RESEARCH MONOGRAPH

INDETERMINATE AND DETERMINATE SENTENCING

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March 26, 1981

81:186

Legislative Research is a component of the Legislative Administration Committee

INDETERMINATE AND DETERMINATE SENTENCING

80:120

Introduction

Legislative Research was asked to provide information on indeterminate and determinate sentencing procedures. This monograph describes these procedures, with background information, arguments for and against, and information from studies which have examined existing systems.[1] The report also discusses alternative sentencing procedures.

Indeterminate Sentencing

Background

Indeterminate sentencing procedures are used in all but 17 states.[2] They are based on the philosophies of individualized sentencing and offender rehabilitation, although considerations of deterrence are incorporated.

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[1]Sentencing practices have varied throughout history, but the origins of widespread determinate sentencing occurred in the late 1700s. Determinate sentencing practices exclusively prevailed in this country until New York introduced the first indeterminate procedure in 1876. By 1910, 21 states had instituted an indeterminate procedure and it was not until the 1970s that the trend showed signs of being reversed. See: William T. Carey. "Determinate Sentencing in California and Illinois: Its effect on Sentence Disparity and Prisoner Rehabilitation," Washington University Law Quarterly, 2 (Spring, 1979): 552.

[2]Alabama, Alaska, Arizona, Arkansas, California, Colorado, Illinois, Indiana, Maine, Minnesota, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, and Tennesee have adopted some form of determinate sentencing procedures.

With indeterminate sentencing, the legislature determines what constitutes a crime and what should be the appropriate punishment, but this is only in the form of general guidelines to be used by the criminal justice system. This means that arresting or prosecuting agents are allowed to specify the seriousness of the crime, and attorneys may influence the sentence through plea bargaining. Sentencing alternatives may be explored by a jury or trial judge during a trial, with the judge having the authority to mitigate excessive sentences imposed by a jury. Even the final sentence may be modified through appeals, a parole board, or an executive grant of clemency.

Indeterminate sentencing procedures may incorporate additional influential elements such as pre-sentence investigations, probation officers, parole boards, or others.

Arguments

Proponents. Indeterminate sentencing proponents believe that an individual's character and circumstances surrounding the criminal act are unique and require a sentencing procedure for individuals that is flexible enough to assess several elements. Such a flexible system can incorporate society's constantly changing views concerning crime and punishment. Proponents argue that objectivity is ensured through the introduction of many participants into the decision making process, including judges, prosecutors, defense attorneys, and parole authorities.

Proponents support the indeterminate system because it recognizes the need for offender rehabilitation. They recognize

that an offender must assume responsibility for his actions and that punishment is an integral part of the criminal justice system, but contend that society must also share some of the responsibility because societal factors may influence a criminal act or provide a standard which the offender cannot meet. They point out that incapacitation without rehabilitation would deny this responsibility and a belief in human dignity or potential, and could also provide society with an unproductive and expensive burden.

Assuming that correction officials and parole authorities can accurately assess rehabilitated individuals who are no longer a threat to public safety, the societal reintegration of the offender can be productive. Rehabilitation can also provide an offender with the incentive to rehabilitate himself and behave properly while incarcerated. This can deter crime by offering an opportunity for offenders to be reoriented towards accepted social norms.

Any standardized procedures are viewed by proponents as unjust because they incorporate a mechanical system of justice that is unresponsive to individuals and the changing needs of society. If an indeterminate system is regarded as unjust, proponents suggest changes within the system such as parole release guidelines.

Opponents. Indeterminate sentencing opponents believe the procedure is not equitable, just, or fair. They view the system as producing unwarranted disparities and denying society its demands for punishment. They view justice as demanding the imposition of penalties determined by society at large (represented

by the legislature), not by the personal and subjective decisions of a judge. Many believe that because sentences are often determined subjectively or without guidance, the punishment may not "fit the crime."[3] Further, when viewed from a utilitarian perspective, criminal acts may even be justified because a lenient sentence may outweigh the disadvantages of the criminal act.

