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RETRIBUTION: NEW YORK'S ANSWER TO THE MULTIPLE FELONY OFFENDER

1. Introduction

On April 18, 1983, sixteen New York state senators introduced an act to amend section 70.30(1)(c) of the New York Penal Law. The amendment (the amended provision) substantially increases the maximum prison term for multiple felony offenders. It applies to those offenders who commit more than two violent felony crimes. Six weeks later, on May 31, 1983, Governor Cuomo signed the amended provision into immediate effect.

Reaction to the amended provision came swiftly, raising issues regarding its potency in affecting the crime rate. While some legislators and district attorneys praised the amended provision because of its intended effect of keeping the criminals off the streets and in jail, other legislators and criminal justice experts criticized the act as impulsive and impractical. These views reflect the ongoing debate regarding the basis on which the criminal sentencing system rests.

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3. Id.
6. In the Memorandum of the State Executive Department, Governor Cuomo stated that this amendment will provide that the perpetrator of such crimes receive a sentence in proportion to the offense committed. 1983 N.Y. Laws 2755. The Memorandum of the Legislative Representative of the City of New York stated that the amended provision prevents defendants from being given a “free ride” for multiple felonies committed after the imposition of the first sentence. Also expressed was support for the concept of the punishment more appropriately fitting the crime, and the possible deterrent effects of such a provision. 1983 N.Y. Laws 2462, 2463. Several district attorneys stated that the amended provision will lower the crime rate by deterring other potential offenders, and will no longer allow offenders who commit multiple crimes in a spree to be given sentences that are only slightly longer than those they would have received had they committed one or two violent felony offenses. N.Y. Times, June 4, 1983, at 25, col. 6. Manhattan District Attorney Robert M. Morgenthau expressed approval of the amendment because it corrected sentencing disparities. Additionally, the Advisory Commission on Criminal Sanctions had, in a 1982 report, recommended increasing the term of imprisonment to the 50 year maximum. Id.
7. N.Y. Times, June 4, 1983, at 25, col. 6. Some legislators and criminologists claim that the old law was passed in reaction to the “diner incident” that occurred in Nassau County on May 29, 1982, over the Memorial Day weekend. Id. Several
In the United States, there is no absolute legislative declaration proclaiming which, if any, philosophical principles are used to justify sentencing offenders. However, sentencing policies are necessary for the criminal justice system so that proper responses can be made to the offender's conduct. Therefore, whenever any statutory amendment to the penal law is passed, the enactment should reflect a coherent penal function in order to promote the stability regarding the predictibility of sentences and further the aims of criminal justice.

This Note first discusses the major consequences of the rationales for criminal punishment. It then examines the rationale of the amended provision. It will be shown that, although the amended provision interacts with several theories of punishment, retribution against the multiple felony offender is its primary purpose and effect. This Note concludes that the amendment to New York Penal Law section 70.30(1)(c) is entitled to prompt judicial recognition and acceptance as a retributivist response to the multiple felony offender.

II. The Amended Provision

Before the amended provision was passed, Penal Law section 70.30(1)(c) provided that a defendant convicted of multiple felony

gunmen robbed a parking lot in Kings County by forcing their victims to disrobe and relinquish possession of their valuables. One victim was assaulted. The gunmen stole an automobile and later proceeded to enter a private residence. The sixteen occupants were forced at gunpoint to disrobe, turn over their possessions, and commit various sex acts. Then the defendants drove to a diner and proceeded, again at gunpoint, to force the 75 patrons to disrobe and surrender their valuables. Several customers were assaulted and two were shot. Many of the customers were forced to commit sexual acts on the defendants and/or each other; some customers were repeatedly raped. After leaving the diner, the defendants were spotted by a patrol car. One of them fired at an officer, who returned fire. All of the defendants were eventually apprehended. N.Y. Times, May 30, 1983, at 26, col. 4. See also 1983 N.Y. Laws 2462. Despite the fact that consecutive indeterminate sentences could be imposed, the then existing law limited the term of imprisonment to a maximum of thirty years.

Several criticisms arose regarding the amendment's practical effect on the ever-increasing problem of prison overcrowding. The Executive Director of the Coalition for Criminal Justice stated that "[t]here was no attempt by the sponsors to ascertain the number of cases that might be affected, or to calculate the effect on overcrowding." N.Y. Times, June 4, 1983, at 25, col. 6.

10. See infra notes 54-187 and accompanying text.
11. See infra notes 211-17 and accompanying text.
12. See infra notes 211-38 and accompanying text.
offenses,\textsuperscript{13} other than a class A felony,\textsuperscript{14} and sentenced to consecutive,\textsuperscript{15} indeterminate\textsuperscript{16} prison terms would serve no more than a maximum of twenty years imprisonment. Also, if one of the offenses resulted in the conviction of a class B felony,\textsuperscript{17} no more than a thirty year sentence could be imposed.\textsuperscript{18} Under this law, no matter how

\textsuperscript{13} N.Y. Penal Law § 10 (McKinney 1975) defines “felony” as “an offense for which a term of imprisonment in excess of one year may be imposed.”

\textsuperscript{14} N.Y. Penal Law § 70.02 (McKinney Supp. 1983-1984) classifies violent felonies as follows:

1. Definition of a violent felony offense. A violent felony offense is a class B violent felony offense, a class C violent felony offense, a class D violent felony offense, or a class E violent felony offense, defined as follows:

   (a) Class B violent felony offenses: an attempt to commit the class A-1 felonies of murder in the second degree . . . ; kidnapping in the first degree . . . ; and arson in the first degree . . . ; manslaughter in the first degree . . . ; rape in the first degree . . . ; sodomy in the first degree . . . ; aggravated sexual abuse . . . ; kidnapping in the second degree . . . ; burglary in the first degree . . . ; arson in the second degree . . . ; robbery in the first degree . . . ; criminal possession of a dangerous weapon in the first degree . . . ; criminal use of a firearm in the first degree . . . ; and aggravated assault upon a peace officer . . . .

   (b) Class C violent felony offenses: an attempt to commit any of the class B felonies set forth in paragraph (a); assault in the first degree . . . ; burglary in the second degree . . . ; robbery in the second degree . . . ; criminal possession of a weapon in the second degree . . . ; and criminal use of a firearm in the second degree . . . .

   (c) Class D violent felony offenses: an attempt to commit any of the class C felonies set forth in paragraph (b); assault in the second degree . . . ; sexual abuse in the first degree . . . ; criminal possession of a weapon in the third degree . . . ; and criminal sale of a firearm in the first degree . . . .

   (d) Class E violent felony offenses: an attempt to commit any of the felonies of criminal possession of a weapon in the third degree . . . .

\textsuperscript{15} “When one sentence of confinement is to follow another in point of time, the second sentence is deemed to be consecutive.” Black’s Law Dictionary 276 (5th ed. 1979). On the other hand, concurrent sentences are “[t]wo or more terms of imprisonment, all or part of each term of which is served simultaneously and the prisoner is entitled to discharge at the expiration of the longest term specified.” Id. at 264.

\textsuperscript{16} An indeterminate sentence is “[a] sentence of imprisonment the duration of which is not fixed by the court but is left to the determination of penal authorities within minimum and maximum time limits fixed by the court of law.” Id. at 694. This is distinguished from a determinate sentence, which is a sentence “for a fixed period as specified by statute . . . .” Id. at 405.

\textsuperscript{17} See supra note 10.

\textsuperscript{18} N.Y. Penal Law § 70.30 (McKinney Supp. 1980-1981) reads in part:

1. Indeterminate sentences. An indeterminate sentence of imprisonment commences when the prisoner is received in an institution under the jurisdiction of the state department of correctional services. Where a person is under more than one indeterminate sentence, the sentences shall be calculated as follows:
violent or numerous the crimes committed, the defendant would serve no more than a thirty year sentence.

