1-1-1982

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THE ADOPTION AND IMPLEMENTATION OF DETERMINATE-BASED SANCTIONING POLICIES: A CRITICAL PERSPECTIVE*

Gray Cavender**
Michael C. Musheno***

I. INTRODUCTION

It has come to the attention of the public generally that the present system of sentencing convicted persons in the United States lacks an underlying rational, cohesive ground. Sentences, that is, are disparate. Individuals convicted of similar crimes are given dissimilar sentences. To the degree that such deviations are manifestly unfair, our sense of justice is shocked. And so there have been cries for an end to such sentencing disparity, and there has been an accompanying call to abandon the orientation toward rehabilitation... in favor of some "realistic" policy.¹

Rehabilitation, the official justification of our sanctioning policy since the late 1800's, has come under attack from a variety of sources, as have the indeterminate sentence and such specific programs as parole. Some researchers have concluded that rehabilitative efforts have failed as a crime control strategy and, moreover, have produced substantial injustices that are inconsistent with traditional legal ideals. Other critics have alleged that the indeterminate sentence and parole vest large amounts of discretion in de-

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* An earlier version of this Article was presented to the American Society of Criminology in Washington, D.C., in November, 1981.

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¹ LeFrancois, An Examination of a Desert-Based Presumptive Sentencing Schedule, 6 J. CRIM. JUST. 35, 35 (1978).
cision makers and that this discretion has been abused and has produced a serious problem of sentencing disparity—i.e., offenders who committed the same or similar crimes serve different prison terms in the name of rehabilitation.

Several jurisdictions have responded to these criticisms by adopting various types of determinate sentencing and limiting or abolishing parole. These modifications are more than a reform of the sentencing structure, however, since they also entail a rejection of rehabilitation in favor of other justifications for the criminal sanction. These justifications usually combine some elements of deterrence, incapacitation, and retribution. Taken together, these changes are so significant as to constitute a shift in our entire sanctioning policy. The shift is widely hailed as a correctional reform that will remedy the problems attributed to the rehabilitative ideal. Advocates claim the reform of sanctioning policy will effect a reduction in crime, reintroduce "justice" into the criminal justice process, and provide an appropriate basis for punishment.2

Of course, as with any new public policy, immediate attempts are made to measure the effectiveness of this reform. Traditionally, assessments of such legislative reforms are conducted as impact analyses. The impact of new legislation is assessed by measuring the degree to which proposed goals are attained.3 Unfortunately, impact studies are insensitive to several important considerations of public policy. First, impact-oriented studies have failed to take into account the historical conditions that produced the reform, i.e., the context within which policy change occurred. Second, the studies reflect little concern with the allocation of resources—generally fiscal and administrative—that is frequently necessary to implement a new policy. Finally, many impact studies include an assumption that the administrative machinery required to implement a new policy will automatically respond to such a policy

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2 See, e.g., D. Fogel, We Are the Living Proof: The Justice Model for Corrections (2d ed. 1979); J. Wilson, Thinking About Crime (1975); Kellogg, From Retribution to "De- sert": The Evolution of Criminal Punishment, 15 Criminology 179 (1977).
change.

These problems undermine the credibility of attempts to study policy reforms. Recently, policy researchers have recognized the deficiencies of impact analyses and responded with a new approach that examines change in the law as an administrative process and that addresses much more than the formal goals of a new mandate.4 Rather than simply resulting in a comparison of goal-related data before and after a legislative change, this perspective encourages investigation into the reasons underlying a reform and focuses inquiry on the administrative response to the reform of laws, i.e., how individuals in public bureaucracies interpret and respond to the intent of legal mandates with the resources available to these people. Such a focus allows one to distinguish policies with actual or instrumental impacts from those that have mostly symbolic impacts on society, for the policies may influence perceptions, but not behavior of individuals.

Two basic research issues characterize this approach to studying policy reforms: (1) the development and testing of conceptual models that describe the inner workings of the administrative processes designated to carry out reforms; and (2) an analysis of how administrative factors explain policy success or failure. Researchers interested in the first issue identify a series of stages through which new programs and other innovations associated with legal policies generally proceed.5 The early research pertaining to the second issue focuses on such organizational features as

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4 Increasingly, domestic social policy is being studied as a dynamic process rather than a static event marked by the formal enactment of law. This process is characterized by interactions among a wide range of actors in and out of government who form and reform coalitions to adopt, implement, and evaluate the elements (i.e., social programs, social technologies, and resources) associated with a legal mandate. W. Lambright, Technology Transfer to Cities: Processes of Choice at the Local Level (1979); J. Levine, M. Musheno & D. Palumbo, Criminal Justice: A Public Policy Approach (1980); J. Pressman & A. Wildavsky, Implementation (2d ed. 1979); L. Tribe, Channeling Technology Through Law (1973).

5 For example, Lee Cronbach identifies four stages, which are “breadboard,” “superrealization,” “prototype,” and “established.” L. Cronbach, Toward Reform of Program Evaluation 16-42 (1980). Gene Hall and Susan Loucks, in a study of legal policies related to educational services, identify stages ranging from “orientation,” i.e., acquisition of information, to “integration,” i.e., the user of the innovation combines with colleagues to achieve a collective impact on clients. Hall & Loucks, A Developmental Model for Determining Whether the Treatment Is Actually Implemented, 14 Am. Educ. Research J. 263, 266-67 (1977).
the centralization of authority within public service agencies and the communication networks that flow from management to street level personnel. More recent research identifies behavioral factors, including discretion and self-interest, as additional determinants of policy success. This growing interest in identifying the administrative stages associated with the execution of legal policies and in assessing how organizational factors affect the success and failure of legal reform has been labeled implementation research:

The study of policy implementation is crucial for the study of public administration and public policy. Policy implementation is the stage of policymaking between the establishment of a policy—such as the passage of a legislative act, or the promulgation of a regulatory rule—and the consequences of the policy for the people whom it affects. If a policy is inappropriate, if it cannot alleviate the problem for which it was designed, it will probably be a failure no matter how well it is implemented. But even a brilliant policy poorly implemented may fail to achieve the goals of its designers.

In this Article, we apply a policy process perspective to the reform of sanctioning policy known as determinate sentencing. We provide an analysis of why such a change is occurring and also locate it within the historical context of past sanctioning reforms. Our presentation describes the historical forces that have consistently shaped the nature of sanctioning policies in Western society, including shifts in underlying conceptualizations of criminal behavior, established classes' perceptions of the crime rate, socioeconomic conditions, and evaluative assessments by criminal justice personnel and reformers of the institutionalized machinery of the justice system. An analysis of these factors reveals the environment


7 Commentators have concluded that discretion and self-interest are essential to an understanding of crime policy implementation. J. Levine, M. Musheno & D. Palumbo, supra note 4, at 11, 135-39. For examples pertaining to the impact of implementors on specific crime policies, see Musheno, Levine & Palumbo, Television Surveillance and Crime Prevention: Evaluating an Attempt to Create Defensible Space in Public Housing, 58 Soc. Sci. Q. 647 (1978); Pastor, Decriminalizing a Victimless Crime: A Preliminary Look at the Impact of Drunkenness Decriminalization, 6 Contemp. Drug Probs. 585 (1977); see also W. Lambright, supra note 4.

in which administrative responses to determinate sentencing take place. We also discuss the resource issues surrounding determinate sentencing, i.e., both the demand for resources the policy entails and the likely response to the demand. Finally, we discuss the implementation of this policy shift with respect to criminal justice personnel who must administer it.

When analyzed from this perspective, the sanctioning reform modeled around determinate sentencing must be cast as a symbolic tool of social control, appeasing the fears of law-abiding citizens while avoiding a serious investigation of American criminal behavior. A broader range of environmental and administrative realities than is usually considered in sanctioning studies reveals the emergence of a sanctioning policy less cohesive than previous policies. This policy is hollow because of the failure to provide resources for implementation, contradictory to penal trends that show a clear movement away from "brick and mortar" facilities staffed by custodians, and checked by federal court decisions demanding rapid improvement in prison conditions. Prescriptively, this focus urges caution for those states that have yet to jump fully into this reform movement.

II. Historical Perspective on Sanctioning Reform

A. Dynamic Forces Shaping Sanctioning Policies

Policies pertaining to crime and punishment are grounded in one or more of the following underlying conceptualizations of how and why to sanction criminal behavior: (1) retribution, (2) deterrence, and (3) rehabilitation. These sanctioning policies, as expressed in criminal codes, are justified by the prevailing explanations of criminal behavior, but these policies are also a reflection of socioeconomic conditions that exist at a particular point in history. Change in sanctioning policy occurs when socioeconomic shifts in a society generate demands for new mechanisms of social control that are legitimated by new theoretical explanations of criminality. Also, the experience of administering previous policies and perceptions of the success of these policies influence the stability of existing sanctions.

In this section we examine historical trends associated with

shifts in sanctioning policy. Our analysis focuses on the theory of criminal behavior and the officially stated goal of punishment that rationalized each conceptualization. We also discuss the impact of these shifts in sanctioning policy on such operational aspects of the criminal justice process as sentencing and penal strategies. An awareness of the context within which these changes occurred, i.e., the forces that produced them, will enhance our understanding of the current sanctioning reform—the movement toward determinate sentencing and its related penal strategies.

1. Retribution. Sanctioning policy was based primarily on the philosophy of retribution until the eighteenth century, and the tenets of that philosophy provided an explanation of criminal behavior as well as a rationale for punishment. Behavior was assumed to be the product of free will or choice, and individuals were held morally and legally responsible for their actions. Criminals deserved punishment because the law promised such a result for a willful breach of rules and because wrongdoers would otherwise gain an unfair advantage over law-abiding people.

