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A Retributive-Justice Model of Sentencing

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"SOCIETY should treat all equally well who have deserved equally well of it...." *John Stuart Mill.*

As John Stuart Mill argued that society should treat individuals equally who have deserved it, this article argues that society should punish individuals equally who have deserved it.

Sentencing, next to adjudication of guilt, is the focal point of the criminal justice system. In the past decade, the major criticism leveled against this system has been the increasing concern over the problems of sentencing disparity. All of the important writings published about sentencing during the past decade agree that fairness and certainty in punishment should be the primary goals of sentencing reform.[1] In order to accomplish these two goals most authors urge the structuring, limitation or abolition of sentencing disparity. Yet, while seeking to reduce the discretion available to the criminal justice system as a whole, we have only been successful in limiting discretion granted to some parole authorities; we have done little to structure the discretion granted to judges and nothing to limit prosecutorial discretion.

This article focuses on judicial discretion in relation to the problems that arise from sentencing disparity and the unfairness relative to this disparity. In particular, it is concerned with the lack of due process at sentencing which creates inequitable sentences inherent in the present sentencing structure. The article provides new directives for improving the sentencing system. These directives rely on a retributive-justice model predicated on Andrew von Hirsch's and Richard Singer's ideas of sentencing.

The paper concludes by providing a summary of the major components of the suggested retributive-justice model of sentencing which include: (1) the elimination of sentencing disparity; (2) mandatory utilization of sentencing guidelines, wherein the sentence is based predominately upon the *seriousness* of the offense (harm done and/or monetary loss/gain); (3) a sentence which is *proportional* to the amount of harm done or attempted; (4) prosecutorial guidelines which are mandatorily imposed in the utilization of plea bargaining; (5) a criminal code which specifies the goals of the retributive-model; (6) elimination of good time and parole; (7) a restitution format in which the offender is responsible to pay the victim specific amount of money for damages or loss suffered as a result of the offender's behavior; (8) establishment of a National Appellate Court for Sentence Review; (9) appeal of the sentence by both the government and the defendant if it is outside the guidelines (the government if it is under the guidelines and the defendant if the sentence is over). In addition, the model affords due process procedures to the sentencing hearing by providing a systematic, fair procedure for all judges to follow in determining a particular sentence for a defendant. It is this last point that this article will consider in some detail throughout the discussion of the retributive-justice model.

Sentencing Disparity

In less than a century sentencing and corrections have passed through four distinct eras.[2] First there was the era of retribution, marked by relatively fixed, severe sentences; then there was a passage to an era of utilitarianism. During this latter era the goals of the criminal justice system focused upon redirecting and rehabilitating the offender's behavior. Thus, the rationale for individualized sentencing was given credence and was increasingly accepted as the norm for sentencing. By the mid-1970's, however, an era of humanism emerged in which prisoner and defendants' rights were focused on and less emphasis was placed on treatment. Much of the de-emphasis on treatment was due, however, not only to the issues of individual rights but also to the fact that

[1]American Friends Service Committee, Struggle for Justice, 1971. Dershowitz, "Let the Punishment Fit the Crime," *New York Times Magazine*, 12/28/75.
Marvin Frankel, *Criminal Sentences: Law without Order*, 1973.
Brian Grosman, ed., *New Directions in Sentencing*, 1980.
Norval Morris, *The Future of Imprisonment*, 1974.
Richard Singer, *Just Deserts: Sentencing Based on Equality and Desert*, 1979.
Lawrence Travis, III, and Vincent O'Leary, *Cha[illegible]tes in Sentencing and Parole 1976-78*, 1979.
Twentieth Century Fund, *Fair and Certain Punishment*, 1976.
Andrew von Hirsch, *Doing Justice: The Choice of Punishments*, 1976.
Andrew von Hirsch and Katharan Hanrahan, *The Question of Parole*, 1979.
[2]Gerhard O.W. Mueller, "The Future of Sentencing: Back to Square One," in B. Grosman, ed., op. cit., at note 1, p. 13.

current research failed to demonstrate that treatment or rehabilitation worked.[3] In the 1980's with the upsurge in the crime rates some states have seen fit to return to the retributive model of relatively fixed, severe sentences.

