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This Issue in Brief

Mandatory Sentencing: The Politics of the New Criminal Justice.—New mandatory sentencing policies are winning political support in the 50 states and Congress; however, despite stated goals to equalize sentencing and deter crime, the new laws probably can be expected to aggravate prisoners' grievances and serve as simply another bargaining tool in the criminal justice system, asserts Professor Henry R. Glick of Florida State University. Little empirical research exists on the impact of the new sentencing laws, but available evidence strongly suggests that they will have few beneficial results, he adds. The only major change may be an explicit abandonment of the reform ideal and existing, albeit limited, rehabilitation programs.

The Failure of Correctional Management—Revisited.—In "revisiting" the case of correctional management failure (his first article appeared in 1973), Dr. Alvin W. Cohn appears to be painting a drab, bleak picture. Yet, he maintains, from the time the original paper was written until now, he does believe that there has been some meaningful change. While no one could or should argue that corrections has successfully reformed itself or is being reformed appropriately, there have been some significant changes that suggest a brighter future, especially with regard to the status of management, he concludes.

Rethinking the President's Power of Executive Pardon.—Although only superficially understood by most citizens, the President's power of executive clemency has undergone a protracted evolution in terms of legal scope and constitutional interpretation, according to Professor Christopher C. Joyner of Muhlenberg College. Pronounced an "act of grace" by the Supreme Court in 1833, the pardon power in 1927 was deemed an act intended primarily to enhance public welfare. As such, the President's pardoning authority has become broad and multifaceted, immune from review by court action or congressional restriction. A pardon neither obliterates the record of conviction nor establishes the innocence of a person; it merely forgives the offense.

Team Approach to Presentence.—An interdisciplinary team approach is the trademark of the Seattle Presentence Investigation Unit, reports Chuck Wright, Adult Probation and Parole supervisor for the State of Washington. This collective approach is used when most feasible, and has led to effective improvements in investigation, information gathering, report writing and recommen-

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Mandatory Sentencing: The Politics of the New Criminal Justice

BY HENRY R. GLICK, PH.D.

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AN IMPORANT policy change now occurring in American criminal justice is the quickening shift from variable and indeterminate sentencing to new models of mandatory minimums for certain categories of offenses. This kind of sentencing is designed to reduce discretionary decisionmaking of judges and parole boards, to equalize sentencing policy, guarantee minimum punishment for offenders and perhaps deter others from crime. Over half the states and the Federal Government have adopted or are seriously considering this and similar kinds of legislation.[1]

The new criminal sentencing policies seem to reflect fundamental changes in elite attitudes about the purposes and performance of the criminal justice system, indicating a shift in support from the rehabilitation and treatment models of sentencing to explicit public endorsement of punishment, retribution and deterrence. Increasingly, law makers (with perceived support from their constituents) are becoming suspicious of the criminal justice system's ability to rehabilitate and frustrated over the value of probation and lenient sentencing. Their new open endorsement of punishment-as-policy is an important transformation, for it sheds completely the goal of rehabilitation, obliterating any expectation, however small, that criminals can be reformed. If rehabilitation had little chance for success in the past due to lack of resources and genuine commitment, then it has practically none in the foreseeable future since it rapidly is becoming legitimate to explicitly opt for retribution. Thus far, however, the new sentencing policies are in transition and have not produced coherent, well-defined substitutes for past sentencing practices. Confusion and disagreement regarding their probable impact on crime, deterrence and prisons also abound.

Politics and Policy Change

One of the motivations for recent shifts in sentencing policy in the states was the rising radicalism of American prisoners during the late 1960's and 1970's.[2] Prison violence and riots are not new in America, but the motivation and content of prison protest indeed has changed, with political demands replacing traditional complaints about basic prison living conditions. Instead of lack of adequate food, housing and recreation, prisoners recently have complained about justice: unequal sentencing in which inmates have been sentenced for substantially different terms for the same crime, and parole, which often is not granted according to general rules and standards, but depends instead upon the arbitrary notions and whims of parole boards. Armed with the indeterminate sentence, for example, parole boards were practically invincible. Sensitive to the civil rights movement and political radicalism, prisoners demanded changes in prison systems and judicial processes which exercised absolute and often despotic control over their future.

