

SENTENCING: FINALLY SOME ANSWERS OR ONLY MORE QUESTIONS?

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Catherine Fitzmaurice and Ken Pease. *The Psychology of Judicial Sentencing*. (Manchester: Manchester University Press, 1986). x + 174 pp. Figures, tables, notes, bibliography, index. \$30.75.

Andrew von Hirsch. *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*. (Manchester: Manchester University Press, 1985). xii + 220 pp. Notes, bibliography, index. \$25.00.

Expanding on the observations he made in *Doing Justice* (1976), Andrew von Hirsch makes us think, an exercise not always evident in criminal sentencing. He has taken the opportunity to refine his argument for just deserts in sentencing and attack the proponents of selective incapacitation. He is generally convincing in his demonstration of the superiority of his rationale and prescription for sentencing. His just deserts position is premised on the idea of "deserved punishments, proportionate to the blameworthiness of the criminal conduct" (p. 9). Selective incapacitation relies on the ability to predict which criminals will engage in more serious criminal activity. They can then be punished more severely than those who have committed the same offense but appear to be less likely recidivists.

Von Hirsch traces the debates between the competing schools of thought to help explain their current divisions. He labels those who espouse selective incapacitation as the "conservative theorists" (*ibid.*) who abandoned first rehabilitation and then general deterrence as a sentencing rationale. The just deserts advocates are "civil libertarians and others concerned about the fairness of the criminal justice system" (*ibid.*) who had also abandoned rehabilitation.

The reasoning behind the just deserts theory is carefully derived and well explained in what is the strongest section of the work. This position argues that we should punish proportionately simply because it is fair to do so. Punishment is condemnatory, and certain types of behavior should be condemned. This is a position that does not have to be modified or jettisoned when further research is conducted. Von Hirsch resists most attempts to reconcile the reliance on past behavior with the projection of future be-

havior, stating that sentencing should be based almost exclusively on the seriousness of the offense. Some allowance is made for consideration of prior convictions, but the strong emphasis remains on the gravity of the offense. He views consideration of prior convictions as a "discount" for first-time offenders, not as a penalty for the more experienced criminal, but he acknowledges that this is a function of his perspective. Not all proponents of the just deserts approach agree with this "deviation," but von Hirsch explains it as a reflection of a tolerant society.

Proportionality in punishment involves both ordinal and cardinal magnitudes, according to von Hirsch. Ordinal magnitude refers to the rankings of crime severity. Cardinal magnitude deals with the problem of "anchoring" the penalty scale. It is relatively easy to construct a ranking of crime severity, but "there seems to be no crime for which one can readily perceive a specific quantum of punishment as the uniquely deserved one" (p. 43). For this reason, ordinal magnitude is a determining factor in sentencing, while cardinal magnitude is limiting.

The seriousness of crime is dependent on the harm done by the act and the culpability of the individual. The latter factor has been largely ignored in sentencing, but von Hirsch argues, should be considered. He offers four recommendations to lawmakers: (1) the seriousness of the crime should be explicitly graded; (2) an independent, conscientious judgment of gravity should be made; (3) lawmakers should explicitly state the reasons for their choices; and (4) those choices should be based on a systematic rationale. The Minnesota, Pennsylvania, and Washington sentencing commissions have followed at least the first two suggestions.

The author strongly attacks the selective incapacitation argument, perhaps with good reason. Two Rand Corporation studies have developed new predictive strategies for use in the application of this theory (Greenwood, 1982; Chaiken and Chaiken, 1982). Greenwood claims that his predictive method could reduce the rate of robberies by 15 percent and the prison population by 5 percent. He also claims a false-positive rate of only 4 percent. This is indeed a major improvement on previous predictions. However, von Hirsch accurately points out several methodological problems in Greenwood's study, including his predictor variables, which were derived from interviews with inmates and contain information not available on the official record, and his definition of a false-positive.

Von Hirsch views the new concept of categorical incapacitation (Cohen, 1983) with some degree of approval. Cohen has suggested that by targeting certain categories of crime for more harsh sentences, we may be able to reduce the incidence of that crime. Moreover, this strategy can fit within the philosophy of just deserts, as long as ordinal magnitude is not violated. Accommodation is definitely not von Hirsch's goal. Any system of sentencing

must be based on just deserts, he (p. 172) argues: "I must confess my impatience with attempts to treat justice as anything but central to sentencing policy." He (p. 174) further questions the effects of any sentencing policy on the crime rate: "The crime problem cannot be solved through sentencing methods, however ingenious—at least not through methods that would be acceptable in a free society. We should disbelieve those who promise it can."