As the focus of the correctional philosophy changed in the 1980's, however, many sentencing systems failed to make parallel changes.[4] Thus, even though the failures of rehabilitative efforts were recognized, courts continued to utilize an individualized correctional approach in sentencing and sentencing disparity increasingly was assailed as the major flaw of this system. The present thrust of many scholars' arguments is that individualized sentencing which relies upon treatment is unfair to individuals who are disadvantaged to begin with. This is because treatment programs usually mean that longer periods of incarceration are needed in order to cure or rehabilitate these types of offenders, or they show favoritism to white collar criminals because they do not need treatment and, therefore, they receive lighter sentences. In joining in these arguments, defense attorneys emphasized that the crazy quilt disparities—the wide differences in treatment of defendants whose situations and crimes appear to be similar and whose divergent sentences are unaccounted for—stir doubts as to whether the guarantee of the "equal protection of the laws" is being fulfilled.[5]

The current criminal justice literature reflects disillusionment with an individualized sentencing approach which results in vast disparities in sentences rendered by the same and/or by different judges to individuals who have committed similar types of offenses. An excellent citation regarding this problem appears in the introduction of the *Twentieth Century Task Force Report on Sentencing* which states that:

> Although the Task Force does not overlook the other serious problems that afflict the criminal justice system in the United States, we believe that perhaps the major flaw is the capricious and arbitrary nature of the criminal sentencing. By failing to administer either equitable or sure punishment, the sentencing system—if anything permitting such wide latitude for the individual descretion of various authorities can be so signified—undermines the entire criminal justice structure.[6]

This wide latitude of views expressed in the various criminal philosophies means that radically different goals are assessed in the sentencing process. This complicates the sentencing structure, in which some of these philosophies advocate "individualized" sentencing, while others reject it and call for a reduction in sentencing disparities by utilizing retributive models. For this reason a single philosophy needs to be adopted by the criminal justice system which can accomplish all of the established goals and provide a sound, equitable, and rational basis for sentencing throughout the United States.

Retribution

The philosophy of retribution demands a reduction in sentencing disparity because it requires that sentences be based upon the serious nature of the offense and be proportional to the harm done by the offender. However, because this model has been reflective of a vengeance approach to sentencing, scholars have been hesitant to adopt its views and goals. Recently some scholars have attempted, however, to pursue a retributive model in which a "just deserts" philosophy focuses less on vengeance and more on a fair, rational sentencing system. The current retributive models developed, in particular, those of Andrew von Hirsch[7] and Richard Singer[8] are rational methods of allocating criminal punishment. Both of these models reject "individualized" sentencing and explore alternative systems of equal sentencing based on the seriousness of the offense committed. Both models focus on the offense and seek to apportion blame on the basis of the harm done and the intent with which the offender acted.[9] This type of sentencing system is more likely to achieve equality of punishments and to be more manageable than the present system. By focusing on relatively objective, public facts that are relatively easily knowable (or at least inferable), one might then avoid both the unfairness of seeking to weigh intangibles and the inequalities that stem from subjective judgments of individual triers and sentencers.[10]

Singer and von Hirsch also recognize that equality of punishment, while a necessary condition for a fair sentencing system, is *not* a sufficient condition. Proportionality is another required dimension of fairness in their retributive models. Von Hirsch and a colleague stated their position on this matter in their book, *The Question of Parole:*

> The commensurate-deserts principle imposes (two) kinds of constraints on the severity of penalties. First, it imposes a rank-ordering of penalties. Punishments must be arranged