These fundamental complaints about judicial and prison systems rarely produced immediate results. The Attica commission in New York did little other than "improve" prison conditions by changing the name of maximum security institutions to "correctional facilities." Elsewhere, plans for prison improvement died in state legislatures which refused to fund substantial improvement, or which disappeared under the flood of other public programs with much greater popular appeal. Once prison protest and violence subsided, immediate reform efforts generally vanished also.[3]

Despite the usual slowness of prison change, sentencing reform is occurring. Touched in part by recent prison violence as well as increasing research which testifies to sentencing inequality and questions the efficacy of rehabilitation, various criminologists, prison administrators, government executives and those in allied professions

[1] Joan Petersilia and Peter W. Greenwood, "Mandatory Prison Sentences: Their Projected Effect on Crime and Prison Populations," (Santa Monica, Cal.: The Rand Corporation, October 1977), 1.

[2] See, for example, Burton M. Atkins and Henry R. Glick (eds.) *Prison, Protest and Politics*, (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1972) and David Fogel, "The Case for Determinancy in Sentencing and the Justice Model in Corrections," *American Journal of Correction*, Vol. 38 (July 1976) 25-28.

[3] In addition to Atkins and Glick, see the representative collection of readings in George F. Cole, (ed.), *Criminal Justice*. (North Scituate, Mass.: Duxbury Press), 1976.

have begun to propose that the indeterminate sentence and vast judicial discretion be replaced with mandatory minimums and other more determinative sentences. This kind of sentencing is expected to have many advantages: It would be more fair to all prisoners, especially responding to charges of racial prejudice in sentencing and parole; new sentencing also avoids linking release to rehabilitation goals, an imprecise and often too flexible standard for release; and such sentencing is expected to deter crime. Mandatory sentencing proposals also often require or imply the abolishment of parole boards, probation officers and presentence investigators.[4]

Except for judges and other officials whose traditional roles are most directly affected by the new sentencing laws, mandatory policies are politically attractive, for unlike most other proposed prison reforms which require expensive construction or personnel increases, sentencing reform usually appears relatively costless and is easily translated into straightforward voter appeal. In addition to criminal justice experts who frequently favor the changes for "equal justice" considerations, elected representatives also are eager to endorse the proposed policies for their simple appeal to punishment and retribution. This kind of support differs from the arguments usually put forth by professional reformers, but they aim toward the same result. Professional criticism of current sentencing policy and popular dissatisfaction with rising crime rates, fear of physical assault, and the apparent failure of rehabilitation all seem an unbeatable combination for producing statutory change.

Both liberals and conservatives, Republicans and Democrats have joined to reform the law. In congressional debates over Federal proposals for mandatory sentencing laws, for example, Senator Edward Kennedy (Democrat, Massachusetts) argued that while poverty and related social conditions must continue to be considered in dealing with criminals, we also need to ". . . fight a more practical and less ideological war on crime."[5] Making punishment a certainty also will deter others, he argued. Similarly, Representative Sam Stiger, Republican from Arizona, maintained that we should abandon the rehabilitation model, for it has produced no benefits in fighting crime but fosters release of many prisoners on parole, probation and suspended sentences only to commit other serious crimes. It is time, he argued, ". . . to admit we just do not know how to rehabilitate a criminal and start thinking about the criminal's victim for a change."[6]

In Florida, where the legislature recently enacted a 3-year minimum mandatory sentence for the use of a handgun in the commission of a crime, an editorial in the state sheriff's association magazine warned that the use of a handgun now served notice to ". . . the practitioners of rape, ripoff and rampant blood letting . . . if you get caught and you're carrying a gun, there are no more easy outs. You'll get at least three years, with no loopholes, and you could get life."[7]

Although the "electability" of the new sentencing seems clear, new legislative proposals do have some political opposition; however, it does not seem that the detractors will have much success, for the size of their immediate professional clientele is small and specialized and they have limited general public visibility. State and national bar associations, for example, defend the traditional judicial role in sentencing, supporting general discretion to make the punishment (or chances for rehabilitation) fit the crime and the criminal. Historically, judges have had extensive leeway in imposing punishment ranging from suspended sentences to many years in jail for the same crime. An important part of a judge's power rests in imposing sentences, especially since his role in criminal cases often is narrowed by plea bargaining. But traditional discretion has decreasing appeal, for it is wide variation in the exercise of judicial discretion which has led to much of the debate and controversy over sentencing policy.

