

Sociology 3395: Criminal Justice and Corrections

Class 17: Sentencing and Punishment

Upon conviction, a court must come up with an appropriate sentence for an offender. Our CJS believes that this must be just in nature: guilty people must be punished for their crimes. Of course, this renders sentencing most controversial, since what type and length of sentence is just is in the eyes of the beholder.

The punishments available to the sentencing judge depend on the offence, but judges generally have a wide variety of possible punishments from which to choose (e.g. jail, fines, community service orders or probation, to name a few). Yet, allegations about disparity in sentencing have led to demands for controlling judicial discretion as well as for alternative forms of sanction. Sentences must be given upon conviction, so the question becomes what the appropriate sentence is to indicate the disapproval of society.

Controversies arise in cases like R. v. Gladue, a case where a Cree woman stabbed her husband upon suspecting him of an affair. She plead guilty to manslaughter and was given 3 years in jail. While the judge noted a variety of aggravating and mitigating factors in setting this sentence, there was controversy because, as an off-reserve resident, she was not entitled to special consideration due to her Aboriginal status set out in s.718(2)(e) of the CC. She appealed this but lost. Finally, she appealed to the SCC, where it was decided that she should be entitled to a conditional sentence of 2 years less a day on this basis (to be served in the community). This was justified on the basis of the excessive imprisonment of Aboriginals and their estrangement from the Canadian CJS. This decision was quickly followed by two similar cases in BC (though, it should be noted, the courts don't always accept applications for reduced sentence on this basis). Needless to say, this sentencing provision has been controversial since its introduction. Some critics feel that it violates the principles of proportionality and equality introduced in Canada's sentencing law of 1996.

The Purpose of Sentencing:

While sentencing may be the most important stage in the CJS, punishment covers a wide variety of sentences that include fines, probation, community service, imprisonment, intermittent sentences, or recognizances to keep the peace. Moreover, judges may combine several of these punishments into a split sentence (e.g. a fine and probation). Because of the range of options open to judges, sentences have come under much criticism (i.e. as either too lenient or too long). It is uncommon for everyone to agree that justice has been done.

Sentencing involves handing out a punishment to the convicted offender. Punishing criminals is claimed to serve 2 ultimate purposes: (1) "the deserved infliction of suffering on evil doers" and (2) the "prevention of crime." Yet, these ideas raise many questions. How do we determine what is "deserved" punishment. How can we be sure that punishment will prevent

crimes? How can we be sure that convicted offenders are rehabilitated? How should we adjust sentences to achieve these goals? And what is the overall purpose here - the protection of society or the benefit of offenders? To deal with these questions, we need to consider the 4, basic philosophical reasons for sentencing (while separate and distinct, all sentences reflect a combination of them).

(1) *Deterrence*: Under this heading comes the rationale that by punishing an offender, the state signals its intent to control crime and deter potential offenders. Deterrence refers to the protection of society through the prevention of criminal acts. This is accomplished by punishing offenders in accordance with their offence. Too lenient a sentence might encourage more people to stray out of lack of fear; too severe a sentence might reduce the ability of the CJS to impose punishment regarded as fair and impartial, possibly encouraging even more criminal activity (e.g. robbers killing the witnesses to avoid harsh sentences). There must be a careful balance maintained between fear and justice for this approach to work.

As noted before, there are 2 types of deterrence: specific and general. The former attempts to deter, through punishment, the individual offender from committing another crime. The latter attempts to deter others in society from following in their footsteps. To date, there is some evidence to show that specific deterrence works, but only in very specific instances such as domestic violence. More studies, however, have shown the opposite. The evidence on general deterrence is somewhat stronger.

The objectives of these 2 types of deterrence may be incompatible. While a man, for example, may be best deterred from re-assaulting his wife through anger management therapy, this sentence may not be perceived by members of society as adequate enough to deter them from similar behavior. Deterrence may also be hard to achieve because it relies on the certainty and speed of punishment, neither of which are characteristic of our CJS.

(2) *Selective Incapacitation*: If an offender is seen as a significant risk to society, s/he may be sentenced to a long prison term. Incapacitation justifies long sentences for “chronic” offenders who commit the most heinous or the greatest number of criminal offences in order to reduce the crime rate. In essence, the goal of the incapacitation approach is to prevent future crimes by imprisoning individuals on the basis of their past criminal offences.

