MCLAUGHLIN, ASSESSING THE IMPACT OF DETERMINATE SENTENCING AND PAROLE ABOLITION IN MAINE (1978)). In 1976, the state essentially eliminated discretionary parole but did not alter judicial power over sentencing. See S. SHANE-DUBOW, *supra* note 157, at 125-30.

<sup>165</sup> See Messinger & Johnson, *supra* note 159, at 22 (attacks on state's parole authority); Parnas & Salerno, *supra* note 159, at 31.

<sup>166</sup> The California Supreme Court in *In re Rodriguez*, 14 Cal. 3d 639, 652, 537 P.2d

a recently released parolee, California politicians began to seriously consider sentencing reform.<sup>167</sup> California's reform package developed as a compromise measure between prisoners' rights, civil liberties, and law enforcement interests.<sup>168</sup> The common target of liberal and conservative reformers was the state's parole authority.<sup>169</sup> The bill finally approved by the legislature and governor abolished the state's main parole board and eliminated discretionary parole except for a small number of offenders already under sentence. Under the new law, judges were to decide between probation and a low, middle, and high term of incarceration. The law required judges to give reasons when varying from the middle or base term. Provisions were also made for sentence enhancements which would increase sentence length upon proof of certain aggravating factors. Sentences would also be reviewable on appeal.<sup>170</sup>

The main political battle over reform legislation in California did not concern sentence length. After an early struggle between civil liberties and law enforcement interests over sentence lengths, a package was passed by the legislature and signed by the governor in September, 1976, to be effective at the beginning of 1977. A further battle over sentence length took place in the interim, however, resulting in amendments which increased prison terms for some violent offenses. In the years since adoption, California has modified the sentencing scheme in a number of respects, generally in the direction of increasing penalties for crimes which have stirred public anger.<sup>171</sup>

Most of the jurisdictions which followed California in enacting determinate sentencing schemes experienced the same basic pattern

---

384, 393, 122 Cal. Rptr. 552, 561 (1975), held that the state's main parole authority, the Adult Authority, could set sentences only in proportion to offender culpability. An attempt to alleviate this flaw through an executive promulgation of guidelines was rejected by the court of appeals as inconsistent with the state's indeterminate sentencing statute. *In re Stanley*, 54 Cal. App. 3d 1030, 126 Cal.Rptr. 524, 128 Cal. Rptr. 829 (1976).

<sup>167</sup> See Messinger & Johnson, *supra* note 159, at 17-29; Parnas & Salerno, *supra* note 159, at 29-31.

<sup>168</sup> See Messinger & Johnson, *supra* note 159; J. CASPER, D. BRERETON & D. NEAL, *THE IMPLEMENTATION OF THE CALIFORNIA DETERMINATE SENTENCING LAW*, 16-17 (1982).

<sup>169</sup> See generally Parnas & Salerno, *supra* note 159, at 31-35 (summary of the Act's provisions).

<sup>170</sup> See Messinger & Johnson, *supra* note 159, at 38-52; Parnas & Salerno, *supra* note 159, at 17-29.

<sup>171</sup> See J. CASPER, et al., *supra* note 168, at 4-5; Von Hirsch, *Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Sentencing Commission*, 5 HAMLINE L. REV. 164, 166-67 (1982). Recent plans for revision call for streamlining and restoring proportionality to a scheme which has been complicated and distorted by piecemeal changes, often in response to particularly outrageous crimes. L.A. Daily Journal, Nov. 4, 1988, at 1, col. 6.

of consensus-building between conservatives and liberals, with the original reform package emphasizing just desserts and equality of sentence, but with the ultimately approved package more oriented toward crime control. Judicial discretion was sometimes a major target of reform, at other times not; discretionary parole was usually severely restricted, if not eliminated.<sup>172</sup> By the end of 1982, a total of fifteen jurisdictions (including the District of Columbia) had adopted some form of determinate sentencing.<sup>173</sup> A total of twenty-seven jurisdictions had in some fashion tightened parole eligibility, eight jurisdictions had eliminated parole.<sup>174</sup> The general direction of reform in terms of length of prison term was illustrated by the fact that, during the period 1971-1982, forty-nine jurisdictions enacted mandatory sentences for certain offenses and thirty-three jurisdictions provided for, or increased the severity of, repeat offender laws.<sup>175</sup>

After more than a decade of debate, the federal government finally decided upon a determinate sentencing scheme in 1984.<sup>176</sup> Although the federal reform process was slower paced than in most states, its pattern was similar. The stated targets of reform were the sentence disparities and uncertainties fomented by the rehabilitative ideal.<sup>177</sup> Liberals and conservatives joined forces to make punishment more certain and more fair by eliminating discretionary parole

---

<sup>172</sup> For example, Illinois' determinate sentencing reform began as a 1976 proposal by one of the earliest rights-oriented reformers, David Fogel, and featured severe restrictions upon judicial discretion. The legislation, which was approved in 1978, however, set only moderate limits on judicial discretion. Its most prominent features were the abolition of discretionary parole and the creation of a new category of offenses punished by mandatory prison terms. L. GOODSTEIN & J. HEPBURN, *supra* note 159, at 56-61. Connecticut's original determinate reform package was rejected as too lenient and too restrictive of judicial discretion. The law, which went into effect in 1981, abolished all parole, including post-release supervision, and included a number of minimum mandatory sentences, but imposed little restriction on judicial sentencing. *Id.* at 62-69. Pennsylvania's reform followed the same basic pattern, concluding with a combination of sentence guidelines and minimum mandatory terms which increased sentence severity. Cirillo, *Windows for Discretion in the Pennsylvania Sentencing Guidelines*, 31 VILL. L. REV. 1309-10 (1986); Martin, *supra* note 159, at 61-99. See also Cullen, *supra* note 155, at 57-76 (examining the relationship between ideology and criminal justice policy); Schwert, *Illinois' Experience with Determinate Sentencing: A Critical Reappraisal*, 33 DE PAUL L. REV. 631 (1984) (examining the success of sentencing reform in Illinois in controlling abuses of discretion).