Similar opposition to mandatory sentencing comes from professional probation officers who have the task of supervising offenders released by the court and whose recommendations can influence the length of an imposed sentence. But noting that criminal sentencing policy is shifting to mandatory prison terms, thereby reducing or eliminating their role, probation officers seek to maintain and redefine a function for themselves in trial court. It recently has been noted, for example that,

> Our law making procedure virtually insures that sentencing provisions will emphasize the exemplary, rather than the rehabilitative goals of sentencing. It is for this reason that probation officers must have a suasive role in the sentencing process to offset the vocal demands that punishment should fit the crime, rather than the individual.[9]

Similar roles have been proposed for parole boards which are seen as vehicles for possible early release for offenders who have made substanial personal progress while in prison. If applied to all crimes, mandatory and similar sentencing laws apparently would eliminate the parole board function.

The prosecutor and the public defender also would seem to be threatened by mandatory sentencing since, if an offender is guilty of a particular crime, the prosecutor and others have little alternative but to apply the law to that individual. As the Florida Sheriffs Association hypthesizes, there will be no loopholes, no easy outs: An offender will face a fixed penalty regardless of unusual or special circumstances surrounding the crime or personal characteristics of the defendant himself. The prosecutor, public defender and judge all would lose their discretionary power.

Despite the appearance of nondiscretionary decisionmaking, however, it seems likely that the prosecutor will have a continued important role in managing and shaping the course of prosecution. No offender is automatically or technically accused of any specific act until the prosecutor's office determines the exact charges. Even though an offender may be arrested while holding a handgun, for example, and the facts gathered by the police justify a serious criminal charge meriting a mandatory sentence, he may not automatically be charged with using the handgun to commit a criminal act. Such a charge also could be reduced to obtain a quick guilty plea to a less serious charge, not requiring a mandatory sentence. This is discretionary with the prosecutor and likely will be an important part of the traditional plea bargaining exchange. Thus, instead of reducing the prosecutor's role in plea bargaining and discretionary decisionmaking, his function may be substantially enlarged with the addition of mandatory sentences which he can bargain away in order to secure a guilty plea to a lesser charge. Various opponents to mandatory sentences have suggested this likely development as an important reason to have serious qualms about the new policy. In their view, the use of the mandatory sentence as another bargaining tool undermines the entire purpose of the new sentencing policy to produce predictable and fair and equal sentences for individuals charged with similar crimes.[10]

New Policies and Old Laws

Given the dual support for sentencing reform which comes from professionals and legislators alike, it would seem that much planning and consideration of policy outcomes and consequences might precede the new sentencing rules. This does not appear to be the case, however, and the new sentencing programs have been subject to considerable criticism. The new sentencing reforms may be politically attractive and satisfying, but may produce results that are no better, and perhaps worse, than past policies. For example, while mandatory sentencing is designed to guarantee punishment for minimum terms, some commentators have suggested that conservative state legislatures not only would make prison terms mandatory, but would seize the opportunity to make them much longer as well.[11] Additionally, since rehabilitation seems to work best with first offenders given probation or who are incarcerated for only short periods, this kind of sentencing may destroy the few tenuous advantages available from current practices.

Another basic problem seen in current sentencing reform is that it does not alter the underlying purpose of the criminal justice system. Despite the soothing moralistic salve of rehabilitation as the traditional goal of American prisons, prison routine has always made punishment the function of jail. Reviewing proposals for sentencing reform, for example, one writer has termed rehabilitation "pap for the feint hearted" suggesting that despite its lofty promise, rehabilitation has never worked, or perhaps has never been tried, but in any case we should accept what judges have always done: impose sentencing as punishment and retribution.[12]

