



THE SEVENTH PUBLIC LECTURE

In memory of

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SENTENCING REFORM

Given By

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INTRODUCTION

I remember sitting in a sunny Old College office sometime in the late 1970's, dozing through a postgraduate seminar on sentencing led by Derrick McClintock. I saw myself as a radical criminologist, critical of the whole repressive state apparatus. Come the revolution, punishment would be unnecessary so who could possibly be interested in sentencing.

I am now rather embarrassed by these reflections. Mrs Thatcher arrived instead of the revolution, and this would have come as no surprise to Derrick. Derrick was not a detached ivory tower academic, he was always engaged. While his students argued Marxist theory in the pub, he worked with policy makers nationally and internationally to promote a more humane approach to what he knew were the intractable problems of crime and punishment.

So I am proud to have been invited to give this lecture and I think Derrick would appreciate the irony that my topic today is sentencing reform.

The world of crime and punishment today is very different from the world Derrick inhabited when he took up the chair in Criminology at Edinburgh in the early 1970's. In retrospect, this was the end of one era and the beginning of another.

Criminology had very rapidly grown into a discipline with very close links to government and policy makers, typified by the Institute of Criminology at Cambridge where Derrick studied. Mainstream criminology was based on certain assumptions:

The scientific study of crime would produce knowledge about the causes of offending on which rational policies could be based which would control crime. Crime was

- caused by social disadvantage
- offenders could be rehabilitated
- criminal justice policy was a matter for policy makers and experts
- law and order was not a matter for party political antagonism.

Thirty years later, the world of crime and punishment looks very different.

Law and Order is now near the top of the political agenda. No party can afford to be seen to be “soft” on crime. Rehabilitation, at least as a general justification for punishment, is perceived to have failed. Penal policy consists of sound bites made by politicians based on an assessment of public opinion rather than rational policy made by experienced policy makers based on the results of research conducted by experts. (Three strikes and you’re out, Prison Works, Tough on crime, Tough on the causes of crime, Do the Crime, Do the Time, Hard time for Armed Crime)

What Garland¹ calls the “crime experience” is mediated through media representations of crime (fact and fiction) which engage our emotions rather than our intellects. Policy has to address these emotional responses, such as fear, anxiety, frustration and cynicism and not just rational concerns about the efficient administration of justice.

This is the context in which sentencing reform has to take place. Of course it is not that law and order has suddenly become politicised. It always has been. It is rather that the consensus about crime and punishment which was shared by academics, policy makers and politicians in the 50s and 60s no longer exists.

WHY DO WE NEED TO REFORM SENTENCING?

1. Discretion and Disparity

Scottish judges exercise very considerable discretion. Although there is a substantial body of sentencing law, there are very few rules which describe how to calculate the appropriate penalty for a given set of circumstances.

Judges operate through what a Court of Appeal judge in Victoria Australia has described as “instinctive synthesis”. This comes from a variety of sources: from their experience both as judges and as counsel, from the local working culture of the court (which of course varies from one court to another), from the informal professional culture of the various branches of the judiciary, and from the modest training that judges receive.

¹ D. Garland “The Culture of High Crime Societies” Some pre-conditions of recent “law and order” policies. *British Journal of Criminology* 40/3. 2000

Such extensive discretion creates considerable potential for inconsistency between judges and between courts. This was one of the main driving forces behind sentencing reform in the US. Judge Marvin Frankel from the Southern District of New York described the range of choice provided to the sentencing judge in 1973 in the USA as “terrifying and intolerable for a society that professes devotion to the rule of law not of men.”

This is a concern about the formal processes of sentencing being out of step with the more systematic and accountable decision making in other areas of modern law.

This concern with sentencing being both unsystematic and unaccountable arises from time to time in Scotland. In December 1999, the Sunday Times published a “league table” which ranked High Court judges in order of “toughness” based on their sentencing patterns for 1998. The basis of the comparison was spurious, as there were no real allowances made for the relative seriousness of the caseloads dealt with by each judge but this level of technical detail is unlikely to be noticed by the general reader.

The government occasionally publishes sentencing statistics from the Sheriff Courts which appear to show disparity between courts but again there are no controls for the seriousness of the relative caseloads, so it is not at all clear what if anything, the statistics tell us.

2. Changing Substantive Patterns of Sentencing

The concern for disparity in sentencing is predominantly focussed on the formal procedures of choosing sentence. This may not have so much purchase with other stakeholders who are more concerned that judges are not passing the right sentences. For example, many would argue that too many women are unnecessarily imprisoned in Scotland with tragic results.