Retributive sanctioning policy legitimized social vengeance, and penal strategies included such harsh punishments as mutilation or death. These acts were administered in a public ritual that linked the harshness of the punishment to the severity of the crime. Severe public punishment established the government's supremacy over the governed.

The public nature and severity of those sanctions, however, helped produce an unintended consequence, their demise as mechanisms for controlling criminality. Public executions, especially for the growing number of property offenses, often created sympathy for the criminal rather than respect for the law and abhorrence of crime, and social disturbances were not uncommon at such rituals. Accordingly, the number of executions declined during the late

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10 See Table 1 of the appendix to this Article for a summary of this discussion.
11 Kant's categorical imperative is perhaps the best known statement of retribution as the basis of penal law. After assuming a rational model of human behavior, Kant argued that a wrongful act must be punished because people agreed to be bound by the law and, if unpunished, the offender would have an unfair advantage over the law-abiding citizen. See I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100-02 (J. Ladd trans. 1965). For a detailed analysis of Kant's legal philosophy, see J. MURPHY, KANT: THE PHILOSOPHY OF RIGHT (1970).
1600's and 1700's even though the number of capital offenses increased. Juries sometimes refused to convict defendants or found them guilty of noncapital crimes, and judges imposed reduced penalties whenever possible.  

Pardons saved many from execution, but other penal strategies developed as substitutes for the death penalty. Though they were hailed as more humanitarian than the death penalty, such alternative punishments as galley service and transportation must also be understood as a reflection of the technologies associated with Western economic development during that period. Through galley service during the sixteenth and seventeenth centuries, for example, criminals were pardoned from the death penalty and assigned to ships as oarsmen. The penal strategy fluctuated with the need for rowers and disappeared altogether with the emergence of sailing technology. Transportation, a strategy whereby criminals were conveyed to the colonies to serve as laborers, was proclaimed a humanitarian alternative to the death penalty during the sixteenth, seventeenth, and eighteenth centuries. Transportation provided the cheap labor needed to make colonization profitable without depleting the European labor supply. It disappeared when slavery and economic independence made convict labor unnecessary in the colonies.

These penal strategies were alternatives to the death penalty, but they too were harsh because retribution remained the justification of the criminal sanction through the 1700's. Criminals assigned to galley service were literally worked to death, and transported convicts often starved en route to the colonies. The situation reflected the belief that criminals should suffer severe punishment for a crime.

Sanctioning policy in America during colonial times was also based on retribution. The idea of moral responsibility had strong

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Biblical support and was the basis of punishment.  

America was settled too late for galley service although transportation figured prominently in our history. The Colonies prospered economically through the use of transported English offenders who essentially performed slave labor until the American Revolution. There were fewer capital offenses and common forms of colonial punishment included branding, mutilation, public whipping, fines and restitution, and banishment.

2. Deterrence. Deterrence emerged as the conceptual backbone of sanctioning policies late in the eighteenth century and reflected shifts in the theories about the nature of behavior, changes in the socioeconomic structure of society, and dissatisfaction with the administration of a retributive-based penal policy. Jeremy Bentham, an important contributor to utilitarianism, explained behavior as a function of a hedonistic calculus. Bentham concluded that behavior was a result of rational choice among available courses of action. People would choose behaviors that produced pleasure and avoid those that caused pain. This view of behavior, when applied to legal theory, produced a sentencing arrangement in which the severity of penalties was proportioned to the undesirability of crimes. The assumption was that rational people would be less likely to commit crimes as the cost, the unpleasantness, of the penalty increased. They would be deterred. In addition to deterrence-based sentences, legislatures adjusted criminal codes by reducing judicial discretion.

Proponents favored incarceration as the primary penal response to criminal behavior because a prison sentence offered a way of proportioning punishment to the crime. Behavior within prison theoretically could also be controlled by the pleasure-pain princi-

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18 Id. at 15.
19 Id. at 12-14.
20 Criminologists often use the phrase "the classical school of criminology" in discussions of the utilitarian response to criminal behavior. The phrase embodies a deterrence-based penal policy, a limitation on judicial discretion, and an assumption of free will. See I. TAYLOR, P. WALTON & J. YOUNG, THE NEW CRIMINOLOGY: FOR A SOCIAL THEORY OF DEVIANCE 1-3 (1973) [hereinafter cited as TAYLOR, WALTON & YOUNG].
22 Id. at 399.
23 Id. at 396.
ple, so the observation and surveillance of inmates became essential in the management of an institution structured around rewards and punishments and committed to the production of an obedient, disciplined individual. Bentham's Panoptican, the prototype of such prisons, was designed to allow the administrator total observation without being seen by the inmates.24

Some advocates saw utilitarianism as an accurate theoretical basis for explaining and controlling criminal behavior, while others endorsed that movement as a reform aimed at reducing the number of capital offenses.25 Still other proponents were pragmatically driven, and searched for control mechanisms that would protect emerging property rights and commercial practices from the disruptive social problems that accompanied the Industrial Revolution.26 Riots, vagrancy, highway robbery, and poaching were perceived as threats to the established social order, and those crimes were attributed to a dangerous criminal class.27 Business leaders demanded sanctions that would be administered with more regularity and hence more efficiency.28

The impact of utilitarianism and deterrence-based sanctioning policies was not limited to England. By 1800, deterrence-based criminal codes were adopted in many American states. In America, as in Europe, massive socioeconomic changes overwhelmed previ-

24 M. Foucault, supra note 12, at 200-03. The effect of total observation was to make each inmate feel consciously and constantly visible, assuring the automatic functioning of the administrator's power since the power is both visible and unverifiable. The effects of surveillance are continuous, even when the inmate is not actually being watched. Id. at 201. For a discussion of the role of observation as a tool in achieving disciplinary success, see M. Foucault, supra note 12, at 170-75.


26 Taylor, Walton & Young, supra note 20, at 3.


28 One author suggests that the adoption of classical school sanctioning policy, i.e., incarceration as a deterrent, was more a function of pressure from the business community than of such utilitarians as Bentham and Cesare Beccaria. Rustigan, A Reinterpretation of Criminal Law Reform in Nineteenth Century England, 8 J. Crim. Jusr. 205, 212-14 (1980). The business community demanded effective punishment to control the dangerous class and threat to property. Id. According to Foucault, the primary objective of classical reforms was "to make of the punishment and repression of illegalities a regular function, coextensive with society; not to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity; to insert the power to punish more deeply into the social body." M. Foucault, supra note 12, at 82.
ous control mechanisms. Americans were also influenced by the solutions of prominent utilitarian writers. Penitentiaries constructed in America during the early 1800's focused on the total control of inmates. Furthermore, a number of nations adopted deterrence-based policies during the late eighteenth and early nineteenth centuries and thus produced an approach to crime control that focused attention on the relationship between crime and sanctions.

3. Rehabilitation. Faith in deterrence-based sanctioning policies had begun to wane by the 1820's. The administration of such a legal system proved difficult, the crime problem worsened despite deterrence-based policies, and socioeconomic upheavals continued to generate new social problems. New mechanisms of control were again called for, and new official approaches grounded in yet another conceptualization of criminal behavior emerged.

The concept of rational behavior, a critical assumption of deterrence-based sanctioning policies, was challenged during the mid 1800's by the development of a new explanation for criminality in the criminal class, which was still perceived as a major threat to the social order. The depravity of the criminal class was explained as a function of defective moral training, a by-product of rapid urbanization and industrialization. The proposed solution was programs of moral training that would supposedly reduce the crime problem by instilling the proper values in members of the criminal class. The focus of attention began to shift from legal categories of crime to the situation of the criminal.

This new explanation began to influence both sentencing arrangements and penal strategies by the mid-1800's. In many cases, it was simply inappropriate to hold a defendant fully responsible

29 Cesare Beccaria's On Crimes and Punishments was a major statement of classical school penal policy. The treatise was widely quoted in the United States and became an influential force. It popularized the philosophy of deterrence and was the basis of criminal code revision. See D. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic 59-62 (1971); see also O. Lewis, The Development of American Prisons and Prison Customs, 1776-1845, at 92-94 (1922 & photo. reprint 1967) (explanation of the goals behind harsh discipline and grueling conditions in early 19th century prisons).

30 See, e.g., Monachesi, Cesare Beccaria, in Pioneers in Criminology 36, 48-49 (H. Mannheim 2d ed. 1972); see also H. Barnes, supra note 16, at 98-99; Taylor, Walton & Young, supra note 20, at 7.

for a crime. Judges began to consider such mitigating circumstances as age and background before imposing sentence, and in 1843 the first use of the insanity defense suggested that some defendants were not legally responsible at all. Within prisons, programs were developed around the goal of moral training, and incentives were employed to encourage participation in those programs.

The transition from a sanctioning policy based on the concept of defective moral training to one based on rehabilitation occurred later in the 1800's with the emergence of positivism. Positivists went beyond defective moral training and argued that behavior, including criminal behavior, was the product of factors over which the individual had little or no control. Relevant factors included education, poverty, biological anomalies, and psychological defects. Proponents of the view argued that factors could be identified through such scientific techniques as experimentation and observation and that prison programs could then be developed that would eliminate the problems and thereby reduce crime. Such an approach would, of course, be good for society but would benefit the criminal as well.

Notwithstanding these justificatory claims, an awareness of the importance of economic factors is essential to an understanding of the development of the rehabilitative ideal. Throughout the 1800's, economic prosperity existed side by side with economic hardship. Despite the growth of manufacturing, unemployment was widespread, hordes of children flocked to the city, and inflation under-
cut the value of money. Crime, however, was attributed to the values, rather than to the poverty, of the criminal class. Even the programs for moral reeducation, designed to teach obedience to the law, though, were structured around work habits and industriousness, values related to economic position. Despite this confusion about the importance of economic factors, the theory and promise that legitimized rehabilitation attracted many committed followers.

