

## 3.8: Substantive Law - Punishment- Incarceration and Confinement Sanctions

Substantive criminal law not only defines what behaviors are crimes, but also the law that determines the permissible punishment for the criminal behavior. All three governmental branches of government impact criminal punishment. One of the most important duties of a judge is to **impose a sentence** which means determining the appropriate punishment for an offender upon conviction. Thus, punishing offenders is a judicial function. Because of the trend toward mandatory sentencing, discussed below, much of the discretion of sentencing has been removed from judges and placed on the prosecutors in their screening and charging decision-making. As such, punishing offenders may rightly be considered an executive function. Finally, the lengths of sentences and types of punishment that attach to the various crimes, without regard to who may be committing the offense, is a product of the legislative process. In the last 30 years, through ballot measures, propositions, referendum, and initiatives, the people (the general public through voting) have played a large role in deciding the types and lengths of punishment.

### Incarceration/Confinement Sanctions

Confinement sanctions include incarceration in prisons and jails, incarceration in boot camps, house arrest, civil commitment for violent sexual offenders, short term shock incarceration, electronic monitoring, and split probation (when incarceration is imposed as a condition of probation). Most believe that confinement is the only effective way to deal with violent offenders. Although people question the efficacy of prison, regarding it as little more than a factory for producing future criminals, incarceration does protect society outside the prison from dangerous offenders. Prison is effective at incapacitation, but rarely is it effective at rehabilitation. In fact, serving time in prison often reinforces criminal tendencies.

State and federal approaches to incarcerating individuals have shifted in response to prevailing criminal justice thinking and philosophy. Over time, governments have embraced four different approaches to sentencing offenders to incarceration: indeterminate, indefinite, determinate, or definite. Criminal codes may incorporate more than one single approach. These approaches can be seen as a spectrum of judicial discretion. **Indefinite and indeterminate sentences**, at one end, are those that allow judges and parole boards the most discretion and authority. **Determinate and definite sentences**, at the other end, allow little or no discretion. Currently, most states are following determinate sentencing coupled with sentencing guideline, mandatory minimums, habitual offender statutes, and penalty enhancement statutes.

### Indeterminate-Indefinite Sentencing Approach

For much of the twentieth century, statutes commonly allowed judges to sentence criminals to imprisonment for indeterminate periods. Under this indeterminate sentencing approach, judges sentenced the offender to prison for no specific time frame and the offenders' release was contingent upon getting **paroled**, or released by a parole board after a finding that the person was rehabilitated. Because some criminals would quickly be reformed but other criminals would be resistant to change, indeterminate sentencing's open-ended time frame was deemed optimal for allowing treatment and reform to take its course, no matter how quickly or slowly. The decline of popular support for rehabilitation has led most jurisdictions to abandon the concept of indeterminate sentencing. Indefinite sentences give judges discretion, within defined limits, to set a minimum and maximum sentence length. The judge imposes a range of years to be served, and a parole board decides when the offender will ultimately be released.

### Determinate-Definite Sentencing Approach

Under determinate sentencing, judges have little discretion in sentencing. The legislature sets specific parameters on the sentence, and the judge sets a fixed term of years within that time frame. The sentencing laws allow the court to increase the term if it finds aggravating factors and reduce the term if it finds mitigating factors. With determinate sentencing, the defendant knows immediately when he or she will be released. In determinate sentencing, offenders may receive credit for time served while in pretrial detention and "good time" credits. The discretion that judges are allowed in initially setting the fixed term is what distinguishes determinate sentencing from definite sentencing.

Definite sentencing completely eliminates judicial discretion and ensures that offenders who commit the same crimes are punished equally. The definite sentence is set by the legislature with no leeway for judges or corrections officials to individualize punishment. Currently, no jurisdiction embraces this inflexible approach that prohibits any consideration of aggravating and mitigating factors in sentencing. Although mandatory minimum sentencing embraces some aspects of definite sentencing, judges may still impose longer than the minimum sentence and therefore retain some limited discretion.

