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*Sentencing in the United States**

Strafzumessung in den Vereinigten Staaten von Amerika

Sentencing is a complex task that requires thoughtfulness, insight, and compassion. It requires compassion not just for the victim, but also for the defendant. It requires insight into the meaning of the crime – why did the defendant do it? And it requires thoughtfulness – the judge must weigh many things that point in different directions in arriving at a sentence. What will the impact of the sentence be on the defendant? On the victim and his relatives? On others who might be tempted to do the same crime? A judge who decides sentences on the basis of anger or disgust in not a judge. He is simply human, but a wise judge must take into account a variety of factors. He wants the victims to feel that their injury and suffering was not discounted or otherwise belittled. The judge wants the defendant (and his sympathizers) to appreciate the seriousness of his offense, and he wants the defendant to mature from his experience in crime, so that he does not again become a scourge on the community.

Much of this is simply idealistic, because some criminals do not fear or respect justice. They hope simply not to be caught, and if caught,

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they hope to receive a light not a just sentence. They have little sympathy for their victims, and many will not be deterred because they believe in their luck. Chances are good that their crime will not be discovered and punished. But even if they are caught, a prison sentence means simply that they will see some old friends in prison, and when they are released, they will return to another set of old friends in their neighborhood – many of whom idealize and applaud criminal activity.

Judges know all this and take it into account. But they cannot be governed by the futility of sentencing. They are educators and they teach not only offenders but also victims and the rest of us about justice. Justice means that offenders receive a punishment in proportion to their crime, and it means that those whose crimes are similar in their circumstances receive similar punishments. Today, justice is even-handed and justice is proportionate, but justice is also relative to the cultural level of the community.

SENTENCING MODELS

Judges are often tempted, however, to teach the defendant a lesson. They are tempted to vent their anger and frustration against a defendant by inflicting a very severe sentence. Still, judges in the United States are constrained by law to sentence within a range which usually reflects both aggravating and mitigating circumstances. Should they exceed either the maximum or the minimum, they must provide an explanation, and these explanations when taken together provide a valuable guide to revising the sentencing schedule along lines that fit the flow of cases judges must face. This method is described in the United States as presumptive sentencing, and so far 10 states including Minnesota, Pennsylvania, Washington, Florida, Tennessee, and North Carolina practice presumptive sentencing (United States Bureau of Justice Assistance 1996 23).

We also use determinate sentencing. For example, a judge is offered by the legislature a range of punishments for each offense with aggravating and mitigating circumstances, and after weighing them all he must provide a sentence that is specific. The only condition that can affect the sentence is the defendant's behavior in prison. He can receive reductions in sentence because of "good time". Determinate sentencing puts the ultimate burden of defining the appropriate punishment on the legislature. Pun-

ishment ultimately must express the level of the community's repudiation of the offense, and the legislature is the proper body to define what the people think about criminality.

Indeterminate sentencing puts the burden on the parole board, which in most states is appointed by the governor. Its function, of course, is to decide when the inmate is ready to go home. For a century from about 1870 to 1970 in the United States, we used indeterminate sentencing almost exclusively, but it resulted in wide disparities in which, for example, some defendants (mostly white) received shorter sentences and paroles while others (many who were Black) received neither. It also meant that most inmates had at best only a very vague notion as to when they might be released. They only knew when they would be eligible for parole, but the parole itself was far from certain. The defendant was sentenced by the judge to a wide range of years but within limits determined by the legislature, e.g., from 5 to 15 years. The ultimate length of the inmate's sentence within this range was set by the parole board. Their decision depended heavily on the inmate's demeanor in prison and on the prosecutor's attitude toward the criminal's original offense. Either could force the rejection of the inmate's parole. Indeterminate sentencing was used to provide inmates a strong incentive to pursue prison programs diligently and to avoid rule infractions, and in the United States 30 states including, for example, the District of Columbia, Hawaii, Massachusetts, and Michigan, still follow this model (United States Bureau of Justice Assistance 1996 23).

