

Criticisms of the Criminal Justice System: A Decision Making Analysis

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When a decision making analysis is applied to key decisions within the criminal justice system, e.g., bail, sentencing, and plea bargaining, a wide range of evidence suggests that the decision makers believe they follow policies other than those that actually guide their decisions; that the policies that are followed are often simple ones, involving only a few decision factors; and that the decision outcomes are often assigned to defendants in a reasonable manner but that, even so, the outcomes are often ineffective. Because many proposals for the reform of the criminal justice system are based on the testimony of decision makers and "experts" whose knowledge of the system is often flawed, it is unlikely that reforms will have a beneficial impact on criminal behavior until much more is known about the day-to-day decisions of judges, prosecutors, and probation officers.

INTRODUCTION

The criminal justice system has been criticized for many different failings in recent years. Those who have been more concerned with the defendant have attacked the criminal justice system on the grounds that: its prisons not only do not rehabilitate but they violate the basic human rights of inmates; decision makers within the criminal justice system base their decisions on extra legal factors (e.g., race and socioeconomic status); too many truly innocent people are convicted because of faulty evidence; there is too much disparity among different judges sentencing similar defendants for similar crimes; a lopsided emphasis is placed on punishment rather than rehabilitation; crimes committed by the weak and pow-

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erless are selectively prosecuted; and because of indeterminate sentencing, some defendants are held in prison much longer than is fair or just. In contrast, those critics who take the perspective of the actual or potential victim argue that: despite a few temporary reversals, the crime rate has been steadily rising in the U.S.; the police are hampered by ambiguous and overly protective probable cause and search and seizure rules; judges release too many dangerous criminals on bail thereby allowing them to commit additional crimes while awaiting conviction for another crime; too many obviously guilty criminals are released without proper punishment because of misguided statutes that allow smart defense lawyers to employ insanity or diminished capacity defenses; alcohol and drug users are released rather than severely punished; prosecutors do not pursue cases unless they are certain of a victory in trial; and the indeterminate sentencing system releases too many criminals without proper punishment. These are but a small sample of the many and varied criticisms that have been levied against the criminal justice system in an attempt to encourage one or another reform in the functioning of the system.

Although it would be easy to counter many of these pleas for reform in the criminal justice system by questioning the motives of those who make these recommendations (Konečni & Ebbesen, 1982b), an often ignored but equally important issue in the analysis of criticisms such as these is the extent to which these pleas are based on accurate knowledge of the day-to-day functioning of those aspects of the criminal justice system that are being attacked. In this paper, we shall argue that both participants in the criminal justice system (who are apparent experts on the day-to-day functioning of the system by virtue of making the crucial day-to-day decisions or by being intimately involved in them) and most researchers who study the system are overconfident in the accuracy of their own beliefs about how the system functions. Therefore, many if not all of the reforms in the criminal justice system that are proposed as a result of these criticisms are certain not to produce the hoped for effects on criminal justice system functioning.

To support this position we shall review what is known about several different, but key areas of the criminal justice system, namely, bail setting, prosecutorial decision making, sentencing, and parole decisions and compare the picture that emerges from these analyses with some of the criticisms and proposals for reform of these criminal justice system functions that have been suggested by the "experts."¹

Decision Making and Discretion

Because most reforms of the criminal justice system eventually must be implemented at the lowest levels by those who make the decisions that determine the disposition of defendants, critical analyses of the criminal justice system must

1. We chose these areas of the criminal justice system for several reasons. First, they are key decision points in the system. Second, much is known about several of these areas. Third, although there is disagreement about the exact function that these aspects of the system should serve, the alternatives are clear enough that critical analyses are possible.

focus on such key groups as judges, prosecuting and defense attorneys, probation officers, and parole board members. Although the decision alternatives that are available to key decision makers within the criminal justice system are often constrained by law, it is clear that much discretion exists throughout the criminal justice system (Bottomley, 1973; Hogarth, 1971; Shaver, Gilbert, & Williams, 1975; Wilkins, 1962, 1964). For example, police officers cannot directly impose sentences on the people that they arrest and probation officers can not plea bargain, but police officers have considerable latitude in deciding who to arrest and probation officers are relatively unconstrained in how they weight and evaluate specific factors of a case in making recommendations for or against probation. In other words, the discretion that exists in the criminal justice system is of a type that leaves decision makers relatively free to assign outcomes (such as an amount of bail, a reduction in charges, or a prison term) to particular defendants but generally constrains the set or range of options that the decision maker can choose from.

