Sentencing Reform in the States: Some Sobering Lessons from the 1970’s*

Franklin E. Zimring**

In 1970 the criminal law of sentencing was anything but a hot topic in the Halls of Academe or in legislative assemblies. Major emphasis within the criminal law was on codification and reform of substantive principles.¹ The prison population in the United States was 130,000 less in 1970 than in 1980.² There was an acknowledged need to make improvements in the way that judges and parole authorities make reasoned decisions. But major structural changes were not anticipated.

When the Brown Commission (National Commission on Reform of Federal Criminal Laws) issued its final report in 1971, less than a tenth of the working papers concerned criminal sentences and some of that “sentencing” discussion concerned capital punishment.³ The academic community was happy to live with the Model Penal Code structure that had been crafted by Paul Tappan and others. Legislators were satisfied with the status quo in the allocation of sentencing authority except where notorious crimes would lead to cries for “getting tough” through mandatory prison terms.

Thus, the major assault on the old order of criminal sentencing was the substantive criminal law surprise of the 1970’s. In these pages I want to examine the recent history of the sentencing reform movement in the states. State government is the main arena of punishment policy in the federal system. Major changes

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* 1981 Franklin E. Zimring
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** Professor of Law and Director, Center for Studies in Criminal Justice, University of Chicago Law School. B.A., Wayne State University, 1963; J.D., University of Chicago, 1967.
have occurred in the past decade and more change is on the way. The question I will pose is whether we can learn from our past experience. Part one provides a thumbnail sketch of recent changes in the debate about sentencing. Part two briefly describes the "determinate sentencing" systems that a number of jurisdictions have enacted as a response to attacks on parole discretion. Part three will propose five lessons from the recent past that would-be law reformers of the future will ignore at their peril.

**PRISONERS, PROFESSORS AND POLITICIANS**

By the end of the 1970's, a substantial number of American states, including California, Illinois, Indiana and Maine, had radically restructured allocation of power in sentencing and every major state in the Union was considering major changes. Maine, one of the first states to abolish parole, was considering its reintroduction. Some influential proponents of "fixed" sentencing had reconsidered their position. The proposed Federal Criminal Code, a document that spent the entire decade under Congressional scrutiny, failed to be enacted in part because of disagreement between the House and Senate about whether federal parole authority should be displaced by a Federal Sentencing Commission that would create sentencing guidelines. When the proposed Federal Criminal Code was submitted to Congress, nobody had ever heard of "sentencing commissions" or "sentencing guidelines." The pace of change has been fast, indeed!

Where did it all start? For our purposes, the search is for proximate causes. Problems of criminal sentencing antedate the Code of Hammurabi, but our question is what happened in the 1970's. The key actors in my scenario are prisoners, professors and politicians—in that chronological order. The precipitating events were the prisoners' rights movement and the Attica prison riot or uprising, depending on your politics. The climate was one of rights consciousness as well as declining faith in the use of state power to

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coerce cures or to exercise total control.

Prisoners

The origins of the prisoners' rights movement are beyond the scope of this undertaking.\(^7\) The impact of the "prison-eye view" of sentencing is my focus.

*Struggle for Justice*,\(^8\) the first of the 1970's reform tracts, spends much of the body of the report describing prison and jail conditions. This is not done from the perspective of shocked outside visitors. These are the inmates talking, quoted from the text of a grievance petition:

We now address ourselves to the physical brutality perpetrated by the officials of Tombs Prison against the inmates thereof. This unnecessary brutality has been largely directed against the Black and Puerto Rican inmate population. We vehemently denounce this policy of inhumane treatment.

It is common practice for an inmate to be singled out by some Correction Department employee because he did not hear the officer call his name or because the officer did not like the way this or that inmate looked or because of the manner in which the inmate walked or because the officer brings the turmoil of his own personal problems to work with him, and together with other officers, beat the defenseless inmate into unconsciousness, often injuring him for life physically and mentally or both.

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IN CONCLUSION

We are firm in our resolve and we demand, as human beings, the dignity and justice that is due to us by right of our birth. We do not know how the present system of brutality and dehumanization and injustice has been allowed to be perpetuated in this day of enlightenment, but we are the living proof of its existence and we cannot allow it to continue.

