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Reconsidering Indeterminate and Structured Sentencing

by Michael Tonry

American sentencing and corrections policies are in ferment. No longer is there anything that can be characterized as the American approach. Thirty years ago there was. Every State, the Federal Government, and the District of Columbia had an indeterminate sentencing system in which legislatures set maximum authorized sentences (and occasionally, but seldom, minimum sentences); judges chose among imprisonment, probation, and fines and set maximum sentences; corrections officials had broad powers over good time and furloughs; parole boards set release dates; and virtually all these decisions were immune from review by appellate courts. The details varied, but the broad outlines were everywhere the same.

In 1999, there is no standard approach. Some jurisdictions retain parole; some have abolished it. Most retain good time, but of lesser scope than in the past. A sizable minority have adopted some form of "structured sentencing." Eight or 9 operate "presumptive" sentencing guidelines systems, another 8 to 10 have "voluntary" guidelines, and 2 jurisdictions in 1 State have "mandatory" guidelines. Five have statutory determinate

sentencing systems, and more than 30 retain some form of indeterminate sentencing. The numbers are imprecise because systems differ so greatly that reasonable people can disagree over which label best characterizes a particular system. All jurisdictions are affected by recently enacted three-strikes, mandatory minimum, or truth-in-sentencing laws.

Sentencing and corrections policies are fractured or fracturing. What look like monolithic tough-on-crime policies in many jurisdictions are being undermined from within by new, individualized programs and approaches. Many people, asked to characterize American crime policies, might describe the unprecedented and continuing expansion of jail and prison populations, the widely shared impulse to lengthen sentences for violent offenders, the federally encouraged truth-in-sentencing movement that requires offenders to serve at least 85 percent of nominal prison sentences, the initiatives in many places to limit prisoners' opportunities and worsen their living conditions, and the reluctance of elected officials to advance policies that an opponent might characterize as soft.



Directors' Message

It is by now a commonplace that the number of people under criminal justice supervision in this country has reached a record high. As a result, the sentencing policies driving that number, and the field of corrections, where the consequences are felt, have acquired an unprecedented salience. It is a salience defined more by issues of magnitude, complexity, and expense than by any consensus about future directions.

Are sentencing policies, as implemented through correctional programs and practices, achieving their intended purposes? As expressed in the movement to eliminate indeterminate sentencing and limit judicial discretion, on the one hand, and to radically restructure our retributive system of justice, on the other, the purposes seem contradictory, rooted in conflicting values. The lack of consensus on where sentencing and corrections should be headed is thus no surprise.

Because sentencing and corrections policies have such major consequences—for the allocation of government resources and, more fundamentally and profoundly, for the quality of justice in this country and the safety of its citizens—the National Institute of Justice and the Corrections Program Office (CPO) of the Office of Justice Programs felt it opportune to explore them in depth. Through a series of Executive Sessions on Sentencing and Corrections, begun

Directors' Message

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in 1998 and continuing through the year 2000, practitioners and scholars foremost in their field, representing a broad cross-section of points of view, are being brought together to find out if there is a better way to think about the purposes, functions, and interdependence of sentencing and corrections policies.

We are fortunate in having secured the assistance of Michael Tonry, Sonosky Professor of Law and Public Policy at the University of Minnesota Law School, as project director.

One product of the sessions is this series of papers, commissioned by NIJ and the CPO as the basis for the discussions. Drawing on the research and experience of the session participants, the papers are intended to distill their judgments about the strengths and weaknesses of current practices and about the most promising ideas for future developments.

The sessions were modeled on the executive sessions on policing held in the 1980s and 1990s under the sponsorship of NIJ and Harvard's Kennedy School of Government. Those sessions played a role in conceptualizing community policing and spreading it. Whether the current sessions and the papers based on them will be instrumental in developing a new paradigm for sentencing and corrections, or even whether they will generate broad-based support for a particular model or strategy for change, remains to be seen. It is our hope that in the current environment of openness to new ideas, the session papers will provoke comment, promote further discussion and, taken together, will constitute a basic resource document on sentencing and corrections policy issues that will prove useful to State and local policymakers.

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While there is no doubt widespread support for policies primarily premised on retributive notions of deserved and required harsh punishments, that is neither the whole nor a consistent story. The burgeoning drug court movement, for example, is creating new diversion opportunities for many thousands of offenders, and in some jurisdictions eligibility is being extended to increasingly serious offenses and offenders; increasing numbers of offenders who face mandatory prison sentences if convicted find themselves being diverted from prosecution altogether. In many States, policies have been adopted that aim to divert many nonviolent offenders from prison into community-based programs. Similarly—though this has advanced less far—restorative and community justice programs in many places are moving toward dealing with increasingly serious crimes and offenders.