This view of discretion does not imply that guidelines that attempt to control the way in which outcomes are assigned to defendants do not exist. Many do (e.g., the Model Penal Code, 1962; the Model Sentencing Act, 1963). However, the decision guidelines that exist within most agencies are (with only a few exceptions) expressed in terms of broad and relatively abstract categories. For example, some states have statutes or administrative guidelines for the setting of bail that suggest that when setting bail, a judge is to take account of the mental character or mental condition of the defendant as well as the "risk of nonappearance" (Ebbesen & Konečni, 1982a). Recent guidelines for sentencing are no more specific. For example, the Model Sentencing Act proposed by the National Commission on Crime and Delinquency (1963) suggests that a primary factor in sentencing should be the dangerousness of the defendant. The way in which the probation officer or judge combines and weights specific case factors in an attempt to estimate the dangerousness of the defendant is not specified, however. More recent proposals are little better. Guidelines developed by a congressional committee in the late 1970's (O'Donnell, Churgin, and Curis, 1977) proposed that federal sentencing decisions should be based on such things as the deterrence of other people from committing crime and the promotion of respect for law and order. Even the attempts by several states to reduce the discretion of decision makers by following the recommendations of the National Institute of Law Enforcement and Criminal Justice (1978) to abolish indeterminate sentencing has not helped specify with any greater certainty how specific factors are to be translated into a sentencing decision. At almost every stage of the criminal justice system, decision makers are not told how to translate all of the many and varied specific aspects of a case into a decision. What specific features of a case should the judge use to assess the mental condition of a defendant or the risk of nonappearance at later court proceedings? In those few instances in which decision guidelines suggest that specific case factors, such as the prior record of the defendant, are to be considered, the guidelines are silent about how such specific factors are to be scaled. How much worse are three prior convictions than two? How many larceny convictions are worth one armed robbery? Equally, if not

more important, how should the accused's record of prior convictions be weighted relative to other case factors?

This discretionary system has frequently been criticized for being unfair to the accused. Not only is it suggested that defendants accused of similar crimes are treated very differently from one locale to another (Bottomley, 1973; Green, 1961) or because they differ on some extra legal variable, such as, race (Gaudet, Harris, & St. John, 1933) or socioeconomic status (Goldfarb, 1965) but several researchers have concluded that different decision makers will treat the *identical* defendant in very different ways. For example, on the basis of sentencing panel studies, O'Donnell et al. (1977) concluded that different federal judges, given the same file describing the identical crime and identical defendant characteristics, can and do order very different sentences—as widely different as imposing a 3 year prison term versus releasing the defendant with only 1 year probation.

Tests of the validity of criticisms of the criminal justice system that arise from the discretionary nature of decision making require that the implicit policies (Wilkins, 1982), if any, that decision makers follow be discovered and that these policies be examined in light of the particular function that the decisions are supposed to serve within the system. For example, if the major function of a particular type of decision is the control of the future behavior of the defendant, then the implicit policy that decision makers have adopted can be evaluated in terms of its effectiveness in producing the hoped for behavioral control.

Failures of the Bail Setting System

Although there is widespread disagreement about the exact social control functions that the bail system should serve, most agree that the bail system is in need of reform. Some argue (Foote, Markle, & Woolley, 1954) that the court has a right to do whatever is necessary to guarantee that the accused appears at required court proceedings, but object when bail is set at such high levels that defendants cannot afford to pay the bail, or the 10%–30% percent bail bondsman's fee, and, therefore, virtually ensures that those low on the socioeconomic ladder will be more likely to be detained than those high on the ladder (Ares, Rankin, & Sturz, 1963). Others contend (including Supreme Court Justice Burger) that a major function of the bail system is to protect the community, witnesses, and jurors from harm that a potentially dangerous individual might cause if released. For example, the Attorney General's Task Force on Crime, a federal advisory panel appointed by President Reagan, recommended recently that judges should be allowed to consider the dangerousness of the defendant when setting bail (San Diego Union, Aug. 5, 1981). At the state level, several bills have been proposed in California, for example, that would allow judges to consider protection of the public as well as the likelihood that a defendant would appear at later court proceedings. It is interesting to note that Supreme Court *dicta* is mixed on this issue (Ebbesen & Konečni, 1982a) as are state statutes and administrative guidelines. A fair evaluation of the

effectiveness of bail decisions can only be made, therefore, in the context of both appearance and what Chief Justice Burger called "bail crime" (San Diego Evening Tribune, February 4, 1980).

