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Criminal Justice Decisionmaking: Discretion Vs. Equity

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DECISIONS ARE made at various stages of the criminal justice process which affect the ultimate fate of the alleged or convicted offender. While the chain of decisions may be governed in part by applicable law or formalized procedures, the process is often colored by a melange of personal or cultural biases, emotional factors, philosophical views, financial concerns, and political considerations. At one end of the spectrum, crucial decisions may be made on the basis of snap judgments, unmitigated prejudice, or outright whimsey. At the other extreme, and more closely approximating the ideal of blind justice and the application of Solomon-like wisdom, decisionmaking is relatively sophisticated, judicious, and objective. This continuum is of great significance to the offender because his or her fate may be determined partly by chance factors, depending upon where the offender falls in the system.

How well the criminal justice system works *typically* is debatable. In his thorough and well documented book, *Criminal Violence, Criminal Justice*, Charles E. Silberman presents a persuasive if rather surprising argument that the system is not nearly so faulty as many people suppose. Silberman contends that the great majority of criminals ultimately "pay the piper" for their misdeeds and generally receive essentially just and equitable treatment at the hands of the courts (though that author emphasizes that the *appearance* of justice is too often seriously lacking). More critical or downright malign views of criminal justice are frequently expressed and the courts, rightly or wrongly, often bear the brunt of criticism.

Most authorities would probably disagree with Silberman's contention that overall the courts achieve a very reasonable approximation of equity in sentencing. In fact, there is a considerable body of experience and empirical research which indicates that inequity (or unjustified disparity) in sentencing is a chronic and very serious problem.

Silberman observes, with a great deal of justification, that respect for the law is the cornerstone of any effective criminal justice system (while drastic methods of law enforcement and draconian sanctions will almost certainly prove counterproductive). However, respect for the law cannot flourish when both the substance and the appearance of justice are continually undermined by widespread and sometimes highly publicized examples of inequitable sentencing.

In an article entitled, "Our Losing Battle Against Crime" in *U.S. News & World Report*, issue of October 12, 1981, it was observed that: "Judges reach inconsistent conclusions. Even in the same courthouse, '15 years may hang in the balance depending on what courtroom a defendent is assigned to,' notes Martin Schwartz, a University of Cincinnati criminal-justice expert. Once early releases by parole boards are factored in, disparities in time served can be enormous. A recent study by the *National Law Journal* found that the average period spent in prison by convicted felons ranged from 13 months in South Dakota to 53 months in Massachusetts."

In a study of 2,224 convicted felons, Barry and Greer examined the causes of variability in severity of legal sanctions (*Journal of Research in Crime and Delinquency*, July 1981). These investigators concluded: "Approximately one-half of the total variability in sanctions was attributable to offense severity and prior record. Under the assumption that all the remaining, unexplained variation could be attributed to sentencing and plea bargaining discretion, it was found that sentencing decisions accounted for a substantially greater proportion of variability than plea bargaining decisions."

The "Washington Whispers" section of *U.S. News and World Report*, issue of April 12, 1982, includes this item: "Does the punishment fit the crime? Not according to a recent Justice Department survey of federal judges. The inquiry found that sentences imposed in identical hypothetical cases ranged all the way from probation to 25 years in prison—with Southern judges the toughest, New Jersey ones the most lenient."

While some cases of unusually severe sentencing have attracted public notice and even protest, it is very lenient sentencing which most readily provokes stormy reactions in the present climate of public fear and outrage about rampant crime. For example, judgment rendered in a 1981 Boston case produced an indignant response among the public and press when five young men convicted of a gang rape were placed on 2 years probation and fined $500 each, payable at $5 a week. The judge reportedly based his decision upon the fact that the defendants were first offenders from supportive families. Evidently in response to the outpouring of protest, the judge subsequently announced that he was reconsidering the sentence and the case was brought under review by the Supreme Judicial Court in Massachusetts.