American penologists agitated for a sanctioning policy based on rehabilitation during the 1860's and 1870's. The penologists were supported in their efforts by prisoners' aid societies, national academic organizations, and influential political leaders. Strengthened by humanitarian intentions, religious fervor, and the scientific credibility of positivism, proponents successfully pressed for legislation to accommodate their ideas. Rehabilitation and the arrangements that would implement it were adopted in 1870 as the official policy of the National Congress on Penitentiary and Reformatory Discipline held in Cincinnati.39

Sentencing arrangements and penal strategies were developed to facilitate the treatment of criminal behavior. The first development was the indeterminate sentence, a sentencing structure designed to foster rehabilitation.40 The law defining an offense es-


40 Theoretically, the indeterminate sentence would authorize prison administrators to hold inmates in prison until rehabilitation was effected. Z. Brockway, Fifty Years of Prison Service 401 (1912).
established an upper limit to confinement, but the offender could be released via parole prior to that maximum term when the prison personnel decided that rehabilitation had been effected. Penal strategies included the transformation of prison personnel from custodians and punishers to treatment specialists who diagnosed the offender's problem, designed programs to resolve it, and determined when the rehabilitation was accomplished. The approach necessitated further commitment to a focus, at sentencing and in prison, on the criminal's individual characteristics rather than on the legal category of crime.

B. Rehabilitation and the Law

Rehabilitation as a basis of sanctioning policy was popular among American penologists and legislators, but opposition emerged during the late nineteenth and early twentieth centuries in the form of legal challenges to the indeterminate sentence and early release via parole. Opponents generally stated constitutional grounds, arguing that the indeterminate sentence and parole infringed upon the separation of powers, made punishment uncertain and hence cruel and unusual, violated due process of law, and violated the proportionality between a crime and the punishment.

The separation of powers claim actually presented three issues. First, it was argued that parole encroached upon functions vested

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41 "A sentence is more or less indeterminate to the extent that the amount of time actually to be served is decided not by the judge at the time sentence is imposed, but rather by an administrative board while the sentence is being served." Dershowitz, Indeterminate Confinement: Letting the Therapy Fit the Harm, 123 U. Pa. L. Rev. 297, 298 (1974). The indeterminate sentence generally entails a maximum and a minimum term although sometimes no minimum is set. D. STANLEY, PRISONERS AMONG US: THE PROBLEM OF PAROLE 21 (1976). The offender will be released at some point during the term when the experts are convinced that rehabilitation has occurred, i.e., that the offender has been cured of criminality. Id.

42 P. BEAN, supra note 32, at 44-45. An emphasis on the expert diagnosis and treatment of an offender's problem resulted in the label "medical model" for the approach. Id. at 37.

43 N. KITTRIE, supra note 36, at 28-29.

44 Interestingly, members of the judiciary in the various states were among the more vocal critics of rehabilitation and argued that the statutory modifications necessary for implementing rehabilitation encroached upon the judicial authority to impose sentences. See B. McKELVEY, supra note 39, at 132.

45 For a more detailed discussion of these constitutional challenges, see Lindsey, supra note 39, at 40-52.
in the judiciary and, second, that parole boards constituted an unlawful delegation of legislative powers. Courts generally rejected those challenges and reasoned that, while trial courts and legislatures had certain vested functions, the legislature was empowered to mitigate punishments and to create a body to oversee the administration of sanctions. The third argument—that the indeterminate sentence and parole encroached upon the governor's power to grant pardons—was rejected because the courts were able to distinguish pardon from parole.

The second line of legal challenge was that the indeterminate sentence made the length of imprisonment so uncertain as to be cruel and unusual punishment. States overcame the argument with the assertion that the duration of imprisonment was the maximum term stated in the sentence or the relevant statute.

Although the Michigan Supreme Court twice ruled that parole legislation was an unconstitutional deprivation of liberty without due process of law, other states generally rejected the due process claims, as did the United States Supreme Court. These courts reasoned that states were not limited by the fourteenth amendment in dealing with punishment so long as they did not deprive particular classes of offenders of equal justice.

The last constitutional challenge was that statutes mandating indeterminate sentencing prohibited the proportioning of penalty to offense. The assertion was rejected because legislatures were pre-

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46 Two widely cited cases on this point are Miller v. State, 149 Ind. 607, 49 N.E. 894 (1898), and State ex rel. Att'y Gen. v. Peters, 43 Ohio St. 629, 4 N.E. 81 (1885). See also In re Lee, 177 Cal. 690, 171 P. 958 (1918); State v. Duff, 144 Iowa 142, 122 N.W. 829 (1909); Woods v. State, 130 Tenn. 100, 169 S.W. 558 (1914).

47 The Michigan Supreme Court, in People v. Cummings, 88 Mich. 249, 255-56, 60 N.W. 310, 312-13 (1891), agreed that parole was an infringement of the pardoning power. Other courts, however, disagreed after discussing the history of the pardon. See Miller v. State, 149 Ind. 607, 49 N.E. 894 (1898); State v. Page, 60 Kan. 664, 57 P. 514 (1889); George v. Lillard, 106 Ky. 820, 51 S.W. 793 (1899); State ex rel. Att'y Gen. v. Peters, 43 Ohio St. 629, 4 N.E. 81 (1885).


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sumed to establish terms of imprisonment that reflected the views of citizens. Courts would not strike down sentences unless they shocked the moral sense of the community. 51

While the decisions in those cases dealt with constitutional issues and were grounded in legal reasoning, the excitement and the sense of promise of rehabilitation also pervaded the opinions. The spirit of reform generated by the pro-rehabilitation penologists undoubtedly influenced the courts and encouraged them to permit the implementation of such a policy. There were serious constitutional questions, and the approach entailed a significant shift in legal thinking. The policy was nevertheless accepted as a new means of crime control. Rehabilitation was all the more attractive because its goal was protection of the public through programs designed to help, rather than to punish, the offender. Rehabilitation was thus linked to the expanding concept of parens patriae and the notion that the state, because it was being helpful, could exert more control. 52

III. THE CONTROVERSY OVER REHABILITATION

The era of rehabilitation has dominated American corrections and criminology for over one hundred years. Beginning in the 1870's, states developed the administrative or penal machinery to render the rehabilitation-based sanctioning policy operational. 53

51 See People ex rel. Bradley v. State Reformatory, 148 Ill. 413, 421-22, 36 N.E. 76, 79 (1894); Miller v. State, 149 Ind. 607, 618, 49 N.E. 894, 897 (1898).

52 For example, in State v. Page, 60 Kan. 664, 57 P. 514 (1899), the Kansas Supreme Court rejected a challenge to the indeterminate sentence and called such a structure "gracious." Id. at 669, 57 P. at 516. For a similar view, see Miller v. State, 149 Ind. 607, 49 N.E. 894 (1898). There, the Indiana Supreme Court rejected the claim that the indeterminate sentence was cruel and unusual for lack of proportionality. Calling the reformatory a benevolent institution, the court suggested the indeterminate sentence provided hope for society and the criminal class. Id. at 614-16, 49 N.E. at 896.

Helping the offender was part of a larger social reform movement that emerged during the nineteenth century—the welfare state. Concern about the criminal class spread until the entire working class became a target of state intervention. Programs such as compulsory education, poor relief, and rehabilitation of criminals were vehicles for instilling the proper moral values in the problem population although such efforts also expanded the state's sphere of control into the lives of the poor. See L. Radzinowicz, Ideology and Crime 40 (1966); Dahl, State Intervention and Social Control in Nineteenth-Century Europe, 1 CONTEMP. CRINES 163-87 (1977); Zalman, The Rise and Fall of the Indeterminate Sentence, 24 WAYNE L. REV. 45, 63-67 (1977).

53 Of course, it required years for the states to create the correctional system that would implement a sanctioning policy informed by rehabilitation. An overview of early state legis-
Positivism promised the diagnosis of criminal pathologies, and prisons implemented classification efforts to identify the cause of criminal behavior for offenders. Of course, the early attempts at classification were somewhat unsophisticated by today's standards and represented little more than groping among potential causes of crime. The other premise of positivism, treatment, was the basis of the prison rehabilitation programs designed to remedy the offender's crime-producing problems. The early treatment programs were also experimental and included various diets, military exercises, and religious training. The indeterminate sentence provided the flexibility and the incentive, through early release via parole, for offenders to participate in treatment programs and to be rehabilitated.

A. Arguments Against Rehabilitation

Scholars have continued to theorize about the root causes of crime; classification procedures and treatment programs have become more sophisticated; and the size of the correctional bureaucracy has expanded substantially. Recently, however, there have been serious criticisms of rehabilitation and demands for new approaches to crime control. The criticisms directed at rehabilitation is presented in Lindsey, supra note 39, at 30-40.


85 See D. MATZA, BECOMING DEVIANT 17 (1969). Matza uses the term correctionalism to describe the positivist influence in the United States. Id. at 15. Even the theories that were developed early in the 1900's to explain criminal behavior were correctional. They assumed that the factors producing criminality could be discovered and corrected by criminologists. Id. at 18-24. Despite the orientation, however, the early attempts at rehabilitation were more a search for causes than well-planned programs aimed at specific deficiencies. B. KRISBERG, supra note 54, at 162-63.