But no criminal case is just one of a class of similar crimes. Each case has its own stamp, and in the United States that's what judges are for – to fit a punishment to each crime. In the United States we have, however, a rather punitive schedule of punishments (Weigend 1983 21; United States Bureau of Justice Assistance 1998 24–5) – at least when compared with that used in western Europe. For example, in state courts many first-time offenders who deal in hard drugs receive very lengthy prison sentences – 25 years or so. Weapons violators are also severely punished (if they use a weapon in the course of their crime, their punishment can be doubled), and the same is true for repetitive, violent offenders – they can receive life imprisonment ("three strikes and out"). Convicted defendants in the federal courts were also treated severely (see United States Bureau of Justice Statistics 1998). In 1995 84 percent of the defendants were convicted and of these about 2/3rds were sentenced to prison, 27 percent received probation, and 7 percent were fined.

Felony violent offenders who were imprisoned were given sentences on average of 92 months, felony property offenders received on average 26 months, and felony drug offenders were given 85 months.

But the judge is still a judge, no two cases are identical, and the judge must consider not only the crime and its victim, but also the offender and the broader population. How does a criminal and his case affect the rest of us, who are neither defendants nor victims? On March 6th, 1983 an unmarried, young lady entered a bar in New Bedford, Massachusetts. She was flirtatious, and as the evening wore on, she also became drunk. Finally, she accompanied some young men into a back room where they all shot some pool and played a pinball game.

Now, young women face a difficult dilemma that young men are rarely even aware of – much less face. They want very much to be appreciated by young men, and they dress themselves accordingly. But they also have to be in control of the relationship, and that means that they cannot seem to promise too much. They realize that they alone must apply the brakes, because young men don't have brakes. Girls know what makes them attractive, and they do their best to be attractive. But they demand that the course of the relationship be left to them, and the law backs them up in this.

This case was a good example of the woman's dilemma, because the young lady did her best to be appealing to young men–she wore suggestive clothing and used a seductive manner. But when the young men began to take matters into their own hands and demanded that she submit to their wishes, she resisted and tried to leave. She put on the brakes, but they rejected her pleas and proceeded to rape her for two hours forcefully and repeatedly. Six of the men were arrested and charged with aggravated forcible rape, a crime that carried a maximum of life imprisonment. But instead of holding them in jail for trial, all went free on negligible bail; until feminist groups protested and their bail was increased to $50,000. Two had their cases dismissed, two of the four paid their bail and were allowed to await trial at home, and two remained in jail awaiting trial. This case was tried in Fall River and all four were convicted of aggravated forcible rape.

The defendants were all young men who had never committed a serious crime, they were all well known in New Bedford, and it was clear that the rape itself in each case had been a spontaneous event. No one had planned it. All of these facts supported a light sentence, but when the judge handed down his sentence, there was disbelief and outrage among feminist groups throughout the United States. He had given all

of the convicted defendants relatively short prison terms! Three were given terms of from 9 to 12 years and one was given a sentence of 6 to 8 years – relatively light sentences for an aggravated forcible rape. Apparently, Hollywood was also amazed, because the case was made into a hit film, **The Accused**, with Jodie Foster as the attractive young lady who was brutally raped. My point is this. We all have a sense however vague regarding justice. And the judge's action in this case offended most Americans' sense of justice. He had been too lenient, and basic justice in everyone's mind seemed to require greater pain for the defendants. A light sentence for the defendants meant to the victim that her suffering and humiliation had been discounted. She had not received justice. She had a sense of what her injury required of the court, and her sense was not honored by the court. Victims, of course, usually have an exaggerated concept of what justice demands in their case, but when the rest of us feel insulted and outraged by the judge's leniency, our respect for justice and the courts is weakened.