[3]D. Lipton, R. Martinson, and J. Wilks, *The Effectiveness of Correctional Treatment*, 1975. See also, Martinson, "Is Rehabilitation Dead?," *Corrections Magazine*, v.1, n. 5:3-7, May/June 1975.
[4]S.L. Messinger and P.E. Johnson, "California's Determinate Sentencing System: History and Issues," in *Determinate Sentencing—Reform or Regression?*, pp. 13-58.
[5]Frankel, op. cit. note 1, p. 103.
[6]Twentieth Century, op. cit. note 1, p. 3.
[7]von Hirsch, op. cit. note 1.
[8]Singer, op. cit. note 1.
[9]*Ibid*, p. 27.
[10]John C. Coffee, "Repressed Issues of Sentencing: Accountability, Predictability and Equality in the Era of the Sentencing Commission," 66 *Georgetown Law Journal*, 975 (1978).

> so that their relative severity corresponds with the comparative seriousness of offenses. . . .Second, the principle limits the absolute magnitude of punishments. A penalty scale . . . must also maintain a reasonable proportion between the quantum of punishment and the gravity of the crimes involved.[11]

One important factor is that in the system discussed in this article, fairness means not only equality of punishments for similar types of crimes committed, but also it means proportional punishments—lesser crimes should receive lesser punishments and the scale of severity should be narrow and not too harsh.

One of the major flaws cited by critics of the retributive approach is that, while limiting judicial discretion, it fails to realistically take into account prosecutorial discretion and the prosecutor's use of plea-bargaining. In fact, the critics argue that these models only serve to replace abuses of judicial discretion with an even more dangerous potential, increased prosecutorial discretion. And, this problem is complicated by the fact that even Singer and von Hirsch, two committed retributivists, disagree with one another on how prosecutorial discretion should be controlled.

Von Hirsch advocates the total elimination of the plea-bargaining process whereas Singer takes a more realistic approach. Considering the overloaded court systems, he recommends that guidelines be developed and instituted for prosecutors to utilize. Alschuler, an expert on the subject of prosecutorial discretion, offers another solution: The legislature could specify the reward that would follow the entry of a plea of guilty. In any case, it does appear that there are workable solutions which could be adopted which would restrict the discretion of the prosecutor. This author favors Singer's approach and develops guidelines that would limit the prosecutor's reduction of the charges to a lesser offense in exchange for a plea of guilty.

Judicial Discretion

Disparity in sentencing exists because there is no agreement on the goals of sentencing and in the Federal system there are no directives to guide judges for determining an appropriate sentence. The only direction that the Federal criminal code provides is maximum penalties for each offense. Thus, a judge is left to follow his own premises of what is just punishment for the offender who comes before him.

It is not the purpose of this article to suggest that all judicial discretion be eliminated. Obviously, principles of justice cannot help but include some element of discretion when human judgment is involved. This is eloquently stated in Kenneth Culp Davis' treatise on *Discretionary Justice* and in a leading English work on jurisprudence which states that:

> The total exclusion of judicial discretion by legal principle is impossible in any system. However great is the encroachment of the law, there must remain some residuum of justice which is not according to the law—some activities in respect of which the administration of justice cannot be defined or regarded as an enforcement of the law.[12]

In recognition of this idea, the guidelines that would be adopted in this retributive model would allow judges to go outside the guidelines but in so doing it would also compel sentencing judges to state on the record the reason why the sentence did not conform to the guidelines. This would be a way to allow for judicial discretion where a judge believes that the guidelines cannot in all fairness be utilized.

Fair and Certain Punishment

Criminal sentencing specifies the form in which justice is to be meted out to convicted defendants.[13] The idea of justice as applied in this article, is that all men are equally before the law as being equally bound by it.[14] By failing to administer either equitable (just) or sure punishment, the present sentencing system undermines the entire criminal justice system. And, because sentencing is neither fair nor effective it harms both the individual and society by not promoting respect for the laws.

