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SENTENCING GUIDELINES:

A MORE POSITIVE APPROACH FOR DETERMINATE SENTENCING

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AUG 1 - 1978

ACQUISITION

A Position Paper of the

MINNESOTA CITIZENS COUNCIL ON DELINQUENCY AND CRIME

Sponsored by

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February 24, 1977

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This position paper is the result of over one year of study by a subcommittee of the Minnesota Citizens Council on Delinquency and Crime. The Council is supported by Correctional Service of Minnesota, a statewide private research, education and service agency. The Board of Directors of Correctional Service of Minnesota has approved this position.

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RECOMMENDATION:

A SENTENCING COMMISSION SHOULD BE ESTABLISHED TO SET GUIDELINES FOR THE JUDICIARY COVERING MAJOR ASPECTS OF SENTENCING. JUDICIAL GUIDELINES WOULD BE COMPREHENSIVE AND A SUBSTANTIAL IMPROVEMENT OVER THE LARGELY UNFETTERED DISCRETION IN OUR PRESENT INDETERMINATE SYSTEM AND BETTER THAN THE ARBITRARINESS OF STATUTORILY FIXED TERMS OF IMPRISONMENT. DEFINITE TERMS OF INCARCERATION WOULD RESULT FOR EVERY OFFENDER WHO IS SENTENCED TO IMPRISONMENT.

THE ISSUE

Major questions which we have attempted to answer during the course of our study are:

1. Should the legislature fix definite terms of imprisonment for each crime?

2. How much discretion should the sentencing authority possess?
3. Who should make the decision to release inmates from prison?

THE PROBLEM

Current sentencing procedures do not satisfy either the general public or practitioners in the criminal justice system.

The general public is frustrated by the ineffectiveness of the criminal justice system. Increased frequency of crime has led to a prevailing sense of inadequate public safety. It is further alleged that criminals are released without imprisonment or are returned to the streets following imprisonment too early and that this is a primary cause of rising crime rates.

An increasing number of persons believe that the current sentencing procedures do not work. The current sentencing system based on indeterminate lengths of incarceration, release by a parole board and various alternatives to imprisonment such as probation is viewed by many as not having met expectations as a deterrent or a correction for crime rates.

The largely unhealthy tendencies of offenders to manipulate the present criminal justice system are confirmed by procedures which are filled with uncertainty, "game playing" and other activities necessary to impressing judges and parole boards.

In spite of efforts to improve both sentencing and release procedures, disparities between individuals (which give rise to questions of fairness) appear to be inherent in a system which depends on a great deal of unfettered discretion at both sentencing and release.

Our position statement in the fall of 1976 made it clear that we would not support statutorily fixed prison terms until other options had been reviewed.

We have now accomplished that task to our satisfaction.

During the past year a number of other groups have also studied this issue. No one has developed a persuasive argument for statutorily fixing the length of prison terms. It is our judgement that those who continue to argue for this approach have not marshalled adequate data to support their position in spite of its political attractiveness as a solution.

The fact of the matter is that the idea of statutory fixed prison terms that was in good currency a year ago is rapidly losing favor as people understand its implications. That has certainly been our experience as we have read and listened to a broad range of persons who are knowledgeable about the subject.

WHERE WE ARE

The proponents of fixing the length of prison terms by statute have made an important contribution with the introduction of determinate sentencing bills. Others, as they have dialogued about the issue, have added to the discourse. All of this activity has:

- Stimulated wide interest and discussion.
- Caused people at all levels in the community to examine the advantages and disadvantages of various approaches to fixed prison terms.
- Sharpened our understanding of the issues.
- Encouraged constructive debate.
- Made it necessary for all of us to examine our philosophies about the purpose and use of sentencing.
- Been a catalyst for improving present parole decision making. (The Minnesota Corrections Board, "parole board," to its credit, has introduced much needed guidelines to its decision making process.)
- Enhanced the potential for consensus.

