Seton Hall Law Review

Vol. 8 1976 No. 1

CRIMINAL DISPOSITIONS FOR NEW JERSEY: PRETRIAL INTERVENTION, THE MODEL PENAL CODE, AND JUST DESERTS*

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Many states and the Congress are at crossroads in their efforts to deal with criminal offenders. Although New Jersey has experienced many of the problems that have surfaced in criminal justice systems throughout the nation, New Jersey is contemplating and implementing solutions which differ from those being recommended elsewhere by continuing to focus on rehabilitation of the criminal offender. Most recently, the state legislature, with the passage of its version of the Model Penal Code in the General Assembly,[1] appears ready to require sentencing judges to fit sentences even more than ever to the characteristics of the offender.[2] The state supreme court in *State v.*

* The author wishes to thank the Research Program in Criminal Justice of the Woodrow Wilson School of Public and International Affairs at Princeton University, and members of the School's 1976 and 1977 Criminal Justice Policy Task Forces, for helpful thoughts incorporated in this article. The article has profited substantially from many suggestions made by Ronnie F. Liebowitz, Esq.

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[1] N.J. Assembly Bill No. 642 (introduced Feb. 19, 1976), *as amended*, (June 14, 1976), was passed by the General Assembly on November 22, 1976. 64 N.J. LEGIS. INDEX A17 (Feb. 17, 1977). This bill, which proposes a "New Jersey Code of Criminal Justice" (Model Penal Code), will be cited throughout this article as M.P.C. § 2C:X-X.

[2] *See* M.P.C. § 2C:44-1(b) which lists eleven factors to "be accorded weight in favor of withholding sentence of imprisonment." Those factors which focus on the offender include questions of whether (1) previous "criminal activity" is completely absent or has been lacking "for a substantial period of time," *id.* § 2C:44-1(b)(7); (2) the action was the result of exceptional circumstances, *id.* § 2C:44-1(b)(8); (3) the temperament of the offender suggests that he is not likely to commit another crime, *id.* § 2C:44-1(b)(9); (4) he will react well to probation, *id.* § 2C:44-1(b)(10); and (5) incarceration would work an extreme "hardship [on] himself or his dependents," *id.* § 2C:44-1(b)(11).

Leonardis[3] has expanded the availability of participation in pretrial intervention programs (PTI),[4] whose main goal is rehabilitation.[5] Furthermore, legislation making release on parole virtually automatic, instead of dependent upon an inmate's rehabilitation,[6] is at an impasse.[7]

This article seeks to evaluate whether the effort to rehabilitate should continue to have great weight in determining the disposition of criminal offenders in New Jersey, or whether a punishment-oriented "just deserts" system of dispositions should be substituted.[8]

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[3] 71 N.J. 85, 363 A.2d 321 (1976), *aff'd on other grounds on rehearing*, No. A–20/21/52 (N.J. May 31, 1977).

[4] *See* notes 28–38 *infra* and accompanying text.

[5] 71 N.J. at 98, 363 A.2d at 328. In discussing the purposes underlying PTI programs, the court stated that "[w]hile the goal of expeditious disposition is certainly important and central to the PTI concept, it is at the same time subordinate to the rehabilitative function of PTI." *Id.* In support of this conclusion, the court discussed People v. Reed, 112 Cal. Rptr. 493 (Ct. App. 1974), which, in the words of the *Leonardis* court, "explicitly recognized the primacy of the rehabilitative function." 71 N.J. at 98–99 n.8, 363 A.2d at 328.

[6] *Compare* N.J. Assembly Bill No. 1452 (introduced Feb. 3, 1976) *with* N.J. STAT. ANN. §§ 30:4–123.6, .14 (West 1964). The current New Jersey statute looks to a potential parolee's ability to "assume his proper and rightful place in society." *Id.* § 30:4–123.14. The parole board has the authority to determine the standards which must be met for parole eligibility, and the enabling statute suggests such criteria as abandonment of "evil" habits and friends and repaying the victims of the crime. *Id.* § 30:4–123.6. These particular standards reflect concern with the offender's rehabilitation. In general, however, the overriding goals of the parole board are unclear. *See* notes 283–88 *infra* and accompanying text.

In contrast, the purpose of Assembly Bill No. 1452 is "to introduce more objectivity and predictability into the parole process, and to eliminate many of the problem areas in existing law which have lend [*sic*] to inequities and to dissatisfaction with the administration of parole." N.J. Assembly Bill No. 1452, Statement, at 11 (introduced Feb. 3, 1976). The most important difference is the requirement that the parole board release an inmate *"unless"* it finds "that [he] has engaged in conduct indictable in nature" during his imprisonment or believes "that there is *substantial likelihood* that [he] will commit a crime under the laws of this State if released on parole at such time." *Id.* § 6(c) (emphasis added). The release would be granted upon completion of a "mandatory minimum term, or 25 years of any life sentence, or one-third of the maximum sentence where no mandatory minimum term or life sentence has been imposed." *Id.* § 6(a).

[7] Although the bill was introduced on February 3, 1976, it has never progressed beyond a second reading in the Assembly. 64 N.J. LEGIS. INDEX A37 (Mar. 21, 1977).

[8] The concept of just deserts if founded on the notion that a member of society should be punished in proportion to the seriousness of the act designated by society as wrongful. *See generally* notes 172–228 *infra* and accompanying text.

This article will not consider whether existing criminal statutes are just. For some conflicting views on this point, see CRIMINAL JUSTICE IN AMERICA 16–25 (R. Quinney ed. 1974) ("law in capitalist society gives political recognition to powerful social and economic interests"); J. RAWLS, A THEORY OF JUSTICE 356–62 (1971) (legislative decisions must not be viewed as a contest between competing interests but as an attempt to

After examining the empirical and philosophical soundness of the dispositional goals underlying *Leonardis* and the Model Penal Code, the author will explore the traditional justifications for criminal sentencing,[9] and will indicate how the *Leonardis* and Model Penal Code systems reflect these rationales. The basic premise of the article is that the directions of criminal justice reform being taken by New Jersey are at odds with those being taken by other jurisdictions,[10] and that New Jersey is ignoring the conclusions reached by commentators who have reexamined the traditional goals of criminal dispositions. Those conclusions are that dispositions should fit the offense more than the offender,[11] and that judicial discretion in imposing criminal dispositions should be restricted.[12]

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implement the policy that best serves the principles of justice); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 3–9 (1976) [hereinafter cited as TWENTIETH CENTURY FUND] ("greatest indictment of the criminal justice system in the United States is . . . that it fails in providing equitable justice"); A. VON HIRSCH, DOING JUSTICE 143–49 (1976) (in an unjust society both "traditional utilitarian theories" and just deserts are unfair).

[9] For an excellent analysis of sentence justifications and the historical progression of sentencing goals in this country, see Dershowitz, *Background Paper* to TWENTIETH CENTURY FUND, *supra* note 8, at 67.

[10] States such as California, Maine, and Washington currently have fixed-sentencing laws. Act of Sept. 20, 1976, ch. 1139, 1976 Cal. Legis. Serv. 4752 (West); ME. REV. STAT. ANN. tit. 17-A, §§ 1251–1252 (West Supp. 1976); Act of Feb. 20, 1976, ch. 38, § 2, 1975–76 Wash. Laws 151 (to be codified as WASH. REV. CODE § 9A.20.020). For additional discussion of the trend toward "flat-time sentencing," see N.Y. Times, Oct. 12, 1976, at 17, col. 1.

On the federal level, a bill introduced in Congress by Senator Edward Kennedy and several consponsors is an attempt to amend title 18 to impose tighter sentencing guidelines for judges to follow, S. 181, 95th Cong., 1st Sess., §§ 3579, 3621, 3657, 123 CONG. REC. S373 (daily ed. Jan. 11, 1977), and to provide appellate review of sentencing, *id.* § 3742. The bill would establish a "United States Commission on Sentencing," *id.* § 3802, to "promulgate and distribute to all Federal courts suggested sentencing ranges for specific offenses," as well as "guidelines [to] be considered by the sentencing court in determining the appropriate sentence for a defendant and general policy statements [on] sentencing," *id.* § 3803.

Another federal bill, S. 1437, 95th Cong., 1st Sess., 123 CONG. REC. S6835 (daily ed. May 2, 1977), is a proposed general revision of title 18. Senator McClellan, its sponsor, and Senator Kennedy, his cosponsor, favor a specific delineation of the underlying policies of the criminal code and of sentencing in particular. *See id.* §§ 101(b), 2003(a)(2). In addition, the sentencing judge is required to consider specific guidelines, promulgated by a statutory sentencing commission, for sentences, and to state why he has chosen the sentence imposed. *Id.* § 2003(a)(3), (b).

[11] *See, e.g.*, A. VON HIRSCH, *supra* note 8, at 66–76; Dershowitz, *Let the Punishment Fit the Crime*, N.Y. Times, Dec. 28, 1975, § 6 (Magazine), at 7, 27.

[12] M. FRANKEL, CRIMINAL SENTENCES 69–85 (1972); A. VON HIRSCH, *supra* note 8, at 98–104; Dershowitz, *supra* note 11, at 27.

Judge Frankel suggests a variety of methods by which to limit the discretion of the sentencing judge, including (1) the use of sentencing councils composed by judges, M. FRANKEL, *supra* at 69–74, (2) mixed sentencing tribunals composed of judges, psychia-

Accordingly, the final sections will propose an alternative system of dispositions for New Jersey, premised on the view that the main goal of a criminal justice system should be the protection of society through just techniques.[13] In formulating this proposal certain additional concepts should be borne in mind. First, a distinction must be drawn between justifications for a system of criminal dispositions in general and justifications for dispositions meted out to specific offenders.[14] Utilitarian concerns such as deterrence of future offenses

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trists or psychologists, and sociologists or educators, *id.* at 74–75, and (3) appellate review of sentencing, *id.* at 75–85. Although he currently appears to favor the use of appellate review, *id.* at 85, Judge Frankel also recognizes a need for comprehensive "study and action by the Congress and the state legislatures to govern the field of sentencing," *id.* at 84–85.

Professor von Hirsch proposes that discretion be limited by the promulgation of " 'presumptive sentence[s]' " from which the sentencing judge could vary slightly, but only "if he finds aggravating or mitigating circumstances" arising from the characteristics of the offense. A. VON HIRSCH, *supra* at 99–101. Although von Hirsch does not decide what branch of government should set these "presumptive sentences," he appears to favor the judiciary, either through the formulation of standards by the trial court or through appellate review. *Id.* at 102–04.

Professor Dershowitz also favors the "presumptive sentence" approach, but he proposes that aggravating and mitigating factors be derived from the offender's background as well as from the characteristics of the offense, and also suggests that the "presumptive sentence" be set by the legislature. Dershowitz, *supra* at 27; *see* notes 226–28 *infra* and accompanying text; *cf.* Hoffman & DeGostin, *An Argument for Self-Imposed Explicit Judicial Sentencing Standards*, 3 J. CRIM. JUST. 195 (1975) (criticizing disparity in sentencing, but focusing upon channeling rather than eliminating discretion, and suggesting formulation of guidelines for judicial exercise of discretion by a group of "judicial peers" rather than by individual judges).

[13] *See* N. KITTRIE, THE RIGHT TO BE DIFFERENT 12 (1971) (relying upon Bergan, *The Sentencing Power in Criminal Cases*, 13 ALB. L. REV. 1 (1949)). Although the principal goal of the criminal justice system is to protect and maintain society, N. KITTRIE, *supra* at 12, the desire to achieve social order is not the sole consideration in fashioning such a system. Therefore a balance must be struck from which the law can "preserve not only the society but its ideals and values as well. And, in so doing, it must balance its desire for stability and order against its other values." A. VON HIRSCH, *supra* note 8, at xxviii. *See also* Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51, 84 (1972).

[14] Rawls, *Two Concepts of Rules*, 64 PHILOSOPHICAL REV. 3, 3 (1955). The distinction has been defined as a difference "between justifying a practice as a system of rules to be applied and enforced, and justifying a particular action which falls under these rules." *Id.* at 5. The "practice" or "system" is developed to "furthe[r] the interests of society," *id.* at 5–6, and thus, utilitarian rationales, such as deterrence and incapacitation, are appropriate to justify the "practice" or "system" in general, *id.* at 5. Rawls also makes a distinction between the retributive justification behind a judge's sentencing function and the utilitarian justification behind the legislature's function. *Id.* at 6; *accord*, Harris, *Disquisition on the Need for a New Model for Criminal Sanctioning Systems*, 77 W. VA. L. REV. 263, 286–87 (1975). Harris concludes that "[i]n *designing* a system of laws and sanctions for their violation, we should look forward to the future effects upon society. In *imposing* a particular sanction, however, we should look only backward, to the act committed." *Id.* at 287 (emphasis in original).

and incapacitation of dangerous offenders may be appropriate in defining offenses and in devising an overall system of sanctions, but they interfere with the determination of what disposition is just for a specific offender.[15] Similarly, while rehabilitation is a salutary goal in that it may enable society to help offenders conform to its rules in the future, its consideration in the disposition of an individual offender through PTI, sentencing, or parole is unjust and ineffective because of the difficulty in knowing whether that offender can be or has been rehabilitated.[16] Second, it it important to recognize that offenders are no longer regarded as potential " 'slave[s] of the State,' "[17] but are now held by courts to be subject only to the fewest deprivations necessary to further the legitimate interests of society.[18] It will be suggested that a just deserts system best satisfies these principles.

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[15] *See* Harris, *supra* note 14, at 286.

[16] *See id.* at 287; notes 117–26, 130–35 *infra* and accompanying text. It will be suggested that rehabilitative opportunities be made increasingly available to offenders, on a voluntary basis, but that rehabilitation not be considered in meting out individual sentencing or parole dispositions. *See* note 206 *infra* and accompanying text.

[17] Jackson v. Godwin, 400 F.2d 529, 532 (5th Cir. 1968) (quoting from Ruffin v. Commonwealth, 62 Va. (21 Gratt) 790, 796 (1871)). *Ruffin* is representative of early cases expressing the theory that offenders are "slaves of the State undergoing punishment for heinous crimes." 62 Va. (21 Gratt) at 796. A later Georgia case, Westbrook v. State, 133 Ga. 578, 585, 66 S.E. 788, 792 (1909), exemplified the more modern view, however, when it stated that "[t]he convict occupies a different attitude from the slave toward society. He . . . has all the rights of an ordinary citizen which are not expressly or by necessary implication taken from him by law."

[18] *E.g.*, Wolff v. McDonnell, 418 U.S. 539, 555 (1974) ("though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime"); Moore v. Ciccone, 459 F.2d 574, 576 (8th Cir. 1972) ("constitutional rights need be denied prisoners only to the extent 'justified by the considerations underlying our penal system' " (quoting from Price v. Johnston, 334 U.S. 266, 285 (1948))).

The following cases have expressly recognized rights which are retained by prisoners: Wolff v. McDonnell, 418 U.S. at 553, 555–72 (prisoners entitled to some due process protections in a disciplinary proceeding involving revocation of good-time credits); Procunier v. Martinez, 416 U.S. 396, 412–21 (1974) (personal correspondence of prisoners may be censored, but censorship subject to certain conditions and procedural protections to avoid impinging on first amendment rights; absolute ban on access to paralegals invalid); Johnson v. Avery, 393 U.S. 483, 490 (1969) (right to legal services in postconviction habeas corpus proceeding includes the right to use "jailhouse lawyers" if the state does not provide "some reasonable alternative" for legal assistance); Baxstrom v. Herold, 383 U.S. 107, 110 (1966) (equal protection requires that a prisoner being committed to a mental institution at the end of his sentence be afforded the same "jury review" or "judicial determination" available to others so committed); *Ex parte* Hull, 312 U.S. 546, 549 (1941) (a prisoner's right to federal habeas corpus relief cannot be "abridge[d] or impair[ed]" by the state); Nolan v. Fitzpatrick, 451 F.2d 545, 547 (1st Cir. 1971) (prisoners have the right under the first amendment to correspond with the news media regarding prison matters); Sostre v. McGinnis, 442 F.2d 178, 202–03 (2d Cir. 1971) (en banc) (prisoner cannot be punished for written expressions of his beliefs

RECENT DEVELOPMENTS

Although it is the function of the legislature to establish policies for the disposition of offenders,[19] legislatures—including New Jersey's—have generally "abdicated" this responsibility.[20] As a result, individual judges have been invited to devise their own criteria for dealing with offenders, achieving the goal of protecting society by fashioning sentences to suit individual cases.[21] In molding their sen-

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although the writings may be confiscated to maintain security), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972); Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (use of a strap for punishment held a violation of eighth amendment's prohibition against cruel and unusual punishments); Long v. Parker, 390 F.2d 816, 821–22 (3d Cir. 1968) (prison officials must establish "a clear and present danger" in order to prevent Black Muslims from receiving religious literature); Gilmore v. Lynch, 319 F. Supp. 105, 110–12 (N.D. Cal. 1970) (prisoners have a right of access to legal materials, which right cannot be unduly restricted by the state), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971). *See generally* N. MORRIS, THE FUTURE OF IMPRISONMENT 21 (1974); *see also* Note, *Prison Mail Censorship and the First Amendment*, 81 YALE L.J. 87 (1971).

For a discussion of the standards on prisoners' rights recently proposed by a federal advisory commission, see NATIONAL ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, CORRECTIONS 17–72 (1973) [hereinafter cited as CORRECTIONS].

[19] Gore v. United States, 357 U.S. 386, 393 (1958) (determinations regarding the "severity," "efficacy" and "apportionment" of punishments "are peculiarly questions of legislative policy"); M. FRANKEL, *supra* note 12, at 107 ("judgments affecting consequences so grave as the length and character of sentences" and "the legitimate bases for" them "should . . . be matters of law"); *cf.* Baker & Reeves, *The Paper Label Sentences: Critique*, 86 YALE L.J. 619, 619 (1977) ("first step in determining an appropriate criminal sentence is to identify the purposes to be served").

[20] M. FRANKEL, *supra* note 12, at 104–06; *accord*, State v. Ivan, 33 N.J. 197, 200, 162 A.2d 851, 852–53 (1960); Harris, *supra* note 14, at 264–65. In *Ivan*, the New Jersey supreme court found that "[o]ur Legislature has not stated the aims to be achieved by punishment." 33 N.J. at 200, 162 A.2d at 853. Harris states that, in general, legislatures have failed to fulfill their responsibility in three ways: (1) by "provid[ing] little guidance in terms of what the sentencing courts are expected to accomplish through" an individual criminal disposition; (2) by enacting "[p]enal codes [which] are silent or vague as to the criteria to be used in determing [*sic*] specific sentences"; and (3) by "authorizing various sentencing alternatives," resulting in chaos. Harris, *supra* at 264–65. For a discussion of how the Model Penal Code also fails to provide priorities or guidelines, see note 59 *infra* and accompanying text.

[21] *See* M. FRANKEL, *supra* note 12, at 5–11; A. VON HIRSCH, *supra* note 8, at 28–29; Harris, *supra* note 14, at 264–72. A total lack of consistency in the dispositions of individual offenders results from several factors. M. FRANKEL, *supra* at 7. One cause is the lack of sentencing guidelines. *Id.* 5–6. In addition, the judicial approach to sentencing often endorses tailoring the punishment to the offender's characteristics and situation as well as to his crime. *See* Williams v. New York, 337 U.S. 241, 247–48 (1949); Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937); State v. Ivan, 33 N.J. 197, 200, 162 A.2d 851, 852 (1960); State v. White, 27 N.J. 158, 184, 142 A.2d 65, 79 (1958). And further contributing to this disparity is the fact that "[t]he judge's sentencing decision is not bound by any of the constraints which ordinarily govern his judicial work," since he need not justify the imposition of a given sentence, and thus generally does not do so. A. VON HIRSCH, *supra* at 28.

tences, judges in New Jersey reach a "composite judgment,"[22] utilizing and reconciling the conflicting and often overlapping[23] justifications of rehabilitation of the offender, deterrence of future crime by that offender and others, incapacitation of offenders dangerous to the community, and denunciation or punishment of persons who have violated society's rules.[24] Two recent developments evidence New Jersey's continuing emphasis on individualized dispositions.

Pretrial Intervention/State v. Leonardis

Pretrial intervention programs were introduced in New Jersey in 1970 through the adoption of New Jersey Rule 3:28 by the New Jersey supreme court.[25] PTI programs allow the pretrial referral of defendants to community-based rehabilitative programs providing counseling, training, and job placement. A defendant may remain in a PTI program for a period not to exceed six months,[26] and if he successfully completes the program, criminal charges against him are dismissed.[27] In 1976, the New Jersey supreme court in *State v. Leonardis* strongly suggested that PTI programs be established in all New Jersey counties, the court finding that such programs had achieved success by lowering the rate of recidivism and by fostering skills leading to employment.[28]

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[22] State v. Ivan, 33 N.J. 197, 201, 162 A.2d 851, 853 (1960).

[23] It will become evident to the reader that rehabilitation and incapacitation are similar in that both seek to prevent future crimes by specific offenders, although by different methods. Incapacitation and punishment often appear to justify identical dispositions, but for different reasons.

[24] State v. Dunbar, 69 N.J. 333, 339, 354 A.2d 281, 284 (1976) (Pashman, J., dissenting) ("punishment [must] perform one or more of the [recognized] functions: retribution, rehabilitation, deterrence and protection of society"); State v. Ivan, 33 N.J. 197, 199–201, 162 A.2d 851, 852–53 (1960) ("sentencing judge must deal with . . . complex of purposes, determining in each situation how the public interest will best be served").

For more detailed discussions of the four rationales for punishment, see notes 74–136 *infra* and accompanying text (rehabilitation); notes 137–56 *infra* and accompanying text (incapacitation); notes 157–71 *infra* and accompanying text (deterrence); notes 172–213 *infra* and accompanying text (punishment).

[25] *See* N.J.R. 3:28 note.

[26] *Id.* 3:28(b), (c)(2). The initial time period allocated for program participation is three months. *Id.* 3:28(b). This period may be extended an additional three months "[o]n recommendation of the program director and with the consent of the prosecuting attorney and the defendant." *Id.* 3:28(c)(2). If the charge involves controlled dangerous substances, additional postponements up to one year may be granted by the judge. *Id.* 3:28(d).

[27] *Id.* 3:28(c)(1). Dismissal of the complaint requires "recommendation of the program director and . . . consent of the prosecuting attorney and the defendant." *Id.*

[28] 71 N.J. at 94, 363 A.2d at 326. The *Leonardis* court briefly described some of the available county PTI programs. *Id.* at 106, 363 A.2d at 332. These include broad-based programs which admit individuals "charged with almost any criminal offense," others

The main issue decided by the *Leonardis* court was that PTI programs could not presumptively exclude individuals charged with certain offenses.[29] The court reasoned that the rationale underlying PTI is rehabilitative[30] and that consequently, "[g]reater emphasis should be placed on the offender than on the offense."[31] Although no one could automatically be excluded from PTI, the court said that eligibility "criteria must be sufficiently discriminatory to assure selection of those applicants who have the best prospects for rehabilitation."[32]

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dealing with defendants having drug-related problems, and some which treat "cases [arising] from a pattern of alcoholism." *Id.* In describing these different programs the court stated that "there is considerable room for variation in the development and implementation of county programs." *Id.*

[29] *Id.* at 113, 121, 363 A.2d at 336, 340. The court opined that conditioning admission solely on the nature of the offense charged might be discriminatory, although it "defer[red] such considerations until another day, and decline[d] to determine this cause on constitutional grounds." *Id.* at 113, 363 A.2d at 336.