Opponents also claim that indeterminate sentencing procedures may coerce offenders to participate in rehabilitation programs--an act they view as an infringement on the individual's rights. They believe this could be a threat to or force behavior modification on prisoners who are unruly or do not conform to prison norms. Opponents cite forced rehabilitation and disparate sentencing practices as the basis of institutional unrest or violence.

Studies

L. Paul Sutton, a research analyst for the Criminal Justice Research Center, surveyed sentencing literature in a report entitled Federal Criminal Sentencing, Perspectives of Analysis and a Design for Research. The following discussion summarizes his major findings.

Prior to the late 1960s, sentencing research conducted on indeterminate sentencing models examined the relationship of race

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[3]This could provide little justice; and if sentences are too lenient, little deterrence. The argument is the same one used during the introduction of determinate sentencing in the 1700s.

to sentencing decisions. Most studies found a direct correlation between race and sentence disparity, but they have been subsequently criticized for focusing on small geographic areas or specific charges, lack of other societal factors, or failure to account for a judge's personal influence.[4]

Racial discrimination is often found in the more comprehensive recent studies, but it appears that the emphasis is shifting from race to socio-economic factors.[5] For example, a 1969 study of cases involving the death penalty found that the variable most influencing a jury's decision was whether a prior criminal record was introduced; second was socio-economic status. When other factors (e.g., job stability, responsibility for killing, resisting arrest, and co-defendent testimony) were held constant, the study found that race and counsel were not significantly related to the sentencing decision.[6] Another study found that pretrial status and prior convictions were more significant than race.[7]

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[4]U. S. Department of Justice, Law Enforcement Assistance Administration, Federal Criminal Sentencing: Prespectives of Analysis and a Design for Research, by L. Paul Sutton, Analytic Report 16 (Washington, D. C.: Government Printing Office, 1978), p. 4-5.

[5]For current studies proving racial discrimination in sentencing see: Chiricos, Waldo, and Marston, "Race, Crime and Sentence Length," paper presented at the American Sociological Association Conference, New Orleans, 1972 as cited in Federal Criminal Sentencing, p. 7.

[6]"Standardless Sentencing," Stanford Law Review 21 (1969): 1297 as cited in Federal Criminal Sentencing, p. 8.

[7]C. Engle, Criminal Justice in the City: A Study of Sentence Severity and Variation in the Philadelphia Criminal Court System, (Ph.D. dissertation, Temple University, 1971) as cited in Federal Criminal Sentencing, p. 9.

Some of the more recent studies have examined the relationship of the judge to the sentencing process. A 1968 Philadelphia study found sentences to differ for legally significant cases, while the greatest influence appeared to be the severity of the preceding case. The researcher concluded that "the greater the resemblance between the stimulus case and the preceding case, the more powerful the anchoring effect of the preceding case."[8]

A 1972 Canadian study agreed with these findings, suggesting that sentences may be influenced by judicial attitudes reacting with the social environment and the immediately preceding case. This study differed from the 1969 one because it found that the most significant variables were attitudes, perceptions, predispositions, and "cognitive complexity" of the magistrates. Factors such as age, race, sex, and prior records were less significant than the magistrates themselves.[9]

Indeterminate Adjustments

As indeterminate sentencing practices incorporate a variety of elements into the decision making process, many believe that an adjustment in administrative procedures could eliminate many

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[8]Green: "The Effect of Stimulus Arrangements on Normative Judgment in the Award of Penal Sanctions," Sociometry 31 (June 1968): 125 as cited in Federal Criminal Sentencing, p. 11.

[9]J. Hogarth, Sentencing as a Human Process (Toronto: University of Toronto Press, 1971) p. 163 as cited in Federal Criminal Sentencing, p. 10.

of the system's ills. The following is an examination of several of these administrative proposals.

Presentence investigations. Presentence investigations are designed to provide judges with a more complete understanding of the offender. They are usually accomplished through intense testing (aptitude, personality, and psychological), analysis of the offender's record, and interviews conducted with the offender's probation officer. More developed investigations are intended to promote individual sentencing practices.