Various New York courts\(^{19}\) and legislators\(^{20}\) contended that this restriction on sentence length was too short to be effective, especially in the light of recent egregious incidents.\(^{21}\) This criticism focuses on the fact that the restriction allowed a defendant to obtain a "free ride"\(^{22}\) because, once he is convicted of two violent felonies, the thirty-year limitation takes effect no matter how many more violent felonies he may have committed.\(^{23}\) The court in \textit{People v. Mosley} \(^{24}\) hypothe-
sized a situation in which a defendant commits rape, arson, robbery, assault, and murder. The court recognized that despite these serious and numerous felonies, the existing law restricted the judge to imposing at most a thirty year sentence.\textsuperscript{25}

Therefore, New York Penal Law section 70.30(1)(c) was amended to increase the aggregate length of a prison sentence for the multiple felony offender.\textsuperscript{26} In essence, the amended provision states that the aggregate maximum term of consecutive sentences imposed for two violent felony crimes, one of which is a class B felony, will be forty years; the aggregate maximum term of consecutive sentences imposed for three or more violent felony crimes, one of which is a class B felony, will be fifty years.\textsuperscript{27} In effect, section 70.30(1)(c)(iii) amounts to a maximum sentence of nearly life imprisonment when the severest maximum term is imposed.

Any statute regarding sentencing should be supported by at least one of the generally accepted rationales of punishment in order to further the goals of a coherent criminal justice system. Which rationale or rationales the amended provision subscribes to, and whether the amended provision fulfills the reasoning behind the rationale, is subject to inquiry.

\textsuperscript{26} \textit{Id.} at 741, 358 N.Y.S.2d at 1009.
\textsuperscript{27} Indeed, a person can commit any number of Class B felonies . . . , and yet be sentenced to a maximum of only 30 years' imprisonment if the series of crimes was committed prior to the time the person was imprisoned under any of the sentences arising out of those crimes . . . .

Thus a person who kills intentionally, who causes serious physical injury in the course of a robbery, who rapes a child, who blows up an occupied building, faces a maximum term of 25 years, or a maximum of thirty years for a series of such acts before being imprisoned on any one of them.

\textit{Id.}

\textsuperscript{26} N.Y. \textbf{PENAL LAW} § 70.30(1)(c)(ii)-(iii)(McKinney Supp. 1983):

(ii) Notwithstanding subparagraph (i) of this paragraph, the aggregate maximum term of consecutive sentences imposed for the conviction of two violent felony offenses committed prior to the time the person was imprisoned under any of such sentences and one of which is a class B violent felony offense, shall, if it exceeds forty years, be deemed to be forty years;

(iii) Notwithstanding subparagraphs (i) and (ii) of this paragraph, the aggregate maximum term of consecutive sentences imposed for the conviction of three or more violent felony offenses committed prior to the time the person was imprisoned under any such sentences and one of which is a class B violent felony offense, shall, if it exceeds fifty years, be deemed to be fifty years.

\textit{Id.}
III. Sentencing Rationales

A. Preface and History

The four generally accepted goals for punishing criminal offenders are deterrence, incapacitation, rehabilitation and retribution.28 In determining a proper sentencing strategy, the courts and legislatures have based their decisions on one or more of these rationales,29 not necessarily preferring one rationale over another.30 Often, decisions with respect to sentencing will reflect the prevailing opinion in society regarding the favored rationale for criminal punishment.

The philosophy of criminal law in the United States was originally brought to the American colonies with the adoption of the English common law.31 The early system of criminal justice was founded upon the concept of retaliation.32 If an offender willingly broke the law, he


29. See infra notes 188-210 and accompanying text.

30. See, e.g., Fielding v. LeFevre, 548 F.2d 1102, 1108 (2d Cir. 1977)(no constitutional principle exists that prefers one rationale over another; therefore, lower court's opinion to punish offender solely for impact of deterrence and retribution is valid); Castle v. United States, 399 F.2d 642, 652 (5th Cir. 1968)(noting Supreme Court's decision in Powell v. Texas, 392 U.S. 514 (1968), court commented that rehabilitation is not the only rationale for punishment and that deterrence is also valid consideration); People v. Burgh, 89 A.D.2d 672, 672, 453 N.Y.S.2d 783, 785 (3d Dep't 1982)(not only are deterrence and retribution valid considerations, but also is defendant's rehabilitation; sentencing judge should consider all three factors when determining sentence); People v. Farrar, 52 N.Y.2d 302, 305-06, 419 N.E.2d 864, 865, 437 N.Y.S.2d 961, 962 (1981)(judge should consider rehabilitation and deterrence when fashioning sentence).


32. Richardson, From Retaliation to Rehabilitation to Retribution in Criminal Punishment, 36 J. Missouri Bar 149, 150 (1980). The author states that retaliation, or lex talionis (the law of the claw), functions according to the principle of the punishment fitting the crime.
was punished for his guilty mind and the illegal act.\(^{33}\) By seeking revenge for the malicious conduct, society was retaliating against the offender for the illegal action. Hence, the offense was expiated by the punishment invoked by the legal system. Retaliation prevailed as the primary justification for the imposition of criminal sentences in the United States until the end of the Civil War.\(^{34}\)

During the mid-19th century, the idea of rehabilitation, the concept of re-educating the offender, began superseding retaliation as the predominant theory of punishment.\(^{35}\) Some of the reasons cited for this change included a new understanding of individual rights as opposed to state sovereignty, a concept arising out of the revolutions of the 18th century,\(^{36}\) the movement within the legal system toward criminal law codification,\(^{37}\) and the growing acceptance of the science of psychiatry.\(^{38}\) The theory of rehabilitation promotes the education of the offender, based on a belief that part of the guilt for the offense belongs to the economic and social conditions of society.

Between 1880 and 1920, the ideal of rehabilitation changed the American penal system by introducing probation and parole programs.\(^{39}\) By 1922, thirty-eight states had adopted indeterminate sentencing and, by 1976, all states had done so.\(^{40}\) The rehabilitative theory also helped to establish the practices of reducing a prison term

33. *Id.* Atonement for the offense was an eye for an eye; this sense of criminal justice continued to thrive in society largely due to religious support. *Id.* “But if any harm follow, then thou shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.” 21 Exodus 23-24.


35. Richardson, *supra* note 32, at 150.

36. *Id.*

37. David D. Field and Edward Livingston influenced this movement toward criminal law codification. At the same time, Ireland and Australia were transforming their prison systems from retaliatory in nature to rehabilitative, which also had an influence in the United States. See L. Orland, *Prisons: Houses of Darkness* 29-33 (1975).

38. Richardson, *supra* note 32, at 150.

39. The first indeterminate sentencing legislation was proposed in New York in 1876. The legislation provided for no set minimum or maximum terms whatsoever, education of the offenders, and “conditional liberation.” The New York Legislature, however, did require that minimum and maximum terms of imprisonment be established. *Council of State Governments, Definite Sentencing: An Examination of Proposals in Four States* 5 (1976).

40. *Id.* See also Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation,* 7 Hofstra L. Rev. 29, 30-31 (1978).
for good behavior and of instituting maximum-minimum sentencing
guidelines.41
The rehabilitative ideal was first challenged in the late 1960s and
early 1970s.42 Various studies and treatises were published questioning
the validity and effectiveness of rehabilitation.43 Generally, the criti-
cisms focused on the issues of sentencing disparity for similar crimes,44
the courts' and parole boards' inability to accurately predict future
conduct by the offender,45 and the fact that, in general, rehabilitation
had not been proven to be sufficiently effective.46
As a result, another shift has occurred in the primary philosophy
behind criminal sentencing, not only because of the disenchantment
with rehabilitation, but also because of the high crime rates and
the “get-tough” law-and-order policy of the late 1970s and 1980s.47
Authorities have referred to this new concept as “justice,” “retribu-
tion” or “just deserts.”48 Other criminal justice theorists, however,
believe that this concept is a step back to retaliation.49 Nevertheless,
this trend has prompted many states to abandon or modify the indeterminate sentencing system in order to avoid the problems stemming from the rehabilitative theory. Retribution seeks to impose a punishment proportionate to the offense committed to prevent the offender from profiting from his crime. The theory promotes punishment for the sake of justice, and justice is served when the sentence is proportionate to the crime. Appropriate sentences result in fairness to both the offender and society.