The manner in which we chose to express our grievance is admittedly dramatic, but it is not as dramatic and shocking as the conditions under which society has forced us to live. We are indignant and so, too, should the people of society be indignant.

The taxpayer, who, just happens to be our mothers, fathers, sisters, brothers, sons and daughters should be made aware of how their tax dollars are being spent to deny their sons, brothers,

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fathers and uncles justice, equality and dignity.9

This document consumes seventy-five percent of the first six pages of the report. It is no surprise, then, that the "prison-eye view" of possible reforms plays a large role later in the report.

One thing that is surprising, in retrospect, is that Struggle for Justice quotes with approval a document that was designed to rationalize a jail riot. Much of the liberal reform literature in the early 1970's was inspired by a rethinking, precipitated by prison violence, of the role of imprisonment. The classic case, the attention-getting cause celebre of this period, was Attica. The Attica riot (or "uprising") galvanized elite attention on the prison as an institution and ultimately led to an analysis of the purposes of punishment and the institutions of punishment from the point of view of those currently behind bars.

What was so special about Attica? That this riot should have such stunning impact is, in my view, a function of three things:

(a) the moral climate of the late 1960's,
(b) the way the riot was handled, and
(c) the location of the prison.

The late 1960's was the era of rights consciousness and demonstrations, frequently not civil demonstrations, to vindicate those rights. Beginning with marches for racial equality, demonstrations and civil disorders became instruments of consciousness raising. The prison riot, viewed in this light, seems legitimate. Moreover, if one considers the prison riot a form of demonstration, the official reaction seems bizarre. The "Kent State Massacre" involved four deaths. The Attica uprising involved more than ten times as many.

One further contribution to the impact of Attica was the prison's location. It was a New York prison, located in a state that contained the media, opinion leaders and foundations which set agendas, particularly liberal agendas, in this country. It was their prison. One wonders whether a similar tragedy in New Mexico or Texas would have set off such intense, elite soul-searching.

Professors

In the United States, most "elite soul-searching" is done by university professors, syndicated columnists and think-tank types. The usual vehicles are books written on foundation grants, Blue Ribbon Commission reports to public agencies or ad hoc commit-

9. Id. at 2-6.
tees. Attica, interacting with the mood of its time, produced all of these in abundance. Furthermore, some of these post-Attica documents would play an important part in justifying proposed reforms in sentencing. Other voices, too, influenced the move toward determinate sentencing. David Fogel, author of *The Justice Model for Corrections*, was an ex-prison warden. Marvin Frankel, whose critique led the liberal chorus criticizing the existing system, proposed different reforms that were not based on the prisoner's eye view. The "professors" who served on committees and wrote books brought ideological baggage of their own to the problems of sentencing equity. Liberal professors have a passion for treating like cases alike and a distaste for unregulated discretion. In order to understand how these preferences shape the central, shared criticism of then current systems for determining criminal punishment, one must outline the huge and not tightly regulated discretions that even reform efforts left in criminal justice systems.

Under the Model Penal Code provisions, sentencing powers are shared by prosecutors, judges, parole boards and the state legislature. The prosecutor chooses to bring charges and, if so, what charges to bring. For example, assume there are charges for a Class II felony and the defendant is convicted: Under the Code, who determines what kind of punishment and how much? The judge chooses between probation and prison. The Code instructs him to elect probation unless the defendant is dangerous, in need of rehabilitation or unless a non-prison sentence would "depreciate the seriousness of the crime." If the judge chooses prison, he sentences the offender to a minimum term of one, two or three years at his discretion. The same judge has no power over the maximum term the offender will serve and no power over how long, in fact, the prisoner may serve beyond his minimum term. Assuming that the judge in our example chooses one year, the offender will serve anywhere between one and ten years, depending on when the parole board decides he is no longer dangerous or continued imprisonment will not hamper rehabilitation or depreciate the seriousness


of the offense. A convicted Class II offender can receive any sentence between probation and ten years imprisonment. Why is that?

In the old California system, felons could receive anything between probation and life imprisonment for the same crimes. Persons convicted of similar crimes received grossly different punishments, and persons committed to prison arrived at the gates not knowing whether they would stay for one year or for ten. The Model Penal Code, with its maximum sentence limits and a presumption of early parole release, cut down on parole discretion, but left plenty of power with a centralized state correctional agency. This the liberals thought a central evil of a punishment system.

