THEORIES OF PUNISHMENT

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I. Introduction

My topic is Theories of Punishment. My interest in this subject is a result of my career as an attorney practicing mostly as a criminal defense lawyer. Sentencing has, obviously, always been an integral and important part of criminal law. It underlies the process at every stage beginning at arrest. It affects decisions as to any charges to be brought by a prosecutor. It is vital to the decisions of defense counsel as to the conduct of his representation and of course to the defendant who must weigh the possible sentence if convicted or pleads guilty to some offense, or indeed, even before committing the offense. It may be in the mind of the judge in the conduct of proceedings in the case and, of course, at the time of the imposition of a sentence. However, in the hurly-burly of everyday practice, being immersed in the process itself, the participants-police, prosecutors and courts and, of necessity the defendants themselves are caught up in the pragmatic reality of the case before them rather than in the philosophical nuances, the intellectual niceties, the *pilpul,* as it were, of theoretical definitions, semantics and hair-splitting. Instead, for me the real question is simply: how can I get the best possible result for my client. That will probably involve employing tactics and strategy other than arguing pure philosophy to those with interests adverse to your client's and to the authority that will ultimately impose the actual sentence in a particular case. In all my almost 40 years of criminal defense practice in every level of sentencing courts I have never nor have I ever heard any lawyer cite to a sentencing judge the names or writings of H.L.A. Hart, John Rawls, Ronald Dworkin or Richard Posner in the course of a sentencing proceeding. Those men are, by the way, probably the most prominent modern theorists in the area of the philosophy of justice.

My presentation will be based mostly on the federal system of sentencing because the majority of my career was as a federal public defender serving exclusively in the federal system. That system may serve as a model for the procedures in state courts, each of which may establish its own system subject to compliance with the United States Constitution. You will recognize that the material I will present is merely a limited introduction to the basics of this subject. A full treatment would require a course of at least semester length. It would involve extensive in-depth analysis and study and serious discussion of the underlying history of many societies, cultures and philosophies developed over centuries that I cannot begin to cover in one brief presentation. My modest intention is simply to raise an interest in and plant a seed of understanding of the question of punishment and treatment of criminal offenders because I believe that it is a question that does much to define the true nature of a society, but is often overlooked. Most of us really only consider punishment in the most notorious and horrendous cases that may receive extensive media coverage that incites intense public desires for revenge by way of severe punishments. But, it should be hoped that our society has evolved beyond revenge being a consideration in the punishment of crime.

II. Early Concepts of Punishment

The literature seems to consider the early Mesopotamian cultures as being the first to contain populations and permanent residents and the first formal legal codes. But, it seems to me that even before

the existence of organized collections of persons in villages and cities there was probably a primitive form of punishment administered by individuals and, perhaps later by tribes or clans to avenge wrongdoing by one individual or one tribe or clan against another. There was no established authority nor a formal legal code or standards. A transgression against a member of one clan by a member of another might demand that the individual might seek some sort of vengeance for himself or that his clan might exact vengeance in his behalf against the transgressor or his tribe. This system would raise all sorts of problems including a question of proportionality or a decision by tribal leaders, for example, that seeking recompense from another tribe might escalate into a situation of war between the tribes which might cost more than the retaliation was worth. Sort of a primitive cost vs. benefit analysis. It would become apparent at some point that organized collections of people living in close proximity would require some form of government which would include some codified system of laws or rules and penalties for violations of them was necessary to run that community with any sort of order and security. An early social contract developed between the ruler and the populace. A social contract involves a basic, perhaps unstated, agreement that at least implies the rights, obligations and duties of the parties-the ruler, and the citizens individually and collectively-such as payment of taxes, providing security and obedience to a code or standard of conduct. Thus, we see references to Gilgamesh, the Fifth King of Uruk, present day Iraq. He ruled around 2500 B.C. Ur-Nammu of the 3rd dynasty of Ur probably set out the earliest legal code in about 2050 B.C. There was at that early date a reference to the conflict between the temple and the state. That code provided for what amounts to fines for violations of the code, but later records show a death penalty for murder. There seems to have been provision for a difference in punishments for persons of either upper class or lower class. Around 1750 B.C. came the Code of Hammurabi. Hammurabi established a single legal code which provided for many aspects of life in his Babylonian Kingdom including tax collection and a postal service. It contained the principle of *Talio* which provided for mutilating or amputating the part of the body that had committed a crime. Legal rights and judicial procedures were available to all. Records were kept and precedents established. There was a death penalty as punishment for a wide variety of crimes such as thievery, the sale or receiving of stolen goods, kidnapping or keeping a disorderly tavern. It is interesting to note that these early codes provided for fines, mutilation, amputation and even death, but there is no mention of prisons or detentions as punishment for crimes. Prison or jail as a punishment is a relatively recent development arising in 18th century England and France when prisons started to be used for punishment of criminals rather than for just being poor houses or to hold political prisoners or house those awaiting execution or torture. But, they require a system of buildings, administration and care and maintenance of the persons sent to prison and all the expense that goes with it. It is much cheaper to chop off a thief's hand and be done with it than to send him to prison, an attitude not without supporters even today.