Apparent leniency or severity in individual cases, or even consistent variation in sentencing for given violations of the penal code, does not necessarily establish that injustice has been done (or, to put it differently, that arbitrary or capricious disparity exists). Crimes and criminals often differ markedly despite their superficial similarities. For example, it is hardly realistic to believe that every violation of Section 211 of the California Penal Code (Robbery) actually constitutes the same crime or that all the perpetrators are beady-eyed and heartless Neanderthal types showing what the early Italian criminologist Lombroso called "the stigmata of degeneracy."

What does constitute inequity or unjustified disparity in sentencing? The point is arguable, depending upon one's philosophy, but it may be stated for the sake of brevity and simplicity that inequity exists when significant differences in sentencing occur which cannot be justified on the basis of the severity of the crime, the defendant's prior criminal history, or characterological considerations which have a demonstrable bearing upon the appropriate penalty or disposition.

In other words, it is not mere uniformity in sentencing which should be the goal but rather a fair and rational approach which allows for variability within a consistently applied framework. At least in theory, discretionary powers granted to judges and others should be the instrument for individualizing the administration of justice, according to the crime and the criminal, without doing serious injury to the principle of equity.

On the face of it, the individualization of justice is an immensely appealing concept. In my capacity as a forensic psychologist, I have met offenders who ran the gamut of character and behavior. Some of these alleged or convicted felons were habitual criminals while others had run afoul of the law for the first times in their lives; some were undeniably dangerous while others were remarkably unaggressive; some appeared utterly callous while others were overwhelmed with guilt, etc., etc. Before advocating the "throw'em to the dogs" approach, one would be well advised to remember the type of lawbreaker about whom it might be said, "There but for the grace of God go I."

In order to achieve a greater appreciation of the individualized justice approach, it is helpful to have at least some understanding of the avowed goals of the criminal justice and correctional systems. As identified in the literature, the major goals are usually four: (1) punishment; (2) deterrence; (3) incapacitation; (4) rehabilitation. The first of these goals, punishment, seems self-explanatory and its justification self-evident. After all, the inhabitants of the modern world are not so greatly removed genetically and culturally from the tribesmen of the pre-Christian era that we cannot relate with satisfaction to the Biblical admonition, "An eye for an eye, a tooth for a tooth."

In Western society, incarceration is the type of sanction usually most closely identified with punishment. Whether incarceration is in fact punishment is not quite so ambiguous as it might appear. While many offenders unquestionably suffer greatly in prison, there are others for whom the commitment to jail or prison is like throwing Br'er Rabbit into the briar patch. A recently committed first offender told me in amazement of a conversation he had had with an "old timer," a repeat offender who had returned to prison again and again. Asked why he had perpetuated this seemingly self-destructive cycle, the old-timer replied, "I like it here."

The concept of deterrence has to do with the expected reduction in crime resulting in either of two ways, or both:[1] (1) making crime so "expensive" for the already convicted offender that he or she would wish to avoid it in the future; (2) setting an example for persons in the community-at-large for whom the *prospect* of incarceration or other legal sanctions would deter antisocial behavior. That deterrence, in the first sense described above, is not greatly successful is evident from the high rate of recidivism in most states. The degree to which deterrence *is* successful, or could be successful given certain conditions, is a matter of strong debate. Perhaps the most crucial point is that jail or prison terms do not appear to have a sufficient deterrent effect among a minority of offenders, the habitual criminals, who account for a disproportionately high percentage of crimes committed.

The role of deterrence in the sense of example-setting is not easy to measure. That crime is probably suppressed by the risk of punishment, however, is illustrated in situations in which the external controls and sanctions of the law temporarily break down (thus reducing the chance of punishment). In the

[1]Sometimes referred to as specific and general deterrence.

seemingly civilized Canadian city of Toronto, for example, there was widespread disorder and looting when the police went on strike a few years ago.

Incapacitation is perhaps the one pillar of the criminal justice system that undeniably "works" so long as it is in force for a given offender. That is, the offender who is securely locked up does not have the possibility of inflicting further harm upon the larger community (and is thus incapacitated), though he or she may well continue to practice antisocial behavior within the jail or prison setting.