Proponents believe that a more conducive attitude towards rehabilitation will be achieved if more attention is given to the needs of an offender. They contend that a more thorough report, written by persons involved with probation work, could significantly influence a judge's decision and cause sentences to parallel the probation department's policies.

Parole release guidelines. Parole release guidelines were first implemented in 1972 by the U. S. Board of Parole.[10] Oregon became the first state (1977) to establish a commission to make recommendations concerning such guidelines.[11] The Parole Board established parole release guidelines in 1979.[12]

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[10]The U. S. Parole Commission officially adopted guidelines in 1976, but has lately proposed revising its procedure because of an improvement in calculating the risk of recidivism. See: "New Parole Procedures Proposed for U. S. Prisons," National Law Journal 3 (January 5, 1981): 4.

[11]ORS 144,775(8).

[12]OAR 225-35-005 to 255-30-020.

Parole release guidelines are basically the same as sentencing guidelines. Using a matrix system based upon an offense severity rating and history risk score, a parole release date is established. This date may be decreased by the board upon special petition, or increased upon recommendation of the Corrections Division administrator.

Proponents believe parole release guidelines structure discretion at one of the most influential levels in the sentencing process. They also believe inmate frustration decreases because a specified time of release can be psychologically advantageous. Furthermore, rehabilitation may be enhanced if further sentence reductions are available to offenders.

Nonstatutory restitution. Nonstatutory restitution is distinguished from alternative sentencing practices because it is delegated by the court, not the legislature. This decree is usually imposed in cases against the public order and involves public service. The procedure requires a judge to offer a restitution program to a defendant after consulting with the defense attorney. After determining how the defendant's skills will be used, the judge and the defendant sign an agreement designating the number of hours to be served.

Proponents view the program as an alternative to incarceration. Opponents believe that public visibility of the program can significantly hinder offender rehabilitation, especially if the nature of the sentence is public information.

Volunteer service rehabilitation. This alternative allows offenders to participate in any rehabilitation program before a

sentence is determined. The courts make no determination of admission nor do they advise the offender or program administrators. Clients simply join the program during pretrial release and submit evidence of the program's effects at the time of sentencing. No guarantee is given as to whether participation will affect a sentencing decision.

Proponents believe the program provides offenders with an opportunity to recognize their actions and need for rehabilitation. It may also provide the offender with an opportunity to demonstrate a responsibility for future actions. This would be significant because the judge would be provided with some evidence of an offender's potential for rehabilitation.

Determinate Sentencing

Background

Determinate sentencing practices were established prior to indeterminate schemes, and reintroduced because of dissatisfaction with current sentencing practices. Basically, there are three determinate sentencing procedures: discretionary, presumptive, and mandatory incarceration. Each proposal attempts to reduce judicial discretion, while promoting a more standardized procedure for determining a criminal sentence.[13]

[13]A recent study concluded that a concrete federal sentencing policy (assigning specific weight to various offender, offense, or other related factors) is at least technologically feasible. See: U. S. Department of Justice, Law Enforcement Assistance Administration, Predicting Sentences in Federal Courts: The Feasibility of a National Sentencing Policy, by L. Paul Sutton, Analytic Report 19 (Washington, D. C.: Government Printing Office, 1978).

Discretionary. Determinate discretionary schemes establish a sentence range for each crime, but generally the range is much narrower than that with indeterminate procedures. Discretionary sentences may be fixed or mandated for specific crimes.

Presumptive. Determinate presumptive schemes are characterized by an established single sentence for each crime, but often allow discretion for aggravating or mitigating factors which may influence the decision. As a result, presumptive methods appear to provide a balance between broad discretion and total inflexibility.

Mandatory incarceration. Mandatory incarceration allows for no discretion within the sentencing process and is primarily used for establishing a minimum sentence or to focus on criminals with prior records. There are no parole provisions and any participation in a rehabilitation program is voluntary.

