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Making the Punishment Fit the Crime: A Consumers' Guide to Sentencing Reform

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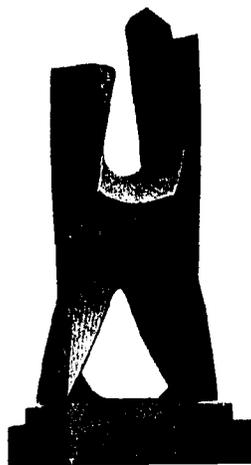
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Making the Punishment Fit the Crime: A Consumers' Guide to Sentencing Reform

By Franklin E. Zimring*

In its current crisis the American system of criminal justice has no friends. Overcrowded, unprincipled and ill-coordinated, the institutions in our society that determine whether and to what extent a criminal defendant should be punished are detested in equal measure by prison wardens and prisoners, cab drivers and college professors. What is more surprising (and perhaps more dangerous), a consensus seems to be emerging on the shape of desirable reform—reducing discretion and the widespread disparity that is its shadow, abolishing parole decisions based on whether a prisoner can convince a parole board he has been “reformed,” and creating a system in which punishment depends much more importantly than at present on the seriousness of the particular offense.

A number of books and committee reports that have endorsed these goals and proposed various structural reforms to achieve them are the stimulus for this essay. While diverse in style, vocabulary and emphasis, at least six books in the past two years have proposed eroding the arenas of discretion in the system.¹ Some au-

**Professor of Law and Director of The Center for Studies in Criminal Justice.*

1. Norval Morris, *The Future of Imprisonment* (University of Chicago Press, 1974); James Q. Wilson, *Thinking About Crime* (Basic Books, 1975); Ernst van den Haag, *Punishing Criminals* (Basic Books, 1975); Andrew von Hirsch, *Doing Justice—The Choice of Punishments, the Report of the Committee for the Study of Incarceration* (Hill and Wang, 1976); David Fogel, *We Are the Living Proof: The Justice Model of Corrections* (W. H. Anderson, 1975); *Task Force on Criminal Sentencing, Fair and Certain Punishment—Report of the Twentieth Century Task Force on Criminal Sentencing* (McGraw-Hill, 1976).

thors, such as James Q. Wilson and Ernst van den Haag, see reform as a path to enhancing crime control. Others, such as Andrew von Hirsch, the Twentieth Century Fund Committee and David Fogel, advocate reform for less utilitarian reasons, with titles or subtitles such as "Doing Justice," "A Justice Model of Corrections," and "Fair and Certain Punishment."

This note cannot comprehensively review such a rich collection of literature, nor is it politic for me to oppose justice, fairness or certainty. Rather, I propose to summarize the present allocation of sentencing power in the criminal justice system and discuss some of the implications of the "structural reforms" advocated in some current literature.

Multiple Discretions in Sentencing

The best single phrase to describe the allocation of sentencing power in state and federal criminal justice is multiple discretion. Putting aside the enormous power of the police to decide whether to arrest, and to select initial charges, there are four separate institutions that have the power to determine criminal sentences—the legislature, the prosecutor, the judge, and the parole board or its equivalent.

The *legislature* sets the range of sentences legally authorized after conviction for a particular criminal charge. Criminal law in the United States is noted for extremely wide ranges of sentencing power, delegated by legislation to discretionary agents, with extremely high maximum penalties and very few limits on how much less than the maximum can be imposed. In practice, then, most legislatures delegate their sentencing powers to other institutions. For example, second degree murder in Pennsylvania, prior to 1973, was punishable by "not more than 20 years" in the state penitentiary.²

2. The old Pennsylvania statute is used as an example because we have recently studied the old distribution of punishment for criminal homicide in Philadelphia. See Zimring, Eigen and O'Malley, "Punishing Homicide in Philadelphia: Perspectives on the Death Penalty," 43 *University of Chicago Law Review* 227 (1976).

Any sentence above 20 years could not be imposed; any sentence below 20 years—including probation—was within the power of the sentencing judge.