The courts depend upon our respect for justice, because we temper our own behavior by our sense of what justice is. To a certain extent our personal moral codes and the law reinforce one another. If either is diluted, it weakens our resolve to behave morally*. If justice is diluted, it also lowers our respect for government. The courts cannot afford to undermine that respect, because otherwise we would not feel as much restraint in our relationships with one another. If we respect the law, we attempt to abide by it. In Japan the law is highly respected, and 60 percent of those facing murder changes await their trial in jail. If we do not feel a moral obligation to uphold the law, the police and courts can only control us via aggressive policing and painful punishments. If the courts offend our sense of justice, we will not conform automatically to the law but only by calculation. We will be tempted to take our chances, but that is the route to social chaos.

THE JUVENILE COURT

In the last 30 years the juvenile court in America has come under severe criticism for the lenient way it has handled juveniles. Juveniles

* P. Bohannan (1965) suggests that law is a form of custom that has been reinstitutionalized, and weakness in international or colonial law often reflect contradictions of each with local custom.

commit most of the same crimes that adults do – maybe not so viciously nor so commonly, but they display the same range as adults, from the most severe crimes to the most petty. But in the last few years the juvenile court has come under severe attack in America, because it has not punished juvenile training school for eighteen months and if all went well at the institution, they were released to their community on parole for another three to five years, and that would be the end of it. If the juvenile got into further serious trouble as an adult, the jury would never learn about the murder case, because the child's case was "sealed" – it was not public information. The juvenile's experience was very different from that of an adult in court, and the juvenile court was seen in America as a court that did not give the juvenile's crime the attention it deserved.

On October 20th, 1994 several boys in a housing project decided to steal some candy from a nearby store, and they directed the youngest among them, Eric Morse – a five year old – to carry out the theft. But he refused. To persuade him, the older boys who were 10 and 11 years old and on the 14th floor, took the five year old to a window and dangled him out. When he still refused to shoplift the candy, they let him drop to his death. Those boys did not receive the usual leniency in the juvenile court, but think what the mother of that boy felt when she learned what had happened to her son. To give such boys leniency would have disregarded the seriousness of their crime for the young victim and for his parents. Victims must feel that their suffering is respected in court, and lenient sentencing builds up a sense of resentment on the part of those who have every right to expect justice – the victims.

Thus, punishment must fall within the broad guidelines established not only in law but also in the minds of the victims and unrelated bystanders. Otherwise, the courts will lose the good will of the people it serves, and its ability to govern the people will be undermined. This is the message behind the "Just deserts" thesis put forth in the last few years by Andrew von Hirsch in America.

JUST DESERTS

"Just deserts" is often mentioned in Europe as a synonym for severity of punishment, but that is mistaken. Severe punishments attend most serious crimes in the United States, but to explain that fact by a "buzz word" is simplistic. Just deserts refers to the responsibility of the court

to earn the good will and respect of the people by sentencing in proportion to the severity of the crime.

Thomas Weigend, a respected European legal scholar, seems to agree with von Hirsch when he suggests that:

„[...] the desert principle must be related to the modern state's task of safeguarding social peace and order... If punishment is to restore the social peace disturbed by the offense, the penalty must be such that everyone affected – the victim, the offender, and society at large – can accept it as a commensurate, fair and sufficient response to the wrongful act" (Weigend 1983 47).

The alternative in the long run, Weigend seems to be saying, is a coercive state that rules by force and not by moral authority. To defy the people's sense of justice is to flirt with authoritarianism.

Just deserts does not mean blind severity. It only means that lenient treatments cannot substitute altogether for punishment. It also means, however, that treatment can be applied in specific cases, e.g. with juveniles, if the people accept and understand such methods. If they prefer severe punishments for juveniles, but we as criminologists or jurists understand that severe punishments will only mean greater criminality for juveniles and greater trouble for society, we must persuade the people that justice can be augmented with treatment for the benefit of all. We do not undertake punishment against those who cannot help what they do, i.e., the insane, and though most offenders undertake crime voluntarily, their alternatives are usually much narrower than those of conventional citizens. We do not need to punish them severely if the victims and bystanders would rather see compassion and rehabilitation. In the today United States only a few call for rehabilitation, and most call for punishment. Our task in America is to educate the public so that rehabilitating offenders becomes a solemn duty rather than a scandal.