86 B. KRISBERG, supra note 54, at 163.

87 At first, many states vested responsibility for the parole release decision in prison personnel, often superintendents. There was, however, dissatisfaction with that approach. Many believed that special expertise was essential to the release decision and that prison wardens could simply not devote enough time to such a vital aspect of rehabilitation. Hence, many jurisdictions created a separate administrative body empowered to make those decisions—the parole board. See Lindsey, supra note 39, at 78-79. It was also believed that a parole board could ensure more uniformity in release criteria and guard against abuses in decision making. See P. CLARE & J. KRAMER, INTRODUCTION TO AMERICAN CORRECTIONS 308-09 (1976), for a discussion of the federal parole board's early development.

88 A number of writers have been critical of the era of rehabilitation, but for general
tion cover a range of issues and a variety of points on the political continuum. These criticisms can, however, be divided into the following categories: (1) rehabilitation has failed as a crime control strategy; (2) the administration of penal policies associated with rehabilitation produces both practical and legal problems; and (3) there are philosophical dilemmas concerning the legitimacy of sanctions administered for rehabilitative purposes.

Notwithstanding the positivist claim that the causes of crime could be identified and crime cured, crime has been neither reduced nor eradicated. For several years, researchers have concluded that rehabilitation programs are not effective—i.e., the recidivism statistics for those who participate in such programs are no better than for offenders who do not participate. Some critics explain these findings as caused by theoretical deficiencies in our explanations of criminal behavior, while others contend that our criminological theories simply have not been implemented. Criminologists in this latter group argue that the administrative commitment to rehabilitation has been lacking, and that as a result


Perhaps the most widely quoted statement about the failure of rehabilitation came from Robert Martinson who analyzed numerous correctional programs and concluded that, "[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." Martinson, WHAT WORKS? QUESTIONS AND ANSWERS ABOUT PRISON REFORM, 35 PUB. INTEREST 22, 25 (1974). Of course, Martinson's conclusion is not a recent discovery. See Bailey, CORRECTIONAL OUTCOME: AN EVALUATION OF 100 REPORTS, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 153, 156-57 (1966); ROBISON & SMITH, THE EFFECTIVENESS OF CORRECTIONAL PROGRAMS, IN CONTEMPORARY CORRECTIONS: A CONCEPT IN SEARCH OF CONTENT 119, 133 (B. Frank ed. 1973).

Kellogg has concluded that our theories of criminal behavior have generally been discredited. Kellogg, supra note 2, at 187. Yochelson and Samenow have been equally critical of theoretical criminology. It is their conclusion that criminals are skillful manipulators, providing largely inaccurate information to support the misguided theories developed by research criminologists. See 1 S. YOCHELSON & S. SAMENOW, THE CRIMINAL PERSONALITY: A PROFILE FOR CHANGE 494-95 (1976). Schrag, on the other hand, has argued that our criminological theories are not integrated into correctional theory—i.e., there is no real effort to translate theories of criminal behavior into operational treatment techniques. Schrag, THEORETICAL FOUNDATIONS FOR A SOCIAL SCIENCE OF CORRECTIONS, IN HANDBOOK OF CRIMINOLOGY 705, 706 (D. Glaser ed. 1974). Schrag has also noted that our correctional theories are so poorly developed that they barely qualify as theories. Id.
rehabilitation has essentially remained only a model, rather than an operational theme in correctional agencies. Treatment programs have proliferated, but the criteria for assigning inmates to them are more bureaucratic than therapeutic; and over the years direct expenditures for rehabilitative programs have been minimal, especially when compared to other areas in correctional budgets.

Of course, these comments say little about the failure of rehabilitation per se and address instead the administration of rehabilitative programs within penal institutions. The exigencies of managing a prison render rehabilitation a less important concern than custody or security. This phenomenon, known as goal displacement, refers to a situation in which an organization’s primary goal, rehabilitation in this case, is subordinated to secondary goals, custody, or security. Historical and current evidence supports this argument. As early as the 1860’s, advocates of rehabilitation expressed concern that decisions to grant inmates early releases from prison were based on security needs rather than on assessments that the inmates were reformed. Fearing that a deferred release would generate prison unrest, administrators released offenders as soon as they were eligible. A similar observation has been made regarding release decisions today, and this observation figures prominently in the criticism of the parole process.

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61 Several authorities suggest that rehabilitation has never been implemented and that other conceptualizations, deterrence for example, inform sanctioning policy in practice. See Taylor, Walton & Young, supra note 20, at 7; Cohen, Guilt, Justice and Tolerance: Some Old Concepts for a New Criminology, in Deviant Interpretations 13, 20-21 (D. Downes & P. Rock eds. 1979).


63 For a general overview of goal displacement, see P. Blau & M. Meyer, Bureaucracy in Modern Society 106-10 (2d ed. 1971), and A. Etzioni, Modern Organizations (1964). This perspective is applied to criminal justice agencies in W. Chambliss & R. Seidman, Law, Order and Power 328-30, 412 (1971).

64 Moran, The Origins of Parole, in Corrections in the Community: Alternatives to Imprisonment 411 (G. Killinger & P. Cromwell eds. 1974). Early release became so automatic that it was sometimes viewed as a right rather than a privilege. On this point, see F. Wines, Punishment and Reformation: A Study of the Penitentiary System 360 (1919).

65 On the historical displacement of rehabilitative goals, see M. Carpenter, Our Convicts (1884 & photo. reprint 1989). The American Friends Service Committee contends that from the beginning prison administrators endorsed rehabilitation because it gave them more control over the behavior of inmates and the size of the inmate population. American Friends Service Comm., supra note 58, at 86. One author has demonstrated that concerns over cus-
Several general evaluations of the contemporary prison concur in the conclusion that, for administrative reasons, the demands of security or custody often displace rehabilitative aims in prison operations. Such administrative concerns are certainly not surprising, since inmates are in prison for violating social norms, are detained against their will, and feel no obligation to obey prison regulations.

Thus, there is merit in the allegation that the failure of rehabilitation is in fact a failure in the administration of treatment programs in prison. Nonetheless, many researchers doubt the efficacy of rehabilitative efforts, and, while some studies are more supportive of rehabilitative efforts, the public remains unalterably convinced that crime is increasing at an alarming rate and that rehabilitation has failed.

A second line of attack on rehabilitation pertains more directly to the administration of sanctions. Critics contend that correctional administrators have been given so much discretion that their decisions often abridge procedural fairness. The constitutionality of parole and the indeterminate sentence was upheld years ago, and since that time courts have maintained a hands-off policy in most areas of correctional decision making. Recently, however,


* For general statements of the predominance of custody or security in penitentiaries, see G. Sykes, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 9-11 (1958), and Thomas, *The Correctional Institution as an Enemy of Corrections, 37 FED. PROBATION* 8, 10-12 (1973).

* For statements more supportive of rehabilitation, see Palmer, *supra* note 62, at 149-50. Another somewhat supportive statement regarding the effectiveness of treatment programs comes from Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 Hofstra L. Rev. 243 (1979). Despite these supportive studies, however, citizens continue to believe that crime is increasing significantly and that the best solution is a harsher, more punitive response by the criminal justice system. See Doleschal, *Crime—Some Popular Beliefs, 25 CRIME & DELINQ.* 1-3 (1979).


* The hands-off doctrine is an approach whereby courts simply refuse jurisdiction in cases involving prisoners following a showing of legal conviction. Courts are unwilling to intervene in correctional decisions because such involvement might undermine the authority of prison officials and preclude such penal objectives as protection of the public. See Newman, *Court Intervention in the Parole Process, 36 ALB. L. REV.* 257, 258-60 (1971); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Com-
the courts have begun to reconsider this posture, and judicial activity in several areas of correctional administration has increased. Courts have become more responsive to the due process argument and have limited and reviewed some of the administrative discretion that was a trademark of the era of rehabilitation. The cruel-and-unusual-punishment challenge has also reemerged as a successful argument for some inmates who claim that their terms of imprisonment are too long. A number of critics have

70 According to some writers, this new willingness to intervene is an outgrowth of the Warren Court's judicial activism that afforded greater constitutional safeguards for those accused and convicted of crimes. Sullivan & Tifft, Court Intervention in Correction: Roots of Resistance and Problems of Compliance, 21 CRIME & DELINQ. 213, 215 (1975). Judicial review was especially important in instances where administrative discretion could result in a loss of liberty. This was clearly a concern in cases of correctional administration because there seldom were specific criteria to guide decision making, nor was there any formal review of these decisions. This was especially true of parole. Dawson, The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice, 1966 WASH. U.L.Q. 247, 295. A second explanation of judicial interest in correctional cases pertains to the failure of rehabilitation. The courts originally rejected many constitutional challenges because they were convinced that correctional experts, guided by scientific techniques and good intentions, could deliver rehabilitated offenders. See supra notes 31-37. The disclosures of Martinson and others (see, e.g., D. LIPTON, R. MARTINSON & L. WLKS, supra note 3; Bailey, supra note 59; Robison & Smith, supra note 59) have made clear that this is not the case, and courts are no longer disposed to overlook constitutional questions for promised rehabilitation. A good statement of this position comes from Meyerson, who suggests, "Some disparity in sentences might be acceptable . . . if the fundamental concept in indeterminate sentencing were sound, but it is not clear that prisons do perform the task of rehabilitation." Meyerson, The Board of Prison Terms and Paroles and Indeterminate Sentencing: A Critique, 51 WASH. L. REV. 617, 624 (1976); see also Dershowitz, supra note 41, at 328-38; Zalman, supra note 52, at 91.
71 Courts have been swayed by due process arguments in a number of cases. The United States Supreme Court required an adversary hearing on the determination of a sex offender's threat to the community in Specht v. Patterson, 386 U.S. 605, 610 (1967). In Mempa v. Rhay, 389 U.S. 128 (1967), the Court held that an individual was entitled to counsel at a deferred sentencing hearing after a revocation of probation. Id. at 137. The Court suggested a number of due process measures for a parole revocation procedure in Morrissey v. Brewer, 408 U.S. 471, 489 (1972), and for probation revocation procedures in Gagnon v. Scarpelli, 411 U.S. 778, 782, 790-91 (1973). The Court imposed due process requirements in a prison regulation case pertaining to censorship of mail in Procunier v. Martinez, 416 U.S. 396, 417-19 (1974).
72 In two cases, the California Supreme Court accepted a cruel-and-unusual-punishment challenge from inmates serving time on indeterminate sentences. In re Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975); In re Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972). In both cases, the court reasoned the inmates were incarcerated for periods of time that were disproportionate to their crimes. 14 Cal. 3d at 656, 537 P.2d at 397, 122 Cal. Rptr. at 555; 8 Cal. 3d at 437, 503 P.2d at 939, 105 Cal. Rptr. at 235. The court, in reaching its decisions, compared the terms with penalties for other offenses in California
suggested that rehabilitation has produced an across-the-board increase in time served by inmates.73 Perhaps the most widespread criticism is that the sentencing structure and release mechanisms, by focusing solely on the offender and permitting so many discretionary decisions, have created an unacceptable degree of disparity in punishment.74 There is also concern that, because of the disparity, inmates have a strong sense of injustice that translates into hostility and the potential for prison riots.75

