

## Chapter 1

### **PUBLIC OPINION AND SENTENCING**

#### **Introduction**

This is a report on how Americans would sentence persons convicted in the federal criminal courts. It is based on a probability sample of 1,737 American households. One adult aged 18 or over in each household was interviewed face-to-face and asked to state the sentence he or she would give to each of a set of 42 persons, each described in a short vignette as having been convicted of one of a variety of specific criminal acts. The answers given are summarized and analyzed in this report, constituting measures of Americans' views about appropriate punishment for convicted criminals.

The study and this report were undertaken on behalf of the U. S. Sentencing Commission. The legislation setting up the U. S. Sentencing Commission specifies general goals to be achieved in a schedule of sentences for convicted persons:

1. To provide effective deterrence to those who might consider violating the federal criminal code.
2. To provide just punishments for those who were convicted.
3. To ensure uniformity in sentencing across the many federal courts.
4. To make provision for departures from uniformity when justifiable.

The Guidelines Manual, first issued by the Commission in 1987 and updated annually, is the major instrument devised to reach those goals. The guidelines consist of a set of detailed and comprehensive rules for calculating recommended sentences for persons convicted in the federal courts. The rules are tailored to the crimes committed, certain characteristics of the convicted person, and sensitive to circumstances that can mitigate or enhance punishments. By following the guidelines' rules, the federal courts can each arrive at similar dispositions for similar cases. The Commission also maintains records of the actual sentencing practices of the federal courts to ascertain whether its goals are being met.

#### **Why Study the American Public's Views on Sentencing?**

What are the connections between public views on sentencing and the guidelines? First of all, such views are relevant to the Commission's goal of prescribing "just" sentences. A predominant interpretation of "just" punishment is that it is defined by popular consensus: for a schedule of punishments to be considered just, there should be some correspondence between that schedule and what the public believes to be appropriate sentences for the crimes in question. How close should be such a correspondence is another issue, although at the limits it can be said that the punishments in a prescribed punishment schedule should be positively correlated with the punishments desired by the citizens. That is, crimes treated harshly in the criminal code and the guidelines should also be considered as deserving harsh punishments by the citizenry, and, conversely, those treated leniently in the guidelines should also be considered as deserving minor treatment by the public.

Second, punishment as deterrence also involves public opinion. The deterrence principle suggests that punishments for crimes ought to be set high enough to offset the gains achieved in breaking the law. For deterrence to be effective, public views of sentencing have to be related to actual punishments. Punishments regarded as too lenient arguably cannot serve as deterrents. To the extent that the public's views of just punishments are influenced by ideas of deterrence they become relevant.

Third, the rehabilitative goals of punishment have only minor connections to public views on sentencing. Nevertheless, there is some connection in the sense that rehabilitation treatments as a mode of sentencing also need the support of the public.

Fourth, there is also the view that sentences can be used directly to prevent crime by the incarceration of those likely to violate the laws consistently. In practice, this view of the goals of sentencing puts great emphasis on increasing sentence lengths with each additional conviction. How to apply selective incarceration is typically viewed as a technical issue, although the recent increased political support for legislation along the lines of "three strikes and you're out!" indicates that there are issues concerning the strength of public support for such measures.

The legal and social philosophers writing about punishment and the proper rationale for sentencing make much of the contrasts among the goals of just punishments, deterrence, rehabilitation, and selective incarceration. However, actual sentencing systems typically pursue all four goals, emphasizing deterrence in some crimes, just punishments in others, making provisions for the possibility of rehabilitation for some offenders, and for lengthier incarceration of the seemingly incorrigible. The sentencing rules set out in the guidelines are no exception.

The varied purposes pursued in the guidelines mean that the public's views on sentencing are relevant but not determinative. That is, to the extent that sentences are based on just punishment principles, then there should be some concern with ascertaining whether the public agrees at least with ordering of punishment severity. The other sentencing principles are not as demanding about the degree to which there should be matching between sentencing rules and the views of the public, although all at least assume that some positive popular support is needed for proper functioning. In short, some concordance between public opinion and sentencing rules is looked for although the writing of sentencing guidelines should not be dominated by the aspiration to make the two coincide precisely.