Creative and ambitious people in many places are trying new things. Drug courts are one example. Efforts to incorporate broad-based community participation into corrections programs and policy setting are another. Efforts to incorporate restorative and community elements in individual programs or on departmentwide, countywide, or statewide bases are still another. In Wisconsin and elsewhere, practitioners are experimenting with new forms of indeterminate “risk-based” sentencing. In many places, developments of the past decade—structured sentencing, recognition of victims' interests, and expansion of community and intermediate punishments—are being extended.

In an effort to shed light on some of the competing conceptions of sentencing and corrections in this country, this paper presents an overview of the state of indeterminate and structured sentencing and examines arguments for and against each approach. The other two current conceptions of sentencing and corrections—community/restorative and risk-based—are discussed in two separate policy briefs in this publication series.



Sentencing and corrections in the United States at century's end

Because no single, widely shared vision of what sentencing and corrections should be about has emerged to replace indeterminate sentencing, any effort to describe “American sentencing and corrections policies” is bound to be oversimplified and inadequate. A complicated classification might take several factors into account:

- The retention and scope of discretionary parole release.
- The retention and scope of good time.
- The existence and scope of prison administrators' authority to release prisoners on furloughs, to house arrest, or to various kinds of partial and intermittent confinement.
- The breadth of mandatory minimum, three-strikes, and truth-in-sentencing laws.
- The existence of sentencing guidelines and whether they (1) cover felonies and misdemeanors or felonies only; (2) cover all sentences or confinement only; (3) are presumptive, voluntary, or mandatory and, if presumptive or mandatory, whether they are rigorously enforced by the appellate courts as in the Federal system or loosely as in Pennsylvania.

Once those distinctions are made—and they understate the range of variation—there would be no more than a few States in any category.

The structure of sentencing and corrections in the States

No one has attempted a survey of how American jurisdictions handle sentencing and corrections. For one thing, such a survey would be too complex. No conventional categories or labels encompass all the important structural differences in the States' sentencing and corrections systems. The Bureau of Justice

Assistance (BJA), U.S. Department of Justice, has, however, published two recent surveys that attempt to characterize State sentencing systems.

Thirty-six States and the District of Columbia have indeterminate sentencing systems, BJA reported in its most recent State sentencing survey.¹ The rest had determinate sentencing systems. BJA's key test to distinguish between the two types of systems was whether parole release remained available for a sizable fraction of cases; the 14 determinate sentencing States had largely eliminated parole release (though typically not parole supervision), and the indeterminate sentencing States had not.

Using a different organizing scheme, BJA found there were 5 "statutory determinate sentencing states" (States where there was no parole release, and where sentencing standards were stated in legislation), 30 "indeterminate sentencing jurisdictions" (States where there was parole release, and where there were no sentencing guidelines), 6 "voluntary/advisory sentencing guidelines states" (voluntary guidelines with or without parole release), and 10 "presumptive sentencing guidelines states" (States with or without parole release and where presumptive guidelines were backed by appellate sentence review).²

How the States organize corrections

Just as there is no single American approach to sentencing and corrections, there is no single approach to the way they are organized. The principal functions of corrections managers and the scope of their authority vary widely.

- A few States, including Delaware, have consolidated corrections systems in which one State agency has authority for management of prisons, jails, probation, and parole (now vestigial in Delaware); managers in such systems thus have the broadest scope of authority.

- A few States have partly consolidated systems in which one State agency has authority for management of prisons, probation, and

parole but jails are the responsibility of local—usually county-level—managers.

- Some States have partly consolidated systems in which two State agencies have authority over State-level functions—for example, one agency operates prisons and probation and a second operates parole, or one operates prisons and a second operates probation and parole—and local agencies operate jails.

- Some States have fragmented systems in which separate agencies operate State prisons, probation, and parole while local agencies operate jails.

- Some States have more fragmented systems in which authority is divided among various combinations of one to three State agencies; these coexist with various combinations of local jail, probation, and parole agencies and, sometimes, consolidated local community corrections agencies.

- Some States have even more fragmented systems in which separate State and local agencies have authority over overlapping functions (for example, State and local probation systems) or parallel functions. An example of the latter is Minnesota, where some counties have county-level community corrections agencies while in other counties the State Department of Corrections performs those functions.

All this diversity is a challenge and an opportunity. The challenge is to overcome the political and practical barriers to change posed by such great diversity. The opportunity is that so many corrections managers have so much range for innovation and exploration.