While both this and the deterrence approach focus on punishing offenders to protect society, incapacitation favors much longer sentences. Supporters argue that it is an effective and cost-effective crime control approach - both in terms of crime rates and overall social costs. Critics, however, believe it is flawed as it doesn't include proportionality for specific criminal offences (e.g. how can locking up a robber for life reduce the crime rate? Perhaps s/he needs to simply be given a shorter sentence that will deter him/her from committing future crimes). Another argument is that incapacitation only protects society while the offender is in prison, and after such a long sentence they may be even more disposed to cause trouble.

(3) *Rehabilitation*: This approach is based on the belief that many (but not all) offenders can be treated in such a way that, once released, they will live crime free lives. Supporters argue that it is fairer and more productive to treat certain offenders rather than punish them without treatment. The goal is to treat the social and psychological problems of offenders, and it is necessary to have a wide variety of programs available to assist with this. Rehabilitation based sentencing is predicated on reform in the future rather than on the criminal act committed.

Of course, the success of such programs have been the matter of much debate. Many argue that a get tough approach will work better in controlling crime. Yet, recent studies reveal that the rehabilitation approach is successful, particularly when treatment programs and offender needs are effectively matched. Rehabilitative sentences, unlike those above, do not always include imprisonment. In fact, offenders may be sentenced to serve their punishment in the community if appropriate services are available.

(4) *Justice*: Under the justice approach, offenders should be punished no more or less severely than their actions warrant. The severity of their sentences should depend on how serious their crime was, in proportion to the gravity of their offence. Essentially, they should be punished because they deserve it, but the punishment should fit the crime. Moreover, punishments should be equally and fairly given to those with the same number of prior criminal convictions that have committed the same crime. The focus is on the crime committed rather than any attribute of the individual. Extralegal factors such as race, gender and social class are not to be considered. Different people who commit the same offence and get a different sentence can only have this justified on the basis of aggravating or mitigating factors. The actual sentence focuses on the offender's crime, not on any future projections of the likelihood of treatment success, future criminality, reduction in the crime rate or the protection of society. Moreover, this model urges that sentences generally should be shorter, and sometimes community based.

How Do Judges Decide on a Sentence?

Judges' ability to sentence offenders are restricted by law. They can't, for example, give out a life sentence for a summary conviction offence as that isn't allowed by law. However, within the legal "structure of sentencing" judges have certain parameters within which they can individualize sentences on the basis of the offender (e.g. prior record) as well as the circumstances surrounding the crime. Judges are limited in their options, since they don't have the ability to use discretion in every case (e.g. first degree murder).

Judicial discretion in sentencing may be affected by personal preferences, the legal seriousness of the crime, the offender's race, the quality of the arguments presented, and/or the impact of the crime on the victims. All such factors may contribute in some way to the judge's decision.

Criteria used by judges in making sentencing decisions are set out in the CC. This sets out the maximum punishment for each offence (there are also a few automatic sentences and a few

minimum ones), but there is often lots of room to exercise discretion. Of course, this decision affects many people besides the offender, including the victims, the police, and the community. It can be hard for judges if a sentence goes wrong.

Judges have a number of sentencing options available, so a judge who decides on a sentence must first determine what s/he hopes to accomplish. Possible objectives include deterrence, selective incapacitation, justice or rehabilitation. These are important because our CJS is supposed to accomplish some social utility beyond merely solving crimes and catching criminals. Two factors are important here: sentencing and dispositions.

Sentencing has been defined as the judicial determination of a legal sanction to be imposed upon a person found guilty of an offence. This includes all of the traditional elements, namely that the sanction must be legal, imposed by a judge, and follow a criminal conviction. This needs to be distinguished from the actual disposition imposed on the offender (i.e. the actual sanction imposed in sentencing).

Before an offender receives a disposition, s/he must either plead or be found guilty in a court of law. The issue then becomes the type and length of disposition, which can depend not only on the seriousness of the offence, but also the events of the court proceedings and the circumstances surrounding the offence.