Bail Setting Decision Strategies

A number of studies of the bail setting decisions of judges in different jurisdictions have been published in recent years (Ebbesen & Konečni, 1975, 1982a; Goldkamp & Gottfredson, 1979; Landes, 1974; Suffert, 1966). Although somewhat different methods were employed in each study, several consistent patterns of results emerge from these studies. First, and possibly most important, is the fact that the decisions are made in a relatively brief hearing in which a fairly large amount of specific case information, including recommendations for specific bail amounts by prosecuting attorneys and defense attorneys, the nature of the current charges, some details about the crime, information about the defendant's prior record, and information about the defendant's community ties (e.g., marital status, children, home ownership, employment) is presented to the judge. Second, in the two studies that examined attorney recommendations, the prosecuting attorney's recommendation was by far the best predictor of the amount of bail that judges actually imposed, although the defense attorney's recommendation also had an effect—to increase the judge's recommendation whenever the defense attorney recommended anything other than release on own recognizance. Third, measures of the severity of the current charge and of the defendant's prior record also predicted the amount of bail that judges set, but indicators of community ties did not yield consistent results across the studies suggesting that community ties are not strongly predictive of the amount of bail that judges impose. Finally, the one study that examined the causal relationships among these factors (Ebbesen & Konečni, 1982a) found that the prosecuting attorney's and the defense attorney's recommendations seemed to mediate between the two case factors, severity of the crime and prior record, and the judge's decision. Thus, it seemed as if the judge's decision was primarily determined by the prosecuting and defense attorneys' recommendations and the latter were, in turn, primarily determined by the severity of the current charges and the defendant's prior record.

The failure of community ties to have even a minimal impact on judicial bail setting, not to mention the recommendations of the defense attorneys (even though they spent a considerable amount of time in the hearings emphasizing positive aspects of the defendant's community ties) is of considerable interest in light of the fact that the Vera Institute supported Manhattan Bail Project (Vera Institute of Justice, 1972) proposed a set of very specific bail setting guidelines based almost entirely on case factors related to community ties. In addition, interviews conducted with judges and judicial decisions based on simulated-case files (Ebbesen & Konečni, 1975, 1982a), suggested that judges believed *community ties* to be the most important factor in their own bail setting decisions despite the fact that not one study of their actual bail setting decisions suggested that community ties were being considered. This result along with others reported later in this paper

suggests that judges may not be aware of the factors that govern their own decision making (Ebbesen & Konečni, 1980).

Such results cast considerable doubt on the validity of *judicial* claims for the need for particular reforms in the bail system. Although they appear to have expert knowledge about judicial decisions by virtue of making the decisions themselves, judges seem to have models of how they and their peers decide that are inconsistent with complete statistical analysis of their decisions.

A blatant example of this point is the already mentioned criticism of the bail system that Chief Justice Burger levied. He claimed that much of the crime in the U.S. was the result of judges not being allowed to consider the dangerousness of a defendant when setting bail. He argued that this resulted in many criminals being released, either on their own recognizance or after paying an inappropriately small bail amount, only to commit additional crimes while awaiting what was a virtually assured conviction for the original crime. This position was reaffirmed by President Reagan's Task Force and later was openly supported by various state legislators around the country, including those in California, where the data for some of the findings reported earlier were collected. Apparently, these "expert" critics of the bail system all believed the same thing as the individual judges who were making the bail setting decisions, namely, that judges base their decisions on factors related to the appearance of the defendant at later court hearings and not on the dangerousness of the defendant. In addition, they also assumed that simply by allowing judges to consider dangerousness, "bail crime" could be reduced.

Predictors of Appearance and Dangerousness

Several aspects of the criticisms and the proposed reforms need to be examined in light of the decision policies that judges seem to be following when setting bail. First, the claim that "bail crime" is a major source of crime in the U.S. is probably overstated. A number of studies have reported that only a small proportion (less than 15%) of those defendants who are released while awaiting trial are arrested or charged with serious crimes during the pretrial interval (Clark, Freeman, & Koch, 1976; Gottfredson, 1974; Landes, 1974; Thomas, 1974). Second, despite the belief of the critics that judges do not take the dangerousness of the defendant into account when setting bail, it is conceivable that those factors that have an influence on judicial bail setting decisions are those that predict pretrial criminal activity. If this were the case, the system would already be working in a manner consistent with the proposed reforms and any change in law or guidelines would simply legitimize what was the "de facto" standard. Clark et al. (1976), Gottfredson (1974), and Landes (1974) have examined the relationship between the pretrial behavior (both appearance and criminal) of the defendant and case and defendant factors available to judges in bail hearings. The consistent result is that when combined in a multivariate model all of the factors that are available to the judge (including such things as the age, sex, race, and education of the defendant) predict a significant but small proportion of the variation in the pretrial behavior of the defendants. But, when these predictive models have been applied to new data samples, they have accounted for less than 5% of the total variation in pretrial

behavior. In short, the information that is available to judges when they set bail is not very diagnostic of either appearance or pretrial criminal activity. Nevertheless, it is of interest to note that the severity of the current charge and the extent of the defendant's prior record, when considered in isolation, were the only factors consistently related to pretrial criminal activity across all of the studies—and these were precisely those factors that indirectly (through attorney recommendations) influenced judicial bail setting decisions! In short, the judges already seemed to be taking account of the best available information (poor as it is) about the dangerousness of the defendants, despite what *they* claimed, what state and administrative guidelines emphasized, and what Chief Justice Burger pined for.