Indeterminate sentencing

It is curious that indeterminate sentencing is the least discussed, studied, or openly supported of the four conceptions of sentencing

and corrections, since it remains the majority approach. Why has it survived in so many places? Possible explanations include inertia (any existing arrangement creates vested interests that resist change), efficiency (the discretion granted officials readily permits adjustments to accommodate new circumstances), and general satisfaction (prosecutors, judges, and corrections officials may believe it provides useful tools for achieving legitimate goals).

Origins and characteristics

Full-blown indeterminate sentencing existed in every American jurisdiction from the 1930s to the mid-1970s, at which point Maine and California became the first to reject core features such as parole release and the idea that probation ought to be available in nearly every case.

"Individualization" was the fundamental idea behind indeterminate sentencing. At every stage officials needed broad authority to tailor dispositions to the treatment needs of individ-

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ual offenders and the public safety risks they posed. Probation officers were to assert broad authority over probationers and to help them find jobs and overcome personal problems, and they were also to help judges make the best decisions by preparing comprehensive diagnostic presentence investigation reports. Judges needed broad authority to set appropriate sentences; parole boards needed authority to set release dates and release conditions; and prison managers needed authority to award and deny good time, grant furloughs, and move prisoners between institutions and programs.

The Model Penal Code, developed in the 1950s, was the high point in the conceptualization of indeterminate sentencing. Although

developed for the American Law Institute, an establishmentarian organization of lawyers, judges, and law professors, the group that wrote the Code's sentencing and corrections provisions included prosecutors, psychiatrists, mental health specialists, and leading corrections professionals.

In retrospect, it is almost startling how much attention in the Model Penal Code was given to the perceived need to accommodate offenders' treatment needs and prospects and how little attention was given to notions of "deserved punishment," "just deserts," or public opinion. The Code's principal sentencing, parole release, and good time provisions, set forth in the following sections, reflect this.³

Purpose of sentencing. The first official draft of the Code lists eight "general purposes of the provisions governing the sentencing and treatment of the offender." The first three are: "To prevent the commission of offenses; To promote the correction and rehabilitation of offenders; To safeguard offenders against excessive, disproportionate or arbitrary punishment." Nowhere is mention made of "imposing deserved punishment," "acknowledging the seriousness of the crime," "expressing public outrage," or anything similar.

Authorized prison sentences. The first proposed draft of the Code divided all felonies into three classes, with the following authorized minimum and maximum prison sentences:

- First degree: minimum 1 to 20 years; maximum life imprisonment.
- Second degree: minimum 1 to 3 years; maximum 10 years.
- Third degree: minimum 1 to 2 years; maximum 5 years.

Supporting commentary explains that "it is desirable that the court play a substantial role in sentencing, with authority not only to determine whether the defendant should be sen-

tenced to imprisonment but also to exercise some influence upon its length." It then points out that proposals to shift all authority over sentence length to a treatment board or corrections administrators were "considered at length" before being rejected.

Authorized probation sentences. In the first proposed draft, judges were authorized to sentence any person to probation when the judge "deems that his imprisonment is unnecessary for protection of the public." The commentary explains that the draft language "is based upon the view that suspension of sentence or probation may be appropriate dispositions on conviction of *any* offense" (emphasis added) unless a mandatory sentence of death or life imprisonment is prescribed.

Reconsideration of sentences. The first proposed draft made every prison sentence "tentative" for the first year and authorized the corrections commissioner to petition for resentencing. The commentary explains why: Judges have limited opportunity to study the offender, and corrections officials may later decide that the judge "proceeded on the basis of misapprehension as to the history, character, or physical or mental condition of the defendant."

Good time. Prisoners were to receive 6 days' good time for each month served on good behavior, and corrections officials could award another 6 days per month for "especially meritorious behavior or exceptional performance of his duties," according to the Code's first proposed draft. The good time credits would apply to (and thus advance) both the minimum term before parole release eligibility and the maximum term before mandatory release.

Parole release. The first official draft made prisoners eligible for parole release on completion of their minimum sentences less any applicable good time and created a presumption that prisoners would be released when they first become eligible.

Public sentiment. Although neither the first nor the final proposed drafts contained provisions for mandatory sentences or probation ineligibility (except concerning life sentences and the death penalty), the final draft implicitly acknowledged that public reaction might sometimes be relevant in setting sentences. In language creating a presumption against imprisonment and for probation in every case, the final draft included a new provision: "A lesser sentence will depreciate the seriousness of the defendant's crime." It was among the reasons for disregarding the presumption and ordering a term of imprisonment. A similar provision about the seriousness of the crime was added to a list of considerations that might justify disregarding the presumption that prisoners would be released when first eligible for parole.

