

CHAPTER 9

Sentencing

Teaching Outline

I. Introduction (p.260)

Sentencing: The imposition of a criminal sanction by a judicial authority. (p.260)

II. The Philosophy and Goals of Criminal Sentencing (p.260)

A. Retribution (p.261)

- A call for punishment based on a perceived need for vengeance.
- Corresponds to the just deserts model of sentencing.
- The primary sentencing tool of the just deserts model is imprisonment, with death used in extreme cases.

Retribution: The act of taking revenge upon a criminal perpetrator. (p.261)

Just Deserts: A model of criminal sentencing that holds that criminal offenders deserve the punishment they receive at the hands of the law and that punishments should be appropriate to the type and severity of the crime committed. (p.261)

B. Incapacitation (p.262)

- This is the “lock ‘em up” approach.
- Requires only restraint, not punishment.

Incapacitation: The use of imprisonment or other means to reduce the likelihood that an offender will commit future offenses. (p.262)

C. Deterrence (p.262)

- Overall goal is crime prevention.

Deterrence: A goal of criminal sentencing that seeks to inhibit criminal behavior through the fear of punishment. (p.262)

Specific Deterrence: A goal of criminal sentencing that seeks to prevent a particular offender from engaging in repeat criminality. (p.262)

General Deterrence: A goal of criminal sentencing that seeks to prevent others from committing crimes similar to the one for which a particular offender is being sentenced by making an example of the person sentenced. (p.262)

D. Rehabilitation (p.262)

Rehabilitation: The attempt to reform a criminal offender. Also, the state in which a reformed offender is said to be. (p.262)

E. Restoration (p.262)

Restoration: A goal of criminal sentencing that attempts to make the victim “whole again.” (p.262)

Restorative Justice (RJ): A sentencing model that builds on restitution and community participation in an attempt to make the victim “whole again.” (p.263)

Instructional Cue

Stress that the dominant philosophies guiding sentencing decisions today are incapacitation and deterrence. An effective way to demonstrate the predominance of these philosophies is to show a graph illustrating the number of incarcerated prisoners over time. Even with declining crime rates, the number of defendants sentenced to incarceration continues to grow.

III. Indeterminate Sentencing (p.264)

A. Explanation of Indeterminate Sentencing (p.264)

- Based on the belief that offenders are more likely to participate in their own rehabilitation if participation will reduce the amount of time they have to spend in prison.
- Parole is an important aspect of the indeterminate model.
- The primary determinant of the amount of time actually served is the inmate’s behavior while incarcerated.

Indeterminate Sentencing: A model of criminal punishment that encourages rehabilitation through the use of general and relatively unspecific sentences (such as a term of imprisonment from one to ten years). (p.264)

Consecutive Sentence: One of two or more sentences imposed at the same time, after conviction for more than one offense, and served in sequence with the other sentence. Also, a new sentence for a new conviction, imposed upon a person already under sentence for a previous offense, which is added to the previous sentence, thus increasing the maximum time the offender may be confined or under supervision. (p.264)

Concurrent Sentence: One of two or more sentences imposed at the same time, after conviction for more than one offense, and served at the same time. Also, a new sentence for a new conviction, imposed upon a person already under sentence for a previous offense, which is served at the same time as the previous sentence. (p.264)

Instructional Cue

Provide students with the sentencing options when operating under an indeterminate sentencing model. For example, a defendant convicted of burglary could be sentenced to a fine, probation, 5

to 10 years in prison, or 10 to 25 years, depending on the judge's decision. Use examples like this to highlight the problems with the indeterminate sentencing model.

B. Critiques of Indeterminate Sentencing (p.264)

- Contributes to inequality in sentencing.
- Allows judges' personalities and personal philosophies to influence sentencing.
- Allows a defendant's personal and social characteristics to affect sentencing.
- Defense attorneys manipulate the system to appear before the "right" judge.
- It produces dishonesty in sentencing.
- Time served is generally far less than what is indicated on the books.

Gain Time: The amount of time deducted from time to be served in prison on a given sentence as a consequence of participation in special projects or programs. (p.265)

Good Time: The amount of time deducted from time to be served in prison on a given sentence as a consequence of good behavior. (p.265)

IV. Structured Sentencing (p.265)

- The problems with indeterminate sentencing led many states to revise their sentencing codes to provide greater control over their sentencing systems.