<sup>173</sup> S. SHANE-DUBOW, *supra* note 157, at 280.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> 28 U.S.C. §§ 991-998; Sentencing Reform Act of 1984, §§ 211-239, Pub. L. No. 98-473; 98 Stat. 1987-2040 (1984).

<sup>177</sup> S. REP. NO. 225, 98th Cong., 1st Sess. 38-39, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182 [hereinafter S. REP. 225]. See also UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 1A3 (1988) [hereinafter GUIDELINES MANUAL].

and creating a sentencing commission which would set strict guidelines for judicial sentencing.<sup>178</sup> Congress avoided the most controversial punishment issues by delegating the determination of sentence length to an appointed commission.<sup>179</sup>

The 1984 sentencing reform was but one of a number of penal changes the federal government undertook in the eighties. It may not even have been the most important. The Comprehensive Crime Control Act of 1984, of which the determinate sentencing bill was a part, also approved preventive detention of certain defendants,<sup>180</sup> and enacted stiff new penalties for certain repeat offenders.<sup>181</sup> In 1986, new mandatory penalties for narcotics trafficking were enacted.<sup>182</sup> In 1988, Congress passed, and the President signed, a further series of increased penalties for narcotics offenses, including a death penalty for narcotics-related murders.<sup>183</sup> Meanwhile, the Sentencing Commission's guidelines, approved by Congress in 1987,<sup>184</sup> and by the Supreme Court in 1989,<sup>185</sup> will also boost the severity of federal punishment. Although, for certain offenses, the amount of time spent in prison may be reduced, the guidelines contemplate that more federal offenders, especially white collar offenders, will go to prison instead of receiving probation.<sup>186</sup>

---

<sup>178</sup> The bill enacted grew out of similar legislation offered by Senator Kennedy and Senators Thurmond and Laxalt who represented the liberal and conservative wings of the Senate, respectively. The legislation was also actively supported by the Reagan administration. See S. REP. NO. 225, *supra* note 177, at 37-38.

<sup>179</sup> The decision to delegate sentence length decisions to a sentencing commission was designed to obviate a protracted political debate within the legislature over this divisive issue. See Feinberg, *Sentencing Reform and the Proposed Federal Criminal Code*, 5 *HAMLINE L. REV.* 217, 218-19 (1982).

<sup>180</sup> 18 U.S.C. §§ 3142-43. The bail reform legislation authorized courts to detain defendants in jail before trial on the ground that they might be dangerous to the community. The law also made it easier to detain certain defendants on grounds of flight risk. Although these changes were designated, and have been held to be nonpunitive, they clearly expanded the government's penal powers. See *United States v. Salerno*, 481 U.S. 739 (1987) (upholding the constitutionality of the Bail Reform Act of 1984).

<sup>181</sup> 28 U.S.C. § 994 (h)

<sup>182</sup> 21 U.S.C. § 841 (b)(1), § 960(b), *amended by* Anti-Drug Abuse Act of 86, Pub. L. No. 99-570, §§ 1002, 1302 (1986), U.S. CODE CONG. & ADMIN. NEWS 3207-2 - 3207-4, 3207-15 - 3207-18.

<sup>183</sup> Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 1988 U.S. CODE CONG. & ADMIN. NEWS 4387 - 4395; *see also, id.* at §§ 6371 (increased penalty for serious crack possession); 6452 (life in prison for third-time drug offender); 6454 (enhanced penalties for offenses involving children); 6460 (enhanced penalty for use of certain weapons in crime of violence or drug trafficking).

<sup>184</sup> 18 U.S.C. § 3551.

<sup>185</sup> *United States v. Mistretta*, 109 S. Ct. 647 (1989) (upholding the constitutionality of the Sentencing Commission and its guidelines).

<sup>186</sup> Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 *HOFSTRA L. REV.* 1, 20-21 (1988).



While many of those who initially advocated determinate sentencing saw it as a means to restrict state power over individual offenders, the influence of crime control ideology meant that, as enacted, the impact of sentencing reform on the state's penal power was more ambiguous. The discretion afforded state decisionmakers was generally reduced, but the overall severity of punishment, especially when other penal changes are considered, was generally increased. As a result, some idealists have argued that the reform process was subverted by crime control interests.<sup>187</sup>

#### D. INSTITUTIONAL INTERESTS

In sharp contrast with earlier reformers, those promoting determinate sentencing recognized the shortcomings of penal institutions. Indeed, the failures of parole boards, and to a lesser extent, sentencing judges, prompted the reform effort. Reformers argued that because such decisionmakers could not be trusted on faith, decisions had to be regulated. Yet, in some respects, determinate sentencing simply shifted the institutional balance of power. Legislators gained power by eliminating the administrative authority of parole boards and restricting the sentencing powers of judges through either direct enactment or delegation to a sentencing commission. By design or by default, legislators also increased the powers of prosecutors.

The alteration of institutional powers was controversial and widely debated. Many reformers argued that giving more sentencing power to legislatures was unwise, given politicians' propensity for taking a short-term, partisan approach to penal issues.<sup>188</sup> Less widely debated was the effect of new determinate schemes upon prosecutors.<sup>189</sup> For the most part, reform schemes have not sought to restrict significantly prosecutors' discretion over sentencing through the bringing of charges or plea bargaining.<sup>190</sup> To an extent

---

<sup>187</sup> See, e.g., Greenberg & Humphries, *The Cooption of Fixed Sentencing Reform*, 26 CRIME & DELINQ. 206 (1980).