In order to understand the relationship between a sentencing statute, the rationales of punishment and the impetus underlying the amended provision, a closer examination of deterrence, incapacitation, rehabilitation and retribution is required. Although each rationale is separate and distinct in character and effect, often a variety of rationales may be relied upon through the imposition of a single sentence or sentencing statute.51 Courts have stated that enunciating reasons for sentencing an offender is proper, and some have even suggested that such commentary should be required, not only to provide for a sound response to the offender's conduct, but also for reasons relating to possible appellate review.53

B. Deterrence

The deterrence theory is predicated upon the principle that punishment prevents people from breaking laws because the pain of imprisonment, a criminal sanction, will outweigh an individual's desire to engage in criminal activity. Many theorists believe that deterrence is

Richardson, supra note 32, at 151 (once rehabilitation came under attack, legal reformers turned to older theories of punishment and renamed retaliation, "retribution"). But see infra notes 180-81 and accompanying text.


51. See infra notes 188-210.


the sole purpose of the criminal law. The general aim of deterrence is to reduce the crime rate through the threat or use of punishment. The deterrence theory therefore has been termed "forward-looking" in that the effect of the rationale is geared toward the regulation of future acts.

There are two categories of deterrence: specific and general. The theory underlying specific deterrence is that the imposition of punishment on an offender will discourage him from engaging in subsequent criminal conduct. The goal of general deterrence is to punish the specific offender in order to discourage others in society from engaging in criminal behavior.


The purpose of punishment, be it a criminal sentence, a civil penalty, or punitive damages, is not to inflict suffering or to impose a loss on the offender. Its object is to act as a deterrent: first to discourage the offender himself from repeating his transgression; and, second, to deter others from doing likewise.


56. "The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed." Holmes, supra note 55, at 46. See also J. Kress, Prescription for Justice: The Theory and Practice of Sentencing Guidelines 230 (1980) (deterrence theory operates on "psychometric calculation of a 'threat' threshold sufficient to reduce the antisocial behavior of specific offenders"); G. Mueller, Sentencing: Process and Purpose 48 (1977) ("[t]he term deterrence seems to refer to the employment of terror as such a stimulus") (emphasis in original); van den Haag, supra note 42, at 51, 60-61; von Hirsch, supra note 42, at 38; Golding, supra note 44, at 95-96.

57. See infra notes 60-75 and accompanying text.


59. Golding, supra note 58, at 72-73; Hospers, Punishment, Protection, and Retaliation, in Justice and Punishment 21 (J. Cederblom & W. Blizek eds. 1977) "Punishment here is not because a crime has been committed and the offender deserves to be punished for it; the punishment is in order to promote good (and/or prevent evil) in the future . . . ." Id. at 25 (emphasis in original).


Both deterrence theories operate on the premise that members of society tend to anticipate the consequences of their actions.63 However, this rationale does not apply to “crimes of passion;” that is, crimes committed with emotions which render the individual incapable of “cool reflection.”64 A crime of passion is committed without consideration of possible consequences and, therefore, the amount of threatened or actual punishment will not have any effect on the offender’s actions.65 For example, since most homicides are crimes of passion, the deterrent effect of punishment is relatively insignificant.66 Deterrence is more likely to be an effective factor, however, in crimes such as burglary and kidnapping, where the potential offender has the opportunity to consider the possible consequences of his actions.67

An argument against the deterrence theory is that deterrence requires society to “use” an individual merely as a means to an end—the
deterrence is most controversial of all theories of punishment; “[t]he question here is whether punishment of these defendants, in this court, on these charges will, if well-publicized, deter others in this state . . .”; “[e]ven though few may be charged and convicted, many will understand that if caught, they face stiff sentences”) (emphasis in original); People v. Corapi, 42 Misc. 2d 247, 250, 247 N.Y.S.2d 609, 612 (Sup. Ct. Albany County 1964)(quoting Judge Cardozo in his essay Law and Literature in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 379 (1947)(Address before New York Academy of Medicine, Nov. 1, 1928):

Punishment is necessary, indeed, not only to deter the man who is a criminal at heart, who has felt the criminal impulse, who is on the brink of indecision, but also to deter others who in our existing social organization have never felt the criminal impulse and shrink from crime in horror.

Id. See also sources cited, supra note 61; ZIMRING & HAWKINS, supra note 54, at 38-39.

65. See supra note 63 and accompanying text.
67. MORRIS, supra note 42, at 58-84; MUELLER, supra note 56, at 51. See also Dangler, 556 F. Supp. at 197-98. In this case, the court referred to the relationship between sentencing and the degree of criminal intent involved. “Certainly the criminal intent involved in a coldly calculated series of acts designed to make money for the criminal with bad purpose either to disobey or to disregard the law is far higher than that involved in a momentary crime of passion or a crime of opportunity, sudden and overwhelmingly tempting.” Id. at 198.
reduction of the crime rate. Deterrence opponents object to the sentencing of an offender to imprisonment in order to make him an example to others so that they will not engage in similar unlawful conduct. These opponents would argue that an individual should not be used for this purpose. Nevertheless, advocates of the deterrence theory believe that the "use" of an offender is justified because the offender who has broken the law has forfeited his right not to be "used." Proponents of the deterrence rationale also maintain that this "use" promotes the greater good of lower crime rates and ultimately establishes a law-abiding society. In this regard, the interests of society outweigh the interests of the offender.

A corollary to the opponent's argument is that deterrence can be achieved unjustly by punishing anyone guilty or innocent with a disproportionally severe sentence. For deterrence to be successful, the important concern is what the public believes the person did, not necessarily what he actually did. Therefore, actual guilt or innocence is irrelevant. In addition, attaching disproportionally severe sentences to any offense would deter criminal activity (e.g., a twenty-year prison sentence for a parking violation). However, the response from the deterrence theory advocates is that such an abuse of this theory would result only in outrage, indignity, loss of respect for the criminal justice system, and juries not convicting offenders who would receive disproportionate sentences. The logical foundation upon which the deterrence theory rests would not support either punishment of innocent persons or imposition of disproportionate sentences.

Opponents of the deterrence theory argue that the mere threat of a prison sentence does not deter illegal conduct, citing not only high

69. See Kress, supra note 56, at 231.
70. See Golding, supra note 58, at 74-75; Kress, supra note 56, at 231; Singer, supra note 60, at 14-15; Ezorsky, supra note 68, at 330-33.
71. See Golding, supra note 58, at 75, 79-83 (author discusses view that deterrence justifies punishment of the innocent).
72. Pugsley, supra note 9, at 393.
73. Golding, supra note 58, at 76-79; Golding, supra note 44, at 96-98.
75. Pugsley, supra note 9, at 393.
recidivist rates, but also the fact that offenders currently awaiting sentencing were not deterred by the threat of punishment. However, proponents argue that the threat of punishment may have deterred a specific offender from committing more serious offenses, and that crime statistics do not reflect the number of citizens who avoid criminal behavior because of the deterrent effect of the sanction. Such statistics, they contend, merely indicate those instances when the deterrent effect of anticipation was ineffective. What remains unknown, however, is whether the offender acted despite the potential consequences of his action or because he was not fully aware of his fate once apprehended.

For general deterrence to be effective, the public must be aware of an action's threatened sanction. For this goal to be achieved, an evaluation of the means and degree of public dissemination regarding sentencing information is required. Deterrence, however, has not achieved ideal results because public awareness of crimes is most frequently focused upon sensational trials and not on the mundane offense and punishments.

