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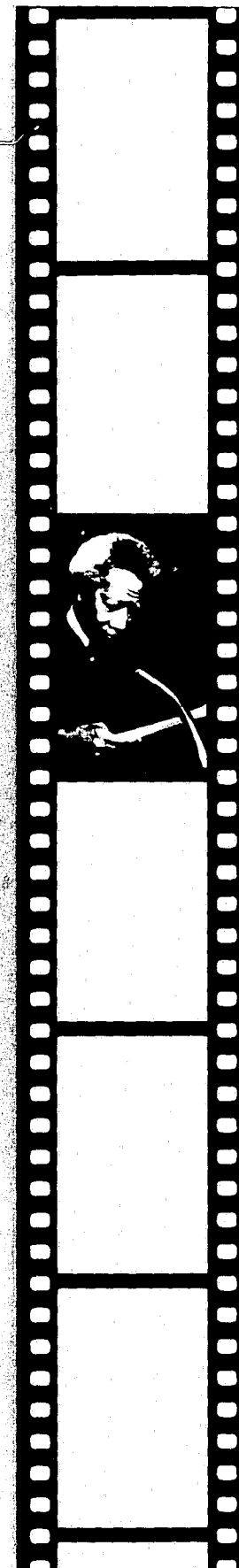
Sentencing

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Your discussions may be enriched by some knowledge of
the recent history of sentencing in America, by an overview
of recent changes in sentencing laws and practices, and by
a summary of the arguments that are made by opponents
and proponents of those recent changes.



Historical Background

Sentencing is the process by which judges impose punishment on persons convicted of crimes. The punishments imposed may range from probation without conditions to the death penalty and also include fines, community service, probation with conditions, and incarceration in jail or prison.

For most of the 20th century, all American jurisdictions had "indeterminate" sentencing systems. Criminal statutes generally authorized judges to impose a sentence from within a wide range. Probation to 5 years was a common range; probation to 25 years was not unknown. The judge's decision was usually final; appellate courts seldom considered appeals from sentencing decisions.

For defendants sentenced to prison, the judge's sentence set the outer limits, but a parole board would decide when the offender was released. The judge might have imposed a "3-to-10-year sentence," but the parole boards often had authority to release after 1 year, or after the offender had served a designated fraction (often one-third) of the sentence. Thus, whether the offender served 1 year in prison, or 3, or 5, was generally up to the parole board.

This system was called indeterminate because the prisoner's actual time in prison would not be known, or determined, until final release by the parole board. The system of indeterminate sentencing could be justified on a number of bases, but its primary theoretical rationale was that it permitted sentencing and parole release decisions to be individualized, often on the basis of the offender's rehabilitative progress or prospects.

Criminologists long accepted the view that an offender's criminal misbehavior could be analogized to a disease, which could be cured if properly treated in a proper institution. Cure became a major goal of both sentencing and incarceration; when released, the offender would enjoy a more satisfying, productive, and lawful life; he would not commit additional crimes and everyone's interests would be served. This medical model of disease and cure required that offenders be returned to the free world when professionals judged that they were "cured."

Treatment programs were seen as essential, and both vocational and psychological training programs were introduced into prisons. This rehabilitative outlook shaped even the vocabulary of criminal punishment. Prisons were often called "correctional" institutions, those for young adults were often called "reformatories." Indeterminate sentencing survived for so long because it could be many things to different people. For those not enamored of rehabilitation, its capacity for individualizing punishment meant that offenders seen as dangerous could be held for lengthy periods and thereby be *incapacitated*. For those concerned with *retribution*, indeterminate sentencing allowed sentences to be individualized on the basis of an assessment of each offender's unique circumstances and degree of moral guilt. Finally, the threat and possibilities of severe sentences could be seen as a deterrent to crime.

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The discretions of judges and parole boards were exercised without legislative direction as to which sentencing goals were primary, or which factors should be considered in setting sentences or determining parole release. Different judges in the same courthouse could consider the same factor as either mitigating or aggravating the defendant's culpability. Thus, for example, while one judge might consider drug addiction as a mitigating factor that justified reducing the offender's sentence, another judge or parole board member might consider such information an indicator of future criminality, and a reason to increase the sentence.