Von Hirsch's model of sentencing is quite attractive, particularly because of his willingness to consider some outside variables, notably prior convictions and categorical incapacitation. There are some problems with his model, however. He acknowledges the difficulty of implementing his ideas, and he points out some of the difficulties in the Minnesota sentencing guidelines, a reform that he generally applauds. If lawmakers follow his suggestions in constructing a sentencing scheme, interstate disparities would likely result. This may not trouble von Hirsch, since he wants to "make allowances for differences in how people value the worth of life's goods" (p. 67). However, one may question, for example, why two urban areas in different states are permitted to reflect these differences in their sentences, but an urban and a rural area in the same state are not. Also, the problems of implementation may be underplayed, particularly the role of the prosecutor in determining sentence from both the charging decision and plea or sentence bargaining. This may well be a major source of sentencing disparity that is not initially visible.

Finally, it is possible that there are some "conservative theorists" who find just deserts an attractive idea. Von Hirsch points out that although much of the literature has emphasized moderation in punishment levels, this advice does not have to be followed. It is conceivable that widely varying sentences can be defended on this basis, depending on one's view of proportionality and justice.

The aim of Fitzmaurice and Pease is to begin to apply certain psychological theories and research to the problems of criminal justice. Although they focus on judges in the United Kingdom, who possess more sentencing discretion than their American counterparts, many of their comments are widely applicable on both sides of the Atlantic. The authors spend a good deal of time discussing psychological experiments, some of which are clearly relevant to the problems of sentencing.

Fitzmaurice and Pease claim that a discussion of sentencing principles (Thomas, 1979) is not especially meaningful, since it is not possible to predict the purpose of the sentence from the actual sentence. All sentences reflect two major variables—the seriousness of the offense and the prior record of the defendant. This holds true regardless of the alleged purpose of the sentencing scheme. This conclusion is also bolstered by the results of the authors' interviews with British judges. The judges claimed to consider many variables in their sentencing decisions, but a regression

analysis of their sentences revealed only the two important determinants of sentencing.

Like von Hirsch, Fitzmaurice and Pease are concerned with justice and proportionality. Mere agreement on the rankings of crime severity will not achieve these goals. In current sentencing practice, sentence length appears to rise more slowly than offense severity. While we may agree that one crime is twice as serious as another, the sentences will probably not reflect a difference that great. This is readily apparent in concurrent and consecutive sentences. In a truly proportional system, the outcomes should be additive.

Fitzmaurice and Pease also find that certain numbers seem to be preferred in sentencing. Is there any logical reason that sentences are for six months rather than five months? Reasons do exist, but their logic is questionable, according to the authors. Sentences tend to be given in three-month increments at the bottom of the sentencing scale, then move up to six- and twelve-month increments, finally reaching five-year intervals. Fitzmaurice and Pease attribute these patterns to our common perception of a "noticeable difference" (p. 104), which may not bear a relation to proportionality.

Culpability is an assessment of the individual's responsibility for a crime. Causal links are made in our consideration of mitigation, but Fitzmaurice and Pease point out that psychological variables may blur our judgment. For example, we tend to underestimate the impact of situational variables on behavior, to believe that our personal views constitute a consensus, to rely too heavily on individual case information and to deemphasize probabilities, to believe items are related when they really are not, and to overstate what a "reasonable man" can know, thus making this standard unfair to defendants (pp. 17–34).

Requiring judges to supply reasons for their sentences probably does not increase the rationality with which sentences are imposed, for the reasons tend to become standardized and not reflective of the actual motivations for the sentences. This should come as no surprise to most who have been exposed to such practices.

Many within the criminal justice field may be skeptical of psychologists, and vice versa. As Fitzmaurice and Pease (p. 17) admit, "It is very recently that clinical psychology has made a serious attempt to stop being patronising about practical decision-makers. Judges have by and large not yet stopped being patronising about psychologists." This is unfortunate, if true. However, many of the ideas contained in their book are at least worthy of consideration. It is unfortunate that the authors deal exclusively with examples from indeterminate sentencing schemes, leaving us to wonder about the degree to which determinate sentencing reforms have dealt with these problems.

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