

Background Paper 83-2

SENTENCING REFORM LEGISLATION

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SENTENCING REFORM LEGISLATION

I

INTRODUCTION

Our present system for imposing sentences upon convicted offenders may be characterized as an essentially unstructured exercise of judicial discretion.*

The move to determinate sentencing carries several imputations: (1) the legislature assumes a competency to sentence unknown defendants either to a specific term or to a range of terms, (2) the power of the 'sentencing court' tends to be greatly circumscribed, (3) release discretion is minimized, and (4) the punishment of crime, not the offender, becomes the focus of sentence fixing.**

In recent years, several state legislatures have modified their indeterminate sentencing laws. These changes have resulted in part, from disillusionment with the theory of rehabilitation which spawned the indeterminate sentencing practice and with perceived inequities in sentencing practices. Indeterminate sentencing laws are intended to rehabilitate offenders by shaping the length of a sentence around the needs and circumstances of each offender. Despite this logic, it is argued that indeterminate sentencing has not accomplished its objective.

Increasing crime rates are a major concern to the public and rehabilitation methods, it is claimed by several writers in the field, have not significantly reduced recidivism. As a result, a trend toward punishing criminal behavior more severely has developed and steps have been taken to restructure sentencing laws which are seen as providing judges with too much discretion.

In doing this, state legislatures have attempted to avoid aspects of sentencing which are subject to criticisms.

*Lowel Espey in "Toward Certainty in Sentencing: Correctional Alternatives" from the Fall 1976 Criminal Justice Quarterly.

**M. G. Neithercutt writing in "Parole Legislation" from the March 1977 Federal Probation.

Such criticisms include:

1. Indeterminate sentencing often results in unwarranted disparities in sentences among offenders who commit similar crimes. Sentencing should be more uniform to ensure more fairness and equity.
2. Punishment should reflect the severity of the crime. Judicial discretion does not ensure that offenders will be punished appropriately. Moreover, discretion permits subjective and often unguided decisions to be made by judges and parole boards regarding the length of time to be served.
3. If decisionmaking is widely disbursed, accountability is diluted and sometimes lost.
4. Under indeterminate systems, the inmate has no idea of the actual time that he or she will serve.
5. Sentence discrepancy creates resentment among inmates and contributes to institutional problems.

II

FIXED TERM SENTENCING LAWS

Fixed term sentencing laws usually reduce judges' discretion by limiting the sentences judges can impose. Such laws achieve this by:

1. Limiting the applicable sentence to be imposed for different crimes, thereby reducing sentencing and paroling discretion; and
2. Requiring that any sentence imposed be for a fixed number of years. A judge still has the discretion to use probation as an appropriate alternative.

According to the National Conference of State Legislatures, at least 13 states have adopted sentencing laws that are determinate in nature.*

The two major objectives of these laws appear to be equity and certainty of punishment.

*Alaska, Arizona, California, Colorado, Illinois, Indiana, Maine, Minnesota, New Jersey, New Mexico, North Carolina, Pennsylvania, and Tennessee.

Writers use many different terms to refer to so-called fixed time or "flat" sentences. Two of those terms are determinate and presumptive.

A. Determinate Sentencing

Under so-called determinate sentencing laws, a sentence range is established for each class of crime which usually is much narrower than that available under traditional indeterminate sentencing statutes. The sentencing authority has discretion to select any sentence within the established range, but is restricted from going outside the range. Any sentence imposed normally is for a fixed term. Determinate sentences are not mandatory for all offenses, allowing discretion for probation or alternatives to prison. Some states using determinate sentences are Illinois, Indiana and Maine.

B. Presumptive Sentencing

A presumptive sentence presumes those who have committed similar crimes should spend similar time in prison. A presumptive sentence may, within a certain range, be increased or decreased depending upon aggravating or mitigating circumstances. The presumptive sentences and the maximums and minimums are established by law. The National Conference of State Legislatures says Arizona, California, Colorado and New Mexico are among the states which have adopted so-called presumptive sentencing statutes.

Traditional sentencing provisions such as those referring to habitual offenders or to the use of a weapon in the commission of a crime are included in many fixed term sentencing laws.

