Sentencing is the imposition of punishment. After a defendant pleads guilty to a crime or is convicted as the result of a trial, the focus shifts from prosecution to the sanctioning of guilty defendants. The judge imposes the sanctions on the defendant. The punishment of guilty defendants has philosophical justifications and occurs as the result of a codified process. Despite the philosophical justifications and structured process, some research suggests that there is disparity and discrimination in sentencing. The research findings helped spur a 30-year reform movement. Some of the reforms appear to be at least partially successful. Despite the success of some reforms, research continues to identify race-related sentencing disparity. A number of sentencing-related cases mark the legal landscape in the early 21st century, with the continuing goal of amending the sentencing process to ensure that it is consistent with the protections of the Constitution of the United States.

Philosophies of Punishment

The philosophies of punishment provide different answers to the questions of whether, how, and for how long to punish an individual. The five philosophies are retribution, deterrence, incapacitation, rehabilitation, and restoration/restorative justice. The answers derived from the philosophies of punishment have practical implications for sentencing policy and practice.

Retribution is premised upon the notion that criminals are guilty of the accused crimes and, therefore, deserve to be punished. The punishment is justified by the fact that criminals chose to engage in illegal behavior. Retribution is not geared toward preventing future crime but solely on sanctioning past behavior. The amount of punishment is determined through the principle of proportionality—the punishment assigned to offenders should be equal to the harm that they caused through their crimes. The punishment is determined by the seriousness of the crime and the culpability of the offender. The punishment does not have to resemble the crime.

Deterrence can be specific or general in nature. The purpose of specific deterrence is to dissuade a specific offender from committing future crimes, or recidivism. General deterrence is intended to prevent others from engaging in criminal activity similar to that of the offender by demonstrating the consequences associated with the crime. The amount of punishment should be only significant enough to outweigh the benefits of the crime, and no more. Deterrence utilizes cost-benefit analyses to determine the quantity of punishment with the goal of crime prevention and is calculated through a balance of certainty, swiftness, and severity in punishment.

Incapacitation is the isolation of high-risk offenders in order to limit the opportunities that they have to commit additional crimes. Incarceration is the most popular form of incapacitation, but incapacitation also includes forms of home confinement and electronic monitoring, boot camps, and chemical castration for some sex offenders. The punishment should be proportionate to the risk posed by the offender; high-risk offenders should be punished more severely than low-risk offenders. One of the biggest criticisms of incapacitation is that it involves the assessment of dangerousness and the
prediction of those offenders at the highest risk of recidivism. The determination of high risk and
dangerousness is complicated—those who have committed the most serious offenses (murderers) are
the least likely to repeat their offenses, whereas shoplifters and petty drug dealers are the most likely
to repeat their offenses. If dangerousness and punishment are determined based on likelihood of
recidivism, then shoplifters would be punished more harshly than murderers. Additionally, prediction can
result in a high rate of false positives—treating people harshly because they have been deemed high
risk when they may not have ever reoffended. These two scenarios present ethical problems.

Rehabilitation focuses on addressing offenders' treatment needs, thereby reducing the likelihood of
recidivism. Rehabilitation is based on the assumption that there is some characteristic(s) that drives an
offender’s behavior. An assessment is needed to identify these characteristics and treatment needs,
which may include substance abuse or mental health treatment, education, job training, or other forms
of behavior modification. The amount of punishment/treatment should be based on offenders’ needs
and potential for reform. Rehabilitation is criticized on the grounds that it is difficult to determine true
causal factors and design effective treatment programs.

Restoration/restorative justice is different than the other philosophies, which focus on punishing or
treating the offender. The aim of restoration is to repair the harm done to the victim and his or her
community and to repair the relationship between the victim and the offender. Advocates of
restoration argue that this approach to punishment meets the requirements of justice and prevents
the ostracism of offenders that can result in the traditional criminal justice system through the use of
reintegrative shaming.

**The Sentencing Process**

After defendants are found guilty beyond a reasonable doubt through plea agreements or trial, they
move to the sentencing phase. A plea agreement may include an agreed-upon sentence that is
consistent with the offense(s) pled to and the designated range in sentencing statutes. The shift to
determinate sentencing drastically reduced the practice of sentence bargaining. The judge generally
imposes the sanctions agreed upon in the plea deal but is not required to do so. In misdemeanors and
disorderly persons cases, defendants may plead guilty at the initial appearance and be sentenced
immediately. Felony trial convictions involve a more complex sentencing process.

Upon conviction for felonies or serious misdemeanors that can result in periods of incarceration, a
presentence investigation is completed by the probation office. The presentence investigation report
includes information on the offense(s) of conviction, the defendant’s role, background, prior record, and
possibly an assessment of potential for reform. This report is submitted to the court for the judge's
review prior to the sentencing hearing. Prosecutors and defense attorneys also receive a copy of the
report.

The judge hears arguments from opposing counsel at the sentencing hearing. After oral arguments, the
judge sanctions the defendant in a manner consistent with sentencing laws and with consideration
toward the presentence report. Sentences may include periods of incarceration or a variety of
alternatives to incarceration, such as probation, fines, community service, and restitution. Sentences
often include multiple sanctions. The presentence report may also be used to sentence offenders who
plead guilty but for whose cases judges have very limited information.