Some (see Savelsberg 1992) regard just deserts as an anachronism – a neoclassicism that attempts to return to a stage of law – a formal/autonomous stage – (see Nonet and Selznick 1978) that is being replaced by a new stage – responsive law that is geared more to fairness – i.e., the needs of society and the offender – than formal/autonomous law. And there may be some truth to the criticism. Though von Hirsch sometimes writes as if autonomous law is incompatible with responsive law, the fact remains that the two reflect distinct aspects of the law and neither is likely to fade away in favor of the other. To be sure autonomous law is primary but responsive law is certainly geared to several structural

developments in post-industrial society (see Savelsberg 1992 1354–60) that will not disappear. Thus, the gradually expanding political power and social responsibility of the lower strata, the growing consolidation of economic power and the resultant involvement of government, and the activism of a wide variety of political interest groups – all mean that responsive law is growing in importance throughout the West. My point here, however, is that we need a blend of the two, i.e. autonomous and responsive law. Each presents answers to basic questions in the law and neither can be dispensed with in modern society. I believe that von Hirsch understands this duality and favors a respectful balance.

Indeed, von Hirsch (1986 149) himself proclaims that "As long as a substantial segment of the populations is denied adequate opportunities for a livelihood, any scheme for punishing must be morally flawed". In other words, as long as some are seriously handicapped in pursuit of social esteem, just deserts is unfair to those who have few alternatives to crime, though not so unfair as a sentencing philosophy that focuses on handicaps and ignores the will behind the crime or the public's sense of justice.

Just deserts means that the ultimate standard of justice comes from the people, and that their standard can be adjusted up or down – by parents, teachers, judges, priests, and political leaders. Not all of these speak from the same lectern, and as a result the public are pulled this way and that – but good sense ultimately prevails and the people follow the standard that best explains their feelings. Just deserts reminds us simply that justice also depends upon the procedures used in formulating the law, not simply upon the direction it might take. It is neutral on retribution or resocialization. Von Hirsch (1993) makes it clear that he is not opposed to rehabilitation as such, only rehabilitation that is not geared to just deserts. The challenge facing progressive jurists and criminologists therefore, is to develop the public's understanding regarding the **best** route in balancing retribution and re-education. Reprobation is important because victims and the general public have a deep sense of justice that must be honored in the penal law, and re-education is necessary because it offers hope both to the offender and the public that some criminals can escape their miserable destiny if they try. A penal system that offers mainly reprobation is a bleak, heartless system that ignores the themes of self-improvement and redemption that are so deeply rooted in Western culture. But a penal system that ignores reprobation

in favor of re-education runs the risk of losing the publics allegiance. Both are important and should be reflected in the penal law.

Since the people already understand the significance of punishment, the task facing educators is to awaken the people to benefits of rehabilitation. But some judges and teachers believe that the people should only follow. The law does not depend on enlightening the people, it depends only upon legal scholars who understand the law. In America the law is defined by the legislature, but recently punishments in many American states have been set by a commission of experts consisting of 15 or 20 respected judges, political leaders, prosecutors, defense attorneys, correctional officials, legislators and private citizens that decides how severely different kinds of convicted criminals should be sentenced. The commission debates the issue from every angle and concludes with a matrix of offenses along one axis and with mitigating or aggravating circumstances on the other. The public is largely excluded from these commissions, but commission members have found that broadly representative boards are stronger in the long run. They can foster broad commitment to sentencing reform (see United States Bureau of Justice Assistance 1996 38).

In California however, the sentencing commission was not broadly based, and it was not successful in the long run. It was asked to provide a sentencing schedule that punished criminals according to the severity of their crime and that avoided any increase in the prison population. The schedule was completed in due time and presumptive sentences for a variety of crimes were established that would not force an increase in the prison population. But when the schedule was considered by the California legislature, 43 amendments were enacted that stiffened the sentences and produced massive increases in California's prison population (see Messinger and Johnson 1978). In legislatures a balance between those who favor rehabilitation and those who favor harsh punishment is hard to achieve, and a severe sentencing model tends to emerge.