C. Nevada Sentencing Practice

In Nevada, a judge selects a specific sentence from minimum and maximum limits provided for in the law.* The

*Nevada Revised Statutes 193.130, "Punishment of felonies," says:
Every person convicted of a felony:

1. For which a term of imprisonment is provided by statute, shall be sentenced to a definite term of imprisonment which shall be within the limits prescribed by the applicable statute, unless the statute in force at the time of commission of such felony prescribed a different penalty.

2. For which no punishment is specially prescribed by statute, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years, or by a fine of not more than \$5,000, or by both fine and imprisonment.

The Nevada administrative office of the courts advises that no statistics are kept concerning the "spread of sentences" given for conviction of criminal offenses.* It says many felony offenses carry sentences of from 1 to 10 or 1 to 15 years and judges usually choose a sentence "somewhere in the middle" of those ranges. Judges' decisions concerning the appropriate length of a sentence for felonies are influenced, certain Nevada judges say, by the offender's previous record, the nature of the crime, and the offender's general attitude.

III

SENTENCING GUIDELINES

Sentencing guidelines is another approach being used to reduce sentence disparity and to make sentences more certain. Past sentencing decisions or parole decisions, or both, are analyzed. Guidelines are then developed from the data which reflect the average length of sentence for offenders who commit similar crimes. Typically, offender characteristics, including prior record and employment stability, are considered in developing the guidelines.

Sentencing guidelines can be designed to cover both the "in" (whether or not to incarcerate) and the "out" (probation or fine) decisions and the length of sentence. Other than mandatory "prison time" laws, determinate sentencing laws enacted in most states have little influence over the "in"/"out" decision. A sentencing judge, in most cases, still has the authority to grant probation or to sentence an offender to a correctional facility.

Under a federal Law Enforcement Assistance Administration grant, judges in Denver, Colorado, were the first to establish sentencing guidelines to cover both the "in"/"out" decisions and the length of sentence. In practice, a sentencing judge makes the decision before consulting the guidelines. If the decision falls outside the guidelines, the judge is supposed to reevaluate the decision. If the

*The department of parole and probation's Biennial Report July 1, 1980 - June 30 1982, which is listed in the suggested reading section of this paper, lists various sentencing data. Included are statistics on the (1) distribution of convictions by crimes, (2) characteristics of persons convicted of crimes and (3) judicial sentencing dispositions (i.e. probation or sentence) by crime categories, judicial districts and individual judges.

decision remains outside the guidelines, the judge must indicate, in a written statement, the reasons for the deviation. This enables the jurisdiction to monitor sentencing decisions in order to reduce disparity.

In 1976, determinate sentencing legislation was vetoed by the governor of Minnesota. Since then, however, Minnesota became the first state to begin developing guidelines under a legislative mandate. Pennsylvania later adopted similar legislation in 1979. Although the Minnesota and Pennsylvania laws differ in approach and application, both provide that the guidelines are advisory to trial court judges and that judges are not bound by them. This represents a major difference from determinate or fixed term sentencing where the judge is bound by the sentence range specified by law. Other similarities in the Minnesota and Pennsylvania laws are:

1. Both states established commissions composed of officials from the criminal justice community to design the guidelines;
2. Judges are required to indicate the reasons for deviating from the sentencing guidelines in a written statement; and
3. Sentences can be appealed by either the defendant or the state.

A summary of the sentencing reform activities in each state is included in a 1980 report, entitled Overview of State and Local Sentencing Guidelines and Sentencing Research Activity listed in the "Suggested Reading" section of this paper. According to the foreward and summary pages 1 through 13, the following 10 states had operational sentencing guidelines as of April 1980: Alaska, Arizona, Illinois, Minnesota, New Jersey, Ohio, Oregon, Pennsylvania, Utah and Washington. The guideline projects in Arizona, Illinois, Ohio and Pennsylvania are being used only in certain local areas of those states.

The report also says that guidelines were being developed in 14 other states at the time of the study. Connecticut, Indiana, Massachusetts and Michigan had statewide guidelines; Colorado and Louisiana had local ones. Sentencing guidelines were being developed on a statewide level in Rhode Island, South Carolina and Vermont, and on a local level in Georgia and Kansas. In Florida and Maryland,

guidelines were being developed on both state and local levels. Pennsylvania's commission, at the time the report was written, was attempting to develop statewide guidelines in addition to the local ones that already existed.