MISUNDERSTANDING ABOUT DETERMINATE SENTENCING

It has become clear to our study committee that there is great confusion as to what determinate sentencing is. Some of these misunderstandings are as follows:

1. That determinate sentencing means that everyone who is convicted of a crime will go to prison. This is not the case because the proposed legislation leaves intact the judges right to stay of imposition of sentence and to stay of execution of sentence. Probation is still an option except in those serious cases where various proposals would mandate imprisonment.
2. That it will reduce crime. No one knows for sure. It is our judgement that it will not since certainty of apprehension is more important than certainty or severity of punishment.
3. That lengths of sentences will be longer. The legislation being considered actually has the potential of resulting in shorter sentences.
4. That determinate sentencing will impact on all criminals. It cannot-- since most crimes are not reported and only a small percentage of reported crimes are cleared by arrest. And, since the proposed legislation is largely silent on the use of probation, only a comparatively small number (although economically costly) would end up in prison.
5. That determinate sentencing will diminish discrimination against minorities. It will have little impact on this issue. Most of the concern regarding racial and economic discrimination centers on who goes to prison not on the length of the prison term (although the latter is an important issue as well). Determinate sentencing, as currently proposed, is largely silent on the issue of who gets to prison. Discrimination in the decision to incarcerate, where it exists, is not affected by these proposals.

DISADVANTAGES OF FIXING THE LENGTH OF IMPRISONMENT BY STATUTE

We share the judgement of most observers that indeterminate sentencing has not worked well. It has not given our community a sense of safety. It has also led to disparities and inequities. Dispositions vary widely giving rise to allegations that dispositions are based on economic or racial considerations. Offenders with the same crimes and seemingly comparable life histories are sentenced to disparant lengths of imprisonment. Indeed, some get probation and similar persons are imprisoned. And, parole boards, until very recently, have released inmates in a manner thought by many to be capricious. Even the new "matrix" system,

while a commendable and possibly effective attempt to improve release procedures under the current indeterminate system, is very much in the first stages of experimentation.

However, to move to the other end of the continuum--that is, statutorily fixed lengths of prison terms, is equally undesirable since it is too absolute and inflexible. Such a plan would eliminate any possibility of judicial discretion in cases which require individualized justice. Discretion by local judges, in some cases, is necessary to insure justice. In spite of arguments on both sides of the debate, it is our conclusion that both the crime and the individual must be considered.

Furthermore, the proposed law is silent on the juvenile justice system. We think that this is a serious omission for such an important modification. The median age of offenders in Minnesota has dropped considerably since 1962. Crime is increasingly a young person's activity. Most of what can be accomplished to prevent criminal careers has to take place in the juvenile field. Why we unduly focus our attention on the adult continues to be astonishing to our committee. Any new law on sentencing must be capable of impacting on juvenile procedures. Current proposals do not accomplish this goal.

Other disadvantages are:

1. Such a law does little to guide judges in the use and conditions of probation.
2. The state legislature is a difficult place to define specific lengths of imprisonment for a crime because of the understandable political nature of the process.
3. The law would be extremely difficult to modify at later dates, especially if shorter sentences in some instances became desirable.

4. It does not guarantee imprisonment any more than the present system and thus the assumed deterrent impact is, in fact, diminished.
5. The informal system of plea bargaining may become more important than it is at the present time. There is reason to believe that taking away discretion at the judicial level only forces it to lower levels such as prosecution, defense and even into arrest.
6. Costs would increase. Projections indicate that statutory fixed terms of incarceration would have a tendency to increase populations at our state prisons. This may make it necessary to keep the old, ineffective and inefficient Stillwater Prison in spite of spending over 25 million for a new modern prison plus its upkeep. One could argue that this could be justified if it cut crime. The problem is that the evidence is to the contrary. Long terms of imprisonment have not been shown to deter crime.

SUGGESTED CRITERIA FOR MODIFICATIONS IN SENTENCING LAWS

Any changes in sentencing laws should meet the following criteria. While the list is ranked, all are viewed as essential to any improved system of sentencing.

