



INTRODUCTION

Reflections on Sentencing Reforms

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Whether in the state or federal system, the vast majority of criminal defendants who are not screened out of the criminal justice process before trial either plead guilty or are convicted. Two major systemic questions immediately spring from this fact. First, what are the screening processes that result in a large number of defendants never coming to trial? And second, what should the criminal process do with those who are left in the system?

The answer to the screening question breaks down into three major discretionary activities: a) police investigative and arrest discretion; b) prosecutorial charging discretion; and c) plea bargaining. The answer to the second major systemic question is, of course, the concern of criminal sentencing. The American Bar Foundation (ABF) shed substantial light on all of these important decision-making points in the 1960s when it published its exten-

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sive analytic descriptions of the law-in-action in three states.¹

Aside from the ABF's work, only the exercise of police discretion had been studied, reported on, and evaluated extensively. More recently, possibly because of heightened public concern, plea bargaining practices have also drawn substantial research attention. Prosecutorial charging discretion, however, apart from some of its plea bargaining implications, remains comparatively untouched and clearly needs current narrative and reflective illumination. Nonetheless, our knowledge and ideas about the various screening decisions are, on the whole, substantial. Paradoxically, however, there have been relatively few procedural or substantive changes.

Just the opposite is the situation for sentencing. Although philosophical debates over the goals of the criminal law and thus the purposes of sentencing have long been with us, relatively little had been written about the practical application of these ideas. "Out of sight, out of mind" perhaps! Yet in the mid-1970s, Maine, Indiana, and California enacted dramatic reversals of their entire sentencing structures. Illinois and Minnesota soon followed, with many other states doing so as well in subsequent years. Ultimately, Congress passed the Sentencing Reform Act for the federal courts in 1984, effective November 1, 1987.² Thus, in the span of a few years during the late 70s and early 80s, many states and the federal government dramatically switched from more than half a century of indeterminate sentencing to its philosophical and functional opposite: determinate or fixed sentencing.

How could these astounding changes happen so quickly, particularly in the absence, at least initially, of substantial published research or scholarship? While many contributing causes undoubtedly came together to effectuate this change, two readily

¹ ROBERT O. DAWSON, *SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE* (1969); WAYNE R. LAFAYE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (1965); FRANK W. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* (1969); DONALD J. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1966); LAWRENCE P. TIFFANY ET AL., *DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT* (1966). The three states surveyed were Kansas, Michigan, and Wisconsin.

² Pub. L. No. 98-473, §§ 211-39, 98 Stat. 1987 (1984). For an excellent history and overview of the Act, see GERALD T. MCFADDEN ET AL., *FEDERAL SENTENCING MANUAL* ch. 1 (1990).

come to mind. First, even before Robert Martinson's 1974 evaluation that "almost nothing works" in correctional rehabilitation,³ many had become disenchanted with the medical model of sentencing⁴ that gave rise to indeterminacy in the early twentieth century. Second, the media-supported prisoners' rights movement of the late 60s and early 70s provided wide public exposure to the difficulties in making rational parole release decisions. The movement also exposed actual parole board abuses and the resulting broad sentence disparities. A classic example of this public exposure was Jessica Mitford's lecture circuit tour following her 1973 bestseller on the subject, *Cruel and Usual Punishment*.

With determinate and fixed sentencing, a judge no longer simply sentences a defendant to a broad range of years (sometimes as much as zero to life). Likewise, the actual time to be served is no longer determined by a subjective and arbitrary parole board decision that the defendant has been cured, rehabilitated, or at least will most likely not recidivate.

Although different in scope and detail from each other, the federal and most of the state sentencing changes have one similar, overriding feature that distinguishes them from the old system. These new sentencing structures require the judge to impose a specific sentence, including the actual time to be served. The judge imposes this sentence in open court, at the end of trial or the acceptance of a guilty plea. The statutory requirements and administrative guidelines limit the judge's choice of sentence type and length by focusing primarily on the circumstances of the crime rather than the characteristics of the offender (other than prior record).

In California, one of the leaders in the movement, the legislature specified a low, middle, or high term of years for each crime. The judge, using statewide guidelines, selects the term of imprisonment plus any relevant proved enhancements. That sentence, less good time, constitutes the time to be served (with a period of

³ Gendreau and Ross conclude this from Robert Martinson, *What Works?—Questions and Answers about Prison Reform*, 35 PUB. INTEREST, Spring 1974, at 22 (1974), and then point out that Martinson subsequently "renounced his views" in a less publicized article in 1979, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979). Paul Gendreau & Robert Ross, *Revivification of Rehabilitation: Evidence from the 1980s*, 4 JUST. Q. 349, 350 (1987).

⁴ This sentencing model is based on the view that illness causes crime and that such illness may be diagnosed, treated, and cured.

subsequent outside supervision). California included in its new law the simple, direct statement that “the purpose of imprisonment . . . is punishment.”⁵ Thus, while California does not prohibit treatment or rehabilitation during confinement, it also does not require them.

Commentators hailed California’s Uniform Determinate Sentence Law, with its single-minded emphasis on imprisonment as punishment, for its certainty and initial mechanical simplicity. It was enacted in 1976, less than two years after the initial bill. Over the years, however, criticism has increased. This criticism includes concern over the legislature’s constant tinkering with terms, the resulting complexity in term length computations, and even the absence of treatment, rehabilitation, or reintegration.