David Rothman, the leading historian of American corrections institutions, explains that indeterminate sentencing policies, as they developed from the mid-19th century onward, and the underlying beliefs leading to their adoption, were based on two widely held views. First:

An environmental interpretation of crime made a mockery of personal culpability. No one who was raised in a slum could be held strictly accountable for his actions. The wretchedness of the social setting was so great that responsibility could not be assigned in uniform and predictable fashion. Elemental fairness dictated that the offender be treated as an individual. It was not merely a sensible and effective principle, but a just one. Any other method was vengeful.⁴

Second, Rothman notes, beginning in the 1920s and 1930s, psychological explanations of criminality began to be embraced. Both these beliefs—the environmental and the psychological—lent themselves to individualized sentencing and corrections policies, since their treatment implications depended on the par-

ticular environmental conditions or psychological problems affecting individual offenders.

Rothman reports that life seldom comported with theory and that treatment programs were seldom as available, generous, or effective as rhetoric suggested they should have been. He also suggests—as the title of his book, *Conscience and Convenience*, reveals—that the administrative convenience and autonomy that indeterminate sentencing granted judges and corrections officials (“Convenience”) was as important a source of its endurance and widespread support as were the humane principles (“Conscience”) on which it was nominally premised.

By the mid-1970s, many of the rationales and practices of indeterminate sentencing began to be challenged. Civil rights and prisoners’ rights activists claimed that broad discretion produced arbitrary and capricious decisions and that racial and other invidious biases influenced officials.⁵ Research findings cast doubt on the effectiveness of rehabilitative treatment programs.⁶ Proceduralists urged that broad, standardless discretion denied constitutional due process.⁷ Conservatives argued that broad discretion permitted undue leniency and undermined the deterrent effects of sanctions.⁸ Others argued that a system that did not tailor punishment to culpability was unjust.⁹

Positive attributes

Indeterminate sentencing must have properties that are valued. Why else has it survived in so many places? What is considered “positive,” however, inevitably varies with the identity of the evaluator. A number of claims (some of them inconsistent with others) can be made in favor of indeterminate sentencing, although no single individual is likely to subscribe to all of them.

Sentencing as a human process. Indeterminate sentencing acknowledges that every human being is a unique bundle of attributes and experiences; that rigid policies often cannot take into account meaningful differences

among cases; and that dispositions are most likely to be just and appropriate when they are tailored to the nature of the crime, its effects on the victim, and the characteristics of the offender.

Rehabilitation as a goal. Indeterminate sentencing views human beings as malleable and redeemable and, accordingly, allows maximum scope for efforts to provide services to offenders and to expose them to opportunities for self-improvement and advancement. Recognizing rehabilitation as a goal aids institutional managers because it justifies public investment in a wide range of programs and services that help keep prisoners active and maintain prisoner and staff morale.

Public safety as a goal. Indeterminate sentencing allows judges and corrections officials routinely to take public safety considerations into account when making decisions about individual offenders. Decisions about parole release can take account of offenders’ risk profiles, and decisions about probation conditions, supervision, and revocations can be fine-tuned to the particular risks individual offenders present and the temptations they face.

Delegation of authority. Indeterminate sentencing places decisionmaking authority in the hands of officials who are in direct contact with the offender and his or her circumstances. This parallels developments in the private sector, where in recent years shifting authority downward—as close to the customer as possible—has commonly come to be seen as desirable. The closer decision-making is to individual customers (or prisoners), the less likely it is that decisions will be based on inaccurate or incomplete information or stereotypes.

Professionalization. Indeterminate sentencing assumes that judges and corrections officials have specialized knowledge and experience that can be used to design effective programs,

control risks to the public, and aid in offender reform. The satisfaction, professional self-esteem, and effectiveness of corrections officials are probably enhanced as a result.

Insulation from public emotion. Indeterminate sentencing removes the important decisions about individual offenders from public attention. Trials (or arraignments and

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guilty pleas) take place in public and can easily be reported in the mass media, but decisions about parole release and good time are made in settings where public attention is much less likely to be focused. Especially for notorious crimes or for behaviors temporarily receiving heightened attention, this enables judges to announce sentences that appear to be harsh when public passions are aroused but allows parole and corrections officials later on to fine-tune sentences after these passions have abated.

Administrative efficiency. Indeterminate sentencing allows corrections managers to deal with problems of overcrowding or with changes in resource allocation by adjusting policies governing award of good time, setting of parole release dates, or releasing offenders on furloughs or to intermittent or partial confinement.