The *prosecutor* is not normally thought of as an official who has, or exercises, the power to determine punishment. In practice, however, the prosecutor is the most important institutional determinant of a criminal sentence. He has the legal authority to drop criminal charges, thus ending the possibility of punishment. He has the legal authority in most systems to determine the specific offense for which a person is to be prosecuted, and this ability to select a charge can also broaden or narrow the range of sentences that can be imposed upon conviction. In congested urban court systems (and elsewhere) he has the absolute power to reduce charges in exchange for guilty pleas and to recommend particular sentences to the court as part of a “plea bargain”; rarely will his recommendation for a lenient sentence be refused in an adversary system in which he is supposed to represent the punitive interests of the state.

The *judge* has the power to select a sentence from the wide range made available by the legislature for any charge that produces a conviction. His powers are discretionary—within this range of legally authorized sanctions his selection cannot be appealed, and is not reviewed. Thus, under the Pennsylvania system we studied, a defendant convicted of second degree murder can be sentenced to probation, one year in the penitentiary or 20 years. On occasion, the legislature will provide a mandatory minimum sentence, such as life imprisonment for first degree murder, that reduces the judge’s options once a defendant has been convicted of that particular offense. In such cases the prosecutor and judge retain the option to charge or convict a defendant for a lesser offense in order to retain their discretionary power.³ More often the judge has a wide range of sentencing choices and, influenced by the prosecutor’s recommen-

3. See Zimring *et al.*, *supra* note 2, at pp. 229–41.

ation, will select either a single sentence (e.g., two years) or a minimum and maximum sentence (e.g., not less than two nor more than five years) for a particular offender.

The *parole* or *correctional authority* normally has the power to modify judicial sentences to a considerable degree. When the judge pronounces a single sentence, such as two years, usually legislation authorizes release from prison to parole after a specified proportion of the sentence has been served. When the judge has provided for a minimum and maximum sentence, such as two to five years, the relative power of the correctional or parole authority is increased, because it has the responsibility to determine at what point in a prison sentence the offender is to be released. The parole board's decision is a discretionary one, traditionally made without guidelines or principles of decision.

This outline of our present sentencing system necessarily misses the range of variation among jurisdictions in the fifty states and the federal system, and oversimplifies the complex interplay among institutions in each system. It is useful, however, as a context in which to consider specific proposed reforms; it also helps to explain why the labyrinthine status quo has few articulate defenders. With all our emphasis on due process in the determination of guilt, our machinery for setting punishment lacks any principle except unguided discretion. Plea bargaining, disparity of treatment and uncertainty are all symptoms of a larger malaise—the absence of rules or even guidelines in determining the distribution of punishments. Other societies, less committed to the rule of law, or less infested with crime, might suffer such a system. Powerful voices are beginning to tell us we cannot.

Parole under Attack

Of all the institutions that comprise the present system, parole is the most vulnerable—a practice that appears to be based on a now-discredited theoretical foundation of rehabilita-

tion and individual predictability. The theory was that penal facilities rehabilitate prisoners and that parole authorities could select which inmates were ready, and when they were ready, to reenter the community. The high-water mark of such thinking is the indeterminate sentence—a term of one-year-to-life at the discretion of the correctional authority for any adult imprisoned after conviction for a felony. Ironically, while this theory was under sustained (and ultimately successful) attack in California, New York was passing a set of drug laws that used the one-year-to-life sentence as its primary dispositive device. Yet we know (or think we know) that prison rehabilitation programs “don’t work,” and our capacities to make individual predictions of future behavior are minimal.

So why not abolish parole in favor of a system where the sentence pronounced by the judge is that which is served by the offender? The cost of post-imprisonment sentence adjustments are many: they turn our prisons into “acting schools,” promote disparity, enrage inmates, and undermine both justice and certainty.⁴

There are, however, a number of functions performed by parole that have little to do with the theory of rehabilitation or individual predictability. A parole system allows us to advertise heavy criminal sanctions loudly at the time of sentencing and later reduce sentences quietly. This “discounting” function is evidently of some practical importance, because David Fogel’s plan to substitute “flat time” sentences for parole is designed so that the advertised “determinate sentences” for each offense are twice as long as the time the offender will actually serve (since each prisoner gets a month off his sentence for every month he serves without a major disciplinary infraction). In a system that seems addicted to barking louder than it really wants to bite, parole (and “good time” as well) can help protect us from harsh sentences while

4. Fogel, *supra* note 1, at pp. 196–99.

allowing the legislature and judiciary the posture of law and order.