If punishment has been our actual policy, it differs little from the new sentencing proposals, but punishment alone perhaps is too brutal, too basic, too uncivilized to stand alone. Therefore, instead of simply scrapping rehabilitation and openly adopting mandatory sentencing, lawmakers seek a new moral goal for inprisonment: deterrence, in which jailing continues to have a

[4] Michael Kannensohn, "Sentencing Criminal Offenders," *State Government*, (Winter 1977), 7-11.
[5] "The Controversy Over Mandatory Sentences," *Congressional Digest*, Vol. 55 (August 1976), 200.
[6] *Ibid.*, 220.
[7] *The Sheriff's Star*, (January 1976), 6.
[8] "The Controversy Over Mandatory Sentences," 205. Also, Gerald D. Robin, "Judicial Resistance to Sentencing Accountability," *Crime and Delinquency*, Vol. 21, No. 3 (July 1975), 201-12.
[9] Carl H. Imlay and Elsie L. Reid, "The Probation Officer, Sentencing, and the Winds of Change," FEDERAL PROBATION, Vol. 39, (December 1975), 11.
[10] See, for example, Patrick D. McAnany, *et al.*, "Illinois Reconsiders 'Flat Time': An Analysis of The Impact of the Justice Model," *Chicago-Kent Law Review*, Vol. 52, 639. See also the various points of view collected in "The Controversy Over Mandatory Sentences."
[11] Martin A. Gardner, "The Renaissance of Retribution—An Examination of Doing Justice," *Wisconsin Law Review* (1967), 790.
[12] Eugene Z. DuBose, "Criminal Sentencing: Point and Counterpoint," *Journal of Criminal Law and Criminology*, Vol. 65 (March 1974), 128.

higher motive, this time that of protecting society.[13] But deterrence may prove to be more elusive than rehabilitation, since the link between prisoner and potential violator is much more indirect than between prisoner and rehabilitation program. Nevertheless, the politico-moral justification probably is more important now than anticipated consequences.

In creating new sentencing laws, state legislatures typically do not rid state law of old policies. The result seems to be an internally inconsistent, something-for-everybody criminal code which may prove more dangerous and disappointing in the future. A case in point concerns prisoners convicted at different times under different philosophies of the state criminal code. Although not usually addressed as part of the new state statutes, it is presumed that offenders incarcerated under the new laws will serve their terms in the same prisons, perhaps the same cells, with those convicted under older variable sentencing laws. As they compare conviction experiences and requirements for release, the new criminal laws may be expected to aggravate prisoners' grievances about unequal sentencing, the tyranny of parole, and rehabilitation for some but its complete absence for others. Moreover, the new laws themselves may be internally inconsistent, requiring mandatory minimums, but also promising sentence reduction for good behavior and self-improvement (rehabilitation!). The new sentencing may be self-defeating, in addition, if certain prisoners receive longer sentences than others for the same crime if convicted also as habitual or dangerous criminals.[14] These issues are similar, and probably just as explosive, as those raised nearly a decade ago in prison riots and demonstrations.

Sentencing Reform and Empirical Research

Mandatory sentencing generally is so new, there is not very much data or information available indicating how it has performed; whether the new punishment is being imposed and if crime has been deterred. Nevertheless, there is reason to doubt the anticipated impact of mandatory sentencing. Recent figures in Florida, for example, reveal that admissions to all state prisons are very low under a recent state law requiring a 3-year minimum mandatory sentence for use of a handgun in the commission of a crime. Passed by the 1975 legislature, a total of 274 offenders were convicted and sentenced to prison under the law in 1976; in the first six months of 1977, the total was 217. As a point of reference, total annual admissions to Florida state prisons are approximately 8,500 inmates.[15]

This data provides only sketchy information about the impact of the law on crime and punishment policy, but some tentative observations seem appropriate. First, it seems clear the law is rarely applied to handgun crime. Arrest statistics for Florida's cities and counties for handgun crime currently are being gathered for a complete study of the state's mandatory sentencing policy. The data reveals that for Jacksonville alone robberies and assaults involving firearms recently totaled 1,418 cases annually with 596 resulting in arrest. Clearly, the number of defendants statewide actually sentenced to 3-year minimum terms is a mere token of the total amount of crime ending in arrest. It seems likely that in addition to the usual percentage of cases dismissed by prosecutors, plea bargaining to lesser offenses to avoid the three year minimum is occurring, indicating a continued important role for prosecuting and defense attorneys and judges, all of whom continue to exercise wide ranging discretion under traditional sentencing policies. If this is the case, mandatory sentencing laws simply will become new and additional bargaining chips that prosecutors, in particular, can use to obtain convictions. Clearly, the role of these new laws in affecting plea bargaining needs to be examined in order to fully assess their impact in criminal justice.