On the one hand organisations like SACRO are concerned at the rising prison population and may seek to find a means of reforming sentencing to bring about a reduction in the use of imprisonment, particularly for petty recidivist property offenders or those whose offending is closely related to a substance abuse problem. On the other hand, sections of the public and some politicians may wish to reform sentencing to make sentencing tougher. While this aspect of sentencing reform is vitally important, I have chosen for the rest of this lecture, to focus on how sentencing reform might address the need to demonstrate to the public that an important goal for judges in their sentencing practice is the pursuit of justice.

3. Diminishing public confidence in the judiciary.

Research shows that the public are both relatively ignorant of what the courts do, and at the same time have very little confidence in judges' sentencing.

Successive iterations of the British Crime Survey have shown that 80% of respondents think that sentencing is too lenient, around one third of respondents thought that judges did a poor job and respondents placed judges bottom of a list of six criminal justice professions when asked to assess their effectiveness.

These figures do not apply to Scotland but we should not assume that the results would be very different if the same questions were asked in Scotland. The prison population has risen significantly (From 5000 in 1990 to 6018 in 1998) and Scotland should seek to avoid the rapid escalation of prison which has occurred in the USA. (In 1999 there were over 6 million people (3.1% of the total population) under sentences of prison, probation and parole, the total prison population has been rising at an average rate of 5.7% per year between 1990-99 and the Federal prison population rose by 14% in 1999.)

SENTENCING REFORM AND PUBLIC OPINION

Sentencing needs to change, because the public have diminishing confidence in what the courts are doing. This may not be an accurate view but there is evidence that it is a strongly held belief. What can be done about this? There is no point in blaming the media which has its own commercial agenda. Nor is there much point in blaming politicians for behaving politically. Political parties cannot deliver their policy objectives unless they are elected. Rightly or wrongly, politicians seem to feel that the public want them to express the rhetoric of tough punishment

There is however, some evidence that public punitiveness can be tempered by a concern for justice. Asked generally, the public will say that sentencing is too lenient, but research² shows that if the public are provided with more information about a case, their sentencing decision is much closer to that of the judge. The public have a strong sense of justice and judges also want to ensure that their sentence is just. However there appears to be a

² Hough, M., and Roberts, J., (1998) Attitudes to Punishment: findings from the British Crime Survey, Home Office Research Study No 179. London: Home Office

significant communication problem. The message of just sentencing which judges want to convey is not reaching the public.

JUST DESERTS AND SENTENCING GUIDELINES

One of the aims of the sentencing reform movement which began in the USA in the mid-1970's, was to improve the consistency of justice in sentencing so that the public could be sure that offences of similar seriousness would receive a similar penalty. Many states introduced sentencing guidelines to replace judicial discretion which was thought to produce inappropriate levels of disparity and discrimination in sentencing.

The guidelines were based on a neo-classical theory, known as Just Deserts, which argued that punishment ought to be proportionate to the seriousness of the offence. Little attention was to be paid to the circumstances of the offender in order to avoid discrimination on race, gender or class grounds.

Some 20 states have adopted some sort of sentencing guidelines and a further ten states have explored this approach without yet implementing any changes. Mandatory sentencing guidelines (e.g. Arizona, California, Illinois, Indiana and Maine) leave judges with virtually no discretion. Presumptive Guidelines (e.g. Minnesota, Pennsylvania, Oregon, Federal Sentencing Guidelines) allow judges to depart from the guidelines under certain specified conditions, more or less restrictive depending on the jurisdiction. (Western Australia is the first non US jurisdiction to consider this approach). Advisory Guidelines (e.g. Wisconsin, Maryland, Michigan) need not be followed by judges who retain their discretion in sentencing.

Sentencing Guidelines are often seen as eliminating judicial discretion. However, there is a considerable range of variation in the extent to which sentencers' discretion is structured within these guidelines systems. Mandatory systems appear to eliminate discretion, but where there is a wide range of penalty within each "box", they can permit greater discretion than a presumptive system which has narrow ranges and only allows judges to depart from the guidelines under highly unusual circumstances. Broadly speaking, the task facing sentencing reformers has been to find a balance between trying to inject greater consistency into sentencing and allowing judges some leeway to take account of the distinctive circumstances of an individual case. All systems have developed some way of defining "types" of offences which are broadly similar, and indicating what range of penalty is required/appropriate. The systems all have some mechanism for allowing judges to vary sentence where for some specified reason the case doesn't fit the "type" into which it has been classified.