Disadvantages

What is negative is also in the mind of the observer, so the criticisms of indeterminate sentencing, like the positive values attributed to it, are sometimes inconsistent.

Disparities. A principal criticism of indeterminate sentencing is that it too often results in stark differences in sentences for people who have committed similar crimes, and these disparities often result more from differences in the values, beliefs, and personalities of the judges or parole board members than from

differences among offenders.¹⁰ Proponents of indeterminate sentencing might respond that while it is undesirable that different sentences result from caprice or idiosyncrasy, there is nothing inherently wrong if offenders convicted of the same crimes receive different sentences when this is justified by their respective risk profiles or treatment needs.

Bias and stereotypes. A second recurring criticism is that the broad discretion accorded judges and corrections officials gives too

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much rein to their conscious biases or unconscious stereotyping. Offenders whose lives and backgrounds are far removed from officials’ personal knowledge and experience might receive less empathy and understanding than those with whom officials have more in common.

Inadequate implementation. Some critics argue that corrections systems seldom if ever carry through on the implied promises of indeterminate sentencing. Vocational training is often not relevant to the job market. Psychiatric, psychological, and medical services often are of low quality. Funds are seldom sufficient to provide a rich array of services tailored to offenders’ needs in prison or in the community. During the height of indeterminate sentencing, many American prisons were squalid, brutal places.

Deserved punishments. An additional criticism is that indeterminate sentencing severs the link between seriousness of crime and severity of punishment. This is not quite the same criticism as the one leveled at disparities, since severity of offense is only one way in which sentences can be disparate (or comparable). For example, disparities might be measured in terms of treatment needs or risk

assessments. The “deserved punishment” criticism holds that people should receive particular punishments and that anything less, in the Model Penal Code’s phrase, “depreciates the seriousness of the crime.” Put more colloquially, a “coddling criminals” complaint has regularly been lodged against indeterminate sentencing since its beginnings.

Public sentiment. Some critics contend that indeterminate sentencing allows the “behind-closed-doors” decisions of judges and others to frustrate realization of the public’s (or elected officials’) views. This criticism is the converse of the “positive” attribute discussed above—that indeterminate sentencing insulates decisions about individuals’

lives from the influence of short-lived passions and political pressures.

Treatment effectiveness. No list like this one would be complete without mention of the widely adopted “nothing works” point of view. In retrospect it is clear that such claims were often overblown, and that subsequent research justified greater optimism about the effectiveness of some kinds of treatments for some kinds of offenders. Nonetheless, if “tailoring sentences to offenders’ rehabilitative needs” was traditionally a major rationale for indeterminate sentencing, the widely shared perception that treatment was seldom effective presented a major challenge.

Compatibility with community/restorative sentencing

To many people today, some of the “positive features” of indeterminate sentencing have an antiquated quality, while many of the “criticisms” represent influential contemporary ideas. Thus it is strange that a majority of the States still have sentencing and corrections systems that can fairly be described as indeterminate. Possible reasons for retaining these systems—inertia, hypocrisy, managers’ self-interest—were mentioned earlier. However, other qualities may also be important. These

include, notably, the focus of indeterminate sentencing on the offender as a unique individual, the administrative flexibility it provides managers, and its relatively light focus on disparities measured solely in terms of crimes and criminal histories. These qualities make indeterminate sentencing potentially more reconcilable with community/restorative sentencing and risk-based sentencing than is structured sentencing, with its emphases on detailed rules, “certain” punishments, and public accountability.



Comprehensive structured sentencing

For much of the past two decades, it appeared that structured sentencing would gradually replace indeterminate sentencing, but this now looks less likely. Although these sentencing guidelines systems can achieve many of their creators’ goals, they cannot easily encompass newer goals, especially those of community/restorative and risk-based sentencing.

Structured sentencing has developed incrementally, beginning with unsuccessful pilot projects to develop voluntary sentencing guidelines. They were typically developed by academic consultants supported by Federal grants, working under the general oversight of committees of judges.¹¹ Their goal was to document the main tendencies in past sentencing patterns and to restate those patterns in nonbinding guidelines. The rationale was that judges are protective of their sentencing discretion and will oppose creation of binding guidelines and resist any that are developed, but they might be influenced by voluntary guidelines developed under judicial oversight. This rationale was undermined by evaluation research that revealed that voluntary guidelines had no discernible effects on sentencing patterns.