Arguments

Proponents. Those who favor determinate sentencing believe that disparate or unjust sentences are the result of little guidance being offered to the judge. As a result, sentences reflect the personal reactions of judges to particular cases.[14] With a statutorily delegated minimum or permanently fixed guidelines, proponents contend sentences will be more uniform and ensure that punishment is secured. This, they note, eliminates

[14]Carey, Determinate Sentencing, p. 555.

uncertainty as to release dates and can reduce inmate frustrations or violence emanating from such uncertainty. Criminal deterrence may be aided, as possible offenders may realize there will be no avoidance of punishment.

Proponents also contend that determinate sentences can reduce the crime rate by incarcerating repeat offenders for longer periods of time. Determinate methods redistribute the time actually served to more serious felons, without increasing total man-years served. Determinate sentencing is also viewed as productive because there should be greater prison stability and policy makers know in advance changes in populations, costs, and needed services.

Proponents also believe the sentencing procedure is more responsive to the needs of the public, as sentences are determined by elected officials. They point out that support stems not only from liberals who desire equitable and predictable sentences, but from conservatives who desire longer sentences.[15]

Opponents. Opponents of determinate sentencing believe that the standard procedure only makes sentencing routine, therein providing an unjust, inequitable, and mechanical system of justice. They note that the system might even make the criminal act legitimate since the crime would be more an assessment

[15]Offenders might even be more responsive to determinate sentencing practices. As of April 8, 1980, 65 percent of Illinois prisoners who were given a choice of sentencing under the old indeterminate sentencing practice or the new determinate scheme chose the new law, even though the median time increased 3.3 years. Marvin E. Aspen, "'Illinois' New Flat Sentencing Law," Corrections Magazine 4 (June 1978): back cover.

of risk. In fact, they believe that the removal of sentence uncertainty could undermine deterrence, as a clear choice of punishment could contribute to criminal acts where the payoff exceeds the punishment. Most important, determinate sentencing can severely restrict or eliminate parole, which is often viewed as a mechanism to mitigate sentencing abuses.[16]

Opponents argue that the determinate system includes the same levels of discretionary decision-making. This is because everything is still dependent on the attitudes of police, prosecutors, and the courts. And, opponents believe that a system of mandatory incarceration can only contribute to an increase in prison, courtroom, and investigative costs.

Studies

In a report entitled Policy Issues in the Sentencing of the Criminal Offender, the Florida Senate Committee on Corrections, Probation and Parole conducted a study which reviewed sentencing literature. In reviewing determinate sentencing procedures, the report cited a Rand Corporation of California finding that prison populations would increase by 450 percent if all felons were sentenced to a minimum of five years, while the population would increase by one-half if one year sentences were imposed.[17] The

[16]Maine, for example, abolished parole in 1975.

[17]Joan Pettersilia and Peter W. Greenwood, Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations (Santa Monica: Rand Corp., 1977) as cited in Florida Senate Committee on Corrections, Probation and Parole, Policy Issues in the Sentencing of the Criminal Offender, October 16, 1976, p. 23.

study concluded that policies that focus on defendants with prior records appear to reduce crime less than those ignoring prior records.[18]

Also cited in the Florida Senate Committee report were studies of Michigan and Pennsylvania which show that the intent of mandatory sentences (establishing a minimum prison time) is already being accomplished within the alternative sentencing practice. For example, preliminary data from the Pennsylvania study show that persons with prior records and serious offenses are receiving sentences as long as those prescribed by the minimum law.[19]

The Michigan study confirmed this finding by demonstrating that two-thirds of those sentenced under a mandatory two year statute for the use of a firearm (in the commission of a felony) would have been incarcerated without the new law. Furthermore, the study found no reduction in the use of firearms subsequent to the enactment of the legislation.[20]

An Arthur D. Little, Inc. study comparing California's determinate sentencing law with 27 other states and the District of Columbia produced several findings concerning the effect on

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[18]Ibid., p. 26.