Critics of the bail system who have emphasized appearance have argued, in general, that the system is unfair because the rich can afford to pay higher bail amounts and, therefore, are less likely to be detained during the pretrial interval. Although there is a built in logic to this criticism that is hard to deny, were judges to adjust the bail amount that they set according to the economic conditions of the defendant, the importance of this criticism might be diminished. Alternatively, if the poor were less likely to appear when released, such a judicial decision strategy would produce results counter to the appearance function of bail. Unfortunately, little evidence exists concerning the relationship between economic status and appearance. In addition, the role that this factor plays in judicial decisions can only be estimated from the failure of community ties to be strongly related to the amount of bail that judges set. In short, it is unclear what to conclude about this type of criticism of the bail system.

Bail and Control of Pretrial Behavior

Another important issue in evaluating the validity of criticisms of the bail system is the extent to which the decision options that are available to the judge (release on own recognizance, impose a particular amount of bail or some other form of surety) actually control the pretrial behavior of the accused in the expected manner. More specifically, the decision strategy that judges use might be completely correct in terms of the factors that guided the choice of outcomes but the outcomes that are available may have little or no effect. In the case of bail setting, judges might assign bail options so that those options thought to have the most effect on pretrial activity are imposed on those individuals whose case factors indicated that they needed the most extra encouragement to comply with the law. Nevertheless, the judicial beliefs about the relative effectiveness of the options could be wrong.

Several studies have examined the effects that the amount and the form of bail have on the pretrial activity of defendants (Clark, et al., 1976; Landes, 1974; Enlein, 1978). Unfortunately, none of them reported results dealing with the relationship between pretrial crime and bail. Instead they focused on the effect of bail on appearance. A consistent result emerging from all three studies was that the amount of bail that was set by the judge was unrelated to the likelihood that released defendants would appear at later hearings. Instead, factors such as the time between arrest and disposition, whether the defendant had a lawyer, and the weight of the evidence against the defendant were related, albeit weakly, to appearance.

Of course, it might be argued that the failure to find a consistent relationship between the amount or type of bail and appearance is a function of the fact that all those defendants who would not have appeared had they been released were forced to appear by virtue of being detained. A test of this idea requires that all defendants be released, regardless of judicial decisions. That such a test has yet to be performed supports our claim that critics of current system functioning are overconfident in their beliefs about how the system functions. We simply do not know what proportion of those who are detained will commit additional crimes and/or not appear at court proceedings. On the other hand, the data that are available tentatively suggest that even if judges were to take the dangerousness of defendants into account and did so on the basis of valid predictors of pretrial criminal activity (although this seems very unlikely, e.g., Monahan, 1981; Wenk, Robinson, & Smith, 1972), assigning higher amounts or different types of bail to those at greater risk would have no effect on crime unless the amounts were so high as to cause all high risk defendants to be detained in jail. In this case, the same effect could be achieved by eliminating bail and simply detaining all high risk defendants.²

Prosecutor Decision Making

Prosecutor decision making is another area about which very little is known. In fact, in a recent *Annual Review of Psychology* article dealing with psychology and the law (Monahan & Loftus, 1982), with the exception of one issue (the use of eyewitness evidence), discussion of prosecutorial function and decision making is conspicuously absent, despite the obviously central role that the prosecutor plays in the disposition of criminal cases (Gelman, 1982). Nevertheless, frequent criticisms have been raised.

Interestingly enough, one of the most frequent attacks against prosecutor decision making comes from psychologists who claim to be experts (by virtue of having conducted several experimental simulations) about one or another aspect of this part of the criminal justice system. In particular, it is often suggested that too much emphasis is placed on eyewitness evidence (Loftus, 1983a, 1983b) resulting in too many wrongful convictions. As we (Konečni & Ebbesen, in press, a) and Loh (1981) have argued, however, it is likely that very few convictions are obtained on the basis of eyewitness evidence alone. Loh has suggested that the identity of the perpetrator is not the major issue in the vast majority of trials and that eyewitness evidence is the only form of evidence in about 5% of all criminal trials. In addition, McCloskey and Egeth (1983) note that documented cases of

2. In this context, the question of decision errors is obvious. As we have noted elsewhere (Ebbesen & Konečni, 1982a), those proposing reforms in the bail system have often failed to consider the impact that the reforms might have on the error rates of those making decisions. How many and what type of defendants will be detained unnecessarily and are these errors to be evaluated in the context of those defendants who are released and fail to appear or commit additional crimes? Until such weighting systems are developed and agreed upon, a full evaluation of the effectiveness of any particular reform, whether it be putting greater emphasis on dangerousness or on appearance will be impossible.

wrongful conviction as a result of incorrect eyewitness testimony are only a fraction of all of the cases in which eyewitness testimony is involved. In short, just as Chief Justice Burger overstated the importance of bail crime, many psychologists may be overemphasizing the problem of wrongful convictions due to faulty eyewitness evidence.