Besides observing the extent to which new sentencing laws are imposed, it is important to determine if they deter crime, for deterrence is a central theme in supporting and justifying the new penalties. Florida again provides an opportunity to assess the impact of the law, not only because a mandatory law has been in force since 1975, but also because a statewide advertising campaign was conducted during 1976 to alert potential offenders about the new penalty. At least one large billboard was placed in each county, normally along a well-traveled highway, along with numerous posters in convenient store windows alerting potential robbers of the handgun law. Additional billboards were erected in urban areas. Data on the location of the billboards, local crime rates and arrest statistics are being gathered to determine if the new laws affect crime rates. As indicated above, the total number of admissions to state prison under the new law are low, but the rate has more than doubled between 1976 and 1977. It is likely the rate is up sharply because the law has been applied to more handgun cases and possibly is used in plea bargaining to reduce charges from even more serious penalties. Nevertheless, the increased rate does not support deterrence expectations.

Research in other jurisdictions also suggests that mandatory sentencing may have modest impacts on deterring crime. In a study of the impact of gun control laws and mandatory sentencing in Massachusetts, for example, researchers concluded that the law only temporarily produced a decrease in the number of firearms in circulation in the state and that most crimes committed with firearms were not reduced by the new law which required a minimum 1-year sentence for illegal possession of a firearm. A slight decrease occurred in assaults involving firearms, usually an unpremeditated act in which an assailant, who normally carried a gun, was inclined to use the weapon if involved in a violent confrontation. The total number of assaults, however, remained high, many gradually involving other kinds of weapons. In contrast, use of firearms in robbery and murder remained constant. Thus, while some positive effects of the new law have been noted, they are very modest.[16]

As indicated above, there is little systematic empirical research describing mandatory sentencing and plea bargaining, but experience with Oklahoma's drug laws illustrates how other judicial officials in addition to the prosecutor attempt to delay or avoid the impact of mandatory sentences if the requirements of the new laws conflict with their own policy goals, strategies or personal values. In this way, the mandatory sentence may face political opposition in the lower court bureaucracy similar to that experienced in the past by other unpopular policies such as school integration, expanded rights of criminal defendants, school prayer, and others. Oklahoma has had a mandatory sentencing law for certain drug violations since 1971. Attempts to have the law declared unconstitutional on various grounds have failed in state appellate court, but lower court judges, prosecutors and juries frequently fail to impose the full effects of the law in individual cases. It is reported that prosecutors typically reduce charges to lesser drug offenses which do not require imprisonment, defense attorneys sometimes opt for a jury trial in order to raise the mandatory sentencing feature of the law before the jury, hoping for sympathetic acquittal, and certain trial judges have delayed sentencing up to 2 years following conviction hoping the law would be nullified by higher courts. Well known for his opposition to the required sentence, one trial judge, in a rare written opinion, explicitly contrasted the policy goals and outcomes of traditional rehabilitation theory with the mandatory sentence, balancing the very favorable rehabilitation rates for nonimprisoned first offenders under supervised probation against the relatively poor results with first offenders who are given prison terms. Besides losing opportunities for reducing recidivism, he decried the exorbitant cost of imprisoning all offenders under mandatory sentencing. Thus, at least for this judge, and probably for many others, the debate over rehabilitation versus retribution continues to be a salient and fundamental issue in judicial policy-making.[17]

From the few reports that are available, it appears that a considerable gap may exist between legislative goals in mandatory sentencing and actual judicial results, but clearly, too little complete and systematic research had been done to support such a firm conclusion. It is possible, for example, that conflict and disagreement exist only in certain areas of criminal law. In Oklahoma, judges and the legislature apparently disagree on how drug violations (including marihuana) should be adjudicated. This is among the most controversial issues in American criminal law and it may be that legislative and judicial decisions regarding other crimes may not arouse the same kind of passion and disagreement.