Finally, there is the concept of rehabilitation, an optimistic approach that enjoyed a considerable vogue from about the early 1950's until the middle to late 1970's. The basic idea was that offenders could be taught the various skills of living that would facilitate a positive and law-abiding adjustment in the community (though for many offenders this would be a process, technically speaking, of *habilitation* rather than *rehabilitation*). It might be a bit premature to announce the demise of rehabilitation, finally and irrevocably, but it would be fair to say that the practice of rehabilitation is in a very anemic condition at present. For example, the enactment of the determinate sentencing law in California, which went into effect on July 1, 1977, reflected widespread disillusionment with indeterminate sentencing based upon "... treatment of prisoners under the medical model hailed as the most advanced and enlightened in the country" (Brewer, Beckett, and Holt in the *Journal of Research in Crime and Delinquency*, July 1981).

Though conceptually distinct, the four major goals of criminal justice are interrelated in practice. For example, punishment is thought by some to deter; the probability of recidivism (the obverse of deterrence) is obviously related to the identified need for incapacitation, and so on.

The application of punishment *per se* (as a form of societal vengeance) rests upon strictly philosophical assumptions, not subject to any final proof, and the justice of any given punishment can only be judged according to the prevailing social consciousness or moral lights of a particular time and culture. For example, it would be considered barbaric today in most societies to hang children for petty offenses, as did occur in an earlier era. Though the issues have changed over time, a debate still rages about the "right" philosophy of punishment. Beyond the issue of punishment in its narrow sense, the remaining goals of the criminal justice system all involve an assessment, explicitly or implicitly, of the character and behavior patterns of the particular offender.

One of the key issues underlying an assessment of the individual offender, especially the more sophisticated approaches to evaluation, is the matter of *prediction*. Will the convicted person reoffend (deterrence); is there a demonstrable need to protect society by locking up the offender for a greater or lesser period of time (incapacitation); will the offender respond positively and justify the use of funds and resources to provide him/her with the skills of living (rehabilitation)?

Our present capacity to predict behavior is limited, though not without value in some cases. It seems very likely that the accuracy of prediction increases significantly at the extremes of the continuum of social adjustment. For example, the probability of serious recidivism would be relatively low for an individual who at age 30 commits his first significant offense, involving strong situational factors, after a lifetime of employment stability, living according to social conventions, etc. Conversely, a relatively poor risk would be the person who has been a chronic behavior problem, with many arrests, poor work history, drug problems and the like.

Nevertheless, there remains a large "gray area" with respect to prediction and the problem is particularly acute in the area of predicting violence. Many studies have shown that the "misses" generally exceed the "hits" even among the more elaborate and sophisticated endeavors to predict violence. An excellent discussion is available in John Monahan's book, *Predicting Violent Behavior* which documents the difficulties and thorny issues in this area.

A study done by my colleague Dr. Terrill Holland, in collaboration with N. Holt and G. E. Beckett, reaches some significant and somewhat surprising conclusions about violent and nonviolent recidivism (*Journal of Abnormal Psychology*, Vol. 91, No. 3). This study shows that there was *no* significant relationship between the number of past violent offenses and future violence in a 32-month followup period after the offenders returned to the community. In other words, the number of past violent offenses would be of no help in assessing whether a given individual would become violent again. However, there was a predictive relationship between nonviolent criminal history and the *general* probability of recidivism (either violent or nonviolent).

At one extreme, there are some persons, probably a relative handful, among whom violence is a very frequent occurrence—the habitual barroom brawlers; certain volatile, psychologically disordered individuals; some juvenile gang members, and so on. However, this pattern is not typical of the vast majority of criminals, even those characterized as violent offenders who may acquire this label on the basis of one, two or three incidents in which violence was actually demonstrated. The difficulty of predicting violence is probably related to the fact that it is actually a rare phenomenon among a vast "universe" of behavioral events. For most persons, violence might be called a *contingent* response, elicited only when there is a particular convergence of situational factors and certain psychological states of the individual.