Proportionality: A sentencing principle that holds that the severity of sanctions should bear a direct relationship to the seriousness of the crime committed. (p.266)

Equity: A sentencing principle, based upon concerns with social equality, that holds that similar crimes should be punished with the same degree of severity, regardless of the social or personal characteristics of the offenders. (p.266)

Social Debt: A sentencing principle that holds that an offender's criminal history should objectively be taken into account in sentencing decisions. (p.266)

- Various structured sentencing models were adopted to address concerns such as proportionality, equity, and social debt.

Structured Sentencing: A model of criminal punishment that includes determinate and commission created presumptive sentencing schemes, as well as voluntary/advisory sentencing guidelines. (p.266)

Determinate Sentencing: A model of criminal punishment in which an offender is given a fixed term that may be reduced by good time or gain time. Under the model, for example, all offenders convicted of the same degree of burglary would be sentenced to the same length of time behind bars. (p.266)

Voluntary/Advisory Sentencing Guidelines: Recommended sentencing policies that are not required by law. (p.266)

Presumptive Sentencing: A model of criminal punishment that meets the following conditions: (1) The appropriate sentence for an offender convicted of a specific charge is presumed to fall within a range of sentences authorized by sentencing guidelines that are adopted by a legislatively created sentencing body, usually a sentencing commission. (2) Sentencing judges are expected to sentence within the range or to provide written justification for failing to do so. (3) There is a mechanism for review, usually appellate, of any departure from the guidelines. (p.266)

- This allows for the consideration of aggravating and mitigating circumstances.

Aggravating Circumstances: Circumstances relating to the commission of a crime that make it more grave than the average instance of that crime. (p.267)

Mitigating Circumstances: Circumstances relating to the commission of a crime that may be considered to reduce the blameworthiness of the offender. (p.267)

Instructional Cue

Death-penalty legislation provides an effective illustration of the differences between aggravating and mitigating circumstances. For example, the aggravating circumstances that might be considered during the sentencing phase of a death-penalty trial include the number of victims who were murdered, whether the murder occurred during the commission of another crime (felony-murder), how heinous the murder was, and whether the victim was a law enforcement officer. Mitigating factors include the defendant's age, the defendant's mental state at the time of the offense, the defendant's prior record, and the defendant's use of drugs or alcohol at the time of the offense.

A. Federal Sentencing Guidelines (p.267)

- The Sentencing Reform Act limited the discretion of federal judges by mandating the creation of federal sentencing guidelines.
- In *Mistretta v. U.S.*, the Court held that Congress acted appropriately in the creation of the federal sentencing guidelines and that the guidelines could be applied in federal cases nationwide.

Truth in Sentencing: A close correspondence between the sentence imposed on an offender and the time actually served in prison. (p.267)

1. Federal Guideline Provisions (p.268)

- A sentencing range is specified, and judges are allowed to depart from the guidelines if a case has atypical features (aggravating or mitigating circumstances).
- Any departure from the guidelines may become the basis for appellate review.

2. Plea Bargaining under the Guidelines (p.268)

- Approximately 90% of federal sentences are the result of guilty pleas, most of which stem from plea negotiations.
- The Sentencing Commission requires that plea agreements be fully disclosed in the court record and detail the actual conduct of the offense.
- In *Melendez v. U.S.*, the Court held that although federal judges may depart from sentencing guidelines, they may not accept plea bargains that would have resulted in sentences lower than the minimum required by law for a particular type of offense.

B. The Legal Environment of Structured Sentencing (p.269)

- In *Apprendi v. New Jersey*, the Court says that requiring sentencing judges to consider facts not proven to a jury violates the Constitution.
- Since *Apprendi*, the Court has expanded the number and types of facts that must be decided by a jury.

C. Three Strikes Law (p.271)

- Currently, about half the states have passed three-strikes legislation.
- At the federal level, the 1994 Violent Crime Control and Law Enforcement Act contains a three-strikes provision.
- Questions remain about the effectiveness of three-strikes legislation and its impact on the justice system.