Courts that have relied upon the deterrence theory for sentencing also consider the seriousness and nature of the crime involved. For example, in United States v. Brubaker, the defendant was convicted

76. See Golding, supra note 58, at 72; von Hirsch, supra note 42, at 38-39; Golding, supra note 44, at 73.
78. Id.; Golding, supra note 58, at 72.
79. von Hirsch, supra note 42, at 38-39. "[R]ecidivism among convicted offenders shows only that they have not been deterred, and indicates nothing about the effect of their punishment on the rest of the population. In the absence of any punishment, a much larger number of persons—who now refrain—might have committed crimes." Id. at 38-39.
81. See, e.g., J.M. Burns & J.S. Mattina, Sentencing 3 (1978); Golding, supra note 58, at 96.

The public is not very well informed on the sentences that are meted out, yet the general deterrence value of punishment is dependent on the publicity it gets. What the public hears about is a few horrendous crimes and a few sensational trials. Perhaps the state should take out newspaper advertisements giving the names of convicted offenders, the type of offense, and the sentence received.

Kress, supra note 56, at 231 ("[t]he study of effectiveness measures, improved information systems, and the public dissemination of sentencing information is called for, while the changing incidents of crime in the community—and public and press commentary concerning it—are legitimate concerns for the sentencing judge").
82. 663 F.2d 764 (7th Cir. 1981).
of two counts of embezzlement and one count of income tax evasion. He was sentenced to two consecutive five-year sentences for the embezzlement conviction and a concurrent three-year sentence for the income tax evasion. The lower court had justified the sentence because of the "consciously illegal" nature of the defendant's actions and the severity of the offense. The court stated that, "where there has been an individualized determination, it is proper for a sentencing court to place greater emphasis upon deterrence than other goals of criminal justice." 

Despite the problems associated with the deterrence rationale, it is still a critical consideration in sentencing policy decisions. Deterrence is based on a "forward looking," common sense approach, and "it is still a fundamental fact of social life that the risk of unpleasant consequences is a very strong motivational factor for most people in most situations." 

C. Incapacitation

Incapacitation or "neutralization" involves removing the offender from society, thus rendering him incapable of committing further criminal acts. The practical effect of incapacitation is the reduction of the crime rate by physically preventing the offender from endangering society. Incapacitation is generally appropriate in situations where the defendant poses a substantial risk to society. The rationale assumes that the offenses committed are so severe and the chance of repetition so great that the judge incapacitates the offender for the purpose of protecting society. 

Incapacitation can take many forms, including exile, house arrest, military service, banishment, deportation and incarceration.
ceration is the primary means of incapacitating in the United States.\textsuperscript{91} The incapacitation of an offender does not require the infliction of pain other than that inherent in the incapacitation itself. Although suffering and loss of freedom occur as a result of incapacitation, theoretically, these factors are considered to be unintended side effects.\textsuperscript{92} Incapacitation recognizes that incarceration is a severe penalty, and that the loss of liberty is itself a grave punishment.\textsuperscript{93}

Each of the several sentencing rationales discussed recognize society's right and obligation to incapacitate dangerous criminals in order to protect society.\textsuperscript{94} Incapacitation should, however, be used only to the extent necessary to attain its preventive purpose.\textsuperscript{95} In addition, the incapacitation should last only as long as the offender poses a danger to society.\textsuperscript{96}

A narrower concept of the incapacitation theory is "predictive restraint," which incapacitates offenders based on a prediction of their criminal propensities.\textsuperscript{97} The theory behind predictive restraint is that if the offender is considered likely to commit another crime in the future, then he should be currently incapacitated in order to protect society.\textsuperscript{98} This doctrine is supported by both the Model Penal Code\textsuperscript{99}

\textsuperscript{91} Incarceration has been defined as collective residential restraint. By restraint we mean that the individual is restricted to a narrowly circumscribed place . . . . By residential we mean that the place is, for a specified period, the individual's principle abode . . . . By collective we mean that the person must live in the immediate company of others, not members of his family or persons of his own choosing.

\textsuperscript{92} Twentieth Century Fund Task Force, supra note 42, at 70.

\textsuperscript{93} Von Hirsch, supra note 42, at 109.

\textsuperscript{94} See, e.g., Mueller, supra note 56, at 54.

\textsuperscript{95} Even among the staunchest advocates of a so-called non-punitive system, society's right and obligation to incarcerate dangerous offenders is generally conceded. Naturally, the principle of utility would dictate that, solely as far as neutralization is concerned, no more force should be employed than is necessary . . . .

\textsuperscript{96} Id.


\textsuperscript{98} See generally Golding, supra note 58, at 101-02; Von Hirsch, supra note 42, at 19-26; Cohen, supra note 97, 23-25.

and the Model Sentencing Act. The Model Penal Code states that an offender may be confined if the sentencing judge determines that during a suspended sentence or probation, there is a risk that he is likely to violate the law. The Model Sentencing Act relies on this forecasting of criminal activity when deciding which convicted offenders are to be imprisoned and for how long, stating that the danger the offender poses to society is the prime reason for his incapacitation.

The basic flaw in the theory of predictive restraint is the inability to sufficiently predict recidivist activity. Predictive restraint places a large amount of discretion with those entrusted to evaluate an offender's character. Accurately predicting future criminal behavior is exceedingly difficult. Those empowered to make the predictions—judges, psychiatrists and correctional officers—rarely check the accuracy of their decisions in order to learn from their mistakes. A problem of “overprediction” or “false positives” also exists. Overprediction occurs when the judge mistakenly classifies the offender as a recidivist. This mistaken classification has the most severe consequences for the non-recidivist offender, who faces an extended loss of liberty. An element of incapacitation is the belief that the deprivation of liberty is the severest penalty and that incapacitation should last only as long as the offender poses a danger to society. Overprediction results in an injustice to the offender and an abuse of the rationale itself.

100. COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELIQUENCY, MODEL SENTENCING ACT (2d ed. 1972) (hereinafter MODEL SENTENCING ACT).
101. MODEL PENAL CODE, supra note 99, § 7.01(1)(a).
102. MODEL SENTENCING ACT, supra note 100, §§ 1, 5, 9.
104. Dershowitz, supra note 103, at 46.
107. von Hirsch, supra note 42, at 22. “The offender’s confinement might have to be lengthy, if the aim is to prevent the offender from offending again. He would have to be held until his predicted criminal tendencies abated—which might take years . . . .” Id.
108. See supra notes 93-96 and accompanying text.
Various studies\textsuperscript{109} have concluded that the methods of forecasting criminal behavior, clinically or statistically, are not reliable. The expert must base his forecast upon the relationship between the defendant's current characteristics and his subsequent criminal behavior, since only grossly observable characteristics of the criminal population can be identified.\textsuperscript{110} The use of predictive restraint to incapacitate the offender is too uncertain to justify a satisfactory form of punishment. The idea of structuring a criminal justice system on arbitrary predictive factors is difficult to accept. "[W]hatever additional safety benefits might be gained . . . on the basis of statistical factors . . . simply are not worth the price of bringing into the criminal justice system an element of blatant injustice to individuals."\textsuperscript{111}

**D. Rehabilitation**

Rehabilitation has been the favored and primary purpose of sentencing criminals in the United States for the last one hundred and fifty years.\textsuperscript{112} This rationale

is part of a humanistic tradition which, in pressing for ever more individualization of justice, has demanded that we treat the crimi-
nal, not the crime. It relies on a medical and educative model, defining the criminal as, if not sick, less than evil; somehow less "responsible" than he had previously been regarded. As a kind of social malfunctioner, the criminal needs to be "treated" or to be reeducated, reformed, or rehabilitated. Rehabilitation is, in many ways, the opposite of punishment. It pleads for a non-moral approach. At the same time, incarceration, as distinguished from more historic forms of punishment, allows the possibility, at least theoretically, of both punishment and education occurring simultaneously.113

The theory of rehabilitation, or "resocialization,"114 was a rejection of the retaliatory forms of punishment,115 which generally employed prison sentences and was condemned for encompassing vengeance.116 A cornerstone of the rehabilitative ideal is the belief that, instead of punishing, the criminal justice system should educate.117 The rehabilitation occurs through the imposition of a sentence which allows for the treatment of the particular offender's "social malfunction" through such means as vocational training, psychiatric therapy, and electrical and chemical modification.118 The doctrine seeks to bring about changes in the offender's character so that he will be able to act

fords a more valid and profound significance than the exaction by society of a pound of flesh on repayment for commission of crime . . . Under any circumstances, it is abhorrent to cage a human being and bring his life to a useless, non productive, and deteriorating standstill while the clock ticks on. It is a complete waste of man's most precious and coveted commodity—time. Accordingly, we are constrained hopefully to provide a constructive and meaningful rehabilitative program while he is incarcerated, until a more effective alternative is found which will successfully stimulate motivation to change from a potential hostile, aggressive, and professional criminal career.