There is every reason to expect that guideline sentences and popular views on sentencing will not be far apart. The Commission had some knowledge about popular views and in constructing the guidelines used that knowledge along with other considerations, such as existing sentencing practices. Accordingly our concern here is to uncover the specific forms that best describe the relationships between guideline sentences and public views on sentencing. For example, it may turn out that guideline sentences are uniformly higher or lower than those the public would prefer. Or, that there is close agreement on punishments for most crimes, but disagreement on some classes of felonies. There is a variety of possible relationships between guideline sentences and popular views which will be considered in the analyses.

All that said, two major points emerge. First, finding out what are just sentences in the eyes of the citizenry is important in the construction and adjustment of a sentencing system that is concerned with appearing as just. Second, public views on sentencing are not (and likely should not be) the major criterion to be used in constructing a sentencing system.

## **Existing Empirical Studies of Public Opinion on Sentencing and Closely Related Topics**

Although there is a longstanding concern in legal and social philosophy with the issue of punishment, the empirical studies of public views on sentencing only began a few decades ago with the development of sample survey methodology. The philosophical literature deals with profound moral issues, such as the principles that justify punishment, the legitimate social purposes of punishment, and how equity in punishment can be achieved. In contrast, the empirical literature typically is concerned with describing citizens' views of punishment, how citizens would punish criminals, and with citizens' assessments of existing criminal justice practices.

### **Global Assessments of Sentencing Severity in the Courts**

The empirical studies receiving the widest attention are the long series of global public assessments of sentencing practices in the courts started by the Gallup Poll in the middle 1930s and continued through today by a variety of investigators. Based on answers to questions typically asking whether the courts are "too harsh, too lenient, or about right" in the treatment of convicted felons<sup>1</sup>, these studies have received attention because they have shown consistently that majorities of the American public believe that the courts have been too lenient in sentencing. The American courts are not alone in being so regarded but are joined by Canadian and British court systems. Although these findings have been cited by many advocates of harsher sentencing as proving public support for their views, that interpretation is based on the frail assumption that citizens know what actual sentencing practices are in the courts. If Americans underestimate sentences given by courts, then there is little force to this argument. Because the mass media often find that it is newsworthy when lenient sentences are given to serious crimes, there may be reason to suspect that generalizations from outlier cases that appear in the media are a major force underlying this persistent finding.

The global assessments of sentencing are also ambiguous concerning the kinds of crimes and the types of courts being considered: do the findings mean that the American public thinks that all courts are too lenient for all crimes, that some crimes are being treated too leniently in some courts, or some other combination?

### **Studies of Crime Seriousness**

Given the important role played by crime seriousness or severity in some sentencing philosophies, it is not surprising that there is a strong tradition in criminological research of attempts to devise quantitative measures of seriousness. Louis Thurstone, pioneer in psychometrics, made the first study of crime seriousness in the early 1930s mainly as a vehicle for his (then) new "paired comparison" method.<sup>2</sup>

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<sup>1</sup>These studies have been summarized in: Julian V. Roberts "Public Opinion, Crime and Criminal Justice" in Michael Tonry (editor) *Crime and Justice: A Review of Research* 1992. Vol 16. Chicago. The University of Chicago Press and Nigel Walker and Mike Hough (editors) *Public Attitudes To Sentencing: Surveys from Five Countries*. 1988. Cambridge Studies in Criminology. LIX. Gower. Aldershot, GB

<sup>2</sup>Louis L. Thurstone *The Measurement of Value*. 1959. Chicago. The University of Chicago Press.

