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Editors:
C.A.F.M. Grütters
J.A.P.J. Breuker

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C.N.J. de Vey Mestdagh

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More information about the JURIX foundation and its activities can be obtained by contacting the JURIX secretariat:

Mr. C.N.J. de Vey Mestdagh
University of Groningen, Faculty of Law
Oude Kijk in 't Jatstraat 26
P.O. Box 716
9700 AS Groningen
Tel: +31 50 3635790/5433
Fax: +31 50 3635603
Email: sesam@rechten.rug.nl

 http://jurix.bsk.utwente.nl/

THE SENTENCE, THE PUNISHMENT AND THE PROSECUTION

P.J. VAN KOPPEN
Netherlands Institute for the Study of Criminality and Law Enforcement (NISCALE),
Leiden, The Netherlands

1 . Introduction

Any program aiming at reducing differences in sentencing by different judges for comparable crime is the right solution to the wrong problem. Such programs be it a special Court of Appeals for sentencing policy or any knowledge system to aid the judge are not related to what sentences do, namely punishing, and ignore how sentences come about. I will discuss both problems in turn and will finish with a possible solution.

I need to make one remark in advance. I will concentrate on common crime committed by common offenders. These are the same types for which setting standards by a special Court of Appeals or by a knowledge based system has any sense. Probably, my remarks are less relevant for what I call special crimes, like exceptionally violent crimes or `one-time' crimes as husbands killing their wives.

2 . Sentencing versus punishment

The focus on sentencing in both proposals starts from the assumption that the sentence is the punishment. It is not; at least not the major part of the punishment. Let us have a look at punishment, and return to sentencing later.

Laboratory experiments in psychology – be it with rats, pigeons, or humans – has learned us much about punishment. In the history of psychology, research on learning has taken a large place. One type or learning is particularly relevant here: operant conditioning. This is, simply put, learning by the consequences of one's behaviour. Behaviour which is always or often followed by pain is suppressed; behaviour which is always or often followed by pleasure is reinforced. That is the general scheme used by nature and, indeed, by most parents, to educate and socialize human beings. If we touch a hot stove, we burn our fingers. Such learning is severe, but can go fast. Parent sometimes have more trouble – as I know from experience – in learning "good" behaviour by reprimanding their children. Reinforcing behaviour by rewarding children is, indeed, often easier.

Research has learned us much on the conditions under which punishment works best and on the kinds of punishments which are most effective [Houten, 1983]. In summary [Crombag, 1992] punishment is most effective when it is immediate, inescapable, severe, and given on a fixed ratio schedule of 1, i.e., each time the forbidden behaviour occurs.

Let us take a look in more detail. The benefits of immediate punishment has become common knowledge in the criminal justice system. In fact the policy for handling football-hooligans is aimed at inflicting immediate punishment upon them. For most crimes, however, the punishment is neither immediate nor escapable. But I will return to that later.

Two items in the list of effective punishment are at odds with how we want to organize our state and our criminal justice system. Giving punishment on a fixed ratio schedule of 1 is not related to sentencing, but to the likelihood of getting caught. To reach such a schedule, we would need to reach a likelihood which might only be attained in a police state. We have chosen a state in which a fixed ratio schedule of 1 would be impossible.

Within certain limits, the same arguments hold for the severity of punishment. We know that the intensity of punishment is directly related to the amount of behaviour suppression: the higher the intensity, the more bad behaviour can be suppressed. Since we abolished the rack and other forms of torture, there is a limit to the intensity of punishment we can inflict, but intensity can be surplanted by a longer duration of punishment.

This is not a plea for tough punishment, even for minor crimes. But at present we punish offenders completely the other way around. The common pattern encountered by the common offender is the following. After the first offence he is caught for, he is usually only reprimanded especially when he starts his criminal career at an early age. With successive occasions, the punishment grows gradually, until he finally is sentenced to a prison term. From psychological research we know this is probably almost the best way to learn offenders that crime pays. Low-intensity punishment produces a characteristics pattern of recovery of the suppressed behaviour and, more important, successive punishment is much less effective. With this pattern of punishment we learn the perpetrator that crime pays: at first the financial and emotional gain from the crime is not compensated by any real punishment; later on the slow increase of punishment intensity is compensated by habituation to punishment by the offender.