The Code of Hammurabi was a source of two other legal systems; the Biblical Law of the Hebrews and the Islamic Law, Sharia.

III. Biblical and Ancient Punishments

What we think of most commonly as "Biblical Justice" is the *lex talionis,* or law of retaliation or vengeance; that is, an eye for an eye, a life for a life. The meaning and nuances of that concept have been discussed and debated now for two thousand years. But, the basic concept of Judaic law seems to be actually reciprocal in nature rather than retaliative. In my opinion the idea of "eye for an eye" is not a prescribed penalty or punishment. It is not a mandatory sentence such as we see today in some modern penal codes for certain specified offenses. Rather it is a limitation on the punishment in a given situation. In other words, the maximum punishment for the taking of an eye may be the forfeit of the offenders eye, but that is the extent of the permissible punishment. A

victim or his tribe may not impose a greater punishment on the offender or his tribe than that. This represented a new level of social awareness. It led to a much needed passing of the right of punishment from the individual or his tribe to the political entity by way of the legal codes that came into existence since no orderly society can long exist without the curbing of unrestrained individual retaliation. Reciprocal justice is, in a nut shell, simply "let the punishment fit the crime." The objective seems to be to remove dangerous elements from society and to deter from violating the law. It served to prevent people from taking the law into their own hands.

However, the Bible does prescribe the death penalty for a number of activities such as: Murder, adultery, bestiality, rape sodomy, witchcraft, kidnapping, cursing a parent and for women found not to have been a virgin on her wedding night. But, with the exception of premeditated murder, the sanction of the death penalty could be commuted by an appropriate substitution of money or something that reflected the seriousness of the crime. There is little evidence that that many of these penalties were ever carried out. Further, since two or three witnesses were required for a conviction, executions would have probably been rare. But, one guilty of a premeditated murder had to pay with his life.

In his Sermon on the Mount Jesus preached against resisting an evildoer, but rather "turning the other cheek." However the New Testament did not set out rules for structuring society and gives few clues about how Christians should respond to crime. Jesus did preach rendering unto Caesar that which are Caesar's and to obey the government. Since that time there have been and are many disagreements among Christians about crime and punishment. These disagreements being so wide that I will leave it to one more versed to sort them out and discuss them. I believe it enough to comment that the different approaches are probably mostly contained within the various theories of punishment set forth in this work.

Sharia is the law of Islam and is based primarily on the Koran. It means "the clear path" and is considered, as are the laws of Judaism to be of Divine origin. The judges often have discretion to that allows them to make various punishments for the same crime. The possible punishments in the Koran may seem barbaric, harsh and primitive to non-Muslims, but some Muslims say that they compare to punishments in the Old Testament. Some would reply to that by noting that the Old Testament punishments were interpreted with wisdom and not taken literally. The Bible does not sanction torture such as crucifixion or the beating of women. The New Testament leaves criminal punishment to the civil authorities.

The Greek laws had much of their background in the Code of Hammurabi. In about 621 B.C. Draco set up a legal code supposed to promote stability and equality. His code, however, mandated the death penalty for virtually all crimes even for petty theft. Hence the term "Draconian" used today to describe laws and punishments that are overly severe and harsh. The code was, however later reformed. The Romans derived most of their laws from the Greeks. They constructed the "Twelve Tables" designed to ensure the rights of citizens. It did mandate the death penalty for a number of crimes and also set out trial procedures such as compelling witnesses to appear and the conduct of judges. Later a permanent court system began to develop. After the Roman Empire divided between Rome and Constantinople, the Byzantine emperor, Justinian, compiled a body of laws known as the Justinian Code which lasted well into the 19th century and was the model for the Napoleonic Code of France and the laws of Germany. The legal codes of India and China grew
independently of Europe and the Mideast and will not be made a part of this paper since it does not appear

that they have had much, if any, influence on the laws of the western world.

