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Punishment and Sentencing Alternatives

Contributors: Richard S. Frase

Editors: David S. Clark

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In the context of punishment, sentencing means the imposition of criminal penalties on defendants who have pled guilty or been found guilty at trial of one or more criminal offenses. For most crimes in most jurisdictions, the judge who receives the guilty plea or the finding of guilt makes the initial sentencing decision. However, subsequent decisions by the judge to revoke probation, or by correctional authorities to grant parole release, good-conduct credits, or temporary furlough, may have a substantial effect on the actual sentence carried out. Moreover, sentencing in the broadest sense often occurs before, or in lieu of, the judge's initial sentencing decision.

Police and prosecutors in all United States jurisdictions and in most Western nations have discretion to decline to charge offenders at all, or as fully as the law would allow. When they exercise this discretion, these officials are, in effect, exercising sentencing leniency that avoids or limits the formal sentencing powers of judges and the informal sentencing powers of correctional authorities. Similarly, when prosecutors and defendants engage in plea-bargaining negotiations, which typically involve recommendations or agreements as to the sentence or dismissal of charges, they are making sentencing decisions, directly or indirectly.

The most important dimensions of sentencing include the purpose or purposes of punishment underlying these decisions; the available sentencing alternatives (prison, fines, and so on); the legal structure limiting the judge's choice of alternatives and regulating the application of the sentence imposed (revocation of probation, release on parole, and so on); and the actual sentencing and punishment practices in a given jurisdiction. The choices among purposes, alternatives, and legal structures involve universal questions of justice and public policy that must be resolved in all legal systems. These choices raise issues of great importance given the potential severity of criminal penalties and the impact of crime on individual victims and the public. The choices actually made vary substantially across jurisdictions within the United States and in other Western nations and have evolved considerably over the past two centuries.

Sentencing Purposes

The traditional purposes and limitations of criminal punishment include retribution, rehabilitation, incapacitation, deterrence, and denunciation. Retributive (or just deserts) sentencing views punishment as being proper for its own sake, or for the sake of fairness to the offender, to victims of crime, to law-abiding offenders, and to other offenders who committed the same offense. The strictest version seeks to impose penalties directly proportional to the seriousness of the offense and the offender's blameworthiness. A more modest version, sometimes called "limiting retributivism," merely sets upper and lower bounds—sentences should not be excessively severe or unduly lenient. Within these limits, officials may pursue other purposes and the court should impose sanctions no more severe than necessary to achieve those purposes.

Nonretributive punishment theories view criminal penalties as justified based on the desirable consequences—in particular, the prevention of future criminal acts by this or other would-be offenders. Rehabilitation prevents or lessens future crimes by addressing the causes of the offender's behavior through treatment or education. Incapacitation prevents crime by physically restraining dangerous offenders—temporarily (by means of incarceration) or permanently (by execution). Deterrence uses fear of punishment to discourage future crimes by this offender (special deterrence) and by other offenders (general deterrence). Denunciation (also referred to as the expressive function of punishment, or indirect general prevention) uses criminal penalties to define and reinforce social norms. In the long run, this may be the most important crimepreventive effect of criminal sentences (the deterrent, incapacitative, and rehabilitative effects of sentences are limited since few offenders are actually caught and convicted).

Many courts and other officials have recently begun to apply a new sentencing theory known as restorative justice. The specific goals of this new paradigm are restitution, compensation, or other satisfaction for the victim or the community, victim-offender reconciliation and healing, and more active participation by victims and community representatives in the adjudication, sentencing, and punishment processes.

In any given case, the sentencing goals listed above are likely to be in conflict. For instance, imprisonment may provide general deterrence of would-be offenders, yet some of the incarcerated offenders may become worse in prison (more dangerous, or less able to cope with freedom). Mental illness or drug addiction may reduce the offender's blameworthiness, but may also indicate dangerousness and a need for incapacitation or treatment.