<sup>188</sup> See, e.g., von Hirsch, *supra* note 171, at 167-68. Of course, jurisdictions without determinate sentencing schemes remain prone to similar problems through the passage of mandatory minimum penalties.

<sup>189</sup> See, e.g., Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for 'Fixed' and 'Presumptive' Sentencing*, 126 U. PA. L. REV. 550, 564 (1978) (arguing that reformers have generally ignored prosecutorial sentencing power); Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 741 (1980) (arguing that all recent sentencing commission proposals have failed to address prosecutorial discretion).

<sup>190</sup> On Minnesota's scheme, see Falvey, *Defense Perspectives on the Minnesota Sentencing Guidelines*, 5 HAMLINE L. REV. 257, 258-59 (1982); Rathke, *Plea Negotiating Under the Sentencing Guidelines*, 5 HAMLINE L. REV. 271 (1982). See also, Ku, *supra* note 159, at 127. In federal reform, Congress indicated a desire to curb prosecutorial discretion in plea bar-

not presently clear, negotiations between defense attorneys and prosecutors have led to case dispositions different from what determinate standards would have dictated.<sup>191</sup>

Perhaps the most important institutional consideration, the impact of penal change on prison populations, was discussed but rarely addressed with any seriousness. One of the long-term trends of punishment in the 1970s was a significant increase in the length of time convicts spent in prison.<sup>192</sup> Due in part to determinate sentencing reforms and in part to altered priorities by both judges and parole boards, prison populations increased during the late seventies, even while the total number of persons admitted to prisons decreased.<sup>193</sup> In 1974, a total of 218,500 adult felons were incarcerated; by 1979, that number had swelled to 301,800.<sup>194</sup>

From 1980 through 1984, the nation's prison population grew by forty-one percent, with more than half a million residing in prison by the end of 1985.<sup>195</sup> The number of federal prisoners has increased from about 19,000 in 1980<sup>196</sup> to over 48,000 in 1988.<sup>197</sup> Recent federal drug penalty legislation and other changes are expected to increase the federal prison population to somewhere between 105,000 and 156,000 by 2002.<sup>198</sup> In California, in the first six years of the eighties, the state's prison population increased by an average of 16% per year, climbing from some 23,000 inmates in 1980 to nearly 58,000 in 1986.<sup>199</sup>

Although jurisdictions throughout the nation built new prisons,

---

gaining. S. REP. NO. 225, *supra* note 177, at 167. The new guidelines give judges significant power to accept or reject plea bargains, but in this respect they do not represent a significant change in federal law. GUIDELINES MANUAL, *supra* note 177, at § 6B1.2 and commentary. The Commission regards substantive restrictions on judicial discretion over plea bargaining as premature. See Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459, 461 (1988); Breyer, *supra* note 186, at 29-31.

<sup>191</sup> See J. Casper, et al. *supra* note 168, at 32-44 (empirical study of three California counties suggests no major difference in pattern of plea bargaining with introduction of determinate sentencing); Knapp, *Impact of the Minnesota Sentencing Guidelines on Sentencing Practices*, 5 HAMLINE L. REV. 237, 255-56 (1982) (suggesting a pattern of negotiated dispositions which varies from what guidelines would have required).

<sup>192</sup> See Greenberg & Humphries, *supra* note 187, at 220-221.

<sup>193</sup> UNIFORM PAROLE REPORTS, PAROLE IN THE UNITED STATES: 1979 17-21 (1979).

<sup>194</sup> *Id.* at 18. The most rapid growth occurred from 1975 to 1977.

<sup>195</sup> REPORT TO THE NATION, *supra* note 148, at 105.

<sup>196</sup> DEPARTMENT OF JUSTICE, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND, 1925-86 13 (1988) [hereinafter HISTORICAL STATISTICS].

<sup>197</sup> N.Y. TIMES, April 25, 1988, at 1, col. 4.

<sup>198</sup> UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 71, 73 (1987), reprinted in PRACTISING LAW INSTITUTE, FEDERAL SENTENCING GUIDELINES 313, 389-91 (1987) [hereinafter SUPPLEMENTARY REPORT].

<sup>199</sup> HISTORICAL STATISTICS, *supra* note 196, at 13. Prison population in the state from

increases in bed space lagged far behind the increase in inmate populations.<sup>200</sup> The result was that more prisoners were crammed into less space. With courts playing a more aggressive role in supervising prison conditions, however, there were limits to this alternative.<sup>201</sup> In many jurisdictions, legislatures provided for a tacit return to parole. Connecticut, for example, which had eliminated all forms of parole, restored discretionary parole in 1982, in response to a rapidly growing prison population.<sup>202</sup> Illinois used liberal grants of what it called "meritorious good time" to clear its prisons for new prisoners.<sup>203</sup> In 1982, California increased the amount of good time a prisoner might earn to fifty percent of his or her sentence, thus cutting down the length of prison terms and easing overcrowding.<sup>204</sup> In many jurisdictions, the task was left entirely to correctional authorities who responded in a variety of ways, such as holding state prisoners in local jails, increasing use of work release and community treatment programs, and instituting varieties of institutional parole.<sup>205</sup>

The shift in mode of punishment, from indeterminate sentencing to determinate, was not a major cause of prison overcrowding. Most determinate sentences were set based on the average length of time served under indeterminate sentencing.<sup>206</sup> Instead, a general trend toward harsher punishment and an increase in crime were the main factors leading to overcrowding.<sup>207</sup> Determinate sentencing

---

1977-85 increased significantly faster than the state's population. CALIFORNIA PRISONERS AND CIVIL NARCOTIC ADDICTS, 1983, 1984 & 1985 1 (1986).