Punishments can vary widely across Canada, from probation to life imprisonment. While most agree that offenders should be punished somehow, there is far less consensus about the purpose of punishment. The foundations of these purposes are to be found in the guiding forces of our CJS (see above). Any sentence can reflect one or a combination of these purposes. Yet, if any specific purpose of sentencing exists, it is closest to specific deterrence, to reduce the crime rate by stopping the criminal activities of apprehended offenders and deterring others from committing crimes. How we can best achieve this is, of course, open to debate.

Forms of Punishment:

Canadian judges have a number of dispositions available to them when sentencing an offender. These include: (1) imprisonment (either federal or provincial. Limited to most serious offences); (2) Intermittent sentences (either on weekends, etc., to enable employment. 90 day limit); (3) Fines (by themselves, or combined with other sentences. Usually for low risk offenders when done alone); (4) restitution and community service (paid to injured parties or to benefit the community); (5) probation (living in the community under conditions and supervision); (6) restorative justice (for minor offences, meeting with victims to work out acceptable solution); (7) absolute/conditional discharges (absolute removes criminal sanction; conditional involves conditions/supervision like probation); (8) community-based sanctions (community referrals to things like substance abuse or behavior modification programs).

The Sentencing Process:

When a judge decides to sentence a convicted offender, s/he relies on information provided by others. Pre-sentence reports prepared by probation officers, for example, are invaluable. These discuss relevant information about the crime and its impact on the victims, as well as a large amount of personal data about the offender. Much of this isn't admissible at trial, but it gives the judge background about the offender's employment, family, education, and personal issues. In addition, Crown and defense counsel propose sentences to judges, though the judge doesn't have to go along with their recommendations.

Judges look at other factors as well. The most important is the seriousness of the offence and whether or not there are any aggravating or mitigating factors. Usually the more serious the offence the longer the sentence. Mitigating circumstances are those things that permit a shorter sentence than is usually given (e.g. guilty plea, remorse and attempts at rehabilitation), while aggravating factors permit it to be lengthened (e.g. long prior record, planning, brutality, weapons, type of victim). After taking these matters into account the judge may decide to adjust the usual sentence s/he would have given on the basis of the seriousness of the offence alone.

Sentencing Law in Canada:

In 1994 Bill C-41 was introduced with the aim of reforming the sentencing system as well as intermediate punishments. In 1996 the Sentencing Reform law was proclaimed, bringing about a significant change in the sentencing system in this country. The law had 3 objectives: (1) to provide a consistent framework; (2) to create a sentencing policy and process; and (3) to increase public accessibility to the sentencing law. This same legislation introduced conditional sentences as an option for judges for the first time.

This legislation also contained a statement of the purpose of and principles of sentencing. These include: (1) denouncing unlawful conduct; (2) deterrence (general and specific); (3) selective incapacitation, when necessary; (4) rehabilitation; (5) reparation; and (6) promoting offender responsibility and acknowledgment of harm to victim and community. These objectives include all of the traditional purposes, but also signal the federal governments' interest in RJ. S.718 also includes a statement recognizing the principle of proportionality, along with a number of other sentencing principles (e.g. the "hate bill" sections, least restrictive options, and the controversial Aboriginal section noted at the outset).

Sentencing Patterns in Canada:

A recent study of sentencing patterns in 2000-2001 revealed a number of interesting things. For example, the likelihood of being sentenced to a period of incarceration for committing a criminal offence has remained relatively stable since 1994-95 at about 34%. The median length of incarceration was 30 days (stable since 1996-97). The most common offences were common assault and impaired driving. Convictions were registered in 61% of cases. The

highest conviction rate for violent crimes was for sexual assault (64%), followed by robbery and major assaults. For property offences, convictions were lead by B+E (69%), followed by property damage/mischief and theft. Overall, probation was the most common sanction, imposed in 44% of cases resulting in conviction. This was followed by fines (37%) and incarceration (35%). 83% of cases involved males, many of whom were between the ages of 18-34.

Issues in Sentencing:

Some feel that judges are too lenient, others that they are too harsh. This has led to research on public opinion about sentencing. Another issue is variation in the sentences imposed by different judges and in different parts of the country. Finally, what is being done about sentencing disparity and judicial discretion?