IV. Current Theories

It seems as though every philosopher, pseudo-philosopher and wannabe philosopher has felt a compulsion to write and publish his views on the subject of punishment. There are the thinkers such as Aristotle, Plato, Cicero, Thomas Hobbes, Jean-Jacques Rousseau, Immanuel Kant, Jeremy Bentham, Cesare Beccaria and many, many others down to probably the leading modern writers such as H.L.A. Hart, John Rawls, Richard Posner and Ronald Dworkin. But despite the difference in their various approaches they all seem to fall within one or a combination of the accepted theories of punishment or a sub-section of them. Those are: 1) Deterrence, 2) Retributive, 3) Preventive, 4) Reformative, and 5) Expiatory.

Deterrence is intended to serve as a warning to the offender not to repeat the crime and to others who may be tempted to commit the crime in the future. This theory is generally accepted as a legitimate purpose of punishment although its value is sometimes questioned due to continued crime rate levels and rates of recidivism. I find it interesting that executions in places like Texas and Florida, the states that have probably executed more people than other states, still have murders committed in them. Deterrence by the death penalty seems to have had limited effect at best. What I have found to have a real deterrent effect is the method and conditions of serving a prison sentence in the attitudes and policies of the authorities and in the dangers presented by fellow inmates.

The object of retributive punishment is to expose the offender to the pain or suffering caused to the victim. It is the "just deserts theory." This theory is not favored by some sociologists and penologists because they consider it to be barbaric and primitive. However, it is, I believe, a consideration, consciously or unconsciously, in many, if not most, sentences imposed. It seems to be a major factor in the sentencing beliefs of much of the public, particularly in the sentencing of homicides, sexual abuse cases, especially involving minors and other sensational offenses. This, I believe, can motivate some judges in their sentencing in those cases when they owe their seats on the bench to popular election.

Prevention or incapacitation is probably the most effective method of punishment in terms of accomplishing its goal, that is, of keeping the offender away from society at least for the term of his imprisonment, or beyond if the sentence is death or life without parole. Both sentences are problematical in that they cause great expense to the society since death row prisoners will spend a long time in exhausting appeals often remaining in custody for many years before resolution and, the lifers, of course, must be cared for and maintained for lengthy periods. Recent sentencing policies have resulted in many more of them than probably ever before. We are now at the point when some of them, with more to come, will require extensive medical treatment and nursing home care.

The object of the reformative theory is to reform the behavior of the offender. It is hoped that by educational and vocational training while in custody will enable the offender to rejoin society as a functioning member. For this reason special youth facilities have been built with these opportunities. While the offender may leave the institution with degrees and certificates attesting to his efforts he will probably find them to be of little use in finding work due to sociological and economic factors.

Supporters of the expiatory theory believe that the offender's repentance is a legitimate reason for punishment. This seems to have roots in religious values and morals. I have never seen or heard of any judge sentencing on that basis alone. Repentance or what is known as acceptance of responsibility for the crime committed is very often a factor in determining a sentence and every defense counsel will so instruct his client. It is a case of "be sincere, and if you can't be sincere, fake it."

As we have seen the concept of punishment evolved from retaliation to retribution; that is, from punishment for an offense against an individual or a clan administered by the individual or clan to a system a system of communal retributive punishment for a wrong done against the community in the form of the injury to a member of it. To me this is basically a philosophy of retaliation or "just deserts" by the community although communal retribution is more impersonal and structured then personal retaliation. Further, theorists raised the ideas of "utilitarianism" and "consequentialism" as justifications for punishment. Utilitarianism is a sort of a communal cost-benefit analysis going beyond the retributive analysis I have referred to. It goes to establishing a general framework of the values and priorities of the community. John Rawls wrote that the general standards set by utilitarianism is the work of an authority such as a legislature while retribution is in the province of a judge in applying those standards to a specific person in a specific case.