A case in point is a recent study by the Federal Judicial Center in which researchers compared the actual past sentences of federal judges in various types of cases with proposed mandatory minimums found in several Congressional bills. The purpose of the research was to determine if there was a genuine need for revamping sentencing policy in light of the possibility that judges *already* were imposing sentences similar to the newly proposed minimums. The study concluded that in most case categories, the sentences imposed by the judges in past cases were just as stringent as those found in the proposed legisla-

[13] For a discussion linking deterrence to justifications for new sentencing policy, see: Gardner, 789-99.
[14] For an excellent illustration of these kinds of inconsistencies, see the discussion of Illinois statutes in McAnany, *et al.*, 659-60.
[15] Figures have been provided by the Florida Department of Offender Rehabilitation.
[16] James A. Beha, "And *Nobody* Can Get You Out," *Boston University Law Review*, Vol. 57 (1977), 314.
[17] Christopher L. Shaw, "Criminal Law; Mandatory Prison Sentences—A Case Study Approach," *Oklahoma Law Review*, Vol. 28 (1975), 614-22.

tion. Only in sale of drug and bank robbery cases were certain judges' sentences less severe than the new proposed minimums. The findings suggest that existing judicial sentencing policy most often meets the policy goals of the law makers and that perhaps only in those cases which have become visible political issues in recent years, e.g., drug sales, have legislative requirements exceeded the sentencing decisions of certain judges.[18]

A final important issue that some recent research has examined is the conflict between the possible benefits of the mandatory sentence in reducing crime through incapacitation (imprisonment) and the corollary requirement that prison populations must increase. A Rand Corporation study has concluded that mandatory sentencing could reduce crime 20 percent if *all* convicted felons were required to serve 1.2 years in prison; however, prison populations must increase 85 percent. Crime reductions up to 30 percent of recent levels would require 3-to 5-year prison terms for all convicts, but a likely tripling of the total U.S. prison population.[19]

Chances are excellent that a shift to mandatory prison sentences for all offenders and a near doubling or tripling of prison populations will not occur, not because state legislatures and Congress refrain from enacting such laws, but because the administration of these programs impose heavy new burdens on prisons in addition to the effects on judicial systems discussed earlier. Urban county jailers already deal with deplorable and overcrowded conditions, frequently linked to riots, demonstrations or routine violence. These local jail administrators usually are anxious to promote plea bargaining to transfer prisoners quickly to state prisons or back to the streets. And even with these measures, city jails remain jammed and intolerable places. In recent years most state prisons have had to cope with increasing admissions but with no additional facilities; some are under court order to significantly reduce overcrowding and to improve living conditions, and on occasion prison administrators have refused to accept more prisoners from county jails. Temporary tent prisons in Florida were erected in the early 1970's, graphically illustrating the acute and urgent need for more space. All of this exists now *without* the mandatory sentence. Even if crime could be reduced to eighty percent of current levels, the added cost in prison construction or the further compressing of bodies in old buildings probably will be too high. Consequently, while increased mandatory sentencing may become the legislative criminal justice policy of the future, judicial-correctional policy probably will not and cannot meet legislative goals.

[18] James Eaglin and Anthony Partridge, "An Evaluation of the Probable Impact of Selected Proposals for Imposing Mandatory Minimum Sentences in the Federal Courts," (Washington: Federal Judicial Center), July 1977.

[19] Petersilia and Greenwood, 24-26.

Conclusion

If mandatory and fixed sentencing laws were applied fully, they would produce some benefits beyond their immediate political appeal. They may eliminate some of the disparity in sentencing and the bitter sense of discrimination and arbitrariness which typical judicial discretion and parole decisions often have produced. Although existing evidence is weak, the new sentencing might also deter some crime, but this remains to be seen. Nevertheless, there is reason to doubt that the new laws will have a substantial impact upon overall criminal justice policy. When mandatory sentencing is used only as a bargaining chip, or when juries refuse to convict, the new laws cannot achieve their stated policy goals. Equally important, if the laws apply only to certain offenses such as handgun and drug crime, as is the case in many states, the thrust of the new policy will be lost in the maze of existing and alternative criminal laws which still permit substantial discretion and decisional variation. With only certain felons convicted under these new laws, feelings of discrimination and injustice will continue to pervade the jails.