## Presumptive Sentencing Guidelines

In the 1980s, state legislatures and Congress, responding to criticism that wide judicial discretion resulted in great sentence disparities, adopted **sentencing guidelines** drafted by legislatively-established commissions. These commissions proposed sentencing formulas based on a variety of factors, but the two most important factors in any sentencing guideline scheme were the nature of the crime and the offenders' criminal history. Some states enacted advisory sentencing guidelines that gave suggestions to judges statewide of what was considered an appropriate sentence that should be followed in most cases. Some states enacted mandatory sentence guidelines that required judges to impose **presumptive sentences**, the length or type of sentence that was presumed appropriate unless mitigating or aggravating factors were identified on the record.

Sentencing guidelines generally differentiate between presumptive prison sentences and presumptive probation sentences. Judges who **depart**, or (select a different sentence, from the presumptive sentences can do a **dispositional departure** and impose prison when probation was the presumptive sentence or impose probation instead of prison. Judges may also do a **durational departure** in which they sentence the offender to a term length different than the presumptive term length, for example, giving an 18-month sentence rather than a 26-month sentence.

Guideline sentencing allows for judicial discretion, but at the same time, limits that discretion. Judges must generally make findings when sentencing the offender to a term of incarceration that is different from the presumptive sentence. The judge must indicate which **aggravating factors** (factors indicating the offender or offense is worse than other similar crimes) or **mitigating factors** (factors indicating the offender or offense is less serious than other similar crimes). The Sentencing Reform Act of 1984 (18 U.S. C.A. §§ 3551 et. seq. 28 U.S.C.A. §§991-998) first established federal sentencing guidelines. The Act applied to all crimes committed after November 1, 1987, and its purpose was "to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes." Scheb, at 681. It created the United States Sentencing Guideline Commission and gave it the authority to create the guidelines. The Commission dramatically reduced the discretion of federal judges by establishing a narrow sentencing range and required that judges who departed from the ranges state in writing their reason for doing so. The Act also established an appellate review of federal sentences and abolished the U.S. Parole Commission.

Most states have adopted some version of sentencing guidelines, from the very simple to the very complex, and many states restrict their guidelines to felonies. Although limiting judicial discretion, state sentencing guideline schemes all allow some wiggle room if the judge finds that the case differs from the run of the mill case. In a series of cases, the Court has found that federal and state sentencing guidelines schemes that do not require the jury to make findings of aggravating factors which justify a harsher sentence imposed by the judge violate the defendant's right to a jury trial (found in the Sixth Amendment). See, *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Booker*-*United States v. Fanfan*, 543 U.S. 220 (2005); *Blakeley v. Washington*, 542 U.S. 296 (2004). Accordingly, some of the sentencing guideline schemes have been invalidated and some modified.

"There is still considerable uncertainty about the efficacy of sentencing guidelines. There is evidence that they have reduced sentencing disparities but they clearly have not eliminated this problem altogether. There is also concern that sentencing guidelines have promoted higher incarceration rates and have thus contributed to the problem of prison overcrowding. It is fair to say that to be successful, sentencing guidelines must be accompanied by policies designed to effectively manage prison populations." <sup>[1]</sup>

### Controversial Issue: Mandatory Minimum Sentences

Legislative enactments, ballot measures, initiatives, and referendums have resulted in **mandatory minimum sentences** schemes in which offenders who commit certain crimes must be sentenced to prison terms for minimum periods. Mandatory minimum sentences take precedence over but do not completely replace, whatever other statutory or administrative sentencing guidelines may be in place. It is possible for a judge to impose a sentence that exceeds the mandatory minimum on an offender who, because of his or her extensive criminal history or particular brutality of the crime, warrants a particularly harsh guideline sentence.