One justification for these heavy doses of discretion was the need to individualize sentences to achieve the rehabilitative purposes of the criminal law, to select only those who need treatment for prison programs and then to hold them only until a cure has been achieved. By the mid 1970's, faith in rehabilitation as a purpose of imprisonment was an idea whose time had gone.

There was strong objection to the fairness of making a punishment decision turn on the need for treatment, whether or not treatment worked. This, combined with evidence that in-prison programs did not work, was a devastating critique of prisons in the name of treatment. There was also evidence in abundant supply that the system's capacity to predict whether an individual would commit future crimes was quite limited. The empirical evidence for these propositions had been available for years. But I would argue that the prison-based origin of the early 1970's review of the purposes of punishment blew the cover of the "rehabilitative ideal" more convincingly than a thousand empirical studies: How can

anybody get cured in Attica, or Stateville, or San Quentin? How can anyone in justice be sent to any one of these dungeons “for his own good”? This context is important—throughout the 1970’s we retained faith in rehabilitation, possibly in some community settings for juveniles and the drug dependent, and for some non-incarcerative sentences. The slogan that “nothing works” is best understood as “nothing works in the American mega-prisons.”

In theory, the rejection of rehabilitation and the new 1970’s priority attached to equality in criminal sentences could apply, in equal measure, to judicial discretion and parole powers. Both the judge and the parole board depend on rehabilitation as one excuse for discretionary power. Both the judge and the parole board could argue that discretion serves many other purposes, including reducing the use and duration of imprisonment and treating offenders who are in fact different from each other as unique individuals rather than non-persons punished mechanically depending on what section of the penal code was violated. Finally, both judicial and parole discretion could be justified as a means of reducing disparity that results from different prosecutors pursuing different policies, and parole could be viewed as a method of evening out disparities that result because judges sentence equally culpable defendants to widely different terms of imprisonment.

In fact, much of the liberal reform literature did propose cutting back on judicial as well as parole power. But the theory and practice of parole were particularly vulnerable to assault, and this special vulnerability became an important element of what was to happen in the political process. Parole, more than judicial discretion, was linked to theories of rehabilitation and to the capacity of administrative bodies to predict when offenders were no longer dangerous. After all, the argument goes, the only thing that a judge does not know when he passes sentences is how an offender will fare in prison. If prison conduct does not predict later behavior, there is no reason to second-guess the sentencing judge—no reason unless you do not trust sentencing judges.

There is a further explanation of the special vulnerability of parole authority to the mid-1970’s attack—one that stems from the

influence of prisoners and former prison officials in the debate. Any prison inmate will rather naturally resent the system that resulted in his confinement and all the agencies that share, from his perspective, the blame for his predicament. However, by the time an inmate has served part of a prison term, his resentment will tend to focus more upon the authorities that are keeping him in prison than on the authorities that sent him to prison in the first place. His immediate enemy is the parole board. His resentment is particularly acute when, as was typically the case, hearings on parole release date occurred well into a prison term, creating uncertainty, dependency and a feeling of powerlessness. And for what? To enable a hearing examiner to have more information about whether his months or years at Stateville had yet produced a “cure.” That such procedures “turn our prisons into acting schools” is understandable. That parole becomes the focus of inmate hostility under such circumstances seems inevitable.

The correctional official turned penal reformer also is more concerned about parole authorities, because he sees their exercise of power and is more remote from judges and prosecutors. Nowhere is the maxim that familiarity breeds contempt more true than in sentencing reform.

David Fogel, author of The Justice Model for Corrections, is a prime illustration. Experience in prison administration had confined his attention to the in-prison aspects of sentencing inequity to the point where he advocated a scheme that would place tight limits on prison time for a large number of offenders for whom probation would remain a frequently used option. The convicted offender could receive either probation or two years for the same offense, but his cellmate, equally convicted, would have a similar sentence. This may or may not be a decent proposal for evening out sentencing disparity, but it is the essence of the “prison-eye view” of criminal sentencing, in this case a prison warden-eye view.