This lack of fairness in sentencing is taken further in Judge Constance Motley Baker's observations that—punishing the defendant for what he is, rather than for what he has done, loosens what may already be a fragile tie between the defendant and society.[15] Moreover, it raises the argument that equal protection under the law stops at the point of sentencing. It now matters who you are, not what it is you did.

New Directives for Sentencing

Rational sentencing depends upon a sound sentencing policy. According to a recent work on sentencing, *Predictive Sentencing*, a rational, fair policy must meet certain requirements of which the main one is that the sentence (punishment) must be justified.[16] Norval Morris also recognizes

[11] von Hirsch and Hanrahan, op. cit. note 1, p. 18.
[12] G. Williams, ed., *Salmond on Jurisprudence*, 1957, p. 44.
[13] Twentieth Century, op. cit., note 1, p. vii.
[14] Otto Bird, *The Idea of Justice*, 1967, p. 18, and John Rawls, *A Theory of Justice*, 1971, p. 60.
[15] Judge Constance Motley Baker, "Law and Order and the Criminal Justice System," *J. Cr. L. and Crim.* 64, 1973, p. 26.
[16] L. Whinery, T. Nagy, G. Sather and K. Fisher, *Predictive Sentencing*, 1957, p. 8.

this factor in suggesting principles to guide the decision to imprison including consideration of "desert": "no sanction should be imposed greater than that which is 'deserved' by the last crime, or series of crimes, for which the offender is being sentenced."[17] This suggestion appears to be a necessary directive if one is to develop a fair, equitable and just sentencing system. And, it is also apparent that since deterrence has remained an elusive goal and rehabilitation has been repeatedly pronounced to be illusory, we are, at this point, being driven back to punishment.[18] By focusing on a retributive just-deserts model, however, which relies on principles of fairness, equity, and justice, the sentencing system can refrain from either being discriminatory or from becoming vindictive.

Often if one relies on punishment the fear is that the sentences will become more severe. One must not forget, however, that the new directions in sentencing must also consider their impact upon the facilities presently available for the disposition of sentenced offenders. There is space for only a certain number of prisoners. At the present time there is space for approximately 250,000 prisoners in the penal institutions in this country. Given that the average sentence exceeds 2 years, only about 100,000 new prisoners may be incarcerated each year (at the present level of penalties handed out).[19] Yet, nearly 700,000 offenders are convicted annually for the relatively serious index crimes. Thus, it is obvious that no more than 14 percent of these individuals can be accommodated in prisons. All others must receive lesser penalties. Careful thought must be given to developing guidelines for the equitable utilization of all types of sentencing alternatives, not just probation or incarceration. Community service and other types of sentences would have to be included in the sentencing guidelines.

This article has been leading up to and arguing for a retributive-justice model of sentencing. Three basic principles of this model have been adopted from James Sterba's book, *The Demands of Justice:*

> (1) To accept Hart's principle that punishment is generally morally justified only if it is inflicted on a person who has committed an offense with the cognitive and volitional conditions of *mens rea.*
>
> (2) To have a legal system that contained procedural safeguards against punishing the innocent (presumption of innocence) and the evidential restrictions of due process.
>
> (3) To adopt measures to protect the interests of the victim over those of the criminal.[20]

If current prison sentences cannot be justified for their rehabilitative, deterrent or incapacitating effects, then it realistically appears that the only justification left is that of punishment—retribution or denunciation. And if the system is not to be unduly harsh, then the only rational solution is to base the sentencing policy on a retributive model of justice and fairness. This type of model would calculate punishments on the basis of the seriousness of the offense (the amount of harm done, physically and/or monetarily), taking into account the culpability and prior serious felony convictions of the offender. Offenses would be graduated on a scale of severity (similar to the present one utilized by the U.S. Parole Commission), which would be determined by legislative mandates.