Sentencing disparity occurs when similar crimes don't receive similar punishments. There are 3 types: (1) by the same judge in similar cases; (2) from judge to judge; and (3) from court to court. The sentencing commission interviewed 400 judges, who indicated that they felt variation existed among their sentencing practices, largely due to differences in personal attitudes. In addition, over 80% of about 700 Crown prosecutors believed unwarranted variation existed within their jurisdictions, (over 90% felt this occurred across jurisdictions in Canada).

Geographic location also plays a role here. Whether or not convicted offenders are incarcerated and for how long often depends on where they committed the crime. In 2000-01 the highest incarceration rate was in PEI (59% of convicted cases, largely impaired driving driven), followed by Ontario and the Yukon. The lowest rate was in Saskatchewan (22%). As well, Roberts and Birkenmayer (1997) found big differences in sentencing patterns among provinces. For example, "theft under" garnered a sentence of incarceration in about 4% of cases in Nfld but 26% in the Yukon. Other offences were found to have even greater sentencing variations by jurisdiction (e.g. B+E).

Another major issue that comes into play in sentencing involves courthouse norms. This emphasizes the impact of individual courtroom workgroups and highlights the different sentencing practices of different judges for similar crimes. Hogarth (1971) found a good deal of sentencing variation among 71 Ontario magistrates, much of this based on their varying penal philosophies and attitudes toward what was really important during a trial. Hogarth's research estimated that the legal facts of a case accounted for only about 9% of the sentencing variations found in his study. Another famous study of 206 provincial court judges, by Palys and Divorski (1986), presented 5 hypothetical cases to see how judges would sentence. While there were variations in all 5 cases, the greatest difference was found in a case of assault causing bodily harm (ranging from a \$500 fine + probation to 5 years in jail).

A very important issue concerns discrimination in sentencing. This occurs when the sentence is affected by extralegal factors such as race, class, gender or any other factor not directly related to the offence. Much research in Canada focuses either on Aboriginals or Blacks.

LaPrairie (1990) reported that while Aboriginals are over-represented in Canadian correctional facilities, it is not due to discrimination. Others, however, all report that they found some sentencing discrimination against Blacks (e.g. Don Clairmont). In some respects, this is mediated by factors such as employment and pre-trial detention. Thus, judges who consider factors such as whether the offender is employed or had been held in pre-trial custody when passing sentence may discriminate against Blacks without ever intending to do so (Williams, 1999).

Public opinion is also an important consideration. Research in several Western countries indicates that members of the public select harsher sentences than judges do. There is often a wide gap here. However, research comparing the relative punitiveness of public and judicial attitudes has come to a different conclusion. Roberts and Doob (1989) found that 62% of the public and 63% of the judiciary agreed on which offenders should be incarcerated. Once the public is presented with sufficient information, in fact, members of the public even became less punitive than judges.

But does the public agree with judges about which offences should lead to jail time? Roberts and Doob found big differences here. The public wanted harsher sentences for arson, assaulting police, forgery, theft and fraud over \$5000. The judiciary favored harsher penalties for robbery, perjury, and B+E.

While the public may be more punitive in some respects than the judiciary, they do tend to be supportive of a variety of sentencing goals (deterrence when the crime is minor, selective incapacitation when serious and violent). As well, the socio-economic status of individuals has been shown to be an important predictor of public attitudes towards sentencing. Higher-status individuals tend to be dissatisfied with the ability of the courts to assist victims, while lower status individuals are more concerned about the ability of the courts to protect the legal rights of the accused.

In the most recent GSS (1999), less than 25% of Canadians sampled felt the courts were doing a good job of determining whether or not the accused is guilty (21%), helping the victim (13%), and providing justice quickly (13%). 41% felt the courts were doing a good job of ensuring a fair trial for the accused. Most Canadians were in favor of community-based sanctions, but only for certain, usually first time offenders. For repeat offenders the preference shifted to jail (e.g. 68% for B+E, which almost paralleled the actual court ordered figure of 63%). In comparison, for a repeat offender convicted of assault, 63% of the public wanted a prison term, while the courts in 1998-99 only ordered this in 29% of such cases.