As part of a continuing project on legal decision making at the University of California, San Diego, we (Root, Ebbesen, and Konečni, 1984) have been collecting data on district attorney decision making. In this study, we have begun coding a random sample of the archival records that the San Diego district attorney's office generated during 1979. Some 275 factors are being extracted from these files covering such things as the type of physical evidence, the link between the evidence and the crime, the nature of the crime (including such things as whether weapons or injury were involved), details about the defendant's prior record, defendant characteristics, results of pretrial motions and bail hearings, witness characteristics and their relationship to the defendant and the victim, victim characteristics, role of the police in the arrest and as witnesses, use of eyewitness identification procedures, crime location and duration, the state of the defendant and witnesses at time the crime was committed and at arrest, the use the prosecutor makes of different types of evidence, the disposition that the prosecutor selects, and so on. Although we have analyzed only a small fraction of the data, several patterns are already emerging. First, in a majority of the cases, police officers are the primary witnesses to the crime and arrest the suspect while the crime is being committed or shortly thereafter. That this is the case should not be surprising when one considers the difficulty of finding the guilty suspect once he or she has fled the scene of the crime. Second, in those cases in which police personnel are not witnesses, the witnesses, including the victim, that are available frequently knew the defendant prior to the crime. That is, the witnesses were not identifying one stranger from a crowd of other strangers, rather they were reporting that a particular individual who was already known to them had committed the crime. Third, in the vast majority of property crime cases (the most frequent type of charge), some form of physical evidence strongly linking the defendant to the criminal activity was also present, e.g., property known to be stolen was found on the defendant, cancelled checks with the defendant's name on them were available, and so on. This result seems equally reasonable when one notes that most of cases that a prosecutor deals with result not from extensive police investigation designed to "pin" the crime on a particular individual, but rather from the fact that the police happen to be at the right place at the right time or that witnesses and victims already know who the criminal is. Arrests are simply not likely otherwise.

Admittedly, these are tentative results. Nevertheless, a similar, though less ambitious, study was conducted by Myers and Hagan (1979). After examining some 24 different factors, they reported that the best predictors (in order of importance) of whether prosecutors decided to dismiss a case were the severity of the charges against the defendant, the victim's willingness to prosecute, whether there was an eyewitness to the crime, the relationship between the victim and the defendant, and whether stolen property was recovered. These findings are generally consistent

with those that we are finding. In particular, prosecutors seem more likely to dismiss a case if there is no physical evidence linking the suspect to the crime and if the witnesses did *not* know the defendant prior to the crime. The fact that the presence of an eyewitness increases the likelihood of full prosecution may or may not be consistent with our results since Myers and Hagan did not report who the witnesses were in most of the cases. If they were the victims or police officers then their findings would be quite consistent with our own tentative results. An unwilling victim who is the primary witness or an arrest of someone that the victim or police officers did not see committing the crime could be the factors that the prosecutors were responding to in Myer and Hagan's study.

These results add another dimension to the criticism by McCloskey and Egeth (1983a, 1983b) and by Konečni and Ebbesen (in press, a) of those who want to reform the way in which eyewitness evidence is used in the system. The primary argument of those calling for reform is that eyewitness evidence is highly fallible and some changes in procedure are required to correct for this fallibility. Virtually all of the support for this view comes from psychology experiments that claim to simulate the conditions present when eyewitnesses view and report aspects of a "crime". There is little doubt that the large majority of these studies do indeed find that their subjects make a large number of errors in reporting details and in identifying the "perpetrator" and that the error rate is affected by a wide range of factors. However, for a number of reasons these results tell us virtually nothing of importance about the role of eyewitness evidence in the criminal justice system.

- (1) Eyewitness evidence may be far less fallible in real world cases than is suggested by the results from simulated studies. If the initial viewing conditions of a crime coincide with an arrest, the question of perpetrator identity is virtually irrelevant. The criminal was caught in the act. If police officers frequently serve as the main witnesses, one wonders whether they are less susceptible to those factors that might increase witnessing errors than are the college student subjects often used in the simulations. If the witness knew the defendant prior to the crime, then the likelihood of incorrect identification seems minimal. In short, there is every reason to believe that these psychology studies are not nearly adequate simulations of the conditions that frequently occur when crimes are witnessed and that the results from these studies are, therefore, irrelevant (Diamond, 1979; Ebbesen & Konečni, 1980; Konečni & Ebbesen, 1979, 1984; Monahan & Loftus, 1982).
- (2) Even if the former conclusion is wrong and eyewitness evidence is as fallible as has been claimed, we currently have no idea whether the disposition decisions of the prosecutor take account of that fallibility. If prosecutors believe that eyewitness evidence, by itself, is frequently filled with errors and, therefore, refuse to file charges in most of those cases in which the only evidence is that from one eyewitness, then it could be argued that procedures for controlling eyewitness fallibility already exist. The same argument can be applied to jury decision mak-