Between 1975 and 1985, voluntary guidelines were developed in many States, usually at

county- or judicial-district levels but sometimes at State levels (for example, Maryland, Delaware, Utah, Florida, Massachusetts, New Jersey, Michigan, and Wisconsin). A few States (for example, Virginia, Arkansas, and Missouri) adopted them as late as the 1990s. Most of the local-level guidelines and many of the original State-level guidelines were long ago abandoned.

The next step was State-level presumptive guidelines, so called because they are based on the presumption that cases should be handled in accordance with applicable guideline ranges. Under such systems, judges can impose other sentences but are required to cite their reasons for doing so, and parties to the case can appeal the adequacy of these reasons in high courts. Minnesota led the way with a three-part strategy consisting of creation of a permanent sentencing commission, promulgation by the commission of presumptive guidelines, and establishment of appellate sentence review to ensure that trial judges departed from guidelines only in appropriate cases. The initial guidelines that took effect in 1980 set presumptive standards for *prison sentences* received for committing *felonies*.

The Minnesota presumptive guidelines achieved their primary goals: Judges followed them in a large majority of cases; sentencing disparities were reduced in general and in relation to race, gender, and geographic area; and appellate courts developed case-law standards for the allowable scope of and grounds for departures. What is more, a policy decision tying sentencing standards to available prison capacity was made, thereby making Minnesota one of a handful of States to escape severe prison overcrowding in the 1980s.¹²

Since these initial guidelines took effect, the evolution of structured sentencing has consisted of subsequent steps that one by one fleshed out the Minnesota approach:

- **Felonies and misdemeanors.** Minnesota created guidelines for felonies only (as did

Washington and Oregon, other early presumptive guidelines States); Pennsylvania, North Carolina, and the Federal system covered misdemeanors as well.

- **Prisons and jails.** Minnesota set standards for sentences to confinement in State prisons only; Pennsylvania, Oregon, the Federal system, and North Carolina set standards for jail sentences as well.

- **Confinement and nonconfinement sentences.** Minnesota, Washington, Oregon, and the Federal system (and, initially, Pennsylvania) set no standards for nonconfinement sentences; more recently, North Carolina, Pennsylvania (in 1994), and Ohio established standards for nonconfinement guidelines. Other States in the process of developing guidelines (Massachusetts, for example) are following suit.

- **Community corrections funding.** Recognizing that guidelines for nonconfinement sentences are unlikely to be followed or effective unless there are credible programs to receive offenders, North Carolina coupled development of guidelines with enactment of a community corrections act that appropriated money to be distributed to counties to establish and operate county-level corrections programs. Pennsylvania followed suit when it revised its guidelines in 1994. Ohio did likewise, and new sentencing commissions appear to view community corrections funding as an essential accompaniment of their proposals.

- **Legal force.** Minnesota's guidelines were presumptive. Although most of the guidelines developed later (Pennsylvania, Washington, Oregon, Kansas, Ohio) were also presumptive, North Carolina and the Federal sentencing commission made their guidelines even more restrictive. Each adopted "mandatory" guidelines (an oxymoron?) and attempted to prevent judges from imposing sentences other than as guidelines prescribed.

If Minnesota was the exemplar of structured sentencing as it existed in 1980, North Carolina is the exemplar in the late 1990s. Although not all guidelines States have presumptive guidelines, most features of the evolved approach are being emulated: using projection models to link sentencing policy with corrections resources; setting standards for prison, jail, and nonconfinement sentences; and promoting creation of local community corrections programs and State funding to pay for them.

Strengths

The success of structured sentencing is partly due to the fact that it has served the different policy goals of the 1970s and the 1990s. In Minnesota, Washington, and Oregon, the primary 1970s goals were to reduce sentencing disparities and the possibility of gender or racial bias, and to achieve a form of "truth in policymaking" by tying sentencing policies to corrections spending policies. In most of the early guidelines States (Pennsylvania being

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an exception), increasing sentencing severity or reducing crime rates were not seen as primary goals.

By contrast, many of the newer guidelines systems were developed with just such aims. Voluntary guidelines in Virginia, for example, are expressly based on the premise of incapacitation as a goal and attempt to incorporate research findings on selective incapacitation and criminal careers. Such guidelines provide a mechanism for enhancing the likelihood that judges will impose harsher sentences, and tying policy to corrections capacity is a way to manage the fiscal consequences of the new policies. The evidence from North Carolina is that guidelines appear to be successful at achieving these 1990s goals.

Whether they reflect the goals of the 1970s or 1990s, well-designed and implemented structured sentencing systems arguably possess the following strengths:

Set and change sentencing policies.

