

Introduction

The determinate ideal captured the imagination of a generation of jurists, social activists, policymakers, and academics. Propelled by swirling forces, competing expectations, and hollow promises, it burst forth on the public policy scene with a vigor and popular appeal unmatched in recent history. In this book, I argue that the determinate ideal is a myth founded on false notions of power and purpose.

Until the early 1970s, sentencing policy in the nation was heavily influenced by a set of ideas about the purposes of punishment and the allocation of sentencing authority. With foundations in a century-old paradigm, the rehabilitative ideal encompassed more than a concern with rehabilitating criminals: it legitimized a set of procedures and structures that shaped sentencing policy throughout the country.¹

The rehabilitative regime was founded on the assumptions that a criminal sentence should rehabilitate (i.e., change the offender's criminal propensities), deter, and incapacitate; that the allocation of sentencing authority should be determined by the purpose of the criminal sanction; that case-by-case decisionmaking should be encouraged; that future behavior could be predicted; that criminal-justice practitioners possessed the expertise required to make individualized sentencing decisions; that sentences should be indeterminate; that mandatory incarceration and mandatory minimum sentences should be avoided; that judicial discretion should be encouraged; that decisions on the duration of the sentence should be deferred until late in the offender's term; and that the parole board should decide how long the offender remained incarcerated.

The rehabilitative program began to lose its hold on sentencing policy throughout the nation in the early 1960s and thereafter. The retreat from the old order was widespread. Liberals and conservatives, defense interests and law-enforcement interests, claimed that the rehabilitative philosophy was theoretically and empirically flawed, its promises a chimera.

The destabilization of the rehabilitative regime accelerated as each of its tenets became suspect. While the manifestations of discontent varied from

state to state, it was evident that a sea change in sentencing philosophy was occurring. The hegemony of the rehabilitative ideal was coming to an end.

As the challenges to the reigning paradigm mounted, reform proposals were inevitably sought. Determinate sentencing, a concept that by then had attained national prominence, appeared a ready-made answer. While determinate sentencing proposals varied by prescription and specificity, they shared basic characteristics. The offender would be informed at the time of sentencing, or shortly thereafter, of the length of the prison term. Penal rehabilitation and other crime-control objectives would be abrogated or minimized in favor of retributive purposes. Discretion would be eliminated or curtailed. Disparity, the by-product of individualized sentencing, would be abolished.

Determinacy was embraced warmly by anti-rehabilitationists espousing the law-enforcement perspective as well as by anti-rehabilitationists favoring the defense position. Law enforcement saw determinacy as the guardian of tough punishment, while defense saw it as the essence of fairness and due process. Faced with this unusual alliance, policymakers, accustomed to the traditional opposition between the left and the right, had cause to wonder what determinacy was really about.

The reasons underlying determinate sentencing's bizarre attraction to both the left and the right were rarely discussed until an attempt was made to operationalize the amorphous concepts underlying the determinate ideal. Once the effort to write down the code began, once the vague was rendered specific, the conflict between the competing expectations of the defense and law-enforcement establishments could no longer be ignored. No calculus could be conjured up to determine whose definition would assert primacy. In the end, proponents became opponents, and no one was satisfied.

Crime Control and Discretion

This book explores the myth of the determinate ideal by asking two questions. First, what happens when a sentencing model ignores the crime-control purposes of the criminal sanction and fails to allocate sentencing authority among criminal-justice decisionmakers? Will crime-control objectives disappear, or will they simply be forced underground? Will decisionmakers stop making discretionary decisions, or will they merely stop accounting for the decisions they make?

The second question builds on the first. What happened to the determinate model, which once seemed destined to sweep the nation as the natural successor to the discredited paradigm? Why did determinacy rise and fall, why did it appeal and then repel? How could the movement for determinate sentencing attract both the left and the right? What is the consequence for public policy when the clash between conflicting ideologies can no longer be ignored?

Controlling Crime Through Sentencing

The determinate sentencing proposals that gained prominence in the late 1960s and early 1970s were rooted in theories of retributive justice, disclaiming reliance on crime-control objectives. Punishment for its own sake, not in the service of an unattainable utilitarian objective, became the banner under which the determinate sentencing forces mustered.

I question whether a sentencing system can ever divorce itself from the pursuit of crime control. Does not the diversity of behavior prohibited by the criminal law necessitate a diversity of responses? If so, will decisionmakers continue to seek to control crime through the imposition of the criminal sanction, even where utilitarian purposes are obfuscated by retributive rhetoric?²² If the sentencing system does not explicitly accommodate rehabilitation, incapacitation, or deterrence, will these purposes nevertheless operate *sub rosa*, frustrating the objectives of the reform?