In order to assure that the penalties or sentences rendered from this model are equitable in that individuals who commit similar types of crimes (same severity level) and who have similar types of prior records will receive a sentence in the general proximity of one another, this model would have to incorporate the following directives:

(1) Punishment should be based upon the seriousness of the offense committed, which should in turn be predicated on the harm done and/or attempted and the culpability of the offender. Sentences would be proportional to the severity of the crime. Lesser offenses would be given proportionately lesser severe penalties.

(2) The sentencing structure would be based on a system of presumptive penalties. Upon a finding of guilt the court would utilize a formula to compute the sentence. The sentencing guidelines would be mandated from the National Court of Appeals and Judicial Conference and would provide the alternatives and ranges available for the offense. The guidelines would incorporate the offense severity levels and the aggravation and mitigation factors.

(3) Offender's prior conviction record (felonies) and the severity rating of these offenses would be included in a scale of points as factors of aggravation. These points would add specific amounts of time to the offender's term. Offender's social status, employment, race, sex, education and other background characteristics would not be allowed to be utilized as factors in determining the sentence.

(4) Judges would be required to utilize the sentence of the guidelines unless there were factors in mitigation/aggravation that a judge believed necessitated a sentence outside the range of the guidelines. If the judge gave a sentence outside the guidelines then the court would be required to state on the record the reason why and this record would be available for appellate review.

(5) The government would be permitted to appeal a sentence if the sentence was below the guidelines; a defendant would be permitted to appeal a sentence if it went above the guidelines for that offense and prior record. Either party would be permitted to petition the court if either party believed that the guidelines were improperly applied. The

[17] Morris, op. cit. note 1, p. xi.
[18] Mueller, op. cit., note 2, pp. 13-17.
[19] J. W. Mohr, "New Directions in Sentencing," in Grosman, ed., op. cit. note 1, p.
[20] James Sterba, *The Demands of Justice*, 1980, pp. 75-76.

petitioning party would have to make a showing for leave to appeal.

(6) A National Court of Appeals for Sentencing Review would be established to sit in Washington, D.C. The President would appoint 12 judges. In appointing these judges, the President should select individuals who have judicial experience and the members of the court should reflect representation from both political parties and from all geographic regions of the United States. By having one court review all appeals (rather than 12 circuit courts) there would be less chance of disparity in the review of sentences. This court would have the power to fix a sentence if it was the opinion of the court that the sentence was improperly outside the guideline range.

(7) The sentencing guidelines would include a wide range of penalties including: restitution, fines, social or community service, commitments to halfway houses or study or work-release, probation, conditional discharge, pretrial diversion and prison terms. The guidelines would specify the instances in which these alternatives are to be utilized and in what fashion. The grid would provide the narrow range of penalties that would be rendered for the offense category. Mitigation/aggravation points would provide a slightly wider range of possible penalties for each offense category.

(8) Prosecutorial guidelines would be mandated. A format would specify and direct prosecutors in using plea-bargaining. The guidelines would not permit prosecutors to reduce charges down more than one level of severity in exchange for a plea of guilty.

(9) Restitution would be given a high priority in this model. A restitution formula, based upon the amount of harm done or the loss of the victim and/or the monetary gain by the offender, would be established. The earning power of the defendant would be considered as well. The prosecutor's office would have the power to enforce the collection of restitution until the debt was paid or until the court decided that the offender could no longer fulfill this obligation.

(10) The Federal criminal code would delineate the goals of this retributive-justice model of sentencing. This would provide for a cohesive directive for all criminal justice practitioners. The code would also include the guidelines and the ranges of penalties, in addition to the mitigation/aggravation scales.

(11) Good time and parole would be eliminated. Postrelease supervision could be part of the sentence and it would be under the jurisdiction of the sentencing court. Thus, parole boards would not be necessary. All institutional disciplinary problems could be dealt with administratively or if the allegations were serious enough the prosecutor could review the evidence and if there was sufficient evidence he could prosecute the inmate on new charges. The guidelines could provide for a 6-month period of prerelease halfway house commitment for all incarcerated offenders who received a sentence of over 6 months.