On a philosophical level, critics have argued that it is unjust to base sanctioning policy on rehabilitation. Such an approach, they contend, distorts the proper nexus between crime and punishment—individuals should be punished because they performed wrongful acts. Rehabilitation, however, shifts the legal focus from crime to the criminal and makes sanctions prospective—preventive and correctional. The rhetoric of rehabilitation, say these critics, disguises the fact that our sanctions punish and that offenders suffer penalties we would not permit absent such a rationale.76 Reha-

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73 See AMERICAN FRIENDS SERVICE COMM., supra note 58, at 85; Dershowitz, supra note 41, at 303.
74 Several sources argue that the offender-oriented perspective inherent in rehabilitation shifts the focus of legal attention away from the crime and undermines due process, especially in the correctional sector. See M. FRANKEL, supra note 58, at 5-8; McAnany, Merritt & Tromanhauser, Illinois Reconsiders "Flat Time": An Analysis of the Impact of the Justice Model, 52 Chi.-Kent L. Rev. 621, 622-25 (1976).
75 D. FOGEL, supra note 2, at 239.
76 See Allen, supra note 58, at 230-32; N. KITTREDGE, supra note 36, at 39-49. One of the strongest statements of this position comes from the philosopher C.S. Lewis: "Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive." Lewis, The Humanitarian Theory of Punishment, in 2 CRIME AND JUSTICE: THE CRIMINAL IN THE ARMS OF THE LAW 43, 46 (L. Radzinowicz & M. Wolfgang eds. 1971). The American Friends Service Committee has suggested that rehabilitation became popular among correctional administrators because it permitted a more efficient means of controlling inmate behavior and the size of prison populations. AMERICAN FRIENDS SERVICE COMM., supra note 58, at 86. The manipulation of good time awards and parole release dates places inmates at the mercy of administrators, often in an almost Kafkaesque vein since the discretionary decision making is so arbitrary and secretive. Parole hearings often tend to be very brief, almost ritualistic, and the inmate is surprisingly uninformed about the entire process or the rationale for the board's decision. See D. STANLEY, supra note 41, at 42-46; Talarico, The Dilemma of Parole Decision Making, in CRIMINAL JUSTICE: LAW AND POLITICS 447 (G. Cole 2d ed. 1976). Further, through careful use of the many early release mechanisms, correctional officials have increased control over the number of those incarcerated. See AMERICAN FRIENDS SERVICE COMM., supra note 58, at 86.
bilitative-based sanctions therefore permit greater punishments, and since these punishments are to serve some larger social end, they deny the worth of the individual. The critics also condemn the focus of rehabilitation on causation, since such a focus entails a rejection of free will, a fundamental postulate of our legal system. The philosophical criticisms of rehabilitation have revitalized interest in retribution, deterrence, and incapacitation as justifications of sanctioning policy.

Thus, rehabilitation has been condemned as the dominant theme of penal policy and the primary justification of the criminal sanction. Critics contend that the administration of the policy of rehabilitation has permitted abuses and that it poses implementation problems, given the necessity of other correctional goals. Continuation of the policy is difficult to rationalize given the empirical research that challenges the efficacy of rehabilitation programs and the public perception that rehabilitation is "soft on" and thus encourages crime. Opposition to rehabilitation has generated a number of proposals purporting to remedy the alleged weaknesses of the rehabilitative model. These proposals supposedly offer a sanctioning policy that will reduce crime by incarcerating more offenders, while making the administration of sanctions more realistic, efficient, and just. Moreover, these new proposals allegedly cost less because prison sentences will be shortened. This economic aspect is especially important at a time when rising costs are straining correctional budgets. These proposals generally reflect the dissatisfaction among scholars and citizens alike with the so-called liberal response to crime—rehabilitation.

B. Determinate Sentencing: The Alternative

Alternatives to the rehabilitation model differ, but they are gen-

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77 Rehabilitation, it is suggested, undermines human dignity and makes the offender the passive object of social policy. For a more detailed discussion of this point, see Plant, Justice, Punishment and the State, in The Coming Penal Crisis: A Criminological and Theological Explanation 53, 60-62 (A. Bottoms & R. Preston eds. 1980).
78 See A. von Hirsch, supra note 58, at 47-49; Allen, supra note 58, at 229-32. This position, including the assumption of free will, draws heavily from Kant's philosophical works. See A. von Hirsch, supra note 58, at 50.
79 See, e.g., American Friends Service Comm., supra note 58, at 97; D. Fogel, supra note 2, at 199-202.
80 See, e.g., D. Lipton, R. Martinson & J. Wilks, supra note 3.
eraly lumped under the label determinate sentencing. The propos-
als fall into four categories: (1) presumptive sentences, (2) definite
sentences, (3) guidelines, and (4) mandatory sentences.

With presumptive sentencing, the legislature establishes three
possible prison terms for each offense, the middle term being the
presumptive one. A judge will sentence an offender to the middle
term unless aggravating factors mandate the upper term or miti-
gating factors justify the lower term. The plan is designed to re-
duce disparity by controlling judicial discretion, i.e., by specifying
potential sentences and the circumstances under which they are to
be imposed. Presumptive sentencing has overtones of deterrence in
that reduced discretion supposedly adds an element of certainty to
punishment. The plan also satisfies those who endorse retribution
as the basis of sanctions because the sentence is tied to the offense,
and the enhancement and mitigation provisions generally focus on
harm and culpability, concepts related to the offense rather than
to some future ends of the sanction.81

The second category of proposals involves definite sentences. For
each offense, the legislature establishes a range of sentences, and
the judge imposes a fixed term of imprisonment within the range.
Judicial discretion obviously continues under this approach, but
the term of imprisonment is a definite one rather than a range of
years bounded by a minimum and maximum sentence.82 The
length of sentence thus becomes more certain, enhancing the de-
terrent effect of the sanction while removing some of the anxiety
about release that has plagued inmates with indeterminate
sentences. As with the presumptive approach, there is more inter-
rest in the certainty of sentences than in the potential for

81 See A. von Hirsch, supra note 58, at 114; Twentieth Century Fund, Fair and Cer-
tain Punishment 19-29 (1976); Kellogg, supra note 2, at 189. Six states now have presump-
tive sentencing. They are Alaska, Arizona, California, New Jersey, New Mexico, and North
1340.4 (Supp. 1981); Kannensohn, A National Survey of Parole Related Legislation: En-
acted During the 1979 Legislative Session, in UNIFORM PAROLE REPORTS 5-6 (1980).

82 States with this type of legislation include Colorado, Illinois, Indiana, Missouri, and
1005-8-1 (Smith-Hurd 1982); Ind. Code Ann. §§ 35-50-1-1 to -50-6-6 (Burns 1979 & Supp.
(1982); see also Kannensohn, supra note 81, at 6.
rehabilitation.

The third category, the guideline approach, actually represents two methods of ensuring determinacy. With sentencing guidelines, a sentencing commission develops an actuarial-like table of penalties using as criteria the severity of the offense and a prediction factor essentially based on prior criminal record. The table generates a recommended sentence, although the judge may vary from it for cause, stated in writing. Disparity is reduced, and the sentence is certain in length.83 Parole guidelines adopt a similar format in that the parole release decision is determined from an actuarial table structured around offense severity and a prediction factor, i.e., likelihood of success on parole. Parole guidelines are an attempt at limiting discretion and reducing disparity in parole decisions.

There is some disagreement as to whether the fourth category, mandatory sentences, is actually a form of determinate sentencing, although the passage of such proposals has accompanied the antirehabilitation trend. Mandatory sentences specify set periods of incarceration for enumerated offenses. The sentences are retributive in that the length of sentence is tied to the nature of the crime. Further, mandatory sentences are potentially deterrent in nature because a minimum term will be served, and thus certainty is assured. These sentences also reduce judicial and parole board discretion.86

83 On the development of sentencing guidelines, see Wilkins, Sentencing Guidelines to Reduce Disparity?, 1980 CRIM. L. REV. 201, 201-14. Sentencing commission and guidelines have been endorsed by M. FRANKEL, supra note 41, at 69-71; P. O'DONNELL, M. CHURIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977); and Singer, In Favor of "Presumptive Sentences" Set by a Sentencing Commission, 24 CRIME & DELINQ. 401 (1978). Kannensohn notes that Minnesota and Pennsylvania have passed legislation. Kannensohn, supra note 81, at 6; see MINN. STAT. ANN. § 244.09 (West Supp. 1982); 42 PA. CONS. STAT. ANN. § 9721 (Purdon Supp. 1982). The approach is also under consideration by the Congress. See Singer, supra, at 408.