Historical Perspectives

In eighteenth century England and the American colonies, the predominant purposes of punishment were retribution, deterrence, and incapacitation. Confinement [p. 1247 ↓] was rare, and the courts used it mainly for debtors, persons awaiting trial, and a few minor offenders held in houses of correction. Most offenders were subject to corporal punishment (flogging, branding, the stocks, hanging), banishment, transportation to a penal colony, and fines. By the early nineteenth century, however, imprisonment had become the dominant method of punishment. This shift reflected increased revulsion toward physically painful penalties, changing views of the perfectability of humankind, labor shortages in the colonies, and colonial independence. At about the same time, legislatively fixed penalties gave way to laws letting judges choose from a range of penalties. However, discretion to grant probation in lieu of prison, and the possibility of early release on parole, did not arrive until the end of the nineteenth century, with increased attention to the goal of rehabilitation.

Emphasis on rehabilitation and scientific diagnosis and treatment methods continued to increase through the middle of the twentieth century, with corresponding increases in judicial and parole discretion. In the 1970s, this indeterminate sentencing system began to fall out of favor. Some critics argue that the broad discretion exercised by judges and parole boards permitted substantial disparities in the sentencing of offenders convicted of similar crimes, that case-specific assessments of offender amenability and dangerousness were unreliable, and that few treatment programs were effective. Other critics felt that judges and parole boards used their discretion to impose unduly lenient sentences. Critics proposed several reforms for reducing disparities by reducing sentencing and parole discretion. In some courts, judges began experimenting with voluntary guidelines. In 1980, the state of Minnesota became the first jurisdiction

to adopt legally enforceable, statewide sentencing guidelines, promulgated by a permanent sentencing commission and limiting both judicial and parole release discretion.

Contemporary Sentencing Structures and Procedures

Following Minnesota's lead, about twenty other states and the federal courts have adopted guidelines (although a few states subsequently repealed them). In more than half of these states, the guidelines are not legally binding on judges, and in about a third, the guidelines do not replace parole discretion. The federal guidelines remain controversial, but judges, attorneys, and academics have generally accepted most state guidelines.

A majority of states continue to use indeterminate sentencing (retaining broad judicial and parole discretion), but with some limitations—in almost all states, including those with sentencing guidelines, certain offenses or offenders (especially repeat offenders) are subject to mandatory sentencing laws, requiring the court to impose a prison term of at least a specified length. Unlike sentencing guidelines, such mandatory sentence laws do not permit departures to take account of unusual circumstances in a given case. Many other states have limited parole release discretion, while retaining broad judicial sentencing discretion. A few states allow juries to impose or recommend sentences, and this is particularly common in death penalty cases.

With or without guidelines, the judge has determined, traditionally, the facts bearing on sentences in a hearing separate from the trial or entry of a guilty plea and subject to few of the procedural protections of trial other than the right to counsel. However, U.S. Supreme Court decisions since 2000 have greatly reduced judicial sentencing fact-finding. These cases hold that any fact that increases the statutory maximum prison term, permits imposition of the death penalty, or justifies upward departure from the sentence prescribed by legally binding guidelines or statutory sentence recommendations must either be admitted by the defendant or submitted to the jury and proved beyond a reasonable doubt.

Sentencing Alternatives

Although all Western countries except the United States have abolished capital punishment, more than three-quarters of U.S. states and the federal government authorize it. However, only about half of the states have carried out executions in recent decades, and fewer than a dozen do so frequently. Death penalties apply to a variety of crimes, but in recent years, courts have only imposed them for murder.

Other sentences authorized in most jurisdictions include imprisonment in a state-run prison or locally operated jail, fines, and probation supervision. The [p. 1248 ↓] court may combine the latter with a suspended prison, jail, or fine sentence that it will not carry out if the defendant complies with certain conditions. Probation and suspended-sentence conditions can include periodic reporting to a probation officer or other supervisor; limitations on travel, place of residence, or associates; home detention or electronic monitoring; attendance at a day-reporting center; alcohol or drug abstinence, enforced by periodic tests for alcohol or drug use; restitution to the victim; community-service work; participation in educational, counseling, or medical treatment programs; and refraining from further criminal behavior.

Offenders sent to prison or jail may benefit from early release on parole, reduction of their sentence for good behavior, and temporary furloughs for purposes of education, treatment, work, job seeking, and family visitation. Finally, convicted persons often lose driving or other privileges or suffer other disabilities such as loss of voting rights, either automatically or at the discretion of various officials, and they may be required to forfeit certain property obtained by or used in the commission of the offense.