A seemingly amiable older gentleman I evaluated for the court had been convicted of Assault With a Deadly Weapon after firing shots at a house occupied by his former girlfriend and another man, apparently her new boyfriend. He had also threatened them with a gun in an earlier incident. It was verified that he had served prison terms in another state for two different homicides, both involving the deaths of women with whom he had been romantically involved. He had been released on parole about 10 years before the assault case and had no record of arrests in the intervening period. His known violence was infrequent, but when it occurred it was with deadly force, evidently all under circumstances in which he was disgruntled in his love affairs.

Given that violence is usually difficult to predict, it would appear that sentencing alternatives, in general, should not be greatly influenced by estimates of the probability of violent recidivism (though there are exceptional cases). This consideration is particularly critical in view of the rising tide of crimes against persons—61 percent of the current commitments to the California Department of Corrections are for this type of offense broadly speaking (though not all, of course, involved actual physical harm to victims) compared to 40 percent 10 years previously.

To recapitulate, the formal considerations for criminal justice decisionmaking involve an assessment of the crime and the criminal, factors which must be fitted into the matrix of social goals (punishment, deterrence, incapacitation, and rehabilitation). Judicial and administrative discretion forms the keystone of a system which, in the best case, produces fair and rational discriminations among defendants or, in the worst case, creates a crazy quilt of inconsistency.

Diversity is probably more the norm than the exception in the human affairs and not necessarily the prime evil to be stamped out in the criminal justice system any more than in any other area—after all, a counterbalancing of contending social forces is often desirable. The problem is how to bring diversity within tolerable limits, allowing for legitimate differences in philosophy and practice, while at the same time not unduly penalizing offenders by an incoherent application of statutes and administrative procedures. Why has this desirable goal seemingly been so difficult in the attainment?

As a starting point for addressing the question raised above, I would suggest the following simplistic but nonetheless descriptive statement: Criminal justice decisionmaking is just not easy in many cases. The decisions are not easy, that is, if the personality and case factors are considered in their full and sometimes baffling complexity. Consider, for example, two cases I have handled for purposes of court evaluation within the last year or so. Both cases involved first offenders, one relatively youthful and the other elderly, who pled guilty to Voluntary Manslaughter.

The younger offender was one of several defendants who participated in a gang-style shooting in which an innocent youth merely standing on a street corner was killed and another was wounded. This offender displayed a distinctly cold manner and showed not the slightest remorse for his part in senselessly taking the life of another human being. The elderly man had killed his wife, this "wonderful woman" as he tearfully called her, in a classic and apparently unpremeditated crime of passion. Should these two offenders be treated equally before the law because of the technical equivalence of their offenses? (Obviously, this simplified and abbreviated account does not do justice to all the case factors which might be considered relevant and important.)

That criminal justice decisionmaking remains an obdurate problem involves three key issues: (1) Though progress has been made, scientific understanding of criminal behavior is in a relatively early stage of development (the highly desirable but elusive goal of predicting behavior being one of many examples); (2) differences in philosophy will probably always exist regardless of the relevant scientific considerations (e.g., the question of applying the death penalty); (3) the decisionmakers are themselves human, with all this implies for their potential for wisdom or foolishness (or simply the inherent human quality of being different for whatever reason).

With respect to the third point noted above, I can illustrate with data pertaining to evaluations of convicted felons performed by some of my colleagues and myself. A service to the courts, these evaluations conclude with a general recommendation for sentencing (e.g., a grant of probation if consistent with public safety or commitment to state prison or other state institutions). It is evident from extensive statistics that there are systematic differences among decisionmakers (based on their recommendations), despite lengthy experience and/or professional training and despite efforts to promote a high level of objectivity in decisionmaking.