Id. at 555. See also, Mueller, supra note 56, at 55 ("I know of no American criminologist or lawyer who does not subscribe to resocialization or rehabilitation as a foremost aim of our correctional approach"); Mueller, Punishment, Corrections, and the Law, in The Tasks of Penology 47, 69-72 (H. Perlman & T. Allington eds. 1969) ("a correctional system must start with the proposition that everybody placed within its jurisdiction, i.e., every convict, is a fit individual for rehabilitation").

113. von Hirsch, supra note 42, at xxix.
114. Mueller, supra note 56, at 55.
115. See supra notes 35-41 and accompanying text; Twentieth Century Fund Task Force, supra note 42, at 83-100.
116. Id.
in a law-abiding manner upon release. Successful rehabilitation requires that each offender be treated separately in order that each individual sentence will promote that specific individual's reform.

The rehabilitative theory is supported by the Model Penal Code and the Model Sentencing Act. The Model Penal Code allows for the consideration of rehabilitation in a correctional institution if the sentencer is of the opinion that such action will result in the protection of society. The Model Sentencing Act states that criminal rehabilitation is sentencing's primary purpose and that treatment for the offender should last only as long as required to bring about his rehabilitation. The Act also maintains that in dealing with an offender's rehabilitation, individual characteristics and circumstances must be considered. Advocates of the rehabilitative theory argue that this justification provides a civilized society with a means to lower the crime rate, to deal with the offenders themselves, and to improve society at large. A sentence designed specifically to fit the offender, subjecting him to an individualized program, theoretically will reduce one's willingness to engage in subsequent criminal activity while providing him with the motivation, skills and treatment required to make him a contributing member of society. The proponents of this theory also argue that, since the recidivist rate is high, it is apparent that

119. See generally supra note 117 and accompanying text.
120. See Menninger, supra note 117, at 4-10; E. van den Haag & J. Conrad, The Death Penalty: A Debate 53 (1983); Golding, supra note 44, at 92; Menninger & Menninger, supra note 117, at 242-43.
121. Model Penal Code, supra note 99.
122. Model Sentencing Act, supra note 100.
123. Model Penal Code, supra note 99, § 7.01(b).
124. Model Sentencing Act, supra note 100, art. 1 § 1.
125. Id.
127. See, e.g., infra note 117 and accompanying text; United States v. Foss, 501 F.2d 522, 528 (1st Cir. 1974)(sentencing judge must consider "individualizing" sentence to offender so as to provide for offender's rehabilitation); Verdugo v. United States, 402 F.2d 599, 611 (9th Cir. 1968)("[t]here is undoubtedly a strong public interest in the imposition of a proper sentence—one based upon an accurate evaluation of the particular offender and designed to aid in his personal rehabilitation"); People v. Jacobsohn, 60 A.D.2d 607, 608-09; 400 N.Y.S.2d 136, 139 (2d Dep't 1977)(sentence must be condemnatory and evaluate offender's possibilities for rehabilitation); People v. Cerio, 34 A.D.2d 1095, 1096, 312 N.Y.S.2d 596, 597 (4th Dep't 1970)("[i]mprisonment, therefore, should be meted out with a view to the rehabilitation of the defendant as a useful and responsible member of the community") (quoting People v. Silver, 10 A.D.2d 274, 276, 199 N.Y.S.2d 254, 256 (1st Dep't 1960)).
no sentencing rationale works effectively and that the only way to curtail criminal offenses therefore is to reform the criminal offender.126

One of the major criticisms of the rehabilitative system is that different sentences are sometimes imposed on different offenders for the commission of the same or equivalent offenses. Specifically, sentencing disparity under the rehabilitative theory exists not only in length and severity, but also in decisions concerning whether to imprison an individual or to place him on probation.129 This disparity is often perceived as fundamentally unfair.130

Professor van den Haag mentions another problem regarding the rehabilitative theory. He states that if rehabilitation is given priority over the other rationales of punishment, justice and punishment themselves become irrelevant.131

Once the criminal is thought [of] as a sick person in need of treatment, his crime as a symptom of sickness, he does not deserve punishment. Disease is no crime, and treatment or cure is not justice according to what is deserved. Treatment for crime can only be effective or not. It can neither be just nor unjust . . . . For the strict rehabilitationist, the notion of crime is as irrelevant as the notion of justice or punishment. All he sees is a person in need of treatment.132

Other criticisms of the rehabilitative rationale include the argument that this justification for sentencing removes the judge from the sentencing process and places too much discretion in the hands of the behavioral scientists and criminal justice experts who “want a blank check, enabling them to write in their experiments in personality transformation.”133 Removing the judge from the sentencing process divorces from it the concept of punishment, and provides a freedom from “irksome legal controls” in treating offenders.134 One authority has referred to this concept as “lawless sentencing” which so far has

128. Campbell, supra note 118, at 36-38.
129. See Corecki, supra note 44, at 44-55, 74-81 (1979); Von Hirsch, supra note 42, at 12
(“[i]f one of two convicted burglars is thought likely to respond to community-based treatment while the other seems more amenable to a prison based program, that would be reason for putting one on probation and imprisoning the other”); Golding, supra note 44, at 92; Hospers, supra note 59, at 26.
130. Golding, supra note 44, at 92.
131. Van Den Haag & Conrad, supra note 120, at 54.
132. Id.
133. Pugsley, supra note 9, at 386.
produced "more cruelty and injustice than the benefits its supporters envisage[d]." However, proponents argue that the behavioral scientists are better able to decide the length of time required for treatment of the offender than the sentencing judge.

The most significant criticism of rehabilitation, however, is that no method has been proven fully effective. Starting in the late 1960s and 1970s, studies and treatises were published discussing the effect rehabilitative measures had on reducing the rate of recidivism. In comparing offenders subjected to rehabilitative programs with those not subjected to such programs, the studies found no significant statistical difference in subsequent criminal activity upon release. The Committee for the Study of Incarceration, reported in 1976 that few successes have been found in rehabilitative attempts. For example, the Committee's studies indicate that intensive supervision of the released offender has no effect in reducing subsequent criminal behavior, and that, although probation is regarded by rehabilitationists as a crucial component of the theory, recidivist rates among those on probation compared to those confined and then released are not substantially different. These studies, along with others, indicate

135. Frankel, supra note 8, at 88.
136. Gorécki, supra note 44, at 47; Mitford, supra note 117, at 80.

The idea is to remove the sentencing power from a . . . trial judge and place it in the hands of skilled experts in human behavior. These experts would look at the man rather than his crime, take into account all circumstances that may have driven him to break the law, keep close track of his progress in prison, and release him when he has demonstrated by his behavior that he is ready to return to the community.