The offenses charged in *Leonardis* and in its companion case in the supreme court were possession of marijuana and hashish, posession with intent to distribute hashish, and conspiracy to possess and distribute marijuana. *Id.* at 90, 92, 363 A.2d at 323, 324. This article will not consider whether it is appropriate to classify such offenses with the "[h]einous [o]ffenses" which are generally excluded from PTI programs: "Atrocious Assault and Battery where the victim is seriously injured; Homicide; Mayhem, Forceable Rape; Assault and Battery on a Police Officer involving injury; Armed Robbery where the victim is injured; Sale of a Controlled Dangerous Substance." 71 N.J. at 90–91 & n.3, 363 A.2d at 324 (quoting from Bergen County Probation Dep't, Bergen County Pre-Trial Intervention Project, Exclusion Criteria A1 (available from Bergen County Probation Dep't, Hackensack, N.J.)).

A second issue in *Leonardis* was what due process standards had to be met before an offender could be denied admission to a PTI program. *See* 71 N.J. at 113–14, 363 A.2d at 336. The court decided this issue by limiting "the virtually untrammeled discretion" that prosecutors had exercised with regard to admissions. *Id.* at 121, 363 A.2d at 340. The court required prosecutors to set forth reasons for refusing to consent to an offender's admission. *Id.* at 119, 122, 363 A.2d at 339, 340–41.

Further due process protections are afforded defendants by the review procedures formally established in the court's PTI Guidelines. If an offender moves to challenge a denial of admission, a designated judge is to decide the motion, after a hearing, upon a standard of "arbitrary or capricious action." Order Implementing Guidelines for Operation of Pretrial Intervention in New Jersey, 99 N.J.L.J. 865, 875 Guideline 8 (Sept. 8, 1976).

[30] 71 N.J. at 98, 363 A.2d at 328. The *Leonardis* court recognized, however, that the goals of pretrial diversion programs such as PTI are " 'two-fold.' " *Id.* at 96, 363 A.2d at 326–27 (quoting from Note, *Addict Diversion: An Alternative Approach for the Criminal Justice System*, 60 GEO. L.J. 667, 673 (1972)). The court identified these two goals as "rehabilitation" and "expeditious disposition" of criminal charges, 71 N.J. at 96, 363 A.2d at 327, but held that "expeditious disposition is . . . subordinate to the rehabilitative function of PTI," *id.* at 98, 363 A.2d at 328.

For a discussion of the rationale behind PTI programs involving addicts, see Note, *supra* at 669–73.

[31] 71 N.J. at 102, 363 A.2d at 330; *see id.*, at 112, 363 A.2d at 335.

[32] *Id.* at 100, 363 A.2d at 329.

To implement its holding, the court outlined standards[33] which were subsequently issued in the form of more detailed guidelines for participation in PTI.[34] Under the guidelines, offenders "accused of *any* crime [are] eligible for admission to [PTI] program[s]," with consideration to be given to "amenability to correction, responsiveness to rehabilitation and nature of the offense."[35] Even second or subsequent offenders are eligible.[36] The guidelines make clear, however, that the program is not intended for persons charged with minor offenses which are "likely" to "result in a suspended sentence without probation or a fine."[37] In addition, applications from persons charged with taking part in "organized criminal activity . . . or . . . [in] a continuing criminal . . . enterprise," with deliberately threatening or committing violence toward another person, or with "a breach of the public trust . . . should generally be rejected," but each applicant must be considered individually for rehabilitative potential.[38]

In stressing the rehabilitative function in criminal dispositions, New Jersey's PTI programs and the *Leonardis* court fail to give sufficient weight to other relevant sentencing considerations. For instance, as a result of *Leonardis*, some persons charged with serious offenses are likely to be enrolled in PTI programs and their charges dismissed after participation in a brief program, if they are certified as having been rehabilitated. But unless rehabilitative efforts succeed, and unless rehabilitation can be accurately predicted, the generous use of PTI may disadvantage society significantly by returning to the

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[33] *Id.* at 121–22, 363 A.2d at 340–41.

[34] Order Implementing Guidelines for Operation of Pretrial Intervention in New Jersey, 99 N.J.L.J. 865 (Sept. 8, 1976). The Guidelines will be cited throughout this article as PTI Guidelines § X.

[35] 71 N.J. at 121–22, 363 A.2d at 340 (emphasis in original); *see* PTI Guidelines § 3(i) Comment.

[36] PTI Guidelines § 3(e). This Guideline states that "[t]he pretrial intervention program is not limited to 'first offenders.' Defendants, however, whose criminal history includes a conviction or convictions of a serious nature should ordinarily be excluded," *id.*, if this "prior criminal record may be indicative of a behavioral pattern not conducive to short term rehabilitation," *id.* Comment.

[37] *Id.* § 3(d).

[38] *Id.* § 3(i). The "breach of the public trust" exception is applied in cases "where admission to a PTI program would deprecate the seriousness of defendant's crime." *Id.* For all crimes in these categories, "[h]owever, . . . the applicant shall have the opportunity to present . . . any facts or materials demonstrating his amenability to the rehabilitative process, showing compelling reasons justifying his admission." *Id.* In this fashion, the supreme court has recognized the conflict between society's need to limit participation in the program to defendants for whom it may be effective, and the fact that most defendants desire to avoid the stigma of a conviction and the resulting disabilities.

community offenders who might have been incarcerated if the justification for the disposition were one other than rehabilitation.

Another problem with PTI is that it ignores the value to the criminal justice system of having an initial conviction on an offender. For example, if a conviction is a matter of record, a defendant's credibility can be impeached at a trial for a subsequent offense,[39] thereby increasing the likelihood of conviction. Furthermore, upon a second conviction an offender shown to be a recidivist is more likely to be incapacitated through incarceration than is one who appears to be a first offender,[40] and is likely to be incarcerated for a longer period of time.[41] By expanding the use of pretrial intervention, however, the *Leonardis* court is in effect compelling sentencing courts to treat a greater number of second offenders as first offenders.[42]

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[39] N.J.R. EVID. 47.

[40] THE TASK FORCE ON THE ADMINISTRATION OF JUSTICE, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 14 (U.S. Gov't Printing Office 1967) [hereinafter cited as TASK FORCE REPORT] ("a majority of States require heavier punishment for repeated offenders"); A. VON HIRSCH, *supra* note 8, at 84–88 ("[i]n the American criminal justice system . . . [t]he first offender can expect more lenient treatment than the repeater"); *cf.* M.P.C. § 2C:44–1(b)(7) (one of the factors to "be accorded weight in favor of withholding sentence of imprisonment" is that the offender "has no history of prior delinquency or criminal activity").

Research of factors influencing probation and sentencing decisions indicates that a prior conviction is one of the most important factors considered by probation officers and sentencing judges. Carter, *The Presentence Report and the Decision-Making Process*, in PROBATION AND PAROLE 128, 132–35 (R. Carter & L. Wilkins eds. 1970); Carter & Wilkins, *Some Factors in Sentencing Policy*, in PROBATION AND PAROLE, *supra* at 149. Probation officers ranked prior record as the most important factor influencing their recommendations concerning 500 federal offenders in the Northern District of California from September 1964 to August 1965, while the district court judges surveyed ranked prior record as the third most important factor influencing their sentencing dispositions for the same 500 offenders. *Id.*

[41] NEW JERSEY CORRECTIONAL MASTER PLAN POLICY COUNCIL, NEW JERSEY CORRECTIONAL MASTER PLAN DATA: LENGTH OF STAY OF STATE INSTITUTION OFFENDERS FISCAL 1970–1975, at 24–37 (Supp. II 1976) [hereinafter cited as MASTER PLAN DATA].

[42] This result occurs because if the offender successfully completes the PTI program, all charges against him are dismissed, N.J.R. 3:28(c)(1), and therefore there would be no conviction on the individual's record.

It should be noted, however, that a sentencing judge would most likely know that a second offender without prior convictions had previously been enrolled in a PTI program. PTI Guidelines § 3(g) states that "[d]efendants who had previously been enrolled in a program of pretrial intervention . . . should not ordinarily be re-enrolled." (Citations omitted.) Therefore, if the second offender chooses to apply again for PTI, the judge would probably be informed, by either the program officials or the prosecutor, of the offender's prior participation. It is also possible that the fact of prior participation in a PTI program would be included in a presentence report. In these instances, the sentencing judge would know that the defendant had at least been charged with an offense, even though his record showed no previous convictions. The evident failure of the pre-

The *Leonardis* court suggested that the desire to avoid the stigma of conviction is an incentive for an offender to enroll, participate and succeed in a PTI program.[43] *Leonardis* did not consider, however, that one purpose of the criminal law, as opposed to the civil law, is to place "the moral condemnation of the community" upon an offender.[44] Permitting an offender to avoid even the stigma of a conviction erodes the deterrent value of the criminal law. More fundamentally, the criminal law also "defines the minimum conditions of man's responsibility to his fellows and holds him to that responsibility."[45] By allowing an offender to escape criminal responsibility, *Leonardis* undermines society's efforts to stimulate each of its members—the law-breaker and the law-obeyer alike—to be responsible for the consequences of his conduct.[46]

The court's emphasis upon the offender rather than upon the offense is consistent with its reliance upon rehabilitation as the preeminent objective of criminal dispositions. It will be shown, however, that at the present time society can have no confidence in its ability to rehabilitate offenders or to predict which, if any, offenders have been rehabilitated.[47] Furthermore, even if rehabilitation were to occur and to be predicted accurately, pretrial intervention as an alternative to formal criminal dispositions would still undermine the purposes of the criminal law and decrease its deterrent value.

MODEL PENAL CODE

The sentencing provisions of the proposed New Jersey Model Penal Code[48] may be viewed as an extension of the dispositional pro-

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vious PTI participation to rehabilitate the individual might convince the judge that "[t]here is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime." M.P.C. § 2C:44-1(a)(1).

[43] 71 N.J. at 99–100, 363 A.2d at 328–29. In discussing "the stigma of conviction," *id.* at 99, 363 A.2d at 328, the court failed to note and evaluate recently enacted legislation removing many of the barriers to employment of ex-offenders in state government and licensed professions, *see id.* at 99–100, 363 A.2d at 328–29. These new statutes prohibit discrimination in state employment and in granting professional licenses on the basis of a criminal conviction, unless the conviction relates directly to the occupation or licensed profession involved or unless N.J. STAT. ANN. § 2A:93-5 (West 1969) (disqualifying "forever" from public employment various public officials convicted of crimes involving bribery or solicitation of votes) is applicable. *Id.* §§ 11:10–6.1, :17–1 (West 1976) (state employment); *id.* § 2A:168A-1 to -6 (Cum. Supp. 1976-1977) (licensing). Under sections 11:10–6.1 and 2A:168A-2, permissible discriminations against criminals must be justified in writing.

[44] Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 405 (1958).

[45] *Id.* at 410.

[46] *See id.*

[47] *See* notes 75–98, 117–27 *infra* and accompanying text.

[48] M.P.C. §§ 2C:43-1–:46-3.

cess begun with pretrial intervention.[49] Although the Code, at least at first glance, recognizes several justifications other than rehabilitation which a judge should consider before meting out a disposition via a sentence,[50] analysis reveals that the dispositional justification of rehabilitation takes precedence over those of punishment, incapacitation and deterrence.

An examination of the Code's sentencing provisions discloses an apparent attempt to fit sentences to the offenses committed, rather than to the characteristics of the offender, thereby utilizing the justification of punishment. It requires that offenders receive a determinate number of years of incarceration based upon the degree of severity of the crime committed.[51] For example, the sentence for a first-degree crime[52] would be fixed at a number of years between eight and

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[49] *Compare* PTI Guidelines § 1(a) (purposes of PTI include providing "early rehabilitative services") *with* M.P.C. § 2C:1-2(b)(2) (purposes of sentencing provisions include rehabilitation of offenders); *compare* PTI Guidelines § 1(e) (purposes of PTI include deterrence of "future criminal" activities) *with* M.P.C. § 2C:1-2(b)(3) (purposes of sentencing provisions include deterrence); *compare* PTI Guidelines § 3(e) (defendants with prior "convictions of a serious nature" usually barred from participation in PTI program) *with* M.P.C. § 2C:44-1(b)(7) (one factor to be considered "in favor of withholding sentence of imprisonment" is a lack of prior criminal activity); *compare* PTI Guidelines § 3(i)(1) (if offense is "part of organized criminal activity," the defendant ordinarily excluded from PTI program) *with* M.P.C. § 2C:44-1(a)(4) (court shall not order imprisonment unless it feels a prison sentence is necessary for the public safety because, among other possibilities, "[t]he offense is characteristic of organized criminal activity"); *compare* PTI Guidelines § 3(i)(4) (defendant ordinarily excluded from PTI program if offense was "a breach of the public trust [and] admission to a PTI program would deprecate the seriousness of defendant's crime") *with* M.P.C. § 2C:44-1(a)(3) (court shall not order imprisonment unless it feels a prison sentence is necessary for the public safety because "[a] lesser sentence will depreciate the seriousness of the defendant's crime [involving] a breach of the public trust").

It should be noted that a more informal type of disposition occurs at an even earlier stage than PTI when police officers and prosecutors make a decision whether or not to charge alleged offenders in the first instance. Such decisions are not examined in this article. For a discussion of police dispositions, see Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

[50] *See* M.P.C. § 2C:1-2(b). The purposes mentioned for sentencing offenders are prevention of crime, rehabilitation of offenders, protection of society through the deterrent effect of prison sentences, assurance of appropriate and non-arbitrary punishments, differentiation among treatment of offenders, and "advance[ment] . . . of scientific methods and knowledge in sentencing offenders." *Id.* These purposes are defined as "general" and no ranking order is established. *Id. See also* O'Leary, Gottfredson & Gelman, *Contemporary Sentencing Proposals*, 11 CRIM. L. BULL. 555, 561 (1975) [hereinafter cited as O'Leary].

[51] M.P.C. § 2C:43-6. For purposes of sentencing, four degrees of crimes are defined. *Id.* § 2C:43-1. To determine the degree of any particular crime, it is necessary to refer to the section of the Code specifically dealing with that crime. *E.g.*, *id.* §§ 2C:11-3(b), -4(b), -5(b) (defining three degrees of criminal homicide).

[52] Examples of crimes of the first degree are murder, *id.* § 2C:11-3(b), and aggravated rape, *id.* § 2C:14-1(a).

twenty,[53] and for a second-degree crime,[54] between five and eight.[55]

The Code also appears to advance the goals of incapacitating dangerous offenders and deterring other potential offenders. There is a presumption of imprisonment for certain first-degree and second-degree crimes,[56] and extended prison terms may be imposed upon persistent offenders, offenders who are part of an ongoing criminal enterprise, and criminals for hire.[57] In addition, a court may require that a defendant convicted of a first-degree or second-degree crime serve a mandatory minimum term of up to one-half his sentence before being eligible for parole.[58]

Unfortunately, however, priorities are not explicitly established among the sentencing justifications underlying the Code nor are guidelines set forth to assist judges in reconciling conflicting goals in particular cases.[59] Consequently, it would be impossible to ensure that similarly situated offenders were treated similarly. Without an

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[53] *Id.* § 2C:43-6(a)(1) (as originally introduced, maximum sentence was 15 years). An exception to the usual first-degree sentencing range is made, however, for first-degree murder which may carry either a maximum sentence of 30 years or a sentence of 30 years with a minimum requirement of 15 years served before the offender is eligible for parole. *Id.* § 2C:11-3(b). In addition, all first-, second-, or third-degree offenders may be subject to extended sentences if certain criteria are present. *Id.* §§ 2C:43-7, :44-3. See note 57 *infra* and accompanying text for a discussion of extended terms.

[54] Examples of second-degree crimes are manslaughter, M.P.C. § 2C:11-4(b), and extortion, *id.* § 2C:20-2(b)(1).

[55] *Id.* § 2C:43-6(a)(2). Third-degree crimes, such as one form of statutory rape, *id.* § 2C:14-3(b), and theft over $500, *id.* § 2C:20-2(b)(2), may receive a sentence between three and five years, *id.* § 2C:43-6(a)(3). Perpetrators of fourth-degree crimes such as interference with custody, *id.* § 2C:13-4(a)(2), and possession of a switchblade knife, *id.* § 2C:39-3(e), are subject to a sentence of up to 18 months, *id.* § 2C:43-6(a)(4).

[56] *Id.* § 2C:44-1(d). The court is required to imprison an offender for a first- or second-degree offense whenever the "statute defining [the] offense . . . provides that a presumption of imprisonment shall be applied . . . or where a statute . . . provides for a mandatory sentence." *Id.* An exception to this presumption, however, provides that a prison sentence will not be imposed if "having regard to the character and condition of the defendant, [the court] is of the opinion that his imprisonment would be a serious injustice which overrides the need to deter such conduct by others." *Id.*

[57] *Id.* § 2C:44-3. Protracted terms could only be given to first-, second- or third-degree offenders. *Id.* The lengths of the "extended term" are as follows: for first-degree murder, between 30 and 50 years, *id.* § 2C:43-7(a)(1), for other first-degree crimes, between 15 and 30 years, *id.* § 2C:43-7(a)(2), for second-degree crimes, between 8 and 15 years, *id.* § 2C:43-7(a)(3), and for third-degree crimes, between 5 and 8 years, *id.* § 2C:43-7(a)(4).

[58] *Id.* § 2C:43-6(b).

[59] *See id.* §§ 2C:44-1 to -3. These sections of the Code list various factors to be considered by a judge in determining what sentence to impose on a defendant. *Id.* Although the specific theory of justification requiring consideration of each factor may be inferred, there is nothing which indicates which justification is entitled to the greatest weight for any disposition. *See* O'Leary, *supra* note 50, at 561.

overriding rationale, judges would be able to sentence offenders within a wide dispositional range for any particular offense. This fact is illustrated by a number of provisions. Instead of incarcerating an offender, a court may impose up to five years of probation.[60] Moreover, rather than tying a presumption of imprisonment to any specific offenses, the Code requires that offenders be disposed of "without imposing [a] sentence of imprisonment, unless"[61] certain conditions are found to exist.[62] Even if the presence of one of the conditions were to neutralize the presumption of nonimprisonment, a court could not impose a custodial sentence without considering certain subjective facts regarding the defendant.[63] There is also a section permitting referral of any offender to a term "of supervisory treatment."[64] Thus, the Code in fact forces judges to focus upon the offender instead of upon the offense, thereby promoting a rehabilitative approach.

In giving rehabilitation precedence over the other justifications for criminal dispositions, the Model Penal Code belies the claim of

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[60] M.P.C. § 2C:45–2(a). No term of probation could exceed the maximum term of incarceration which could have been imposed for the crime. *Id.* In placing a defendant on probation, a court may, as part of its order, require that he serve 90 days in prison. *Id.* § 2C:45–1(c).

[61] *Id.* § 2C:44–1(a). Under *id.* § 2C:44–1(d) certain offenses are excluded from this presumption of nonimprisonment. *See* notes 56–57 *supra* and accompanying text.

[62] M.P.C. § 2C:44–1(a). Thus, imprisonment is warranted in cases where it "is necessary for protection of the public because . . . [t]here is undue risk that [the offender] will commit another crime"; the offender needs in-patient "correctional treatment"; "a lesser sentence [would] depreciate the seriousness of the . . . crime"; or "[t]he offense is characteristic of organized criminal activity." *Id.* It is significant to note that these factors intermingle the goals of incapacitation, rehabilitation and punishment.

[63] *Id.* § 2C:44–1(b). The judge must consider the offender's prior criminal record, whether the offender is likely to commit another offense, how well he would respond to probation, and whether incarceration "would entail excessive hardship." *Id.* § 2C:44–1(b)(7), (9)–(11).

[64] *Id.* § 2C:43–12(a). The term of such treatment may not exceed one year, except that in the case of a violent crime the limit is three years. *Id.* § 2C:43–13(d).

If a crime of violence is charged, a defendant requesting referral must enter a guilty plea. *Id.* § 2C:43–12(b). In addition, supervisory treatment will be available only for a first offense. *Id.* The defendant must be recommended for referral by "the trial court administrator, the chief probation officer or the program director," *id.* § 2C:43–12(a)(2), unless the request for referral is made by the prosecutor, *id.* § 2C:43–12(a)(1), rather than by the defendant. In any case, however, referral is at the discretion of the judge. *Id.* § 2C:43–12(a) ("judge . . . *may* postpone all further proceedings against a defendant" (emphasis added)).

This proposed statutory pretrial intervention scheme differs from the court-created system which is currently in operation under N.J.R. 3:28. (Current New Jersey PTI practices are discussed at notes 25–47 *supra* and accompanying text.) Under the supreme court's Guideline 4, "neither informal admission nor entry of a plea of guilt" is required for a defendant to be eligible for a PTI program. PTI Guidelines § 4.

many of its proponents that it reduces judicial discretion. For example, an individual convicted of first-degree kidnapping[65] could be placed on probation,[66] incarcerated for a basic term of eight, fifteen or twenty years,[67] made ineligible for parole for one-half of the basic term,[68] or incarcerated for an extended term of from fifteen to thirty years[69] if he had twice previously been sentenced as an adult to a custodial term for a crime involving serious personal harm, one of these convictions having been within five years of the kidnapping.[70] The standards purporting to restrict these dispositional choices, particularly as to probation versus incarceration, are so subjective and ambiguous as to constitute no standards at all. The hypothetical kidnapper is not to be incarcerated unless "there is undue risk . . . [he would] commit another crime," or he needs inpatient "correctional treatment," or "a lesser sentence [would] depreciate the seriousness of [his] crime," or his offense is characteristic of organized criminal activity.[71] Should the court find one or more of these conditions present, it would still have to consider, *inter alia*, the offender's prior criminal record, whether he was likely to commit another offense, how well he would respond to probation, and whether incarceration "would entail excessive hardship."[72]

The validity of the approach taken by the Model Penal Code, like that taken by the New Jersey supreme court in promulgating PTI guidelines in *Leonardis*, is therefore dependent upon the efficacy of rehabilitative efforts. Yet discovering fit subjects for rehabilitation requires judges to perform the difficult task of balancing competing justifications for criminal dispositions in individual cases. It will be shown that judges have proved unable to perform the task of balancing consistently or with rehabilitative success.