The relatively most effective scheme would be to punish from the start. From psychological perspective there is ample reasons to punish the first offender, not by reprimanding him, but with a punishment which surpasses any gains from the crime. There is no reason to inflict inhumane or extreme punishment for minor crimes, but there is enough reason to give the same punishment to each and every offender for a particular crime.

This would also make punishment less escapable as it is now. Most offenders are not caught, but if caught, there a numerous ways to evade a sentence, and if sentenced, there a numerous ways to evade a decent sentence. Fixed sentences for fixed crimes if proven of course would give offenders less opportunity to escape a useful sentence.

3 . Criminal careers

Let me now turn to a more general perspective on how criminals learn. The following has, I admit, a more speculative basis but may be enlightening for the problem at hand.

A typical relation between crime rate and age is depicted in Figure 1. Starting at young age, say somewhere between 12 and 15 years, the crime rate starts going up, reaches its height at the age of about 20 and decreases to a relatively low rate at somewhere around 30. This graph is quite typical across countries and across time [Gottfredson & Hirschi, 1990, pp. 130 ff].

There have been many criminological theories which tried to explain the rise of this graph; there have been some trying to explain the decline of crime at later age. None has been successful in explaining both the rise and fall of crime during the maturation of offenders. Looking at this graph from a learning perspective might give such an explanation, though I must warn you that there is little empirical support for the contentions I am going to make.

In general the graph indicates that teenagers from 12 years onward but probably from an earlier age learn that crime pays; that the net profit of the pleasures of crime and the pains of punishment is positive. From the age of twenty many of them learn that crime does not pay until somewhere around 30 most have learned this; for some crimes continues to pay until old age. If this view is right, we changed the problem to: How do offenders learn their crime pays and how do they start to learn after a certain age – apparently from blue sky – that it does not pay?

Figure 1: Age distribution of crime

Taking this point of view, some obvious hypotheses follow.

1. At young age, the profits of crime surpass the pain suffered from punishment. We know that the criminal justice system only plays a minor role in this scheme of punishment: only 8 to 10 percent of the time juvenile offenders are caught for the common crimes they reported themselves [Junger-Tas et al., 1992], or less than 30 percent of the crimes reported to the police are resolved [TK, 1990-1991]. Then, it seems obvious that, at that age, crime pays.
2. During maturation offenders seem to give up crime more and more, learning that crime does not pay. The kick they get out of crime might become less. With experience they may find out that most criminal acts are indeed – as Gottfredson and Hirschi hypothesized – "trivial and mundane affairs that result in little loss [for the victim] and less gain. These are events whose temporal and spatial distributions are highly predictable, that require little preparation, leave few lasting consequences, and often do not produce the result intended by the offender" [Gottfredson & Hirschi, 1990, p.16]. A fair hypothesis would be that the contingencies of the average offender's environment learns him to abandon crime [Cusson & Pinsonneault, 1986]; they learn that other things in life give a larger and more lasting kick and an ordinary job produces more profits. For, again, the rate at which offenses are reported to the police and the rate at which offenders are caught cannot explain the decline in crime rate [Beck & Hoffman, 1976].
   There may be one exception: at this age recidivists are punished harder if caught. If this punishment has any effect, there is, again, no reason why we did not start doing that at an earlier age.
3. To make my hypotheses complete, but of little relevance to the sentencing problem at hand: After 30 a relatively small proportion of the population remains criminally active. These may consists of two kinds of individuals: those who did not learn anything in the past and will not in the future and the clever ones, who found a manner of committing crime which, against all odds, pays.