The purposes underlying the imposition of punishment on convicted offenders can be categorized in a variety of ways. The discussion here will be limited to the four traditional purposes of the criminal sanction: rehabilitation, incapacitation, deterrence, and retribution.

Crime control is at the heart of all but one of the traditional rationales for punishment. Rehabilitation serves crime control by changing the offender. Incapacitation controls crime by restraining the offender. Deterrence furthers crime control by preventing crime among nonoffenders. Retribution, often referred to as just deserts, alone forsakes utilitarian objectives, pursuing punishment for its own sake—because it is deserved.

Rehabilitation is premised on the belief that the criminal propensities of convicted offenders can be diminished to the point that they will choose not to commit crime. Whether the prescribed treatment is isolation and penitence (the method favored by the Quaker reformers who established Eastern State Penitentiary in Philadelphia in 1829), or congregate-silence (New York's approach at Auburn Penitentiary in 1823), or psychosurgery and other modern therapeutic interventions, the purpose of the sentence has been the same: to control crime by changing offenders into law-abiding citizens.

Incapacitation seeks to control crime by the restraining effects of prison bars. More recently, intensive community supervision and electronic monitoring devices have been added to the incapacitative arsenal. Incapacitation is premised on the assumption that, if free, the offender would continue to offend. Prediction is the cornerstone of incapacitation: who might offend, how likely is the offense, how soon will it occur?

Deterrence assumes that punishment imposed on one offender will induce other potential offenders to refrain from committing crime. The threat of the penalty, coupled with knowledge of its execution on others, will cause citizens to obey the law, deterrence advocates claim.

Rehabilitation, incapacitation, and deterrence are difficult to support empirically. The relative rarity of the criminal event, coupled with the small proportion of crimes that result in an arrest or conviction, make recidivism measures—the typical subjects of studies of crime-control strategies—inherently problematic. Lacking empirical justification, crime-control rationales are vulnerable to attack; nevertheless, recidivism studies remain a staple of the research community.

Retribution is deserved punishment, *lex talionis*, the tariff due. The crime-control purposes of punishment are future-oriented, that is, they seek to prevent crime by either the convicted offender or the general public. Retribution is backward looking: punishment is inflicted for past conduct. Retribution is not amenable to empirical testing. What is deserved is deserved, and whoever has the power defines the terms.

Removing Discretion or Just Moving It?

The determinate model of the late 1960s and early 1970s ignored the organizational context of sentencing decisions and the day-to-day realities of the criminal-justice system. Rather than allocating authority and responsibility among criminal-justice practitioners, the advocates of determinacy sought to eliminate or severely limit discretion.

Sentencing operates in a complex environment, representing a balancing of competing forces, with decisions about sentences made by various criminal-justice functionaries. The question is not whether sentencing discretion will survive a shift to determinacy, but rather how sentencing authority will be reallocated in the new system. The struggle for justice can easily be transformed into a struggle for power.

Unstructured discretion—the power to make and enforce choices without restraint—was portrayed by the proponents of determinate sentencing as the central evil of the old order. Rather than providing for the just and ordered allocation of sentencing authority, they sought to dismantle discretion. Rather than accepting its inevitability and devising decision rules to guide its exercise, they flayed out against it, devising instead proposals to abolish or tightly circumscribe its use.

What happens when discretion is ignored? Does it disappear? Do decisionmakers stop making discretionary decisions about sentences? Or does the locus of discretion simply shift from one constellation of authority to another, as the gulf between stated and actual policy widens? Rather than being exercised by an unwieldy combination of legislators, parole board members, prosecutors, and judges, did the determinate model merely rearrange discretion, yielding another unwieldy combination of legislators, correctional authorities, prosecutors, and judges, each vying for the power that must be newly distributed?

Linking Purpose and Power

The purposes of the criminal sanction are linked to the allocation of sentencing authority, the linkage turning on whether the purposes are retrospective or prospective. Retribution is a retrospective purpose, focusing on the current offense. (And perhaps also on prior offense-related variables, depending on one's views of blameworthiness.) At least theoretically, serving retributive purposes requires no information that cannot be known at the time of sentencing. Consequently, where the purpose behind the sanction is retributive, sentencing discretion is logically placed with courtroom actors: judges, prosecutors, defense counsel, and probation officers.

