

In pursuit of criminal justice

JOSEPH M. BESSETTE

DESPITE evidence suggesting that much of American public policy closely—perhaps too closely—mirrors public desires (for example, Social Security, Medicare, and the federal college-loan program), this is hardly the case in how we punish violent criminals. Policy makers and criminal justice practitioners set punishment levels well below what the public considers appropriate. Indeed, our punishment practices reflect a pronounced disconnect between reasonable public opinion, on the one hand, and actual government policy, on the other.

Most Americans are skeptical of their criminal justice system, and properly so. Perhaps the single best measure of their

The author thanks the Lynde and Harry Bradley Foundation and the Henry Salvatori Center for the Study of Individual Freedom in the Modern World at Claremont McKenna College for supporting the research on which this essay is based. A version of it was presented at the Henry Salvatori Center Twenty-Fifth Anniversary Conference on Modern Freedom, April 20, 1996.

dissatisfaction is the answer they give to a question regularly asked by the Gallup organization about the performance of the courts. In 1994, 85 percent of Americans maintained that the courts in their area dealt "not harshly enough" with criminals. There was almost no change in this level of dissatisfaction across a range of socio-demographic variables such as sex, race, age, education, income, and region. Although this question asks specifically about courts, it is likely that respondents treat courts as a surrogate for the entire criminal justice system, not distinguishing, for example, between courts and overly generous parole boards.

There is an empirical basis for the public's suspicion of insufficient harshness. According to the National Punishment Survey conducted by the Population and Society Research Center at Bowling Green State University in 1987, the public recommends prison sentences for a variety of violent and other serious crimes approximately three times longer than offenders actually serve. And, according to U.S. Department of Justice data on actual time served by those leaving state prisons, half the murderers serve seven years or less, half the rapists serve less than four years, half the robbers serve two years and three months or less, half of those convicted of felony assault (often called aggravated assault) serve one year and four months or less, and half the drug traffickers serve one year and two months or less. Altogether, half of the 54,000 violent offenders who were released from prisons in 36 states in 1992 served two years or less behind bars. These data include many offenders with prior records and many convicted of multiple offenses at one time.

Even these figures fail to capture the full picture, for large numbers of those convicted of felonies receive sentences of straight probation (a period of supervision in the community) rather than incarceration. In 1994, state courts throughout the nation sentenced 29 percent of convicted felons to probation with no incarceration—a total of 253,000 offenders, including 2,400 rapists, 5,500 robbers, over 16,000 persons convicted of aggravated assault, and 48,000 drug traffickers. It is hardly conceivable that the American people agree with the granting of straight probation to so many convicted felons and violent offenders.

Lax criminal codes

Why does our criminal justice system mete out so much less punishment than what the public wants? First, in many cases, state criminal codes are unusually, perhaps even inexplicably, lenient. For example, when in 1978 Minnesota pioneered the use of a sentencing-guidelines grid to rationalize sentencing for convicted felons, it stipulated that a rapist with no prior record serve just two years and five months in prison for his crime (a sentence of 43 months, minus a one-third good-time reduction). Similarly, in California, the presumptive sentence for rape between 1976 and 1994 was six years in state prison (which could drop to three years due to mitigating circumstances or increase to eight years with aggravating circumstances). The formal sentence was subject to various sentence-reduction credits, also stipulated in the penal code, that amounted to 50 percent for most of this period. Thus, until the California state legislature increased the potential punishment for the most serious rapes to an indeterminate 25 years to life in 1994, official state policy called for a mere three years behind bars for most rapes.

This short statutory punishment, together with strict limits on consecutive sentencing, partly explains why even serial rapists in California often serve unconscionably short prison terms for their crimes. Consider Christopher Evans Hubbard who terrorized young women in the suburbs east of Los Angeles in the 1970s and 1980s. Hubbard, whose *modus operandi* was to surprise women living alone by breaking into their homes in the early morning hours, was convicted in 1972 for raping 14 women. He served six years in state prison. On the very day of his release, he raped again. And, avoiding apprehension, he raped at least nine more women during the next two years. For these 10 new rapes, after being convicted in 1982, he served an additional eight years in prison.

Shortly after this second release, in 1990, Hubbard abducted another woman; this time he was sentenced to five years in prison. Denied early release several times because he failed psychiatric examinations, Hubbard would have been freed unconditionally in 1995 at the age of 45 had California not passed a new law that allowed sexual predators to be sent to a state mental hospital for an additional two years if it could be

shown in civil court that the offender was still a danger to the community. For his 24 rape convictions (and he was suspected by authorities of many more), Hubbard served a total of 14 years behind bars, an average of seven months per rape.