According to criminologists who evaluated the work of the commission "California set an example of how not to develop structured sentencing in which the results are strongly influenced by the politics of crime". (see US Bureau of Justice Assitance 1996 17). It is probably more accurate to say that the California sentencing commission attempted to keep politics at bay by narrowing the commission's membership. But since the legislature must ultimately pass on the proposed legislation, the commission inevitably saw its work undone when the bill came

before the legislature (see Casper and Brereton 1984). The commission itself should provide scope for "politics" so that reasoned opinion has an opportunity to balance raw politics. This is probably why Weigend favors a commission (over the legislature) in America (see 1983 60) in reforming the penal law – because the commission can blend politics with penology more easily.

Launching a scientific sentencing schedule that expresses primarily the viewpoint of researchers and scholars, however, is probably futile, since in America politics and the state legislature must by law become involved in sentencing reform. Moreover, the sentencing schedule that is finally produced by an overly narrow commissions is likely to recommend sentences that are at odds with the views of the wider public. The federal sentencing commission is a good example. It recommended severe sentences for cocaine dealers, less severe sentences for heroin dealers, and relatively light sentences for soft drugs dealers. But the sentences for cocaine dealers were too severe from nearly everyone's standpoint, and as a result the Federal sentencing commission was an utter failure (see Tonry 1996 83–88).

The matrix defines precisely the range and kind of punishment that each offender deserves from the standpoint of the commission, and when it is completed, this matrix is published for judges. If judges are obliged by law to provide both a specific sentence and to follow the recommendations of the sentencing matrix, the state is using a determinate sentencing model. If the matrix serves only as a sentencing guide which the judges are not obliged to follow, the state follows either a determinate or an indeterminate sentencing model, depending upon whether they must issue a specific sentence or a range. As we have seen some states follow each of the models.

We have had sentencing commissions for at least 18 states including California, Washington, Wisconsin, New York and Pennsylvania and for the federal courts. And many commissions have been especially severe with drug dealers. They have drawn a distinction between those who deal in soft drugs (marijuana), those who deal in heroin, and those who deal in crack cocaine. Cocaine dealers are often punished with lengthy prison terms, heroin dealers with lesser prison terms, and marijuana dealers with still less severe sentences – e.g., with probation, or short terms in jail. Naturally, everything depends upon the level of the offense – the amount of drugs discovered, the number of previous offenses, and the offender's demeanor. But the federal commission that recently for-

mulated sentences for the federal courts established very heavy sentences for cocaine dealers (prison terms for up to 25 years) and more mild sentences for heroin and marijuana dealers. It turns out however, that cocaine dealers are mainly Black people, while heroin and marijuana dealers are mainly white. The result has been that Black defendants have been handed lengthy prison sentences while white defendants have received short prison sentences or even probation.

Make no mistake: drugs are a serious problem in the United States. Too many people turn to drugs to salve life's slings and arrows with the result that their problems only multiply. If there were no drugs, many more people would probably confront their problems constructively and find solutions outside of crime. Drug addiction is a scourge on American society. But many Black people are unwilling to tolerate a solution that throws the heaviest sanctions primarily on them. What is the difference between heroin and cocaine that mandates heavy sentences for Black dealers and light sentences for white dealers? The sentencing matrix advanced by the federal sentencing commission has been soundly denounced by many who have had anything to do with it – particularly by political leaders, judges and scholars – with the result that it is currently being revised by a new commission.

Commissions can get it wrong. This commission was not sufficiently sensitive to the attitudes of its constituency. The commission did not anticipate the impact of its sentencing matrix on Blacks and whites, and as a result the matrix provoked a swarm of angry criticism. But had the differences in sentencing among Blacks and whites not been there, there still would have been much excitement, because to many the punishments for cocaine dealing seem extraordinary – 25 years in prison without a possibility of parole for a single instance of dealing a kilo of cocaine. Thus, sentencing commissions are obliged to respect the sensibilities of those who must use the product of their efforts, the sentencing matrix – the judges, lawyers, victims and defendants. The standard of sentencing that works best is that which finds the greatest consensus among those who must use it. If the consensus among practitioners is negative, it has failed (see Tonry 1996, 80–9).