86 Kannensohn attempts to distinguish mandatory from determinate sentencing. See Kannensohn, supra note 81, at 9-10. Talarico calls mandatory sentencing, however, a vari-
Writers have provided empirical, legal, and philosophical grounds for abandoning the era of rehabilitation, and many have proposed their own penal schemes. Their ideas have become the center of legislative debate about sanctioning policy. Many legislatures have expressed concern about disparity because of its unfairness and potential link to prison unrest, and the alleged failure of rehabilitation programs has also figured prominently in debates. The effectiveness issue, coupled with a growing fear of crime, has prompted interest in new crime control strategies based on deterrence, retribution, and incapacitation. Not surprisingly, however, various legislatures have given different weight and interpretation to the issues and have enacted penal laws that sometimes differ considerably from the recommended proposals. While many advocates of determinate sentencing oppose using this policy shift as an excuse for enacting more severe penalties, some legislatures have nonetheless increased punishments as part of this sanctioning reform. The punitive nature of these reforms is especially obvious with mandatory sentences.

We have developed four categories of determinate-based sanctioning policy and arranged the states that have enacted related legislation according to these classifications. Table 2 in the appendix of this Article contains a summary of these determinate-based
sanctioning proposals and their intended impact.

IV. IMPLEMENTING SANCTIONING POLICY

The policy process perspective, including an examination of discretion and the availability of resources, is crucial for assessing the potential success of a legal policy. When applied to determinate sentencing, this perspective reveals the complexity of these recommended changes and raises serious questions concerning the likelihood of successful implementation.

Determinate sentencing is proffered as a correctional reform. Of course, prior modifications in sanctioning policy were also cast as reforms and similarly justified by the rhetoric of fairness and of crime control through more effective sanctions. Those reforms failed. They stressed inconsistent goals; their sanctioning policies were more symbolic than practical reforms and were seldom backed by necessary resources; and the personnel charged with implementing the policies were unable or unwilling to do so. Similar problems plague the implementation of determinate sentencing.

A. Resources and Determinacy

Despite assurances from many proponents that determinate sentencing would not enhance the severity of penalties, a common theme of the new penal laws appears to be a focus on crime control through incarceration, i.e., through imprisoning more offenders for longer periods of time. For example, Arizona's new presumptive-based criminal code increases the number of months individuals are likely to be imprisoned for a large number of crimes: robbery

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92 Reformers in the mid-1800's, for example, argued that criminal behavior was a function of defective moral training and that offenders should be exposed to programs of moral education. Yet the reformers retained notions of criminal guilt and implemented these programs in prison. See P. Bean, supra note 32, at 44. Ironically and inconsistently, rehabilitative programs designed to help offenders stripped them of dignity and expanded the state's intervention into their lives. See Plant, supra note 77, at 60-62.
with a gun from forty-nine to eighty-four months; aggravated assault with injury from twenty-six to sixty months; burglary from nineteen to thirty months; theft over $1000 from twenty-two to thirty months; and theft of a motor vehicle from sixteen to thirty months. Such revised sentencing arrangements are so recent that the actual effect on the prison population can only be projected, although preliminary evaluations in both Arizona and California disclose an increase in the rate of incarceration following passage of such laws.

Public agencies can successfully execute a new policy only when they receive essential resources or the capacity to absorb added costs associated with a legislative or judicial mandate. This may present a problem with determinate sentencing since existing resources are already strained and there is little indication that legislatures are disposed to provide increased fiscal resources. The cost of sanctioning continues to rise, as does the number of people processed through the criminal justice system, and thereby adds to the general fiscal crises in state and local budgets. Data from seventeen states that have enacted some form of determinate-based sanctioning policy indicate that the jurisdictions have shown lit-
tle inclination or ability to plan for the pressures these measures will put on each state's correctional system. Table 3 in the appendix to this Article shows that, at or about the time these states mandated the implementation of determinacy, their combined prison capacity, based on estimates of their own correctional agencies, lagged behind their existing prison population. Specifically, while approximately 106,038 individuals were committed to these states' prisons in 1979, the institutions had room for only 101,601 inmates, leaving nearly 4500 inmates for which the states lacked adequate space.

Thirty-four percent of the prison population for which inadequate space existed resided in these seventeen states in 1979. Among the seventeen states adopting any form of determinate sanctioning policy, eleven had correctional systems that were overcrowded, according to standards of capacity set by the administrators of individual institutions or by the central correctional agencies of these jurisdictions. Without question, state legislatures enacting this new sanctioning policy did little to plan for and provide resources to implement successfully these new penal mandates.

In the past correctional agencies used their administrative discretion simply to pack additional inmates into already overcrowded facilities. This practice will no longer be tolerated by federal courts. For example, in Harris v. Cardwell, a United States district court in Arizona ruled on a complaint filed by the American Civil Liberties Union on behalf of inmates at the Arizona State Prison. As is typical of such recent decisions, United States District Judge Carl A. Muecke made his order explicit about overcrowding: "It is hereby ordered that the defendants, and each of them, are prohibited and enjoined from allowing the male population at the Arizona State Prison at Florence to exceed 2125 . . . ." Judge Muecke's decision is part of a chain of federal

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77 This figure is based on rated capacity and prison population figures collected by the United States Department of Justice and compiled in U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1979, at 630 (1980). See Table 4 contained in the appendix to this Article.

78 See P. Keve, supra note 95, at 143-47.

79 Civil No. 75-185 (D. Ariz. 1977).

100 Id.
court decisions that has extended to inmates the umbrella of protections contained in the United States Constitution. These rulings have been fueled by the tremendous increase in the filing of civil rights petitions by state inmates and their surrogates. Civil rights petitions filed by state inmates numbered 9730 in 1978, an increase of 379.3% since 1970 and forty-five times as high as in 1966.

In the past, states have sometimes ignored federal court orders because these courts have no administrative apparatus to implement their mandates. Federal judges often relied on the good intentions of state policy-making bodies and administrative agencies to carry out court orders. There may, however, be a change in judicial attitude on this point. In Alabama, for example, United States District Judge Frank Johnson became annoyed with that state's recalcitrance and to speed compliance with his orders seized full administrative control of the state's prison system. Since then, other states have taken more seriously the orders of federal courts concerning correctional systems.

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101 Of course, legal action in this area is uneven. Perhaps the most widely publicized case in recent years is Rhodes v. Chapman, 452 U.S. 337 (1981). In this case, the Supreme Court ruled that the incarceration of two inmates in a single cell is not cruel and unusual punishment prohibited by the eighth and fourteenth amendments. Id. at 347-50. The Court, however, reaffirmed its intention to scrutinize prison conditions. Id. at 352. A concurring opinion mentioned that sentencings to specific prisons or entire state prison systems have been declared cruel and unusual punishment in 24 states and that similar litigation is pending elsewhere. Id. at 353-54 (Brennan, J., concurring). Moreover, the concurring opinion deplored the serious lack of fiscal resources available to correctional administrators during this period of rising prison populations. Id. at 357. Subsequent to Rhodes v. Chapman, a federal district judge in Alabama ordered the release of 222 named inmates to relieve overcrowding in that state's prison system. See CRIM. JUST. NEWSLETTER, Aug. 3, 1981, at 5. Accelerated parole release dates were ordered for another 50 inmates. Id. Judge R.L. Varner adhered to the ruling in Rhodes v. Chapman, but reasoned that overcrowding for extended periods of time, when considered in light of all other circumstances, constituted a violation of constitutional rights. Id. For an overview of relevant correctional case law, see Toal, Recent Developments in Correctional Case Law, in RESOLUTION (1975).


105 Several commentators suggest that federal suits and closer scrutiny by federal judges
The increased focus on incarceration, coupled with federal court intervention, has created a dilemma for states attempting to implement this new sanctioning policy. States have two basic options for resolving this dilemma. First, states may embark on significant construction programs to overcome historical overcrowding conditions and eventually to meet the additional brick and mortar requirements produced by the new sanctioning policy. Indeed, as can be seen in Table 4 of the appendix to this Article, eight of the seventeen states that enacted some form of determinate sentencing are under court order to correct overcrowding conditions, and one other jurisdiction, Kansas, is currently involved with litigation in which overcrowding is an issue.\(^{106}\) Seven of the eight states under court order have provided estimates for renovation and construction of new facilities totaling approximately $232 million.\(^{107}\) The trend in recent years has been away from large prisons in favor of community corrections centers. This was, in part, a treatment consideration, but fiscal concerns, especially the rising cost of incarceration, were an important aspect of this trend.\(^{108}\) The renewed interest in incarceration, with its emphasis on large prisons, raises the question whether states can afford this new sanctioning policy since they are in no better financial situation than when community corrections centers were popular.

Given the fiscal dilemma, a second, perhaps more attractive, option for states is reliance on various discretionary mechanisms to accommodate the exigencies of daily operations in the face of space shortages. This option need not entail designed overcrowding, but it could include such legitimate mechanisms as discretion exercised by prosecutors (selection of charges), judges (probation or reduced sentences), and correctional administrators (furloughs, good time credits, paroles, and other release mechanisms).

Of course, these solutions are inconsistent with the touted goal of state correctional systems are producing a substantial impact in the correctional sector. See P. Keve, supra note 95, at 140-41; Turner, supra note 102, at 639.

\(^{106}\) See U.S. Dep't of Just., supra note 97, at 631; Kannensohn, supra note 81, at 5-6.

\(^{107}\) See U.S. Dep't of Just., supra note 97, at 631; Kannensohn, supra note 81, at 5-6; Table 4 in appendix to this Article.