It is also useful to view the abolition of parole in terms of its impact on the distribution of sentencing power in the system. Reducing the power of the parole board increases the power of the legislature, prosecutor and judge. If the abolition of parole is not coupled with more concrete legislative directions on sentencing, the amount of discretion in a system will not decrease; instead, discretionary power will be concentrated in two institutions (judge and prosecutor) rather than three. The impact of this reallocation is hard to predict. Yet parole is usually a statewide function, while judges and prosecutors are local officials in most states. One function of parole may be to even out disparities in sentencing behavior among different localities. Abolishing parole, by decentralizing discretion, may increase sentencing disparity, at least as to prison sentences, because the same crime is treated differently by different judges and prosecutors. Three discretions may be better than two!

There are two methods available to avoid these problems. Norval Morris argues for retaining a parole function but divorcing it from rehabilitation and individual prediction by providing that a release date be set in the early stages of an offender's prison career. This would continue the parole functions of "discounting" and disparity reduction, while reducing uncertainty and the incentive for prisoners to "act reformed." It is a modest, sensible proposal, but it is not meant to address the larger problems of discretion and disparity in the rest of the system.⁵

Fixed Price Sentencing

A more heroic reform is to reallocate most of the powers now held by judges and parole authorities back to the legislature. Crimes would be defined with precision and specific offenses

5. Morris, *supra* note 1, at pp. 47-50.

would carry specified sentences, along with lists of aggravating and mitigating circumstances that could modify the penalty. The three books with “justice” or “fairness” in their titles advocate this “price list” approach, albeit for different reasons and with different degrees of sophistication. The Twentieth Century Fund study goes beyond advocating this approach and sets out sections of a sample penal code, although all members of the committee do not agree on the specific “presumptive sentences” provided in the draft.

There is much appeal in the simple notion that a democratically elected legislature should be capable of fixing sentences for crimes against the community. Yet this is precisely what American criminal justice has failed to do, and the barriers to a fair and just system of fixed sentences are imposing. The Twentieth Century Fund scheme of “presumptive sentences,” because it is the most sophisticated attempt to date, will serve as an illustration of the formidable collection of problems that confront a system of “Fair and Certain” legislatively determined punishments. In brief, the proposal outlines a scale of punishments for those first convicted that ranges (excluding murder) from six years in prison (aggravated assault) to probation (shoplifting). Premeditated murder is punished with ten years’ imprisonment. Burglary of an empty house by an unarmed offender has a presumptive sentence of six months; burglary of an abandoned dwelling yields a presumptive sentence of six months’ probation. The sample code clearly aims at singling out violent crimes such as armed robbery for heavier penalties, while the scale for nonviolent offenders led two of the eleven Task Force members to argue that the “range . . . appears to be unrealistically low in terms of obtaining public or legislative support.”⁶ Repeat offenders receive higher presumptive sentences, under specific guidelines.

The Task Force proposal produces in me an

6. Task Force Report, *supra* note 1, at 55–56.

unhappily schizophrenic response. I agree with the aims and priorities of the report, at the same time that I suspect the introduction of this (or many other) reform proposals into the legislative process might do more harm than good.

Why so skeptical? Consider a few of the obstacles to making the punishment fit the crime:

1. *The incoherence of the criminal law.** Any system of punishment that attaches a single sanction to a particular offense must define offenses with a morally persuasive precision that present laws do not possess. In my home state of Illinois, burglary is defined so that an armed house-breaker is guilty of the same offense as an 18-year-old who opens the locked glove compartment of my unlocked stationwagon. Obviously, no single punishment can be assigned to crime defined in such sweeping terms. But can we be precise? The Task Force tried, providing illustrative definitions of five different kinds of night-time housebreaking with presumptive sentences from two years (for armed burglary, where the defendant menaces an occupant) through six months' probation. The Task Force did not attempt to deal with daylight or non-residential burglary.