The juvenile court is a good example of what happens when the consensus is negative. The juvenile court has suffered recently in America, because many complained that it ignored justice in favor of rehabilitation and as a result failed to punish juveniles proportionately. In 1995 more than 60 percent of the American people agreed with each of the following

statements: "A juvenile charged with a serious property crime (or a serious violent crime, or with selling illegal drugs) should be tried as an adult". (Maguire and Pastore 1996 Table 2.59, 155). There's more to the story than that of course, but it is a good example of what a dwindling level of confidence among the public does to its attitudes toward the courts.

Just deserts suggests that the penal law depends basically on the cultural level of the people. If the people prefer rehabilitation and the state provides harsh punishment, the law will fail to guide, just as when the people prefer harsh punishment and justice is slanted toward rehabilitation. A justice system that does not reflect the ideals of the community can guide only via coercion. This may be one reason why the United States punishes serious offenses so severely – the law does not conform to the morality of all those it governs, and it must be severe to be heeded.

Still, many criminologists have found that rehabilitation works best with some people, and punishment works best with others. Thus, the task of those who would reform the penal law in America is to awaken the public to the ideas behind criminological reasoning. The first step is to persuade the public that significant numbers of offenders can, indeed, become reconstructive citizens. Next, we must explain how re-education might be blended effectively with punishment in sentencing. Third, we must show that those who respond best to re-education can be reliably distinguished from those who respond best to punishment, and finally we must identify which methods within punishment or re--education are most effective in reducing further criminality.

At bottom most reforms in criminal justice rest on advances in education that focus on the strengths and weaknesses of criminal justice (see Maguire and Pastore 1966 Table 2.56). Law is sacred in that it expresses our sense of morality and justice. But law is not sacred in that it is ever changing. As we change and our society changes, law must also change. It can go too fast or too slow. But it ought not to be frozen.

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ZUSAMMENFASSUNG

Im Artikel werden die Kompliziertheit des Verlaufs der Strafzumessung und verschiedene Faktoren dargestellt, die von einem Richter bei der Strafzumessung berücksichtigt werden müssen. Es wird unterstrichen, daß die Richter dazu verpflichtet werden, sich von der Objektivität leiten zu lassen und sein persönliches Engagement zu meinden. Sie sollten auch die Zwecklosigkeit der Bestrafung mancher Taten nicht berücksichtigen: die Strafe soll vor allem als gerechtig empfunden werden.

Es werden mögliche Muster der Urteilsfindung besprochen, darunter die bestimmte und unbestimmte Strafzumessung. Im letzteren Fall wird die endgültige Entscheidung auf den Ausschuß für die bedingte Freilassung verschoben. Dann wird das Prinzip der „zutreffenden Strafe", der in den USA letztens Priorität noch vor der Resozialisierung gegeben wird, analysiert. Das Prinzip der „zutreffenden Strafe" bedeutet aber nicht zugleich eine strenge Repressionsanwendung. In der Gestaltung der Regeln und Tendenzen im Bereich der Strafzumessung spielen sowohl die föderativen als auch Landes-Ausschüsse für die Strafzumessung eine gewisse Rolle.

Die Strafen im Bereich einiger Straftaten und hinsichtlich mancher Kategorien der Straftäter sind nach wie vor sehr streng. Es anbelangt u.a. die Straftaten mit Gewaltanwendung. Streng werden die rückfälligen Straftäter behandelt. Die Resozialisation der Täter wird vorwiegend bei den Jugendlichen angewendet; die Öffentlichkeit fordert aber, daß die Minderjährigen für die schwersten Taten wie die Erwachsenen bestraft werden.