ing. In fact, juries might respond to eyewitness evidence in just such a manner as to "catch" most of the few errors made by the prosecutors. The fact that prosecutors seem to take account of the presence of physical evidence and of the relationship between the victim and the defendant suggests that prosecutors do worry about the validity of eyewitness evidence.

- (3) When one realizes that most guilty verdicts are obtained by a plea of guilty (Ebbesen and Konečni, 1982b), the question of the effect of fallible eyewitness evidence on guilt decisions should be asked not about the prosecutor but about the defendant. This crucial issue has been virtually ignored in the psychological literature. We have no idea what effect, if any, the presence of erroneous eyewitness evidence has on the willingness of a defendant to plead guilty, especially in light of the fact that other forms of evidence and other witnesses may be frequently available. It could be argued, in fact, that the real issue is not how eyewitness evidence affects guilt/innocence decisions, but rather how this information affects plea and sentence bargaining. The important issue may be not who or what was done, but how much punishment should be received.

Until issues such as these are resolved with relevant data, it seems premature to argue for reforms in the way in which eyewitness evidence is used in the criminal justice system.

Sentencing, Parole, and Individualized Justice

One controversy that seems to generate legislative support on one side for several years and then on the other side several years later is the question of whether sentences should fit the individual or the crime (Carter & Wilkins, 1967; Curry, 1975; Frank, 1949). In different terms, the question is how much discretion should judges and parole boards have and if they have any, what noncrime factors should be taken into account? Frequently, the arguments against punishment of the individual are that judges take extra legal factors into account (Flood, 1963; Gaudet et al., 1933; Green, 1961; President's Commission on Law Enforcement and Administration of Justice, 1967), that such a system generates too much disparity across judges (O'Donnell et al., 1977), and that the deterrence function of sentencing is severely compromised. The argument in favor is often based on the notion that effective rehabilitation requires that sentences be tailored to individual needs.

When the same analysis as that previously applied to bail setting is applied to the sentencing decisions of judges and to the release decisions of parole boards, similar conclusions emerge. First, judges report that they follow decision policies that are inconsistent with the policies that they actually follow (Konečni & Ebbesen, 1982). Although asked in a variety of ways to indicate what their sentencing policies were, the answers that were obtained did not describe their own behavior.

Judges believe they respond to some factors that they, in fact, do not respond to, and they believe that they do not respond to some that they, in fact, do. Second, the decisions of judges and parole boards seem to be determined by recommendations that they receive from others. In the case of judges, their decisions seem to be directly influenced by the recommendations that probation officers give them (Carter & Wilkins, 1967; Curry, 1975; Czajkoski, 1973; Ebbesen & Konečni, 1981). Parole boards seem to respond directly to recommendations given to them from the Case Analyst (Carroll, 1980; Carroll et al., 1982) and there is strong evidence suggesting that the Case Analyst's recommendation is, in turn, determined by the inmate's institution's recommendation (Carroll, et al., 1982). Second, very few factors seem to be taken into account by those who make the recommendations. Three factors account for most of the variation in probation officer recommendations: the severity of the charges, the defendant's prior record, and whether the defendant was detained, released on bail, or on his or her own recognizance at the time of the sentencing hearing. Factors that affect parole decisions seem to vary from state to state depending on other aspects of the sentencing process across states (Carroll, et al., 1982; Gottfredson & Wilkins, 1978; Maslach & Garber, 1982) but the number of factors that is needed to predict the decisions is frequently less than five, with one or two (prior record and/or severity of crime) accounting for very large portions of the predictable variation. It is important to note, however, that certain variables are conspicuously absent from the list of factors that seem to influence decision makers who control sanctions, e.g., race, ethnic background, economic status. The case factors that are related to sentencing and parole decisions are not particularly diagnostic of such criterion variables as rearrest and parole failure. In short, sanctions seemed to be applied to convicted offenders according to decision rules that (a) do not take account of the many and varied characteristics of offenders, (b) emphasize past criminal conduct of the defendant, and (c) because of the latter, tend to be based on precisely those available factors that are most strongly related (weak as the relationship is) to the future criminal behavior of the offender.³