The problem is not simply that any such penal code will make our present statutes look like Reader's Digest Condensed Books; we lack the capacity to define into formal law the nuances of situation, intent and social harm that condition the seriousness of particular criminal acts. For example, the sample code provides six years in prison for "premeditated assault" in which serious harm was intended and two years for assaults where serious harm was not intended." While there may be some conceptual distinction between these two mental states, one cannot confidently divide hundreds of thousands of gun and knife attacks into these categories to determine whether a "Fair and Certain Punishment" is six years or two.

Rape, an offense that encompasses a huge

*The phrase is borrowed from my colleague, James White, who is preparing a book with this title.

variety of behaviors, is graded into three punishments: six years (when accompanied by an assault that causes bodily injury); three years (when there is no additional bodily harm); and six months (when committed on a previous sex partner, with no additional bodily harm). Two further aggravating conditions are also specified.⁷ Put aside for a moment the fact that prior consensual sex reduces the punishment by a factor of six and the problem that rape with bodily harm has a “presumptive sentence” one year longer than intentional killing. Have we really defined the offense into its penologically significant categories? Can we rigorously patrol the border between forcible rape without additional bodily harm and that with further harm—when that distinction can mean the difference between six months and six years in the penitentiary?

I am not suggesting that these are problems of sloppy drafting. Rather, we may simply lack the ability to comprehensively define in advance those elements of an offense that should be considered in fixing a criminal sentence.

2. *The paradox of prosecutorial power.* A system of determinate sentences reallocates the sentencing power shared by the judge and parole authorities to the legislature and the prosecutor. While the judge can no longer select from a wide variety of sanctions after conviction, the prosecutor's powers to select charges and to plea-bargain remain. Indeed, a criminal code like that proposed by the Twentieth Century Fund Task Force will enhance the relative power of the prosecutor by removing parole and restricting the power of judges. The long list of different offenses proposed in the report provides the basis for the exercise of prosecutorial discretion: the selection of initial charges and the offer to reduce charges (charge-bargaining) are more important in a fixed-price system precisely because the charge at convic-

7. The aggravating factors are (1) “the victim was under 15 or over 70 years of age” and (2) the victim was held captive for over two hours. Task Force Report at p. 59.

tion determines the sentence. The prosecutor files a charge of "premeditated" killing (10 years) and offers to reduce the charge to "intentional" killing (5 years) in exchange for a guilty plea. In most of the major crimes defined by the Task Force—homicide, rape, burglary, larceny and robbery—a factual nuance separates two grades of the offense where the presumptive sentence for the higher grade is twice that of the lower grade.⁸

This means that the disparity between sentences following a guilty plea and those following jury trial is almost certain to remain. Similarly, disparity between different areas and different prosecutors will remain, because one man's "premeditation" can always be another's "intention." It is unclear whether total disparity will decrease, remain stable, or increase under a regime of determinate sentences. It is certain that disparities will remain.

The paradox of prosecutorial power under determinate sentencing is that exercising discretion from two of the three discretionary agencies in criminal sentencing does not necessarily reduce either the role of discretion in sentence determination or the total amount of sentence disparity. Logically, three discretions may be better than one. The practical lesson is that no

8. The presumptive sentence for rape doubles with an assault causing bodily injury. The penalty for armed robbery where the offender discharges a firearm is three years if the offender did not intend to injure and five years if intent can be established. The presumptive sentence is two years if the weapon is discharged but the prosecutor cannot or does not establish that "the likelihood of personal injury is high." The penalty for armed burglary doubles when the dwelling is occupied. An armed burglar who "brandishes a weapon" in an occupied dwelling receives 24 months while a nonbrandishing armed burglar receives 18. Assault is punished with 6 years when "premeditated" and committed with intent to cause harm. Without intent, the presumptive sentence is two years. See *Fair and Certain Punishment* at pp. 38-39, 56-59. Threat of force in larceny means the difference between six and twenty-four months. As I read the robbery and larceny statutes, armed taking of property by threat to use force is punished with a presumptive sentence of six months on page 40 of the report while the same behavior receives 24 months on pages 60-61.

serious program to create a rule of law in determining punishment can ignore the pivotal role of the American prosecutor.