Recent Changes in Sentencing

By 1970, indeterminate sentencing had come under attack. Some critics claimed that the wide, unreviewable discretions of judges and parole boards resulted in discrimination against minorities and the poor. Some were concerned about unwarranted sentencing disparities. Because sentences could not be appealed, there was nothing a prisoner could do about a disparately severe sentence. A considerable body of research demonstrated the existence of unwarranted sentencing disparities and many believed them to be inherent in indeterminate sentencing. In addition, highly publicized reviews of research on treatment programs concluded that their effectiveness could not be demonstrated; the resulting skepticism about rehabilitative programs undermined one of indeterminate sentencing's foundations.

None of these critiques of indeterminate sentencing was uncontroverted. Supporters of treatment programs argued that such programs could and do succeed, or that the evaluation research was flawed, or that programs failed because they were poorly managed, or underfunded, or targeted on the wrong categories of offenders. Judges, but not only judges, argued that sentencing disparities were not as great a problem as critics contended. First, because judges were able to consider all factors characterizing the offender, the offense, and the offender's prior criminal record, many judges argued that most sentences were soundly based and only appeared disparate. Second, because individual judges inevitably hold different opinions and values, and have different beliefs about the purpose of punishment, their sentences properly might reflect those differences.

The critics of indeterminate sentencing have successfully attacked it in many jurisdictions. Changes in sentencing laws have swept the country. Many new systems are "determinate" in that parole release has been eliminated and the duration of a prison sentence can be determined at the time of sentencing. States as different and dispersed as Maine and California, or Florida and Washington, have instituted major changes. These include the abolition of parole, the establishment of detailed statutory sentencing standards, and the establishment of various systems of "presumptive" sentencing. A number of jurisdictions have established new administrative agencies called "sentencing commissions" and delegated authority to them to develop guidelines for sentencing.

Parole reforms—abolition and guidelines. The attacks upon indeterminate sentencing moved several States to limit or eliminate the discretion of parole boards. A dozen States, including Pennsylvania, Connecticut, Maine, California, and Washington, have recently abolished their parole boards. While this has effectively eliminated the indeterminate aspect of sentencing, it has not necessarily affected the wide discretion held by judges. In the early 1970's, Maine eliminated the parole board but allowed judges to impose any sentence from within a very wide range authorized by law (e.g., probation to 15 years). The legislature provided no guidance as to the "appropriate" sentence within that range. At the other extreme, States like California abolished parole releases, but adopted detailed standards for judges' sentencing decisions. Some jurisdictions retained parole release but adopted parole guidelines. The Oregon parole board and the United States Parole Commission, among others, voluntarily adopted strict guidelines to standardize their release decisions. This reduced both the unpredictability of sentences and the *ad hoc* discretionary aspect of parole release that had bothered many critics.

Sentencing commissions. In several States, including Minnesota, Pennsylvania, and Washington, sentencing commissions have developed comprehensive "sentencing guidelines" which attempt to standardize sentences, primarily on the basis of the offender's crime and his past criminal record. Of course, even where the legislature delegates the task of setting sentencing guidelines to a commission, it retains the right to ratify or reject the commission's proposals. The details of the guidelines systems vary substantially, as have their impacts. In Minnesota, it appears that judges have generally followed the guidelines and that sentencing disparities have been reduced. In 1984, Congress established a Federal sentencing commission to develop sentencing guidelines for the Federal system. That commission is scheduled to report to Congress by mid-1986.

Presumptive sentencing. Some of the new determinate sentencing systems provide a range within which the judge should impose sentences in ordinary cases. Others, such as North Carolina, New Jersey, and California, have established a single presumptive sentence. In California the "presumptive" sentence for a number of crimes is 3 years, but a judge may sentence an offender for either 2 or 4 years and still remain within the range authorized by the statute. In an example from Minnesota that was discussed in the Crime File program, the presumptive sentence is 49 months, but the judge may impose sentences between 45 and 53 months without leaving the range. In other States, however, that range may be much wider—20 to 50 years in Indiana for Class A felonies. If the range is too wide, one of the main reasons for removing indeterminacy—the effort to reduce disparities—may not have been achieved at all.

Not even the most restrictive of these schemes totally precludes the judge from imposing any sentence, so long as it is within the statutory minimum or maximum sentence. Even under sentencing guidelines, a judge may sentence outside the guidelines if a written statement of reasons is provided. Some States provide lists of aggravating and mitigating circumstances that may be considered in departing from the guideline sentence or range.