The Federal Act’s stated goals are quite different from California’s. Although the Federal Act does not distinguish kinds of incarceration or other sentences in its statement of goals, it explicitly includes most traditional sentencing purposes. The Act specifies not only punishment but also deterrence, public protection, and corrective treatment. To accomplish these goals, the legislature appointed a commission. Perhaps because of the Act’s multiplicity of purposes, the Commission created a grid of forty-three levels of crime and six categories of criminal offenders, with guidelines to help determine the relevant place on the grid for each particular case.

Beyond the differences in the two systems’ goals are their differences in origin. The Federal Act’s genesis is just the opposite of California’s. After lengthy consideration, Congress signed enabling legislation into law in 1984. The effective date, however, had to be delayed until the Commission and staff were selected and the guidelines then drafted and approved. Once proposals were circulated, they were subjected to much debate, compromise, and further delays before finally going into effect November 1, 1987. Constitutional challenges to the Act immediately arose, causing uncertainty across the nation as to which sentencing procedure to use. While the United States Supreme Court upheld the Act’s constitutionality in *Mistretta v. United States*,⁶ the controversy nevertheless continues, and strident criticism over the Act’s complexity remains unabated. Indeed, litiga-

⁵ CAL. PENAL CODE § 1170(a)(1) (West 1985).

⁶ 488 U.S. 361 (1989).

tion involving the Federal Sentence Reform Act is so extensive that a Federal Sentencing Reporter was created.

Criticism and litigation do not necessarily mean that the changes are wrong. Good defense lawyers will always seek to take advantage of any possible ambiguity, vagueness, or other error for the benefit of their clients. Similarly, prosecutors may also view their duty strictly from an adversary position and urge an interpretation most consistent with public protection.

Many trial judges have a somewhat different underlying problem with the new laws. Indeed, these judges have often been the most vocal critics on both state and federal levels. Typically, they openly complain of such things as complexity and rigidity. In addition, however, many judges privately express concerns about both the mandated multiple procedural and administrative changes that impact their individual decisions and the movement of the entire criminal calendar. The old state and federal laws may often have been burdensome and problematic, but at least they were understandable enough so that a relatively comfortable routine developed. Despite some allegations to the contrary, judges are human, and it is a very human reaction to prefer comfort over discomfort, even temporarily.

In time, as more clarifying amendments are enacted and appellate courts resolve the issues counsel raise, the amount of litigation will become manageable. Thus, as is always the case, some acceptable, settled certainty will descend upon the law and procedure. The trial courts will have gained a working understanding of the law and will have established appropriate decision-making procedures. This new and relatively comfortable routine will be both acceptable and preferable to other changes because it will represent the status quo.

Some of the following articles address the ambiguities, vagaries, conflicts, and other questions of guidelines interpretation. Other articles deal with the broader process issues that may arise whenever a major systemic change is made. For example, the following are just a few of the very interesting and important questions about the new federal sentencing laws, some of which are touched upon in this symposium: What is the impact on prison population (being careful to separate out other laws' impacts)? What is the overall financial cost compared to the old system? What impact, if any, is there on recidivism? To what extent, if at all, has disparity been reduced? Is the new law race-neutral in application? How has the charging function of the prosecutor

been altered, if at all? How has plea bargaining changed, if at all? What other places in the criminal process have changed, if any, as a result of the new laws? Has judicial discretion increased or decreased? What are the extent and justifications for judicial departures from the guidelines? What is the extent of acceptance-of-responsibility and of cooperation reductions, and what are their impacts on truthfulness, plea bargaining, judicial discretion, disparity, and the purposes of the Act? Is there more (undue?) reliance on the preparer of the presentence report than before? What is the extent, success rate, and cost or benefit of sentence appeals?

The answers to these questions would, of course, be useful. But the fact that scholars are seriously asking these questions and pursuing their answers is far more important than the answers themselves. For the major strength of the determinate sentence movement is in the attention that it has focused on one issue—how to deal with persons who violate the criminal law. This should always be the central issue of any rational criminal system. If society finds that an act is damaging enough to deem it violative of societal mores and expends limited resources to seek out and process those violations, then, logically, society should direct substantial initial thought toward the question of what to do with the offenders. Yet while indeterminacy predominated, there was comparatively little in-depth attention to this question. Thus, the authors of this symposium are important contributors to the increasing wealth of contemporary sentencing scholarship.

But what is the future of criminal sentencing reform? Or, better yet, what should it be? A fascinating little book descriptively entitled *Curious Punishments of Bygone Days*⁷ casts some light on these questions. The author, Alice Morse Earle, culled old court records and newspapers to critically describe such “inhumanities” as ducking stools, stocks, pillories, whipping posts, branding, and other punishments. Interestingly, Earle’s chronicle, written in 1896, looked ahead to the more “enlightened,” treatment-oriented indeterminate sentence. Economics, not philosophy, morality, enlightenment, or scholarship, may now be leading us away from incarceration—indeterminate or determinate—as it has done cyclically in the past. I seriously believe that this cycle can be broken; our economic *and* punishment needs, as well as reintegration, can best be resolved by a return to many of the

⁷ ALICE M. EARLE, *CURIOUS PUNISHMENTS OF BYGONE DAYS* (1896).

short-term “curious punishments of bygone days” simply dressed in modern guise.⁸

⁸ See WILLIAM ANDREWS, *BYGONE PUNISHMENTS* (1899). For a modern example of just one kind of possible short-term punishment, see the very creative book, GRAEME NEWMAN, *JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS* (1983).