TRADITIONAL JUSTIFICATIONS OF CRIMINAL DISPOSITIONS

THE REHABILITATIVE IDEAL: REFORMATION OF OFFENDERS

Rehabilitation is based upon the belief that psychological disorders and environmental defects cause persons to commit offenses. By identifying the causes of an individual's offense, society could provide

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[65] M.P.C. § 2C:13-1(c). Under the Code, kidnapping is a first-degree crime when the victim is not released safely before the kidnapper is apprehended. *Id.*

[66] *See id.* § 2C:44-1.

[67] *Id.* § 2C:43-6(a)(1).

[68] *Id.* § 2C:43-6(b).

[69] *Id.* § 2C:43-7(a)(2).

[70] *Id.* § 2C:44-3(a).

[71] *Id.* § 2C:44-1(a).

[72] *Id.* § 2C:44-1(b)(7), (9)-(11).

him with sufficient psychotherapy, reeducation and new skills to become a "reformed" and useful citizen.[73] The rehabilitative ideal came into prominence at the beginning of the twentieth century because lengthy incarceration based upon the goal of punishment had failed to protect society.[74]

Unfortunately, recent studies show that rehabilitation has also failed to achieve this goal of protecting society. In New Jersey, for example, a recent report indicates that an average of 36.5% of persons released on parole each year from 1969 through 1974 was subsequently returned to prison.[75] During fiscal years 1970 through 1975 an average of 47% of persons newly commited to state prisons had served at least one prior term in a state prison.[76] In fiscal year 1973, the state's parole population of 7,620 was the source of almost 7,000 arrests for indictable, disorderly persons and juvenile offenses.[77] A comprehensive study prepared for the Committee for the Study of Incarceration has reviewed the results of various types of rehabilitative programs in large and small institutions and in the community.

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[73] N. KITTRIE, *supra* note 13, at 30.

[74] *See id.* at 24, 30–31. *See generally* Dershowitz, *supra* note 9, at 93–95. For a discussion of the historic philosophical and psychological theories which led to the rehabilitative rationale, see N. KITTRIE, *supra* note 13, at 20–32.

Rehabilitation has never been the goal of criminal dispositions for every offender. For example, section 3(i) of the PTI Guidelines would ordinarily exclude from eligibility for pretrial intervention participants in organized crime and persons who breached a public trust. The Model Penal Code suspends its presumption of nonimprisonment for similar offenders. M.P.C. § 2C:44–1(a). Although many offenders need "social, psychological, environmental and physiological" assistance, "character and behavior retaining programs are irrelevant to many prisoners." N. MORRIS, *supra* note 18, at 20. Such programs will have no effect on an offender whose crime results from a rational decision to commit a criminal act rather than from some treatable disorder. *Id.* at 20–21.

Nevertheless, rehabilitation has occupied a prominent place in American sentencing justifications. In Williams v. New York, 337 U.S. 241, 247 (1949), the United States Supreme Court approved the use by a sentencing judge of information on a defendant's background and character. The *Williams* Court stressed the significance of "[r]eformation and rehabilitation" as "goals of criminal jurisprudence." *Id.* at 248.

[75] OFFICE OF FISCAL AFFAIRS, NEW JERSEY STATE LEGISLATURE, PROGRAM ANALYSIS OF THE NEW JERSEY PAROLE SYSTEM 82 (1975) [hereinafter cited as PROGRAM ANALYSIS]. For the three years from 1969 through 1971, approximately 24% of all persons paroled nationwide were returned to prison. *Id.* at 83.

[76] NEW JERSEY CORRECTIONAL MASTER PLAN POLICY COUNCIL, NEW JERSEY CORRECTIONAL MASTER PLAN 74–75 (1977) [hereinafter cited as CORRECTIONAL MASTER PLAN]. The difference between this percentage and the statistic cited at text accompanying footnote 75 is partly accounted for by the fact that the former probably includes some prisoners who were released at the end of their sentences, rather than on parole at an earlier time.

[77] *See* PROGRAM ANALYSIS, *supra* note 75, at 74, 81. The total number of parolee arrests for that year was 7,867, which included arrests for several additional categories of offenses. *Id.* at 81.

The results show that although isolated programs produced some rehabilitated offenders, in few programs did enrolled offenders have rates of recidivism consistently lower than comparable unenrolled offenders.[78] One commentator has speculated that the advancing age of offenders while incarcerated, rather than the rehabilitative programs, might itself be responsible for even this minimal reduction in recidivism.[79] A compilation of 231 studies which was prepared from 1966 to 1970 by the New York Governor's Special Committee on Criminal Offenders reached the same conclusions: "[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism."[80]

Contrary to conclusions reached by the *Leonardis* court, even studies relied upon in that opinion[81] indicate that it is impossible to conclude that existing pretrial intervention programs have reduced recidivism.[82] The risk of recidivism permitted by the programs relied upon in *Leonardis* is less than that presented by New Jersey's PTI programs, because participation in the former was limited to unemployed defendants without significant records or prior incarceration, "and exclud[ed] crimes of violence, majority property crimes and ad-

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[78] Greenburg, *The Correctional Effects of Corrections: A Survey of Evaluations*, in CORRECTIONS & PUNISHMENT 140–41 (to be published Sept. 1977); *see* A. VON HIRSCH, *supra* note 8, at 14–18; Greenburg, *supra* at 111–40.

[79] *See* A. VON HIRSCH, *supra* note 8, at 13. It has been observed that the older a person is when released from prison, the greater is the likelihood that he will avoid being arrested and incarcerated again. D. STANLEY, PRISONERS AMONG US 51 (1976); *see* L. WILKINS, EVALUATION OF PENAL MEASURES 55–56 (1969).

[80] Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22, 23–25 (1974) (emphasis deleted).

[81] 71 N.J. at 94–95, 363 A.2d at 326. The court utilized the following sources: NATIONAL COMM'N FOR CHILDREN & YOUTH, FINAL REPORT: PROJECT CROSSROADS—PHASE 1 (1970) [hereinafter cited as PROJECT CROSSROADS]; NATIONAL PRETRIAL INTERVENTION SERV. CENTER, DESCRIPTIVE PROFILES ON SELECTED PRETRIAL CRIMINAL JUSTICE INTERVENTION PROGRAMS (1974); VERA INST. OF JUST., THE MANHATTAN COURT EMPLOYMENT PROJECT: FINAL REPORT (1972) [hereinafter cited as VERA INST.]; Comment, *Pretrial Diversion: The Threat of Expanding Social Control*, 10 HARV. C.R.-C.L. L. REV. 180 (1975); Note, *Pretrial Intervention Programs—An Innovative Reform of the Criminal Justice System*, 28 RUTGERS L. REV. 1203 (1975) [hereinafter cited as *Innovative Reform*]; Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827 (1974). *See* 71 N.J. at 94–95, 363 A.2d at 326.

[82] *See, e.g.*, PROJECT CROSSROADS, *supra* note 81, at 3, 19, Document Resume (sample too small; limited to age group between 16 and 25); VERA INST., *supra* note 81, at 44–45, 61 (not "a true experimental design"; study conducted "*ex post facto*"; sample too small; "too early to determine . . . long-range effects" (emphasis in original)). *See also* Comment, *supra* note 81, at 199 ("reliable control groups" not established by PTI programs).

dicted defendants."[83] Inclusion of such offenders in New Jersey PTI programs and in rehabilitative sentences meted out under the Model Penal Code makes it probable that the participants' rate of recidivism will be significantly higher in this state. Indeed, one of the commentators cited by the *Leonardis* court views PTI not as an alternative to incarceration, but rather as an alternative to probation.[84]

Defects of a Rehabilitative System

There are many reasons why the rehabilitative model has not worked and cannot work. These reasons are both psychological and practical in nature.

Psychological and Physical Impediments to Rehabilitation

One explanation for the failure of rehabilitative efforts is that a patient must accept treatment voluntarily for it to be effective.[85] Most offenders participating in rehabilitative programs of the pretrial or custodial variety recognize that they must *appear* rehabilitated, or suffer the consequences of reinstitution of criminal proceedings or denial of parole release. Therefore, even assuming correct diagnosis of the personality disorder giving rise to the antisocial behavior,[86] because participation in the prescribed treatment program is tied to release, it is usually neither voluntary nor sincere and rarely has lasting effect.[87]

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[83] *See Innovative Reform*, *supra* note 81, at 1208 n.35 (describing the Manhattan Court Employment Project and Project Crossroads).

[84] Comment, *supra* note 81, at 197. PTI programs are viewed in that Comment as a method by which prosecutors can maintain greater leverage over offenders in cases where the offenders would otherwise receive a "dismissal, fine, probation, or suspended sentence." *Id.*

[85] *See* J. MITFORD, KIND AND USUAL PUNISHMENT: THE PRISON BUSINESS 110 (1973); N. MORRIS, *supra* note 8, at 17–18. Even the most coercive form of rehabilitation, aversive conditioning, has not achieved permanent success unless the offender has shown a willingness to alter his life. This type of treatment attempts to produce a conditioned response—socially acceptable behavior—by means of aggressive suppression of the antisocial behavior. The techniques employed range from electric shocks to surgically implanted electrodes in the subject's brain. *Id.* at 23–25. It has been found that without reinforcement the conditioned response diminishes over a period of time. A. VON HIRSCH, *supra* note 8, at 17 & n.*.

[86] The "assumption [behind rehabilitation] that criminals are 'sick' in some way that calls for 'treatment,' " is not universally accepted, and is considered by Judge Frankel to be the primary fallacy of the rehabilitative model. M. FRANKEL, *supra* note 12, at 89. *See also* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 40–44 (1971).

[87] *See* N. MORRIS, *supra* note 18, at 17; J. Q. WILSON, THINKING ABOUT CRIME 170 (1975). It should be noted, however, that even among participants in coercive treatment

In addition to being inherently coercive, most dispositions based upon the goal of rehabilitation are psychologically harmful to the inmate; uncertainty over whether criminal proceedings will be terminated or when parole release will be granted produces counterrehabilitative anxiety.[88] Pretrial intervention programs skirt this problem by limiting offender participation to six months; however, this limitation may in turn permit too short a period for even the best of rehabilitative programs to have much, if any, effect on an offender.[89] Under New Jersey's existing minimum-maximum sentencing structure as well as under the proposed Model Penal Code's specific term sentencing, the sentences in effect become indeterminate, since the New Jersey Parole Board has the authority to parole the typical inmate at any time after one-fifth of the term has been served.[90] The resulting offender anxiety is augmented by the failure of the *Leonardis* court and the state legislature to establish standards for the essentially subjective decision of whether an offender has been rehabilitated, which is the predicate of release from a PTI program or release on parole from an institution.[91]

Moreover, to the extent that rehabilitative programs are conducted inside prison walls, they may be doomed to failure, since the prison environment may be especially antithetical to the type of programs needed to foster rehabilitation.[92] Conditions are overcrowded in New Jersey as well as across the nation,[93] with rehabilitative

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programs, there will likely be some who do wish to be rehabilitated and for whom participation is, in that sense, "voluntary."

[88] O'Leary, *supra* note 50, at 563. *See also* J. MITFORD, *supra* note 85, at 87–94.

[89] *See* N. KITTRIE, *supra* note 13, at 37. Kittrie suggests that "the therapeutic needs of the delinquent" are determinative of the amount of time needed to rehabilitate him. *Id.*

[90] *See* N.J. STAT. ANN. §§ 30:4–92, –123.10, –140 (West 1964); M.P.C. § 2C:43–9(a). Parole eligibility for first offenders currently occurs after the minimum term or after one-third of the maximum term less credit for work assignments and good behavior. N.J. STAT. ANN. § 30:4–123.10 (West 1964). This typically comes out to one-fifth of the maximum term. Letter and Parole Eligibility Table from Thomas Stephens, New Jersey Parole Board, to author (June 17, 1977) (on file at *Seton Hall Law Review*). Under the Model Penal Code, parole eligibility would typically occur at one-fifth of the sentence imposed by the judge.

[91] *See* notes 118–19, 283–88 *infra* and accompanying text.

[92] *See* Pugh v. Locke, 406 F. Supp. 318, 325–26 (M.D. Ala. 1976).

[93] *See, e.g., id.* at 325 ("overcrowding" is greatest problem in Alabama prison system); CORRECTIONAL MASTER PLAN, *supra* note 76, at 85, 179 (as of July 1, 1976, New Jersey medium/maximum facilities were functioning at 151% of standard bed capacity and minimum facilities were functioning at 115% of capacity); N.Y. Times, Sept. 5, 1976, § 1, at 22, col. 8 (Law Enforcement Assistance Administration loaned 475 house trailers to ten states, including New York and New Jersey, to relieve overcrowded conditions in states' prisons); *id.*, Mar. 15, 1976, at 21, col. 1 (as of March 7, 1976, federal

facilities strained and programs understaffed.[94] The custodial and security requirements of prison operation are incompatible with and have taken precedence over rehabilitative methods.[95] The harsh realities of inmate treatment at the hands of prison guards and among prisoners themselves are also significant negative factors.[96] It is often suggested that society's commitment to institutional rehabilitation has been inadequate,[97] but there are no indications that social conscious-

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facilities built to accommodate 21,322 inmates were holding 26,047 inmates); *id.*, Jan. 25, 1976, § 2, at 24, col. 1 (prison officials from 17 southern states met to discuss "prison overcrowding that . . . has reached crisis proportions").

[94] *See Oversight Hearings on the Nature and Effectiveness of the Rehabilitation Programs of the U.S. Bureau of Prisons Before the Subcomm. on National Penitentiaries Comm. on the Judiciary*, 92d Cong., 2d Sess. 79–80 (1972) (statement of Senator Cook) (staff-inmate ratios in federal prisons are one teacher for every 98 inmates, one vocational worker for every 82 inmates, one caseworker for every 102 inmates); CORRECTIONS, *supra* note 18, at 353–54 (custody functions receive "a lion's share of resources; activities aimed at modifying behavior and attitudes or at developing skills often are limited or absent"); *cf.* Pugh v. Locke, 406 F. Supp. 318, 325 (1976) (because of insufficient staff, guards "must spend all their time" attending to security and safety concerns rather than to individual inmate needs).

Directors of several correctional institutions have complained that their efforts are restricted "by a lack of resources for rehabilitation." L. DEWOLF, CRIME AND JUSTICE IN AMERICA 59–60 (1975). Another statistic illustrating the problems facing rehabilitative efforts in corrections institutions is that nationwide only 5% of prison budgets are allotted to treatment programs. J. MITFORD, *supra* note 85, at 97. A study prepared by a group of medical personnel found that in New Jersey prisons "[t]he conditions are such . . . that 'it is practically impossible' to make adequate clinical psychological examinations or provide the proper care." N.Y. Times, Oct. 12, 1973, at 60, cols. 4–6.

[95] AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 86, at 87; D. STANLEY, *supra* note 79, at 17–19. *See also* K. MENNINGER, THE CRIME OF PUNISHMENT 71–81 (1966); G. SYKES, THE SOCIETY OF CAPTIVES 12 (1958).

[96] S. BROWNMILLER, AGAINST OUR WILL 257–68 (1975); L. DEWOLF, *supra* note 94, at 39–40; K. MENNINGER, *supra* note 95, at 77–81. DeWolf states that "[i]t is still common practice in many prisons for the guards to beat prisoners for disobedience, lack of respect, or offenses against other inmates." L. DEWOLF, *supra* at 39. In a 1974 New Jersey case, a prisoner was convicted of murdering a fellow prisoner while they were both patients in the prison's hospital. State v. Clark, 128 N.J. Super. 120, 122, 319 A.2d 247, 247–48 (App. Div. 1974). For other cases involving allegations of physical assault by fellow inmates, see Bethea v. Crouse, 417 F.2d 504, 505 (10th Cir. 1969); Gates v. Collier, 349 F. Supp. 881, 885, 889 (N.D. Miss. 1972).

[97] *See* N. MORRIS, *supra* note 18, at 37; G. SYKES, *supra* note 95, at 132. Professor Morris contends that, "[b]y and large, the public is uninterested in prison matters, except morbidly at times of riots." N. MORRIS, *supra* at 37. He opines that as a result of this public apathy, politicians rarely feel constrained to raise prison reform as a political issue since "most [politicians] are well aware that there are no votes to be gained in penal reform; the lasting banishment of imprisonment, absent escapes and riots, is all that a community expects political leaders to achieve in this sphere." *Id.*

Dr. Sykes feels that because of this lack of concern, "criminals will continue to be confined in large groups under conditions of relative deprivation for some time to come, regardless of the consequences." G. SYKES, *supra* at 132. Various factors may be responsible: "social inertia, the perhaps . . . greater economic inertia of investment in existing

ness or budgetary and political considerations are likely to change so as to permit the prison environment to become compatible with rehabilitative efforts.[98]

Disparity Resulting from the Lack of Sentencing Standards

Another criticism of using rehabilitation as a justification is that it results in considerable unfairness. Because the rehabilitative ideal requires that dispositions fit the offender, judges are forced to possess and use considerable discretion.[99] The sentencing decision is complicated by the fact that it involves not only the question of how long the sentence should be, but also the issue of whether the offender should be incarcerated at all.[100] Although judges strive to eliminate the unjustifiable disparity which results when sentences of various types and lengths are imposed on similar offenders, they have not succeeded. Therefore, differences in sentences resulting from differences in characteristics neither of the offense nor of the offender continue to be a common occurrence.[101] According to Judge Frankel, "it

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physical facilities, or a primitive desire for vengeance." *Id.* Whatever reasons exist for failing to provide adequate rehabilitative programs, as long as this situation continues to exist, a constitutional question is raised by confining people for rehabilitative purposes. In Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971), the court suggested that "[t]o deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process."

[98] A recent article by Professor Wilkins examined the claimed successes of the program at the Maryland Institution for Defective Delinquents at Patuxent, Maryland, which he described as having "the strongest claim to being the archetype of the ideal 'treatment model.'" Wilkins, *Treatment of Offenders: Patuxent Examined*, 29 RUTGERS L. REV. 1102, 1108 (1976). Wilkins concluded that even the apparent low recidivism rate produced at that institution was illusory because of the follow-up standards utilized. *Id.* at 1109–10, 1115–16. Thus, the Patuxent experience does not detract from the conclusion that rehabilitative methods have been unsuccessful. *See id.* at 1116.

[99] A. VON HIRSCH, *supra* note 8, at 27–28.

[100] L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CAPLIN, & A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION 1–3 (1976) (prepared for National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, United States Department of Justice) [hereinafter cited as SENTENCING GUIDELINES].

[101] M. FRANKEL, *supra* note 12, at 21; A. VON HIRSCH, *supra* note 8, at 29–31. Professor von Hirsch suggests that sentencing judges and parole boards also respond to management pressures, *i.e.*, the desire to eliminate the extreme overcrowding of both court schedules and prisons. *Id.* at 30; *see* Dershowitz, *supra* note 11, at 26. As a result, disparity is increased. Persons who have committed serious offenses in the past may be languishing in prison serving extremely long sentences, while recent serious offenders are sentenced to a short term or to probation because the prisons are filled with these earlier offenders. *Id.* In addition, guilty pleas are encouraged in most jurisdictions to relieve congested court calendars. Such pleas result in a wide range of sentencing dispositions. *See* notes 266–74 *infra* and accompanying text. And, once an offender is in

is not possible to avoid the impression that the judges' private senses of good and evil are playing significant parts no matter what the law on the books may define as the relative gravity of the several crimes."[102] Individualized justice results in "a wild array of sentencing judgments without any semblance of the consistency demanded by the ideal of equal justice."[103] A study of New Jersey state prison commitments for the year ending June 30, 1973, revealed wide discrepancies from one portion of the state to another in the lengths of incarceration to which offenders were sentenced for various crimes.[104]

More importantly, substantial sentencing discretion has permitted racial and other biases to affect criminal dispositions. Mr. Justice Marshall's concurring opinion in *Furman v. Georgia*[105] pointed out that since 1930, of the persons executed nationwide, 2,066 were black and 1,751 were white, while 32 were women and 3,827 were men. Of those prisoners executed for rape, 405 were black while only 48 were white.[106] Similar class-based disparity exists in New Jersey, where a recent study indicated that among the group of persons arrested for serious offenses, nonwhites were committed to prison at nearly twice the rate of whites.[107]

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prison, the decision on when he should be paroled may be based on "institutional bedspace." A. VON HIRSCH, *supra* at 30.

For the best results of an extensive sentencing experiment which concluded that there is considerable disparity within the Second Circuit, see A. PARTRIDGE & W. ELDRIDGE, SECOND CIRCUIT SENTENCING STUDY (Federal Judicial Center 1974).

[102] M. FRANKEL, *supra* note 12, at 24. *See also* Harris, *supra* note 14, at 265–66.

[103] M. FRANKEL, *supra* note 12, at 7. *See also* A. VON HIRSCH, *supra* note 8, at 29–31.

[104] DIVISION OF CORRECTION & PAROLE, N.J. DEPT. OF INST. & AGENCIES, SENTENCE DISPARITY AMONG PRISON COMMITMENTS; BY COUNTY, BY JUDGE, AND BY CASE 8–9 (1974) [hereinafter cited as SENTENCE DISPARITY]. Two examples will illustrate the disparities which were uncovered. Robbers in Hudson County were sentenced to an average maximum of 4.29 years, while in Monmouth County the average was 9.38 years. Figures on incarcerated gamblers reveal an average sentence in southern New Jersey of 1.95 years, with the average in northern New Jersey being 2.31 years. *Id.*

Recognizing the existence of disparity, the State Administrative Office of the Courts recently announced a computer study designed to produce sentencing guidelines which would result in less disparity. *See* N.Y. Times, Dec. 10, 1976, § B, at 1, cols. 5–6.

[105] 408 U.S. 238 (1972).

[106] *Id.* at 364–65. The studies cited are said to "indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination." *Id.* at 364. *See also id.* at 251 (Douglas, J., concurring).

[107] CORRECTIONAL MASTER PLAN, *supra* note 76, at 38–40. In 1975, nonwhites were arrested eleven times more frequently than whites for violent offenses, but were sentenced to incarceration 22 times more often. *Id.* For nonviolent crimes, nonwhites were arrested five times more frequently than whites, and were incarcerated six times more often. *Id.* at 40. Some of the disparity can be traced to the failure of the statistics to control for recidivists, who generally receive stiffer sentences.

The ostensibly promising mechanism of appellate review of sentencing, proposed to eliminate unjustifiable disparity,[108] has not in fact been successful. Theoretically, an appellate tribunal should be able to equalize sentences imposed by a multitude of judges situated throughout a given jurisdiction. Such courts, however, have tended to review cases on a piecemeal basis without developing an overall sentencing policy.[109] As a result, there is no frame of reference to assist appellate courts in deciding whether or not the specific sentence they are considering provides a proper basis for reversal as a violation of the applicable standard of review. In addition, appellate courts infrequently exercise their power to adjust sentences. A 1960 study of the Connecticut Sentence Review Division revealed that

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[108] *See, e.g.*, ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 3–4 (Approved Draft 1968) [hereinafter cited as ABA]; L. DEWOLF, *supra* note 94, at 213–14; M. FRANKEL, *supra* note 12, at 69, 75–85; W. GAYLIN, PARTIAL JUSTICE 227–29 (1974).