If the sentencing rules restrict discretion only for sentences of imprisonment but do not affect the judge's decision to imprison or not (the "in-out" decision), one purpose of the

reform may be substantially frustrated. In California, for example, while the percentage of persons convicted of burglary who were sentenced to prison rose after new sentencing legislation was enacted, from 27 percent to 35 percent, nearly two-thirds of persons convicted of burglary received no prison sentence, while one-third received a prison term within relatively strict guidelines. In Minnesota, judges follow the in-out guideline in 91 to 94 percent of the cases, thereby establishing some consistency in these decisions. It could be argued that the decision whether to imprison is more important, at least in terms of disparity, than the decision of how long to imprison.

Voluntary guidelines. Finally, many jurisdictions, such as Michigan and Denver, have experimented with "voluntary" sentencing guidelines, which provide judges with information on the "usual" sentence for the offense and the offender; the judge is not obligated to follow these guidelines. Voluntary guidelines have generally been developed by judges or by advisory committees appointed by the State's chief justice. Some judges favor voluntary guidelines, even though they believe judges should retain full discretion over each individual sentence.

Arguments and Counter-Arguments

Recent changes in sentencing laws and practices have not gone unchallenged. Some, as noted above, question the premises for change and the critiques of indeterminate sentencing.

Other critics argue that retribution or "just deserts," the primary purpose of many modern sentencing laws, is philosophically unacceptable in the late 20th century, and that sentencing grids which substantially constrain judicial discretion are unfair because they forbid judges to consider mitigating factors and to act mercifully. Some also argue that the endorsement of retribution (albeit "equal" retribution) as a proper goal of sentencing has led to severely increased sentences, which these critics see as undesirable.

Another concern about the new sentencing laws is that the perceived rigidity of the statutes or guidelines enhances the discretion of the prosecutor, particularly during plea bargain negotiations. Judicial discretion at least is exercised in the open, while prosecutorial discretion is generally exercised behind closed doors.

There is another concern not mentioned in the Crime File program: If determinate sentencing systems retain "good time" (time off for good behavior) to reduce sentences, prison guards and other prison personnel may effectively become sentencers. Minnesota and most other States that have adopted determinate sentencing still provide for substantial good time; California recently enlarged the amount of good time a prisoner can earn off his determinate sentence and has therefore enlarged the discretionary power of prison officials to affect the actual duration of confinement.

Yet another criticism of sentencing reform is that it has contributed to recent increases in prison crowding, first by causing the sentencing to prison of many offenders who previously would have received probation, and second by removing the "safety valve" of early release on parole in the event of overcrowding. This problem was avoided in Minnesota, where the legislature specifically instructed the sentencing commission to take prison capacity into account when it developed the guidelines. Minnesota has entrusted to the commission the job of realigning the guidelines to avoid overcrowding if it arises. A similar provision is contained in newly enacted Federal legislation. The provision should be emulated by any State considering changes in the sentencing system unless, of course, the State's citizens are willing to bear the financial burden of building more prisons.

The controversy over indeterminate and determinate sentencing reflects deeper arguments over the purposes of the criminal law. For the past century, those who argued for uncertainty and indeterminacy sought to use the criminal sentence as a means of crime control. They sought to frighten the potential offender, to rehabilitate the "treatable" offender, and to incapacitate the incorrigible in order to reduce victimization in society. Recent sentencing changes, while partly based on empirical disillusionment with these goals, also draw upon the retributive notion of a fair, certain, and equal punishment for all those who inflict the same harm upon society. The dispute over the purposes of criminal sanctions has persisted for centuries, and the recent changes are unlikely to resolve that dispute.

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Discussion Questions

1. What should be the purpose of sentencing—retribution, deterrence, incapacitation, or retribution?
2. Is it more important that sentences be consistent, which probably means that judges will be deprived of much of their discretion, or that sentences be "individualized," which probably means that there will be significant unwarranted disparities?
3. Should sentencing decisions be influenced by the size of the prison population?
4. Do you believe judges and parole board members can assess when or whether offenders are rehabilitated?
5. If you were a legislator, which would you favor—determinate sentencing or indeterminate sentencing?

This study guide and the videotape, *Sentencing*, is one of 22 in the CRIME FILE series. For information on how to obtain programs on other criminal justice issues in the series, contact CRIME FILE, National Institute of Justice, NCJRS, Box 6000, Rockville, MD 20850 or call 800-851-3420 (301-251-5500 from Metropolitan Washington, D.C., and Maryland).

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