Guidelines enable policymakers to establish and change sentencing policies. Of course, no policy is ever implemented exactly as its authors intended. Practitioners often resist new policies they disagree with and, to varying degrees, manipulate and circumvent them. Nonetheless, at least in the 1980s and 1990s, having structured sentencing systems has enabled jurisdictions to successfully alter sentencing patterns. In North Carolina, for example, the goals were to increase the likelihood that many serious offenders would receive prison sentences and to lengthen their prison terms. Both goals were achieved the first year, with 100 percent of those convicted of the target crimes going to prison. Another North Carolina goal was to free up needed prison beds by diverting people convicted of less serious offenses to intermediate and community punishments. This goal too was met, and the percentage of nonviolent offenders sentenced to State prisons plummeted.

Project and regulate prison space needs.

Guidelines enable policymakers to make responsible decisions about construction, operation, and financing of prisons. Experience in the 1980s with the Minnesota, Washington, and Oregon guidelines showed that “capacity constraints” can work, and the North Carolina experience with more complete and comprehensive guidelines in the 1990s confirms this. Recent projections show that North Carolina prisons will operate below capacity through 2007.

Reduce sentencing disparities. Guidelines enable policymakers to reduce the extent of unwarranted racial, ethnic, gender, and geographical disparities in sentencing.

Provide impetus for community corrections funding. Guidelines provide a politically credible basis for proposals for State funding of local corrections programs. Since probation and other community-based programs have long been notoriously underfunded and typically are the first target of budget cuts and reallocations, guidelines have the effect of enhancing the funding, scope, and programmatic richness of community corrections. The North Carolina, Pennsylvania, and Ohio sentencing commissions have all achieved conspicuous success at using structured sentencing to leverage increased State investment.

Other arguments can be made for structured sentencing. The sentencing commissions have created institutional capacities, previously lacking in many States, for projecting the effects of proposed changes in sentencing policy. In a number of States, the commissions are regularly called on to perform that service. Similarly, the commissions have created a cadre of State sentencing policy experts where none existed before.

Disadvantages

Criticisms of structured sentencing are based on two concerns: that it has insufficiently realized its potential and that current initiatives need to be extended and perfected; and that it has gone too far and made sentencing too impersonal and mechanical.

Unfulfilled promise. If it were clear that current trends toward comprehensive structured sentencing were desirable, a number of as-yet-incomplete tasks could be identified for this system. Because a kind of inertia sets in after a State makes major changes in sentencing laws, many States have sentencing systems that are locked, like flies in amber, at an earlier developmental stage. Minnesota, Washington, and Oregon, for example, after years of trying to create guidelines for intermediate punishments (and in Oregon, guidelines for misdemeanors), failed to do so. Other States (Maryland, for example) retain

voluntary guidelines systems that few believe significantly constrain judges’ decisions in individual cases. Even the current bellwether States of North Carolina, Pennsylvania, and Ohio have not succeeded in catalyzing the development and funding of sufficiently ample community corrections programs, and none has so far managed to devise policies governing choices among intermediate or community punishments.

Dehumanization. The second criticism of structured sentencing is more basic: that sentencing until recently was and in the future should be a “human process,” and that much structured sentencing flies in the face of that vision. Nearly every nonpartisan expert body that has considered the desirability of mandatory sentencing laws has urged either their rejection or their limitation to a tiny fraction of the most serious cases. Yet every State adopted mandatory minimum sentencing laws in the 1980s and 1990s, and both the Federal and North Carolina guidelines are described by their developers as “mandatory”; judges must impose the mandatory sentence whether or not on the facts of a particular case it appears just or called for. Many judges have long opposed guidelines and mandatory sentencing laws because their rigidity can result in injustices in individual cases. As structured sentencing becomes more comprehensive, these problems will steadily worsen.

Worries

Comprehensive structured sentencing raises worrisome issues about the roles of corrections officials, the scope for incorporating key elements of community/restorative and risk-based sentencing, the politicization of sentencing policy, and the quality of justice delivered to criminal defendants.

Diminishing corrections officials’ roles. The implications of structured sentencing are different for officials who operate prisons and those who operate probation agencies and community programs. Prison managers could

become little more than operators of human warehouses. As structured sentencing coupled with truth-in-sentencing and its “85 percent” rule becomes more pervasive, many prison managers may find that:

- They lack the resources needed to operate meaningful rehabilitative and other programs inside the facility.
- They have lost the discretion to furlough prisoners or release them to halfway houses or to other forms of intermittent or partial confinement including house arrest.

American corrections since the founding of the American Correctional Association has always encompassed commitments to help offenders learn how to live satisfying, law-abiding lives. But current sentencing trends threaten to impoverish the functions and the vision of correctional managers and make American prisons uniquely bleak and inhumane places.