In many state jurisdictions, guidelines have been accepted and appear to work without many criticisms. However in some states, and particularly in the US Federal Guidelines System, many judges feel that they are forced into unjust sentences because the Guidelines do not take account of a large number of factors which are “morally and penologically relevant”, e.g. the character of offender, the degree of remorse shown, the background of offender (employment/family/community links etc), the nature and extent of involvement in the offence etc. In some jurisdictions this has led to judges, prosecutors and defence agents finding “ways around” the guidelines to produce a substantively just sentence. This of course brings law into disrepute.

WHAT IS WRONG WITH GUIDELINES?

There is nothing wrong in principle with the pursuit of consistency in sentencing? The problem is that the “just deserts” approach misrepresents the way in which judges think about sentencing. Just deserts elevates concerns for consistency (treating like offences alike), over concerns for ensuring that all the circumstances of an individual case are taken into account. Judges try to hold these in balance. Justice lies somewhere inside this tension between an individualised approach to sentencing and a tacit tariff which describes the “going rate” for particular kinds of offences. Justice resists objective specification. There are too many relevant factors which may be taken into account. The meaning of these factors depends on the context of the case. They cannot be given a single universal “seriousness” value.

Sentencing is often described as an art not a science. This suggests that judges pull sentences out of thin air in an almost random fashion. However, despite the extent of judicial discretion in Scotland, sentencing shows consistent patterns. These patterns are produced by judges working from their own knowledge and experience in courts alongside other experienced professionals.

Judges do not split a case into component parts, ascribe a seriousness score to each of these and calculate the resultant sentence. They examine the case as a whole and form a view as to the overall seriousness of the case. However this is not done afresh for each individual case in a vacuum. Sentencing is inevitably comparative, cases are more or less serious than other cases. The problem is that judges have limited access to systematic and reliable information about these cases. They do not have access to information which shows them what the court has done before for cases similar to the one they have before them.

SENTENCING INFORMATION SYSTEMS

A Sentencing Information System (SIS) is based on a very simple idea, first identified in 1953 by Norval Morris. It will be easier for judges to be consistent in their sentencing if they have access to reliable information about what they and their colleagues have done in the past. The development of Information Technology over the last twenty years offers considerable opportunities for sentencing reform. In the 1980's computerised information systems were produced for sentencers. These did not last because they were relatively expensive, slow and complicated to use. However in New South Wales and in the High Court in Scotland, more recent systems have managed to overcome these problems with more advanced technology.

The Scottish High Court Sentencing Information System is currently being implemented. By the end of 2002, all High Court judges will have access to a continuously updated database. Judges will be able to enter information about a case they have before them and the screen will display the sentencing pattern for cases which share those characteristics. Judges can choose how much information to enter about a case and thus they have some control over defining what is to count as a similar case. The flexibility of the system allows judges to use a range of definitions to get a feel for the range of sentencing for broadly defined similar cases. Against this background, and armed with full details of the case at hand a judge is better equipped to pursue consistency in sentencing. The word "pursue" is used rather than "achieve" because consistency is only one goal of sentencing, the other is substantive justice for the particular case at hand.

The SIS thus leaves judicial discretion untouched but provides support for the exercise of this discretion. The responsibility for improving consistency in sentencing remains with the judiciary. To this end the SIS may be a useful tool for the Appeal Court in this court's role in promoting consistency in sentencing.

There are many other important considerations concerning the SIS which there is no space to develop here including access to the database, the appropriate institutional home for the database, its potential for developing judicial education etc. I want to conclude by considering the potential of the SIS approach to improve the communication of the pursuit of justice in sentencing between the courts and the public.

CONCLUSIONS

The SIS approach has considerable potential to communicate positive messages about sentencing to the public. (Of course it could also be used negatively).

Firstly, the SIS allows judges to continue to exercise discretion to pursue justice in individual cases but also allows these decisions to be placed against a background of sentencing for similar cases. This can improve accountability without sacrificing substantive justice for individual cases. The SIS also offers opportunities for this pursuit of justice to be communicated to the public. This will not be an easy challenge, but perhaps the courts should think about using the services of professional communicators to take advantage of these opportunities.

Secondly, the existence of an SIS carries powerful symbolic messages about sentencing. It suggests that sentencing (and by extension, the sentencing judge) is modern, rational, efficient, and technical and not anachronistic, ad hoc, inefficient and out of touch. Courts are encumbered with anachronistic ritual, costume and procedure which no longer carry the same message as they did when they were designed several hundred years ago. A SIS offers the courts an opportunity to help correct the misleading impression that the public seem to have about judges' sentencing. And to promote informed public debate about the pursuit of justice.