Sentencing guidelines constitute an attempt to bring some uniformity into all of this. The goal is to reduce judicial variation in sentencing by limiting unchecked discretion. Guidelines state that sentencing will be done without regard to the race, gender, social or economic status of the offender. In their original form, only 2 factors were to be considered: (1) the severity of the crime; and (2) the prior record of the offender. These regulate both the decision to commit an offender to prison and the length of the term. Guidelines are constructed to imprison those

convicted of serious, violent crimes as well as those with long criminal records. Most property offenders wouldn't be jailed until they have been convicted of a number of offences, with alternative sanctions to be tried first.

Another popular aspect of this rationale is that it ignores all characteristics of the offender, so advocates point out that theoretically it is fair and equal to all.

Sentencing guidelines were recommended by the Canadian Sentencing Commission in 1987 in an attempt to control problems associated with "unrealistically severe" maximum penalties, injustices imposed by mandatory minimum sentences, and the lack of easily accessible information about current sentencing practice. The resultant "fundamental overhaul" recommended: (1) a new rationale for sentencing (later Bill C-41); (2) elimination of all mandatory minimum penalties (except murder and high treason); (3) the replacement of the current penalty structure with one based on 12, 9, 6, 3, and 1 year, plus 6 months, with some provision to exceed maximums for the most serious offences); (4) elimination of full parole; (5) provision for reduction of time served in return for good behavior; (6) increased use of community sanctions; (7) elimination of automatic imprisonment for fine default; (8) creation of a presumption for each offence as to whether incarceration should be imposed or not; (9) creation of a "presumption range" for each offence normally requiring incarceration; and (10) creation of a permanent sentencing commission to complete the development of guideline ranges for all offences, act as an information clearing house, and make recommendations for legislative change.

Of course, it may be questioned whether sentencing guidelines actually achieve their goals of fairness and equity. Yet, analysis of the US experience by Miethe and Moore (1985) found that judges were using the guidelines by giving more weight to offence based characteristics. Differential treatment of offenders on the basis of race, employment status and gender declined, as did geographic disparities. Moreover, tighter controls on judicial discretion in sentencing didn't simply move this further back in the CJS process. Indeed, in a later follow-up study, it was found that this approach substantially reduced sentence disparity, despite some variations appearing along the way (e.g. prosecutors changing their charging and plea-bargaining practices to beat the guidelines).

Over time, however, research has shown considerable variation appearing in the application of these guidelines. D'Alessio and Stolzenberg (1995) found that there tended to be more judicial deviation from sentencing guidelines the longer they were in effect, and that prosecutors increasingly circumvented guidelines through charging practices based on offender-based criteria like family background or race.

Such studies tell us that the elimination of disparity and discrimination in sentencing is very difficult to achieve - even despite having principles of equality and equity written into the CC.

Finally in this respect, let us consider where the victim comes in here. During the 1980's, the lack of victim involvement in sentencing was raised in several Western countries. Proponents of their involvement urged that this would be an important step in recognizing victims' status, increase their dignity, show that a real person had suffered, and promote fairness by giving victims the right to be heard in court. Opponents countered that giving victims legal rights would challenge the very basis of our adversarial system between the state and accused, put too much pressure on the judge, enable vindictiveness, cause court delays, increased costs, and more sentencing disparity. Some argued that judges themselves were reluctant to permit victims to give input in their domain, and that there was no guarantee that victims would have an influence.

Yet, in 1989 Bill C-89 was passed giving victims the right to enter a victim impact statement detailing the effect of the crime on their lives. The written form is forwarded to the judge for consideration in sentencing (and is either filed or read out loud). This reform was hoped to bring victims back into the CJS by giving them an input on the sentence. Yet, the effect of these statements on sentences is largely unknown since it is rare for a judge to mention a VIS. Yet, some judges have made it a habit to mention them in certain cases, particularly those in which they feel that aggravating circumstances in the offence severely traumatized the victim, leading judges to hand down tougher sentences.

During the 1980's-1990's provincial governments in Canada also passed victims rights legislation (typically "victims' bills of rights) which outlined the principles and standards for the treatment of victims in the CJS, the right to have property returned, and to have input at sentencing. The federal government expanded its legislation on victims in 1996 in Bill C-41. This amended the CC by specifically codifying the rights of victims to victim impact statements, restitution, and participation in some parole hearings.