Sentencing Practices and Trends

About 80 percent of violent offenders in the United States receive either a prison or a jail sentence, usually the former. Jail sentences are typically for one year or less; prison terms are often much longer. The average time actually served in prison for different felonies varies from about three years for assault to twelve years for murder and nonnegligent manslaughter. Between 60 and 70 percent of property, drug,

weapons, and other felony offenders receive a custody sentence, with prison sentences somewhat more frequent than jail terms; the average prison time served by these offenders is one and a half to two years. The most common misdemeanor punishments are short jail terms, probation, and fines. Courts usually punish traffic violators with a fine or loss of driving privileges.

Sentencing practices vary significantly among U.S. and other jurisdictions. Incarceration rates (prison and jail inmates per one hundred thousand residents) are four times higher in some U.S. states than in others, and are five to ten times higher for the United States as a whole than in the countries of western Europe. Only some of this domestic and international variation reflects differences in the volume and seriousness of crime in these jurisdictions. Similarly, the dramatic recent increases in U.S. inmate populations cannot be explained by increased crime rates; adult arrests remained constant or declined between 1989 and 2002, but jail and prison populations almost doubled. A major reason for these severity increases and international differences is that crime and punishment have become important political issues in the United States, but less so in Europe.

The Future of Sentencing

Thirty-five years ago, there was widespread agreement that judges and correctional authorities should have broad discretion in the imposition and execution of sentences. By the early 1990s, political, media, legislative, and academic interest in sentencing had dramatically increased; rehabilitative goals had been abandoned or greatly deemphasized; judicial and correctional discretion had been considerably reduced; and sentencing severity had increased dramatically.

In the next thirty-five years, there is reason to expect further change in sentencing purposes, alternatives, structures, and severity. Sentencing purposes will probably retreat from the current offense-based approach, with greater attention once again given to case and offender-specific factors, in particular: (re)habilitation and (re)integration efforts, risk management, and restorative justice goals. Hybrid models such as limiting retributivism will reconcile the inherent conflict between offense and offender-based goals: offense-based values will set outer limits on maximum and

minimum allowable sentencing severity, within which courts may pursue offender-specific sentencing goals.

Thirty-five years ago, the only sentencing alternatives were incarceration (in prison or jail) and probation (with minimal supervision or other conditions). Since the late 1980s, the courts have given greater emphasis to intermediate sanctions such as intensive probation, day-reporting centers, home detention, community service, and day fines. These measures are cheaper than incarceration and provide more control and punishment than probation, so the courts are likely [p. 1249 ↓] to use them more heavily in the future. How much more will depend on whether states are willing to invest in staffing and other infrastructure to run these programs (which many local jurisdictions cannot afford). New technologies may also be employed—new biological and other predictive tools, more precise electronic monitoring, and blocking of chemical abuse and violence through medication or surgery.

Sentencing structures will also continue to evolve. More states will probably adopt guidelines despite the unpopularity of the federal version and the recently added procedural requirements for upward departures. Guidelines bring greater fairness and consistency to sentencing policy and practice, and the greater uniformity of guideline sentencing permits states better to predict future prison populations, avoid overcrowding, and set priorities in the use of limited resources.

At the close of the twentieth century, the United States had the most punitive sentencing system of any developed nation. State prison population increases have been slowing and sometimes even declining in recent years. Unlike the federal government, states must balance their budgets, and correctional expenses represent a large portion of a state's budget. As states continue to struggle with budget crises (and gain little help from the deficit-ridden federal government), they will look for ways to reduce correctional expenditures and make better use of available resources. States will find they can achieve these goals through sentencing guidelines which reserve prison for violent and repetitive crimes, although encouraging broader use of intermediate sanctions for mid-level offenders.

Richard S.Frase

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See also

- [Crime Trends](#)
- [Death Penalty](#)
- [Discretion in Legal Decision Making](#)
- [Legality and Discretion](#)
- [Parole](#)
- [Plea Bargaining](#)
- [Prisons and Jails, Criminology of](#)
- [Punishment, Economics of](#)
- [Punishment, Psychology of](#)
- [Restorative Justice](#)
- [Victims' Rights](#)

Further Readings

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