

Sentencing Guidelines Grid: Using Technology to Achieve Equity

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What do the 1967 march on Washington, The Prison Model, and sentencing guidelines have in common? Each have tried to relieve intense feelings of injustice.

Equity, disparity and uniformity in criminal sentencing are the issues. In the last 20 years, we've seen a major change in criminal sentencing policy. This move to adopt sentencing guidelines began in the federal system in 1975 with Sen. Edward Kennedy's (D-Mass.) efforts in the form of his legislation that reformed sentencing and established the U.S. Sentencing Commission. And, in 1984, President Reagan signed into law the Sentencing Reform Act (P.L. 98-473).

The primary focus of the Commission (28 USC Sec. 991) is to refine sentencing using available scientific knowledge that is useful in developing criminal policy. Purportedly, uniformity and equity is achieved through the application of technology that treats categories of offenses the same. Guidelines are explicit policies that specify sentences for categories of offenders. Sentencing guideline grids denote the range within which a judge may sentence. Generally, the offense

severity is on the vertical axis and the criminal history scores on the horizontal axis. The scores correlate to the sentence terms. The lower the points, the shorter the prison term (*Wake Forrest Law Review*, Vol. 28, Summer 1993). Today, some 14 states have adopted guidelines.

Guidelines and grids have an interesting history. On the one hand, this new technological framework of sentencing has been heralded by liberals who believed it to be an anti-discrimination, even anti-imprisonment measure; and on the other hand, it has been praised by conservatives as a law and order crime measure. Guidelines and grids soon captured the attention of Minnesota, North Carolina and Washington, which adopted guideline-like systems during the early 1980s. They had faith that transferring the decision-making authority from the individual judges to an administrative body (Commission and/or Legislature) would eliminate judicial bias and discretion.

This review does not attempt to explain how reformers came to embrace the guidelines grid system. Certainly this system has problems. One need only to read print media headlines criticizing guidelines as racially biased (*The Sacramento Bee*, August 1993). As is

often the case with most systems, expectations have not been met.

So, how does government mete out justice equitably to control crime and preserve domestic tranquility? Should we rely on technological decision-making because we are not perfect about applying human judgment? We cannot escape the human side of sentencing. In fact, it is through sentencing that society expresses its goals for the correctional process. These goals include retribution — giving offenders their just desserts; incapacitation — locking the offender away from society; deterrence — demonstrating that swiftness and certainty of punishment would deter future activity; rehabilitation — providing vocational, educational and counseling services for offender reintegration into the community; and restitution — having offender repay the victim and community for their crime/s.

These utilitarian values have long since underpinned sentencing policy. In fact, the importance of these goals are enumerated in the U.S. Sentencing Commission's directive (18 USC Section 3553 (a) (2)). In short, sentencing reveals public attitudes about crime and punishment. The goals of sentencing change with emerging ideas about how to achieve inmate reform. A review of American penal history reveals that ear-

ly sentencing, for the most part, was determinate in nature. The Legislature set a maximum number of years of imprisonment and the presiding judge set the actual term, not to exceed the fixed maximum. In the 1870s, there was a revolution in sentencing practices and a push for indeterminacy.

By the close of the 1900s, the majority of states adopted indeterminate sentencing (ISL). On May 18, 1917, the California Penal Code 1168(a) was modified to read:

Every person convicted of a public offense (punishable) by imprisonment, shall be sentenced to state prison, but the court shall not fix the term or duration of the period of imprisonment. (Paula A. Johnson, *Santa Clara Law Review*, Vol. 17, Johnson, 1977).

Judges were no longer sentencing offenders to a flat or determined term. The incarceration period was to be determined by the parole board. Change in sentencing policy is intimately related to the emerging ideas of how to achieve offender reform. There are numerous articles on rehabilitation (Paul Gendreau, *Revivification of Rehabilitation*, 1982). The prison setting was envisioned to be a place where the inmate rehabilitation progress would take place. The curative aspects of prisons have consistently come under attack.

In 1974, Robert Martinson wrote *What Works—Questions and Answers About Prison Reform*, an article published in *The Public Interest* in 1974 that captured the attention of the justice community. His essay presented the results of research of correctional programs conducted between 1945-67. Martinson concluded that "with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." At the end of the article, he posed a question: "Does Nothing Work?"

The "nothing works" debate continues even today. Some argue that treatment and rehabilitation are too expensive an approach to solve the problem of crime. Others proclaim the treatment approach is worthy of praise for its situational effect on modifying criminal behavior and providing training essential to the offender's post-release progress. Still others claim that experience tells us that the propensity for crime increases as certainty and swiftness of punishment decreases, and only



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severity of punishment works. Assessing the effectiveness of penal and correctional practices in meeting the purposes of sentencing is critical.

What do we know about what works? It has been argued by Frances Cullen, a professor with the University of Cincinnati, and Paul Gendreau of Ontario Correctional Services, that readers of Martinson's article overlooked a point. Martinson was careful to note that the failure to find treatment successes may have been the result of an inability of research methods to detect when programs are effective. There is validity in claims that the use of rehabilitation programs have been weakened by a lack of expertise and dedication (Gendreau, *Effectiveness of Rehabilitation*, 1979). Supporters of rehabilitation are adamant that it was working under ISL (Clannon, Sentencing Senate Hearing, 1990).

So why this appeal to determinate sentencing (DSL)? First, it holds a promise for more rational and just sentencing. Second, it purports to achieve the goals of equity and uniformity in sentencing; and it eliminates discretion of the judiciary and parole board.

Those scorning indeterminacy and rehabilitation include notables such as John Bartolow Martin (*Break Down Walls of Prisons*, New York Press, 1951), Francis Allen (*Rehabilitative Ideal*, Chicago Press, 1964), and Norval Morris (*Crime and Justice Research*, Chicago

Press, 1979). They are convinced that rehabilitation is an "ideal" and ISL did not work. But, is DSL resolved to the crises in the justice system? It may be more a Pandora's box than a panacea. By basing the punishment on the crime and not the criminal, DSL assumes that the state has no right and obligation to do anything about the needs of the offender. In addition, those who mistrust the state to administer justice rehabilitation under ISL, are now confident that the Legislature and a commission will administer punishment justly and humanely. Indeed, there is consensus and controversy in criminal sentencing. The question remains: What is the precise relationship between sentencing and rehabilitation?

Where are we today? These past two decades have seen a major growth in the American prison population, especially in California where the inmate population has quadrupled in ten years. More importantly, the demographics of the population stress young adult African American males. Studies report that one in four African American males are behind bars, (Sentencing Project Report, Mauer, 1992).

Furthermore, costs are skyrocketing, the public is fed-up and correctional staff morale is low. Reforms will reflect the more severe attitudes and approaches to reduce disparity and inequity in sentencing. In addition, providing a more consistent and predictable system of penalties consistent with the concept of just punishment/rehabilitation, should be a motivating rationale for the development of sentencing policy.

Is the sentencing guidelines grid appropriate justice policy? Are indeterminate sentencing laws, determinate sentencing laws, or a hybrid system cost-effective measures under which to sentence offenders? As I undertake a more comprehensive review of sentencing and alternative sentencing, I hope to be able to answer these and other questions. I would appreciate input from the richest informational resource, the CCPOA membership.

In closing, let us all consider the way in which the utilitarian goals have been embodied in the heart of the American Administration of Justice system. I am assured that nothing can be more dramatically important to Californians in general, and CCPOA members in particular, than sentencing policy. Please write to me at: KAGL and Affiliates, P.O. Box 293391, Sacramento, CA. 95831. ★