The most comprehensive seriousness study was conducted in 1977<sup>3</sup> as an adjunct to the National Crime Survey. Some 60,000 respondents were included in a national survey that asked each to judge the seriousness of a set of 25 crimes using a magnitude estimation approach. Each respondent was asked to give a numerical estimate of the seriousness of each crime relative to a standard crime, bicycle theft, given the arbitrary value of 10: Thus, if a respondent thought auto theft was four times more serious than bicycle theft, his score for auto theft would be 40. The sets of 25 crimes were varied systematically to cover a total of 204 crimes. Some of the crimes studied involved the same criminal act but varied its characteristics (for example, the degree of injury to a victim was varied.)

The calculated severity scores range widely, anchored at the extremely serious end by such crimes as bombing a public building with the loss of 20 lives (72.1), rape in which the victim is killed (52.8), and a parent killing his own child (47.8), to the other extreme of trespass (0.6), vagrancy (0.3) and school truancy (0.2). Although the full crime set covers some that are handled in the federal courts (e.g. bribery, environmental crimes, and Medicare fraud), most are the kinds of crimes dealt with at high volumes in the state criminal courts. Indeed, the severity scores are built into some database computer systems maintained by state attorneys and are used to identify high severity crimes that should receive priority treatment.

The analyses of crime severity data in numerous studies have found a fair amount of consensus in the American population on the ordering of crimes by severity and comparability across respondent subgroups. There are only minor ordering differences associated with respondent race, gender and region. Intriguing as these results may be, it is important to note that severity studies are not about sentencing. To derive desired sentences from rated severity it is necessary to know how the two are related, a critical issue on which the severity studies are largely silent.

### **Studies of the Public's Sentencing Preferences**

It is surprising that the direct studies of what citizens might want as punishments for convicted felons are so few in number. One of the earliest is a 1973 study of state political and criminal justice elites<sup>4</sup> and the potential support among them for acceptance of alternatives to imprisonment. Berk and Rossi<sup>5</sup> presented elite members with samples of systematically constructed vignettes describing convicted felons, the crimes committed, previous criminal records, and some personal characteristics of the felon. Respondents were asked to provide what they personally thought would be an appropriate sentence for each vignette. Choices included only probation, part-time confinement, or imprisonment for one or several period of years. In addition, they designated what they understood to be common sentencing practices in their state. Because this was a study of state criminal justice systems, the criminal offenses were those frequently encountered in state criminal courts. Although this was not a study of sentencing by rank-and-

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<sup>3</sup>Wolfgang, Marvin E., Figlio, Robert E., Tracey, Paul E. and Singer, Simon I. *The National Survey of Crime Severity*. (1985) U.S. Department of Justice, Bureau of Justice Statistics. Washington, D.C.

<sup>4</sup>Defined as state elected and administrative officials whose duties had close connections with the state criminal justice system. The sample accordingly included governors, heads of relevant legislative committees, judges, members of the criminal bar, prison wardens, etc.

<sup>5</sup>Berk, Richard A. and Rossi, Peter H. *Prison Reform and State Elites*. (1977) Cambridge MA. Bollinger Publishing Company.

file citizens, original plans included citizen samples. In effect, this study was a prototype of the present one.

Another sentencing study was indirectly concerned with sentencing and focused more directly on “justice.” Using a factorial survey<sup>6</sup> design with a sample of about 800 residents of the Boston Metropolitan Area<sup>7</sup>, Rossi, Simpson and Miller presented respondents with sets of 50 vignettes describing convicted persons. The vignettes incorporated a set of 57 different crimes, descriptions of the convicted persons and victims (if appropriate) and some of the consequences of the crimes. In addition, each vignette was randomly given a sentence. The respondents used an 11-point scale to judge whether the sentence given was “about right,” “too lenient,” or “too harsh.” The analysis centered on the factors in the vignettes or the characteristics of the respondents that led to judgments that the sentences were too severe or not severe enough. In addition, the seriousness of each of the crimes was taken from the Wolfgang *et al* national survey of crime seriousness, described above. Although this study did not study directly what sentences were desired by the respondents, the results clearly indicated that the seriousness of the crimes was not the all-dominating factor in respondent judgments of the appropriateness of sentences given. In particular, the consequences of the crimes, such as injury or economic loss to victims, and the previous criminal records of the criminals weighed heavily in such judgments: crimes with severe consequences and recidivists were judged as deserving of longer sentences and more severe penalties.