D. Mandatory Sentencing (p.272)

Mandatory Sentencing: A structured sentencing scheme that allows no leeway in the nature of the sentence imposed. Under mandatory sentencing, clearly enumerated punishments are mandated for specific offenses or for habitual offenders convicted of a series of crimes. (p.272)

Diversion: The official suspension of criminal or juvenile proceedings against an alleged offender at any point after a recorded justice system intake, but before the entering of a judgment, and referral of that person to a treatment or care program administered by a nonjustice or private agency. Also, release without referral. (p.273)

V. Innovations in Sentencing (p.273)

A. Alternative Sentencing Options (p. 273)

- Judges are using discretionary sentencing to impose unique punishments.
- Shaming as a crime-reduction strategy has considerable support in criminal justice literature.

B. Questions about Alternative Sanctions (p.274)

- As prison populations rise, alternative sentencing options are likely to become increasingly attractive.

Alternative Sentencing: The use of court-ordered community service, home detention, day reporting, drug treatment, psychological counseling, victim-offender programming, or intensive supervision in lieu of other, more traditional sanctions, such as imprisonment and fines. (p.274)

VI. The Presentence Investigation (p.274)

- The purpose is to give the judge information about a defendant's background.
- It can be a detailed written report, an abbreviated written report, or a verbal report.
- Information includes personal information, prior record, current offense information, health history, work history, social history, and education.

Presentence Investigation (PSI): The examination of a convicted offender's background prior to sentencing. Presentence investigations are generally conducted by probation or parole officers and are submitted to sentencing authorities. (p. 274)

Instructional Cue

Have the students brainstorm to identify the factors that they think are relevant for a judge to know to make an accurate sentencing decision.

VII. The Victim—Forgotten No Longer (p.276)

A. Victim's Rights (p. 276)

- The sentencing process now frequently includes consideration of the needs of victims and their survivors.
- Over 30 states have passed victims' rights amendments.
- The 2004 Crime Victims' Rights Act establishes statutory rights for victims of federal crimes and gives them the necessary legal authority to assert those rights in federal court.

B. Victim-Impact Statements (p.278)

- Statements that usually describe the loss, suffering, and trauma experienced by the crime victim or the victim's survivors and that are presented before sentencing.
- One study found that sentencing decisions are rarely affected by victim-impact statements.

Victim-Impact Statement: An in-court statement made by the victim or by survivors to sentencing authorities seeking to make an informed sentencing decision. (p.278)

VIII. Modern Sentencing Options (p.279)

A. Sentencing Rationales (p. 279)

- A variety of sentencing philosophies permeate state-level judicial systems

B. Sentencing Practices (p.280)

- In 2006, 1,132,000 felons were convicted in trial courts.

- About 41% were sentenced to active prison terms while another 28% received jail sentences involving less than one year's confinement.
- The number of criminal defendants receiving active prison time has increased dramatically.

C. Fines (p.280)

- One of the oldest forms of punishment. The use of fines as a criminal sanction suffers from built-in inequities and a widespread failure to collect them.
- The day fine system used in Scandinavia is based on the idea that fines should be proportionate to the severity of the offense and the financial resources of the offender.

IX. Death: The Ultimate Sanction (p.292)

- Since 1608, over 18,800 legal executions have occurred in the U.S.
- The numbers declined in the twentieth century.
- The federal government and 35 states have capital punishment laws.
- About 60 offenses are eligible for the death penalty.
- A total of 3,170 offenders were under sentence of death as of August 1, 2012.

Capital Punishment: The death penalty. Capital punishment is the most extreme of all sentencing options. (p.283)

Capital Offense: A criminal offense punishable by death. (p.283)

A. *Habeas Corpus* Review (p.283)

- Automatic review of all death sentences by appellate courts and constant legal maneuvering by defense counsel often lead to dramatic delays between the time sentence is handed down and the time it is carried out.
- An average of ten years and eight months passes between the imposition of a death penalty and execution, directly contravening the notion that punishment should be swift and certain.
- *McClesky v. Zandt* limits the number of appeals available to a condemned person. After the first appeal, the defendant must show (1) why the subsequent appeal wasn't included in the first appeal and (2) how the defendant was harmed by the absence of the claim.
- Based on *Coleman v. Thompson*, state prisoners condemned to die cannot cite "procedural default" (such as a defense attorney's failure to meet a filing deadline for appeals in state court) as the sole reason for an appeal to federal court.
- *Schlup v. Delo* established that an appeal based on new evidence can be heard if it is "more likely than not that no reasonable juror" would have found the defendant guilty.
- Appeals are also limited by the Antiterrorism and Effective Death Penalty Act.
- Recent statements by Supreme Court justices have indicated that long delays caused by the government in carrying out executions may render the punishment unconstitutionally cruel and unusual.