Where the objectives of the criminal sanction are prospective, seeking to control crime in the future, the information needed to accomplish the goal may not be available when the sentence is imposed. Thus, serving rehabilitation, incapacitation, or deterrence purposes may require that criminal-justice functionaries operating at the later stages of the criminal process be vested with the authority to exercise sentencing discretion.

What are the implications of failing to allocate sentencing authority in accordance with the purpose of punishment? If purpose and power are not linked, can the sentencing system fulfill its promise?

What Happened to the Determinate Ideal?

The determinate ideal appealed to law enforcement as well as to defense advocates. Yet, interest in the new reform, which at first seemed to be an unstoppable, natural heir to the old order, soon faded as determinate sentencing began to lose its momentum. How did it happen, how could a major public policy proposal that had such universal appeal suddenly attract widespread and vehement opposition?

The answers to these questions lie in the history of the national movement for determinate sentencing, a saga that took two decades to unfold. By exploring how complex phenomena can be made to appeal to people with differing ideological bents, this book attempts to explain how competing interest groups ultimately controlled the fate of the determinate ideal.

The book describes a course of events not uncommon to other areas of public policy. For any proposal to be considered seriously by policymakers, it must receive widespread attention. Consequently, a means of spreading the message underlying the new policy proposal must be found. The resort to rhetoric is common. To attract a larger following, the proposal may be cast in terms of general social values, such as freedom, democracy, or liberty. Such symbols provide cues that elicit a positive response in many people. In sentencing policy, terms like doing justice, law-and-order, and getting tough come immediately to mind. These terms are vague, having no generally

accepted meaning. People tend to imbue them with meaning consonant with their own value systems.

Vagueness has a price, however. Expanding the base of support for a policy issue may have untoward consequences, as the original supporters of the policy may lose control over its substance. Generalizing the proposal may attract persons and groups with different ideological agendas, different conceptions of the policy issue, and different opinions about its successful resolution.

Varying and changing definitions of the policy proposal may emerge. As more people are attracted to a particular reform or policy direction, the originators' ability to shape the resolution of the issue may diminish. Other groups may influence policymakers, convincing them that their definitions and solutions are preferable to those of the early policy advocates.

The tensions lurking within a loosely defined policy proposal are not overly apparent, and hence not problematic, while the issue remains vague and undeveloped. But when the policy is fully explicated, when the amorphous becomes concrete, the gulf between the policy's promise and its reality is exposed. Not uncommonly, those who originally endorsed the proposal will be displeased with the attempt to translate it into practice.

The book expands on this perspective to explain how defense and law enforcement advocates could agree that determinacy was a much-needed reform. Cloaked in rhetoric, rife with ambiguities, the determinate ideal was susceptible to selective interpretations. The book documents what happened when the conflicting expectations were exposed, as both sides to the debate realized the true price of the reform.

Book Outline

The questions of purpose and power raised in this first chapter dominate the discussion throughout the book. To better capture the dynamic contradictions inherent in the determinate ideal, an in-depth, case study, using New York as the example, is the focus of much of the book. The New York experience—an odyssey that took two decades to unfold—is placed in the context of the national movement for determinate sentencing.

Chapter 2 begins with a brief history of sentencing reform in the United States and then describes the rehabilitative juggernaut at its zenith. Turning to events in New York, the chapter describes policymakers' attempt to devise the quintessential modern rehabilitative system. Chapter 3 presents the counts in the indictment against the old order put forward by the liberal reformers, both in New York and elsewhere around the nation. Chapter 4 chronicles events in the national movement for determinate sentencing.

The next four chapters focus on New York's twenty-year pursuit of a new sentencing system. Chapter 5 discusses New York's rejection of the

rehabilitative ideal, focusing primarily on the law-and-order sentencing movements that flourished under New York Governors Nelson A. Rockefeller and Hugh L. Carey. Chapter 6 chronicles the earlier phases of New York's determinate sentencing movement, from the formation of blue-ribbon commissions, to the support of politically diverse newspapers, to the testimony received at public hearings, to the formation of a sentencing guidelines committee. Chapter 7 documents what happened when the liberal thesis, which had been cross-endorsed by law-and-order and defense advocates alike, was exposed to scrutiny in the process of drafting a determinate sentencing code. Chapter 8 describes the political response to the proposed sentencing code. The concluding chapter summarizes the movement for determinate sentencing in New York and elsewhere around the country in reference to the issues of purpose and power that guide this work.