A major empirical study of American preferences for sentencing was undertaken by Jacoby and Cullen in 1987 with funding from the Bureau of Justice Statistics.<sup>8</sup> The study is based on 1,920 telephone interviews with a national probability sample of telephone-owning households. Using the factorial survey approach, each respondent was read a set of eight vignettes, each describing a crime, characteristics of the criminal, and of the crime victim (if any). Respondents were asked first to rate the seriousness of the criminal event described in the vignette, utilizing the magnitude estimation method employed by Wolfgang, *et al.* in their 1977 national study, and then to designate an appropriate punishment. If imprisonment was selected, the respondent was asked to give the term of imprisonment.

The 24 crime descriptions used in the Jacoby and Cullen study were selected from ten crime categories, mostly so-called street crimes (e.g. car theft, burglary, robbery, assault, rape and drug trafficking.) None of the crimes used involved fraud, tax evasion, or other so-called “white collar” crimes.

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<sup>6</sup> A factorial survey employs principles of randomized experiments to construct short vignettes of “social objects”—in this case, descriptions of convicted criminal offenders—in which the characteristics of the objects are randomly associated. See Chapter 2 for a more complete description of this approach, also used in the study reported here.

<sup>7</sup>Rossi, Peter H., Simpson, Jon E. and Miller, Joanne “Beyond Crime Seriousness: Fitting the Punishment to the Crime,” *Journal of Quantitative Criminology*, Vol. 1, No. 1 (1985), pp. 59-90.

<sup>8</sup> Preliminary findings were published in Zimmerman, Sherwood, Van Alstyne, David J. and Dunn, Christopher “The National Punishment Survey and Public Policy Consequences.” 1988. *Journal of Research in Crime and Delinquency*. Vol. 25. No. 2. pp 120-149. With permission of the authors, this discussion is based on a longer treatment, now under review for publication: Jacoby, Joseph E. and Cullen, Francis T. “The Structure of Punishment Norms: Can the Punishment Fit the Crime.” 1994. Department of Sociology. Bowling Green State University. Bowling Green, Ohio.

Jacoby and Cullen report a fair amount of consensus on the seriousness of the crimes and a fair amount of correlation between seriousness and the sentences given. However, they also report that respondents varied widely in the sentences they imposed. In short, respondents translated seriousness into punishment in widely different ways. The authors also suggest that because of the lack of agreement over specific punishments for specific crimes, public opinion cannot be used as a guide for establishment of sentencing guidelines.

The research efforts described above are all of citizens' judgments without any consideration of costs and emphasize conventional sentencing options. An interesting line of research indicates that respondents' choices of appropriate punishments are modified considerably, most often in the direction of less harsh treatments, when costs and additional non-conventional sentencing options are offered. Funded mainly by the Edna McConnell Clark Foundation and conducted by the Public Agenda Foundation<sup>9</sup>, researchers used focus groups selected to represent significant sectors of the public.<sup>10</sup> A number of focus groups were assembled by telephone invitations to a random sample of telephone households.

The invited persons were assembled and asked to give what they considered to be appropriate sentences to each of a set of convicted offenders, described in terms of the crime committed, and the age, previous record, and gender of the offender. Only two alternatives are offered: prison term or probation. The group is then shown a video describing prison over-crowding in the state, costs of incarceration and a set of less restrictive alternatives (including "strict probation," restitution, house arrest and boot camp.) A group discussion is held after the video showing. The participants are then asked to re-sentence the same group of offenders with the alternatives now added to the choices given originally. Dramatic shifts in preferences are recorded: much less incarceration for minor crimes such as shoplifting and somewhat less incarceration for major felonies such as armed robbery.

There are many technical problems with the research conducted by the Public Agenda Foundation including potentially large sample biases and the possibility that shifts in preferences might not have been as dramatic if participants had been allowed to choose among all alternatives in the first round of questioning. All that said, the Public Agenda research stresses that choices made in the context of fuller information can vary from those made when there is little or no information.