Jeremy Bentham was a utilitarian. His thought was that both crime and punishment cause unhappiness. Therefore, the unhappiness caused by the offense must be weighed against the unhappiness caused by the punishment. Thus, the greater the unhappiness caused by the crime, the greater the greater amount of punishment may be inflicted. The amount of punishment should vary directly with the seriousness of the offense. This can be criticized by the concern that utilitarianism may cause unduly harsh sentences for relatively minor crimes. For example: a community may be troubled by a rash of minor thefts, but few of the thieves are caught. When one thief is caught the inclination may be to impose an unduly harsh sentence far out of proportion to the individual offense for which he was convicted, but which is intended to serve as a deterrent to the thieves still at large to refrain from committing further thefts.

Retribution holds that serious offenses should be punished more severely because the offender “deserves" harsher punishment, the "just deserts" being greater. This requires a determination of what crimes merit what punishments and how to punish the offenders and how to take into account variations in specific cases. In the federal system in this country a system known as "Sentencing Guidelines" has been used. This will be discussed at a later point.

We have the "consequentialists" who argue that punishments are justified to the extent that they achieve, or are expected to achieve the end, such as the common good, the public interests and prevention of crime. This view is not favored by most writers who propose establishing various constraints whether or not they can be justified by their consequences.

Opposed to consequentiality is the "Deontological Theory." The word deontology derives from the Greek words for duty *(deon)* and science or study *(logos.)* It seems to fall within the moral theories that seek to guide and assess our choices of what is morally required, forbidden or permitted. It holds that some choices cannot be justified by their consequences or effects and that no matter how morally good they might be, some choices are forbidden morally.

Many, probably most theorists have tried to combine elements of utilitarianism with elements of retribution hoping to avoid the extremes of each. Utilitarianism carried to its extreme might justify the punishment of an innocent person in order to carry out the aim of reducing crime, while retribution might extend to punishing an offender when it would be to no ones benefit to do so. A recent case has been reported where a young man convicted and sentenced to thirteen years in prison was at liberty during his appeals. The appeals were denied, but he was never taken into custody, but remained at home. Subsequently he married, fathered children, worked and lived a responsible life during the period he was supposed to be in prison. Yet, according to prison records he was a prisoner. It was only when the records showed he was eligible for release that he was found never to have entered the prison. At that point he was arrested and taken into custody. A serious question could now be raised as to whose interests would be served by now forcing him to serve a thirteen year sentence. He seems to have accomplished everything he could have if he had been in prison all this time. He has lived a crime-free life, he has contributed to society and is certainly rehabilitated. Under this utilitarian view should he be sent now to prison?

A first consideration is to try to define a basic philosophy of the meaning of justice in the law. A very quick and over-simplified review of the ideas of some historical figures. The ancients, such as Aristotle and Cicero believed in "Natural Law," that is, the higher law, justice by nature. Aristotle's concept of punishment was to restore the status quo of society returning the parties to their positions before the transgression, that is to return the stolen property to the victim. John Locke changed the natural law concept to "Natural Rights." His ideas influenced many in the revolutionary period in this country, including Thomas Jefferson who altered Locke's proposal of the rights to life, liberty and property by substituting "pursuit of happiness" for the right of property in the Declaration of Independence. Locke, Thomas Hobbes and Jean-Jacques Rousseau in the 17th and 18th centuries stressed the idea of the social contract that dates back to the ancient Greeks. The social contract basically provides that all people freely agree to form a society by giving up a portion of their individual freedom in return for the benefits of communal living, especially for the security it provides. If one member breaks the agreement and transgresses against the rights of another the society has the right to punish the transgressor. That is why criminal charges are framed as being the state versus the transgressor rather than the individual as the plaintiff.

John Austin, (1790-1859), an English lawyer was probably the first writer and lecturer to approach the law analytically. Before Austin analyses of the law were based on history or sociology or general moral or political theories. He was influenced by Jeremy Bentham, John Stuart Mill and Thomas Carlyle. Austin introduced the theory known as "Legal Positivism," or a "Command" theory of law. It became popular in England in the late 19th century, after his death. Simply put, he wrote that laws are the commands of a sovereign who also sets the penalties for violations of those laws. They are laid down by a sovereign or his agents as opposed to other possible law-givers such as God (natural law) or an employer to an employee. His work has been criticized as being a theory of "rule by men" rather than "rule by law."

