Ranking Correctional Punishments

Views from Offenders, Practitioners, and the Public

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Foreword

By Michael Tonry

Systematic thinking about the imposition of punishments in individual criminal cases began late in the eighteenth century with Jeremy Bentham and Immanuel Kant. Kant believed that punishments should be proportioned to the wrongfulness of crimes. An intentional crime signifies a wrong moral choice and punishments should be calibrated to the degree of wrongfulness. Respect for the offender's moral autonomy requires proportionate punishment. Anything more or less is unjust.

Bentham believed punishments should be designed to maximize human happiness and should be calibrated so that the unhappiness avoided as a result of punishment for crime always exceeds the unhappiness produced by the punishment itself. The references to happiness as the goal of punishment ring strangely in contemporary ears, but the basic idea is familiar. Judges in every case should make an individualized cost-benefit determination. Contemplated punishments whose costs—to the offender and others affected—exceed the benefits they could foreseeably accomplish cannot be justified.

Bentham and Kant are often portrayed as embodying polar retributive and utilitarian ways of thinking and theorizing about punishment. It is seldom in our time recalled, however, that they shared a basic and fundamental belief that punishments, however rationalized, should be tailored to the circumstances and characteristics of individual offenders. For very different reasons, both believed that measures of punishment should be subjective, not objective. What mattered was the effect of this punishment on that person, not the effect of this kind of punishment on the average person. Bentham in particular wrote a good bit about the need to subjectivize punishments to the offender's "sensibility."

In this important book about differences in how people experience and characterize punishments, David May and Peter Wood follow a sentencing path that Jeremy Bentham first laid out 200 years ago, but which few have attempted to follow since. Their new work on this old subject became imaginable only from

the 1970s onwards when the institutions and ideologies of indeterminate and individualized sentencing began to collapse. For a century before that, judges and corrections officials mostly believed they should in every case try to balance rehabilitative and incapacitative considerations, and sometimes think about deterrence. There was no need to develop general rules. Without general rules linking crime to punishment, the question of whether the same punishment might affect different offenders in different ways did not come up.

Since the 1970s, indeterminate sentencing has been out of vogue. Most jurisdictions have enacted mandatory minimum and truth-in-sentencing laws, or promulgated sentencing guidelines that are meant to establish general, binding rules. A theoretical literature on retributive punishment, or "just deserts," as it is more popularly known, has come into being. That literature, forgetting that Kant himself wanted account taken of the offender's sensibilities (Bentham's term), argues for fairly rigid sentencing rules in which crimes and punishments are objectivized: X years in prison following conviction of crime Y. What this neglects is that criminal code categories are general and broad and often encompass acts of widely divergent degrees of harmfulness, and that punishment categories are likewise broad. The qualitative experience of a year's imprisonment depends both on the prison (super-max, maximum security, or campus-style minimum security; whether it is well or poorly managed, overcrowded, violent or gang-dominated) and the prisoner (young or old, healthy or sick, robust or delicate, claustrophobic or not, mentally stable or not, a gang member or an employed father of four).

Those are the reasons why Norval Morris and I two decades ago began to play with ideas about interchangeability of punishment. As May and Wood note, we assumed a rough scale of punishments ranging from unsupervised probation to lengthy imprisonment. We wanted to devise a scheme that was respectful of ideas about deserved punishment, but also allowed judges to take account of differences between offenses within a single category, and differences between offenders. In particular we wanted to figure out a way to allow judges to choose between different kinds of punishments (prison v. intensive probation v. home confinement) in particular cases.

We tried various devices. One was to create a system of generic "sanction units" with which punishments could be valued. A year's imprisonment might be X units, a month of community service Y units, a fine equal to a day's pay Z units. The sentence might be for A units and the judge could juggle the Xs, Ys, and Zs as he or she believed most appropriate. In the end we decided a punishment unit scheme could never be made workable. University of Pennsylvania law professor Paul Robinson also wrote a few articles on punishment units but nothing emerged from his work either.

Morris and I finally decided that the best we could do was to propose a general scheme of rough interchangeability and urge developers of sentencing guidelines to authorize use of prison terms or other kinds of punishments as alternatives for particular categories of offenses and offenders. A few jurisdictions, most extensively North Carolina and Pennsylvania, did that. Most guidelines systems, trapped in the view that only prison counts as a serious punishment, did not or did so only a little.

The fundamental problem is that American political and popular culture is remarkably harsh in relation to convicted offenders. For most non-trivial crimes, most people, including most practitioners, believe that only prison counts and that almost all other punishments are less severe. Sometimes the lesser severity is described as inherent ("I'd be happy to spend six months at home sleeping late and watching TV on 'house arrest' "); sometimes it is a consequence of skepticism that state bureaucracies have the capacity or the will to administer seemingly intrusive punishments. Whatever the reason, it is difficult to devise a system for the United States (as occurs in many European countries) in which a week's community service is regarded as equivalent to a month's imprisonment, or a fine equal to a day's net pay is regarded as equivalent to a day in jail.

May and Wood's observation that people have different views about the severity of particular punishments is not new. It is implicit in Bentham's idea that punishments be individualized to take account of individual offender's sensibilities. And it was a frequent finding in evaluations of "intermediate sanctions" in the 1980s: some offenders eligible for a community penalty in lieu of imprisonment always declined, preferring to serve their time and be done with it. They preferred not to be hassled by intrusive and sometimes demeaning conditions and risk failing on the community punishment and winding up in prison at day's end anyway.

What is new and important in May and Wood's work are the efforts to systematically see how groups of people differ in their views about the seriousness of particular punishments, and the findings that there are systematic difference between men and women, blacks and whites, and presumably between and within many other groups. Bentham and Kant would have applauded, as would Norval Morris were he alive, and as I do. This is an important work that picks up threads that others dropped.