<sup>200</sup> See, e.g., GOVERNOR'S TASK FORCE ON PRISON OVERCROWDING, JAIL AND PRISON OVERCROWDING: AN INTERIM REPORT (1981); RESEARCH ON SENTENCING, *supra* note 159, at 32-33.

<sup>201</sup> By 1987, some 36 state prison systems were operating under a court order or consent decree of some kind, most involving population controls. McCarthy, *Responding to the Prison Crowding Crisis: The Restructuring of a Prison System*, 2 CRIM. JUST. POL'Y REV. 3 (1989), citing 1987 ACLU National Prison Project.

<sup>202</sup> L. GOODSTEIN & J. HEPBURN, *supra* note 159, at 94-95.

<sup>203</sup> *Id.* at 109-10.

<sup>204</sup> CAL. PENAL CODE § 2931 (West 1989), amended by Stats. 1982 c. 1234 § 2. For measures taken by other states to reduce prison crowding, see DEPARTMENT OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1985 48 (1987); REPORT TO THE NATION, *supra* note 148, at 109.

<sup>205</sup> See, e.g., McCarthy, *supra* note 201, at 14-17 (reviewing the response of the Alabama correctional system to prison overcrowding).

<sup>206</sup> See Breyer, *supra* note 186, at 7 (noting few departures in guidelines from prior practice); Messinger & Johnson, *supra* note 159, at 53 (noting the irony of initial California determinate sentence lengths being based on average terms served under discretionary sentencing); see also, Ku, *supra* note 159, at 71-72 (noting that determinate sentencing in California neither increased nor decreased average prison time).

<sup>207</sup> See L. GOODSTEIN & J. HEPBURN, *supra* note 159, at 85; RESEARCH ON SENTENCING, *supra* note 159, at 32-33. On the forecasted impact of federal guidelines on prison popu-

reforms, particularly the end of discretionary parole, eliminated traditional means for easing population pressures, however, and made the effects of overcrowding more severe. Public demand encouraged politicians, prosecutors and judges to send more criminals to prison without regard to institutional capacities. The elimination of the parole safety valve created the potential for systemic breakdown.

Only one jurisdiction, Minnesota, made institutional resources a prime consideration in punishment. The state created a sentencing commission to promulgate sentencing guidelines, subject to the stricture that the prison population remain within the capacity of the prison system.<sup>208</sup> Most other jurisdictions were satisfied with vague imprecations about avoiding overcrowding.<sup>209</sup>

Within the prison, the dominant realities of the eighties were overcrowded conditions, meaning less privacy, less recreation, less work, and more violence. Prison crowding generally leads to increased assaults, suicides, physical and mental disorders, disciplinary infractions, and violent deaths.<sup>210</sup> In addition, prisons housed more prisoners serving long terms.<sup>211</sup> The improvements in prisoner attitudes and correctional management, which some had hoped might result from an increase in determinacy in release decisions, did not materialize.<sup>212</sup>

---

lations, see Block & Rhodes, *Forecasting the Impact of the Federal Sentencing Guidelines*, 7 BEHAV. SCI. & L. 51 (1989); SUPPLEMENTARY REPORT, *supra* note 198, at 53-75.

<sup>208</sup> S. SHANE-DUBOW, *supra* note 157, at 159, 166.

<sup>209</sup> For example, in the federal system, Congress mandated that the Sentencing Commission formulate its guidelines "to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons . . ." 28 U.S.C. 994(g). Mandatory penalties and other directions given the Commission seem to have outweighed this imprecation, however. See Breyer, *supra* note 186, at 4, 23-25 (explaining that the Sentencing Commission avoided major departures from past sentencing practices to minimize prison crowding, but noting that there is no national consensus on whether sentencers should be limited by present prison capacity); Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 19 (1987) (arguing that the Sentencing Commission failed to address the dangers of overcrowding); see also von Hirsch, *supra* note 171, at 176-79 (contrasting Minnesota's experience with that of Pennsylvania, where political concerns that guidelines would not be tough enough prevented any firm restraint on prison population); Hamm, *supra* note 154, at 121 (noting lack of planning for increase in prison population in Indiana).

<sup>210</sup> Jan, *Overcrowding and Inmate Behavior: Some Preliminary Findings*, 7 CRIM. JUST. & BEHAV. 293, 298 (1980); G. MCCAIN, V. COX & P. PAULUS, THE EFFECT OF PRISON CROWDING ON INMATE BEHAVIOR 2-6, 117, 131 (1980).

<sup>211</sup> See, e.g., Hamm, *supra* note 154, at 120 (noting an increase in the number of prisoners serving long terms in Indiana). Many jurisdictions have enacted much stiffer penalties for a few serious offenses. See, e.g., Block & Rhodes, *supra* note 207, at 57-69 (forecasting the impact of new federal penalties for drug and career criminal offenses).

<sup>212</sup> See L. GOODSTEIN & J. HEPBURN, *supra* note 159, at 163-64, 167-69. A recent study suggests that a majority of inmates are now either undecided about or opposed to deter-

#### IV. THE LIMITS AND POSSIBILITIES OF PENAL REFORM

The "lessons" of history are the stuff of which reform is made. The first American penal reformers used history to label corporal punishment primitive and brutal. Modern reformers teach that indeterminate sentencing led to injustice by punishing similar offenses in disparate ways. History, viewed in this fashion, is a storybook, with contemporary ideology providing the morals. The insistently cyclical nature of penal reform, however, should provide a caution for reading the past so simply. With each major change in the nation's penal methods being promoted as the cure for its predecessor, and each reform producing new excesses requiring further reform, with the same set of rival justifications of punishment competing for dominance in a seemingly endless game of philosophical musical chairs, the need for a broader perspective on penal change should be apparent.