In 1958 Herbert Lionel Adolphus Hart, (1907-1992), an English lawyer and writer usually referred to as H.L.A. Hart, revived the theory of legal positivism by criticizing Austin's work and, at the same time, building on it. Hart did not try to reduce all legal rules to one kind of rule, but emphasized the differing types and functions of legal rules. According to him law is a system of social rules rather than the strict command theory of Austin, but holds that there is no law without authoritative rules and that law is analytically tied to the concept of authority. His views on punishment are set out in his work *Prolegomenon to the Principles of Punishment.* He defined punishment in terms of five elements distilled as follows:

(i) It must involve pain or other consequences normally considered unpleasant.

(ii) It must be for an offense against legal rule.

(iii) It must be of an actual or supposed offender for his offense.

(iv) It must be intentional and intentionally administered by human beings other than the offender.

(v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed as opposed to an individual defining his own legal system.

Ronald Dworkin, (1931-2013), has been considered one of the foremost and influential legal philosophers of the modern era. He takes issue with Hart's approach to the philosophy of law and justice. Dworkin's philosophy is complex, but basically he advocated law based on principle rather than on policy with limited discretion given to judges. Of course, at some point rules become principles, then become policy when it becomes a standard to be observed. According to Dworkin Hart's philosophy has no place for principles-only rules. Dworkin appears to emphasize retribution over utilitarianism in matters of punishment. John Rawls, (1921-2002), a Harvard professor, wrote his "Theory of Justice" in 1971. He advocated fairness as justice. He combined the theories of Utilitarianism with retribution by writing that utilitarian arguments of punishment are appropriate with regard to the questions about practices and retributive arguments are appropriate to particular rules to particular cases. In other words, utilitarian arguments are for the legislature, for example, to decide the priorities and values of the community in general and retribution is for the courts to apply those values to a specific person in a specific case.

Richard Posner, (1939), is a judge of the Seventh Federal Circuit Court of Appeals and a prolific writer in legal matters. His idea is that theory of retributive punishment has declined with the rise of modern governments and with the increased concealability of criminal activity. In his view retributive theories appear to belong to particular historical circumstances rather than to have "a timeless claim to be regarded as just." Analyzed, in his words, "from an economic standpoint, retribution, the view that punishment is just only when it is imposed on, and commensurate with the guilt of, a criminal, presupposes that the probability of punishment is high. If it is not, devices must be found for increasing either the probability or the severity of punishment."

My personal belief is that, when it comes to sentencing, most lawyers, including judges, prosecutors and defense counsel, believe, rightly or wrongly from a legal philosophical standpoint, consciously or subconsciously, in the positivist views of John Austin an H.L.A. Hart, that law comes from the sovereign rather than from the natural law philosophy of Aristotle.

V. HISTORY OF PUNISHMENT IN AMERICA

Since America was a British colony when settled, the colonists lived under British laws. At the time, punishments could be cruel. They relied heavily on corporal punishment. There were also fines, public shame, such as a mark to identify the offense e.g. Hester Prynn, or a term in the stocks

and, of course, death. Some of the first public buildings erected in the New World were prisons, but they were used primarily for debtors. Political prisoners and high ranking prisoners of law might be held. Commoners were usually kept in custody only when awaiting trial or punishment after which they were released. In 1682 Pennsylvania adopted "The Great Law" promulgated by William Penn. It was supposedly humane, emphasizing hard labor. Premeditated murder was the only crime punishable by death. Penn's law was succeeded by the "Anglican Code" in 1718. That was a very punitive code. It called for corporal punishments such as branding or mutilation and listed thirteen capital offenses.

After the American Revolution the ideas of the Age of Enlightenment from the ideas of Bentham and others as contained in the Declaration of Independence and followed by the adoption of the first ten Amendments to the new Constitution, a new penal system was developed. Quakers became very influential and new prisons were built to reflect the Quaker concept of prison being a "penitentiary" where prisoners could reflect on their offenses, become penitent and thus undergo reformation. Serious offenders were placed in solitary confinement without labor. Others worked together in silence during the day and were confined separately at night. The harsh punishments and isolation caused problems such as mental breakdowns.

Other penal systems have been instituted over the years in efforts to find a system that would meet the goals of rehabilitation and deterrence: The New York Auburn System, a very punitive, strictly disciplined, exploitive system lasted until well into the 19th century when a reformatory was built near Elmira, New York, which emphasized education and training of inmates. It used among other things, indeterminate sentences and parole.