Id. Mueller, supra note 56, at 56.
137. See supra notes 42-46 and accompanying text.
138. See supra notes 42-43.
141. Id. at 152-53. The studies relied on by the Committee for the Study of Incarceration were prepared by David Greenberg and are presented in Greenberg, Much Ado About Little: The Correctional Effects of Corrections, Dep't of Sociology, New York Univ., June, 1974.
that the rate of recidivism seems to be unaffected by the variety of rehabilitative programs, and that at best the concept of rehabilitation remains an ideal.\textsuperscript{145} However, recent studies have added to the confusion regarding the rehabilitative theory.\textsuperscript{146} This research has shown some success in rehabilitative methods and has shown some flaws in previous studies; for example, some researchers argue that the high recidivist rate is not because of the lack of programs, but because of the lack of useful job training and job placement for ex-convicts.\textsuperscript{147}

Courts, however, have been sympathetic to the individual needs of the offender in a variety of instances. An offender's individual characteristics and circumstances sometimes influence the court's opinion as to the appropriate sentence for the offender. In \textit{United States v. Gigax},\textsuperscript{148} the defendant was convicted of willfully making false and fraudulent statements on his income tax return. The court noted that in determining the sentence to be imposed, the judge must consider each defendant, examining all mitigating and aggravating circumstances "with an eye toward reformation and rehabilitation."\textsuperscript{149} Similarly, in \textit{United States v. Lopez-Gonzales},\textsuperscript{150} the defendant was convicted of illegal entry and a maximum sentence was imposed.\textsuperscript{151} The court stated that the punishment must fit the offender, rather than the crime.\textsuperscript{152} "There is a strong public interest in the imposition of a sentence based upon an accurate evaluation of the particular offender and designed to aid in his personal rehabilitation."\textsuperscript{153} These views demonstrate the intent of some courts to tailor their sentences to the needs and circumstances of each individual defendant and to aid the defendant in his rehabilitation.

Rehabilitation, by itself, is not a satisfactory rationale for placing an offender in prison. Even proponents of other theories, however, recognize the benefit of rehabilitation.\textsuperscript{154} Although an argument can be made that the efforts to link rehabilitation to sentence length

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{145} \textit{Van den Haag \& Conrad}, \textit{supra} note 120, at 53.
\item \textsuperscript{146} Martinson, \textit{California Research at the Crossroads}, \textit{22 Crime \& Delinquency} 180, 190 (1976); \textit{Martinson Attacks His Own Earlier Work}, \textit{Criminal Justice Newsletter}, vol. 9, No. 24, at 4 (Dec. 4, 1978).
\item \textsuperscript{147} See e.g., Palmer, \textit{Martinson Revisited}, \textit{12 J. Research in Crime \& Delinquency} 133, 150 (1975).
\item \textsuperscript{148} 605 F.2d 507 (10th Cir. 1979).
\item \textsuperscript{149} \textit{Id}. at 513 (quoting \textit{Williams v. New York}, 337 U.S. 241, 247 (1949)).
\item \textsuperscript{150} 688 F.2d 1275 (9th Cir. 1982).
\item \textsuperscript{151} \textit{Id}. at 1276.
\item \textsuperscript{152} \textit{Id}. at 1277.
\item \textsuperscript{153} \textit{Id}.
\item \textsuperscript{154} \textit{See Singer}, \textit{supra} note 60, at 97-100; \textit{Morris, Punishment and Prisons}, in \textit{Justice and Punishment} 157, 162 (J. Cederblom \& W. Blizek eds. 1977).
\end{enumerate}
\end{footnotesize}
should be abandoned, rehabilitation does have its place inside the prison. While rehabilitation is possibly not the ultimate or primary goal of sentencing, it should be the ultimate goal of the correctional system.

E. Retribution

Retribution or "just deserts," is a concept based on a moral theory of criminal culpability. The goal of retribution is to remedy the injustice caused by the offender's illegal act or omission through a just and proportionate sentence. The rationale is based on the premise that individual members of society voluntarily assume obedience to the criminal justice system in exchange for obtaining society's social benefits and that a balance of burdens and benefits is established. Within this framework, each member of society is responsible for his actions, and has the freedom of choice to engage in or refrain from criminal activity. When a member of society chooses to break the law, the theory of retribution requires that a punishment proportionate to the offense be imposed on the offender. The punishment is a "repayment" for the harm committed, which ideally will offset any harm caused by the offender.

The current cry is that "nothing works" and that, therefore, rehabilitation should be abandoned. This seems to be most superficial. What should be abandoned is the link between coercive efforts at rehabilitation and the duration of detention. The cage is not a sensible place in which to cure the criminal even when the medical analogy makes sense—which it rarely does. So, I want more rehabilitative programs in prison, even though rehabilitation is not a purpose of imprisonment.

Id. at 162.

155. Singer, supra note 60, at 98. The author states that not only should more opportunities and programs be made available in the prison system for the prisoners, but also that prisoners should be able to work for wages and thereby buy their way into programs offered by private industry. However, "all these rehabilitative programs are desirable and important; but time in prison should not be determined by program participation or by perceived progress toward rehabilitation. Sanctions imposed and the punishment visited upon offenders should depend upon their crimes." Id. at 98.

156. Id.


158. Pugsley, supra note 9, at 398.

159. See infra notes 169-74 and accompanying text.

160. Morris, Persons and Punishment, 52 The Monist 475, 479 (1968) ("[i]t is only reasonable that those who voluntarily comply with the rules be provided some assurance that they will not be assuming burdens which others are unprepared to assume"; "[t]heir dispositions to comply voluntarily will diminish as they learn that others are with impunity renouncing burdens they are assuming"); Pugsley, supra note 9, at 398.


162. van den Haag & Conrad, supra note 120, at 55.
benefit the offender may have received from the illegal activity.\textsuperscript{163}

Retributivists believe that, when punishing the guilty, society has the duty to impose sanctions.\textsuperscript{164} The duty to impose punishment centers around the idea of “unjust enrichment.” Punishing the offender disgorges that benefit the offender received unjustly from the illegal activity and restores the equilibrium of benefits and burdens in society.\textsuperscript{165}

This rationale for punishment is also considered by many criminal justice theorists as a reaffirmation of society’s commitment to the status quo regarding legal and illegal behavior. Retributivists are concerned primarily with the gravity of the offense committed and not necessarily with the side effects on the offender once the punishment is imposed.\textsuperscript{166} This narrow concern has been criticized by the proponents of the “forward looking” rationales—deterrence, rehabilitation and incapacitation.\textsuperscript{167} Retribution seeks to punish the offender for his illegal acts with a sentence proportionate to the offense committed, and is not primarily concerned with the effects the sentence may have on controlling or influencing offenders in the future.\textsuperscript{168}

The cornerstone of retribution is the proportionality between the punishment imposed and the offense committed. Retributivists attempt to structure the punishment to fit the crime and have referred

\begin{itemize}
  \item 163. Id.
  \item 164. GOLDING, supra note 58, at 90.
  \item 165. Morris, supra note 160, at 478.
  \item A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased . . . . Justice—that is, punishing such individuals—restores the equilibrium of benefits and burdens. Id. at 478.
  \item 166. See GOLDING, supra note 58, at 84; von HIRSCH, supra note 42, at 46-47; Harris, supra note 126; Hospers, supra note 59, at 22 (“the justification of punishment lies in the commission of past acts . . . .”; “[i]t is possible, even desirable, for a prisoner to be improved and rehabilitated during his term, but this is a fringe-benefit, not the purpose of punishing him . . . .”).
  \item 167. B. WOOTTON, CRIME AND THE CRIMINAL LAW 56 (1963)(retribution is backward-looking and therefore is not worthy of consideration); Bedau, Concessions to Retribution in Punishment, in JUSTICE AND PUNISHMENT 53 (J. Cederblom & W. Blizek eds. 1977)(retribution is “necessarily backward-looking in its orientation to punishment”; “[i]t is in some fundamental sense backward-looking; that is it is an unpleasantness that is only properly imposed in the way that it is because it is deserved; it is an unpleasantness that has been preceded by wrongdoing and is publicly responsive to it”).
  \item 168. See supra note 166.
\end{itemize}
to this concept as “commensurate deserts.”