Conclusion

Criminologists have paid scant attention to the sentencing process in our society. Their major concern has been with the effects of sentences on offenders.[21] Research on the decisionmaking process involved in sentencing is essential, for it is, after all, mainly the decision made by judges that determine which types of offenders undergo which various punishments and treatments that are presently available. It is time to turn our attention to the unguided discretion given to these judges and to the problems created by their vast discretionary powers.

Sentencing disparity has created a disregard for our entire criminal justice system and it has promoted disrespect for our laws. It must be eliminated for it is of vital interest to all of us, and in particular to correctional administrators, who must assure offenders that the judicial process is fair, just, offense-related, and appropriate or equitable.[22] It is important to recognize that all of the principles and safeguards of due process afforded to defendants during the pretrial and trial stages do not make up for an unfair and unequitable sentencing system. It only serves to make it a hyprocrisy that such rights are equitably granted to all defendants in procedural and evidentiary hearings, but then equity and fairness appear to be unavailable at the sentencing hearing, where the penalties are meted out, the most important step to most, if not all, defendants.

In summary, the current literature advocates a movement toward a retributive-justice model of sentencing. In this model, the sentence is based predominantly upon the seriousness of the offense, plus or minus specific aggravating and mitigating circumstances. All judges would utilize the sentencing guidelines, except where the judge believed that inequity would result in so doing. On those rare occasions the judge would be compelled to state reasons on the record why the guidelines were not followed. Upon appeal by either party, this record would be made available to the National Court of Appeals.

One appellate court, which would have the responsibility for reviewing all Federal district court sentences that were appealed, would more likely insure that the same type of decisions were being applied to similar cases. Fewer judges would be making the reviewing decisions. By having a few judges responsible for review, due process and equal protection under the law are carried over from the trial stage to the sentencing stage.

The criminal code would not only provide the presumptive penalties for each offense, but it would also delineate the goals of the retributive-justice model. This would provide cohesive direction to all practitioners of the currently fragmented criminal justice system. Lawyers, judges, probation officers, police officers and correctional administrators would be given guidance and assistance by the criminal code so that all would be working toward similar goals and each participant would be carrying forth the mandates of the legislature embodied in the criminal code.