The Progressive Era began in the 20th century when certain progressives believed that prisoners could be rehabilitated through individualized treatment. They also advocated political action to improve the living conditions of the poor by better public health, public housing and education. The Medical Model Era came about in the 1930's based on the Progressive Movement and the belief that criminal behavior is caused by social, psychological or biological deficiencies.

In 1929 Congress authorized the new Federal Bureau of Prisons to develop institutions with treatment as the main goal. In the 1950's there was a school of thought that punishment was an obsolete way to deal with offenders. Treatment took a central role in penology. Prisons became, to some extent, mental health institutions. After World War II psychiatry was used to rehabilitate offenders with group and individual counseling and psychotherapy. During the 1960's and 1970's a Community Model advocated the reintegration of the offender into society proposing that the emphasis be on psychological treatment

Because of rising crime rates in the 1970's and 80's and with dissatisfaction with the existing systems, critics called for increased crime control by way of increased sentences, an end to indeterminate sentencing and other programs. An influential report by Robert Martinson concluded that except for a few programs rehabilitation did not have any positive effect on recidivism. The report was used by some politicians to implement a "get tough" philosophy of penology. The new crime control model called for incarceration, strict supervision, mandatory sentences and policies such as increased "three strikes and out" punishment.

Procedures have also been established calling for restitution, forfeitures and increased fines.

VI. SENTENCING GUIDELINES AND MANDATORY MINIMUM SENTENCING

The federal Comprehensive Crime Control Act of 1984 created the United States Sentencing Commission as an independent agency in the judicial branch composed of seven voting and two non-voting, ex-officio members. Its purpose was to establish sentencing policies and practices for the federal criminal justice system that would promulgate detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes. The purpose was to further the basic purposes of criminal punishment and rehabilitating the offender. The commission was given broad authority to review and rationalize the federal sentencing process.

The statute contained many detailed instructions as to how this determination was to be made, but the most important of them instructed the commission to create categories of offense behavior and offender characteristics. The commission was required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons, to be determined by the coordination the offense behavior categories with the offender characteristics categories. I have a copy of the chart contained in the original Sentencing Guidelines as well as one from a more recent edition. As you see it is a grid system and ostensibly it is a simple process to reach the intersection of offense behavior with offender characteristics and find the appropriate sentencing range. Believe me. It just aint that simple.

The statute provided that the sentencing judge must select a sentence from within the guideline range so established, but authorized the sentencing judge to depart from the guidelines if a particular case presented atypical features. Those features are set forth in the guidelines manual. A judge must specify reasons for any departure. Departures are subject to review by an appellate court for reasonableness. Sentences within a guideline range are also subject to review by an appellate court to determine it was properly applied.

The Act requires the offender to serve virtually all of any prison sentence imposed. (the time to be actually served was set at 85% of any prison sentence.) The Act also abolished parole and restructured good behavior adjustments. A system of supervised release was created to replace parole. It was made mandatory that a period of supervised release had to be imposed in every sentence of over one year imprisonment.

The guidelines were drafted, approved by congress and became effective November 1, 1987.

Its Policy Statement began with an acknowledgement that the basic objective was to "enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system and to avoid the confusion and implicit deception that arises out of the present which requires a judge to impose an indeterminate sentence that is automatically reduced by 'good time credits.' " It also abolished the parole commission that might have reduced the length of time to be served. There was obviously deep concern in congress that offenders were not serving enough of their original sentences.

Congress was also concerned about the so-called disparities in sentencing from one court to another, so it sought to make sentences uniform and proportional.

There was an homage paid to the philosophical difference between just deserts scaled to culpability (retribution) and crime control through deterrence and incapacitation. The commission took what it considered an "empirical" approach that seems to come down most heavily on the side of deterrence and incapacitation although it did enumerate a limited number of defined bases for departure.

As a result from 1987 to until the U.S. Supreme Court decision in *United* States *v. Booker,* in 2005, judges had to follow the sentencing guidelines. In Booker, the Supreme Court invalidated the mandatory features of the guidelines. It was a landmark decision.

A system that was supposed to, in effect, make sentencing simpler-just apply the guidelines-has since its adoption in 1987 been the subject of, by my count, the subject of some 73 decisions by the Supreme Court, the latest being in January, 2014. In its policy statement the commission recognized the serious drawback that the system adopted had the potential to give a prosecutor the power to determine the sentence by increasing or decreasing the number or content of the charged counts in an indictment. The commission felt that the inability to actually prove at trial counts unfairly charged would protect against such practices. What the commission did not apparently consider was the effect of over charging for purposes of forcing guilty pleas without trial and thus eliminating the inability to prove them as a restraining factor. The possibility of a defendant suffering harsh sentences if convicted at trial together with losing the possible credit for "acceptance of responsibility" by going to trial gives a prosecutor a distinct advantage in the decision of a defendant whether to go all the way to trial or take a plea.

