

The Dilemma Of Sentencing

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THE DILEMMA OF SENTENCING

Introduction

A confusing variety of proposals to change the way criminals are sentenced is being offered to the public.

Each proposal argues it can best reduce crime and ensure equity in the criminal justice system. Almost every new sentencing scheme stresses "certainty of punishment" and reduction of sentencing disparity. They contend if these two conditions are met, protection of the public will follow. These conflicting contentions provide a dilemma to legislators and others who must decide on a concrete approach.

All are based on the belief that what we do to the convicted felon will have a major bearing on crime, and that previous sentencing methods have failed.

To analyze the various proposals, we must first decide what we hope for when we penalize criminals.

The Aims of the Criminal Penalty

The Michigan Department of Corrections believes public protection should be the overall aim of any criminal penalty.

The four functions of a criminal penalty that contribute to public safety are:

Retribution

A prison term as a penalty for a crime is sometimes necessary almost entirely because of the need for retribution. In very serious crimes which incite personal and moral outrage, a failure to punish with prison is likely to lead to further crime and disorder. This occurs not only because of a general weakening of respect for law when it appears offenders are flouting society's rules and getting away with it, but also in very grievous matters in which the victim or victim's relatives may take vengeance into their own hands by inflicting further violence. In serious crimes where violence, death or serious injury occurs, a significant period in prison is undoubtedly necessary; for most other crimes alternative penalties such as probation are sufficient for retribution. Retribution must be limited to fit the crimes. No more severe

a sentence can be justified than the act for which the person stands convicted would merit.

Deterrence

Most people obey the law because of nature, training and preference, not because they are afraid of the penalties. Few would commit a robbery or murder even if they were absolutely certain they would not be caught. Others would do unlimited harm in the community if they knew they wouldn't be penalized. The deterrence function of punishment, therefore, cannot be ignored. It should not, however, be overestimated.

Most persons in the act of committing a serious crime do not expect to be apprehended; others are out of control and give no thought to the consequences. While rational persons will be deterred by certain punishment, it is unlikely that any punishment will be perceived as "certain" when the vast majority of crimes go unsolved or perhaps even reported. In short, the real failure of certainty is not in what happens after conviction, but in what happens before that.

Rehabilitation

Although we should not overestimate the ability of a correctional system to motivate change in an offender, most people do abandon criminal activity after a few years, and we should retain the ability to recognize such change and act on it when it does occur.

If the way in which we sentence offenders does not allow this, then we have lost one of the major incentives for change and added both human and economic costs.

Isolation

One function relatively easy to achieve, though at considerable expense, is prevention of crime by isolating the lawbreaker in prison. For those who do not present any considerable future risk, and whose crimes do not merit harsh retribution, isolation seems unwise. The average prison term in Michigan at present is just over two years. Slightly over a third of the persons convicted of felonies in Michigan now receive prison terms. It would be financially impossible to use isolation in prison as a general solution to crime, even if it were morally justifiable. To lock up all offenders until they are too old to be much risk would be catastrophically expensive, and would prevent only a small part of serious crime.

The best public policy would seem to be to use isolation selectively with very long prison terms only for those whose conduct demands it and who have demonstrated high risk for further serious crime.

The above factors have to do with the crime prevention impact of sentencing. At least two general constraints or considerations must also apply. They are:

Justice

There are two failures of justice which sentencing can lead to. Disparity which occurs when persons with similar crimes and similar potentials for further violence receive widely different sentences because of the individual inclinations of the judge or Parole Board members. And inequity which occurs when people receive similar sentences although their crimes and potentials for violence are seriously different. Disparity can exist when a sentencing structure allows uncontrolled discretion. Inequity can occur when it allows no discretion for individual cases.

The ideal penal code should allow for the weighing of relevant factors by the sentencing judge and the correctional system in determining sanctions, but should limit or rule out the application of irrelevant biases or factors.

Cost Effectiveness

Among alternative systems which provide penalties which are just, the one which provides the greatest public protection for the least money is to be preferred. Some proposals which stress one or another of the goals listed above would provide even less protection than the current system, or would protect the public only at a staggering cost.