Correctional administrators should begin the development of an agenda for dramatic change. We need to take hold of the reins of corrections' future and begin exerting the leadership we probably possess. We need to spell out a practical and just program for ourselves and with those over whom we are given legal sanction.

But what is problematic with a prison view of the entire system? I cannot prove the matter, but allow some speculation.

24. Id. at 281.
What is Wrong with the "Prison-Eye View"?

My thesis: for those who wish to protect the interests of all convicted offenders, the characteristics, perspectives and prejudices of both prisoners currently serving time and former inmates must be carefully examined before their advice is unreflectedly accepted as the right path to reform. First, prisoners and former prisoners are an unrepresentative sample of the population of convicted offenders in the United States. They are the losers. The hundreds of thousands who have avoided prison after felony conviction have less to detest about the institutions of criminal justice that processed them. If a penal system is producing lenient results, this can only be known when a broader sample of convicted offenders is studied.

The sampling problem is even more extreme when those currently in prison are consulted. At any given time, the population of a prison will contain a larger proportion of those with longer than average sentences than the population of convicted offenders sent to prison. The offenders with shorter sentences will have left the prison walls, and the sample of current prisoners will be the losers among the losers.

Related to this is the point that every prisoner understandably detests the system that sent him to prison. Having lost under the current system, the offender behind bars is "reform-oriented". He is willing to take risks that the convicted offender operating behind a veil of ignorance about whether or not he will be sentenced to prison might not be willing to take. This preference for risk is understandable, but one cannot simply assume the wretched condition of the prisoner is justification for endorsing his risk preference. The Class X felon sentenced under a new determinate sentencing scheme, such as that passed in Illinois, will detest that system, and the felon denied early release because his "good

25. The disparity between rates of probation and rates of confinement has often been noted. In 1976, for example, approximately 1,250,000 persons were under state probation supervision (a rate of 583/100,000), while only 386,000 were under confinement in state prisons and jails (a rate of 180/100,000). The ratio of non-incarcerated convicted offenders to incarcerated offenders (for both felonies and misdemeanors) was thus approximately 3.2 to 1. See U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1980 at 472, 491-92 (1981).


27. Mid-70's authors such as Fogel made a point of linking prison discipli-
Unquestioning acceptance of the "prison-eye view" leads to a peculiar form of endless change. Each generation of law reform study groups will recommend change from whatever status quo to something else. Recommendations for systemic change will become endemic. Changes in the allocation of sentencing power and, with them, wholesale re-examination of the purposes of punishment, will come before the legislature every session. If this happens, competition between the interests of sentenced prisoners and other convicted offenders might become simultaneously chronic and acute.

This critique of prisoners as sentencing policymakers is limited and is not intended to deny the entitlement of current and former prisoners to make major contributions on one crucial aspect of penal policy: prison conditions.

Just as prisoners are a biased sample of consumers of the sentencing system, they are a proper sample for assessing conditions within the prison walls. On issues relating to housing, crowding, security, medical care and other aspects of life behind bars, prisoners and prison guards are a perfectly appropriate sample of consumers for a long-deferred consumer survey of the conditions of confinement in American prisons and jails. Once the question shifts from issues of who should go to prison and for how long to the critical issues concerning the conditions of confinement, the sample bias disappears.

The convicted felon who is a non-prisoner has every right to capture the liberal imagination on the issues of the allocation of sentencing power. But those lucky enough to avoid the conditions of American penal confinement should have little voice in con-

nary problems and low prisoner morale to the then current system of judicial discretion and parole power. Of particular concern was that a prisoner would find his cellmate serving half as much time as he was for the same offense. D. FOGEL, supra note 11. Under Class X he could be serving five times as much.


29. The logical point is that only prisoners serve time in prisons. There are others, of course, such as prison guards, the taxpaying public and potential victims of security lapses who have legitimate interests in prison conditions. However, putting security aside and assuming the question is how do we spend the next dollar in improving prison conditions, the prisoner himself has a powerful argument for consumer sovereignty.
menting on those conditions. And this is despite the fine irony that ameliorating the hardships of the American prison could increase the chances that a greater proportion of potential prisoners will become actual prisoners.80

Sorting through the distinctions and borderline cases between penal policy generally and the conditions of correctional confinement is a difficult but necessary task for the liberal reformer. These issues involve different constituencies and therefore different appropriate samples of consumers. And, quite possibly, it is precisely the failure of the liberals to make these distinctions that produced the political risks that make the 1970's a sobering reminder of how not to achieve effective sentencing reform.