Another result of the adoption of the guidelines is the development of a new sub-specialty in the practice of law, a sentencing specialist who will consult with defense counsel on the possible strategies for minimizing the effects of the guidelines. It has been a topic for sentencing seminars and classes on the subject benefiting hotel accommodations, airlines and participating "experts" as well as local Continuing Legal Education sessions.

Most of the mandatory sentences in the federal system were created in 1986 and 1988 although some go back much further. Many of them are penalties for various drug offenses based on types of drugs, quantities and special characteristics. They may be enhanced by the number of prior convictions. Sentences may be as high as life in prison. Also many weapons and explosives violations provide for mandatory sentences depending on the type of weapon, its uses such as in connection with another crime and number and nature of prior convictions. Penalties may range up to life in prison. Later mandatory sentences were created to punish crimes such as sex offenses involving minors or children and child pornography. The penalties for murder may range from life in prison to death. There are also mandatory sentence for a variety of other crimes.

There are several forms of mandatory sentencing. One is the "not less than" type in which the statute may provide for a penalty of not less than a specific number of years, but not more than a statutory maximum. The type most commonly referred to is the flat or single sentence statutes and the capital punishment statutes. There is provision known as the "Safety Valve" law that can ease the mandatory sentence of certain offenders who otherwise would be subject to a mandatory sentence. The conditions for such relief limit eligibility to specified factors such as first offenders with otherwise clean records and cooperation with the government. Other provisions of Guideline Sentencing and related statutes reward cooperation with the Government by making reduced sentences possible.

Mandatory sentences are an even greater weapon for prosecutors to persuade persons to plead

guilty to a lesser crime or face a severe mandatory sentence if they insist on trial. It is also an extremely effective tool to get cooperation from a defendant by way of information, infiltration with recording or transmitting devices or testimony as a government witness at the trial of a co-defendant or other person.

VII. TRENDS IN SENTENCING

In 2010 Congress passed the Fair Sentencing Act which modified some of the most onerous provisions of the Sentencing Guidelines as originally formulated and later amendments and the mandatory sentencing laws. Previously, for example, mandatory sentences for drug offenses ranging from five years to life depending on the amounts of drugs involved, the circumstances of the specific crime and the criminal history of the defendant were called for. Under the original mandatory scale of punishments a crime involving 5oo grams, not quite one pound, of cocaine powder called for sentences ranging from five years to a potential life sentence under certain circumstances. However an amount of only five grams of crack cocaine drew the same penalties, a disparity of 100:1. This raised sharp criticism because cocaine in crack form is primarily a drug more commonly in inner city locations possessed, sold and used in the African-American community the reasons being chiefly because it is cheaper and can be obtained in smaller quantities. Powder cocaine is more commonly used in more affluent, middle class areas. Thus, a poor Black male possessing only five grams of crack faced at least a five year sentence while a white person in the suburbs could possess up to one-half kilogram of powder without invoking the same mandatory sentence. One result was to have the prisons filled with young Black men in disproportionate numbers. The Fair Sentencing act changed the amounts to a ratio of roughly 18:1. The trigger amount of crack is now 28 grams, or about one ounce. Even that ratio should be viewed with some skepticism since crack is now recognized as chemically identical to powder cocaine.

A new bill called the Smarter Sentencing Act is before committees in both the Senate and the House of Representatives with bi-partisan support. This bill would cut minimum sentences for most drug offenses in half and expand the safety valve provision to so as to make more people eligible for its benefits. There may be other provisions and amendments as the bills make their way through the houses.