Appellate review of sentencing has been criticized as "distort[ing] the appellate process" by subjecting appellate courts to emotional appeals, M. FRANKEL, *supra* at 78, and impinging on the " 'discretion' " of the trial judge to sentence based on his personal observation of the defendant at trial, *id.* at 82–83. Judge Frankel answers these criticisms by stating "that the virtues of a higher court include its separation from the . . . trial court, promoting a useful quality of cool objectivity." *Id.* at 79. Furthermore, he argues, just as a trial judge's findings of fact may be reversed if " 'clearly erroneous,' " his sentencing discretion, based on his ability "to observe the defendant . . . should not preclude review altogether," although it may influence the type of review granted. *Id.* at 83. Judge Frankel concludes that the trial judge's discretion "is an authority, *within the law* [which] may be abused, and discretionary decisions may be reversed for abuse." *Id.* at 84 (emphasis in original).

Judge Frankel also contends that the absence of appellate review of sentences has led some appellate courts to reverse convictions on the pretext of obscure errors committed at trial, in response to their own horror at excessive sentences imposed by trial judges. *Id.* at 81–82. Although Judge Frankel also advocates the need for legislative action "to govern the field of sentencing," *id.* at 84–85, he concludes that appellate review is "[o]ne way to begin to temper the capricious unruliness of sentencing . . . so that appellate courts may proceed in their accustomed fashion to make law for this grave subject," *id.* at 84.

[109] SENTENCING GUIDELINES, *supra* note 100, at 5–7. The authors of that study contend that appellate review could be useful in eliminating disparity only if guidelines were first developed to establish general sentencing policy. *Id.* at 6–7. In order to avoid confusion it is also important that a differentiation be made between the standard to be applied in determining whether or not the trial court decision is reversible, *see* note 108 *supra*, and the criteria which should govern the sentencing decision itself. Another criticism of appellate review as it is now practiced is that it is not "equally available to both defense and prosecution." SENTENCING GUIDELINES, *supra* at 6. The authors state that such equality of access must be present "[i]f a common law of sentencing is to develop rationally." *Id.*

It should be noted that in the federal system, "absent reliance on improper considerations . . . or materially incorrect information . . . a sentence within statutory limits is not reviewable." United States v. Velazquez, 482 F.2d 139, 142 (2d Cir. 1973) (citations omitted).

sentences were modified in approximately 8.5% of the instances in which the sentence was appealed.[110] A New Jersey study revealed that of 605 appeals in 1973 alleging excessive sentences, the sentencing court was affirmed in 96.7% of the cases.[111] Whether or not the sentences appealed were in fact excessive, the result of the affirmances was to continue the existence of disparities.

There does not appear to be any remedy for unjustified disparity[112] within the system of individualized treatment advanced by *Leonardis* and the Model Penal Code. The range within which discretion could be exercised would be narrowed only slightly if the Model Penal Code were adopted.[113] The existence of a PTI program simply creates an additional stage at which discretion must be exercised. Under both these systems, judges will still individualize dispositions and will reconcile the competing goals of rehabilitation, incapacitation, deterrence and punishment on a case-by-case basis without the help of useful standards. Judge Frankel suggests that such a system is inappropriate on the ground that "judgments affecting consequences so grave as the length and character of sentences should . . . be matters of law."[114] Thus he concludes that it is the responsibility of the legislature, and not of the courts, to determine "the legitimate bases for criminal sanctions."[115]

If rehabilitation were retained by the legislature as one of the justifications for criminal dispositions, it would be inconsistent to establish standards which constrict or eliminate judicial discretion to individualize dispositions. The effort to rehabilitate particular offenders will, therefore, inevitably result in continued unjustifiable disparity.[116]

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[110] Comment, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453, 1464 (1960). One explanation for the infrequency of sentencing alterations could be the fact that Connecticut permits sentences to be increased as well as decreased. This influences the type of criminals who contest their sentences. Offenders who have received the harshest sentences for the crime committed will be more likely to appeal sentences, as they have little to lose. *Id.*

[111] G. Cook, Sentence Review 2 (Aug. 26, 1974) (unpublished study for the New Jersey Administrative Office of the Courts).

[112] *See* SENTENCING GUIDELINES, *supra* note 100, at 1–3.

[113] If the Code were adopted, all inmates incarcerated under the basic sentence provisions would serve roughly equivalent time depending on the degree of the offense. M.P.C. § 2C:43–2(a), –6. However, when extended terms, *id.* § 2C:43–7(a), probation, *id.* § 2C:43–2(b)(2), and parole release, *id.* § 2C:43–9(a), are also considered, it becomes apparent that there will be wide sentence disparity among persons committing similar crimes. *See* notes 65–72 *supra* and accompanying text.

[114] M. FRANKEL, *supra* note 12, at 107.

[115] *Id.* The author does not share this view.

[116] *See* A. VON HIRSCH, *supra* note 8, at 12. Professor von Hirsch explains that sentencing disparity naturally arises because the rehabilitative "theory looks to offenders'

Reliance upon Defective Predictive Techniques

Another criticism of dispositional decisions based upon rehabilitation is that they depend upon the prediction of an offender's future criminal behavior in the community.[117] New Jersey Rule 3:28, cited in *Leonardis*, permits dismissal of criminal proceedings only "upon certification by program officials that the defendant has successfully participated in the PTI program and has been rehabilitated."[118] Likewise, parole release in New Jersey is presently granted an offender only if "there is reasonable probability that . . . he will assume his proper and rightful place in society, without violation of the law, and that his release is not incompatible with the welfare of society."[119] Both programs assume that rehabilitated offenders can be accurately identified. Yet it can be shown that reliable determinations of rehabilitation are virtually impossible to achieve.[120]

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need for treatment rather than to the character of their crimes." *Id.* Therefore, the disparity can be justified only if the rehabilitative effort succeeds. *Id.* After discussing the various methods used and concluding that they have so far proved ineffective, *id.* at 13–17, Professor von Hirsch concludes that "the rehabilitative disposition is plainly untenable," *id.* at 18.

[117] N. MORRIS, *supra* note 18, at 16. The ability to predict future criminal behavior in the community based on an inmate's reactions to prison rehabilitative programs encounters two problems. *Id.* at 16–17. "[E]xtra-institutional factors," such as prior records, family relationships and future prospects of a home and employment "are closely related to later avoidance of criminality." *Id.* at 16. As a result, "[p]rison behavior is not a predictor of community behavior." *Id.* The second problem involves the compulsive nature of most rehabilitation programs. *Id.* at 17; *see* notes 85–87 *supra* and accompanying text.

Although Morris discusses these problems in terms of predictions based on prison behavior only, it can be assumed that similar problems arise in predicting future criminal behavior based on participation in pretrial intervention programs. The participant in such programs is subject to the same outside factors such as employment and family relationships, and has a similar desire to appear rehabilitated in order to have the charges against him dismissed.

[118] 71 N.J. at 105, 363 A.2d at 331–32; *see* N.J.R. 3:28(c)(1).

[119] N.J. STAT. ANN. § 30:4–123.14 (West 1970).

[120] *See* A. VON HIRSCH, *supra* note 8, at 22–25; *cf.* Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear & Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1097–99 (1976) (psychiatric predictions of dangerousness found to be inaccurate). *See generally* N. MORRIS, *supra* note 18, at 31–34.

Empirical evidence of the inaccuracy of dangerousness predictions resulted from two important Supreme Court decisions. In 1966, in Baxstrom v. Herold, 383 U.S. 107, 110 (1966), the Court held that a prisoner who was certified insane while in prison was nevertheless entitled to a jury determination of his sanity upon the expiration of his sentence. As a direct consequence of this decision, 967 " 'Baxstrom patients' " were released from New York institutions for the criminally insane or transferred to civil institutions. N. MORRIS, *supra* at 69; *see* Cocozza & Steadman, *supra* at 1090. Although these ex-convicts were predicted to be dangerous if released, N. MORRIS, *supra* at 69, a study four years later found that "[o]nly two percent [had been] returned to the institu-

Traditionally, predictions of recidivism have been made intuitively. For example, the former United States Board of Parole and the State Parole Board used virtually no explicit criteria in determining whom and when to release.[121] More recently, in order to reduce the number of disparate parole decisions, the present United States Parole Commission has formalized the process. The Commission has begun using a matrix including both offense and offender characteristics[122] and excluding any characteristics relating to rehabilitation.[123] Even under this new technique, however, predictions as to individual offenders can fail in two ways: by failing to identify future offenders, and by retaining under social control offenders who pose no risk of committing future offenses.[124] These failures illustrate that even the most accurate predictions of recidivism do not reveal the percentage of offenders falsely predicted to be probable recidivists,[125] and

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tions for the criminelly insane," fewer than twenty-six percent had been assaultive in civil mental institutions, and fewer than sixteen percent of those released to the community (about which there was sufficient information) had been rearrested. *Id.* at 70. The study therefore was illustrative of the failure of the predictions of dangerousness. Cocozza & Steadman, *supra* at 1090, 1093.

Following the 1963 decision in Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963), which determined the right to counsel of indigents prosecuted by a state, a number of Florida prisoners who had not been afforded this right were released. Singer, *supra* note 13, at 84. Although no formal prediction of recidivism was involved, a study which followed these releasees showed a "recidivism rate . . . one-half that of prisoners who served their maximum sentence." *Id.*

[121] *See* PROGRAM ANALYSIS, *supra* note 75, at 18–30; D. STANLEY, *supra* note 79, at 27; Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 820 & n.44 (1975).

[122] *See* 28 C.F.R. § 2.20 (1976). *See generally* notes 139–44 *infra* and accompanying text.

[123] *See* Project, *supra* note 121, at 873–74.

[124] N. MORRIS, *supra* note 18, at 66–67. To illustrate the two types of failures, Morris has developed a hypothetical example concerning 100 incarcerated offenders whose future criminality must be predicted by a parole board. *See id.* at 67. He begins by assuming that all 100 offenders are released. Of those, 30 are predicted to recidivate, and 20 ultimately do. Of the 70 who are predicted "rehabilitated," 5 recidivate. Thus, there are 10 inmates incorrectly predicted to recidivate and 5 inmates falsely predicted to be cured. *Id.* In a real situation, the entire sample would not be released. As a result, the 10 individuals who are falsely predicted to be recidivists would be retained in custody unnecessarily, *see id.*, while the 5 falsely predicted rehabilitated would be free to victimize society once again. *See also* E. TUFTE, DATA ANALYSIS FOR POLITICS AND POLICY 36–40 (1974).

[125] *See* Project, *supra* note 121, at 875 & n.319. Since inmates predicted to recidivate will remain incarcerated, it is impossible to determine how many of them are, in fact, rehabilitated. Von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717, 738 (1972); *see* A. VON HIRSCH, *supra* note 8, at 25; Project, *supra* at 875.

"can[not] predict whether a given *individual* will" recidivate or not.[126]

Given the risks of recidivism the natural tendency is to overpredict the percentage of offenders who will recidivate.[127] By predicting that all offenders will recidivate, 100% of the potential recidivists will remain incarcerated, but the cost of this approach, of course, is to overincarcerate large numbers of rehabilitated (or safe) offenders.

Overincarceration: Practical and Philosophical Ramifications

It might be claimed that the desire to protect public safety justifies the prolonged retention under social control of an indeterminate number of persons who will not commit future violent crimes in the effort to retain those who will.[128] Such an effort, however, would be counterrehabilitative. Rehabilitated offenders who are incarcerated beyond the time required to rehabilitate them may become embittered and frustrated when ultimately released.[129] In addition, all incarcerated offenders would be likely to lose the external incentive to attempt rehabilitation if they were to see rehabilitated offenders nonetheless being retained in institutions.

Although the injustice of overincarceration is readily apparent from the viewpoint of the overincarcerated offender, this injustice can be demonstrated on a philosophical level as well. John Rawls recently devised a game theory involving ideal, rational people who could divorce themselves from their own personal situation in attempting to

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[126] Project, *supra* note 121, at 875–76 n.320 (emphasis in original); *accord*, Hoffman & Beck, *Parole Decision-Making: A Salient Factor Score*, 2 J. CRIM. JUST. 195, 203 (1974). *See also* L. WILKINS, *supra* note 79, at 126–29. For a detailed discussion of the operation of the United States Parole Commission's recidivism prediction system, see notes 139–44 *infra* and accompanying text.

[127] N. MORRIS, *supra* note 18, at 68; Singer, *supra* note 13, at 84. For an article opposing the use of preventive confinement, see Von Hirsch, *supra* note 125.

[128] An extension of this argument, which would appeal to those who fear the release at the end of their terms of offenders who have committed serious crimes, is to utilize capital punishment for all violent offenders. A less dramatic extension of the argument is to urge incarceration of all violent offenders until their fiftieth birthday. Such proposals may be considered excessive and unjust under some persons' definition of justice. Logically, however, the overincarceration of offenders wrongly predicted to recidivate is no different. For the concept of justice adopted in this article, see notes 130–34 *infra* and accompanying text.

[129] Such inmates may, therefore, be more prone to commit crimes. *See* Comment, *supra* note 81, at 190. The low degree of recidivism found to have resulted when Gideon v. Wainwright, 372 U.S. 335 (1963), prompted the early release of a large group of prisoners, supports the conclusion that overincarceration may indeed increase criminal propensities. *See* Singer, *supra* note 13, at 84–85.

construct a just society.[130] The game theory postulates that each of these people is in an "original position" preceding the creation of social institutions, and that they make choices as to the structure of those institutions from "behind a veil of ignorance," that is, knowing the general facts about human society, but ignorant of their own status, abilities or psychological inclinations.[131] The choices which would be made by people in this ideal situation, and upon which all future social arrangements would be based, define what Rawls considers to be "the principles of justice."[132] Rawls' rational person, theoretically removed from the personal consequences of his choices, would reject a system of social control which would demand undeserved sacrifice of him, unless there were "compensating benefits" for all members of society.[133] In view of the failure of rehabilitative ef-

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[130] *See* J. RAWLS, *supra* note 8, at 4. Professor Rawls' basic premise is that "the primary subject of justice is . . . the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation." *Id.* at 7.

[131] *Id.* at 12. The "original position" is a "hypothetical situation" designed to eliminate social considerations that would prevent an unbiased decision. *Id.* Professor Rawls postulates more specifically as to the "original position" that

> [a]mong the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities.

Id. Rawls describes such individuals as acting "behind a veil of ignorance," in order to guarantee "that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances." *Id.*; *see* N. MORRIS, *supra* note 18, at 81–82.

For more extended discussion of "original position" and of the "veil of ignorance," see J. RAWLS, *supra* at 11–22, 118–92; Hart, *Rawls on Liberty and Its Priority*, 40 U. CHI. L. REV. 534, 535 (1973).

[132] J. RAWLS, *supra* note 8, at 4, 11. Rawls further defines these

> principles of justice for the basic structure of society [as] the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established.

Id. at 11.

[133] *Id.* at 14–15. In particular, Rawls would require compensating benefits "for the least advantaged members of society." *Id.* He asserts that

> [a]ll social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored.

Id. at 303; *see id.* at 298–303. *See generally id.* at 60–67. A rational person might acquiesce in such a sacrifice if the incapacitation of potential recidivists or the deterrent

forts to produce "compensating benefits," the rational person would not agree to sanctions beyond those necessary to punish or rehabilitate him, merely to prevent the release of others who were not rehabilitated. Therefore, the retention of safe offenders in the name of rehabilitation would be unjust under Rawls' formulation.[134]

Conclusion

It may be concluded that rehabilitation has failed, and that it is doomed to perpetual failure for the psychological and practical reasons discussed herein. Thus, depriving offenders of liberty in the attempt to rehabilitate and to incapacitate potential recidivists is

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effect upon others could be shown to make him safer in the long run. The possibility of these compensating benefits in connection with justifications other than rehabilitation will be discussed at notes 147–71 *infra* and accompanying text.

It should be noted that since the problem of overincarceration is one created "by the state under claim of right," it is therefore different from the problem of victimization by recidivists. A. VON HIRSCH, *supra* note 8, at 25. Nevertheless, the argument that the overincarceration of rehabilitated offenders should be tolerated to protect society from recidivists is potent emotionally and politically. A compromise approach not recommended by the author could nevertheless be reached by distinguishing among crimes, rather than adopting the Model Penal Code's generalized concern over the "risk . . . the defendant will commit another crime." M.P.C. § 2C:44–1(a)(1). For first- and second-degree offenders the costs of victimization might outweigh the cost of overincarceration, but for third- and fourth-degree offenders the balance might be different. *See* O'Leary, *supra* note 50, at 574 (relying upon Wilkins, *Current Aspects of Penology: Directions for Corrections*, 118 PROCEEDINGS AM. PHIL. SOC'Y 235, 241–43 (1974)). *See also* L. WILKINS, *supra* note 79, at 125–29. Thus, if they cannot be eliminated altogether, predictions of recidivism or dangerousness might be limited to certain classes of offenders who have committed particularly heinous offenses.

[134] A legal formulation of the Rawls position is the less drastic means test. *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960). The essence of the test is that when confronted with an intrusion upon one's fundamental constitutional rights, such as life or liberty, the ends of the state must be legitimate and compelling and the means employed to achieve those ends must be the least drastic available. The Court stated that "[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.*; *see* Singer, *supra* note 13, at 55–56; *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1102 & n.154, 1122 (1969). *See also* Dandridge v. Williams, 397 U.S. 471, 484–85 (1970). Overincarceration of rehabilitated offenders cannot be said to be the least drastic means of protecting society from recidivists.

Even where fundamental rights are not involved the Court has required that procedures adopted by a legislature to achieve a legitimate legislative goal be rationally related to that goal. *See* Shapiro v. Thompson, 394 U.S. 618, 637–38 (1969); McGowan v. Maryland, 366 U.S. 420, 425–27 (1961); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 23–24 (1972). Since the inability to predict recidivism accurately results in a lack of rational relationship between the means employed and the end desired—protection of society—incarceration in the name of rehabilitation is impermissible.

For a discussion and comparison of these two tests, see Singer, *supra* note 13, at 55–59.

unjust,[135] as is the unexplained disparity in sentences meted out to similar offenders.[136] To the extent that rehabilitative efforts are continued, they should not be used to justify an offender's disposition or to determine the timing of his release from custody or confinement.

INCAPACITATION: PROTECTION FROM DANGEROUS OFFENDERS

Incapacitation as a justification for dispositions requires incarceration of an offender if, in the words of the Model Penal Code, "[t]here is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime."[137] This consideration requires a parole-release decisionmaker to predict dangerousness or recidivism in the offender who is already incarcerated. In this respect, incapacitation resembles rehabilitation. The difference between them is that no effort to reform an offender is necessary to advance the incapacitative rationale for a disposition. Moreover, the incapacitative prediction is different from the prediction inherent in the justification of rehabilitation in that the former focuses only on information about the offender's life prior to sentencing, and does not consider rehabilitative progress subsequent to that time. Therefore, the prediction required for incapacitation need be made only once, at that point when an offender's disposition through pretrial intervention, probation or incarceration is determined. It need not be repeated as an offender, under social control, participates in programs, learns new skills, receives therapy or simply ages. This incapacitative prediction can thus be made with more confidence because it is

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[135] Not only are such deprivations unjust, but the attempt to rehabilitate when coupled with the wish to control also gives rise to the possibility of totalitarianism. N. MORRIS, *supra* note 18, at 9–11. In addition, the belief that the goal of rehabilitation justifies social control raises a concern over the likelihood of "an increase in the number of citizens who are brought under social control," *id.* at 9, since probation and parole continue social restraints on offenders for considerable time periods, and expose offenders to substantial risks of future incarceration through revocation procedures. *See also* Comment, *supra* note 81, at 197.

For a more extensive discussion of the potential abuses of a "therapeutic state," see N. KITTRIE, *supra* note 13, at 1–45, 340–71.

[136] The implication of Furman v. Georgia, 408 U.S. 238, 239–40 (1972), which held the death penalty unconstitutional as applied in the cases then under consideration, was that the death penalty may not be imposed arbitrarily. *See id.* at 245 (Douglas, J., concurring); *id.* at 255–57 (Brennan, J., concurring). As a result of this opinion, it is possible that other types of sentences may also be considered unconstitutional when arbitrarily applied.

[137] M.P.C. § 2C:44–1(a)(1); *see* A. VON HIRSCH, *supra* note 8, at 19–20. As dissatisfaction with rehabilitation as a justification increases, incapacitation becomes more acceptable as an alternative. The argument is made that "[e]ven if the capacity for cure is lacking . . . the public can be protected by identifying potential recidivists and holding them as long as they are likely to commit further crimes." *Id.* at 20 (footnote omitted).

based on objective facts which have already occurred, and is not a speculation as to how an offender may have changed—or appear to have changed—as a result of rehabilitative efforts.

While parole boards have traditionally attempted to assess an offender's *rehabilitation*,[138] the United States Parole Commission has recently been making parole release decisions on the basis of a matrix which facilitates an *incapacitative* decision.[139] One axis of the matrix contains scores compiled as a result of the presence or absence of certain offender characteristics: prior convictions, prior incarcerations, age at first commitment, whether the offense involved auto theft, prior parole revocation, drug history, employment record, education, and living arrangement contemplated upon release.[140] Those scoring the best as to these factors have the best prognosis for a successful parole period.[141] The other axis contains six categories of offense severity derived from a grouping of the federal criminal offenses.[142] The intersection of an inmate's offender characteristics and offense severity is a cell in the matrix. Inmates with a good prognosis based upon offender characteristics are paroled earlier than those with a poorer prognosis; those with the best prognosis based upon offender characteristics and the lowest offense severity are paroled earliest of all.[143] Through use of the matrix, the Parole Commission has had considerable success in predicting groups of inmates who do not recidivate when released.[144]

Because most of the offender characteristics considered for parole will also have been present at the time of sentencing, it has been

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[138] Dershowitz, *supra* note 9, at 91. *See also* notes 284–88 *infra* and accompanying text.

[139] 28 C.F.R. § 2.20 (1976); *see* Hoffman & Beck, *supra* note 126; Project, *supra* note 121.

[140] 28 C.F.R. § 2.20 (1976). The composite grade of characteristics is denominated a salient factor score. *See id.*

[141] *See id.*; Hoffman & Beck, *supra* note 126, at 202. The prisoner's score on the matrix is totaled and on this basis the prisoner is placed within one of four defined categories. The categories are "Very good"—a score of nine to eleven, "Good"—a score of six to eight, "Fair"—a score of four to five, and "Poor"—a score of zero to three. 28 C.F.R. § 2.20 (1976).

[142] 28 C.F.R. § 2.20 (1976) (low, low moderate, moderate, high, very high, greatest).

[143] *See id.*; Hoffman & Beck, *supra* note 126, at 200.