Mandatory minimum sentences are a type of determinate sentence. Most mandatory minimum sentences are for violent offenses or those involving the use of firearms. Federal law also mandates minimum prison terms for serious drug crimes prosecuted in federal courts. For example, a person charged with possession with the intent to distribute more than five kilograms of cocaine is subject to a mandatory minimum sentence of ten years in prison. See, 21 U.S.C.A. §841 (b) (1)(A).

In our attempts to limit judicial discretion, we may have perhaps gone too far. Judges must impose mandatory minimum sentences regardless of any compelling mitigating facts that warrant a lesser sentence, even when victims fervently request leniency for the defendant. Sentencing discretion resting with a neutral judge has been replaced by charging discretion resting

with the prosecutor. Prosecutors, in filing certain charges, can now compel negotiated pleas, and they now hold most of the cards. Also, mandatory minimum sentencing has resulted in the over-incarceration of non-violent offenders. On December 18, 2018, a bi-partisan bill for criminal justice reform called the First Step Act passed the U.S. Senate with an 87-12 vote. The bill seeks to reverse some of the effects of overly harsh sentences for non-violent drug offenders.

#### Link to Video on the above link showing the Senate Vote on the First Step Act on December 18<sup>th</sup>2018

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## Other Mandatory Sentences—Penalty Enhancements

Legislatures have also exercised their authority over sentencing by passing laws that enhance criminal penalties for crimes against certain victims, for crimes done with weapons, or for hate crimes. For example, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 that included several provisions for enhanced penalties for drug trafficking in prisons and drug-free zones and illegal drug use in federal prisons. States have passed gun enhancements and hate crime enhancements. *See, e.g.,* ORS 161.610 (authorizing enhanced penalties for the use of a firearm during the commission of a felony); *Wisconsin v. Mitchell*, 508 U.S. 486 (1993) (authorizing enhanced penalties for hate crimes).

## Concurrent and Consecutive Sentences

Frequently, judges sentence defendants for multiple crimes and multiple cases at the same sentencing hearing. Judges have the option of running terms of incarceration either **concurrently** (at the same time) or **consecutively** (back-to-back). States vary as to whether the default approach on multiple sentences is consecutive sentences or concurrent sentences. The Court has held that the decision to impose concurrent or consecutive sentences was a judicial determination, not a jury determination, and thus not subject to *Apprendi*'s rule that any sentencing enhancement factor must be proved to the jury beyond a reasonable doubt. *Oregon v. Ice*, 555 U.S. 160 (2009). Justice Ginsberg wrote,

“Most States continue the common law-tradition: They entrust to judges’ unfettered discretion the decision whether sentences for discrete offenses shall be served consecutively or concurrently. In some States, sentences for multiple offenses are presumed to run consecutively, but sentencing judges may order concurrent sentences upon finding cause therefor. The other States, including Oregon, constrain judges’ discretion by requiring them to find certain facts before imposing consecutive rather than concurrent sentences.”<sup>[2]</sup>

## Civil Commitment of Violent Sexual Offenders

Some sexual offenders may still be dangerous even after they serve their entire prison term. Both state and federal laws allow the continued confinement of violent sexual predators after the expiration of their criminal sentences. In 1997, the Court upheld a Kansas statute finding that such confinement did not violate the double jeopardy or *ex post facto* prohibitions. *Kansas v. Hendricks*, 521 U.S. 346 (1997). In 2010, the Court decided that in enacting the Adam Walsh Act, 18 U.S.C. 4248, Congress had not exceeded its authority by allowing civil commitment after an offender has served his or her criminal sanction. Justice Breyer wrote, “the statute is a necessary and proper means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.”<sup>[3]</sup>

Link to 2015 report on Federal Sentencing (includes incarceration and alternatives) (link also included below with split probation.

[https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617\\_Alternatives.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf)

1. Scheb II, J.M. (2013). *Criminal Law and Procedure* (8th ed., pp. 683). Belmont, CA: Cengage. ←

2. *Oregon v. Ice*, 555 U.S. 160, at 163-164 (2009). ↩
3. *United States v. Comstock*, 560 U.S. 126, at (2010). ↩

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