

How Should Low-Level Drug Dealers Be Punished?

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April 9, 1998

Abstract

The US pursues a number of drug control strategies, but it invests the most resources in arresting, prosecuting, and incarcerating low-level drug dealers. Thus, it is important to reflect on what is the appropriate and expedient punishment for these offenders. Currently punishments vary from nothing to very long prison sentences; substantial variation is appropriate because not all low-level dealers are equally destructive. Unfortunately the current system does not punish most severely the most culpable offenders. A stronger correlation between severity of sanction and culpability could be achieved by: (1) moving decisions concerning length of incarceration from the state level to the local level, (2) reducing minimum sanction severity to expand the variation between minimum and maximum sanctions for all defendants except those who meet locally established definitions of what constitutes unusually destructive forms of dealing, and (3) allowing judges to depart from presumptive sentences instead of computing sentence length from fixed formulas based on readily observable – but only marginally relevant – criteria such as quantity possessed. The goal would be to allow police, prosecutors, and judges to work together to identify and target long sentences on the minority of most vicious dealers. This would serve the interests of justice, by making the punishment better fit the crime, and efficiency, by making more effective use of scarce and expensive punishment capacity.

Acknowledgment

This paper benefited from many ideas and insights contributed by members of the Harvard Mind/Brain/Behavior Interfaculty Initiative working group on Drugs and Addictions.

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I. Importance of Problem

About 1.3 million people are arrested in the US for drug abuse violations every year.¹ How should the ones who are convicted be punished? Most people agree that high-level drug dealers or “kingpins” should be locked away for a long time. Likewise there is a promising new approach for non-violent drug users, alternately called coerced treatment or coerced abstinence and described elsewhere in this volume. But what should be done with the more than one million low-level dealers who collectively move drugs from the kingpins to the consumers? That straightforward question turns out to be surprisingly difficult. The goal of this paper is to provide a framework for thinking about how such offenders should be sentenced.

By many measures this is a large problem. Of the 1.3 million people arrested for drug law violations each year, about 350,000 are arrested for drug distribution, and about 200,000 of them are convicted.² Ninety percent of those convicted at the federal level and three-quarters of those convicted at the state level are incarcerated.³ About 100,000 are sent to prison, with an estimated average time served of 35 months.⁴ At an average incarceration cost of \$25,000 per prison cell-year (Caulkins et al., 1997), that represents an investment of \$7.3 billion dollars annually on imprisonment of drug dealers, with additional billions spent on enforcement, adjudication, and jail sentences. By way of comparison, total federal spending on drug treatment and prevention are about \$2.5 billion and \$1.4 billion, respectively (ONDCP, 1997, p.19); state and local spending on these programs is of a comparable magnitude (ONDCP, 1993).

For two reasons low-level dealers absorb the vast majority of this enforcement effort. First, low-level dealers are easier to arrest because they operate in more public locations and participate in transactions which are of lower value, limiting the precautions that can practically be taken per transaction. Second, there are vastly more of them

¹ In 1994, there were an estimated 1,351,400 arrests for drug abuse violations (Maguire and Pastore, 1996, p.394).

² In 1994, an estimated 27% of the 1,351,400 arrests for drug abuse violations were for sale or manufacture (Maguire and Pastore, 1996, p.432). Also in 1994, 16,197 people were convicted of drug trafficking in US District Courts and 165,430 were convicted in State Courts, for a total of 181,627. (Maguire and Pastore, 1997, p.470) Those numbers have been rising over time.

³ Maguire and Pastore, 1996, pages 470 and 499, respectively.

⁴ Maguire and Pastore, 1996, p.507.

because drug dealers at one level of the distribution network sell to multiple individuals at the level below (Caulkins, 1997). To illustrate, suppose there were five layers of dealers, with importers or manufacturers at the top and retail dealers at the bottom, and suppose that every dealer supplied eight people. Then there would be over sixty times as many retailers and first-level wholesale dealers as there would be dealers in the top three layers of the distribution network combined.

One could address sentencing decisions for each of these layers separately, but as a first pass we simply want to differentiate between sentencing for “high level” and “low level” dealers, with the presumption that high level dealers should receive long sentences but that sentencing of lower level dealers merits some analysis. We could define everybody above retail to be “high level,” but that is problematic for conceptual and practical reasons. Conceptually, first level wholesale dealers are very far from “kingpins” in terms of wealth, power, and amounts of drugs sold. Pragmatically, it is not always easy for the criminal justice system to distinguish retail sellers from the lowest level of wholesale dealers. Hence we lump retail and first-level wholesale dealers together and discuss sentencing of “low-level” rather than just “retail” dealers. Moreover, there is a great deal of cycling between these two levels.