[144] *See* Hoffman & Beck, *Salient Factor Score Validation—A 1972 Release Cohort*, 4 J. CRIM. JUST. 69, 71, 74 (1976); Hoffman & Beck, *supra* note 126, at 202. These studies evaluated prediction success by considering the subject's record after his release from prison. Two classifications were developed in order to interpret the results: Favorable Outcome or Unfavorable Outcome. These classifications were based upon whether or not the parolee had committed technical violations and been returned to prison, had been convicted of a new offense with a greater sentence than sixty days, or had absconded. *Id.* at 196.

suggested that a similar matrix could be utilized by sentencing judges.[145] Use of such a matrix would reduce existing disparity in offender dispositions. In addition, it would predict more successfully groups of offenders likely to recidivate than would predictions based upon rehabilitative progress. Nevertheless, the problem of overincarcerating the safe offenders within groups predicted as likely recidivists remains,[146] as does the problem of failing to recognize dangerous persons among groups of offenders predicted not to recidivate.

Whether or not it is just to impose a burden upon specific offenders who need not be incapacitated in order to retain control over groups of individually unidentifiable offenders who do require incapacitation depends upon whether every member of society derives a resulting benefit.[147] The delayed release of a group of offenders known to include recidivists results in a real reduction in crime. Yet the reduction has been viewed as minor,[148] perhaps because even the recidivists will ultimately be released and because offenders needlessly retained develop criminal propensities while incarcerated that they would not otherwise possess.[149] Additionally, not all recidivists commit serious crimes. Thus, although incapacitation should be con-

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[145] SENTENCING GUIDELINES, *supra* note 100, at xii–xiii; *see* Hoffman & DeGostin, *supra* note 12, at 198–201. The sentencing matrix developed by the Sentencing Guidelines is similar to that used by the United States Parole Commission. SENTENCING GUIDELINES, *supra* at xii. Experimental use of this matrix has occurred in four jurisdictions. *See id.* at 28–31; N.Y. Times, Dec. 4, 1976, at 30, col. 6.

[146] The choice of the particular nine factors employed in the Parole Commission's matrix excludes other factors which might prove only marginally less successful, such as the offender's marital status or whether or not he came from a broken home. Some inmates might score poorly on the factors used, but well on the factors discarded. *See* SENTENCING GUIDELINES, *supra* note 100, at 23–28; Hoffman & Beck, *supra* note 126, at 196. It follows, therefore, that whichever test is employed, a number of safe offenders will remain unidentified and will not be paroled.

Of particular importance if such a matrix were to be applied to sentencing is the validity of the sample used to construct the matrix. The Board of Parole developed its salient factors by canvassing inmates released in largely arbitrary fashion. Those inmates already possessed factors that appealed in unarticulated fashion to the Board of Parole. *See* Hoffman & Beck, *supra* note 126, at 196–97. To increase the validity of the sample, and to reduce the number of false positives, the entire prison population should be included in constructing the sample. In terms of sentencing, the sample used to construct a predictive matrix should be all offenders guilty of a crime, not merely offenders guilty of a crime who have been incarcerated and paroled, particularly in light of the disparity which exists in sentences meted out to members of different groups. *See* note 107 *supra*.

[147] *See* J. RAWLS, *supra* note 8, at 3–6, 61. In United States v. Brown, 381 U.S. 437, 458 (1965), the Supreme Court recognized incapacitation of offenders posing a serious risk to society as a legitimate goal of sentencing. *See* Project, *supra* note 121, at 872–76.

[148] *See* Project, *supra* note 121, at 875.

[149] This fact was illustrated by the follow-up study of defendants prematurely released in the wake of Gideon v. Wainwright, 372 U.S. 335 (1963). *See* note 120 *supra*.

sidered in defining offenses and determining the sentences each type of offense should bear, it should not be considered in making individual dispositional decisions. When doubt exists as to the distribution of burdens to be borne by individuals, the priority of individual liberty should prevail.[150] The justice of a system of dispositions based upon incapacitation is therefore in question, although less so than one based upon rehabilitation.[151]

Incapacitation, even as expressed in the Model Penal Code, has never been advocated as a legitimate goal for all offenders.[152] Rather, it has been advanced as a goal for those who could not be rehabilitated, such as members of criminal syndicates.[153] Theoretically, for incapacitation to work properly, incarceration would have to exceed the maximum permissible sentence for those offenders who are still considered dangerous even at the end of their terms.[154] With exile abandoned and life imprisonment meaning substantially less than it implies,[155] only capital punishment is certain to incapacitate beyond the point of such an offender's dangerousness. In modern American history such a drastic disposition has only been promulgated and permitted for limited serious offenses.[156]

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[150] J. RAWLS, *supra* note 8, at 43. Rawls suggests that "liberty can be restricted only for the sake of liberty." He expresses two conditions: "(a) a less extensive liberty must strengthen the total system of liberty shared by all; (b) a less than equal liberty must be acceptable to those with lesser liberty." *Id.* at 302.

[151] *See* notes 130–34 *supra* and accompanying text.

[152] *See* State v. Ivan, 33 N.J. 197, 199–201, 162 A.2d 851, 852–53 (1960). The *Ivan* opinion noted that "[f]ew would permanently isolate the offender without regard to the nature of his crime upon a finding of incorrigibility." *Id.* at 200, 162 A.2d at 852. The Model Penal Code has a presumption of nonimprisonment, but that presumption is overcome if "[t]here is undue risk that . . . the defendant will commit another crime." M.P.C. § 2C:44–1(a)(1). The Code still requires, however, that "the nature and circumstances of the offense and the history, character and condition of the defendant," *id.*, as well as certain mitigating factors, *id.* § 2C:44–1(b), be considered in determining the need for incarceration.

[153] *See* M.P.C. §§ 2C:44–1(a)(4), –3(b); *cf.* PTI Guidelines § 3(i) (a defendant involved in "organized criminal activity" should normally be barred from the PTI program unless he can establish "his amenability to the rehabilitative process," as well as "compelling reasons justifying his admission and . . . that a decision against enrollment would be arbitrary and unreasonable").

[154] *See* A. VON HIRSCH, *supra* note 8, at 22 n.*.

[155] A first offender sentenced to life imprisonment in New Jersey is eligible for parole at the end of approximately fourteen years of incarceration, assuming good behavior and maximum use of work credits. PROGRAM ANALYSIS, *supra* note 75, at 21, 24.

[156] *See, e.g.*, Roberts v. Louisiana, 45 U.S.L.W. 4584, 4584–85 (U.S. June 6, 1977) (per curiam) (mandatory death sentence impermissible for murder of peace officer if no consideration of possible mitigating circumstances); Washington v. Louisiana, 428 U.S. 906 (1976) (summary order vacating death penalty imposed in that case as cruel and unusual punishment); Roberts v. Louisiana, 428 U.S. 325, 331–34 (1976) (plurality opin-

DETERRENCE

It has long been thought by many commentators that a criminal penalty meted out to any one offender to a certain extent deters criminality on the part of other potential offenders.[157] General deterrence as a goal of criminal dispositions assumes that offenders rationally decide in advance upon the costs and rewards of criminal behavior.[158] This premise is antithetical to that underlying the justification of rehabilitation—that psychological disorder or environmental defect, rather than a deliberate weighing of positive and negative factors, causes persons to commit offenses.[159] Each of these assumptions is partially correct: although many offenders are insensitive to "costs

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ion) (abridging scope of capital offense does not cure constitutional infirmity); Woodson v. North Carolina, 428 U.S. 280, 292–301 (1976) (plurality opinion) (mandatory death sentences rejected by society as unfair and arbitrary); Gregg v. Georgia, 428 U.S. 153, 176–87 (1976) (plurality opinion) (death penalty not *per se* unconstitutional, but proportionality to crime committed must be considered); Furman v. Georgia, 408 U.S. 238, 286, 296–98 (1972) (Brennan, J., concurring) (American standards have severely limited use of death penalty; arbitrary imposition is " 'cruel and unusual' punishment"). The Supreme Court has now held that the death penalty for rape is unconstitutional as a violation of the eighth amendment. Coker v. Georgia, 97 S. Ct. 2861, 2866 (1977).

[157] A. VON HIRSCH, *supra* note 8, at 37–44; F. ZIMRING & G. HAWKINS DETERRENCE 1–5 (1973); *see* Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 953–56, 973 (1966) [hereinafter cited as *Punishment*]. *But see* Antunes & Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URB. L. 145, 146 (1973); Gardiner, *The Purposes of Criminal Punishment*, 21 MOD. L. REV. 117, 125 (1958). The reasons proffered for the split between deterrence advocates and opponents are that there have not been adequate empirical studies to support either side effectively. A. VON HIRSCH, *supra* at 40–44; B. WOOTTON, CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST 96 (1963); *Punishment*, *supra* at 953; Antunes & Hunt, *supra* at 145–46; and that each side argues in too general a sense, F. ZIMRING & G. HAWKINS, *supra* at 4–5; Andenaes, *General Prevention—Illusion or Reality*, 43 J. CRIM. L.C. & P.S. 176, 181–82 (1952) [hereinafter cited as *Illusion*]; *cf.* Gardiner, *supra* at 123 (deterrence "works less through fear of punishment itself, than through fear of social disapprobation"). John Stuart Mill suggested that those on each side of the argument select examples to fit the concept of justice which they propose, without considering the examples of the other side. J. MILL, *Utilitarianism*, in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 51–52 (1910).

In order for criminal penalties to act as effective deterrents, it is essential that the public have knowledge of them, F. ZIMRING & G. HAWKINS, *supra* at 142, that the members of the public believe that the penalties are applicable to their behavior, *id.* at 158, and that they believe in the capability of the authorities to enforce the penalties, *id.* at 160. *See also* notes 170–71 *infra* and accompanying text.

[158] *See* AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 86, at 55–56; B. WOOTTON, *supra* note 157, at 97–100; Gardiner, *supra* note 157, at 122; *Punishment*, *supra* note 157, at 950–51; *cf. id.* at 955 (deterrence has some effect even when behavior is irrational).

[159] *See* J. Q. WILSON, *supra* note 87, at 175; *cf.* Gardiner, *supra* note 157, at 123 (certain types of offenders act only impulsively and are unaffected by punishment).

and benefits," others may be influenced by such calculations.[160]

It is uncertain which individual criminal acts could be deterred or how severe a penalty is needed to deter their commission. Deterrence is useful, however, in determining which general crimes ought to be prohibited, and, in a general way, how severe the sanctions for violations should be. For example, it is widely believed that persons committing murders ought to be punished. This belief extends to persons murdering members of their families in spite of indications that such offenders will not recidivate,[161] and that punishment is therefore unnecessary either to rehabilitate or to incapacitate them.[162]

Deterrence is generally considered a utilitarian goal in that it serves to maximize social well-being.[163] Although most utilitarians believe that "all punishment . . . is evil,"[164] they make the important point that punishment may be used to maximize society's protection provided that the by-product is "the minimum aggregate suffering."[165] Inasmuch as it focuses on the greater good of society, the utilitarian view is unconcerned with the distribution of benefits and burdens to individual members of that society.[166] Thus, the general deterrence rationale which this theory underlies is not useful to judges in achieving justice in individual cases.[167]

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[160] J. Q. WILSON, *supra* note 87, at 176–77; *see Punishment*, *supra* note 157, at 950, 963. The measure of the deterrent effect upon a particular offender depends upon the type of offense to which he is attracted, his emotional state in making the decision to offend, his motivation toward the specific crime, and deterrent factors other than criminal penalties. F. ZIMRING & G. HAWKINS, *supra* note 157, at 131; *see id.* at 128–41; *cf.* AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 86, at 57 ("[f]or most people, the influence of upbringing, education, and conscience will prevent serious crime regardless of what criminal law may say or do about it").

[161] J. MITFORD, *supra* note 85, at 276–77; *cf.* N. KITTRIE, *supra* note 13, at 195 (homicide offenders have lowest rate of recidivism).

[162] *See* Furman v. Georgia, 408 U.S. 238, 355 (1972) (Marshall, J., concurring).

[163] *See* Bentham, *Punishment and Utility*, in PUNISHMENT AND REHABILITATION 66 (J. Murphy ed. 1973). The theory of utility is that every person desires happiness and thus tries to maximize his own happiness. J. MILL, *supra* note 157, at 11–12. True utilitarianism seeks to maximize the happiness of society as a whole, rather than to maximize the happiness of individuals. *Id.* at 10, 16; *see* J. RAWLS, *supra* note 8, at 26; *cf.* Beccaria, *Of Crimes and Punishments*, in A. MANZONI, THE COLUMN OF INFAMY 14 (1964) (laws sacrifice liberty in order for society to be secure). *See also* Rawls, *supra* note 14.

[164] Bentham, *supra* note 163, at 68.

[165] A. VON HIRSCH, *supra* note 8, at 50; *see* J. MILL, *supra* note 157, at 48–49; Bentham, *supra* note 163, at 67–68. This use of punishment is consistent with achieving the overriding "public conception of justice," which is "the fundamental charter of a well-ordered human association." J. RAWLS, *supra* note 8, at 4–5; *see id.* at 26.

[166] *See* AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 86, at 55; J. RAWLS, *supra* note 8, at 22–24.

[167] *See* J. RAWLS, *supra* note 8, at 3–4; A. VON HIRSCH, *supra* note 8, at 50–51.

As an illustration, it would be possible for a judge to accomplish the goals of a deterrence system by punishing an individual who is not guilty, since publication of the sentence could deter others regardless of the sentenced person's innocence.[168] Moreover, if deterrence were the central justification for criminal dispositions, the imposition of a penalty upon one committing an undeterrable crime, such as a passionate murder,[169] would be necessary. Penalizing such an act causes suffering to the individual offender which is not outweighed by a compensating benefit to society. In such cases, punishment would result in less social satisfaction, not more.

There is considerable agreement that "the certainty of punishment" for all offenders is more important than is the magnitude of punishments meted out to individuals;[170] whether or not an incre-

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Rawls and von Hirsch conclude that it is unjust to sacrifice the welfare of individuals for the general good of society. J. RAWLS, *supra* at 3–4; A. VON HIRSCH, *supra* at 50–51; *cf.* AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 86, at 55 (general deterrence does not consider "the effects of punishment upon the subsequent career of someone who has been punished"); B. WOOTTEN, *supra* note 157, at 92 (not possible to evaluate whether individual dispositions have contributed to the overriding objective). *See also* I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (Ladd trans. 1965) ("human being can never be manipulated merely as a means to the purposes of someone else"). As one of the most fundamental premises of his philosophy, Rawls states that

> [e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.

J. RAWLS, *supra* at 3–4.

[168] *See* A. VON HIRSCH, *supra* note 8, at 51 n.*.

[169] *See* F. ZIMRING & G. HAWKINS, *supra* note 157, at 138. Zimring and Hawkins note "that crimes committed for material gain are more susceptible to deterrence than crimes of passion such as homicide and assault . . . because crimes of passion are associated with higher levels of emotional arousal." *Id.*

[170] Antunes & Hunt, *supra* note 157, at 158; *Punishment*, *supra* note 157, at 964; *see* A. VON HIRSCH, *supra* note 8, at 61–63; J. Q. WILSON, *supra* note 87, at 174; Gardiner, *supra* note 157, at 123–24. *But cf. id.* at 125 ("prevention of crime involves wider issues than either severity . . . or certainty"). In 1764, Cesare Beccaria suggested that the certainty of punishment was of primary importance because "[t]he certainty of being punished, however lightly, always makes a stronger impression than the fear of another worse punishment, associated with a hope that it will not be inflicted." Beccaria, *supra* note 163, at 57; *accord*, *Punishment*, *supra* at 964, *cf.* Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L.J. 590, 594 (1977) (increased public knowledge of likelihood of detection and conviction of certain types of crime deters commission of that crime). One commentator, however, relates that some studies have shown that it is "the combination of certainty *and* severity of punishment" that serves as an effective deterrent. D. STANLEY, *supra* note 79, at 10 (emphasis in original).

ment in deterrence results from an increase in the severity of individual penalties is open to serious question.[171] The *Leonardis* court did not consider the goal of deterrence. If it had so considered, the court might have had to conclude that although some liberty is deprived by participation in pretrial intervention programs, for some of the eligible crimes the "benefits" of the crime to a potential offender would exceed the "costs" of participation. The commission of such crimes might therefore be encouraged by the increased availability of PTI programs.

PUNISHMENT, OR JUST DESERTS

One of the early origins of the modern theory of just deserts is Immanuel Kant's philosophy that a person should be punished when he deserves it and because he deserves it, the degree of punishment being determined by the gravity of the offense.[172] Kant's view is

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[171] *See* J. Q. WILSON, *supra* note 87, at 175. *Compare Punishment*, *supra* note 157, at 970 *with* Antunes & Hunt, *supra* note 157, at 158. As severity increases, the resulting extra increment of deterrence may become so minimal as to be not worth the costs of maintaining a prisoner through the extra period of incarceration. J. Q. WILSON, *supra* at 179; F. ZIMRING & G. HAWKINS, *supra* note 157, at 208–09; Antunes & Hunt, *supra* at 160. In addition, it should be noted that the public has only a sketchy appreciation of how severity of punishment may function as a general deterrent. *See Punishment*, *supra* at 970. Thus, if the penalty for a particular crime seems too severe, an offender may not be convicted at all, in preference to giving him a harsh sentence. J. Q. WILSON, *supra* at 179; *Punishment*, *supra* at 970.

In the extreme case of severity—capital punishment—some studies have indicated that the death penalty is no more of a deterrent than lengthy incarceration, *see* A. VON HIRSCH, *supra* note 8, at 39, and even sophisticated statistical and econometric studies of the death penalty have failed to establish a consensus on its deterrent effect. Gregg v. Georgia, 428 U.S. 153, 184–86 (1976) ("results simply . . . inconclusive"). *Compare* Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975) *with* Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187, 206 (1975) *and* Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359, 367 (1976).

[172] *See* I. KANT, *supra* note 167, at 99–107; A. VON HIRSCH, *supra* note 8, at 6. Kant reasoned that an individual's "innate personality [that is, his right as a person]" prevents society from punishing him for any other reason than his commission of an offense. I. KANT, *supra* at 100 (brackets in original). As this is the only acceptable justification, it is wrong to use punishment to accomplish a private goal "for the criminal himself or for civil society." *Id.* The offender "must first be found to be *deserving* of punishment before any consideration is given to the utility of this punishment for himself for his fellow citizens." *Id.* (emphasis added).

In determining the severity of the punishment, Kant argued that "the principle of equality," which he further described as the "retributive principle of returning like for like," is the governing standard. *Id.* at 101. Under Kant's reasoning, therefore, a murderer must be put to death; otherwise "there is . . . no equality between the crime and the retribution." *Id.* at 102.

based upon the theory that each member of society has undertaken a reciprocal obligation to limit his own behavior.[173] In violating the criminal law, a member of society obtains an "unfair advantage" over the other members of society. Punishment of the offender is necessary to remove the "unfair advantage" he has obtained,[174] even if the punishment benefits no one in terms of rehabilitation or deterrence, and even if there is no need to incapacitate the offender.[175] Professor von Hirsch has noted that by focusing on the past, the just deserts model differs "from the other purported aims of punishment—deterrence, incapacitation, rehabilitation—which seek to justify the criminal sanction by its prospective usefulness in preventing crime."[176]

Kant and von Hirsch have utilized the principle of proportionality to establish the severity of the punishment to be meted out to offenders. They suggest that grievous crimes ought to bear harsher penalties than minor crimes.[177] If they do not, criminals may choose to commit serious crimes instead of minor ones, thereby reaping the greatest advantage possible for the same penalty. Beyond the requirement that crimes be punished proportionately to each other, it is important that the most grievous crimes bear grievous penalties in

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[173] I. KANT, *supra* note 167, at 64–65; *see id.* at 36–37. Kant argued, for example, that secure personal ownership of property would be impossible without members of society entering into such a reciprocal obligation, since an individual's undertaking to respect the property of others derives its obligatory nature from their implied promise to do the same. *Id.* at 64.

Kant's philosophy on this issue is a reformulation of Rousseau's social contract. *See* Murphy, *Marxism and Retribution*, 2 PHILOSOPHY & PUB. AFF. 217, 225 (1973); J. ROUSSEAU, *The Social Contract*, in THE SOCIAL CONTRACT AND DISCOURSES 13–16, 29, 30 (1950). Rousseau defined the "social compact" as a contract in which " '[e]ach of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole.' " *Id.* at 15 (emphasis deleted). The result of "the social compact [is to set] up among the citizens an equality of such a kind, that they all bind themselves to observe the same conditions." *Id.* at 30.

Under Rawls' conception of the contract, "the principle of equal liberty" is given priority. J. RAWLS, *supra* note 8, at 244. Thus "liberty can be restricted only for the sake of liberty itself." *Id. See generally* notes 130–34 *supra* and accompanying text.

[174] A. VON HIRSCH, *supra* note 8, at 47–48; Murphy, *supra* note 173, at 228. Murphy derives the concept of the "unfair advantage" obtained by the criminal from an analysis of Kant's theory of reciprocal obligations. *Id.*; *see* note 173 *supra* and accompanying text. This reciprocity makes "it . . . important to guarantee that those who disobey [the law] will not gain an unfair advantage over those who do obey voluntarily." Murphy, *supra* at 228. The "unfair advantage" obtained by the criminal thus consists of his "not bearing the burden of self-restraint" exercised by the other members of society. *Id.*

[175] *See* I. KANT, *supra* note 167, at 100–01.

[176] A. VON HIRSCH, *supra* note 8, at 46.

[177] *See* I. KANT, *supra* note 167, at 101; A. VON HIRSCH, *supra* note 8, at 66–76, 90–94.

the absolute sense, so that the benefits to a calculating person committing the offense will not outweigh the costs of punishment.[178] Since it is the offense and not the offender that is crucial, the severity of punishment for an offense depends only upon the harm society believes to be caused by the type of crime and upon the consequent deprivation to which society determines that the average person committing the offense should be subjected.[179]

The incarceration of an offender is not necessarily the just disposition for all offenses; fines, probation, community service and even pretrial intervention can be devised to constitute just deprivations of liberty for offenses less serious than offenses demanding incarceration.[180] In a just deserts system, however, such alternatives to incarceration could never be permitted to replace incarceration for an offense the just deprivation for which has been established as a given term of incarceration. Pretrial intervention as interpreted by the *Leonardis* court, as well as the Model Penal Code and existing sentencing practices in New Jersey, permit such alternative dispositions, thereby destroying the proportionality of punishments and allowing grievous offenses, under certain circumstances, to bear lenient penalities.

One objection to a just deserts model of criminal dispositions is that offenses must be ranked in order to establish proportionate penalties. This problem is not a serious one, as studies suggest general agreement among persons from all segments of society upon groupings of crimes according to their degrees of severity.[181] For ex-

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[178] Beccaria, *supra* note 163, at 61–63; *see* A. VON HIRSCH, *supra* note 8, at 67. These ideas invoke the concept of deterrence to help determine the appropriate magnitude of penalties. In meting out punishment to particular offenders, however, deterrence principles should not be utilized. *See* note 212 *infra* and accompanying text.