So far, we have been dealing with the liberal intellectuals re-examining criminal sentencing in the wake of prison riots. Not all intellectuals are liberals, however, and a series of influential books on crime and punishment from a "law and order" perspective emerged in 1975 and 1976. J.Q. Wilson's Thinking About Crime81 and E. van den Haag's Punishing Criminals82 are representative of the genre. The liberal titles, by contrast, emphasize "Doing Justice," and "A Justice Model" for corrections. The liberals emphasize equality while the conservatives emphasize crime control, but there is apparent common ground on the issue of certainty of punishment. In some cases, liberals and conservatives seem to agree that punishment means prison:

We can certainly reduce the arbitrary and socially irrational exercise of prosecutorial discretion over whom to charge and whom to release, and we can most definitely stop pretending that judges know, any better than the rest of us, how to provide "individualized justice." We can confine a larger proportion of the serious and repeat offenders . . . .83

This is Allan Dershowtiz, who probably voted for McGovern,

of the same vintage:

(1) presumptive sentences for first offenders should be set considerably lower than the prison sentences authorized today;

(2) a larger number of criminals who have committed serious offenses should serve time in confinement; and

(3) the area of discretion allocated to and exercised by sentencing judges and parole boards should be considerably narrowed. As we will see, this is an important area of common ground.

**Politicians**

Enter the politicians. The allocation of sentencing power is not a "hot issue" in the average state legislature: law and order is. Efforts to abolish parole authority and achieve more equal criminal sentences fell on nearly deaf ears in most major states. In California, the initiative for revolutionary changes came from a legislator shopping around for issues. In Indiana, sentencing authority legislation was a product of a more comprehensive penal code reform. In Illinois, a long-proposed restructuring of sentencing authority did not become a high visibility issue until the sentencing provisions were amended by the addition of a "get tough" Class X mandatory sentencing category. The marriage of law and order agendas with a sentencing equity proposal should have been anticipated. Under these circumstances, parole—the enemy of the liberal reformers—may have been a safeguard against increases in both sentence length and sentencing disparity. But these speculations are premature. Before making guesses about the impact of recent reforms, we must examine the laws enacted during the middle and late 1970's, a period we may come to call the "era of determinate sentencing."


It may be useful first to describe a few of the 1970's state sentencing schemes and, second, to compare these schemes with the objectives of the liberal reformers.

The best definition of determinate sentencing is a negative one. It is a law that provides prison sentences that are not routinely reviewed or reduced by an agency that is called a parole board or authority. How the power that was formerly held by parole authorities has been redistributed varies dramatically from state to state.

1. In California, the judge retains “in-out” discretion for almost all non-firearm crimes. If the judge chooses prison, he must compute the term from a very specific set of sentences provided by legislation. The initial shift was of power from parole authority to legislature, with the judge’s discretion staying intact. Mandatory sentence amendments, an annual event, are now reducing judicial power.\(^{38}\)

2. In Indiana, the total discretion of the system may have increased. In most cases the discretions that used to be shared by the judges and parole board have all been shifted to the judge subject to weak guidelines.\(^{39}\)

3. Illinois now operates under two separate systems, numbers and letter. For the number felonies, the judge retains his “in-out” discretion. If prison is elected, the judge selects the prison term from a relatively narrow band provided by the legislature. For Class X offenses, the law removes the judge’s discretion to provide probation—a minimum three years’ time served (on the minimum six year sentence with maximum good-time credit) is mandated by the legislature. However, the individual judge has enormous power in selecting Class X periods of confinement. The same felony that results in a three year sentence from judge A can result in a fifteen year sentence from judge B. There is no parole review of either sentence. The numbered felonies assume judges have the capacity to individualize the decision between prison and its alternatives, but restrict the judge’s time setting discretion. The X system assumes that judges cannot make good “in-out” decisions, but have the capacity to choose between doses of prison time that vary by a

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\(^{39}\) See Clear, Hewitt & Regoli, supra note 36.
factor of five.\(^4\)

How should these legislative systems be judged by those who wrote about "fair and certain" punishment and "doing justice"? First, it is clear that abolition of parole has been achieved but that the amount of discretionary power in the system remains high. The only concrete advantage of the new systems is reduction of uncertainty about sentence length after the judge pronounces sentence. This could have been accomplished by providing early time fixing by parole boards.