The final portion of this Article examines recent sentencing reforms in light of earlier reforms and develops some of the policy implications of the tripartite structure of penal change. After a brief overview of the successes and failures of determinate sentencing, attention turns to one of the basic questions presented by the Article's analysis: From an idealist perspective, is real reform possible? The model of reform suggests basic reasons why reforms rarely turn out as intended and raises the possibility that justice-inspired reforms do more harm than good. I argue that the risks of inaction and the possibility of reaching a principled compromise between competing penal influences make reform a necessary part of the ongoing effort to do justice in criminal cases. The tripartite model suggests that reformers take a strategic approach to penal change, concentrating not only upon the ideal, but also upon the best means to achieve that ideal, given the influence of rival ideologies and interests. In other words, success in penal reform should be seen as the best and most lasting compromise between penal interests instead of the illusory triumph of a single interest. The Article concludes with a brief look to the future of penal reform.

##### A. DETERMINATE SENTENCING IN HISTORICAL PERSPECTIVE

A full evaluation of determinate sentencing reform involves a number of difficulties. The schemes enacted vary enormously from one jurisdiction to another. Recent changes range from selective

---

minate sentencing, a significant change from the days when it was first proposed. Larson & Berg, *Inmates' Perceptions of Determinate and Indeterminate Schemes*, 7 BEHAV. SCI. & L. 127 (1989).

enactment of minimum mandatory sentences to ambitious legislative schemes like California's to sentencing commission schemes like that of the federal government. In many instances, the differences between schemes may prove more important and more illuminating than the similarities. Defining the basic goal of these reforms presents another difficulty because change is normally the product of compromise between ideological opponents. Finally, any evaluation must be tentative, as jurisdictions continue to consider and implement determinate schemes. With these cautions in mind, we may ask whether recent reformers succeeded any better in implementing their view of punishment than their predecessors. How much resemblance does the present practice of punishment bear to the original idealist vision of reform? Putting aside problems with the theory of determinate sentencing,<sup>213</sup> what are the obstacles to reform presented by the tripartite nature of penal change? The answers suggested do not present any startling insights. Indeed, most of the shortcomings of recent reform have been widely noted. The significance of the evaluation lies in recognizing that many of the failings of recent reforms stem from recurring situations in American punishment. The historical perspective may help us better understand the nature of these problems and take them more seriously.

### 1. *The Ideological Struggle*

From the moral idealist viewpoint, the most positive aspect of the determinate sentencing movement has been its recognition that punishment is fundamentally an issue of criminal justice and should center on the same issues of moral responsibility as does criminal liability generally. The movement has brought punishment back within the legal sphere. Even those reformers with a utilitarian approach have urged a modest and justice-based vision of punishment.<sup>214</sup> Given the moral failures of earlier, instrumental penal

---

<sup>213</sup> The theoretical shortcomings of determinate sentencing are not considered in this Article. A full theoretical evaluation would take up retribution as a theory of punishment and the limits of law in defining justice. On this latter point, determinate sentencing presumes that determinate rules may produce, or at least significantly enhance the production of, just results. At least three deeper assumptions lie beneath this concept: 1) that the basic principles of justice are themselves sufficiently determinate to be captured in rules; 2) that the complexities of criminal cases may, for purposes of punishment, be reduced to a few basic criteria; and 3) that these rules will have determinate meanings. Each of these assumptions raises basic philosophical difficulties.

<sup>214</sup> See S. REP. NO. 225, *supra* note 178, at 65, which states the following on federal sentencing reform:

The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our

visions, the determinate sentencing movement has the great virtue of placing immediate justice concerns above utopian dreams of a crime-free society. The modesty and justice-orientation of recent penal change can be exaggerated, however. Much related penal change, such as the enactment of minimum mandatory penalties, has been justified as a better means of combating crime. While such change usually has not borne the label "reform," because it does not involve significant innovation in the form or distribution of punishment, its impact may prove more important than any "reforms."

In terms of achieving the concrete goals of equality and proportionality in punishment, idealist success has been limited by the extent of political consensus. Where idealists and crime control advocates have joined together to eliminate sentence disparity, they have taken measures which advance that goal. On the question of sentence proportionality, which involves determinations of proper sentence length, idealists and their crime control opponents have found less room for agreement. The two groups have disagreed about the relative severity of different offenses and about the basic scale of penal severity. Moral idealists hoped to limit punishment through determinate methods, but can claim no great successes in this effort. In many instances, crime control advocates have won an expansion in the use of punishment.<sup>215</sup> In the ideological conflict over sentence length, crime control forces have won most recent battles.<sup>216</sup>

The pattern of recent ideological combat recalls that of earlier reforms. The penitentiary, hailed in the post-Revolution years as the symbol of republican benevolence, was, by the Jacksonian era, more representative of a state campaign to repress disorderly elements in society. The correctional reforms which followed in the late nineteenth and early twentieth centuries were promoted as kindly treatment. They won acceptance and were utilized as additional, punitive sanctions against criminal offenders.

The greatest historical distinction presented by recent penal change is the extent to which the conflict between the idealistic and ordering aims of punishment has become an explicit part of the penal debate.<sup>217</sup> Recent reformers have understood the need for a re-

---

arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.

<sup>215</sup> See, e.g., Greenberg & Humphries, *supra* note 187; Schwerk, *supra* note 172.

<sup>216</sup> Recent federal reforms provide the best example. See *supra* notes 176-85 and accompanying text.