[179] The actual scale of just dispositions could be devised by a legislature, by the supreme courts through actual guidelines or through case law, or by a special sentencing body. A. VON HIRSCH, *supra* note 8, at 102–04. *But see* Gregg v. Georgia, 428 U.S. 153, 174–76 (1976) (judges may not legislate what is most appropriate punishment; they may "require" only that "the penalty selected is not cruelly inhumane or disproportionate to the crime involved").

[180] A. VON HIRSCH, *supra* note 8, at 118–23; *see* J. Q. WILSON, *supra* note 87, at 180. *See generally* ABA, *supra* note 108, 13–20, 63–80, 107–08, 117–29; Note, *Creative Punishment: A Study of Effective Sentencing Alternatives*, 14 WASHBURN L.J. 57, 60–75 (1975). For an evaluation of a novel alternative sentence recently imposed, see *Reflections on White Collar Sentencing*, 86 YALE L.J. 589 (1977).

[181] A. VON HIRSCH, *supra* note 8, at 78–79; Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224 (1974). A study conducted in Baltimore in 1972 asked 200 adults to rank 140 specifically described crimes into nine categories of "seriousness." *Id.* at 225–26. No definition of "seriousness" was given to the respondents. *Id.* at 231. There was little difference in

ample, in the Model Penal Code, the New Jersey legislature has managed to classify offenses into four degrees of "crime" and into categories of "disorderly persons offenses."[182] It is probable, though, that over a period of time the rank of certain offenses would be changed, and the penalties they bear would change correspondingly. As an illustration, society might consider an offense such as selective service violation more serious in wartime.[183] In addition, if the frequency of a certain offense such as robbery were to increase greatly, society might consider itself more disadvantaged and might desire the scale of penalties to have more deterrent value. Therefore, the degree of severity of the crime might be raised.[184]

Another objection to punishment as the goal of criminal dispositions, and one more difficult to overcome, is that the theory merely proposes proportionality, but does not establish how severe the penalties should be for different crimes on the scale.[185] The penalty that each offense should bear is not self-evident. Kant, for example, states categorically that if an offender "has committed a murder, he must die."[186] In contrast, the Marquis de Beccaria, whose general philosophy on punishment is similar to Kant's, argues that capital punishment should never be imposed, because life imprisonment is an adequate deterrent for even the most likely criminal.[187] The eighth amendment, although it prohibits cruel and unusual punish-

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response from members of subgroups having different backgrounds. *Id.* at 230–31, 233. Furthermore, it was found that the respondents had little difficulty in performing the ranking task. *Id.* at 226. Offenses against persons, such as specific types of murder and rape, were ranked at the top of the seriousness scale, while crimes against property involving no personal assault were ranked considerably lower. *Id.* at 227–29. Interestingly, white collar crimes, such as embezzlement and price fixing, were ranked fairly low on the scale. *Id.* at 229. For the results of an informal study ranking five crimes in comparison to antitrust violations, see Renfrew, *supra* note 170, at 601–05.

[182] M.P.C. § 2C:1–4. For examples of the four degrees of crimes, see notes 51–55 *supra* and accompanying text. Examples of disorderly persons offenses include: "Criminal Mischief" involving damages of under $500, M.P.C. § 2C:17–3(b); "Criminal Trespass," unless perpetrated "in a dwelling," *id.* § 2C:18–3(a); and issuing "Bad Checks," *id.* § 2C:21–5.

[183] SENTENCING GUIDELINES, *supra* note 100, at 100.

[184] Dershowitz, *supra* note 11, at 27.

[185] *See* N. MORRIS, *supra* note 18, at 75–76; A. VON HIRSCH, *supra* note 8, at 93. Morris states that "[t]he concept of desert is a necessary but not sufficient condition of the punishment of crime." N. MORRIS, *supra* at 75. One of the problems arising out of a just deserts system is that there is considerable variation among different ethnic and national groups as to what the appropriate maximum levels of punishment should be. *Id.* at 75–76.

[186] I. KANT, *supra* note 167, at 102.

[187] Beccaria, *supra* note 163, at 47. This view is based on his belief that a punishment which will not deter others is excessive. *Id.*

ment, permits a legislature or other sentence-setting body considerable discretion in ascribing penalties along the scale of offenses.[188] Thus, although a consensus as to the ranking of crimes might be formed, it might be more difficult for society to reach a consensus as to the maximum and minimum deprivations to be required at either end of the scale.[189]

Furthermore, the just deserts model assumes that all persons who commit a given crime derive the same advantage from it, and that a given deprivation is felt in the same way by all offenders.[190] It might be argued, however, that a poor person is deprived of more utility by a monetary fine than is a wealthy person.[191] Currently, it seems that judges consider the utility theory in an inverted manner, penalizing the poor more heavily than the wealthy.[192] Although a just deserts model would at least impose the same deprivations upon the wealthy as upon the poor, it would not be possible to determine and correct disparate utilities without reintroducing the type of discretion that has been misused in the past.

Professor von Hirsch argues that the grievousness of an offense in a just deserts system should depend upon the culpability of the perpetrator as well as upon the harm risked or produced by the criminal act.[193] By inflicting punishment, society is not only recouping an advantage, but is also condemning an act; an individual who kills

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[188] *See* U.S. CONST. amend. VIII. This discretion is limited, however, by community mores and pressures. Furman v. Georgia, 408 U.S. 238, 277–79 (1972) (Brennan, J., concurring). Justice Brennan viewed "[r]ejection by society" as one of four principles to be applied by a court in determining whether a particular punishment is cruel and unusual. *See id.* at 277. He was careful to stress, however, the necessity of using objective standards in determining whether "contemporary society considers a severe punishment unacceptable." *Id.* at 278. In Gregg v. Georgia, 428 U.S. 153, 173 (1976), the Court stated that "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment." The California supreme court recently indicated that a sentence could violate the "cruel and unusual" standard if its duration was excessive in relation to the offense involved. *In re* Lynch, 8 Cal. 3d 410, 420–24, 503 P.2d 921, 927–30, 105 Cal. Rptr. 217, 223–26 (1972).

[189] *See* A. VON HIRSCH, *supra* note 8, at 93–94. In determining appropriate maximum sentences, a legislature or other sentence-setting body might also wish to consider the deterrent effect of various possible alternatives. Thus, if two alternative sentences are under consideration for a crime which is probably not deterrable, the lesser deprivation should be selected as a result of a rough application of the least drastic means test. *See id.*; note 134 *supra*.

[190] *See* A. VON HIRSCH, *supra* note 8, at 89–90.

[191] *See* P. SAMUELSON, ECONOMICS 407–27 (8th ed. 1970).

[192] *See* notes 105–07 *supra* and accompanying text. This practice constitutes "class justice," by which "the middle-class person is put on probation and the ghetto youth jailed for the same infraction." A. VON HIRSCH, *supra* note 8, at 90.

[193] A. VON HIRSCH, *supra* note 8, at 69. As used here, culpability is similar to intent, although the intent required to enhance culpability beyond the average exceeds the

upon provocation or under the influence of passion may not be as culpable as one who kills for hire. Therefore, the two killers should not, arguably, be punished equally, even though the harm produced is identical. Culpability looks solely to the individual offender's relationship to an offense *at the time* it is committed; it has nothing to do with his background, with his prognosis for rehabilitation, or with his potential for recidivism. Nevertheless, any factors considered in evaluating culpability are bound to be at least in part subjective and, therefore, objectionable to some segments of society. For example, von Hirsch argues that an offender's prior record is one factor to consider in determining culpability for a subsequent offense.[194] He argues that having once been exposed to the criminal law, a subsequent offender should be subjected to a more severe penalty because the prior censure had insufficient impact and because the offender had previously been made aware of the demands of the social contract.[195] It is not self-evident, however, that a conviction for one crime (*e.g.*, auto theft) makes one more aware of society's demands at the time of a subsequent dissimilar crime (*e.g.*, rape). In addition, it can be seen than an offender who has received the just desert demanded by a prior crime has already repaid society for the unfair advantage he derived from that offense.[196] Including prior offenses in a calculation of culpability sounds like an incapacitation-based system, rather than one based on punishment. Therefore, if culpability is to affect dispositions, the factors to be considered must be scrutinized rigorously to ensure that they are philosophically consistent with the precepts of just deserts.

An historical objection to the use of punishment as the exclusive determinant for individual criminal dispositions is that it has already

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minimum mens rea needed for a criminal conviction. *See* notes 238–40 *infra* and accompanying text.

[194] A. VON HIRSCH, *supra* note 8, at 84–88. *See also* J. Q. WILSON, *supra* note 87, at 180.

[195] A. VON HIRSCH, *supra* note 8, at 85. Professor von Hirsch also argues that while a sentencing court might have been unsure of an offender's culpability (*i.e.*, knowledge of society's demand) on the first occasion, it could not be unsure on a subsequent occasion. *Id.* at 85–86.

[196] Furthermore, to augment a new sentence because of a prior conviction in effect recoups more "advantage" for society than was lost by it. Since von Hirsch's model excludes rehabilitation as a purpose of or justification for incarceration, *see id.* at 11–18, he cannot logically argue that the failure of a disposition to rehabilitate justifies a more severe sentence on a subsequent occasion. Von Hirsch's argument in behalf of the use of prior convictions is strong, however, in the case of prosecution of an offender for a subsequent, similar crime, particularly if an element of the crime requires specific intent or special knowledge. *See id.* at 86.

been tried and rejected.[197] Another objection to such a system is that it appears to permit the punishment of incarcerated offenders beyond the simple deprivation of their liberty. Until the mid-twentieth century, retribution in this country was brutal, with corporal punishment of all sorts regularly practiced for a wide variety of offenses, not just the most heinous.[198] In addition, incarceration, particularly during the nineteenth century, was for very long periods of time,[199] perhaps expressing proportionality as conceived at that time.

These objections are no longer valid, since modern punishment practices do not include the severe methods formerly employed. Many commentators now agree that sentences, no matter what the rationale for their imposition, should be shorter than they presently average.[200] This modern concept of proportionality is reflected in the Model Penal Code.[201] Today, except for the death penalty, corporal punishment as the disposition of an offender has been virtually abolished as cruel and inhuman.[202] Furthermore, the judiciary has recently curtailed or eliminated most sanctions within prison walls which are unrelated to the deprivation of liberty.[203] Inmates have

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[197] *See* J. WAITE, THE PREVENTION OF REPEATED CRIME 27 (1943); Menninger, *Therapy, Not Punishment*, in PUNISHMENT AND REHABILITATION 132–33 (J. Murphy ed. 1973).

[198] *See* N. KITTRIE, *supra* note 13, at 14–16 ("flagellation, pillorying or mutilation" were frequent forms of punishment).

[199] *See* Bergan, *supra* note 13, at 2–3; *cf.* J. MITFORD, *supra* note 85, at 82–83 (punitive use of indeterminate sentences). Under a system of indeterminate sentences, the offender receives the maximum term, which corrections officials have unfettered discretion to reduce or not, based on the prisoner's behavior. *Id.* Although on the surface, "the indeterminate sentence seems to imply a policy of early release for the rehabilitated offender, it is actually a means of assuring much longer sentences . . . than would normally be imposed by judges." *Id.* at 83.

[200] *See, e.g.*, ABA, *supra* note 108, at 1–2; CORRECTIONS, *supra* note 18, at 150–53; TWENTIETH CENTURY FUND, *supra* note 8, at 32. *See also* N. MORRIS, *supra* note 18, at 6–9; A. VON HIRSCH, *supra* note 8, at 118.

[201] See notes 61–63 *supra* and accompanying text for a discussion of the sentencing provisions of the Model Penal Code.

[202] *See* Furman v. Georgia, 408 U.S. 239, 262–69 (1972) (Brennan, J., concurring) (discussion of what constitutes cruel and unusual punishment historically and in modern times). The first prisons were established by the Quakers as an alternative to the various forms of corporal punishment that were used in the seventeenth century. *See* N. KITTRIE, *supra* note 13, at 18; J. MITFORD, *supra* note 85, at 31.

[203] See note 18 *supra* and note 291 *infra* for a listing and discussion of prisoners'-rights cases and secondary material.

Application in this context of the least drastic means test, discussed at note 134 *supra*, requires that any punishments imposed upon prisoners be only those which are absolutely necessary and which are the least drastic possible under the circumstances. *Cf.* Procunier v. Martinez, 416 U.S. 396, 413 (1974) ("censorship of prisoner[s'] mail" must advance a "substantial governmental interest" and "be no greater than is necessary or essential to the protection of the particular governmental interest involved").

been granted due process protections before institutional disciplinary penalties may be imposed, in recognition of the fact that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[204]

Since the basis of a punishment-oriented system is the deprivation of liberty, the confinement itself is what constitutes an offender's punishment.[205] Improved rehabilitative programs, with voluntary participation and complete divorce from any dispositional decision, can be included in the just deserts model[206] to maximize the possibility that released inmates will have been rehabilitated. If such reform were to occur, it would defeat two additional historical objections to the just deserts concept—that few, if any, rehabilitative opportunities are offered offenders while they are serving sentences whose length and form are based upon punishment,[207] and that little concern is given to the problems of former inmates.[208]

Perhaps the most striking criticism of a true just deserts framework of dispositions is that it eliminates the possibility of "having mercy" on an offender.[209] Although the criticism is valid as a description of the system, its philosophical weakness lies in the maxim that penal "disabilities are the consequences of the person's *own* actions in having violated the law."[210] Disproportionate leniency in a given case based upon one judge's conception of mercy—a result

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[204] Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

[205] *See* Harris, *supra* note 14, at 293.

[206] N. MORRIS, *supra* note 18, at 14–15 ("treatment programs" should be expanded, but treatment should not be the underlying reason for jailing offender); *see* A. VON HIRSCH, *supra* note 8, at 115–16 ("*voluntary*" training should be available (emphasis in original)).

[207] *See* N. KITTRIE, *supra* note 13, at 30.

[208] *See* L. DEWOLF, *supra* note 94, at 64–65. For an in-depth discussion of this problem, see D. STANLEY, *supra* note 79, at 135–70. The problems confronting parolees range from lack of financial resources upon release, *id.* at 145, to statutory restrictions on employment, *id.* at 151–52, to supervision by a parole officer who symbolizes the "policing society" and who is unavailable at the hours when his assistance is most needed, *id.* at 168–69.

Some progress has been made in New Jersey toward protecting the rights of ex-offenders, particularly in the employment area. *See* N.J. STAT. ANN. §§ 2A:168A-1 to -6 (West Cum. Supp. 1976–1977); *id.* §§ 11:10-6.1, :17-1 (West 1976); note 43 *supra*.

[209] *See* Dershowitz, *supra* note 11, at 26–27. Dershowitz views "flat-time sentencing [as] too extreme a remedy" for the problem of disparity. *Id.* Thus, both von Hirsch and Dershowitz recognize a need for "flexibility" within prescribed limits in order to dispose justly of certain types of cases. A. VON HIRSCH, *supra* note 8, at 99, 125–26; Dershowitz, *supra* at 27.

[210] A. VON HIRSCH, *supra* note 8, at 148 (emphasis in original). Under a rehabilitative rationale, however, factors such as environmental and social conditions are stressed in evaluating an offender's conduct. *See* notes 73–74 *supra* and accompanying text.

permitted by the Model Penal Code but not by a just deserts model—would depreciate the blameworthiness of an act and the seriousness of the crime committed. Such a result is inappropriate, as it is not the role of the criminal justice system to atone for social and economic deprivations which may foster criminality.[211]

Systems of individualized criminal dispositions utilizing considerations of rehabilitation, incapacitation or deterrence produce no more mercy than a pure just deserts system.[212] They produce instead unexplained disparity and the injustices of overincarceration in futile efforts to reduce recidivism. Only the offender who claims that he is of below-average culpability for the type of crime of which he is accused could be shown a degree of mercy in a just deserts system because he deserves less condemnation for the crime than does the average offender. In contrast, the offender who claims only hardship or remorse does not deserve a lesser-than-average denunciation.[213]

Thus, it appears that a punishment-oriented system of dispositions does not attract criticism on empirical grounds because it is not based upon an effort to predict recidivism or to produce rehabilitation. Under a just deserts system, utilitarian concerns such as deterrence and incapacitation are not considered in connection with individual offenders, but rather are considered in defining types of offenses and in establishing the scale of offenses and the range of dispositions. Finally, the just deserts model frees rehabilitiative programs of their coercive concomitants by permitting offenders already sentenced to choose for themselves whether or not to participate.

INDIVIDUAL CRIMINAL DISPOSITIONS FOR NEW JERSEY

In proposing an improved system of criminal dispositions for New Jersey, at least two main approaches could be taken. One would be to reform only those elements which have resulted in unjustified disparity, the system's most visible existing defect, but to retain flexibility in disposing of individual offenders. The second approach would be more comprehensive, eliminating unjustified disparity in *individual* dispositions, while striving for a just *system* of dispositions.

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[211] *See* A. VON HIRSCH, *supra* note 8, at 145–49.

[212] *See* Dershowitz, *supra* note 9, at 122 (individualized systems utilizing indeterminate sentencing result in longer confinements of offenders since parole boards and judges are not better able to resist political and social pressures than are legislatures). Von Hirsch has suggested that any sentencing system, regardless of how much individual discretion it contains, will result in some unfairness. A. VON HIRSCH, *supra* note 8, at 101.

[213] *See* A. VON HIRSCH, *supra* note 8, at 85–87, 125–27.

The overriding concern over unjustified disparity has resulted in recent endorsements of sentencing guidelines as a method of reforming the ills of the dispositional system.[214] The editors of the *New Jersey Law Journal* have recommended adoption of the Model Penal Code's sentencing provisions[215] and the *New York Times* has editorialized[216] in favor of Senator Kennedy's legislative proposal[217] which contains guidelines similar to those in the Code.[218] Unfortunately, this faith in the efficacy of guidelines is misplaced. First, as already shown, studies indicate that judges coming from different backgrounds will interpret guidelines differently, even when given identical offender case histories.[219] Second, it is virtually impossible in any particular case to assign priorities to the conflicting justifications of dispositions included in the guidelines. Third, the effort to achieve utilitarian goals such as deterrence through individual dispositions is doomed to frustration.[220] Therefore, the unstructured use of guidelines, even with the requirement of written rationales for dispositions and with provision for appellate review of sentences, cannot result in a significant reduction in disparity.

Only if the use of sentencing guidelines is strictly structured so that individual judges cannot react differently to identical offenders, will a guidelines system succeed in reducing disparity. One way to structure the use of guidelines is to adopt a sentencing matrix —similar to that utilized for parole decisions by the United States Parole Commission—in which the sentence to be imposed is based upon the typical characteristics of a particular crime, as well as upon

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[214] *See* M. FRANKEL, *supra* note 12, at 113–15.

[215] 99 N.J.L.J. 1108 (1976).

[216] N.Y. Times, Mar. 10, 1977, at 34, col. 1.

[217] S. 181, 95th Cong., 1st Sess., 123 CONG. REC. S373 (daily ed. Jan. 11, 1977).

[218] Section 3579 of S. 181 requires that in deciding upon whether to incarcerate an offender, and in deciding how long to incarcerate him, a court shall evaluate

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
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> (2) the need for the sentence imposed (A) to reflect the seriousness of the offense and promote respect for law by providing just punishment for the offense, (B) to afford adequate deterrence to criminal conduct, and (C) to protect the public from further crimes of the defendant;
>
> (3) whether other less restrictive sanctions have been applied to the defendant frequently or recently . . . .

Id. § 3579. Note that Senator Kennedy would implicitly exclude rehabilitative potential from judicial consideration.

See note 10 *supra* for a discussion of S. 1437, 95th Cong., 1st Sess. §§ 101, 2003, 123 CONG. REC. S6835 (daily ed. May 2, 1977) which also would require use of guidelines.

[219] *See* notes 99–104 *supra* and accompanying text.

[220] *See* notes 166–71 *supra* and accompanying text.

those of a typical person committing that crime.[221] Use of this type of system has in fact been effective in reducing disparity.[222]

Such a system contains certain basic flaws, however. First of all, it tends to err on the side of overincarceration.[223] And more fundamentally, it incorporates factors which are philosophically inconsistent with the just disposition of individual offenders. Since such a descriptive model makes no effort to be internally consistent philosophically, and since it obfuscates the issue of justice inescapably intertwined with each criterion and dispositional justification selected in developing a system,[224] it should be rejected in choosing reforms for New Jersey.

The second alternative is more prescriptive than descriptive, and, as noted earlier, strives to eliminate unjustified disparity, while achieving a system that is just overall. A just deserts system meets these criteria and is most fair to the individual offender. At the same time, the just deserts system can accommodate society's utilitarian interests in protecting itself by reforming offenders, preventing recidivism and deterring other crime.[225] Use of this second approach avoids the philosophical and empirical problems inherent in applying justifications other than punishment to individual dispositions, and should form the basis of any reform of New Jersey's system of criminal dispositions.

Any attempt to add flexibility to a just deserts system through consideration of an offender's characteristics would reintroduce the disparity and consequent unjustified deprivations of liberty criticized above. For example, Professor Dershowitz, in an effort to built flexibility and the possibility of mercy into a just deserts system, recently recommended adoption of " 'presumptive sentencing.' "[226] Under the Dershowitz scheme, sentencing judges would be permitted to sentence above or below the legislatively established presumptive sentence, detailing their reasons in writing, if any of certain legislatively established aggravating or mitigating factors were present. The factors suggested allow consideration of the individual offender since they include such characteristics as sex, age, marital status, employment

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[221] Dershowitz, *supra* note 11, at 27.

[222] *See* SENTENCING GUIDELINES, *supra* note 100, at 14.

[223] *Cf.* note 128 *supra* and accompanying text (protecting the public may be advanced as justification for overincarceration).

[224] *See* R. WOLFF, UNDERSTANDING RAWLS 25 (1977) (social "practice" must be structured justly, not merely administered in a just fashion).

[225] *See* note 14 *supra*.

[226] *See* Dershowitz, *supra* note 11, at 27.

and education.[227] On appeal, there would be a presumption against any variation from the "presumptive sentence."[228]

By incorporating offender characteristics similar to those proposed by Dershowitz or the Model Penal Code, the basic just deserts system is undermined philosophically. Personal characteristics are irrelevant to penalties in a just deserts system, and are relevant only to those dispositional justifications inimical to just deserts. Moreover, Professor Dershowitz's particular system lacks any structure to govern the use of offender characteristics, such as the matrix developed by the Parole Commission in connection with its purely descriptive model. Judges attempting to apply aggravating and mitigating factors will inevitably utilize them subjectively and disparately. Although appellate review of the reasons for avoiding the presumptive sentence is contemplated, this system ignores the poor record of such review.[229] Thus, although Dershowitz has introduced flexibility and the possibility of mercy, he has invited judges to balance conflicting factors on an ad hoc basis and has reintroduced justifications improper for individual dipositions. As the criteria available to judges become more permissive, the less a sentencing system resembles a pure just deserts model.[230]

Devising a Just Deserts System

In order to eliminate that degree of judicial discretion which would continue to foster unjustified disparity in New Jersey, and also to produce a philosophically consistent and just system of dispositions, the sentencing provisions of the Model Penal Code should be amended. The wide range of sentencing options available for identical offenses—extended terms of incarceration, basic terms of incarceration, probation, suspended sentences or fines—should be severely

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[227] *Id.*

[228] *Id.*

[229] The author endorses appellate review in order to maintain a check on the application of factors relating to culpability and upon the use of the matrix suggested at pp. 52–55 *infra*.