3. *The legislative law-and-order syndrome.* Two members of the Twentieth Century Fund Task Force express doubts that a legislature will endorse six-month sentences for burglary, even if it could be shown that six months is above or equal to the present sentence served. I share their skepticism. When the legislature determines sentencing ranges, it is operating at a level of abstraction far removed from individual case dispositions, or even the allocation of resources to courts and correctional agencies. At that level of abstraction the symbolic quality of the criminal sanction is of great importance. The penalty provisions in most of our criminal codes are symbolic denunciations of particular behavior patterns, rather than decisions about just sentences. This practice has been supported by the multiple ameliorating discretions in the present system.

It is the hope of most of the advocates of determinate sentencing that the responsibilities thrust on the legislature by their reforms will educate democratically elected officials to view their function with realism and responsibility—to recognize the need for priorities and moderation in fixing punishment. This is a hope, not firmly supported by the history of penal policy and not encouraged by a close look at the operation and personnel of state legislatures.

Yet reallocating power to the legislature means gambling on our ability to make major changes in the way elected officials think, talk and act about crime. Once a determinate sentencing bill is before a legislative body, it takes no more than an eraser to make a one-year “presumptive sentence” into a six-year sentence for the same offense. The delicate scheme of priorities in any well-conceived sentencing proposal can be torpedoed by amendment with ease and political appeal. In recent history, those who have followed the moral career of the

sentencing scheme proposed by Governor Brown's Commission on Law Reform through the Senate Subcommittee on Crime can testify to the enormous impact of apparently minor structural changes on the relative bite of the sentencing system.⁹

If the legislative response to determinate sentencing proposals is penal inflation, this will not necessarily lead to a reign of terror. The same powerful prosecutorial discretions that limit the legislature's ability to work reform also prevent the legislature from doing too much harm. High fixed-sentences could be reduced; discretion and disparity could remain.

4. *The lack of consensus and principle.* But what if we could trade disparity for high mandatory sentences beyond those merited by utilitarian or retributive demands of justice? Would it be a fair trade? It could be argued that a system which treats some offenders unjustly is preferable to one in which all are treated unjustly. Equality is only one, not the exclusive, criterion for fairness.

This last point leads to a more fundamental concern about the link between structural reform and achieving justice. The Task Force asks the question with eloquent simplicity: "How long is too long? How short is too short?"¹⁰ The question is never answered in absolute terms; indeed, it is unanswerable. We lack coherent principles on which to base judgments of relative social harm. Current titles of respectable books on this subject range from "Punishing Criminals" to "The End of Imprisonment," and the reader can rest assured that the contents vary as much as the labels. Yet how can we mete

9. Compare the Final Report of the National Commission on Reforms of Federal Criminal Laws (Government Printing Office, 1971) with Senate Bill 1, 94th Cong. 1st Session (1975). Among other things, the Senate bill changes a presumption in favor of probation to a presumption against probation, increases the number of felonies in the proposed code and increases the length of authorized sentences by a considerable margin. See Schwartz, *The Proposed Federal Criminal Code, Criminal Law Reporter*, Vol. 17, p. 3203 (1975).

10. Task Force Report, *supra* note 1, at p. 4.

out fair punishment without agreeing on what is fair? How can we do justice before we define it?

* * *

Determinate sentencing may do more good than harm; the same can be said for sharp curtailment of judicial and parole discretion. Such reforms will, however, be difficult to implement, measure and judge. Predicting the impact of any of the current crop of reform proposals with any degree of certainty is a hazardous if not foolhardy occupation.

Not the least of the vices of our present lawless structures of criminal sentencing is that they mask a deeper moral and intellectual bankruptcy in the criminal law and the society it is supposed to serve. The paramount value of these books and reform proposals is not the "structural reforms" that each proposes or opposes. It is the challenge implicit in all current debate: no matter what the problems with particular reforms, the present system is intolerable. The problems are deeper than overcrowding or lack of coordination, more profound than the structure of the sentencing system. These problems are as closely tied to our culture as to our criminal law. They are problems of principle that have been obscured by the tactical inadequacies of the present system.

Note: This article appeared in a slightly altered version in the December, 1976 *Hastings Center Report*.

Editor: Susan C. Haddad
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