Capital cases use a bifurcated trial system. The first phase determines guilt. If the defendant is found

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guilty, then the case moves to a second phase during which the jury decides whether to impose the death penalty or a life sentence. The bifurcated trial system is intended to reduce the disparate, discriminatory, and capricious application of the death penalty.

Disparity, Discrimination, and Reform

Traditionally, the U.S. legal system utilized an indeterminate sentencing system. This system either allowed judges to craft sentences that were appropriate to individual offenders or allowed a conditional release authority to determine when offenders had been sufficiently reformed and ready for return to the community. This process naturally required discretion and often resulted in sentencing disparity. Disparity rooted in legally irrelevant sentencing or release criteria is discrimination.

Legally relevant sentencing criteria include the nature of the offense(s) of conviction, aggravating or mitigating factors, and the offender's prior record. Some jurisdictions allow for the consideration of community stability, employment history, and education. Sentences tailored for individual offenders vary based on the crimes, criminal history, and personal circumstances and may be desirable from a rehabilitative perspective.

Legally irrelevant sentencing criteria include race/ethnicity, sex, religion, socioeconomic status, political orientation, and sexual orientation. When any or all of these criteria are involved in the decision-making process, the sentencing differentials shift from disparity to discrimination; discrimination is unacceptable in all circumstances.

Research suggests the presence of sentencing disparity and discrimination based on a multitude of criteria. Racial discrimination remains one of the most problematic and persistent issues in the criminal justice system, generally, and in the sentencing process, specifically. Research highlights myriad manifestations of racial discrimination in sentencing ranging from systematic discrimination to contextual discrimination and individual acts of discrimination by judges. The research also highlights several origins of the discrimination beyond racist judges and prosecutors, including criminal laws that have a disproportionate and detrimental impact on racial and ethnic minorities, differential enforcement by police officers, and conditional release decisions by parole boards. Further confounding the situation is research that does not support findings of racial discrimination.

A sentencing reform movement began in the 1970s with a shift to determinate sentencing in the form of fixed sentencing schemes that prescribed particular sentences based solely on offense of conviction, offender criminal history, and the abolition of parole. The intent of these reforms was to reduce sentencing disparity and discrimination. A host of additional reforms followed these initial reforms.

Sentencing reforms include descriptive and prescriptive sentencing guidelines; mandatory-minimum sentences for drug, firearm, and habitual offenders; three-strikes-and-you're-out laws; and truth-in-sentencing laws. The intent of these reforms was to make sure that similarly situated offenders who commit similar offenses receive similar sentences and that they serve those sentences, thus reducing sentencing disparity. Some research suggests that racial disparity and discrimination have been reduced, whereas other research indicates that disparity and discrimination persist as reflected in the disproportionate representation of racial and ethnic minorities in U.S. jails and prisons. Any remaining racial disparity or discrimination is likely to be contextual or the result of an interaction effect because direct, systematic racial discrimination has been eliminated from the legal system.

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Legal Developments

The 21st century has produced several important sentencing-related legal developments. The first set of cases starts with Apprendi v. New Jersey (2000), in which the Supreme Court of the United States held that any fact, besides criminal history, that increases the sentence beyond the statutory maximum must be presented and proved beyond a reasonable doubt to a jury. The Apprendi rule was applied in Blakely v. Washington (2004), establishing that failure to admit facts that increase the sentence beyond the statutory maximum for jury deliberation violates the Sixth Amendment right to a trial by jury. This rule was subsequently applied to the federal sentencing guidelines in the consolidated matters of United States v. Booker (2005) and United States v. Fanfan (2005). In these cases, the Supreme Court of the United States held that the Sixth Amendment does apply to the federal sentencing guidelines and that the real conduct sentencing practice violates the requirement that all factors that increase the sentence beyond that in the guidelines must be submitted to a jury for consideration. The Court went on to state that the provisions of the Sentencing Reform Act of 1984 that make the guidelines mandatory are stricken from the act, and the federal sentencing guidelines are advisory to federal judges.

The second set of cases deals with special types of offenders. In Atkins v. Virginia (2002), the Court held that the execution of mentally retarded offenders is prohibited by the Constitution of the United States. The ruling was primarily attributable to the national consensus that had developed against the practice and to the idea that mentally retarded offenders operate with diminished capacity, which renders execution an excessive and unconstitutional punishment. The same reasoning was applied in Roper v. Simmons (2005), in which the Court held that the execution of individuals who were under the age of 18 when they committed their crimes is unconstitutional and thus prohibited.

These five cases and the reform movement dealt with ensuring that sentencing occurs as the result of a systematic process that is consistent with the protections of the Constitution of the United States, which should have the effect of reducing sentencing disparity.

See also

Disproportionate Incarceration, Sentencing Disparities, African Americans, Sentencing Disparities, Latina/o/s, Sentencing Disparities, Native Americans

Further Readings


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