[230] Professor Dershowitz recently wrote a background paper for the Twentieth Century Fund Task Force on Criminal Sentencing. *See generally* Dershowitz, *supra* note 9. The Task Force's Report advocates a just deserts model with judges retaining discretion to modify the "presumptive sentence" for each crime by recourse to certain enumerated aggravating and mitigating factors. TWENTIETH CENTURY FUND, *supra* note 8; at 20–23. Unlike the factors referred to by Dershowitz in his *New York Times Magazine* article, the Task Force's factors do not relate to the offender's background, but rather to his involvement with the crime committed. *Compare id.* at 43–45 *with* Dershowitz, *supra* note 11, at 27. Nevertheless, the problems of lack of structure and the difficulty of establishing priorities among the factors of each crime remains.

limited. In addition, it would be necessary to delete most of the factors set forth by the Model Penal Code for judicial consideration prior to sentencing: risk of commission of another crime, need for correctional treatment, likelihood that the victim will be compensated, prior record of the defendant, character and attitudes of the defendant, predicted affirmative response to probation, and likelihood that imprisonment would entail excessive hardship.[231] Many of these factors cannot be assessed to any degree of certainty. Moreover, by focusing on issues which reflect the offender's overall background and personality, rather than on those characteristics which relate to the commission of the offense in question, the goal of rehabilitation is mingled with those of incapacitation and deterrence. Consideration of such goals by judges in individual cases would inexorably result in a continuation of the sentencing disparity which New Jersey should be avoiding. As the failure of the existing system demonstrates, the use of such subjective factors fails to further society's utilitarian interests.

What is needed is action by the legislature or by a sentencing commission to establish a fixed scale of dispositions encompassing each offense or class of offenses. That scale should be founded upon the disadvantage which society deems itself to have incurred when a particular average offense is committed. A starting point in developing the scale could be the average disposition currently meted out for an offense; since current dispositions are based in part upon factors suggested to be impermissible, refinements would be in order.

Once a just deserts scale is established, the disposition for an individual offender should be varied slightly from the dictates of the scale, only if the offender were found to be above or below "average" culpability for that offense.[232] The "average" culpability for a given type of offense could be established by canvassing already sentenced offenders and determining the characteristics of a typical *offense* of that category. The Model Penal Code supports this approach by defining certain offenses on the basis of culpability.[233] For example,

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[231] M.P.C. §§ 2C:44-1(a)(1)-(2), (b)(6)-(7), (9)-(11); *see* notes 62-63 *supra* and accompanying text.

[232] *See* notes 193-96 *supra* and accompanying text.

Lists of suggested aggravating and mitigating factors are included in the National Advisory Commission's study, CORRECTIONS, *supra* note 18, at 150-51, and in the TWENTIETH CENTURY FUND, *supra* note 8, at 44-45. Some of the corrections factors, however, are related to the offender's background, and not to his culpability. *See* CORRECTIONS, *supra* at 150-51.

[233] *See* M.P.c. 2 2C:2-2(e) which considers "[c]ulpability as determinant of [the] grade of [an] offense."

criminal homicide can be murder, manslaughter or negligent homicide, depending upon the offender's degree of culpability.[234] Kidnapping can be a crime of the first or second degree, depending upon the safe release of the victim, or of the fourth degree if interference with the custody of a child or of committed persons is involved.[235]

Degree of culpability could also be relevant within any single crime defined by the legislature. For example, the average crime of statutory rape might be deemed one committed by a person who made no effort to ascertain the victim's age and whose victim neither protested nor consented to the crime.[236] As another example, the average auto theft might be viewed as one committed by an offender who takes one vehicle on the spur of the moment and abandons it the following day.[237]

Under a just deserts system, a judge should be permitted discretion to compare the circumstances of the individual offender's crime to those of the average crime of that type[238] as determined through the canvass of previously convicted offenders. Certain of the provisions of the Model Penal Code could serve as an appropriate measure of an offender's culpability. For example, some of the factors contained in section 2C:44-1(b) of the Model Penal Code (factors justifying a sentence of no imprisonment) should be retained, as they do suggest a lesser culpability in the commission of the particular offense charged. These factors are (1) the failure of the conduct to cause or threaten harm, or the failure of the offender to contemplate that it would; (2) the existence of provocation; (3) the presence of substantial grounds for excuse or justification falling short of an affirmative defense; and (4) the contribution to the crime of the victim's own conduct.[239] Likewise, some of the conditions listed in section 2C:44-3 (factors allowing imposition of an extended sentence) should also remain in the Code because they reflect a greater-than-average degree of culpability. These factors are (1) the offender managed the offense

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[234] *Id.* §§ 2C:11-2 to -5; *see id.* § 2C:2-2.

[235] *Id.* §§ 2C:13-1(c), -4.

[236] New Jersey's Model Penal Code defines rape as a function of several factors: the degree of force or compulsion, the victim's age, the degree of the victim's awareness as recognized by the offender, and whether the victim knew the offender was not the victim's spouse. *Id.* § 2C:14-1. Rape can be a crime of either the first, second or third degree depending on how the facts reflect the above considerations. *Id.*

[237] The grading of theft offenses is contained in *id.* § 2C:20-2(b). This delineation is similar to traditional definitions of offenses in that it does not detail what would constitute a typical offense. *Compare id. with* N.J. STAT. ANN. §§ 2A:119-1 to -5, -5.2, -9 (West 1969 & Cum. Supp. 1976–1977).

[238] *See* A. VON HIRSCH, *supra* note 8, at 80–81.

[239] M.P.C. § 2C:44-1(b)(1)–(5).

as part of ongoing criminal activity, and (2) the offender was paid for the commission of the crime.[240]

To illustrate how these culpability factors might be applied in specific cases, it will be helpful to view their effect in a statutory rape and in a theft case which vary from the "average" crimes described above. Thus, the statutory rape in which an individual has intercourse with a girl he met while she was hitchhiking at night, who told him that she was sixteen and invited the sexual activity, should be considered to involve less culpability on the part of the perpetrator than does the average statutory rape.[241] A lesser sentence would be justified since our hypothetical offender has substantial grounds for excuse which fail, however, to establish a defense, and since the victim's conduct also contributed to the crime. As another example, the individual who directs others in a large auto-theft operation should be considered more culpable than the person committing the average auto theft because the crime was a part of an ongoing criminal enterprise for profit.

Use of culpability factors permits some flexibility in meting out dispositions without detracting from the soundness of the just deserts model. Whether as a result of statutory definition of the crime or as a result of differentiation among similar crimes based upon culpability factors considered by a judge, all disparity in sentences would result from differences in the seriousness of the offenses committed. No disparity would be caused by differences in the offenders' backgrounds or in their prognoses for rehabilitation or recidivism nor by the effort to deter other criminals. In addition, even those offenders of above-average or below-average culpability would receive a disposition only slightly at variance with the just desert for the average offense of that type. Judges would have extremely limited discretion and would not be permitted to choose among alternative dispositions.

Illustrated below are two alternative sentencing structures which could be utilized in a just deserts system. Both of the Tables selectively incorporate provisions of New Jersey's Model Penal Code. Under either of the proposed Tables judges would be limited to the sentences indicated. Table I takes into consideration only the degree of the crime as defined in the Model Penal Code and the degree of culpability of the offender. Thus, any second-degree crime, whether kidnapping or manslaughter, is penalized by the same sentence: eight years of incarceration for a high degree of culpability, six and one-half years for an average degree of culpability and five years for a low degree of culpability. Table II also takes into consideration the de-

[240] *Id.* § 2C:44-3(b)-(c).

[241] The author obtained a conviction from a jury in just such a case.

Sentencing Tables

TABLE I

Degree of Crime as Defined in M.P.C.	*Degree of Culpability**		
	High	*Average*	*Low*
First Degree	18	14.5	11
Second Degree	8	6.5	5
Third Degree	4	2	6 mos.
Fourth Degree	12 mos.	6 mos.	18 mos. Prob.
Disorderly Persons	6 mos.	6 mos. Prob. & Fine	PTI

TABLE II

Degree of Crime as Defined in M.P.C.	*M.P.C. Citation*	*Degree of Culpability**		
FIRST DEGREE CRIMES		*High*	*Average*	*Low*
Murder[242]	2C:11-3	26	23	20
Kidnapping	2C:13-1(c)	18	14.5	11
Aggravated Rape	2C:14-1(a)	18	14.5	11
SECOND DEGREE CRIMES				
Manslaughter	2C:11-4	8	6	5
Kidnapping	2C:13-1	7.5	6	5
Extortion	2C:20-2b(1)	7	6	5
THIRD DEGREE CRIMES				
Statutory Rape	2C:14-3	4	3	5 yrs. Prob.
Fraud Over $500	2C:20-2b(2)(a)	3	5 yrs. Prob. & Fine	3 yrs. Prob. & Fine
FOURTH DEGREE CRIMES				
Interference with Custody	2C:13-4	12 mos.	6 mos.	18 mos. Prob.
Possession of Switchblades	2C:39-3	18 mos.	6 mos.	18 mos. Prob.
DISORDERLY PERSONS OFFENSES				
Possession of Stolen Property Less than $200	2C:20-2b(3)	6 mos.	6 mos. Prob. & Fine	PTI
Prostitution	2C:34-2	6 mos.	Fine	PTI

* All sentences are for years of incarceration unless otherwise indicated.

[242] The higher sentences for murder reflect the Code's treatment of murder as a crime demanding a special penalty. *See id.* § 2C:11-3(b).

gree of culpability (high, average or low), but provides three possible sentences for each *specific* crime as opposed to each *degree* of crime. Thus, crimes of similar severity are penalized similarly but not identically. As a result, under Table II, the second-degree crimes of kidnapping and extortion require slightly different punishments.

Both Tables are consistent with the just deserts model, and both reveal this model's limitation upon the exercise of judicial discretion. As the Tables indicate, incarceration would not be required for all offenses; probation, fines and pretrial intervention would be available, but not as alternatives to one another or to incarceration. On a practical level the scale and the dispositions included therein would have to take account of the serious problem of prison overcrowding in New Jersey.[243] The particular sentences included in the Tables are only the author's suggestions to the legislature or other disposition-setting body, which might decide to make modifications after gaining some

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[243] Since judges would no longer be able to take account of crowding in penal institutions in deciding individual dispositions, the sentence-setting body should examine institutional capacity together with historic numbers of persons committing various offenses and the sentences established. If those factors taken together indicate that overcrowding will result, then either more institutions would have to be built or the sentence-setting body would have to reduce systematically the incarceration established for some overall offenses. To permit overcrowding would be to permit history to repeat itself, *see* notes 197–208 *supra* and accompanying text, and might violate the eighth amendment.

The proposed system may itself unwittingly ameliorate, or at least not aggravate, the overcrowding problem. Since only those offenders determined by the matrix to warrant incarceration would be imprisoned, the result may be that a different class of offenders will be incarcerated than under the current system of judicial discretion. For example, currently in New Jersey the average offender sentenced to a period of incarceration has been convicted of a more serious offense than the average offender of previous times. MASTER PLAN DATA, *supra* note 41, at 10–11 (Supp. I). These average inmates, however, in spite of the increased severity of their offenses are remaining in prison for shorter periods than heretofore. CORRECTIONAL MASTER PLAN, *supra* note 76, at 71. *See also* Dershowitz, *supra* note 11, at 26 (discussing relationship between many defendants receiving long sentences and many receiving none).

The importance of these considerations relates to the fact that the conditions of incarceration determine to a certain extent the true deprivation resulting therefrom. *See* A. VON HIRSCH, *supra* note 8, at 115. One year in a maximum-security institution is a harsher penalty than one year on a work farm. *See* Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirements of a Full Administrative Hearing*, 31 MD. L. REV. 27, 38–39 (1971). Therefore, similar offenders should be sentenced initially to similar types of confinements. Such a system has been proposed to the author by Christopher Dietz, Chairman of the New Jersey State Parole Board. Under his proposal, all inmates might initially be classified to a maximum security institution, and after having served a fixed percentage of their term, might progress to a medium security institution, and so on until release. Only if an inmate posed a special threat to other inmates, or violated institutional rules, would he remain in or be returned to an institution of higher security. *See also* N. MORRIS, *supra* note 18, at 100–07 (graduated release plan).

experience with a given scale and a given set of dispositions. After the legislature or other body established the specific punishments for each offense, a judge would be permitted to determine, based on the record, only whether the individual offender before him was of above-average, average or below-average culpability.

Probationary terms should be included in the tables for offenses not warranting incarceration. The form of probation would have to be altered, however. Presently, probation is nonpunitive, requiring reports to a probation officer as prescribed by the sentencing judge, as well as conformity to various conditions.[244] Although some of these conditions, such as restrictions upon associations and travel, do restrict liberty, a just deserts system would require more clearly defined deprivations of liberty because such deprivations constitute the essence of punishment.[245] Furthermore, in order for the utilitarian interests built into the criminal justice system to have any impact, the deprivation included in probation must be made clear to offenders and nonoffenders alike. Requiring a person on probation to spend an amount of time engaged in public or community work without compensation, for example, deprives that person of liberty without incarceration and would fit the just deserts model being proposed.[246] A scale of deprivations could and should be devised for persons placed on probation; the more serious the offense warranting probation, the greater the deprivation should be.[247]

Similarly, pretrial intervention programs could be effectively utilized within the just deserts system. For minor offenses such as prostitution, society's ends might be served without conviction and sentence through an offender's participation in a program of therapy or training. Likewise, offenders convicted of possession of marijuana or of certain narcotic drugs might be required to spend several after-

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[244] N.J. STAT. ANN. § 2A:168–2 (West 1971); *see* Best & Birzon, *Conditions of Probation: An Analysis*, in PROBATION AND PAROLE 407, 414–16 (1970); Rheiner, *The Period of Probation*, in PROBATION AND PAROLE 170, 171–72 (1970). Conditions of probation may include, for example, required employment, restrictions on moving, avoidance of certain persons, and continued residence in the state. N.J. STAT. ANN. § 2A:168–2 (West 1971).

[245] *See* Harris, *supra* note 14, at 293.

[246] *See* Note, *supra* note 180, at 64–65. The author of the Note advocates alterations in the use of probation whereby the offender would make restitution to his victim. *Id.* at 69. In the case of a victimless crime, he suggests that the offender be assigned to work in a community project. *Id.* at 65. He refers to such proposals as "creative sentencing" and concludes that such sentencing "adjusts the punishment for each individual case to effect the greatest possible return to society." *Id.*

[247] The same type of proportional scale would be used for fines or for any other type of disposition.

noons a week in a drug treatment center.[248] Whether or not the therapy, treatment or training actually reformed or rehabilitated the offender, the deprivation of liberty inherent in forced participation would serve to recoup the advantage obtained by the offender. Because release or termination would not be dependent upon "cure," the rehabilitative efforts would, as a byproduct, have a greater chance of success.[249]

MULTIPLE CONVICTIONS

Offenders who are to be sentenced at one time upon multiple convictions present the just deserts sentencing system with thorny issues. Presently, such offenders generally receive concurrent sentences. The Model Penal Code would leave the decision on imposition of concurrent or consecutive sentences to the judge's complete discretion.[250] Several commentators, however, have urged a presumption in favor of concurrent terms within sentencing reforms that otherwise retain general judicial discretion.[251] However, neither unfettered judicial discretion nor use of a presumption in favor of concurrent terms would be appropriate in a just deserts system.

There are three common types of situations in which this multiple offense problem arises.[252] First, multiple charges may stem from one incident, as when one possesses and then sells a narcotic drug. At the other extreme, multiple charges may arise from distinct, dissimilar offenses, such as one indictment charging possession of a switchblade, and another charging extortion (without any weapon involved). Third, a single criminal activity may involve multiple and distinct but similar criminal acts, as when one sells narcotic drugs on a number of occasions, perpetrates a series of fraudulent land sales, or extorts money from a number of victims.

As a solution to the first formulation of the problem, an extension of the emerging doctrine of merger[253] may be appropriate.

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[248] Possession of less than 26 grams of marijuana is currently a disorderly persons offense. N.J. STAT. ANN. § 24:21-20(a)(4) (West Cum. Supp. 1976–1977).

[249] *See* notes 85–87 *supra* and accompanying text.

[250] M.P.C. § 2C:44-5(a). The Code does not suggest any guidelines to assist judges in making the decision.

[251] *See, e.g.*, ABA, *supra* note 108, § 3.4(b) & Commentary, at 171–72, 176–79; CORRECTIONS, *supra* note 18, Standard 5.6.

[252] *See* CORRECTIONS, *supra* note 18, Standard 5.6, at 165–66 (hypothesizing five different examples of multiple offense situations).

[253] For a discussion of the merger doctrine in New Jersey, see State v. Best, 70 N.J. 56, 58–71, 356 A.2d 385, 386–93 (1976); State v. Valentine, 69 N.J. 205, 206–15, 351 A.2d 751, 752–56 (1976); State v. Sempsey, 141 N.J. Super. 317, 324–25, 358 A.2d 212, 216–17 (App. Div. 1976); State v. Pratts, 145 N.J. Super. 79, 94, 366 A.2d 1327, 1336–37 (App. Div. 1975), *aff'd*, 71 N.J. 399, 365 A.2d 928 (1976).

When one "participates in a single, continuous criminal episode and then is prosecuted for several crimes each of which represents a different stage of the episode,"[254] the crimes should be merged for the purpose of sentence into the one that is the most serious.[255] The advantage the offender obtains over society would generally accrue from the ultimate crime the offender intended to, and did, commit. Thus, the disposition of the offender who possessed and then sold narcotics should be dictated by the just desert for the sale—the more inclusive and more serious offense.[256]

In the case of the individual facing criminal disposition for several distinct, dissimilar offenses, a just deserts system would demand consecutive sentences. The offender has taken advantage of society several times and in several ways. Those distinct advantages would not be recouped through concurrent dispositions.

The most difficult problem is presented by the example involving the repetition of a similar crime on a number of occasions. On the one hand, as statutes are currently defined, each act is a separate offense, deserving separate and consecutive punishment in a just deserts framework. Such a result, however, merely shifts sentencing discretion to the prosecutor, who could decide how many such repetitive acts to charge and, therefore, how many consecutive dispositions would be imposed.[257] The prisons might become populated by offenders committing relatively minor offenses with great frequency, rather than by the smaller number of offenders who commit sporadic acts of violence.[258] On the other hand, such offenders could be viewed as having been engaged in one criminal enterprise. The "promoting gambling" provision of the Model Penal Code takes this view in part, by defining as one offense the receipt or acceptance of three or more bets in any two-week period.[259] It might, however, be difficult to

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[254] State v. Best, 70 N.J. 56, 61, 356 A.2d 385, 388 (1976).

[255] *Id.* at 61–68, 356 A.2d at 388–91.

[256] The author is suggesting an extension of the merger doctrine since State v. Valentine, 69 N.J. 205, 209–12, 351 A.2d 751, 752–54 (1976), and Gore v. United States, 357 U.S. 386, 387–91 (1958), have held that such crimes do not merge. Similarly, the crime of conspiracy should be merged for purposes of sentencing into one of the objects of the conspiracy if the object formed the basis of a charge and conviction. *See Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 968–71 (1959).

[257] For a discussion of plea bargaining, see notes 262–75 *infra* and accompanying text.

[258] The MASTER PLAN DATA, *supra* note 41, suggest that minor crimes are vastly more prevalent than the five most violent crimes.

[259] *See* M.P.C. § 2C:37-2(b); *cf. In re* Fontana, 100 N.J.L.J. 267 (N.J. Super. App. Div. Mar. 31, 1977) (five separate breaking and entries and five separate larcenies in one night spree considered one crime for expungement statute).

secure agreement as to which series of multiple offenses should be viewed and treated as one enterprise, and which should not.[260]

It is preferable to treat such repeated, similar offenses as one criminal enterprise. This approach is more pragmatic than handling them individually, and could be incorporated into a just deserts system by redefining certain offenses to include individual acts within a more broadly defined, continuing criminal enterprise. Or, for certain offenses, the average offense could be defined as having been committed on a number of occasions, with fewer or more acts being a mitigating or an aggravating factor as to culpability.

Criminal dispositions are made not only by judges. Prosecutors through plea bargains, and parole boards through release decisions, currently also participate in determining both the length and the type of disposition an offender receives.[261] A just deserts system, or any other system of dispositions, which attempts to eliminate or restrict judicial discretion, would be undermined totally if the discretion inhering in prosecutors and parole boards were not reformed in tandem with the sentencing system.

PLEA BARGAINING

Plea bargaining, as currently practiced by prosecutors and defense attorneys in New Jersey and elsewhere, has various forms.[262] When there are several outstanding indictments against an individual, the prosecution may ask the appropriate judge to dismiss certain of the charges if the offender pleads guilty to at least one of them.[263] Or a charge against an offender may be downgraded from a high mis-

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[260] Although many people might agree on such treatment for offenders committing gambling or narcotics offenses, they might not for the offender who, for example, perpetrates seven breaking and entries of homes within a three-week period.

[261] *See* ABA, *supra* note 108, at 242–43. The Model Penal Code fails in any way to address the issues raised by plea bargaining.

[262] *See* NATIONAL ADVISORY COMM'N ON CRIM. JUST. STANDARDS & GOALS, COURTS 42–43 (1973) [hereinafter cited as COURTS]. *See generally* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85–105 (1968).

[263] *See* Alschuler, *supra* note 262, at 85–89. Alschuler describes this type of plea bargaining as being based on "horizontal overcharging," which occurs in two forms: (1) splitting one criminal incident "into numerous component offenses," or (2) charging as "a separate offense" every crime of which the defendant is accused. *Id.* at 85, 87. The chief purpose of such overcharging is to facilitate obtaining a plea of guilty in return for the prosecutor's dropping some of the charges. *Id.* at 85–86. Such a system fails to achieve just deserts in two ways. If the overcharging is spurious and done simply for the purpose of inducing a guilty plea, the defendant might actually plead guilty to some offenses which he did not commit to avoid trial on even more serious charges which are included. On the other hand, if the defendant is actually guilty of all charges included, the sentence he receives will be less than what he justly deserves.

demeanor to a misdemeanor, or to a disorderly persons offense.[264] Lastly, the most important form from a defendant's point of view is that the prosecutor may agree to recommend a specific sentence or an upper limit on a sentence in exchange for a plea of guilty.[265]

Under a just deserts system of dispositions, plea bargaining would have to be eliminated insofar as it is not "based on penologically relevant considerations";[266] otherwise the disposition would reflect the bargain and its underlying impermissible justifications rather than the just desert for an offense.[267] Sentence bargaining is a significant cause of the sentencing disparity[268] which a just deserts model attempts to eliminate. The bargained sentence may be as much a result of the attitudes and abilities of counsel as of the facts underlying a prosecution.[269] Furthermore, judges often impose sentence on the basis of the "real crime" revealed by the presentence report, regardless of the downgrading or dismissal of charges result-

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[264] *See id.* at 86. This type of bargain is based on what Alschuler denominates " 'vertical overcharging.' " *Id.* In such a case "the prosecutor actually seeks conviction" for "a 'lesser included offense.' " *Id.*

[265] COURTS, *supra* note 262, at 43; TASK FORCE REPORT, *supra* note 40, at 11. *See also* Santobello v. New York, 404 U.S. 257, 258–59 (1971) (agreement by prosecutor not to recommend a particular sentence).