Although judges and parole boards do not seem to be influenced by irrelevant offender and case factors when imposing sanctions, it is still important to ask whether the sanctions that are available have any effect on the behavior of defendants. Interestingly enough, there is generally widespread agreement among researchers concerning the ability of sentences to rehabilitate convicted offenders or deter potential ones. As Monahan and Loftus (1982) conclude, the evidence (e.g., Ehrlich, 1979; Martin, Sechrest, & Redner, 1981; Sechrest, White, & Brown, 1979) indicates that the sentencing options available to judges have very little, if any, impact on the likelihood that offenders will commit additional crimes

3. It is important to emphasize that even though the severity of the sanctions that seem to be applied to offenders by judges and parole boards are based on those case factors that are frequently included in actuarial models of recidivism, when compared in terms of their relative predictive accuracy, the actuarial models have almost always done better than the decision makers. In addition, as with bail crime, the actuarial models do a rather poor job of predicting recidivism, suggesting that the expert decision makers do an even poorer job.

and on the likelihood that potential criminals will choose to commit crimes—a conclusion quite similar to that reached about the ability of bail to control pretrial behavior. Therefore the claims that too much discretion prevents deterrence and that too little will hinder the rehabilitative success of the sentencing process seem premature, at best. The sanctions that judges have simply do not appear to control behavior to the extent claimed, one way or the other.

Disparity

The frequent assertion that discretionary systems create disparity both in the form of widespread differences among different decision makers and in unequal treatment on the basis of irrelevant legal criteria needs to be decreased in scope. Consider the latter issue first. There is no shortage of studies that report a significant relationship between offender characteristics, such as race, sex, and socioeconomic factors, and the severity of sanctions that are imposed on these offenders (Farnworth & Horan, 1980; Frazier & Bock, 1982; Gaudet, et al., 1933; Hagan, 1974; Lizotte, 1978; Rankin, 1964; Unnever, Frazier, & Henretta, 1980). However, with the possible exception of the sex of the offender, the impact of these offender characteristics on sanction severity is often reduced to very low, and frequently nonsignificant, levels when other “legally relevant” factors such as prior record, severity of the current charges, and mitigating and aggravating factors are controlled for (Cohen & Kluegel, 1978; Ebbesen and Konečni, 1981; Frazier and Bock, 1982; Goldkamp & Gottfredson, 1979; Hagan, 1974). Thus offenders from different racial groups do seem to have different sanctions imposed on them. The reason that they do may well be a result of the facts that they have different prior criminal histories and that they commit crimes of different types. In short, the disparity that exists in the sentences that different types of offenders receive is probably a function of the disparity in the types of criminals and the circumstances surrounding the crimes they commit that emerge from each offender group. If this conclusion is correct, it suggests that reforms of the system to limit the discretion of decision makers are likely to have a minimal effect, if any, on the way in which sanctions are imposed on different offenders from different social groups.

Differences among different judges seems another matter, however. Surely, the sheer complexity of the decision task that faces judges and probation officers is bound to cause considerable inequality across decision makers. The evidence that exists on this issue suggests that a mixed answer must be given. In particular, there is considerable evidence that the overall severity of the sanctions that are applied to offenders varies from one jurisdiction to another (Bottomley, 1973; Gelman, 1982) and from one judge to another (Austin & Williams, 1977; Ebbesen & Konečni, 1981; Diamond, 1981; Gibson, 1978; Hogarth, 1971; Nagel, 1962; O’Donnell et al., 1977). However, as with offender characteristics, reasons for these differences are not clear. In particular, some have argued that judicial attitudes, prejudices, personality factors, and the presence of subculture standards cause these differences. Others have argued that a major portion, if not all, of the disparity results from different judges being exposed to different types of crimes and

criminals. The latter argument suggests that most judges tend to follow similar decision strategies when imposing sanctions and that differences in the base rates of different sanctions across judges is due to different case distributions across the judges. Unfortunately, research examining the relative contribution of similar decision strategies in the context of different judicial characteristics has not been done. In fact, there are no studies of the role that judicial factors play in the types of decision strategies that judges employ. For example, we do not know whether judicial attitudes are more likely to affect the scaling of factors, the weights applied to factors, and/or the method by which the factors are combined to reach a decision. Nor do we know whether subcultural and jurisdictional variables affect the same or different aspects of judicial decision processes. Nevertheless, when taken together the existing evidence tentatively suggests that both explanations have merit. The extent of the similarity in decision strategies across judges has probably been underestimated by those who argue in favor of individual differences and the impact of individual differences has too frequently been underestimated by those who argue for common decision strategies. Once again attacks on aspects of the criminal justice system for one or another failing is premature given the evidence.