Michigan's Modified Indeterminate Sentencing Structure

An indeterminate sentence is one in which there is a maximum and a minimum sentence with wide discretion in between given to paroling authorities. This type of sentencing was created largely to accommodate rehabilitation in prison. It was designed to allow paroling authorities to decide when a person was "ready" for parole based on reformation or lack of it.

Under a pure indeterminate sentence a convicted felon sent to prison would get a term of one day to life and would stay in prison as long as the correctional system believed he should remain there. Most states, however, have had a modified form of indeterminate sentencing, as does Michigan and it need not be wedded to the concept of reformation.

In Michigan, an offender is given a maximum sentence set by the legislature for the crime of which he is convicted. The judge sets a minimum sentence which can be no more than two-thirds of the maximum. As an example, the maximum sentence under Michigan statute for burglary is ten years. If the judge wants to sentence as heavily as he can, he would give the offender a sentence of 6 2/3 to 10 years. Between the minimum and the maximum the Parole Board can release the offender on parole. There also is a relatively complicated "good time" provision which deducts time from both minimum and maximum sentences for good behavior while in prison. Good time increases greatly for long sentences.

The modified indeterminate sentence structure can include provisions for mandatory minimum prison terms. Prison in Michigan is mandatory only for first degree murder, armed robbery, burglary with explosives, ravishing a female patient, and felonies in which the perpetrator is in possession of a firearm.

The department believes Michigan's current penal code, which sets the penalties for crimes, has some limitations but that the concept of the modified indeterminate sentence is basically sound.

The major problems found in the current code involve the disparities and failures of justice which sometimes occur.

There have been instances in which individuals were placed on probation for very heinous offenses, and there are some built-in inequities because some offenses carry inappropriate maximums. For example, the writing of a bad check carries a more severe maximum than does a felonious assault and some serious crimes against children.

The judicial discretion which ranges from probation to two-thirds of the maximum for most crimes has led to some disparity. Most judges sentence rather consistently, but a few are very severe or very lenient and their decisions are not subject to review.

A major advantage of the current indeterminate sentencing system is that it does allow a correctional system to use its ability to react to change in an individual or to identification of dangerous individuals by either paroling or by keeping the person isolated longer because of future risk to society.

The present system of indeterminate sentencing normally allows enough time between the minimum and the maximum to do this.

Flat or Determinate Sentencing, And Mandatory Prison

Determinate or flat sentencing is sometimes preferred by those who wish to reduce what they perceive as inequities in the parole system. This has two forms, one in which the legislature sets a flat term for each crime, and one in which the judge chooses a sentence within a legislated range.

Under flat sentencing there is no parole. Michigan has a mandatory flat sentence only for first degree murder — life in prison.

Flat sentencing models make no allowance for either positive or negative behavior during the prison term. They are, therefore, the least suited from the standpoint of motivating or reacting to any change which occurs in prison. Also, since the length of the sentence is based only on the crime, and the crime by itself is not usually a strong indication of future dangerousness, people who are dangerous are likely to be released too soon and those who are not are likely to be held too long.

Flat sentences should not be confused with mandatory prison terms, which can be required whether sentences are flat or indeterminate. Many persons have proposed that prison be mandatory for all crimes involving violence. They believe not enough persons come to prison for such crimes, and that potential criminals do not fear the law because punishments less than prison are not severe enough.

Mandatory prison terms are designed, therefore, to increase certainty of more severe punishment. One problem with this approach is that less than one felony in twenty leads to conviction. Therefore, even if prison is certain on conviction it is still unlikely to occur for any given crime.

As an example, mandatory prison for felonies with firearms has been equated with certainty of punishment for such crimes. At most, about five percent of reported felonies lead to conviction. Of those felony convictions in which firearms are involved, about sixty percent now go to prison. Thus the probability of prison for gun offenders is now about sixty percent of five percent, or three percent. Mandatory prison sentences here mean that all of the five percent will go to prison, or that prison will be avoided only 95 percent of the time instead of 97 percent, as at present. There is little increase in certainty. The only increase is in severity for those who are convicted.