<sup>217</sup> This may be an historical illusion, however, caused by the fact that most histories

form strategy that would account for ideological opposition. Idealists have acknowledged and attempted to address the concerns and the political influence of crime control proponents. For example, idealists have urged the use of sentencing commissions as a means of insulating the sentence-length debate from partisan politics.<sup>218</sup> Of course, such commissions remain part of the political structure, subject to legislative decisionmaking.<sup>219</sup>

## 2. *Institutions and Ideology*

In any review of determinate sentencing, institutional problems loom large for both the idealist and the crime control adherent. Overcrowding has proven and will continue to prove a major obstacle to determinacy. Burgeoning prison populations have forced public officials to implement a wide variety of early release programs. Given the cost of prison construction and maintenance and the relative dearth of public resources in contemporary America, overcrowding appears likely to grow far worse. Despite some impressive public expenditures on its behalf, the American penal system has always worked within fiscal restraints which severely limit the opportunity for fundamental penal change.<sup>220</sup>

Overcrowding presents particular problems for the ideology of rights idealist, because it alters the basic nature of punishment without regard to offender culpability. It makes the deprivations of liberty, privacy, work, and security associated with incarceration more severe, but not for reasons related to the prisoner's crime. The offender receives a harsher sentence because the public does not want to pay for more prison space. Overcrowding presents a significant threat to crime control goals as well. With court-set limits on prison populations and limited resources for new prisons, early release becomes the only viable alternative. The penal system still makes worse threats than it can deliver in many instances.

Overcrowding, of course, has been part of American punishment since the nation turned to incarceration as its primary criminal penalty. Philadelphia's Walnut Street Jail, often called the "cradle of the penitentiary" because it was the first American institution to

---

of penal reform have been written from the idealist perspective and give scant attention to the forces opposing reform enactment.

<sup>218</sup> See *supra* note 179.

<sup>219</sup> Thus, although the federal sentencing commission has not, overall, sought to significantly increase federal sentences, its guidelines in combination with new penal legislation will have that effect. See Section IIC.

<sup>220</sup> See Foote, *Deceptive Determinate Sentencing* in DETERMINATE SENTENCING: REFORM OR REGRESSION?, *supra* note 159, at 137-140.



make special provision for sentenced offenders, was overcrowded within a decade of its renovation. The press of prisoners defeated the reformatory scheme of the jail and forced the resignation of reformer-warden Caleb Lownes.<sup>221</sup> Two hundred years later, overcrowding has the same corrosive effect upon criminal justice.

A second institutional concern with determinate sentencing, implicating both idealist and crime control goals, is the failure to control prosecutorial discretion. While schemes have restricted or eliminated discretion by parole authorities, and many have restricted discretion by judges, prosecutorial discretion has been largely ignored. As a result, prosecutors have the power to change the nature of determinate sentencing either for ideological purposes, or, more likely, to enhance institutional efficiency. The potential for institutional cooption is significant.

Although the analogy is by no means direct, one might recall the early penitentiary, whose beneficence depended largely upon the character of its warden. Early American reformers saw prison wardens as exemplary figures—firm but fair, kind, just, and insightful. In fact, they were expected to be virtually saints.<sup>222</sup> Yet, most wardens were not saints, and their institutional role required that they emphasize efficiency over reformation. The model warden was not a celebrated cleric or humanitarian, but Captain Lynds, master disciplinarian. His methods may not have reformed, but they kept prisoners orderly at minimal cost. Similarly, a major theme of the story of virtually all of the correctional innovations of the late nineteenth and early twentieth centuries was their cooption by crime control and especially institutional interests. Placing unchecked discretion in the hands of any single institutional player invites distortion of idealistic aims.

The emphasis of recent penal schemes upon incarceration as retaliation for crime presents other dangers of institutional abuse. The legitimization and even celebration of punishment as *punishment*<sup>223</sup> may encourage the native cruelties of the prison as an insti-

---

<sup>221</sup> B. MCKELVEY, *supra* note 6, at 9.

<sup>222</sup> See, for example, Thomas Eddy's partial description of the ideal warden:

"A keeper should be a person of sound understanding, quick discernment, and ready apprehension; of a temper cool, equable and dispassionate; with a heart warmed with the feelings of benevolence, but firm and resolute; of manners dignified and commanding, yet mild and conciliating; a lover of temperance, decency and order; neither resentful, talkative, nor familiar; but patient, persevering and discrete in all his conduct."

Quoted in O.F. LEWIS, *supra* note 6, at 49 (quoting Thomas Eddy); see also E.C. WINES & T. DWIGHT, *supra* note 52, at 120-23.

<sup>223</sup> That is, as the infliction of suffering rather than rehabilitative treatment.

tution. Without an institutional commitment to caring about prisoners, the temptations to brutality and neglect inherent in the prison world are likely to grow. Brutality and neglect have been common enough in institutions explicitly dedicated to the improvement of the inmate.

B. MORAL IDEALISM AND REFORM—A REJECTION OF THE TRAGIC VIEW

The always quotable George Bernard Shaw warned us against penal reform more than half a century ago. He urged the following upon persons interested in taking up prison reform for benevolent purposes:

[T]o put it down and go about some other business. It is just such reformers who have in the past made the neglect, oppression, corruption, and physical torture of the common gaol the pretext for transforming it into that diabolical den of torment, mischief, and damnation, the modern prison.<sup>224</sup>

Shaw expressed a tragic view of idealistic reform—that it is an endeavor doomed to moral failure and should be avoided at all costs. Some idealists may draw the same message from the tripartite model of reform. The examples of reform reviewed here suggest that idealistic penal reforms win “adoption” only when they also promise enhancement of the state’s powers to repress disorder. Usually, this means an expansion of state powers, often to the detriment of justice interests. The examples further suggest that, regardless of whether new penal methods reflect idealistic or ordering priorities, the last word on penal practice rests with institutional players who care most about institutional efficiency. Thus, the prospects for real idealistic reform appear limited at best. Worse, the idealist must acknowledge that his promotion of reform may give rival interests the chance to make punishment even more unjust.