\(^{108}\) A detailed analysis of the community correction approach, including the underlying rationale and themes as well as the impact on society, is provided in A. Scull, Decarceration: Community Treatment and the Deviant—A Radical View (1977).
of determinate sentencing—to eliminate or curtail discretion. Moreover, the penal laws do limit many discretionary mechanisms. Mandatory sentencing statutes preclude probation for many offenses, and other determinacy legislation constrains judicial flexibility in setting the length of sentence.\textsuperscript{109} Parole has been abolished in some states and altered substantially in others.\textsuperscript{110} Discretion among prosecutors and correctional administrators is all that appears to remain to meet the combined pressures of overcrowding and federal court intervention and determinacy in an era of fiscal crisis.

Although prosecutors still have discretion in selecting charges against the defendant, the irony is that prosecutorial discretion is under attack. Prosecutors have been criticized for exercising their discretion in a discriminatory manner and for the aggrandizement of political or organizational power.\textsuperscript{111} Recent empirical studies challenge these claims,\textsuperscript{112} but there is still widespread popular concern about the exercise of prosecutorial discretion.

The remaining avenue of discretion lies with prison administrators who can award inmates good time credits, which permit a reduction in time served.\textsuperscript{113} But there is irony here as well. Parole boards were created years ago because most state legislatures were convinced that a separate parole authority could render more con-


\textsuperscript{111} See, e.g., Alschuler, supra note 93, at 564.

\textsuperscript{112} Research into plea bargaining reveals that this tool of administrative discretion produces patterns of decision making less keyed to ethnic or racial bias than earlier, less rigorous studies suggested. For a review of these more recent studies, see Krislov, Debating on Bargaining: Comments from a Synthesizer, 13 Law & Soc'y Rev. 573 (1979). Further, a recent study of one state's attempt to eliminate prosecutorial bargaining over criminal charges concluded that prosecutors did not resist such a loss of discretionary power. Rubinstein & White, Alaska's Ban on Plea Bargaining, 13 Law & Soc'y Rev. 367, 371-72 (1979). But see Clear, Correctional Policy, Neo-Retributionism, and the Determinate Sentence, 4 Just. Sys. J. 26, 40 (1978); Glaser, Comments on "Determinate Sentencing," 23 Crime & Delinq. 207 (1977); Talarico, supra note 85, at 66.

\textsuperscript{113} Inmates earn good time credits by obeying prison regulations, and thus inmates can reduce the time they must serve by avoiding infractions within prison. The amount of credit that can be earned varies from state to state and often is dependent on the length of the original sentence. See S. Krantz, The Law of Corrections and Prisoners' Rights in a Nutshell 14 (1976).
sistent and expert decisions than could prison administrators.\textsuperscript{114} The determinate-based sanctioning policy abolishes or constrains parole boards, effectively reverses the arrangement, and relocates the release decision within the discretion of prison administrators through the control of good time awards.

While the new sanctioning policy was adopted as a means of eliminating administrative discretion, those states that retain some flexibility for criminal justice decision makers are in the best position to see their correctional apparatus tolerated by federal courts. Critics have failed to realize that administrative discretion emerges as a critical resource "when the number of specific requirements exceeds the organization's capacity and no order or priority is established by the mandating authority."\textsuperscript{115} Administrative discretion is an important relief valve given existing fiscal demands and constraints.

C. Established Routines and Determinacy

The availability of resources is an important consideration from a policy process perspective, but an equally vital concern is the interest of practitioners who must apply a policy. New mandates will be successfully carried out only when the goals of a new policy can be harmonized with the established routines of relevant implementors. Criminal justice personnel should not be expected automatically to adjust their routines to a new legislative mandate.\textsuperscript{116} Determinate-based sanctioning policy faces a significant implementation problem because it is less than harmonious with the routines of these personnel. Particularly, this policy ignores the increasing professionalization of correctional personnel and their growing commitment both to administrative discretion and a rehabilitative orientation.\textsuperscript{117}

\textsuperscript{114} See Lindsey, supra note 39, at 78-80.
\textsuperscript{115} Montjoy & O'Toole, supra note 91, at 472.
\textsuperscript{116} See id. at 466. For studies that demonstrate the critical roles of "street-level bureaucrats" in the policy process, see J. Prottas, supra note 91; Aaronson, Dienes & Musheno, Changing the Public Drunkenness Laws: The Impact of Decriminalization, 12 LAW & SOC'Y REV. 405, 411 (1978); Lipsky, Toward a Theory of Street-Level Bureaucracy, in THEORETICAL PERSPECTIVES ON URBAN POLITICS 196 (W. Hawley & M. Lipsky eds. 1976).
\textsuperscript{117} Increasingly, correctional practitioners portray themselves as professional personnel within the public service sector. Indicia of correctional professionalism, as with other professions, include more stringent educational qualifications for employment, appropriate job titles, e.g., parole officers are now parole counselors and prison guards are correctional service
Administrative discretion is an inherent component of all human service bureaucracies. First, as administrative personnel associate their roles with professionalism, they expect to be able to exercise individual judgments relevant to their assigned tasks. Professionalism has extended to every sector of the criminal justice system, including the police and correctional service officers. Of course, there are differences in how they utilize discretion, but both managerial and lower echelon personnel in all criminal justice agencies assume that discretion is a legitimate administrative tool in many circumstances.

Further, discretion is inherent in the justice process because lower echelon personnel require an administrative apparatus for adapting general and often vague rules, regulations, and policies to their everyday interactions with client groups. Administrative discretion, then, is a crucial tool for balancing equal treatment with individualized treatment.

Increasingly, the heads of public agencies take the view that discretion is neither inherently bad nor good but that its appropriateness depends on how it is used. Rather than focusing on the elimination of discretion in justice agencies, administrators have concentrated on identifying administrative tools (e.g., work incentives and rulemaking) to channel the discretion among lower echelon personnel. Determine sentencing is a policy inconsistent with the emergence of administrative discretion as a legitimate tool.
of public service employees.

Despite the rhetoric surrounding the new sanctioning policy and the claim that rehabilitation is being abandoned, many states are making significant investments to professionalize their correctional staffs and delegate discretion to lower echelon personnel who have direct contact with inmates through the creation of administrative procedures for interacting with inmates (e.g., inmate grievance procedures and inmate classification systems). Prison personnel are expected to have counseling, as well as custodial, skills, and many institutions now offer incentives for their employees to earn college degrees. These career patterns and the attendant self-image of prison workers, i.e., a view of themselves as counselors rather than custodians, may mean that correctional practitioners will oppose any policy that threatens the rehabilitative model.

Also, significant federal monies have been appropriated to finance experimental programs stressing individual treatment (e.g., work furlough), and many of these programs have become ongoing components of states’ correctional apparatus. So, despite legislation that mandates a shift from rehabilitation to a policy that stresses confinement, the administrative machinery and established career interests that characterize American correctional institutions may prove difficult to dislodge.


123 P. Keve, supra note 95, at 482-94.

124 Morris is one of the few critics of rehabilitation to discuss the role of the correctional bureaucracy with regard to correctional reform. He suggests it may be necessary to preserve career opportunities for correctional counselors. N. Morris, supra note 58, at 36-37. A related view can be found in the legislative history of California’s presumptive sentencing law. See Messinger & Johnson, California’s Determine Sentencing Statute: History and Issues, in Determine Sentencing: Reform or Regression? 13 (1978). Messinger and Johnson detail the compromises required to satisfy the correctional bureaucracy during debate on determine sentencing.

125 Perhaps the major source of federal funds for state correctional programs has been the Law Enforcement Assistance Administration. This federal program and its impact on the correctional sector is discussed more fully in D. Gibbons, Society, Crime and Criminal Careers: An Introduction to Criminology 557-61 (3d ed. 1977). Although the Federal Government has allocated federal dollars to develop rehabilitation-based programs, it has been unwilling to help finance new prison facilities in states. See, e.g., Nat’l Advisory Comm’n on Crim. Just. Standards & Goals, Corrections 357-59 (1973).
V. Conclusion

While there is disagreement over the intended effect of determinate-based sentencing policy and a variety of predictions about the practical impact, many proponents, especially legislators and citizens, view this policy as a solution to the crime problem. This new sanctioning policy, however, like correctional reforms of the past, is more a symbolic than an actual reform.\textsuperscript{126} Determinate sentencing is a function of a change in conditions in society, a dissatisfaction with the rehabilitative era in a number of dimensions, a fear of crime, and a belief that something new must be attempted to reduce the crime problem.

Unfortunately, the somewhat rapid shift to determinate sentencing reflects a lack of understanding of the time required to implement a large-scale social policy reform.\textsuperscript{127} Policies of this scale frequently require years to become a part of the bureaucratic routine. Ironically, this massive shift in penal policy is occurring as the administrative and personnel routines within correctional institutions are rooted increasingly in rehabilitation.

Thus, the potential for successful implementation of the new policy of determinate sanctioning is far from being realized.\textsuperscript{128} Moreover, state legislatures in the past decade have been unable to afford the high costs of institutionalizing criminals. The legislatures have also been reluctant to commit the resources required to carry out this new policy, and it seems doubtful that administrative agencies can absorb the costs associated with these new penal laws by increasing the inmate population of existing facilities. The federal judiciary, responding to inmate litigation, has expanded the requirements of correctional programming, condemned existing prison conditions, and foreclosed many traditional avenues for con-

\textsuperscript{126} Greenberg & Humphries, The Coopitlon of Fixed Sentencing Reform, 26 Crime & Delinq. 215, 221 (1980), suggests that the sentencing "reforms" have changed little beyond the philosophical rhetoric of sanctioning.