[19]Alfred Blumstein, Impact of New Sentencing Laws on State Prison Populations in Pennsylvania (Pittsburg: Carnegie-Mellon University, School of Urban and Public Affairs, 1978), as cited in Policy Issues, p. 24.

[20]Michigan Department of Corrections, First Findings in Use and Apparent Impact of Felony Firearm Legislation, by William Kine (Lansing, 1978) as cited in Policy Issues, p. 24.

the courts, probation, correctional institutions, and the overall decision making process.[21] The study also assessed sentencing research and trends, and provided recommendations concerning the establishment of a sentencing commission in California.

Generally, it found that California's determinate sentencing approach:

(1) more closely approximated national sentencing norms than did the prior indeterminate system;

(2) increased the certainty of imprisonment upon conviction;

(3) enhanced the capability to attain sentence equity; and

(4) structurally provided for less incarceration than the indeterminate system.[22]

The study was unable to demonstrate that the determinate sentencing system was responsible for a decrease in crime attrition and it could not assess the rehabilitative aspects of the determinate system.[23]

With regard to the effects on the court system, the study found that:

(1) the role of the judiciary was expanded in all but mandatory sentencing amendments;

(2) district attorneys were allowed to develop more precise departmental policies for prosecutorial procedures and strategy;

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[21]Arthur D. Little, Inc. Determinate and Indeterminate Sentence Law Comparisons Study: Feasibility of Adopting Law to a Sentencing Commission Guideline Approach: Report to the California Legislature Joint Committee on Rules (San Francisco 1980).

[22]Ibid., p. iv-v.

[23]Ibid.

(3) there was an increase in the number of guilty pleas;

(4) such sentencing significantly affects the timelines of adjudication processes and local corrections because local presentence jail time is credited towards time being served; and

(5) although the procedure clearly influences a district attorney's ability to influence final sentences, other factors may significantly contribute to limiting the power.[24]

In the area of probation and corrections, the study found determinate sentencing to:

(1) produce concerns for emphasized presentence investigations;

(2) reduce the influence of presentence investigations;

(3) influence county probation departments so that their participation in the sentencing process varied; and

(4) shift the nature of a caseload to the probation area (but probation officers believe there has been little difference in the type of offender receiving probation).[25]

The study also found that the systems's emphasis on punishment has lowered the perceived priority of rehabilitation; has denied prison managers large discretion in determining overall prison populations; and will probably limit the overall enrollment in California's Rehabilitation Center, even though participation has continued until now. The study concluded that determinate sentencing has influenced the composition of prison populations, even though the researchers could not conclude that overall prison committments had increased.

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[24]Ibid., p. vi

[25]Ibid., p. vi-vii.

Judicial discretion in the sentencing decision has also been influenced. As stated earlier, the overall judicial role has increased, but this has been accompanied by limitations in some areas. For example, the study found that a great deal of discretion was transferred to the prosecutor's office. Determinate procedures have also encouraged pretrial settlements. Although this has allowed the defense to better convey plea alternatives, it may have resulted in an incentive for accepting negotiated pleas for lesser sentences.[26]

Preliminary data compiled by the Illinois Department of Corrections have shown that the determinate system has increased sentence lengths for major crimes such as murder or rape. Sentence lengths for such crimes as robbery, burglary, battery, or theft have decreased.[27] The data also suggest that the length of sentences increases during the second six months of enactment and that statewide conviction rates are becoming more uniform.[28] Although there were increases in the rate of conviction and imprisonment after determinate sentencing enactment, it was too early to ascertain whether this trend will continue.[29]

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[26]Ibid., p. vii.

[27]Illinois Department of Corrections, Determinate Sentencing Impact: Report to the Criminal Sentencing Commission (Springfield, 1979), p. 28.

[28]Ibid., p. 29, 34.

[29]Ibid., p. 12, 16.