A no less disturbing example is Richard Allen Davis, the man convicted and sentenced to death in 1996 for kidnapping and murdering 12-year-old Polly Klaas. A properly functioning criminal justice system would not have given Davis the opportunity to murder Polly Klaas. Between 1973 and 1993, Davis was arrested at least 17 times (often for multiple crimes): 10 times for burglary, twice for contributing to the delinquency of a minor, twice for possession of a dangerous weapon, twice for robbery, twice for kidnapping, and once for jail escape, vehicle tampering, possession of marijuana, attempted armed robbery, attempted kidnapping, assault, attempted oral copulation, obstructing a police officer, and auto theft. Four times he escaped while in custody. Five times he was sentenced to probation rather than prison. And, each time on probation, he was rearrested for new crimes or for violating the conditions of his probation.

In addition to these probation sentences, he was sentenced to six months in jail in October of 1973; to six months to 15 years in state prison in August of 1975 (for which he actually served less than one year); to three separate sentences ranging from six months to life in 1977 and 1978 (for which he actually served less than six years); to three years in state prison for crimes committed in March of 1985 to be served concurrently with another sentence of 16 years in state prison in July of 1985 for kidnapping, assaulting, and robbing a woman (for which he actually served just eight years). After Davis completed his first incarceration, he was arrested for a new offense within two months; after his second incarceration, again within two months; and after his third incarceration, within 12 months. Polly Klaas was killed just three months after Davis was released from his fourth prison stay.

While reasonable people may disagree about how tough to be with nonviolent first-timers, the nearly universal feeling among Americans is that repeat violent offenders deserve stiff punishment, much stiffer by far than anything the criminal justice system gave to Richard Allen Davis before he mur-

dered Polly Klaas. Had California's stringent "three-strikes" law been in effect when Davis began his criminal career, he would have long ago faced a minimum of at least 20 years behind bars, with the further consequence that any subsequent felony conviction, no matter how minor, include another minimum 20 years in prison.

Discretion too far

Another reason why punishments often fall short of public expectations is judicial leniency. Well-publicized reductions in judicial discretion in recent decades, brought about by sentencing guidelines and mandatory minimum-sentencing laws in the federal system and some states, have done little to change this. In the majority of criminal convictions throughout the country, judges retain extraordinary power to choose probation or prison, to determine the length of prison sentences, to throw out collateral convictions, and to impose concurrent or consecutive sentences for the offenders with multiple convictions. Sometimes that discretion is exercised in ways that completely defy reasonable public judgments about just policy.

This was well demonstrated in a 1982 nationally publicized case when Ron Ebens and his stepson Michael Nitz, both unemployed auto workers, beat Chinese American Vincent Chin to death after an argument at a Detroit area bar. (The assault was precipitated by the offenders' belief that Chin was Japanese and thus shared responsibility for the downturn in the American auto industry.) For this crime, in which the offenders waited for Chin outside the bar, and one held him down while the other beat him to death with a baseball bat, the Wayne County judge sentenced the killers to probation and a \$3,700 fine.

Early paroles also help explain our system's lenience. Sentences that sound tough when they are handed down (like Richard Allen Davis's three separate prison sentences in 1977 and 1978 of one to 25 years, six months to 10 years, and six months to life) can result in actual time in prison well under the stipulated maximum (Davis actually served less than six years). Indeed, in most states, parole boards retain broad authority to release offenders once they are eligible under state law. The result is that very few come close to serving anything

like the maximum to which they were sentenced. Nationally, the typical prison inmate serves only slightly more than one-third of his maximum sentence. Even violent offenders serve well under half of their maximum. The fact that a few famous prison inmates such as Charles Manson and Sirhan Sirhan are continually denied parole obscures the broader reality: Nearly all those eligible for parole eventually receive it.

Finally, plea bargaining is often identified as a major cause of light sentences. Given the huge increase in judicial resources that would be necessary to give trials to all indicted felons, prosecutors and judges, it is said, are under enormous pressure to reach an accommodation with the accused: that is, to give them a break on the punishment in exchange for a plea of guilty. And, in fact, according to the Bureau of Justice Statistics, the vast majority of felony convictions in this country are the result of a guilty plea (89 percent) rather than a trial before a judge (5 percent) or jury (6 percent). As expected, those who plead guilty are, crime for crime, less likely to be sentenced to prison than those found guilty after trial. Moreover, if incarcerated, they receive shorter sentences.

Not every plea bargain, however, leads to overly lenient punishment. Indeed, the term itself is deceptive because it implies that all pleas are the result of a bargain. That nine out of 10 felony convictions result from the defendant's voluntary admission of guilt does not itself prove that in all or most of these cases the prosecutor offered a sentence reduction. Defendants, after all, have a right to plead guilty. That those who go to trial get stiffer sentences may reflect the fact that those charged with the most serious robberies, rapes, or assaults have a greater incentive to go to trial and hope for an acquittal. Moreover, in those cases where evidence problems render a conviction problematic, a prosecutor convinced of the defendant's guilt may decide that a few years in prison, or even felony probation, is better than taking the chance that the defendant will "walk." Thus, in some cases, plea bargains may result in more punishment than would a trial.