Any new law should:

1. Give society a sense of protection.
2. Enhance the deterrent effect of sentencing.
3. Insure greater predictability in sentences.
4. Diminish disparity.
5. Provide rough equality.
6. Provide a more rationale system.
7. Reduce the possibility of racial and economic discrimination.
8. Fit the crime and the offender.
9. Give continued options for individualized justice.
10. Not inhibit efforts to develop effective programs of rehabilitation.
11. Give opportunity for appeal of sentence to both prosecution and defense.
12. Not unduly lock the future into today's understanding of the proper prison term for each crime.

13. Be comprehensive enough to guide probation decisions as well as terms of imprisonment.
14. Be capable of working in the juvenile justice system.

ALTERNATIVES EXAMINED

The major options for determining the length of imprisonment which we considered were:

1. The present system in which the parole board determines the release date after the judge has sentenced the offender to an indeterminate length of imprisonment.
2. Statutes which would set the term of imprisonment for each individual crime or for categories of crime.
3. Statutes which would set the term of imprisonment only for certain offenders convicted of specified violent crimes and those who repeat certain criminal activities.
4. A sentencing council which would handle all dispositions once guilt has been determined.
5. The Department of Corrections which would administratively set the length of imprisonment at some point early in the offender's period of incarceration.
6. A sentencing commission which establishes guidelines to be used by judges in determining disposition after conviction.

RECOMMENDATION

A SENTENCING COMMISSION SHOULD BE ESTABLISHED TO SET GUIDELINES FOR THE JUDICIARY COVERING MAJOR ASPECTS OF SENTENCING. JUDICIAL GUIDELINES WOULD BE COMPREHENSIVE AND A SUBSTANTIAL IMPROVEMENT OVER THE LARGELY UNFETTERED DISCRETION IN OUR PRESENT INDETERMINATE SYSTEM AND BETTER THAN THE ARBITRARINESS OF STATUTORILY FIXED TERMS OF IMPRISONMENT. DEFINITE TERMS OF INCARCERATION WOULD RESULT FOR EVERY OFFENDER WHO IS SENTENCED TO IMPRISONMENT.

Legislation would establish a sentencing commission. It also would set forth the general criteria which would be used by the commission in formulating its judicial guidelines. Factors such as the nature of mitigating and aggravating elements of the crime and the offender should be included. The seriousness of the offense and the prior criminal history of the offender would be important criteria in establishing the guidelines. A sentencing judge who deviated from these guidelines would be required to submit written justification for such variation and the decision would be subject to appeal by both the defendant and the prosecutor.

The sentencing commission would be appointed by the Minnesota Supreme Court. Membership would be persons learned in the law including judges and persons with experience and knowledge in criminal justice. Lay citizens would also be represented. Commissioners would serve part-time. There would be an appropriation for expenses and the establishment of an office with appropriate staff. There was disagreement among our subcommittee members as to whether this should be "sunset" legislation. Some felt that the commission should do its work, be abolished and a new commission appointed at five year intervals to review the impact of the new law. Others felt that an ongoing commission with staff could best evaluate the performance of the new law. It became the consensus that an ongoing commission was not desirable but there should be a body with responsibility to periodically evaluate and modify the guidelines.

We would advocate that the sentencing commission establish guidelines which could result in imprisonments for shorter terms. It seems to us that severity of punishment is ranked behind certainty of apprehension and whether or not a potential offender has something to lose by getting caught. If this is correct, then increasing the term of imprisonment or even making mandatory imprisonments for a large number of

property crimes a part of the guidelines would seem not to have any significant impact, except on economic cost. We think that it is worthwhile to establish guidelines in which imprisonment is more certain for particular classes of criminals than for others. This would include violent and repeat criminals. Under the conditions of our present space and immediate future levels of expenditures, Minnesota could bear the economics of short sentences for more persons and reserve long sentences for those few whose repeated and violent behavior can no longer be tolerated.

Under no circumstance should the guidelines result in an expanded need for security institutions. It is our position that more resources ought to be available for prevention of crime at the community level and for those who are first detected in illegal behavior, especially among juveniles. To continue our dependency on prisons as the panacea for preventive crime is to ignore the substantial body of research which makes it evident that it is better to spend more money with our young people in an attempt to avoid continuance of criminal behavior than to concentrate on later costly imprisonments.