Other. A federal sentencing study found variations on the federal level. It found that the most reliable variable for predicting incarceration is the defendant's prior criminal record, with method of conviction and type of offense placing second and third respectively. While race was not significant, sex was an indicator only in cases involving robbery.[30] In determining the prison length, type of offense and method of conviction were the primary factors.[31]

Sentencing Alternatives

The alternatives discussed here differ from those discussed under determinate sentencing because they allow for more discretion, and recognize that the primary responsibility for sentencing is with the courts. They differ from indeterminate alternatives because they may be initiated by the legislature, rather than administratively from the courts.

Appellate Review

Appellate review is a process whereby a group of trial judges, or another appellate court, is established to review sentences. The sentence is reviewed to determine if it is

[30]U. S. Department of Justice, Law Enforcement Assistance Administration, Variations in Federal Criminal Sentences: A Statistical Assessment at the National Level by L. Paul Sutton, Analytical Report 17 (Washington, D. C.: Government Printing Office, 1978), p. 1.

[31]Ibid.

commensurate with the offense and consistent with the public interest, safety, and standard of justice. Generally, if a sentence is mitigated, a judicial explanation is required.

Proponents. Appellate review attempts to encourage rehabilitation by allowing an offender's grievances to be examined; the result is intended to promote a better respect for the law by both society and the offender.

Opponents. Opponents note that the appellate review prosess can easily be distorted because the reviewers may be swayed by appeals to emotion and sympathy, even though only points of law are to be discussed. Because judges' workload would be significantly increased, many fear they might rush through cases, not devoting sufficient attention to specific points of law. Other concerns include whether judges would openly express their opinions, because they could be subject to subsequent reversal; whether judges would distort substantive law in order to provide relief from excessive sentences, therein altering statutory interpretation and case law; and, whether defense attorneys would be reluctant to appeal cases if the sentence could be increased.

A major concern of both proponents and opponents is whether the state should have the right to appeal, and if so, whether the court should have the right to increase the sentence.[32] Those in

[32]In a recent U. S. Supreme Court decision (U. S. v. DiFrancesco) 79-567, the court ruled in favor of the government appealing criminal sentences it considered to lenient. See: Fred Barbash, "Too Lenient Sentencing Rules Subject to Appeal," The Oregonian, December 10, 1980, p. A12; David F. Pike, "Sentence Second-Guessing Allowed," National Law Journal 3 (December 22, 1980): 3.

favor of state appeal note that both the interests of the state and the individual should be protected. They contend that justice demands the correction of a too lenient sentence as well as an excessive sentence.

Sentencing Boards

Sentencing boards include the participation of noncriminal justice persons in the post adjudication of criminal cases. Generally, boards are comprised of members of the community and include professionals. Judges may be members of the group, but the group's opinion is generally only advisory.

Proponents believe the additional advice can render a more meaningful sentence because the defendant is aware of the public's perception of his crime. This procedure is less radical than a lay court and could produce similar results.

Sentencing Commissions

A sentencing commission would be responsible for the development of sentencing guidelines and reforms. Illinois' twelve member commission is composed of three members selected by the Governor, two Senators, two Representatives, and three members of the circuit court.[33] Subcommittees of the commission have already started to examine the fiscal effect of determinate

[33]Illinois Rev. Stat. Ch. 38 §1005-10-1 & 2 "Supp. 1977." See: Illinois Department of Corrections, Criminal Sentencing Commission, Annual Report, 1979.

sentencing, reclassification of felonies, sentencing alternatives, and sentencing guidelines.[34]

Several advantages of a commission are pointed out by proponents. These include the time, expertise, and manpower of the commission to develop sentence reforms; its lessened vulnerability to direct political pressures; its uniformity in sentencing practice and that it would be able to make reforms without continual legislative action.

A recent California study recommended establishment of a sentencing commission in addition to the existing determinate sentencing legislation. The study concluded that such a commission could alleviate overcrowding in correctional institutions; present ad hoc legislative changes; alleviate the inadequate financial attention paid to implications of sentencing legislation; and provide a focal point for system-wide planning and monitoring of correctional results. The study also recommended that sentencing guidelines be considered by the commission; that the body be established as independent within the executive branch; and that a "sunset" provision be attached to the enacting legislation.[35]

[34]Ibid., p. 1-2.