### **Some Conclusions Concerning Previous Research**

The review of previous research on crime seriousness and sentencing has concentrated on presenting the salient research efforts that are somewhat related to the central purposes of the study reported in the chapters that follow. Several generalizations emerge from these studies, as follows:

- Fairly strong consensus exists on the seriousness ordering of crimes, with those involving actual or threatened physical harm to victims generally considered to be the most serious and status and victimless crimes regarded as least serious.

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<sup>9</sup> The research has been conducted in several states using much the same approach. A good example is Doble, John, Immerwahr, Stephen, and Richardson, Amy. *Punishing Criminals: The People of Delaware Consider the Options*. 1991. New York. The Edna McConnell Clark Foundation.

<sup>10</sup> Sample sizes consisting of about 20 focus groups are typically around 400.

- In giving concrete sentences to convicted persons, citizens are not guided solely by the seriousness of the crimes but also by the convicted person's previous record and the amount of damage or loss suffered by victims.
- Consensus over sentencing is weak: considerable variation can be found in the sentences given by citizens to specific crimes.
- There appears to be little structured variation in sentencing behavior: variation in sentencing is only weakly related to socio-demographic characteristics of citizens. Although the better educated prefer more lenient sentences than the less well educated and men prefer slightly harsher treatment than women, there are no consistent differences by other socio-economic characteristics, or by race or ethnicity.
- There is some evidence that respondent sentencing preferences can be affected, perhaps strongly, by providing a wider range of punishment choices, information on prison conditions, and the costs of incarceration.

The studies reviewed are also silent on many issues:

- All of the studies reviewed concentrated on so-called "street crimes." The lack of so-called "white collar" crimes limits the research's applicability to the federal criminal code.
- None of the studies grapples with the difficult problem of the dynamics of public opinion. There is no information on:
  - how the treatment of crime issues in the mass media affects public opinion.
  - perceptions of citizens views of sentencing by political leaders.
  - the role played by advocacy groups in influencing political leaders' or the general public's views on sentencing.
  - the influence of the actual sentencing practices of the courts upon public sentencing preferences.

### **Objectives of the Research Project**

There are three major objectives for this study:

- 1. Describe the Current Sentencing Preferences of Americans:** Centering on a large set of federal crimes, the research shows the distribution and central tendencies of public views on sentencing. The study also identifies the variations in sentencing due to the crimes involved and their characteristics. In addition, we examine how subgroups of the American population vary in their sentencing preferences. The study is based on an area probability sample of American households, described more fully in Chapter 2. The wide array of federal crimes

studied includes drug trafficking, fraud, environmental offenses, civil rights violations, bank robbery, and various other crimes.

## **2. Understand How Crime Components and Criminal Characteristics Affect Sentencing**

**Decisions:** Respondents rated 42 vignettes constituting a systematically selected sample of all the federal crimes under study. Each vignette described a person convicted of a federal crime. The crime was described in concrete terms. The vignettes also contained descriptions of certain salient features of each particular criminal act and a few characteristics of the convicted person. Each adult interviewed received an independently selected sample of all the federal crimes being studied enabling the analysis to cover a wide range of federal crimes. Because of the way in which those vignettes were constructed, described in Chapter 2, analyses can show how sentencing decisions are affected by each of the descriptive elements incorporated into the vignettes. Such analyses uncover the implicit principles used in arriving at sentencing decisions. For example, the report addresses such concrete issues as how an offender's previous criminal record or the impact on victims affects the punishment desired.

## **3. Compare Guideline Sentences and Public Sentencing Preferences:** For each vignette used in the study, a guideline sentence was calculated, making it possible to compare guideline sentences to the sentencing preferences of the American citizenry. The comparability analysis describes what the congruency between the two sets of sentences may be as well as identifies the specific crimes over which both agree and those over which there are disagreements.