With whatever goodwill and professionalism one may approach a criminal justice decision, one must achieve a perceptual *gestalt* (whole) from the per-

sonality and case factors—a *gestalt* that someone else might perceive quite differently. To stretch a point a bit, it is rather like two human subjects looking at the same Rorschach inkblot; one "sees" a frightening vampire bat while the other "sees," just as confidently, a harmless butterfly.

Is there an answer to the dilemma of criminal justice decisionmaking and, in particular, sentencing disparity? Certainly there is no simple answer apparent and quite possibly no single answer sufficient for all purposes. Broadly speaking, however, there are at least three alternatives: (1) continue as is or introduce minor changes; (2) mandate the use of judicial sentencing guidelines, binding to a greater or lesser degree (total elimination of judicial discretion is opposed by most authorities); (3) create a statutory approach to sentencing which would be prescriptive in nature. To choose involves a complex set of considerations—philosophical, practical, and scientific.

From a philosophical standpoint, there is a considerable body of opinion favoring the so-called "just deserts" or "commensurate deserts" model of sentencing. That is, penalties are meted out in proportion to the actual harm done in the offender's current crime (with prior criminal history factored in as a rule). The just deserts approach (which receives an excellent discussion in Von Hirsch's book *Doing Justice: The Choice of Punishments*) may, but does not necessarily, conflict with other social goals such as rehabilitation. While some may object to giving a lower priority to rehabilitation, which remains a worthy goal, most correctional systems and programs have not yet demonstrated any great proficiency in "improving" offenders. In any event, choosing some offenders for rehabilitation (e.g., work furlough or drug abuse programs) and other offenders for punishment (e.g., state prison) very likely works out to be a class and education related phenomenon which is inherently unfair. There have been many well-informed and sometimes passionate denunciations of our destructive prison systems and our historical emphasis upon punishing offenders, such as Karl Menninger's *The Crime of Punishment*, but if society is to demand its "pound of flesh" it can at least be extracted with some semblance of equity.

In my opinion, judicial and administrative discretion should not be removed from the system but should be narrowed and placed within a structured framework. In particular, I would favor judicial guidelines which provide a definite *target* sentence, based upon the just deserts philosophy and derived specifically from objective determinations of current offense severity and cumulative criminal history (not a highly original formulation on my part, I must hasten to add). The judge should be allowed some discretion in departing from the target sentence, but only with cogent written justification and only according to established criteria for such departures.[2]

There have been a number of important studies of sentencing disparity and various proposed remedies. The sentencing model I personally favor is in some respects similar in principle to the approach recommended by the Twentieth Century Fund Task Force on Criminal Sentencing. Specifically, the approach I would advocate is to consider the statutory minimum as the *base* penalty for all offenders convicted of a given offense with the possibility of enhancements (a higher level of penalty) by clearly defined graduations according to either of two conditions, or both: (1) an objective analysis of the nature and severity of the instant offense based upon clear written criteria for making such determinations;[3] (2) the number, severity, and recency of prior offenses (convictions), summated according to an objective formulation.

Suppose, for example, that a young offender is convicted of second degree burglary on the basis of entering an unoccupied residence through an open window and stealing $50 lying on a table. Assuming no complicating conditions, an analysis of the crime would presumably indicate that minimal harm had been done and would point to the statutory penalty—provided there were no enhancements through prior criminal history. Would the victim or society be better served by damaging the young offender's life, and causing the taxpayers enormous expense, by locking up this person in a prison for, say, 2 years (the "mid-base" term in California for second degree burglary)? On the other hand, given the same circumstances for the current offense but also given that it was the offender's third burglary conviction in 5 years, there would be a greater demonstrated need for incapacitation and thus an enhancement (a specific addition to the base penalty) because of prior criminal history. In this way, a more rational and equitable system of criminal accountability could be established with a wide base in time (i.e., cumulative social harm). However, some authorities believe, and I agree, that it would be desirable to build in a gradual "forgiveness" or decay factor in order that an offender not be caught forever in the web of prior criminal history.

The approach outlined above is clearly not without problems in conceptualization, execution, and

[2]The views expressed by the author are his own and do not necessarily represent the official position of the California Department of Corrections.