Second, the only significant reductions in sentencing discretion have been mandatory minimum sentences, usually of considerable length. I do not think fifteen-year sentences for Class X felons is what the liberal reformers had in mind. Yet forcing lawmakers to make specific punishment decisions in advance tends to press toward greater severity. This is not only because of "law and order" enthusiasm in our state capitals. It is also because the lawmaker will typically have the "worst case" of a particular offense in mind when penciling in a maximum prison sentence. The closer a minimum sentence must be to the maximum, the higher the minimum sentence will float. Discretion is a necessary condition for penal leniency.

This is one reason why all the legislative responses to "just deserts" sentencing have retained judicial discretion to choose between prison and probation for most offenses. To do otherwise would result in one of two revolutionary developments. Either the legislature would have to provide a list of felonies where prison sentences would not be available for "worst case" offenders, or everybody convicted of a felony would go to prison. The first alternative runs counter to the political climate of penal law reform. Providing prison for everybody would double the flow into our overcrowded prisons or shift even more sentencing power to the prosecutors who determine and bargain for charges. The 1970's reformers who argued that larger flows into the prison system could be counter-balanced by shorter sentences were innocent of the X-rated world in which we live; they were also probably dead wrong about the proper role of imprisonment in the criminal law.

The retention of judicial "in-out" discretion makes it difficult to judge whether any of the new laws has reduced sentence disparity. The sentences served by those imprisoned for the same crime
are equal in California. But why prison for them and not two other defendants convicted of the same crime?

Earlier I suggested that the 1970’s might come to be known as the “era of determinate sentencing.” Implicit in that prediction is my belief that sentence reform that focuses only on time served by those imprisoned is going out of fashion. More comprehensive schemes of sentencing guidelines are now being proposed to supplant judicial discretion. This approach, adopted in Minnesota and proposed in the Senate version of the new Federal Code, would produce guidelines that regulate whether prison should be used as well as determining prison terms. As the debate shifts to these proposals, what can recent experience teach us about future sentencing reform?

SOME LESSONS

What sorts of problems should we anticipate in future reform efforts? Let me nominate five candidates.

The Paradox of Partial Reform

The old saw “half a loaf is better than none” may have no application to partially successful efforts to restrict discretion in setting prison terms. Shifting authority from parole authorities to sentencing judges may have decentralized discretion in ways that could increase sentencing disparities between counties and among judges who sit in the same courthouses. Mandatory minimum sentences are no cure. They shift discretion to plea bargaining prosecutors. Further, unless the minimum sentence is very steep indeed, the gap between minimum and maximum will remain wide.

The Danger of Negative Coalition

In an area where change for its own sake often seems attractive, one early warning that things are not what they seem is a collection of strange political bedfellows united in what I shall call a negative coalition. In one important sense, the proponents of de-

42. Zimring, supra note 16.
43. This is the case particularly when criminal offenses are broadly defined. See the discussion of Illinois burglary at text accompanying note 48 infra.
terminate sentencing got exactly what they wanted, the abolition of parole. That was the only goal they shared. When prisoners and police chiefs united in proposing the abolition of parole, it should be crystal clear that each group had a different vision of life without parole. Civil liberties groups in particular seem susceptible to participation in attacks against institutions before the likely consequences have been considered. If the only principle behind a proposal is negative, almost anything can be urged as a plausible substitute. Many complain that determinate sentencing legislation in Illinois was “used” by a law and order Governor. One of the elements of the proposal that made it eminently “useable” is that it contained no coherent affirmative principles about the use of imprisonment.