Several other contemporary sentencing issues are addressed in this research:

- **Death Sentences:** The design allowed respondents to give death sentences to crimes for which the federal statutes do not allow that sentence. Findings are presented on how much support exists for the extension of the death penalty to a wide variety of crimes.
- **Selective Incarceration:** The study also shows how much public support there may be for such measures as sharply increased prison sentences for persistent recidivists. These findings are relevant to proposed selective incarceration measures which would severely increase sentences with each additional conviction, presumably removing habitual criminals who contribute disproportionately to the crime rate. Because the present study includes descriptions of the previous record of the convicted offenders, analysis can show how much public views of sentencing are consistent with selective incarceration proposals.
- **Drug Trafficking Crimes:** Current federal sentencing practices reflect harsh statutory punishments for drug trafficking crimes and vary sentences according to the type of illegal drug involved. This study targets these crimes—more than one-fifth of the vignettes involve a type of drug trafficking—permitting rich and detailed comparisons between guideline and public treatment of drug trafficking offenders.
- **Previously Unstudied Crimes:** The present study covers crimes previously receiving little or no attention: violations of laws protecting the environment, covering the manufacture and marketing of pharmaceutical drugs, or protecting civil rights. The analyses fit these crimes into the hierarchy of crime seriousness and compare public sentencing preferences with guideline sentences.



## **Limitations of the Research**

The vignettes given to the respondents are rich in comparison to those used in conventional sample surveys. The vignettes were a few sentences long, containing important information but admittedly nowhere near the amount of information reviewed by judges in court. Consequently, the sentencing tasks given to the sample can only be regarded as a skeletal simulation of actual sentencing. This is not a study of how American citizens would sentence offenders if those citizens were judges in a federal court.

The study is also centered around “typical” cases appearing in the courts. Those cases which attract widespread media and public attention, such as the trial of the police officers involved in the Rodney King case or the prosecution of Ivan Boesky, are represented among the crimes presented to respondents by “generic” examples stripped of the notoriety given by media treatment and the colorfulness imparted by the personalities involved. The sentencing preferences shown in this report cannot be extrapolated to such cases.<sup>11</sup>

The study is also limited in the punishment alternatives offered to respondents. Alternatives such as restitution, home detention, and fines were not offered. As a consequence, the study is silent on how the American public regards such measures.

The Guidelines Manual is a complex document providing a rich and detailed set of rules for the guidance of federal court justices. The construction of vignettes took many, but not all, of those rules into account by incorporating characteristics of the crime and criminal recognized in the guidelines as relevant to sentencing. Many of the more important sets of rules were used, but there are others which were not. Accordingly, this is not a complete study of comparability but instead a study of a subset of the guideline sentencing rules, albeit some of the more important ones.

We did not ask them to take costs as a consideration nor did we supply any information of typical costs for any of the punishment alternatives that were offered. However, it should be noted that the guidelines also do not cover cost issues either. Hence comparisons between respondents’ sentencing and the guidelines are unaffected.

## **Plan of This Report**

The current chapter provides an introduction to the background of the research and the major issues addressed. Chapter 2 is devoted to describing research methodology, explaining the methods used to construct the vignettes and how the sample of households was drawn. In Chapter 3 the overall distributions of sentencing preferences are shown for each crime group and for examples within each group. Mean and median sentences are presented. In Chapter 4 the degrees of congruency between public sentencing preferences and guideline sentences are shown. Chapters 5 through 9 go into detail about how sentencing preferences are affected by the described features of crimes and the convicted offender. Crimes over which there are significant amounts of disagreement are identified. The remaining chapters are devoted to showing the extent to which public sentencing preferences vary by respondent subgroups:

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<sup>11</sup>Of course, this feature is a desirable characteristic because the present study is thereby more closely applicable to the general run of criminal cases brought before the federal courts.

Chapter 10 describes regional and city size differences and Chapter 11 shows how preferences vary by gender, age, race/ethnicity and by the views respondents hold on selected political issues. The Appendices to the report provide greater detail for the technically concerned reader.