[266] Alschuler, *supra* note 262, at 57. Some proponents of plea bargaining rationalize the justice of the process by pointing out that inasmuch as "a guilty plea evidences a defendant's repentance," that defendant deserves a lesser sentence. *Id.* Such a rationale is clearly incompatible with the just deserts system proposed by this article. *See also* COURTS, *supra* note 262, at 46–49.

[267] *See* Alschuler, *supra* note 262, at 52–85. *See also* A. VON HIRSCH, *supra* note 8, at 104–06. The Alschuler article discusses various reasons advanced by prosecutors for attempting to bargain cases rather than trying them. Among these rationales are (1) administrative efficiency—the desire to reduce the much-touted "backlog" in the courts, Alschuler, *supra* at 52–56, (2) advocacy—the desire to achieve as many convictions and the most severe ones possible, *id.* at 52, (3) desire to achieve what he perceives to be "the 'right thing' for the defendant," *id.*, at 53, (4) desire to mitigate the consequences of a law which is " 'too harsh,' " *id.*, and (5) weakness of the prosecution's case, *id.* at 58–60. Only the last of these reasons may be consistent with a just deserts system. *See* note 275 *infra* and accompanying text. Nevertheless, insofar as a weak case may reflect the fact that a defendant is actually innocent, any pressuring of such a defendant to enter a guilty plea is an attempt to accomplish injustice. *See* Alschuler, *supra* at 60.

[268] *See* Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 580–82 (1977). *But see id.* at 576, 580 (prosecutorial concessions resulting from guilty pleas may narrow sentence range and judges' discretion). Some of the disparities created by a plea-bargaining system are inequities in sentences between defendants who plead guilty and those who are convicted of the same crimes, and "inequalities among those who plead guilty." *Id.* at 580. In addition, when viewed in terms of the actual offense committed, as opposed to the offense for which sentence is imposed, variations in treatment among comparable offenders will be substantial.

[269] *Id.* at 581–82; *see* Alschuler, *supra* note 262, at 79–81. Alschuler observes that "[v]agaries of judicial personality" may also encourage a decision to plea bargain. *Id.* at 80–81.

ing from the plea bargain.[270] Therefore, eliminating the possibility of downgrading or dismissal may increase the integrity of the process.

Although the practice of plea bargaining developed largely as a means of disposing of the volume of cases straining prosecutors' offices and court dockets, it is not clear whether or not many more defendants would in fact demand trials if plea bargaining were eliminated. Presently, approximately ten percent of defendants exercise their right to trial.[271] Informal results from New Jersey counties[272] and experiences elsewhere indicate that when plea bargaining has been curtailed, the increase in the number of defendants exercising their right to trial has been relatively small.[273] In the federal system, at least in the district of New Jersey, there has not been any sentence bargaining, yet there has not been an inordinately high number of defendants demanding trial.[274] One reason for this result, relevant to

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[270] SENTENCING GUIDELINES, *supra* note 100, at 88–90.

[271] *See* Santobello v. New York, 404 U.S. 257, 264 n.1 (1971) (Douglas, J., concurring) (in 1964, 95.5% of New York convictions, 90.2% of federal convictions and 74% of California convictions obtained by guilty pleas) (citing COURTS, *supra* note 262, at 9); Brady v. United States, 397 U.S. 742, 752 & n.10 (1970) (90–95% "of all criminal convictions," 70–85% "of all felony convictions . . . by guilty plea"); COURTS, *supra* at 42 ("[i]n many courts, more than 90 percent of criminal convictions" based on guilty pleas); Alschuler, *supra* note 262, at 50; Note, *Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial*, 119 U. PA. L. REV. 527, 527 (1971) (rate of guilty pleas ranges from 60–95%). *See generally* Alschuler, *supra* at 54–55.

[272] Middlesex County and Ocean County Prosecutors C. Judson Hamlin and Edward Turnbach have respectively reported to the author that the virtual elimination of sentence bargaining has not resulted in a higher percentage of defendants demanding trials or in an increased criminal backlog. In those counties, more important than whether sentence bargaining is permitted is whether petty offenses are disposed of in municipal court without indictment, and whether indictments returned are legally and factually sound. It is possible, however, that defendants plead guilty in these areas because they are aware of the sentencing predelictions of the judges hearing criminal matters.

[273] Berger, *The Case Against Plea Bargaining*, 62 A.B.A.J. 621, 624 (1976) (almost total elimination of plea bargaining in Maricopa County, Arizona, resulting in no increase in number of trials). *See also* COURTS, *supra* note 262, at 46–47 (augmented caseload and expense do not necessarily result when plea bargaining curtailed, as indicated by Philadelphia, Pennsylvania experience); Note, *The Elimination of Plea Bargaining in Black Hawk County: A Case Study*, 60 IOWA L. REV. 1053, 1066–70 (1975) (decrease in plea bargaining in conjunction with addition of several supportive factors resulting in increased efficiency in small city system).

[274] A comparison between the number of guilty and nolo contendere pleas and the number of defendants actually tried in the District of New Jersey serves to illustrate this point. In fiscal year 1976, there were 766 pleas and only 152 trials of federal defendants in New Jersey. [1976] ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS II-22. For 1975, the figures were 578 pleas and 126 trials. [1975] ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS A-58. In 1974, 539 pleaded guilty

a just deserts system, is that a defendant may wish to avoid revealing the details of a crime through testimony at trial, thereby appearing particularly culpable and receiving an enhanced sentence. Under a just deserts model, it is even possible that an increased number of defendants charged with the less serious offenses would plead guilty, since much of the uncertainty as to type and length of sentence will have been eliminated.

It is consistent to retain two forms of plea bargaining in a just deserts system, however. First, a prosecutor frequently finds himself unable to prove the indicted offense, but able to prove a lesser offense.[275] In such a case, downgrading the indicted charge to one that is provable is less plea bargaining than it is correcting a defect in the indictment process. Permitting this type of bargain would eliminate the unfairness and futility inherent in holding a trial which would result in an acquittal of the more serious charge. Second, multiple charges arising out of one incident usually reflect only one harm to the victim and to society.[276] A dismissal of all charges save the most serious one proveable would not do violence to just deserts sentencing because the disposition would be proportional to the actual harm caused.[277]

Thus, the just deserts system has its main impact in this area by eliminating the opportunity to plea bargain when the prosecutor has a solid case. The elimination of this type of plea bargaining promotes greater justice and furthers society's interests, since plea bargaining such a case advances no underlying dispositional interest such as rehabilitation, incapacitation, deterrence or punishment, but promotes only the interest of expediency.

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or nolo contendere, and 89 were tried. [1974] ANNUAL REPORT OF THE DIRECTOR OF THE ADMINSTRATIVE OFFICE OF THE UNITED STATES COURTS A-58. Although there is no formal report or memorandum confirming the lack of sentence bargaining, this fact has been confirmed to *Seton Hall Law Review* by Judge H. Curtis Meanor, United States District Court for the District of New Jersey (July 1, 1977) (letter on file at *Seton Hall Law Review*).

[275] *See* TASK FORCE REPORT, *supra* note 40, at 10; Alschuler, *supra* note 262, at 58–60. Such a situation may result from the disappearance of a witness in the years intervening between commission of the offense and trial, *id.* at 65; or, the prosecutor may have been careless and presented to the grand jury for consideration statutory authority which does not fit the circumstances of the offense committed.

[276] In New Jersey, the emerging doctrine of merger may be viewed as a response to the fact that even though there may be several charges stemming from one incident, they do not necessarily reflect separate harms. For a discussion of merger, see notes 253–56 *supra* and accompanying text.

[277] Such a plea bargain is analogous to the situation where a judge imposes one sentence for multiple crimes arising out of a single criminal episode. *See* notes 254–56 *supra* and accompanying text.

PAROLE RELEASE DECISIONMAKING

Parole is an extension of the sentencing process for incarcerated offenders.[278] Each year nationwide over 60,000 offenders are paroled, subject to certain supervisory conditions, prior to the expiration of their terms of incarceration.[279] At any point in time there are several thousand people on parole in New Jersey; for example, there were 8,000 people on state parole in 1974.[280] Both the decisionmaking process leading to release and the supervision of parolees have recently come under serious criticism as being arbitrary and ineffective.[281] Under the present parole system in New Jersey, neither sentencing judges, offenders, victims nor the public have any idea how much of an imposed sentence of incarceration an offender will actually serve.[282] The New Jersey State Parole Board, utilizing unarticulated criteria, makes its virtually invisible decisions concerning parole release at a date much later than the date of sentencing.[283]

Even those systems whose parole release criteria are explicit fail to accomplish a just result. First of all, in pursuing and reconciling the goals of rehabilitation, incapacitation, deterrence and punishment, parole boards generally have utilized the same subjective fac-

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[278] One article has suggested that under current practices, "parole selection is, in reality, more of a deferred sentencing decision—a decision on *when* to release—than a parole/no parole decision." Gottfredson, Hoffman, Sigler & Wilkins, *Making Paroling Policy Explicit*, 21 CRIME & DELIN. 34, 36 (1975) [hereinafter cited as Gottfredson] (emphasis in original); *see* Harris, *supra* note 14, at 294–95.

[279] D. STANLEY, *supra* note 79, at 1. The justification for parole supervision is based upon three theories: (1) "grace" on the part of a government which could have kept a prisoner incarcerated, (2) "consent" on the part of the inmate to live in accordance with the parole conditions imposed, and (3) "custody" retained by the government over a parolee for the protection of society. *Id.*

[280] PROGRAM ANALYSIS, *supra* note 75, at 69.

[281] *See, e.g.*, Monks v. New Jersey State Parole Bd., 58 N.J. 238, 246–50, 277 A.2d 193, 197–99 (1971); D. STANLEY, *supra* note 79, at 6, 47; Harris, *supra* note 14, at 296–97; Project, *supra* note 121, at 816.

[282] PROGRAM ANALYSIS, *supra* note 75, at 29–30, 40–42. A study of the New Jersey Parole Board found that Board determinations of parole release dates were occasionally based on either incorrect or outdated information, creating needless postponements and lack of certainty for the prisoner. *Id.* at 30. Even after a decision granting parole is made, a prisoner will spend an uncertain amount of time in prison before release. In the group studied this period "ranged . . . from one week to three and one-half years." *Id.* at 41.

[283] *See id.* at 33–40. Although "[t]he Board does not have any specific formula or set of criteria for parole decisionmaking," *id.* at 33, it can be concluded that it does, in fact, favor prisoners exhibiting certain characteristics. Thus, parole is more likely to be granted for older offenders, those offenders who had committed a great number of prior offenses, and offenders who had been on parole the fewest times previously. *Id.* at 36–40. *See generally* The Star-Ledger (Newark, N.J.), June 22, 1977, at 5, cols. 1–4.

tors already found to be inappropriate for sentencing judges.[284] Insofar as punishment is the goal being pursued, the parole board is merely "second-guessing the sentencing judge,"[285] using the same information used by the latter.[286] Another problem is that the delineation of explicit criteria, without more, fails to guide parole boards in determining how long imprisonment should continue if any of the enumerated factors is present.[287] As a result of these problems, present parole practices lead to unjustified disparity in time served among similar incarcerated offenders, creating psychological instability on the part of inmates who do not know how or when they will be paroled.[288]

Parole constitutes a deprivation of liberty inasmuch as parolees must abide by certain rules and conditions not imposed upon other members of society. In addition, parolees face the possibility of return to prison for violation of these rules. These deprivations, however, are not as serious as those faced by prisoners. Thus, the nonuniform release of prisoners on parole would undermine the equality of punishment inherent in sentences based upon just deserts. There are two basic methods for solving the problems presented by parole release in a just deserts system: parole could be eliminated altogether, or parole release decisionmaking could be revised so as to eliminate discretion.

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[284] *See* D. STANLEY, *supra* note 79, at 76; notes 226–31 *supra* and accompanying text.

[285] D. STANLEY, *supra* note 79, at 76.

[286] In the federal system, the presentence investigation report, together with statements from the offender, are frequently the basic sources of information for the judge and the parole board. *See* Division of Probation, Administrative Office of the United States Courts, *The Presentence Investigation Report*, in PROBATION AND PAROLE 69 (1970). Judge Frankel points out that all factors which are properly considered by the judge or the parole board are available on the day of sentencing. Consequently, a parole release decision should not be delayed beyond the time of sentencing. M. FRANKEL, *supra* note 12, at 109.

[287] Gottfredson, *supra* note 278, at 36. The result of this lack of guidelines to govern the use of criteria is that parole release decisions pursuant to the criteria are as arbitrary as those made with no reasons given. *Id.* at 36–37. When a prospective parolee questions the decision of a parole board, the board should be able to articulate the reason or reasons for denying parole as well as the weight given each relevant factor in that case.

In New Jersey, since the decision in Monks v. New Jersey State Parole Bd., 58 N.J. 238, 249–50, 277 A.2d 193, 198–99 (1971), the Parole Board has been required to furnish reasons for a denial of parole. The Parole Board's rules have been accordingly amended. *See* 3 N.J. REG. 135 (1971), *as amended*, N.J. ADMIN. CODE § 10:70–4.7 (Supp. 1976). In Beckworth v. New Jersey State Parole Bd., 62 N.J. 348, 353–59, 301 A.2d 727, 729–35 (1973), the New Jersey supreme court construed what type of notice of the reasons for denying parole would be adequate to satisfy the requirement.

[288] *See* Harris, *supra* note 14, at 297–98.

The elimination of parole would necessarily leave determination of length of sentence completely to the sentencing judge,[289] possibly depriving institutional managers of a useful tool for controlling inmates. Inmates who know that disruptive behavior is likely to postpone or prevent their parole release date will be more docile[290] than those who are serving a fixed sentence set by a judge. The disruption problem is not easily solved through greater use of prison disciplinary procedures, since courts have imposed substantial procedural due process protections in this area.[291] As presently applied, those disciplinary procedures may increase prison time within the outer limits of the sentence imposed by a judge.[292] If parole were abolished and judges imposed fixed sentences, however, any prison time meted out through disciplinary procedures would exceed the outer limits of the sentence judicially imposed[293] and therefore would probably require

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[289] Because nothing occurring after commission of a crime should affect the length or form of the sentence in a just deserts system, the sentencing judge and the parole board would be performing the same function on the basis of the same data and considerations. It might be argued that in the vast majority of cases judges are in no better position to determine length of sentence than are parole boards. Nonetheless, since imposing sentence has traditionally been a function of the judiciary in this nation, there appears to be no reason to delay, duplicate or reassign that function in a just deserts system. *See generally* Project, *supra* note 121, at 898.

S. 1437, 95th Cong., 1st Sess., 123 CONG. REC. S6385 (daily ed. May 2, 1977), appears to recognize the need to concentrate more of the parole decisionmaking power in the judge. Section 2301(c) of the bill vests the sentencing judge with discretion to determine a basic period of parole ineligibility, up to nine-tenths of the sentence. *Id.* § 2301(c). If no such period is imposed, the prisoner is eligible for parole release after serving the first six months of the term. *See id.* § 3831(a). Unfortunately, however, the factors to be considered by the judge, *id.* § 2003(a), and later by the Parole Commission, *id.* §§ 3831(c), 3834(a), are descriptive, and they give weight to considerations of deterrence, incapacitation and rehabilitation. In addition, it is still the Parole Commission which makes the ultimate decision on whether and when parole should be granted. Even though parole "shall" be granted unless it is deemed inappropriate, *id.* § 3831(c), some of the factors which make it inappropriate should not be considered, *id.* § 3831(c)(2)–(3) (likelihood of parole violations; "effect on institutional discipline"). Thus, the parole scheme proposed by the bill also fails to conform to just deserts principles.

[290] *Cf.* N. MORRIS, *supra* note 18, at 17 (prisoners aware that they must present a "facade" of "involvement in treatment programs").

[291] The United States Supreme Court has held that due process protects the inmate from disciplinary actions that are arbitrary. Wolff v. McDonnell, 418 U.S. 539, 546–58 (1974). As a consequence, the New Jersey Department of Institutions and Agencies, Division of Correction and Parole, amended its disciplinary standards which now provide for disciplinary actions to be applied with fairness. N.J. ADMIN. CODE § 10:35–1.1 (Supp. 1976); *see* Avant v. Clifford, 67 N.J. 496, 509, 512–13, 518–35, 341 A.2d 629, 637–38, 641–51 (1975).

[292] *See* N.J. STAT. ANN. § 30:4–140 (West 1964) (good behavior entitles a prisoner to reductions in both the minimum and maximum ends of his sentence).

[293] For example, an offender sentenced to fourteen years for aggravated rape might repeatedly cause melees while in prison. If he had accrued no good-time credits which

a full trial in a court of law on the disciplinary charges. Thus, the retention of parole with at least some discretion in release decisions is important to institutional management.

Another favorable effect of parole is that it retains, under reduced control, offenders who need no longer be incarcerated, but who are not yet ready for unconditional release into society.[294] The threat of parole revocation coerces conformity by parolees to both the requirements of parole and of society itself. That the Model Penal Code recognizes this effect is evidenced by its specific provision of a parole term for every imprisoned offender.[295] If parole release were eliminated, this surveillance of and control over recent prisoners would decrease, as would the exposure of recently released offenders to whatever reintegrative counseling a parole officer may provide.

Yet another objection to the elimination of parole is a political one. Sentences under the Model Penal Code and under existing law have been devised with the knowledge that a first offender who behaves well in an institution is eligible for parole after serving approximately one-fifth of his maximum sentence.[296] With parole eliminated, the typical offender would serve a far longer period of incarceration at a time when most commentators argue that sentences of incarceration are already too long.[297] It might prove politically impossible for a legislature or other sentence-setting body to reduce sentences to one-fifth of their present length so that offenders would serve the same actual amount of time under a no-parole model as they do under the present system. For example, the punishment for a first-degree crime such as aggravated rape would have to be roughly two to three years incarceration if parole release were eliminated, as opposed to the eight to twenty years currently prescribed by the Code. Although the actual time served under each system would likely be the same, it would be difficult to secure acceptance by the public of actual sentences which are so short.

A course preferable to elimination of parole is to reconcile parole release decisionmaking with just deserts sentencing.[298] Such a course would establish a presumptive release date after expiration of approx-

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could be rescinded, under a no-parole system any additional time imposed as an institutional disciplinary measure would be added on to the full fourteen-year sentence imposed by the judge.

[294] *See* D. STANLEY, *supra* note 79, at 81–82. Parole is intended to keep recent inmates under surveillance and also to assist them in becoming reintegrated into society.

[295] *See* M.P.C. § 2C:43–9(b).

[296] *See* note 90 *supra* and accompanying text.

[297] *See* note 200 *supra* and accompanying text.

[298] *See* D. STANLEY, *supra* note 79, at 79–80.

imately one-third of every sentence for every offense.[299] The sentencing judge, the public and the inmate would all know, at the time an inmate is sentenced to a given term, when he would be released, assuming institutional behavior in conformity with institutional rules. Adoption of this type of mechanism would permit retention of the general lengths of existing sentences and of those proposed by the Model Penal Code. It would, however, restrict the exercise of parole board discretion and would prevent the parole board from second-guessing sentencing judges. At the same time, the discretion needed to maintain institutional discipline could be retained; the presumptive date would be altered or prison disciplinary procedures invoked if an inmate engaged in infractions of institutional rules.[300] Such a system would be a further application of just deserts principles inside the institution. Similarly, parole supervision could be maintained, with revocation of parole possible under certain limited circumstances.[301] No effort would be made by the parole board to assess rehabilitation or to predict recidivism, since such determinations would be irrelevant to the paroling decision. The benefits of just deserts sentencing would therefore not be undermined by a parole board, and rehabilitative programs within the institution would be freed of their coercive element.

CONCLUSION

Efforts to achieve the goals of rehabilitating offenders, incapacitating dangerous individuals, and deterring future offenses serve to augment society's safety, and are therefore important to the design of any criminal justice system. When judges attempt to achieve these goals through their dispositions of individual offenders, they undermine the efficacy and justice of the system. Because of their emphasis on rehabilitation and their expansion of the use of judicial discretion, the sentencing provisions of the Model Penal Code, and PTI as mandated by the *Leonardis* decision, exacerbate problems inherent in New Jersey's criminal justice system.

A system of fixed dispositions, from pretrial intervention through sentencing and parole release decisionmaking, would eliminate unjustifiable disparity, free rehabilitative efforts from their debilitating link

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[299] In New Jersey, N.J. Assembly Bill No. 1452, §§ 6, 8 (introduced Feb. 3, 1976) does propose such a system. *See* note 6 *supra*.

[300] *See* N.J. Assembly Bill No. 1452, § 6(c) (introduced Feb. 3, 1976) (release delayed if 'inmate has engaged in conduct indictable in nature"). The second criterion for delayed release under this bill—that the offender will probably engage in criminal activity if released—is inappropriate in a just deserts system, because it involves a prediction of the inmate's likelihood of committing crimes if paroled. *See id.*

[301] *See id.* §§ 13–15.

to release, and make the meaning of conviction clear to offenders, judges, and the public. It would ultimately be just to offenders. Within such a system, sufficient discretion could be retained to permit slightly different treatment for offenders committing acts which constitute identical statutory crimes, but which establish differing offender culpability in relation to the crime committed. Judges, however, would not be permitted to substitute one disposition for another. The loss of liberty by an offender would be proportional to the seriousness of the crime he committed. An amount of plea bargaining essential to just dispositions, as well as the degree of discretion needed to facilitate the maintenance of institutional discipline, could be allowed. The substantial discretion which such a system eliminates has been used arbitrarily and unjustly in the names of rehabilitation and justice-through-mercy; this discretion has resulted in injustice to those offenders who have received disparate dispositions or who have been incarcerated in order to prevent recidivism by others, and in less rehabilitation for all inmates.

The just deserts system advocated is not only an attempt to remedy the ills of the existing dispositional system. Equally important, it seeks to develop a system which is philosophically consistent internally and which advances the principles of justice. It is possible to make more limited reforms than those proposed herein. This article has articulated what the dispositional criteria *ought* to be and has suggested what sentences must follow when given conditions are found to exist. The proposed reforms would result in a just system that advances society's interest in better protecting itself from those who would and do violate its rules.