Do VIS make a difference at sentencing? The Dept. of Justice conducted studies in 6 cities during 1986. One thing discovered was that there was no difference in the degree of victim satisfaction with justice with or without VIS being used in court. Victims felt the most important feature of the program was to be able to have their information made available to court, to be given useful feedback about the case, and to be able to contact somebody should they experience any difficulty. Researchers also found that VIS led to victims being better informed about their cases as they progressed through the CJS. However, it was reported that the impact of this program was the same for participants and non-participants in terms of their level of participation in the CJS, their satisfaction with how the case was handled, and their future reporting of incidents to the police. Most victims were found to hold negative attitudes towards sentencing both before and after their cases.

Sentencing and healing Circles:

In recent years, much attention has focused on the over-representation of Aboriginals in the correctional system. Aboriginals are more likely to be denied bail, be committed to jail for non-payment of fines, and less likely to receive probation as a sentence than non-Aboriginals.

From this evidence, recommendations have been made to decrease the preponderance of Aboriginal people within the prison system. One angle on this has been to reintroduce sentencing and healing circles in which a group of elders participates with a judge in an attempt to heal the accused, the victim and the community.

While such programs vary across Canada, some common features stand out. Sentencing circles are basically a hybrid of the traditional Aboriginal form of community justice and the Western legal system. Judges retain the right to give final approval to a sentence imposed by a sentencing circle. However, the process of arriving at the sentence is far different. While factual disputes are still settled by calling for evidence and examining witnesses, more important is that respected members of the community, victims, police, the accused, family, Crown, defense, and judges try to jointly come to a decision acceptable to all.

There is some variation in the type of offences allowed to be heard by these circles, though most are minor in nature or involve property. Serious violent crimes are usually not allowed to be heard, though there have been exceptions (e.g. Hollow Water).

Beyond the type of offence, there are a number of other criteria to be considered in determining whether a sentencing circle will be held: (1) the accused's consent; (2) accused's roots in the community; (3) willingness of elders/community leaders to participate; (4) victim willingness; (5) whether the victims suffers from BWS; (6) if the victim is in need of counseling/support persons; (7) the resolution of disputed facts in advance; (8) whether the court is willing to depart from the usual range of sentence.

Once a sentence is agreed on, it isn't automatically accepted by the Western legal system. Such sentences have, for example, been overturned on appeal by Crown prosecutors who feel that they are too lenient or a way the offender is simply looking for the lightest possible sentence. (R. v. Morin). Such appeals, however, are rare.

The benefits of sentencing circles are many, including: a reduction in the monopoly of professionals, encouraging lay participation, increasing information flow, enabling a creative search for new options, the sharing of responsibility, the participation of the accused, a more constructive environment, greater understanding of the limits of the CJS, an extension of the focus of the CJS, greater community mobilization, and building bridges between the values of Aboriginals and the larger society.

Yet, despite enthusiasm for the potential of healing circles, some have been cautious in their support. Our own Don Clairmont (1996) studied 3 such programs in 3 different communities and concluded that "in all programs the objectives relating to victims and community reconciliation have proven elusive to date." It is important for these programs to involve the community at large. Also, LaPriarie (1998) reports that victims often find these programs to be less positive experiences than do the offenders. Indeed, only 30% of the families of offenders and victims considered the dispositions to be appropriate. As a result, adjustments

may be necessary.

Conclusion:

Sentencing is one of the most important decisions in our CJS. Canadian judges have considerable discretion in determining the type and length of sentence, and their decisions reflect how they wish the offender to be punished. In most cases, however, their decisions are not final, since members of the parole board may decide to grant full parole before the completion of the sentence.

The purpose of sentencing is to reduce crime by punishing criminals and deterring others from committing crimes. Deterrence, selective incapacitation, rehabilitation and the justice model all vary in terms of emphasis on how best to deal with offenders through sentencing.

The government has in recent years attempted to shift the focus of sentencing more to a justice model perspective. The Sentencing Commission was formed to investigate problems and suggest an alternative, coherent, consistent approach. A number of problems have been noted in the sentencing patterns of judges, including discrimination and disparity. A more structured approach is thus favored by some, though this has its own problems. In addition, alternate sanctions for Aboriginals have been introduced in an attempt to reduce their over-representation in the correctional system.