[35]Determinate and Indeterminate Sentence Law Comparisons Study, p. ix-x.

Sentencing Councils

This sentencing procedure usually incorporates three judges who collectively review cases and render advisory judgments. Only one judge is responsible for sentence determination and he is not required to follow the council's advice. Generally, sentencing councils do not have the power to review findings of fact or reverse convictions; they can only review sentences to reduce inequalities. Councils may be structured to allow judges to be responsible for findings of fact, evidentiary rulings, or expediting the trial process. This would allow a panel of judges, sentencing officials, lay persons, and criminal or rehabilitative experts to assume the actual sentencing function.[36]

Proponents cite studies in Illinois, Michigan, and New York that found advisory members influencing judicial decisions in a significant number of cases. The studies also found that the panels tended to minimize the imposition of excessive or lenient sentences.[37] One judge has cited similar evidence, but added that as sentences move more toward a norm, there is a trend toward lenity.[38]

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[36]Sentencing panels were first established in a federal district court in Michigan. Although well supported, they are very rare. See: U. S. Department of Justice, Law Enforcement Assistance Administration, Alternatives to Conventional Criminal Adjudication: Guidebook for Planners and Practitioners by David E. Aaronson, Nicholas N. Kittrie, David J. Saari, and Caroline S. Cooper, ed. (Washington, D. C.: Government Printing Office, 1977), p. 119.

[37]Pierce O'Donnell, Michael J. Churgin, and Dennis Curtis, Toward a Just and Effective Sentencing System: Agenda for Legislative Reform (New York: Praeger, 1977), p. 18.

[38]Marvin Frankel. Criminal Sentences: Law Without Order (New York: Hill and Wang, 1973), p. 71.

Sentencing Institutes

Sentencing institutes were first introduced on the federal level in 1958.[39] These institutes are a gathering of judges, attorneys, justice department representatives, sentencing specialists, psychologists or other specialists for the purpose of promoting uniform sentencing practices.

Proponents of sentencing institutes claim that a forum is provided for open discussions of sentencing practices. Not only can specific areas of law be examined, but attitudes or ideas as well. Additionally, proponents believe that the institute serves as an information outlet, offering old and new judges a chance to examine alternative sentencing practices or options.

Sentencing Guidelines

Sentencing guidelines are intended for use within an indeterminate sentencing program.[40] Guidelines are usually established by the judiciary and are designed to develop a "standard" sentence for each crime. Guidelines must indicate how long incarceration should be, whether there should be probation, or requiring a judge to state why a sentence deviated from the

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[39]Ibid., p. 61.

[40]Sentencing guidelines were first established legislatively in Minnesota, with similar legislation being adopted in Pennsylvania. Courts and planning agencies have adopted sentencing guidelines in Alaska, Connecticut, Massachusetts, Michigan, New Jersey, Utah, and Washington. See: "Sentence Reform and Guidelines," State Legislatures 5 (June 1979): 4

guideline. Sentencing guidelines recognize sentencing as a legitimate judicial function and often reflect past sentencing or parole decisions.

Proponents of sentencing guidelines believe sentence disparity will be reduced because judges will be required to explain decisions established outside the policy of the court. This could reduce the practice of judge shopping and provide swifter and more certain decision making. New judges can easily be absorbed within the system through the use of guidelines, and the guidelines can provide more information to those outside the judiciary.

Proponents also praise this system because it allows for internal sentence reform measures. That is, when changes are required, legislative action would not be needed. Proponents also contend that this system would free parole authorities to concentrate on institutional behavior.

Contract Sentencing

This sentencing procedure requires the judge and the defendant to reach an agreement concerning the goals and conditions of any sentence. The procedure is not in any statewide operation, but it is often used in trial courts.

Proponents believe this practice removes adversarial sentencing procedures. It can curtail the prosecutor's role of making nonbinding recommendations to the judge. And, there can be benefits in the offender selecting the method of rehabilitation or gaining knowledge of rehabilitative possibilities.

