THE SENTENCING REFORM MOVEMENT

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Concerns about disparity, discrimination, and unfairness in sentencing led to a “remarkable burst of reform” that began in the mid-1970s and continues today.

The initial focus of reform efforts was the indeterminate sentence, in which the judge imposed a minimum and maximum sentence and the parole board determined the date of release. The parole board’s determination of when the offender should be released rested on its judgment of whether the offender had been rehabilitated or had served enough time for the particular crime.

Under indeterminate sentencing, sentences were tailored to the individual offender, and discretion was distributed not only to the criminal justice officials who determined the sentence but also to corrections officials and the parole board. The result of this process was “a system of sentencing in which there was little understanding or predictability as to who would be imprisoned and for how long.”

Both liberal and conservative reformers challenged the principles underlying the indeterminate sentence and called for changes designed to curb discretion, reduce disparity and discrimination, and achieve proportionality and parsimony in sentencing.

Liberals and civil rights activists argued that indeterminate sentencing was arbitrary and capricious and therefore violated defendants’ rights to equal protection and due process of law. They charged that indeterminate sentences were used to incapacitate those who could not be rehabilitated and that offenders’ uncertainty about their dates of release contributed to prison unrest.

Liberal critics were also apprehensive about the potential for racial bias under indeterminate sentencing schemes. They asserted that “racial discrimination in the criminal justice system was epidemic, that judges, parole boards, and corrections officials could not be trusted, and that tight controls on officials’ discretion offered the only way to limit racial disparities.”

Political conservatives, on the other hand, argued that the emphasis on rehabilitation too often resulted in excessively lenient treatment of offenders who had committed serious crimes or had serious criminal histories. They also charged that sentences that were not linked to crime seriousness and offender culpability were unjust.

These conservative critics championed sentencing reforms designed to establish and enforce more punitive sentencing standards. Their arguments were bolstered by the findings of research demonstrating that most correctional programs designed to rehabilitate offenders and reduce recidivism were ineffective.

After a few initial “missteps,” in which jurisdictions attempted to eliminate discretion altogether through flat-time sentencing states and the federal government adopted structured sentencing proposals designed to control the discretion of sentencing judges.

A number of states adopted determinate sentencing policies that offered judges a limited number of sentencing options and included enhancements for use of a weapon, presence of a prior criminal record, or infliction of serious injury. Other states and the
federal government adopted presumptive sentence guidelines that incorporated crime seriousness and prior criminal record into a sentencing “grid” that judges were to use in determining the appropriate sentence.

Other reforms enacted at both the federal and state level included mandatory minimum penalties for certain types of offenses (especially drug and weapons offenses), “three-strikes-and-you’re-out” laws that mandated long prison sentences for repeat offenders, and “truth-in-sentencing” statutes that required offenders to serve a larger portion of the sentence before being released.

This process of experimentation and reform revolutionized sentencing in the United States.

Thirty years ago, every state and the federal government had an indeterminate sentencing system and “the word ‘sentencing’ generally signified a slightly mysterious process which . . . involved individualized decisions that judges were uniquely qualified to make.” The situation today is much more complex. Sentencing policies and practices vary enormously on a number of dimensions, and there is no longer anything that can be described as the American approach.

The Impact of the Sentencing Reform Movement: Mass Incarceration

In 1971, David Rothman, one of the foremost authorities on the history and development of the prison system, wrote that “We have been gradually emerging from institutional responses, and one can foresee the period when incarceration will be used still more rarely than it is today.”

Two years later, the National Advisory Commission on Criminal Justice Standards and Goals, which concluded that “the prison, the reformatory, and the jail have achieved only a shocking record of failure,” recommended that there should be no new correctional institutions for adults and that existing institutions for juveniles should be shut down.

Four decades later, it is clear that Rothman’s prediction did not come true and that the commission’s recommendations were not followed.

Their calls for reductions in the use of incarceration, which were voiced at a time when the inmate population was just over 300,000, fell on deaf ears. Rather than declining, America’s imprisonment rate, which had fluctuated around a steady mean of 110 individuals per 100,000 population for most of the 20th century, increased every year from 1972 to 2008, when the rate peaked at 504 per 100,000 population.