The tragic view of reform may be challenged on at least two grounds, however. First, the tragic view assumes that the risks of action outweigh the negative effects of inaction. Yet the costs of inaction may be significant. Every instance of reform considered here was motivated in part by a perception that the practice of punishment had deteriorated to an unacceptable state during a period of post-reform neglect. In the late eighteenth century, contemporaries recognized the barbarity and inefficacy of corporal punishment. The failures of the original conception of incarceration were equally apparent to late nineteenth and early twentieth century reformers.

---

<sup>224</sup> G.B. SHAW, *THE CRIME OF IMPRISONMENT* 13 (1922).

By the late twentieth century, the arbitrary and unfair results of discretionary decisionmaking led to demands for change. As these examples demonstrate, if no one seeks ideological reform, institutional interests will predominate. In this circumstance, punishment will address neither of its primary purposes but will become the captive of an entirely self-interested bureaucracy.

The justice risks appear even greater when one considers the easy confluence between the ordering impulse and institutional interest. Modern punishment gives penal officials the power and sanction forcibly to deprive wrongdoers of liberty because of their wrongdoing. Both the punitive nature of the enterprise and the imbalance of power inherent in the relationship between state and prisoner represent temptations to cruelty. Whether these temptations are the cruelties of sadism or of indifference, they are not concerns addressed by the need for order or institutional interests. Cruel methods may enhance public order and institutional stability. Without a periodic renewal of the moral basis of punishment, its practice will be characterized by offender mistreatment.<sup>225</sup> In other words, even taking a dark view of reform, idealistic reform may be necessary to improve punishment from the horrendous to the merely bad.

Second, the tragic view assumes that principled compromise between moral idealism and its main rivals in penal influence is impossible. The real question is whether the confluence or compromise between penal forces which defines the nature of change can be a principled one. Can reformers develop a meaningful strategy for reform that takes account of rival influences?<sup>226</sup> When the conflict is a matter of ideology, as when liberals and conservatives disagree on the appropriate sentence for a particular crime, principled compromise will be difficult. Where ideologies directly conflict, neither side is likely to grant the other more than it can demand politically. Yet, punishment is a complex issue which allows for a variety of solutions. The process of change adoption, which involves the construction of a broad political consensus, provides one example of ideological compromise.

Perhaps more promising is the prospect of an accord between

---

<sup>225</sup> That is, by treatment which causes more suffering than is justified or authorized as punishment.

<sup>226</sup> Another way of putting this is to ask whether the entire process of reform can be seen as essentially intentional—reflective of the conscious intention of an individual or group—or whether its explanation is inevitably causal—the product of different groups who act upon each other in unanticipated and unpredictable ways. See J. ELSTER, *EXPLAINING TECHNICAL CHANGE* 32-48, 69-88 (1983).

ideological and institutional visions of punishment. Here, the main obstacle to successful compromise is the failure to recognize conflicting interests. Normally, the political dynamics of reform relegate institutional interests to a quiet but subversive role. Not taken seriously in the open debate about punishment, institutions nevertheless have the last word on reform. The challenge is to accord political weight to the real influence of institutions.

C. A STRATEGIC APPROACH TO REFORM—TOWARD PRINCIPLED COMPROMISE

The tripartite model of reform dictates that we redefine success in the field of penal change. Regardless of personal views of what punishment should be, we must accept and respect the pluralistic nature of punishment. For the moral idealist (and every other interested party), this means concentrating upon the optimal, as opposed to the maximal, solution. It means recognizing the inevitability and incorrigibility of ideological and institutional conflict over the practice of punishment. It means developing a strategy for reaching a principled compromise that will, over the long run, best promote the penal ideal.

Idealists must recognize that no penal system, however just, will survive long if it is too expensive, too inefficient, or appears too soft on criminals. The early promoters of the penitentiary demonstrated a faith in its "benevolence" that failed to recognize the demands of a public threatened by criminal and other threats to order. Even after more than a century of penal experience, reformers early in this century confidently predicted that "punishment"—harsh treatment in retribution for wrongdoing—would soon disappear.<sup>227</sup> In both instances, reformers not only overestimated the efficacy of reformative methods, they ignored political reality. However, much punishment is a matter of justice and a reflection of society's morals, it is also the primary means of keeping the domestic peace. It is, and always will be, a powerful symbol of society's ability to maintain civic order. In this respect, contemporary reformers have displayed greater political awareness, perhaps because the crime control philosophy was, almost from the beginning of the movement, important in reform adoption.<sup>228</sup>

Reformers have usually ignored, or minimized, the limitations of penal institutions. In creating the first penitentiaries, legislatures

---

<sup>227</sup> See, e.g., E. SUTHERLAND, *CRIMINOLOGY* 360 (1924).

<sup>228</sup> See, e.g., Messinger, *Introduction* A. VON HIRSCH & K. HANRAHAN, *supra* note 134, at xxx (noting that crime control will always be a motive for sentencing reform).

in the late eighteenth and early nineteenth centuries often gave explicit directions for penal management.<sup>229</sup> The failure to provide sufficient resources often rendered such directions moot, however.<sup>230</sup> In both the creation of the penitentiary and the correctional system, reform also suffered from a misunderstanding of institutional dynamics. Reformers did not recognize the nonideological, efficiency bias of those in charge of punishment. In recent years, while reformers have shown more institutional awareness, politicians have not. Policy makers have generally ignored warnings of prison overcrowding and uncontrolled prosecutorial discretion. By now, however, the institutional message should be clear: if we ask our institutions to do the impossible, they will not only fail, they will probably do something quite different than envisioned.