The invisible hand of leniency

Some argue that the public, despite its dissatisfaction with current punishment levels, is unwilling to pay the costs of

increased punishment. Yet this hardly seems tenable. Only 1.1 percent of all government spending in this country is devoted to building and operating all of our prisons and to running all of our probation and parole programs. Even doubling or tripling this amount would not raise corrections spending to more than a tiny fraction of all government spending. It is true, of course, that corrections costs are a higher fraction of state-government spending, since state governments finance most of the nation's prisons. But even here the proportion is in the range of 4 percent to 5 percent, far less than what is spent on education and social welfare. With the average American contributing about 30 cents per day to cover the nation's entire correctional budget (including probation and parole), insufficient resources can hardly explain why half the rapists are serving less than four years or why 253,000 convicted felons each year receive a straight probation sentence.

What, then, accounts for the divergence between public opinion and public policy? In important respects punishment policy in the United States is the accumulation of millions of individual decisions each year: decisions about whether to arrest an individual; whether to prosecute him; whether to drop some charges or offer a break on the sentence through a plea bargain; whether to send the convicted offender to probation or prison; whether to imprison those who violate probation; how long to make prison sentences; whether to make sentences for multiple crimes concurrent or consecutive; whether to rescind good-time credits for misbehavior in prison; whether to parole from prison eligible offenders; and whether to return to prison those who violate the conditions of release. While we have excellent statistical information on the aggregate results of these decisions, the public is still essentially ignorant, in all but a few high-publicity cases each year, of the specific punishment decisions made in their community.

Consider Cook County, Illinois, which includes the city of Chicago and some of its suburbs. In 1995, the Cook County court system, one of the largest in the country, disposed of 44,855 felonies and 340,880 misdemeanors. For the felony cases alone there were 2,528 trials before a judge and 416 before juries. Sentences to prison totaled 17,377 and sentences to probation 17,680. This means that, during an aver-

age week, the courts disposed of 863 felonies, held 49 trials before a judge and eight before a jury, and sentenced 334 offenders to prison and 340 to probation. (And these averages exclude over 6,500 misdemeanors disposed of each week, many of which involve crimes that most Americans would also consider serious.)

When the volume of serious crimes moving through a court system is so high, we cannot expect more than a tiny fraction of the cases to receive any extended publicity, no matter how vigilant the press. Perhaps a few crimes each week will attract major press attention—drive-by shootings, bank robberies, child abductions, etc.—and, if they are sensational enough, the attention will last throughout the trial (if there is one) and sentencing. But it is a rare crime that can sustain press attention all the way to sentencing and a rarer one still that will result in press comment when the offender, if sentenced to prison, is eventually released. The proportion of punishment decisions for serious crimes that receive press attention will likely be higher in smaller communities than in big cities; yet it is in the big cities where the crime problem is most serious, and thus it is precisely here where the public knows the least about actual punishment decisions. (In a recent series on homicide, the *Los Angeles Times* reported that it wrote stories on only 15 percent of the homicides that occurred in Los Angeles County from 1990 to 1994.)

It follows that, in the vast majority of criminal cases, those who make the actual punishment decisions are free to do as they will within the usually broad confines of applicable state law. This allows two factors to come into play that help to weaken punishment. One is organizational overload. The thousands of criminal cases each year that are processed by county courts tax the resources of prosecutors, public defenders, judges, and local jail officials. As one veteran deputy district attorney told a reporter from the *Los Angeles Times* in 1990:

We don't have enough courtrooms or judges or prosecutors, and if you're a deputy D.A., you have to move the paper. If you don't move the paper, you're not going to be in that courtroom very long because the judge or your supervisor is going to get rid of you.

Similarly, prison officials are faced with the daunting task

of managing growing prison populations in facilities that were typically designed to house many fewer inmates. It is not surprising that those who run prisons often support generous good-time policies, early-release mechanisms, or accelerated paroles in order to move bodies through the institution.

The other factor is the set of ideas about punishment that govern the thinking of criminal justice decision makers. Those who work within the system do not share the broader public's judgments about punishment, and they are, for the most part, free from public scrutiny. Many hold views closer to those of Ramsey Clark or Karl Menninger than to those of the average citizen. Clark, just a few years after serving as U.S. Attorney General for Lyndon Johnson, wrote that "punishment as an end in itself is itself a crime in our times." Clark endorsed the views of psychiatrist Karl Menninger, who maintained that punishment is "our crime against criminals—and, incidentally, our crime against ourselves. We must renounce the philosophy of punishment, the obsolete, vengeful penal attitude."