4. Making sentencing pay

If my analysis above proves right, and if sentencing has such a little impact on criminal behaviour, our sentencing policy seems to be wrong. Introducing a sentencing scheme that has an effect might have some very nasty side-effects. Setting punishment on a ratio of 1 would require a police state; and even then it might be a hopeless task. But even if we cannot reach such a state of affairs, it might be fruitful to try to get as near to it as possible. That would involve fixed sentences for each crime which is habitual for the average offender. Thus, the punishment need not be extremely severe, but becomes relatively inescapable and, most important, certain if caught. Doing that for special crimes – husbands who kill their wives, for instance, or the other way around, wives who kill their husbands – does not serve any purpose. But letting the shoplifter know in advance that getting caught and proven guilty automatically means, say, a week imprisonment or a *f* 300 fine can be expected to have a larger preventive effect than the present practice.
In The Netherlands the sentence is not only related to the crime, but also related to characteristics of the suspect, because the punishment, among others, serves the purpose of changing the behaviour of the accused. Following my analysis would mean that varying the punishment from offender to offender, from first offenders to recidivists, and from court to court, then, in fact means that the punishments is less effective than is possible. This is a paradox: whether the hand is lenient or tough, any hand sensitive to the offender produces less effect than an unsensitive hand.

Effective sentencing would involve fixed sentences for each crime imposed on every offender, from first offender to the many time recidivist. I do not agree with the obvious objection that such would be inhumane punishment. If it would have the effect that first offenders are kept from crime more often than now – in other words that the crime graph smoothed out from the start – nothing seems more humane to me.

The sentencing problem, then, is solved in a straightforward manner: we do not need a special Court of Appeals, nor a knowledge based system, but only a simple table with crimes and sentences.

5. The role of the public prosecution

Changing the perspective from what the offenders needs to the behaviour of the judge, I begin with a loose remark. In the '60 and '70 judicial behaviour was a fairly hot topic both in psychology and political science. From, as far as I know, the first study [Becker, 1966] on Hawaiian judges, there was a great upsurge in studies of judicial decision making [Hogarth, 1971][Crombag et al., 1977][Van Duyne, 1980][Van Duyne, 1983] [Van Duyne, 1991][Van Duyne & Verwoerd, 1985][Van Duyne & Van Koppen, 1991] [Ten Kate & Van Koppen, 1984][Van Koppen & Ten Kate, 1984]. I will summarize the conclusions drawn from these studies which are relevant here [Van Koppen, 1991].

1. The personality of the judge only has an indirect effect on decision making.
2. Differences in sentencing do not come from personality differences, but mostly stem from differences in evaluation of the facts of the case. If different judges agree on the facts, they usually come up with the same decision. Different judges, however, tend to perceive the same facts differently. Lawrence [1988] for instance, found that depending on the "toughness" of the judge, he or she perceives the motives of the offender as coming from either greed, need, of trouble. And, these attributed motives lead to different sentences.
3. The most important influence on sentencing behaviour of judges is the sentence proposed by the public prosecutor [Slotboom et al., 1992].

Taking these conclusions together, the following gloomy picture can be drawn for any program to diminish disparity in sentencing. If a special Court of Appeals or a knowledge based system produces a proscribed or suggested sentence for a typical crime, judges will always find patterns of facts in the individual case which warrants them to divert from the

prescribed or suggested sentence. Even then, prescribing a sentence will probably be no more effective than a firm policy set by the prosecution.

That leaves us with the following nagging questions which, I think, should be answered before we try to solve sentencing disparity among judges: are these differences so large that we need another time and energy consuming program? In the light of the punishment effect of sentencing I have tried to argue above that I consider these disparities among judges of little importance. In the light of the influence of the prosecution and the remaining possibilities for judges to evade intentionally or not any program, I consider them large enough either. But, I must admit, I am not convinced that the rather crude analysis of sentencing differences between District Courts in The Netherlands by Berghuis, earlier this year [Berghuis, 1992], gives a proper indication of their very size.

6. Conclusion

Now the differences in punishment rendered by courts seems to be relatively unimportant to punishment and reinforcers given by offender to themselves or by the environment to the offenders, it seems that any program to reduce disparity between the sentencing policy of different courts is of minor importance. In this light, such programs seem to stem more for a strive to neatness – it is so messy when different judges give different sentences for the same crime. My analysis, though, almost automatically leads to a proposal which produces much more neatness: a fixed punishment for each offense. Then, judge do not need hardware or special courts for their sentencing. They only need a simple table where they can look up the appropriate sentence.

Can we do away with judges then? Of course not! Determining guilt is a highly qualified job we should not leave to laymen, as Wagenaar, Crombag and I showed [Wagenaar et al., 1993][Crombag et. al., 1992]. And even apart from that, many important legal aspect of criminal procedure need to be decided upon by judges.

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