Any compromise between rival forces must extend over time in order to succeed. The examples of reform reviewed here suggest that the cycle of penal change follows the waxing and waning of different interests. Each ideology or interest seeks to put its permanent stamp upon punishment at its time of maximum influence. Reformers cannot alter this political dynamic, but can seek to moderate it. For example, many idealist advocates of sentencing reform have argued for reliance upon sentencing commissions as institutions which may take a longer view of penal issues and more conscientiously seek a lasting (and principled) compromise between all penal interests. Thus, the sentencing commission might, over the lifetime of determinate sentencing, better protect idealist values.

The strategy of seeking principled compromise is, of course, easier stated than accomplished. In many instances, it may prove impossible. What is important in future endeavors, and what is most encouraging about recent efforts, is that reformers recognize the importance of strategic action. If every interested party acts without regard to the interest or influence of others, then change will be only a haphazard reflection of what is intended. If interested parties acknowledge and respect each others' views and power, then they may reach a negotiated accommodation. In this way, change may be planned; it will not just "happen."

Acknowledging the pluralist nature of change will not, by itself, transform American punishment, however. We still have to decide what we want from criminal punishment. This Article has studied

---

<sup>229</sup> See, e.g., T. DUMM, *supra* note 18, at 104-05 (reviewing Pennsylvania legislation of 1790 which detailed the extent of isolation, conditions of labor, diet, hygiene, and amount of rest to be afforded prisoners in Philadelphia's Walnut Street Jail).

<sup>230</sup> See *id.* at 105.

reform from a largely instrumental perspective. It has not taken up the vital moral issue of whether reformers' aims were appropriate or correct, nor has it directly explored the relationship between the state of American society, crime, and punishment. In any debate about punishment, these issues must be resolved first. The model of reform may assist in developing new reform strategies but it does not help decide what our goals should be.

#### D. LOOKING AHEAD

Looking to the past of penal reform gives some, albeit limited, insight into what may come. One relatively safe prediction is that the near future will bring significant penal change. Even if the nation experiences no further debates about the nature or purpose of punishment, institutional forces, particularly prison overcrowding, will force new ways of punishing criminal offenders. By failing to address prison overcrowding, states and the federal government have created a situation where institutional pressures will, at some point, become overwhelming.<sup>231</sup> When this happens, however, our options for dealing with the problem will be severely limited. Most solutions to overcrowding require long-range planning. Those who will have to take action, primarily courts and state officials, will have to do so in the absence of planning or any developed public consensus. Such officials will probably lack the power to alleviate overcrowding in ways consistent with the goals of criminal punishment. Unless jurisdictions start to view prison overcrowding as an opportunity for further penal reform, change will be haphazard at best.

The biggest question mark for the future is the next direction in moral idealism. As we have seen, penal reform generally begins with a new vision of ideal punishment drawn from a new way of looking at public policy issues. The republican and humanitarian philosophies of the late eighteenth and early nineteenth centuries, the scientific revolution of the late nineteenth and early twentieth centuries, and the ideology of rights of the later twentieth century all inspired distinctive approaches to punishment. Perhaps the conservative political ideology from which crime control proponents have drawn represents the next dominant public policy ideology. If so, history may judge the present trend toward penal expansion as the beginning of a new reform era, rather than part of the determi-

---

<sup>231</sup> Interestingly, this is the opposite of the compromise involved in the earlier correctional system reforms. There, by failing to take account of institutional pressures, but allowing them free reign, the reforms were long-lived, but subject to institutional cooption. With determinate sentencing, there are few safety valves for institutional pressures and formal change will likely be required.

nate sentencing movement. If not, if this trend simply reflects a reassertion of the need for order,<sup>232</sup> then the future of idealism remains murky. Not only is there no indication of another idealistic approach to punishment, there is no indication of a change in basic public policy vision from which penal reform may grow. We may be entering an era when penal institutions will direct penal change. As the historical record demonstrates, such institutional predominance bodes poorly for either justice concerns or punishment as crime suppression.

## V. CONCLUSION

We almost certainly cannot end the cycle of abuse and reform which has characterized the history of American punishment. The dynamic of penal change is too complex and too fluid for that. Certain forces will predominate at certain times and democratic bodies, responsive to shifts in public mood, will not often take the long view. Moral idealists today may complain long and hard about excessive severity in punishment, but with crime control advocates in the ascendancy, the idealists will not be heard. At least they will not be heard until the next stage in the process of penal change, when circumstances will make moral idealism, perhaps of a new variety, politically attractive again. This may occur when the prison system begins to collapse under the weight of its burgeoning population.

If the cycle of abuse-reform cannot be ended, it can be moderated. If all who are engaged in penal issues recognize the importance of rival interests—even those not in the political ascendancy at the moment—then perhaps compromises can be reached which will smooth the transitions between the different stages of change. If moral idealists acknowledge the political potency of society's need for order in penal issues, if all who are concerned with policy take seriously the limitations of institutions, then the gap between penal ideal and reality may be narrowed. The political and institutional awareness shown by many determinate sentencing reformers represents a modest, though significant improvement along these lines. In the enactment of determinate reforms, however, the failure of political consensus and the failure to account for institutional consequences mean that further reforms will soon be required.

---

<sup>232</sup> I suspect this is the case for several reasons. Both as a matter of general public policy and as a matter of penal philosophy, I see the conservative trend as more a corrective to the liberal ideology of rights than a new creative force. In the penal field, the conservative crime control philosophy addresses the need for order more than it addresses justice concerns. Of course, this may be just wishful thinking on the part of one who sides more often with liberals than conservatives in penal debates.

One thing is clear. After two hundred years of experience with penal reform, we can no longer claim that we do not know any better.