During the 1950s and 1960s, states made rehabilitation rather than punishment the central principle of penal policy. Probation became more widely used, along with indeterminate sentences, and liberal release practices. Parole boards began assessing the prisoner's fitness for release, not whether he had suffered a punishment commensurate with his crime. The predominance of this ideology of rehabilitation explains why the nation's prison population did not increase between 1960 and 1975 (and actually declined between 1960 and 1968) at the very time when serious crimes reported to the police more than tripled (from 3.4 million to 11.3 million), when the violent crimes of murder, rape, robbery, and aggravated assault increased three and one-half times (from 288,000 to one million), and when arrests for serious crimes increased two and one-half times.

Despite the fact that the rehabilitation approach has fallen out of public favor—and one now rarely hears it publicly defended as the basis for sentencing adult offenders—approximately three-fourths of the states still retain the essential mechanisms of the rehabilitation ideology: the indeterminate sentence and discretionary parole-board release.

The good sense of the people

The National Punishment Survey revealed that the public is more discerning and reasonable than the critics of tougher punishment—who so often decry the public's supposed mindless thirst for vengeance—are willing to concede. For example, the public's recommendations were highly sensitive to the relative seriousness of the crime. The average recommended time in prison was 15 to 17 years for rape; three to 10 years for robbery, depending on the presence of a weapon and whether the victim was injured; six to eight years for assault, depending on the extent of injury; and two to five years for burglary, depending on the amount stolen and whether the target was a commercial building or a home. Within the same crime categories, greater victim injury and increased property loss always resulted in higher recommended punishment.

Consider the four robbery scenarios outlined in the survey. In the first, the offender did not have a weapon but threatened to harm the victim unless the victim gave him money; the victim gave \$10 and was not harmed. For this offense, 72 percent of the respondents recommended prison as the most severe sanction with an average term of three years and 10 months. In the second scenario, the facts were the same but for the addition of a weapon. For this robbery, 75 percent of the respondents recommended prison with an average term of five years and eight months. In the third scenario, the offender robbed the victim at gun point of \$1,000 and wounded him seriously enough to require hospitalization. Here 92 percent of the respondents recommended prison with an average term of 10 years and three months. In the fourth scenario, the offender shot the victim to death when the victim struggled during the robbery attempt. For this robbery and homicide, 30 percent of the respondents recommended the death penalty and another 67 percent recommended prison as the most serious penalty with an average term of 26 years.

Not only were the results of the survey highly responsive to variations in crime seriousness, there was no evidence here that Americans want to lock them up and throw away the key, for any but the most violent criminals. In a word, the results of the survey seem eminently reasonable, however much tougher

the American people are than the criminal justice system that operates in their name.

In its critique of the findings of the National Punishment survey, the National Council on Crime and Delinquency, one of the nation's leading anti-punishment groups, likened asking Americans what punishments they would mete out to criminals to

questions such as "How many nuclear warheads does the U.S. need to defend against attack?" or "What proportion of deposits should banks hold in reserve to protect their customers?" Asking people who are generally uninformed very specific policy questions may reveal their state of ignorance, but their responses could hardly be taken seriously as the basis for policy making.

Thus it does not matter how much punishment the American people think is appropriate for murderers, rapists, robbers and burglars because, apparently, punishing criminals is a technical matter like designing strategic defense systems or fashioning the details of banking policy. Policy makers, it follows, are free to ignore the desires of an "uninformed" public.

Yet deciding how much punishment an offender deserves involves a moral judgment, not a technical one. To say that the moral judgments of the American people should not "be taken seriously as the basis for policy making" is to reject no less than democracy itself.

Justice for all

Although complete freedom from crime is an unrealistic goal, a substantial reduction in serious and violent crime is not. The most constructive way to move toward that reduction, building upon recent encouraging trends, is to embrace standards of just punishment that approximate reasonable public judgments. Here the challenge lies primarily with state legislatures, for they are the original source of our punishment policies and practices. If the state penal codes themselves prescribe punishments well below public standards, then they should be rewritten and brought into line with public opinion. If judges are too lenient in how they exercise their sentencing discretion, then the legislature can establish presumptive sentences or mandatory minimums for serious offenders or re-

cidivists. If parole boards are too generous in granting releases from prison, then parole can be restricted or even abolished (as about one-fourth of the states have done during the past two decades). And if insufficient judicial resources are resulting in large punishment discounts through plea bargaining, then the legislature should authorize and fund more judges, prosecutors, and public defenders.

By bringing punishment more in line with public judgments about what offenders deserve, we will incapacitate recidivists, more effectively deter would-be criminals, and enhance public confidence in our governing institutions. Finally, by reaffirming and enforcing the precepts of the moral order, we can provide essential institutional support for the good efforts of parents, preachers, and teachers to fashion a law-abiding community.