[3]Another formulation worthy of consideration, though more complex and perhaps more difficult to administer, would be to weigh the harm done in relation to possible mitigating circumstances, such as provocation by the victim. Homicide cases involve special considerations, in terms of basing the penalty upon the degree of harm done, since obviously there are no degrees of death.

philosophy. One of the important practical problems is that official records as to prior criminal history are not always models of completeness and clarity. Furthermore, Charles E. Silberman, in the book previously cited, argues that prescriptive sentencing might well aggravate rather than alleviate the problem of inequitable sentencing and would shift even more discretion to prosecutors—clearly, points to be considered in the development of any new system.

Whether the approach I have advocated would be more or less punitive than existing methods would depend upon several factors, such as the weighting of prior criminal record and the thresholds established for escalating the penalty to the next higher level of severity. It might well increase penalties for repeat offenders who have posed the greatest or most persistent dangers to society. By the same token, it might on the average reduce penalties for first offenders and others whose criminal histories are not extensive. Increased severity of sanctions across-the-board would be a simplistic and probably self-defeating approach, and it is important that the system work in a very selective way to identify offenders for more severe sanctions according to their history of harm to the community.

It could be argued that restrictive guidelines or targeted sentences would in effect constitute an impersonal "computer model" of sentencing. That danger does exist but it seems doubtful that on the whole the targeted sentence approach would produce any greater denigration of the individuality of offenders than presently prevails—the vast majority of defendants pass through the system as more or less faceless nonentities. The subjectivity of most current methods of sentence determination may foster the illusion of individualization because decisionmakers would generally prefer to believe they are "considering the individual" but the components and processes of decisionmaking go unexamined.

Any prescriptive sentencing model, like a computer program, is the product of human minds and as such is not inherently any more impersonal or inhumane than human decisions reached by more subjective means (except perhaps that the emotional elements of decisionmaking are filtered out to a large extent, for better or worse, through a prescriptive approach). Furthermore, the guidelines or sentencing model really only provide the bare skeleton of the decisionmaking process and many of the key judgments would be interpretive and subjective.

What about questions of intent, extenuating circumstances, the character of the defendant, and other factors traditionally considered by the courts as a partial basis for sentencing? Some of these considerations would be captured, at least implicitly, in the analysis of the crime and the criminal history. For example, the generally good character of "that nice Mr. Jones," who assaulted his neighbor during an argument over a garden hose, would be reflected in the fact that he had managed to live 45 years without ever incurring an arrest. Still, it is true that some richness of information would be lost if only the narrowly defined criminal case factors were considered. The issue would be whether any additional considerations would be of such compelling relevance and substance as to justify a departure from the targeted sentence, to set a given offender apart from others who had committed a crime of similar nature and severity. As noted previously, judges should have latitude—as long as accountability is maintained—for dealing with cases which merit special treatment or somehow fall beyond the pale of the usual crime case considerations.

Those who agree with Silberman's thoughtful argument that the adult courts already operate remarkably well, despite their creaky workings and sometimes shabby appearance, will not be well-disposed to rapid or drastic changes. Clearly, the courts do an enormously difficult job, often very well, and to point to specific problems is not to indict the whole system. In the matter of sentencing procedures, however, many authorities agree that an overhaul is overdue. Changes could be implemented which, I believe, would greatly increase respect for the law. As it is, offenders are in effect invited to play "Russian roulette" with the system—and many continue in crime because they bank on being lucky players. In my opinion, it is highly important to introduce a great deal more *predictability* into sentencing, whatever method(s) may ultimately be chosen. It would also appear important to reorient the justice system to dealing in a more systematic fashion with the overall pattern of antisocial behavior by repeat offenders (a much more pressing concern than the largely law-abiding episodic offenders). Conceptions of justice will undoubtedly remain diverse, and rightly so in some respects, but achieving a reasonable consensus on sentencing policy should be ranked as a high priority social goal.

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