The High Price of Equality

Having discovered that “half a loaf” assaults on individualized sentencing discretion may not improve matters, the natural tendency of reformers is to go after the whole loaf: to create a series of rules to replace discretion governing judges, prosecutors and police. The usual goal is to assure by rule that “like cases” receive equal treatment in the criminal justice system. In pursuit of equality, there is a tendency to skip over deeper questions of sentencing equity, questions that go to the heart of the matter—who should go to prison and why. Yet equal treatment of convicted offenders is not fair treatment unless the deeper criteria of just punishment are met.

At the legislative level, we have managed to debate an entire generation of sentence reforms while finessing, to use a polite word, fundamental questions of principle. We select prison sentences in one of two ways. The most popular is statistical precedent. In California, the new prison terms were derived by taking the median time served under the old system. Thus, the dead hand of the parole board ultimately prevailed—it was parole board decisions about sentence length that governed time served under the new legislation, at least until the legislature started amending the fixed terms.

And what are the tools the legislators use to set new terms? Emotion, intuition, pencil and paper. The 1976 legislation in Cali-

44. S. Messinger & P. Johnson, supra note 14.
45. N. Morris, supra note 18; Morris, supra note 17.
California declared "the purpose of imprisonment" to be "punishment." If that's all we know, the most elaborate rules and techniques for apportioning sentences are built on a foundation of thin air. We cannot treat offenders equally without a coherent theory of why we imprison. If we do not know what makes for "like cases," it is pretty hard to assure that they are treated alike.

The Decline of Substantive Law

Fourth, I wish to suggest that we cannot fix precise sentences without rewriting or ignoring modern penal law. The whole thrust of the Model Penal Code was to unify and simplify substantive offenses. Here is Illinois Burglary:

A person commits burglary when without authority he knowingly enters or without authority remains within a building, house trailer, watercraft, aircraft, motor vehicle as defined in the Illinois Vehicle Code, railroad car, or any part thereof, with intent to commit therein a felony or theft. This offense shall not include the offenses set out in Section 4-102 of the Illinois Vehicle Code.

What punishment fits that crime? None really. We either rewrite the offense into an elegantly graded series of crimes or we let a commission subdivide the offense into units it thinks are appropriate. Or, we can preserve discretion, adapt meaningful appellate review of sentences and build toward a common jurisprudence of criminal sentences. As of now, the administrative solution is more popular than either legislative rewriting or judicially developed common law. The link between criminal law and those factors that determine punishment will, under these circumstances, remain weak.

The Question of Prison Population

If there is power in numbers, prisoners will be a far more important influence in the next round of sentencing reform debates than was the case ten years ago; there are more of them, almost 130,000 more, representing more than a fifty percent increase over a decade.

It is difficult to objectively measure the capacity of a prison system—how many inmates it can hold—or the degree of crowding.

49. See note 2 supra.
in a prison dormitory or cell. At the moment, however, such niceties are unnecessary to a policy discussion. Everybody agrees that the prison systems in most major states are at or beyond capacity. The disagreement concerns what we should do about the matter. The alternatives are the creation of much more prison capacity or rigid control on prison population.

This late in the hour, I hold no hope of deciding this debate, but four preliminary observations may shed light on the coming debates on criminal sentences.

First, how many prison cells we should build is a question of criminal sentencing policy. It is a direct function of the number of persons who should go to prison and how long they should stay.

Second, the removal of parole created a shift in the balance of power between state and local government that makes prison population more difficult to control. Prosecutors and judges are local officials. Without centralized state power over release, county officials decide prison policy and state government pays the bills. Executive clemency and "administrative" sentencing adjustments provide some flexibility at the state level, but not much.

Third, there may be some value in viewing sentencing policy as the rationing of prison as a scarce resource in accordance with what the state sees as its most pressing problems. Two extra years for robbery are two fewer for burglary. One reason why administrative bodies are more popular with reformers than are legislative bodies is that this kind of opportunity-cost analysis is rare in the annals of state legislation.

One final semi-irony concerns why prison populations have grown. With all the new mandatory sentences, it is easy to imagine that longer prison sentences are the explanation. Easy but wrong. The number of people sent to prison accounts for most of the increase in most states. Changes in the "in-out" discretion least touched by the mid-70's reforms seem more important than all the laws we have written. In an important sense, the main arena for changes in punishment policy has been the local level, while all the attention has been directed to the statehouse.