Our respect for the thoughtful research of the legislature leads us to suggest that the sentencing commission utilize legislative findings as an important starting point in establishing sentencing guidelines, especially as it relates to the lengths of imprisonment for various offenses.

It is expected that other research on sentencing guidelines, both nationally and locally, would influence the work of Minnesota's sentencing commission.

One further suggestion . . . throughout our deliberations we were impressed, as we have been in previous studies, with the lack of structural integration in the criminal justice system. Welfare, social services and education should also be directly involved in our criminal justice system.

The sentencing commission guidelines approach, if adopted, should be accomplished in the context of simultaneous efforts to develop a comprehensive plan for all of criminal justice in Minnesota.

These recommendations do not, in any way, serve to abandon or discourage attempts to improve the effectiveness of rehabilitation programs. Recently, such a negative position has enjoyed a great deal of attention. There are those who feel that studies indicate that there is no evidence that rehabilitation works. Such a conclusion may well be a function of inadequate research and/or weak attempts at programs of rehabilitation. Of late, new evidence does suggest that some programs do work. In any event, it would be a serious mistake to not upgrade present programs and to carefully determine their usefulness. To do otherwise is to guarantee a negatively self-fulfilling prophesy.

ADVANTAGES OF SENTENCING COMMISSION

A sentencing commission would:

1. Provide greater rationality in the sentencing process by considering both the crime, the criminal and society.
2. Promote more consistent sentences from jurisdiction to jurisdiction.
3. Reduce disparities and inequities.
4. Establish guidelines for the use of probation and conditions of probation.
5. Develop understandable criteria against which the functioning of the system could be held accountable to the public.
6. Have potential for modifications as experience dictates.
7. Reduce the uncertainty among inmates and staff that now exists within correctional institutions by providing definite terms of imprisonment.
8. Have the potential for the establishment of guidelines for the sentencing of juvenile delinquents.

RELATED RECOMMENDATIONS

Other measures which should be considered at the same time a sentencing commission is established are:

1. The parole board should be abolished after such time as is necessary to effect an orderly and just transition from present procedures to those which would prevail under the new sentencing guidelines. Such a body is not necessary under the provision of sentencing guidelines. The offender who is imprisoned would serve the time fixed by the sentencing judge, no more or no less, with the exception of earned good time. Release would be automatic at the end of the fixed term of imprisonment. Participation or lack of same in rehabilitation programs would not effect the length of incarceration.
2. A program to evaluate the impact of this measure would be authorized. Factors to be assessed would be crime and recidivism rates, impact on institutional population and program, impact on court procedures and on other components of the criminal justice system and costs.
3. Good time for incarcerated persons at the rate of one day for each day of good behavior should be instituted.
4. The Commissioner of Corrections should be authorized to allow conditional release during the last 12 months of a term of imprisonment.
5. Participation in programs of rehabilitation, while voluntary, should be available. The State Department of Corrections should have sufficient appropriations to develop effective rehabilitation programs.
6. Parole services should be available for up to 12 months following release.
7. A contractual program between the inmate and the Minnesota State Department of Corrections should be retained for rehabilitation services while incarcerated.
8. The Commissioner of Corrections should establish rules for the operation of the good time provision.
9. Programs of restitution should be expanded.
10. Appropriations for the expansion of effective correctional programs at the local level should be increased.

IN SUM

QUESTIONS

OUR RESPONSES

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| 1. Should the legislature fix definite terms of imprisonment for each crime? | 1. No. We believe that the present indeterminate system of sentencing should be modified. The establishment of a sentencing commission to set guidelines for all of sentencing is the best procedure to accomplish improvement. |
| 2. How much discretion should the sentencing authority possess? | 2. If a judge varies a sentence from guidelines established by the sentencing commission the judge would be required to provide written justifications and the decision would be subject to appeal by both the prosecutor and the convicted offender. |
| 3. Who should make the decision to release inmates from prison? | 3. Release may not occur until the inmate has served the time designated by the sentencing judge less earned good time. |
| 4. Is the sentencing commission a form of determinate sentencing? | 4. Yes. A predetermined length of incarceration is established by the guidelines for each offense and offender. Once a sentence is imposed it is fixed less good time. |

END