The "tough on crime" attitudes of the 1970's and 80's seem to be softening. One might question the reasons for that. Are they motivated by a desire to build a more humane society? A product of the evolving standards of decency in our society as recognized by some court decisions? Being rather cynical as a result of my professional experiences I might suspect that many in authority are far more motivated by the realization of the economic costs of long prison sentences versus their success at preventing crime. Larger prison populations means building more prisons and running them at great expense. It has become a whole industry. The federal courts have required changes in various prisons that are expensive to comply with. But, many of the old attitudes persist. There is still a strong belief in "lock 'em up and throw away the key!" and "feed 'em road kill and fish heads." There is resentment of educational programs where inmates may get high school diplomas or take college courses as coddling. Some have even favored dismantling prison gymnasiums because the inmates may develop physically so as to be a danger to guards. These people do not think that gyms serve to relieve tensions in the institution by giving inmates an outlet for their energy and aggressions. These differences in attitudes differ from jurisdiction to jurisdiction according to traditions and customs, whether progressive or conservative.

VIII. CONCLUSION

I have tried to demonstrate that over the course of over two thousand years much thought has been given to theories of punishment by a legion of thinkers, philosophers and anyone with an idea or opinion about it. There is an inherent disconnect between these ideas and the realities and practicalities of punishment. Perhaps not enough thought has been given to punishment from the offender's standpoint. What is it about punishment that really influences an offender as to whether he seeks to reform (for lack of a better term) or simply decide that he is better off living a life within the law rather than outside of it and thus achieve the ultimate aim of punishment-the reduction, if not elimination, of crime. First, let us recognize that there are some people that just cannot stay within the lines; incapable of conforming to the rules, formal and informal, that society lays down. Those people will continually act in ways that are unacceptable to an organized society. Some might characterize them as just plain bad or evil. To some, there is little, if any, thought given to the consequences of punishment. To others, punishment is a cost of doing business, an acceptable risk. Probably the only thing that reforms them is reaching an age where it is just too difficult to do the time over and over again. Still others, after long terms of incarceration are institutionalized to the point where they are unable to cope with the ordinary stresses of life and are comfortable and functional in a facility that tells them when to get up in the morning, go to bed at night, gives medical care and chooses meals and clothing for them, Upon release and being faced with making those decisions for themselves they may commit some crime in order to be returned to their haven or sanctuary. "Three Strike Laws" are aimed at people who have demonstrated that they are unlikely to be able to change after repeated convictions and prison terms. If applied to really dangerous offenders they certainly prevent crime by incapacitating them. Sometimes, however they are used to incarcerate relatively minor, non-violent criminals for disproportionate sentences. But, it is the other offenders, those who have no prior or relatively minor criminal histories, those whom rehabilitation is designed to send back into the community a person no longer a danger to it by way of education, training, medical and psychological treatment to which attention must be paid. My answer to my question of what it is about punishment that positively influences an offender is in large part in the attitudes and approaches of those involved in the corrections system including police, jail attendants, prison administrators, staff, guards and parole and probation officers. When the offenders that are the targets most likely to benefit from rehabilitation are treated with a level of respect and allowed to retain a sense of personal dignity it becomes much more productive in motivating a desire to take advantage of the various programs that are (or should be) offered in the institutions. Instead, too often the offender is treated, from arrest on, in ways that dehumanize him. This has a destructive effect, particularly on the younger offenders that is hard to overcome.

Further the effect on inmates sentenced to long terms with little hope of early release lose interest in the educational and vocational programs because they cannot look forward to a release while still young enough to build a life that avoids criminal activity in the future. Sentence a person in his early twenties to a mandatory twenty year sentence and he will be convinced that he will be an old man when he gets out, so why study.

Consider the prisons themselves. The tendency here is to build large capacity prisons in out-of-the-way locations, often for political purposes. Although the highest percentage of inmates in Ohio prisons are people from Cuyahoga County, many prisons seem to be built in areas far from Cleveland. They are often built in areas of high unemployment in order to create jobs in the construction and later administration of them. No consideration seems to have been given to the beneficial effect of family visits on the inmates and resulting easing of tensions. Of course, there is the "Not In My Back-Yard" attitude to contend with. But, we must not forget that prison sentences

affect far more people than those actually imprisoned. It affects families, particularly children, spouses or partners and parents in ways that often exact far greater punishment on those outside the walls.

I have gone on and on about this subject and the various philosophies and theories it has inspired.

As I said in my opening, this is a subject that would take an intense semester or more to begin to even

approach it in all its ramifications. I have shared just some of my personal views and

experiences, but no philosophy. I am not a philosopher. (Except in name only as a member of this

group.) I am only now beginning to have a real understanding of the work I did for so long so I cannot

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yet, if ever, presume to claim to have a philosophy of it

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