SUMMARY AND CONCLUSIONS

Several tentative conclusions about the day-to-day operations of the criminal justice system can be drawn from the present review. Decision makers within the system often report that they follow decision policies that either are so global as to be meaningless (e.g., all cases are different, the best interests of society are considered) or, when specific enough, describe policies that are inconsistent with their actual decision strategies. Sometimes reported strategies are consistent with one view of how a particular part of the system should function (as when judges reported that they followed the Vera Foundation's guidelines) but actual decisions are consistent with another view (as when bail setting was actually based on factors that were related to dangerousness). More often than not, the actual decision strategies followed by key decision makers seem to be heavily influenced by the recommendations of another agent in the system, e.g., probation officers control judges, case analysts control parole boards. Those decision makers who make recommendations often base their recommendations on a small number of factors, with either severity of the current crime and/or prior record being the most important. Evidence may play a major role as well, but only in the decisions of the prosecutor. The ability of decision makers to predict the future criminal actions of defendants, either while awaiting disposition or after disposition, is generally not above chance levels, although the factors that seem to be taken into account (characteristics of the current and past criminal activity of the defendant) have the best chance of providing diagnostic information. Other offender characteristics may have an effect, but if so, it is a very small one. With the exception of the incapacitation effects of detention, the sanction options available to decision makers do not seem to have a strong, if any, effect on the future criminal activity of defendants. There is some disparity among different decision makers in how these sanctions are imposed, but the source of this disparity is currently unknown. Very

little is known about prosecutorial decision making, but what is known, seriously questions the claim that errors in eyewitness evidence are rampant.

As should be obvious from this summary, we are not arguing in this paper that the criminal justice system is not in need of major reform. Instead, we are claiming that many, if not all, proposals for reform are premature given the current state of our knowledge of criminal justice system functioning and given the ways in which most serious proposals for reform are generated. Consider the latter point first.

Many proposals for criminal justice system reform come from administrative, congressional, or organizational (e.g., American Bar Association) task force or commission reports or directly from individual decision makers within the criminal justice system. More recently, members of the academic community have entered the fray either directly or by testifying to one or another task force/commission committee. In general, these committees rely heavily on the testimony of "experts". Well known judges, district attorneys chief probation officers, prominent lawyers, and so on are asked to testify about problems and their solutions. Unfortunately, as we have tried to show in this paper, there is every reason to assume that the models of criminal justice system functioning that these individuals believe accurately describe the day-to-day functioning of the system are wrong in many cases (Konečni & Ebbesen, 1982). The decision makers descriptions of how they and their peers make decisions do not reflect the way in which decisions are actually made. This means that testimony by such individuals is likely to encourage "reforms" that are either unnecessary or even counterproductive. In addition, because many of the decision makers form their opinions on the basis of unsystematic observation of their own behavior and thought processes when making decisions, it is likely that their models will perpetuate a global or abstract view of decision making, e.g., that judges should focus on dangerousness or rehabilitative potential, rather than specifying exactly how information that is made available to decision makers is to be translated into case by case decisions.

The case against those academics who base their recommendations on simulation research is even stronger. In many instances, not only has the appropriate research not been done, but the direction of the research is often far removed from and shows a complete lack of knowledge about the actual functioning of the system. Not only does the simulation research on which the critical conclusions are based lack evidence about generality, but the claims that are made often show a complete disregard for the way in which the criminal justice system functions on a day-to-day basis.

We have seen that recommended changes (by a supreme court justice) in bail setting strategies are consistent with what is already being done. Equally interesting, are results that suggest that if the reforms were implemented in a formal manner, say by creating very specific guidelines defining exactly which and how objective case factors were to be weighted and combined (Gottfredson, 1974; Gottfredson, Wilkins, & Hoffman, 1978), such reforms would produce a minimal, barely better than chance, increment in the control of criminal activity.

Two major implications seem to follow from the present analysis. First and foremost, far more needs to be known about the precise day-to-day decision strategies that are being followed by key actors in the criminal justice system. One way

to increase the odds that such will take place is to incorporate a far more extensive and thorough data collection and analysis system into the daily functioning of the criminal justice system. The advent of powerful computer and sophisticated database systems makes this task somewhat less impractical than it might have been in past years. This would mean, in effect, designing a data collection system much like that used by social scientists who study the system. The PROMIS system (Hamilton, 1979) comes closest to what we have in mind, but something even more detailed would be necessary. A related point is that further research that attempts to simulate aspects of the system would be totally unproductive until data about the actual operation of these components of the system were obtained. Several consequences would follow were such a general policy adopted. First, decision makers would be more accountable for their actions. Social auditing would be possible. Second, the real, instead of imagined, effects of changes in policy could be observed. The effectiveness of a proposal that judges weight the dangerousness of offenders more heavily could be assessed directly, for example.

The second major implication from this review is that the best the system may ever be able to do for the near future is concentrate on incapacitation. Decision makers are not capable of predicting behavior, given the information that is available to them, and the sanctions from which they can choose have little if any effect on the criminal activity other than to incapacitate it by detention.

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