Writ of Habeas Corpus: A writ that directs the person detaining a prisoner to bring him or her before a judicial officer to determine the lawfulness of the imprisonment. (p.284)

B. Opposition to Capital Punishment (p.285)

1. Death Penalty and Innocent People (p.286)

- The Death Penalty Information Center says that 140 people in 25 states were freed from death row between 1973 and late 2012 after it was determined they were innocent of the capital crime of which they had been convicted.

2. Death Penalty and Deterrence (p.288)

- Research questions the deterrent effect of the death penalty.

3. Death Penalty and Discrimination (p.288)

- Opponents of the death penalty claim it discriminated against certain ethnic and racial groups.

- This is hard to investigate because it requires measures of both frequency and seriousness of capital crimes between and within racial groups.

Instructional Cue

Discuss the decision by the governor of Illinois in February 2000 to conduct an investigation of the death-penalty system in that state. One factor that motivated the governor was that 13 individuals have had to be released from death row because they were found to be wrongfully convicted.

C. Justifications for Capital Punishment (p.290)

- Just deserts.
- It is a form of revenge and provides closure to survivors, victims and the state.
- It provides protection as the defendant, once executed, will not commit another crime.

D. The Courts and the Death Penalty (p.291)

- There are several key Supreme Court decisions regarding the death penalty.
- *Wilkinson v. Utah* upheld the use of the firing squad as a method of execution.
- *In re Kemmler* stated, "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution." Also, this case upheld the use of electrocution as a method of execution.
- *Furman v. Georgia* stated, "Evolving standards of decency" might necessitate a reconsideration of the constitutionality of capital punishment. Allowing the jury to decide guilt and the punishment of death at the same time allowed for an arbitrary and capricious application of the death penalty.
- In *Gregg v. Georgia*, the two-step process of a judge or jury deciding guilt and then undertaking a separate sentencing phase was specifically upheld by the Supreme Court.

- *Ring v. Arizona* established that juries, rather than judges, must decide the facts that lead to a death sentence.
- *Baze v. Rees* held that Kentucky's capital punishment protocol of lethal injection does not violate the Eighth Amendment.

E. The Future of the Death Penalty (p.295)

- Support for the death penalty varies from state to state. The future of capital punishment may depend more on popular opinion than on arguments pro or con.
- Public opinion may turn on the issue of whether innocent people have been executed.

Learning Activities Utilizing the World Wide Web

The following are presented as instructor led activities, to be used in a classroom with online access.

Visit the Death Penalty Information Center (DPIC) at <http://www.deathpenaltyinfo.org>. Review the various issues discussed (under the Issues link), such as arbitrariness, clemency, deterrence, innocence, juveniles, and mental illness. Also review the various resources available on the site and the types of reports released by the (DPIC). Provide a brief description of the kinds of material each contains for display in class. Ask the class which of these subareas seems the most interesting? Why?

Divide the class into groups, each taking a position on the death penalty. In class, display three or four websites to display for evidentiary support for your position. Websites that may be helpful include:

The ACLU's Capital Punishment page: <http://www.aclu.org/capital-punishment>

Amnesty International Death Penalty Campaign: <http://www.amnesty.org/en/death-penalty>

Death Penalty Focus: <http://www.deathpenalty.org>

Death Penalty Information Center: <http://www.deathpenaltyinfo.org>

After preparation, allow the class to participate in a debate on the issue.

Other websites for organizations and agencies related to the material in Chapter 9 include:

The Sentencing Project <http://www.sentencingproject.org>

National Association of Sentencing Commissions <http://thenasc.org>

United States Sentencing Commission <http://www.ussc.gov>

ACLU's Capital Punishment Page

<http://www.aclu.org/capital-punishment>

Amnesty International Death Penalty Campaign

<http://www.amnesty.org/en/death-penalty>

Death Penalty Focus

<http://www.deathpenalty.org>

Death Penalty Information Center (DPIC)

<http://www.deathpenaltyinfo.org>

Pro-Death Penalty.com

www.prodeathpenalty.com/