Opponents of retribution, however, argue that there is no rational method to determine the proportionality between a specific crime and an imposition of punishment. Since absolute standards regarding proportionality do not exist, they claim retribution lends itself to greater subjective and individualized standards than do deterrence and rehabilitation. If retribution required exact proportions of punishment, this criticism would be correct. However, retributivists have stated that precise measurements of proportionality are not only unachievable in any system, but also are not required in order to satisfy the standards of retribution. They believe that a “rough” estimate of proportionality is sufficient.

The principle of “commensurate deserts” is founded upon common sense notions of justice and equity which view disproportionate sentences as inherently unfair. Legislators in construing statutes or judges in imposing sentences have the ability to fashion a proper and deserved sentence.

Retributivists also argue that their theory of punishment meets the needs of society to condemn illegal conduct, a principle referred to as the “expressive function of punishment.” This principle holds that society needs to punish the offender in order to restore social order.

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172. Singer, supra note 60, at 29.
and has been endorsed by the Appellate Division of the New York Supreme Court in People v. Jacobsohn in which the court stated that a "[s]entence must . . . encompass community's condemnation of defendant's misconduct . . . ."\textsuperscript{177} One commentator has stated that in retribution sentences, "[s]ociety is responding to its emotional need for the 'deliberate infliction of pain and hardship upon the offender'."\textsuperscript{178} This characteristic is one of the distinguishing factors of retribution, since the theory not only vindicates the criminal justice system, but also reaffirms and supports society's values regarding right and wrong.\textsuperscript{179}

Opponents of retribution often argue that this rationale is simply "legal vengeance."\textsuperscript{180} However, a distinction can be drawn between revenge and retribution. One scholar explained that

\[ \text{revenge is a private matter, a wish to "get even" with a person one feels has injured one, whether or not what that person did was legal. Unlike revenge, retribution is legally threatened beforehand for an act prohibited by law. It is imposed by due process and only for a crime, as threatened by law. Retribution is also limited by law. Retribution may be exacted when there is no personal injury and no wish for revenge; conversely, revenge may be carried out when there was neither a crime nor a real injury. The desire for revenge is a personal feeling. Retribution is a legally imposed social institution.}\]

\textsuperscript{181}

Retribution as a justification of punishment began to dominate sentencing philosophy in the late 1960s and early 1970s\textsuperscript{182} for a variety of reasons.\textsuperscript{183} During this period, there has been support in the United States Supreme Court for advocating and validating the use of retribution in fashioning sentences. In Gregg v. Georgia,\textsuperscript{184} the Court stated

\begin{footnotes}
\item[178] CAMPBELL, supra note 118, at 31 (quoting JOHNSON, CRIME, CORRECTION AND SOCIETY 173 (3d ed. 1974)).
\item[179] FEINBERG, supra note 175, at 118; MUELLER, supra note 56, at 40-45.
\item[180] GIBBS, supra note 61, at 82-83.
\item[181] VAN DEN HAAG & CONRAD, supra note 120, at 246. See also Hospers, supra note 59, at 22 (retribution is not "punishment for punishment's sake, nor the infliction of pain for pain's sake, . . . it is rather punishment for the sake of justice"); "[m]otives other than the desire for justice are irrelevant").
\item[182] See supra notes 42-50 and accompanying text.
\item[183] Id.
\end{footnotes}
that retribution "may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."\(^{185}\) In 1972, Justice Stewart, concurring in *Furman v. Georgia* \(^{186}\) stated that the Constitution did not prohibit retribution as a justification for punishment.

The instinct for retribution is part of the nature of man, and channelling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.\(^{187}\)

**F. Multiple Objectives in Criminal Sanctions**

Although each of the four sentencing rationales is distinct and unique in character, both courts and criminologists acknowledge that rarely will a single sentence or sentencing policy encompass only one of these principles.\(^{188}\) Since society's requirements and purposes regarding the criminal law are multi-faceted, a sentence or sentencing statute that reflects only one principle is inadequate.\(^{189}\)

When imposing an appropriate sentence, judges will often examine and evaluate each of the philosophical rationales for punishment before choosing which one will provide an effective sentence.\(^{190}\) Courts will occasionally recognize the operation of all of the rationales in supporting a single sentence.\(^{191}\) The Supreme Court in *Jones v. United*
States recognized that a specific sentence is chosen with respect to society's view of punishment and the court's determination of the proper response to the offender's conduct. Considerations of rehabilitation, retribution, deterrence, and incapacitation are all factors that may properly be weighed in determining a proper sentence.

Other courts have considered the concept of multiple aims when imposing a single sentence. For example, the Appellate Division of the New York State Supreme Court stated:

The proper imposition of sentence is probably the most difficult problem with which a trial judge is faced. A sentence must be fashioned strictly *ad hominem*, based almost entirely on how society will probably be affected by the strictures placed on the activities of a particular defendant. The process must take into account several factors: the rehabilitative, the incapacitative, the deterrent effect, and the vindictive [retributive].

Therefore, it is not uncommon for a single sentence to incorporate multiple punishment rationales. For example, in United States v. Hedman, the defendants were convicted of conspiracy, extortion and filing fraudulent income tax returns. The court acknowledged consideration of rehabilitation, retribution, and deterrence in fashioning a proper sentence. However, since "white collar" crimes were involved, it decided not to concern itself with rehabilitation. Due to the seriousness of the offenses committed, the judge decided to impose "relatively stiff sentences" as punishment and to "teach the public

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196. 630 F.2d 1184 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981).

197. Although disregarding rehabilitation for these offenders of "white collar" crimes, the court did not explain its reasoning. *Id.* at 1201.

198. *Id.*
that 'corruption, greed and lawlessness' "199 are not acceptable practices, with the hope of deterring others from engaging in similar behavior."200

Similarly, in United States v. Bergman,201 the court weighed the four rationales of punishment when considering an appropriate sentence. In this case, the defendant, a 64-year-old rabbi, pleaded guilty to knowingly and wilfully participating in a scheme to defraud the United States government. The court, in designing an appropriate sentence for this defendant, analyzed each rationale's effect. Considering rehabilitation, the judge stated that no one should be imprisoned for this purpose because imprisonment is punitive, not rehabilitative.202 If, however, the sentencer chooses to imprison the offender, the court stated that rehabilitative programs should be made available in prisons.203 The court determined that the incapacitation rationale in this case is inappropriate simply because the defendant was not a dangerous offender.204 The court recognized that this offender was unlikely to commit any further offenses in the future, hence there was no need for specific deterrence.205 The court did cite two aims of punishment that are served by the imposition of a prison sentence: general deterrence and retribution.206 Relying on the need to deter others from committing similar acts in the future and to punish the defendant for the serious offense committed, the court imposed a prison sentence on the defendant.207

Not only have sentences encompassed multiple objectives of criminal punishment, but some statutes have also been drafted with this intent.208 For example, in the Proposed Federal Criminal Code,209 the

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199. Id.
200. Id.
202. Id. at 499.
203. Id.
204. Id.
205. Id.
206. Id.
207. Id. at 500.

The purposes of this Article are to:
(1) punish a criminal defendant by assuring the imposition of a sentence he deserves in relation to the seriousness of his offense;
(2) assure the fair treatment of all defendants by eliminating unjustified disparity in sentences, providing fair warning of the nature of the sentence to be imposed, and establishing fair procedures for the imposition of sentences; and
drafters noted that the four rationales for punishment were the objectives in imposing any sentence. Significantly, the Code noted that one rationale may have more influence on the imposition of a sentence in a specific case than does another rationale. This point raises two questions: (1) which rationale or rationales should a sentencing statute serve, and (2) does the statute effectively further that rationale or those rationales?