Besides developing guidelines based on past sentences, a Rhode Island committee has made policy decisions on the appropriate sentence for various types of crimes and offenders. These "benchmarks" provide judges with guidelines "for structuring judicial discretion."* According to the Rhode Island Bar Journal (March 1982, p. 6), the benchmarks went into effect on January 4, 1982. Vermont began using guidelines for certain offenses early this year.

IV

RECENT FEDERAL LEGISLATION CALLING FOR SENTENCING COMMISSIONS AND SENTENCING GUIDELINES

Several recent federal measures have provided for an overhaul of the United States criminal code, including the establishment of a sentencing commission, sentencing guidelines for the federal judiciary and the elimination of parole. One such measure is S. 1437 of the 95th Congress.

More recent measures include S. 1722 of the 96th Congress and S. 1630 and S. 2572 of the 97th Congress. To date, none of these measures have passed the legislative process.

In referring to section 2003 of S. 1722, the Judiciary Committee's report says:

Section 2003 lists for the first time the factors that a judge should consider in imposing a sentence. It requires that the court impose sentence within the sentencing guidelines unless it finds that an aggravating or mitigating circumstance exists that was not adequately considered in the formation of the guidelines and that should result in a different sentence. It requires for the first time that a sentencing judge state reasons for the sentence imposed. Finally, it contains special provisions concerning presentence provisions to be followed if the court is considering imposition of an order of notice pursuant to section 2005 or of an order of restitution pursuant to section 2006.

*See the Report of the Sentencing Study Committee (Rhode Island Supreme Court, 1981).

The sentencing guidelines commission, the report says, has as one of its goals to:

Avoid 'unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.' It is important that both the Sentencing Commission and the judge keep in mind the importance of avoiding unwarranted disparity. A major premise of the sentencing guidelines is the need to avoid unwarranted sentencing disparity--but judges must also seek to avoid unwarranted disparity in applying the guidelines and particularly in deciding when it is desirable to sentence outside the guidelines.

V

GOOD TIME CREDITS

To reduce the length of total sentence imposed, many states allow inmates to earn credits for good conduct. This, of course, can affect the total length of a sentence. Nevada's "good time" law is contained in NRS 209.433 through 209.451. Subsection 1 of NRS 209.443 says:

Every offender who is sentenced to an institution of the department after June 30, 1969, who has no serious infraction of the regulations of the institution, or laws of the state recorded against him, and who performs in a faithful, orderly and peaceable manner the duties assigned to him, shall be allowed for the period he is actually incarcerated under sentence a deduction of 2 months for each of the first 2 years, 4 months for each of the next 2 years, and 5 months for each of the remaining years of the term, and pro rata for any part of a year where the actual term served is for more or less than a year. Credit shall be recorded on a monthly basis as earned for actual time served.

Subsection 3 of NRS 209.443 says:

In addition to the credits for good behavior provided for in subsection 1, the board may adopt regulations allowing credits for offenders whose diligence in labor or study merits such credits and for offenders who donate their blood for charitable purposes.

VI

PAROLE GUIDELINES

Usually, parole boards decide who will be paroled and determine the length of parole. Under fixed term sentencing laws, parole board responsibilities have been limited and, in some cases, eliminated.

According to a September 1977 Corrections Magazine article entitled "Should Parole Boards Hold the Key?":

The entire thrust of the movement in favor of determinate sentencing over the last few years has been to take out of the criminal justice system all of those elements that have been traditionally identified with parole boards. Prisoners' release dates should have nothing to do with progress or participation in prison programs, say the reformers, both because coerced rehabilitation is immoral and because there is no evidence that programs are of any value.

Maine eliminated the parole function and prisoners in that state are unconditionally released at the expiration of their sentences. In Illinois, a parole period, or mandated supervised release, is designated when the sentence is imposed. The length of supervised release is defined by law.

According to the National Council on Crime and Delinquency (NCCD), the Federal Government and 11 states* have specific decisionmaking guidelines which must be used by parole boards. California has a determinate sentencing law but uses, according to the NCCD, specific parole guidelines for persons being paroled from life sentences.