It still might be argued that psychologically the thought of "mandatory prison" will deter. But first degree murder and armed robbery are the two major offenses in Michigan which carry mandatory prison terms now and have for decades. Yet these two crimes have increased at a much faster rate than felonies as a whole.

Presumptive Sentencing

This type of sentencing, sometimes called "normal" or "standard" sentencing, is a form of flat sentencing which gives a limited range of discretion to judges. This is a relatively narrow range around a specific "presumptive" sentence determined by statute. The intent is to limit disparity but leave some flexibility for individual "aggravating" and "mitigating" circumstances.

In this model the process starts with the legislature establishing a "presumptive" sentence for each crime. Crimes may be as already defined in the penal code, or a new code may be set up. The "presumptive" sentence is said to be that fitting the typical first offender who has committed the crime in "typical" fashion.

The legislature also would decide how much each sentence could be increased or decreased for aggravating and mitigating circumstances.

This model would eliminate any parole board discretion over release of a prisoner. Good time could still be allowed to aid prison discipline.

Probation would be largely eliminated in this type of sentencing, though a presumptive sentence of probation is allowed in some cases.

The philosophy of most presumptive sentencing schemes calls for fairly short sentences, but would require that more persons come to prison.

The main problem with this system is that it does not provide well for public protection. Sentences under this model would be very short, and very dangerous individuals would be released sooner than under the current system. Risk for the future is not a factor in sentencing in this model nor can performance while in prison affect release, even though this may in some cases definitely be predictive of future violence.

To test this model's ability to protect the public, the department computed the presumptive sentence which would have been served under California's new presumptive sentencing law by

some of the persons released in Michigan who went on to commit very serious and violent crimes. Under the new California law, most of these individuals would have served about half as much time as they did in Michigan.

Most persons go to prison now for serious offenses, so this model adds little increase in certainty of severe punishment for the crimes of greatest concern.

Even though this scheme may reduce judicial discretion and therefore disparity between judges, it will grant greater sentencing discretion to prosecutors because they can substantially circumvent such a sentence through plea bargaining, charge bargaining, or sentence bargaining. Thus disparity is not eliminated whereas much discretion which may be relevant is. This is not the intent of proponents of this system, but it is a predictable result.

In common with other forms of flat sentencing, it is our view that presumptive sentencing does not appear to be very cost effective. If sentences are short enough to limit the cost, then early release of the dangerous becomes a problem; if sentences are made long to prevent this, then the cost becomes overwhelming.

If probation were largely eliminated, as this model would necessitate, and the average presumptive sentence were two years, we would triple the size of the Michigan prison system at a cost exceeding a billion dollars.

A Suggested Alternative

There are serious problems with the existing criminal code in Michigan, as elsewhere. In some cases persons convicted of serious crimes receive penalties far too light in view of the gravity of their offenses. The existing law also punishes some simple property offenses more severely than serious crimes against persons. There are also abuses of discretion; a few judges characteristically give very harsh penalties while a few others sentence in very lenient fashion. To the extent that these problems can be corrected by a revision of the criminal code that should be done. But it is essential to recognize that the existing law has some excellent features which should not be lost in our haste to correct its deficiencies. In the first place, the present "modified indeterminate" sentencing law allows for proper use of discretion which most judges use effectively. This is demonstrated by the fact that the persons that they placed on probation do about twice as well as the persons sent to prison. Clearly there is a selectivity which it would be well to preserve. If judges become handicapped

by a penal code which prohibits use of probation in appropriate cases, much money will be wasted on the incarceration of those who present no real threat.

Not only is probation often a more effective and less expensive response than imprisonment, it is also a mistake to think of probation as nothing but a form of leniency and prison as the only real punishment. A term of probation which includes definite requirements for employment and behavior can be a significant sanction in its own right. Being held accountable for responsible performance in the community is more difficult for some offenders than the short terms of incarceration which some sentencing reform proposals would impose. Prison is not the only form of punishment.