Other

The sentencing practices discussed under this heading assume that sentencing practices do not necessarily require incarceration. As such, they can be considered an alternative sentencing practice, but only in-so-far as they are used within either determinate or indeterminate procedures.

Noncustodial sentencing or probation. Generally, probation assumes that an offender no longer poses a serious threat to society and therefore can be released from incarceration. There are several forms of probation including general probation, special probation, deferred entry of judgment, and shock probation.

General probation requires an unthreatening offender to assume no criminal involvement for a specified period of time. In exceptional circumstances, an offender might have to periodically report to a probation officer.

Special probation is conditioned on an offender's participation in a social service program. This form of probation usually has the added requirement of a special sentence, often involving drug or alcohol related counseling or educational training.

Shock probation involves a split sentencing decision. This form of probation operates on the theory that defendants will not appreciate the concession of probation without experiencing incarceration. After serving at an institution, the defendant

will come under the jurisdiction of a probation officer rather than a parole officer.

Deferred entry of judgment can be considered a form of probation, but unlike probation or supervised services, it may eliminate or modify a conviction record. It compares with some forms of intervention by recognizing the adverse affects of a criminal record. Florida and Iowa, for example, permit the suspension of conviction if certain requirements are met by the defendant.[41]

Proponents of such sentencing believe probation officers and judges have the knowledge to assess when an offender poses a dangerous threat to society. They also believe that the release of such offenders will reduce prison populations and state incarceration costs.

Opponents are concerned that legislative decisions involving probation would necessarily affect pretrial intervention--programs they view as internally sound. Opponents also believe that the additional use of probation might increase rather than decrease interjurisdictional discrepancies.

Restitution. Restitution is the payment of damages to the victim of a crime by the offender. Restitution programs may either be permissive (requiring either the use of restitution or an alternative scheme) or mandatory (requiring restitution involving certain crimes.)

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[41] Alternatives to Conventional Criminal Adjudication, p. 114.

Proponents of restitution believe that the act avoids the costly and time-consuming process of court action. Furthermore, the court has the opportunity to use a sentence as a stronger sanction than a civil sanction of nonpayment by the offender.

Victim compensation. This program involves a legislative decision to use state funds for the compensation of individuals who suffer injury from a criminal act. Victim compensation is distinguished from restitution by the fact that the state assumes the role of fund disperser, instead of the offender.

Proponents believe this program ensures payment to victims, whereas payment by the offender may be difficult because of personal or financial difficulties.

Mixed victim compensation and restitution programs. Most programs involve a fund into which both the offender and the state contribute. Generally, the program offers no direct reimbursement to criminal victims. Instead, offenders contribute to the program's general fund and a state agency allocates funds.

Proponents contend that under this system the state recognizes that crime is a social responsibility, while the offender's contribution symbolically recognizes his part in the crime. Since the state shares the financial burden, the allocation of state resources into a social insurance program might be eased.

Nonresidential work facility (NWRF). Within this program, the state provides an industrial work site (or facility) for offenders, but it does not delegate their place of residence. The facility is a profit making enterprise, pays prevailing wages, and operates under strict and conventional work rules.

Job counseling or training is available to the participants, but a portion of their wages is withheld for restitution payments.

Proponents note that the program recognizes the need for punishment and restitution, while it proportions sentences to the severity of the crime. Offenders remain under direct supervision during working hours, but are reintegrated into the community through continued residency or the development of training skills valuable to the community. The program is not dependent on court efforts or prison capacity, as it is self-supporting.[42] Since NWRF is a relatively small labor force composed of the hard core unemployed, there is little threat to the existing labor force. Any labor concerns over competitive bidding should be eliminated, as the use of prevailing wages would deny bids based on cheap labor.

[42]Steven Balkin. "Prisoners by Day: A Proposal to Sentence Nonviolent Offenders to a Nonresidential Work Facility," Judicature 64 (October 1980): 160.

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