The new sentencing policies likely will confront all of these problems in the near future, but an underlying problem about the purpose or goals of criminal justice remains: rehabilitation or punishment. The rhetoric of the new policy brings punishment into the sunshine as the only goal of criminal law. As suggested earlier, punishment may be all that has been accomplished anyway, but at least the image or symbol of rehabilitation always had existed and, weak as it is, it supported some occupational training, recreation and socio-psychological services in prison. These kinds of programs never received much funding and they always were the first to be cut in favor of simple custodial needs. But they existed and, some argue, occasionally produced some benefits. Now, with the new policy of punishment, we may see the legitimate dismantling of whatever meager services that were provided. Not only will the traditional opponents of these programs vote for their abandonment, but their traditional supporters, admitting the lack of tangible results from weak programs, may also find themselves abandoning all forms of rehabilitation.

This is not a defense of existing rehabilitation programs in American prisons. As best we can tell, we have little rehabilitation. At the same time, crime and recidivism are up, and fear and frustration are up. But is the new policy of punishment a satisfactory policy alternative? Society really is not protected by the new mandatory laws, for even though a particular offender is in prison for one or a few years, there are many others just like him in society. We will simply replace one offender with another and while one individual has been punished, he will, at best, be no different, but perhaps be worse when he leaves prison. We simply will have inconvenienced him for a time. Unless lawmakers are willing to lock up all offenders for several years, and build more and more prisons, and unless court officials actively apply the mandatory sentences in all appropriate cases, the new sentencing laws probably will accomplish very little.

There is little agreement on the causes of crime or what kinds of programs are needed to cope with it. Poverty, unemployment, racial discrimination, broken homes, absent parents, drugs, lack of love, child abuse and psychological neglect, etc., all typically are seen as prime candidates for causes of crime. Clearly, no rehabilitation program has dented many of them, but the alternative of abandoning even the hope or the chance of rehabilitation for some in favor of an unequally applied selective punishment policy is no solution at all to crime.

New sentencing laws are likely to be adopted in the future in most of the 50 states and Congress. Since there is a national trend in this direction, much additional research needs to be done which compares state experiences under the new laws and accumulates information about the relationship between sentencing and crime. There are several areas and types of research which will become valuable. First, in addition to legal explication of the new laws, empirical analysis of the implementation of the laws by lower court personnel is important. We need to learn in more detail how frequently the new mandatory laws are applied to cases, instances in which the laws are used to obtain guilty pleas to lesser charges and which groups of defendants are more likely than others to be charged under the mandatory sentencing laws. This kind of research needs to be more than anecdotal in which a few exemplary cases are cited to prove or make a point. Court records and interviews with prosecutors, public defenders and perhaps judges all are needed to determine the frequency and nature of plea bargaining as it involves the new sentencing laws. Comparisons also need to be made with police arrest data, to be able to determine the relationship between local police enforcement and charges determined by prosecutors. Linkages between crime rates, prosecution, conviction and sentencing also need to be developed. In addition to gathering this kind of quantitative data in local courts, it would be desirable to maintain a comparative perspective, noting similiarites and contrasts between jurisdictions within the same state as well as comparing states with similar kinds of laws. In this way, we may begin to better assess the actual implementation of legislative policy by the judiciary. Gathering this kind of information in local courts often is tedious and frustrating, but since sentencing reforms are likely to be important in forthcoming criminal law revisions in most of the states, it is worthwhile to begin closer analysis of the development of these new policies and the impact and outcomes they produce in state law enforcement and judicial policy.

THE CURRENT popularity of the notion of mandatory sentences is a call for repression of the already oppressed in the name of even-handed justice. Its likely outcome will be a greater show of force by the state, a greater invasion of privacy, a fulfillment well before 1984 of the future which Orwell warned of.

—BENEDICT S. ALPER and JOSEPH W. WEISS

END