Managers who work with probation and community penalties will face the challenge of finding the funding and the political authority to create and operate value-adding programs. There is, of course, a possibility that the status and authority of community corrections managers will be enhanced if structured sentencing expands, but, if past experience is any guide, they will find it difficult to obtain new funds and retain old funds in the next economic downturn. Even in the expanding economy of the mid-to-late 1990s, community corrections managers have nowhere obtained adequate funding to operate the programs that are needed.

Constraints on development of programs. Many newly developing community, restorative, and rehabilitative programs (including drug courts, drug treatment programs, and sex offender treatment programs) are beginning to target more serious categories of offenders. These can include people charged with assaults, sex crimes, minor robberies, and

street-level drug trafficking. Such people are, in many jurisdictions, supposed under presumptive or mandatory guidelines to be sent to prison for a fixed term. If judges and prosecutors comply with the guidelines, offenders for whom enrollment in these programs is appropriate will be sent to prison. As a consequence, program development will be stunted.

If judges and prosecutors ignore or circumvent applicable guidelines, there will be increased risks that:

- The justice system will lose credibility.
- Arbitrary and idiosyncratic decisions will be made to divert certain offenders and not others.
- Decisions will be made on the bases of conscious bias or unconscious stereotypes.

Continued politicization. Reduction of sentencing standards to simple numerical formulas may provide an irresistible temptation to adopt symbolic policies in pursuit of short-term political goals. As Franklin Zimring observed in the early days of determinate sentencing, if sentencing standards can be expressed as numbers written on a blackboard, all that is needed to change them is an eraser and the political will.¹³ This is essentially what happened repeatedly in California since enactment in 1976 of the Uniform Determinate Sentencing Law. It happened even in liberal Minnesota where, in 1990—with one stroke—the presumptive lengths of all prison sentences were doubled. Reasonable people can differ about the appropriateness of particular sentencing standards, but a process that facilitates impulsive changes is unlikely over time to produce good policies.

Diminution in the quality of justice. A fourth worry is a corollary of those discussed above and reiterates the recurring criticisms by judges and others of determinate and structured sentencing. Guidelines typically

reduce authorized sentencing criteria solely to the offender’s crime and to some measure

reduction of sentencing standards to simple numerical formulas may provide an irresistible temptation to adopt symbolic policies in pursuit of short-term political goals.

of his or her criminal history; mandatory sentencing laws typically base sentences only on the offender’s crime, thereby reducing sentencing criteria to one or two dimensions. Yet human beings—offenders, judges, and prosecutors alike—are multidimensional creatures, and thus considerations other than simply the crime and the criminal history are often relevant to determining the most appropriate disposition in a particular case. To the extent that structured sentencing prevents judges and lawyers from doing what is just, the overriding purpose of the justice system is undermined.



The other conceptions of sentencing and corrections

In some respects this document may be misleading. It begins by suggesting that there are four contending conceptions of sentencing and corrections and emphasizes the diversity of American approaches to sentencing and corrections, but it focuses on only two of the four—indeterminate and structured sentencing—elaborating the contrasts between them. Most likely, diversity is the more important characteristic. Other documents in this series of publications from the Executive Sessions on Sentencing and Corrections focus on the other conceptions—community/restorative and risk-based sentencing.¹⁴

How sentencing and corrections in the United States will evolve remains to be seen. The next 25 years are likely to witness at least as much change as have the past 25.

Notes

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14. These documents are, respectively, *Incorporating Restorative and Community Justice Into American Sentencing and Corrections*, by Leena Kurki, Research in Brief—Sentencing & Corrections: Issues for the 21st Century, Washington, DC: U.S. Department of Justice, National Institute of Justice/Corrections Program Office, September 1999, NCJ 175723; and *Reforming Sentencing and Corrections for Just Punishment and Public Safety*, by Michael E. Smith and Walter J. Dickey, Research in Brief—Sentencing & Corrections: Issues for the 21st Century, Washington, DC: U.S. Department of Justice, National Institute of Justice/Corrections Program Office, September 1999, NCJ 175724.

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This and other NJ publications can be found at and downloaded from the NJ Web site (<http://www.ojp.usdoj.gov/nij>).

NCJ 175722

An overview of the current state of sentencing and corrections in the United States is presented in the first paper in this series, *Fragmentation of Sentencing and Corrections in America*, by Michael Tonry, Research in Brief—Sentencing & Corrections: Issues for the 21st Century, Washington, DC: U.S. Department of Justice, National Institute of Justice/Corrections Program Office, September 1999, NCJ 175721.

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