In terms of raw numbers, the prison population increased from about 300,000 to just over 1.6 million between 1972 and 2008. Since 2008, the imprisonment rate has declined slightly, driven primarily by changes in the California prison population mandated by the Public Safety Realignment policy implemented in that state.

As these figures convincingly demonstrate, for the past 40 years the United States has been in the midst of “an unprecedented imprisonment binge.” These dramatic increases are not due to increases in serious crime rates; in fact, the crime rate in the United States has declined steadily since 1991.

Most criminologists and legal scholars contend that changes in sentencing policies and practices fueled the growing use of imprisonment in the United States. According to a recent comprehensive report on the growth of incarceration in the United States by the National Research Council, the explosion in the prison population can be
attributed primarily to growth in prison admission rates, especially for drug offenses, and to increases in time served, particularly for violent crimes.

These changes, in turn, are largely attributable to the sentencing reform initiatives aimed at achieving greater severity and certainty of punishment—mandatory minimum sentences, truth-in-sentencing statutes, three-strikes sentencing provisions, life without the possibility of parole (LWOP) laws, and overly punitive sentencing guidelines in which the severity of the sentence is not proportionate to the seriousness of the crime.

Scholars and practitioners concerned about skyrocketing imprisonment rates (and the collateral consequences of incarceration for offenders, their families and their communities) have called for a new round of sentencing reform designed to slow the flow of people into state and federal prisons and reduce both the number of persons now incarcerated and the lengths of sentences they are serving.\(^\text{16}\)

To accomplish this, the tough-on-crime laws that were enacted during the sentencing reform movement of the 20\textsuperscript{th} Century (i.e., mandatory minimum sentences, LWOP, three-strikes, and truth-in-sentencing laws) must be repealed or dramatically scaled back and statutory maximum sentences must be substantially reduced and must be proportionate to the seriousness of the crime.

There is growing evidence that the time is right to pursue these policy changes. In 2006, Bruce Western predicted that “mass imprisonment is likely to be preserved by the political and economic forces that created it,” adding that “policy makers and voters appear to retain a keen appetite for punishment.”\(^\text{17}\)

As the second decade of the 21\textsuperscript{st} century unfolds, this prediction, which appeared to be eminently reasonable just nine years ago, seems less plausible. Evidence that Americans’ appetite for punishment may be shrinking and that the United States must chart a different course on sentencing comes from a variety of sources.

For example, in a speech to the American Bar Foundation in August of 2013, Attorney General Eric Holder unveiled the Department of Justice’s “Smart on Crime Initiative,” which called for major changes to federal sentencing practices and for a reassessment of the nation’s system of mass imprisonment.\(^\text{18}\) Also at the federal level, Congress was considering legislation to reduce prison overcrowding and the skyrocketing costs of incarcerating low-level offenders by giving judges more discretion when sentencing offenders subject to mandatory minimum penalties.

A number of states also are re-thinking their approach to sentencing nonviolent offenders and drug offenders; these states have passed laws designed to rollback or otherwise revise mandatory minimum sentences for these types of offenders.\(^\text{19}\) Other states have tackled the drug offender problem by either decriminalizing or legalizing recreational use of marijuana.

Although critics\(^\text{20}\) contend that these reform efforts are “meager” and represent little more than “nibbling at the edges” of the problem, the fact that they are supported by politicians from both sides of the political spectrum and by large majorities of American citizens suggests that the time is indeed ripe for major change in sentencing policies and practices.
Notes

3 American Friends Service Committee, 1971; Davis, 1969; Frankel, 1972
4 Tonry, 1995: 164
5 van den Haag, 1975; Wilson, 1975
6 von Hirsch, 1976
7 Martinson, 1974
8 Walker, 1993
9 Tonry, 1996: 3
10 Rothman, 1971: 295
11 National Advisory Commission on Criminal Justice Standards and Goals, 1973: 597
12 U.S. Department of Justice, 2013
13 Austin and Irwin, 2011
15 National Research Council, 2014
16 Tonry, 2014; Tonry and Melewski, 2008
17 Western: 195
18 U.S. Department of Justice, 2013: 1
19 Subramanian and Delaney, 2014
20 See, for example, Tonry, 2015

REFERENCES