\textsuperscript{127} It has been demonstrated that the successful implementation of policy reforms, i.e., incorporating them into the established routine, takes one to two decades. Implementation is an incremental process for a variety of reasons. See W. LAMBRIGHT, supra note 4, at 121-35; Rice & Rogers, Reinvention in the Innovation Process, in 1 KNOWLEDGE: CREATION, DIFFUSION, AND UTILIZATION 499 (1980).

\textsuperscript{128} The National Institute of Justice, Department of Justice, is currently sponsoring evaluations of this new sanctioning policy. See NAT'L INST. OF LAW ENFORCEMENT AND CRIM. JUST., CRIM. JUST. RESEARCH SOLICITATION: SENTENCING RESEARCH: TWO STUDIES (1979).
trolling the prison population. The most likely amelioration strategy, administrative discretion, is reduced substantially by determinate sentencing itself.

An understanding of the potential of sanctioning reform requires both a historical perspective and an assessment of contemporary environmental and administrative realities. Determinate sentencing, when evaluated via this perspective, appears to lack the ingredients required to ensure successful implementation in the immediate future. As with many public policies, this policy resembles more a symbolic shift in sanctioning policy than an actual change in policy. During periods when citizens' fear of crime is on the rise, legislators feel compelled to enact reforms that demonstrate their responsiveness to the electorate. Determinate-based sanctioning policy is the present legislative response. Legislators, however, have done little more than formulate this new policy, which is essentially a reinvention of several old policies, and thus the financial and administrative resources necessary to implement determinate sentencing have not been forthcoming. Finally, the administrative machinery and ethos of a previous reform—rehabilitation—continue to dominate state correctional systems.
# APPENDIX

## Table 1

**CONCEPTUALIZATIONS AND SANCTIONING POLICY**

<table>
<thead>
<tr>
<th>Conceptualization Underlying Penal Policy</th>
<th>Assumptions</th>
<th>Goals of Sanctions</th>
<th>Sentencing Arrangements</th>
<th>Penal Strategies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retribution</td>
<td>People are rational, freely choose their courses of action, and are responsible for them. People chose the state and are hence bound by its laws.</td>
<td>Social vengeance, punishment of wrongful act for social order, and expiation.</td>
<td>Definite penalties that are harsh and public, linking punishment to the severity of the crime.</td>
<td>Corporal and capital punishment, publicly administered; later ameliorated by parole, service, transportation, and pardons.</td>
</tr>
<tr>
<td>Deterrence</td>
<td>People are rational and act according to the pleasure/pain principle. People chose the state and are hence bound by its laws.</td>
<td>An efficient penal system with a proper schedule of penalties will cause people to forego criminal behavior to avoid the painful consequences that follow it, i.e., punishment.</td>
<td>Definite penalties that increase in severity with the seriousness of the crime. The penal system must take into account the certainty, celerity, and severity of sanctions.</td>
<td>Limitations on judicial discretion; prison as the principal penalty; observation of the inmate to structure institutional behavior around rewards and punishments.</td>
</tr>
<tr>
<td>Rehabilitation</td>
<td>Criminal behavior is the product of forces (biological, psychological, or sociological) beyond the individual's control. There is a social consensus about the proper behaviors, and deviations are regarded as pathologies.</td>
<td>To diagnose pathology and develop programs to remedy the problem, both to help the society and the offender.</td>
<td>Indeterminate sentencing system that considers the individual offender's characteristics causing the criminal behavior.</td>
<td>Discretion to judge, classification procedures, treatment programs, early release via parole, and discretion in parole authority.</td>
</tr>
<tr>
<td>Determinacy Approach</td>
<td>Jurisdictions</td>
<td>Determination of Sentence</td>
<td>Impact on Discretion</td>
<td></td>
</tr>
<tr>
<td>----------------------</td>
<td>---------------</td>
<td>----------------------------</td>
<td>----------------------</td>
<td></td>
</tr>
<tr>
<td>Presumptive</td>
<td>Alaska, Arizona, California, New Jersey, New Mexico, and North Carolina.</td>
<td>Legislature establishes three potential sentences for each offense; middle sentence is the presumptive one; enhanced sentence with aggravating factors; reduced sentence with mitigating factors.</td>
<td>Emphasis on presumptive term minimizes judicial discretion; guided discretion with specified aggravating and mitigating factors.</td>
<td></td>
</tr>
<tr>
<td>Definite</td>
<td>Colorado, Illinois, Indiana, Missouri, and Tennessee. Maine has a variant of this approach.</td>
<td>Legislature establishes a range of sentences for each offense, and the judge imposes a fixed sentence within the range.</td>
<td>Judicial discretion is limited only by the minimum and maximum penalty.</td>
<td></td>
</tr>
</tbody>
</table>
### Table 3

**Prison Resources of States Enacting Determinate-Based Sanctioning Policies, 1979**

<table>
<thead>
<tr>
<th></th>
<th>Rated Capacity</th>
<th>Prison Population</th>
<th>Difference**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>2,050</td>
<td>2,971</td>
<td>-921</td>
</tr>
<tr>
<td>Arkansas</td>
<td>2,561</td>
<td>2,543</td>
<td>+18</td>
</tr>
<tr>
<td>California</td>
<td>24,660</td>
<td>21,763</td>
<td>+2,897</td>
</tr>
<tr>
<td>Florida</td>
<td>14,369</td>
<td>18,907</td>
<td>-4,542</td>
</tr>
<tr>
<td>Idaho</td>
<td>648</td>
<td>750</td>
<td>-102</td>
</tr>
<tr>
<td>Illinois</td>
<td>10,650</td>
<td>10,729</td>
<td>-79</td>
</tr>
<tr>
<td>Iowa</td>
<td>2,088</td>
<td>2,035</td>
<td>+53</td>
</tr>
<tr>
<td>Kansas</td>
<td>2,195</td>
<td>2,231</td>
<td>-36</td>
</tr>
<tr>
<td>Louisiana</td>
<td>4,900</td>
<td>5,422</td>
<td>-522</td>
</tr>
<tr>
<td>Missouri</td>
<td>3,890</td>
<td>5,003</td>
<td>-1,113</td>
</tr>
<tr>
<td>Montana</td>
<td>830</td>
<td>583</td>
<td>+247</td>
</tr>
<tr>
<td>Nevada</td>
<td>820</td>
<td>908</td>
<td>-88</td>
</tr>
<tr>
<td>New Mexico</td>
<td>1,145</td>
<td>1,640</td>
<td>-495</td>
</tr>
<tr>
<td>North Carolina</td>
<td>10,980</td>
<td>11,436</td>
<td>-456</td>
</tr>
<tr>
<td>Ohio</td>
<td>14,367</td>
<td>12,645</td>
<td>+1,722</td>
</tr>
<tr>
<td>Tennessee</td>
<td>3,508</td>
<td>5,225</td>
<td>-1,717</td>
</tr>
<tr>
<td>West Virginia</td>
<td>1,944</td>
<td>1,247</td>
<td>+697</td>
</tr>
<tr>
<td>Totals</td>
<td>101,601</td>
<td>106,038</td>
<td>-4,437</td>
</tr>
</tbody>
</table>

* Table includes all states that have enacted any form of determinate sanctioning policy by the 1979 legislative session. See Kannensohn, *A National Survey of Parole Related Legislation: Enacted During the 1979 Legislative Session*, in Uniform Parole Reports 5-6 (1979). Rated capacity and prison population figures are collected by the Department of Justice and compiled in U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1979, at 630 (1980).

** Rated capacity less prison population equals difference. “+” sign indicates surplus capacity given “ordinary” or “design” capacity of the prison(s); “-” indicates overcrowded conditions, given “ordinary” or “design” capacity of the prison(s).
<table>
<thead>
<tr>
<th>State</th>
<th>Estimated Construction Costs</th>
<th>Latest Date of Completion</th>
<th>Estimated New Bedspace</th>
<th>Under Court Order</th>
<th>Currently Involved in Litigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>$31,000,000</td>
<td>1981</td>
<td>1,000</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Arkansas</td>
<td>3,300,000</td>
<td>—</td>
<td>200</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>California</td>
<td>220,000,000</td>
<td>1986</td>
<td>4,400</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Florida</td>
<td>21,787,113</td>
<td>1980</td>
<td>624</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Idaho</td>
<td>1,300,000</td>
<td>1980</td>
<td>96</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Illinois</td>
<td>73,000,000</td>
<td>1980</td>
<td>1,500</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Iowa</td>
<td>5,600,000</td>
<td>1981</td>
<td>150</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Kansas</td>
<td>NONE</td>
<td>—</td>
<td>—</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Louisiana</td>
<td>50,000,000</td>
<td>1981</td>
<td>1,500</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Missouri</td>
<td>38,000,000</td>
<td>1981</td>
<td>974</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Montana</td>
<td>4,050,000</td>
<td>1980</td>
<td>192</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Nevada</td>
<td>25,000,000</td>
<td>1981</td>
<td>400</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>New Mexico</td>
<td>14,000,000</td>
<td>1981</td>
<td>300</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>North Carolina</td>
<td>60,500,000</td>
<td>1982</td>
<td>1,822</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Ohio</td>
<td>NONE</td>
<td>—</td>
<td>—</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Tennessee</td>
<td>15,000,000</td>
<td>1979</td>
<td>800</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>West Virginia</td>
<td>NONE</td>
<td>—</td>
<td>—</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

* Table includes all states that have enacted any form of determinate sanctioning policy through the 1979 legislative session. See Kannensohn, A National Survey of Parole Related Legislation: Enacted During the 1979 Legislative Session, in Uniform Parole Reports 5-6 (1979). Information on estimated construction costs, estimated date of completion, estimated new bedspace, whether or not under court order, and whether or not currently involved in litigation has been collected by the United States Department of Justice and compiled in U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1979, at 631 (1980).