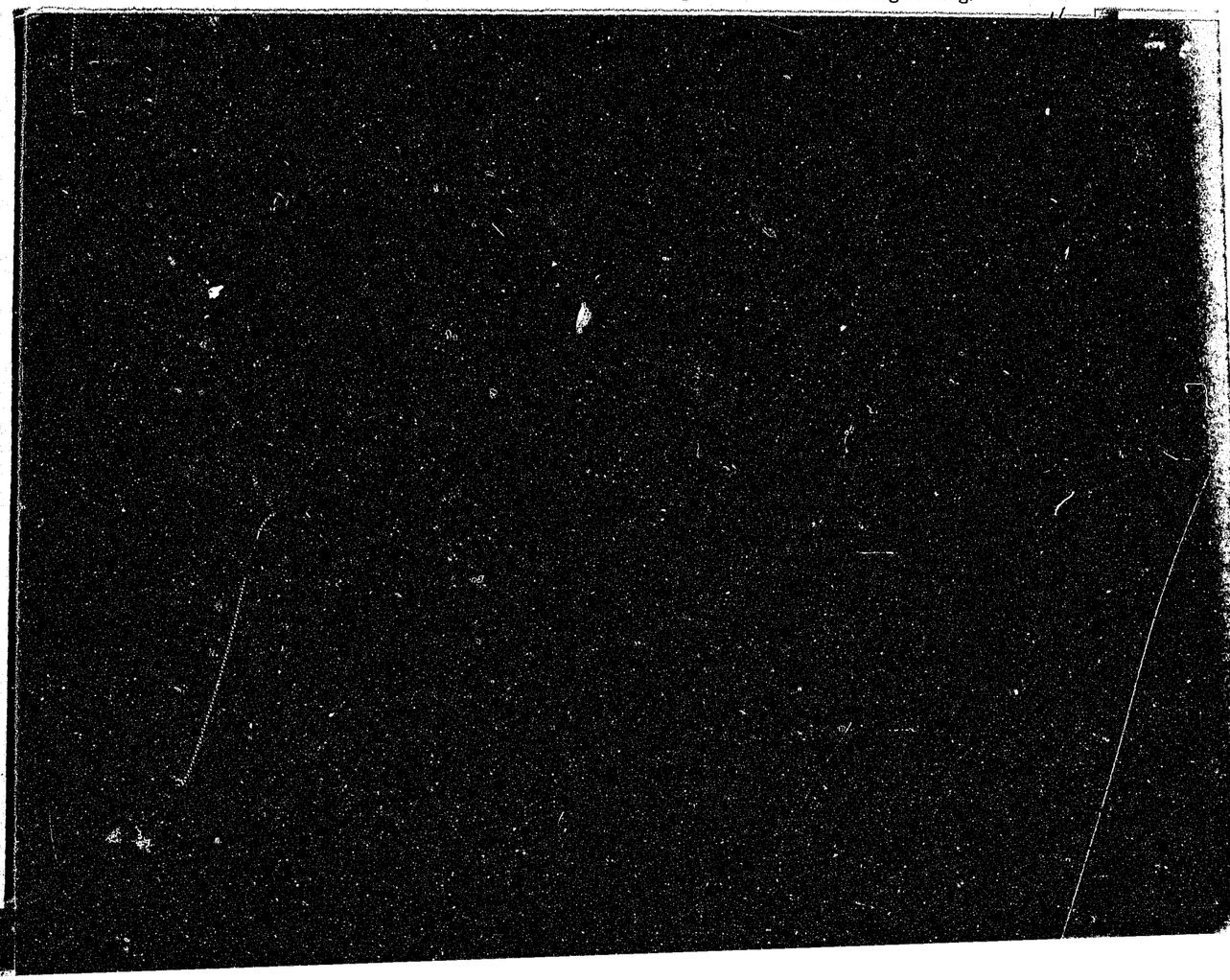
Lastly, this model would advocate specific rules to promote uniformity in the granting or denial of probation as well as to promote uniformity in resolving other sentencing problems; such as what other alternative should be utilized. The choice between probation and prison would be decided by the seriousness of the offense and aggravating circumstances. Prosecutors would be provided with mandated guidelines for utilizing plea-bargaining, which would establish equity in the charging and prosecution of an offense. Postrelease supervision would be part of a sentence available as an alternative within the guidelines. Parole and good time would be eliminated. By having defendants serve "real time" the public would not feel deceived by a sentence and the defendant would know, not only how much time he will serve, but that similar cases will be treated the same. Thus, all of these things will serve to promote respect for our laws.

Judicial sentencing today may thus serve largely as an ad hoc legal process rather than equitable sentencing purposes. Ideally, a retributive-justice model would function according to fair, understandable, rational, evenly applied, equitable standards and criteria. It would be a truly "legal" model based on fairness and equity in imposing sentences with due process afforded to the sentencing hearing. The model would clarify who would go to prison, not merely who should not, and it would uniformly mete out punishments to all defendants.

In a second article the author will attempt to analyze the impacts and effects of this proposed retributive-justice model, which advocates equity through due process at the sentencing hearing.

[21] Robert Dawson, *Sentencing: The Decision as to Type, Length and Conditions of Sentence*, 1969, pp. 417-418.

[22] Alan Dershowitz, "The Basic Question: Who Decides and When?," in Twentieth Century, op. cit. note 1, p. 120.



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