IV. The Amended Provision in Relation to the Sentencing Rationales

The amended provision to New York's Penal Law section 70.30(1)(c) increases the severity of punishment by lengthening the time of incarceration that the multiple felony offender may receive at sentencing. In order to understand and comply with the provision's intent and effect, the sentencing judge should examine the statute in relation to the four sentencing rationales.

One of the specifically stated purposes of the amended provision is the seeking of retribution for the offender's acts, as expressed in the executive and the legislative memoranda. The legislators stated that, by increasing the sentence length for multiple felonies, they are ensuring that the punishment will be commensurate with the offense, hence maintaining the social equilibrium of benefits and burdens. This desire for a proportionate sentence is the cornerstone of the retributive theory. Another aspect of retribution expressed in the memoranda is the community's condemnation of the illegal acts. The statute was amended in response not only to various violent incidents, but also to society's need to inflict appropriate pun-

(3) prevent crime and promote respect for law by,
(i) providing an effective deterrent to others likely to commit similar offenses;
(ii) restraining defendants with a long history of criminal conduct; and
(iii) promoting correctional programs that elicit the voluntary cooperation and participation of offenders.

Id. at 95.

211. See supra notes 26-27 and accompanying text.
215. See supra notes 169-74 and accompanying text.
216. See supra notes 175-79 and accompanying text.
ishment on the multiple felony offenders.\footnote{See supra notes 5-7 and accompanying text.} Therefore, a primary intent of the amended provision is to seek retribution against the multiple felony offender in order to restore the equilibrium in society through the use of proportionate sentences.

Deterrence is another stated purpose of the amended provision. In the legislative memorandum,\footnote{1983 N.Y. Laws 2462.} it is stated that the amended provision's effect will add a measure of deterrence to other future offenders.\footnote{Id. at 2463.} The commonly held belief that increased severity will serve to deter future offenders\footnote{See Antunes & Hunt, The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy, 51 J. Urb. L. 145, 155 (1973)("[t]he commonly held opinion that severe sentencing will lead to a reduction in crime rates simply finds no empirical support . . .").
} has been disproven in numerous studies.\footnote{Tittle, supra note 221, at 416.}

This research has concluded that simply increasing the severity of sentences has little or no impact on the crime rate. Although severity of punishment may serve other functions, "high degrees of severity might be explained as reactive responses by legislators and judicial personnel to high offense rates, particularly where the certainty of punishment is likely to be low—as in urban areas."\footnote{ZIMING & HAWKINS, supra note 54, at 194-208; Antunes & Hunt, supra note 220, at 157-58; Cal. Assembly Comm. on Crim. Proc., Progress Report, Deterrent Effects of Criminal Sanctions, (1965); Chiricos & Waldo, Punishment and Crime: An Examination of Some Empirical Evidence, 18 Soc. Prob. 200, 209 (1970); Gibbs, Assessing the Deterrence Doctrine, 22 AM. BEHAV. SCI. 653, 653-71 (1979); Tittle, Crime Rates and Legal Sanctions, 16 Soc. Prob. 409, 416 (1969).}

Although some offenders might be deterred from engaging in multiple felonies because of the increased prison length, a sentencing judge should not interpret the statute as primarily one of deterrence. It is not likely that the amended provision will deter crime merely through increasing the length of imprisonment.\footnote{See supra notes 218-22 and accompanying text.}

The theory of incapacitation is also mentioned as one of the justifications for extending the prison term for the multiple felony offender. The legislative memorandum states that the amended provision increases the ability to protect society by removing the offender from the community.\footnote{1983 N.Y. Laws 2463.} The protection of society is the focal point of the incapacitation rationale.\footnote{See supra notes 13-18 and accompanying text.} Clearly the statute, both before\footnote{See supra notes 86-96 and accompanying text.} and
after the amendment,²²⁷ provides for incapacitation. However, the
additional intent behind the amended provision was to increase the
protection of society.²²⁸ Therefore, a judge should also consider inca-
pacitation for the protection of society when fashioning a sentence
under the amended provision for the multiple felony offender.

Nowhere in the statute or in the executive or legislative memoranda
is there any reference to the theory of rehabilitation.²²⁹ Increasing the
length of imprisonment by itself will not increase the amount of
rehabilitation one receives. According to some studies, increased sen-
tences actually increased the recidivist rates.²³⁰ Any intent to rehabili-
tate the multiple felony offender would be better expressed by provid-
ing more effective rehabilitative programs in the prison system. The
absence of any reference to rehabilitation may also be explained by
the shifts in public opinion regarding the credibility and effectiveness
of the rehabilitative theory.²³¹

The “diner incident”²³² provides a forceful example of how judges
may properly regard sentencing the multiple felony offender under
the amended provision. In this occurrence, several gunmen went on a
crime spree, attacking approximately one hundred citizens. The de-
fendants pleaded guilty to over 750 counts of robbery, rape, sodomy,
weapons possession, and numerous other felonies.²³³ If this incident
had happened after the amended provision took effect, the thirty year
sentence these criminals received most likely would have been in-
creased. It has been stated that retribution and incapacitation are the
primary aims behind the amended provision.²³⁴ These offenders pose a
clear danger and, in order to protect society, the judge should impose
sentences to incapacitate them. Because of the number and severity of
violent felony offenses committed, the fifty year maximum sentence
allowed by the amended provision²³⁵ is fair because it is commensu-

²²⁷. See supra notes 26-27 and accompanying text.
²²⁹. N.Y. PENAL LAW § 70.30(1)(c)(ii)-(iii) (McKinney Supp. 1983); 1983 N.Y.
    Laws 2462, 2755.
²³⁰. Levin, Crimes and Punishment and Social Science, 27 THE PUBLIC INTEREST
    96, 97-98 (1972). See also, SACRAMENTO CAL. YOUTH AUTH., THE COMMUNITY TREAT-
    MENT PROJECT AFTER FIVE YEARS (1967). In this project, convicted offenders were
given either traditional institutional treatment or a supervised probation program.
Two years later, those receiving the more severe punishment had a higher rate of
recidivism than those participating on parole. Id at 12.
²³¹. See supra notes 42-46, 129-47 and accompanying text.
²³². See supra note 7.
²³⁴. See supra notes 212-17 and accompanying text.
²³⁵. See supra notes 13-27 and accompanying text.
rate with the gravity of the crimes. The fifty year maximum term of imprisonment provides for a more retributive measure of punishment against the offender than does the thirty year sentence allowed under the old law. Had deterrence been the aim of the amended provision, there is a greater possibility that the sentence imposed would be unjust. Extended incarceration for purposes of deterrence may be unjust without empirical proof that longer sentences deter.  

Rehabilitation of the multiple felony offender in this instance is not an important consideration in imposing the punishment. Therefore, when sentencing the multiple felony offender, judges should focus on two rationales for punishment. The first is the need for retribution; the idea that the punishment imposed should be commensurate with the gravity of the offense committed so that “justice” will be done. The second is the need to protect society from the multiple felony offender by incapacitating him through incarceration. Although deterrence and rehabilitation are certainly beneficial effects of any sentence, a judge should not rely on these rationales when sentencing a multiple felony offender. Studies have demonstrated that increased severity of time of imprisonment by itself does not deter.  

In addition, there is no evidence to support the belief that rehabilitation was one of the intended justifications for the amended provision.  

V. Conclusion  

New York State Penal Law section 70.30(1)(c)(ii)-(iii) is a retributivist answer to the multiple felony offender. The intent of the amended provision is twofold: (1) to do justice by implementing a punishment more proportionate to the severity of the offender’s crime or crimes and (2) to incapacitate the offender by his extended removal from society. When a judge is confronted with imposing a sentence on a multiple violent felony offender, retribution as the primary reason for punishment is not only consistent with the intent of the amended provision, but also provides a just response to criminal behavior. Retribution is and has been an accepted rationale for imposing punishment. The statute therefore deserves prompt judicial recognition.

Edward P. Abbot

236. See supra notes 220-23.  
237. Id.  
238. See supra notes 229-31 and accompanying text.