Florida law mentions parole guidelines specifically in Florida Statutes Annotated 947.165. That section says:

(1) The commission shall develop and implement objective parole guidelines which shall be the criteria upon which parole decisions are made. The objective parole guidelines shall be developed according to an acceptable research method and shall be based on the seriousness of offense and the likelihood of favorable parole outcome. Factors used in arriving at the salient factor score and severity of offense behavior category shall not be applied as aggravating circumstances.

*Alaska, Florida, Georgia, Maryland, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Utah and Washington.

(2) At least once a year, the commission shall review the objective parole guidelines and make any revisions considered necessary by virtue of statistical analysis of commission actions, which analysis uses acceptable research and methodology.

Writing in chapter 4 of his book entitled Sentencing Reforms: Experiments in Reducing Disparity, former Oregon state parole board member Ira Blalock says the following about Oregon's parole guidelines:

The guidelines provide explicit structure to the discretion of the board without being procrustean, and offenders, as well as the public, know in advance the customary range of time to be served based on the seriousness of the instant offense and the prisoner's prior criminal history and risk potential. Offense severity, already assigned three felony levels by the Oregon legislature, is further broken down by the board's administrative rules. Discretion is still possible within the durational range; variations are permitted because of aggravation or mitigation. However, the aggravating or mitigating factors customarily considered by the board in the exercise of its discretion are made explicit. The factors considered in assessing the criminal history or risk of parole failure are likewise made explicit. Rigidity is avoided by allowing the board to exercise its discretion, but only with explicit, reviewable, and written reasons.

VII

NEVADA'S PAROLE RELEASE CRITERIA

Nevada Revised Statutes 213.1099 permits the state board of parole commissioners to release on parole a prisoner (otherwise eligible for parole by meeting the conditions contained in chapter 213 of NRS) if it appears from all the information known to the board that there is reasonable probability that such prisoner will live and remain at liberty without violating the laws; and that such release is not incompatible with the welfare of society. Subsection 3 of NRS 213.1099, effective November 25, 1982, because of the passage of Ballot Question 4, lists criteria the parole board must consider in granting parole to prisoners whose sentences have been commuted from death or life without possibility of parole to sentences allowing parole. Such prisoners cannot have any history of:

1. Recent misconduct in the institution;
2. Repetitive criminal conduct;
3. Criminal conduct related to the use of alcohol or drugs;
4. Repetitive sexual deviance, violence or aggression; or
5. Failure in parole, probation, work release or similar programs.

Section 213.120 of the Nevada Revised Statutes provides that a prisoner may be paroled when he has served one-third of the definite period of time for which he has been sentenced or 1 year, whichever is longer.

The state board of parole commissioners now uses several broad criteria in deciding if a prisoner should be released on parole. Two of the most important factors are that the prisoner have a planned program of work or school and a place to live. Other factors the board considers are the nature of the crime, prior criminal history, and previous parole behavior. Other criteria, although not as important, include institutional behavior such as involvement in school or work programs and infractions. It is pointed out, however, that some offenders are "ideal prisoners" but "rotten citizens." Therefore, the main consideration for release on parole should not be institutional behavior. In 1977 A.B. 327 was introduced which was intended to be based on the Maine approach of eliminated parole. That bill, which also contained "flat time" provisions, died in the assembly committee on judiciary.

VIII

SUGGESTED APPROACHES FOR NEVADA

There have been suggestions, as noted in this paper, to modify Nevada's laws affecting criminal sentences and parole. Some say that legislation should be enacted to provide for determinate sentences, guidelines for sentencing or guidelines for paroling. Others believe a concurrent resolution should be adopted which urges the Nevada court system to create a sentencing commission to establish sentencing guidelines to be followed by trial judges. A third suggested approach is the creation of an interim committee to study the sentencing practices in Nevada's courts. That committee could be composed of legislators, practicing trial attorneys, trial judges, district attorneys and private citizens.

There are many members of the Nevada criminal justice system, however, that believe that the Nevada laws pertaining to the sentencing of offenders and the granting of parole should not be modified.

IX

SUGGESTED READING

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