If probation is to be assigned selectively it is important to retain some discretion over who goes to prison and who does not. It is also necessary, however, for the law enforcement system to exercise some control over length of sentence even after an individual has begun serving his time. This is so because evaluation of the individual under sentence can tell us quite a bit about what he is likely to do after release. The Department of Corrections has performed research which indicates that some individuals are more than 40 times as likely to commit future violence as others. It is necessary to condition parole on this kind of information. If a sentencing scheme is adopted which forces release of the dangerous as soon as the non-dangerous then the corrections system can do nothing to protect the public from the dangerous offender it has identified.

In short, if out of concern for the abuses of discretion we eliminate discretion entirely, we will lose our ability to protect the public from the truly dangerous. And if we use the most expensive and harshest sanction of all, imprisonment, for the majority of offenders, we are wasting our resources needlessly. There is no way to define in any piece of legislation, no matter how complex, who needs to come to prison and for how long. Significant control needs to be retained by judges and paroling authorities so that the merits of each individual case can be weighed. To prevent abuses, however, and this is where current law falls short, there must be controls over such discretion so that people who are convicted of serious crimes do pay significant penalties, and so that others are not penalized excessively. It is certainly not beyond the power of human ingenuity to devise a code of criminal sanctions which will provide for these requirements without jeopardizing the public protection as would be done by most current proposals for sentencing reform which look only at the crime and not at dangerousness for the future.

The Department of Corrections has detailed a sentencing proposal elsewhere which tries to accomplish these aims. But whether that proposal or some other is adopted any major revision of the criminal code should certainly contain or allow for the following:

1. It must provide adequate penalties for very serious crimes. Harsh sanctions are often unnecessary. But when a felony has been committed in which the victim is deliberately and seriously injured, public respect for law and order, will be weakened if there is no sanction which measures up to the seriousness of the crime. In short, mandatory prison sentences should be required for such extremely serious crimes.

2. It must allow judges a reasonable range of discretion to weigh and apply the facts which have come out in the investigation and trial. The judge hears the case presented by both defense and prosecution. He must be able to apply all relevant factors in issuing his sentence.

3. It must allow the corrections system to act within reason on what it is able to learn about the offender. There is already a good deal of experience in hand by which we can separate the dangerous from the nondangerous. Since most who come into the prison system leave that system never to return for any serious crime, the system should have discretion to alleviate the public's tax burden by earlier release of those individuals who are unlikely to jeopardize public safety in the future. The same discretion must be used to isolate longer the minority of offenders who are identified as serious dangers for the future.

4. The discretion just described must be both limited and controlled. There must be statutory limits so that penalties do not exceed what each crime merits. Individual abuses of discretion are best prevented by establishing procedures for review of both sentencing and parole decisions where appropriate. Under current law, neither the judge's sentence nor the parole board's decision are subject to any review or appeal whatsoever. This has resulted in jeopardy to the public in some cases, and arbitrary harshness to the offender in others. If decisions which are out of line with both standards and usual practice become subject to review such abuses could be very largely eliminated. An appellate review would allow the continued use of discretion where that is appropriate, and would correct improper and arbitrary application of sanctions where it is not.

5. The length of time actually served for persons sentenced to prison should be based to some extent on performance during that sentence. This is necessary not only in the provision of good time allowances to maintain orderly behavior in prison, but

in terms of conditioning the parole date upon estimation of risk. It is also essential if persons under sentence are to have maximum motivation toward preparing themselves for return to society as productive citizens.

Any sentencing proposal which may be considered should as a minimum standard meet all five of these criteria. In our view presumptive sentencing fails this test. In conditioning the sentence solely on the crime and the circumstances surrounding it, it ignores potential dangerousness for the future, and offers no motivation for the person sentenced to abandon a criminal career and prepare to take a legitimate place in society. For once the sentence is handed down, that sentence is what the offender must serve, whatever he does. The time he or she serves will be empty, because nothing done with it will matter toward determining the day of release. If we are concerned, as we should be, with what happens after the offender is released, that can be a tragic shortcoming.

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