There is enormous heterogeneity in the sanctions these low-level drug dealers receive. About a quarter of those convicted of drug trafficking are sentenced to nothing more than probation.⁵ Yet some receive non-parolable life terms,⁶ and in California there are circumstances under which even a misdemeanor drug conviction must be given a minimum sentence of 25 years to life.⁷ These sharp contrasts in sentencing show up between people possessing more or less than the threshold quantities that trigger

⁵ Maguire and Pastore (1996, p.499) report that one-quarter of those convicted of drug trafficking in state courts are sentenced to straight probation. In Massachusetts, a Continuance Without Finding (CWOFF) is a common disposition for first-time low-level drug dealers in some urban areas. (Will Brownsberger, personal communications, May 3rd, 1997) In New York, the most common dealing charge is a class B felony, which is pled to a class D felony, which is probation-eligible for first-time felons. (Paul Schectman, personal communications, May 2nd, 1997.)

⁶ Michigan has over 200 individuals serving non-parolable life terms for possessing 650 grams or more of cocaine or heroin. For 86% of them, this was their first prison sentence. (Michigan Department of Corrections, 1996)

mandatory minimum sentences, between people possessing powder vs. crack cocaine under the federal mandatory minimum system, and between states that have unusually tough sentencing laws, such as Michigan, and their neighbors, such as Wisconsin, that do not.

Much heterogeneity in sanctions is appropriate because there is a great deal of heterogeneity in the behavior of drug dealers. For example, not all dealers are equally violent. There are “only” about 7,500 drug-related murders in the US each year,⁸ even though at least 1.5 million people have sold an illicit drug at the retail level in the past 12 months.⁹ Thus, in any given year at most one in every two hundred drug dealers resorts to homicidal violence. Similarly, some but not all dealers employ juvenile runners or sell in front of treatment clinics. Some sell only marijuana; others sell heroin and crack. Some dealers are first-time adolescent offenders with no prior record; others are adult, repeat offenders with violent priors.

Unfortunately, as is argued below, the variability in sentences is not well correlated with the variability in culpability. This mismatch violates the fundamental tenet of justice that the punishment should fit the crime. It also represents a missed opportunity to intervene in drug markets in ways that reduce the damage drug dealers impose on society.

Developing more coherent and more effective policies is not an easy matter. Punishing purveyors of black market products is tricky, and conventional models, whether conceptual or mathematical, do not apply. When we lock up a pathological rapist we lock up the rapes, reducing the rate at which the general citizenry is victimized. When we lock up a black market distributor, of drugs or any other commodity, we create a job opening

⁷ Under California’s “Three Strikes and You’re Out” law, a felony conviction for someone previously convicted of two serious crimes generates a sentence of 25 years to life. Under a separate statute, misdemeanor convictions are “promoted” to felonies for individuals on parole. (Greenwood et al., 1994)

⁸ Caulkins et al., 1997, pp.175-179.

⁹The retail value of the cocaine market has been between \$30 billion and \$40 billion between 1988 and 1993 (ONDCP, 1996). Reuter et al. (1990) estimate that a regular (more than once a week) cocaine retailer in Washington DC sold an average of \$4,570 worth of cocaine a month (median was less than \$3,600), and that there were 22 dealers for every 14 full time equivalent dealers. Thus, there are about $(22/14) * \$35B / (\$4,570 * 12 \text{ months/yr.}) = 1,003,000$ retail cocaine dealers. The retail value of all illicit drugs sold in the US is about \$50 billion, so even if street sellers of other drugs sold as much in dollar terms as do cocaine sellers, which is doubtful, there would still be at least $(\$50 \text{ billion}/\$30 \text{ billion}) * 1,003,000 = 1,433,000$ retail sellers.

for someone else and, to a considerable degree, those job openings are filled by replacement dealers (Kleiman, 1997).

However, incarcerating dealers is believed to affect the amount of drugs sold. It makes drug dealing riskier, for which dealers presumably demand greater compensation. To the extent that they do, this raises the price of drugs and, hence, reduces consumption (Reuter and Kleiman, 1986). Enforcement can make dealers more cautious, which should make transactions more difficult to complete (Moore, 1973). Finally, if the incarceration is focused on dealers who are unusually noxious and their replacements are merely average, then enforcement may help reduce the violence, disorder, and other negative externalities associated with drug markets (Caulkins, 1992). However, it is not the case that incarceration incapacitates drug dealing the way it does non-consensual crime.

Hence, to address the important question of how low-level drug dealers should be punished, it is important to start with a clean slate. At some basic level, there are two motivations for punishing criminals. We punish criminals simply because we think it is the just or moral thing to do, and we punish criminals in order to achieve tangible objectives, such as reducing crime. The next two sections of this paper take up the perspectives of justice and efficiency in turn. Drawing on insights developed in those sections, we suggest ways in which sentencing policy toward low-level drug dealers might usefully be reformed.

II. What is the Just Punishment for Low-Level Drug Dealing?

Issues of justice can be extraordinarily complicated. We wish to focus just on the notion that the “punishment should fit the crime,” and within that paradigm we address just two issues. First, is the average level of punishment appropriate? Second, are longer (shorter) than average sanctions being directed at those dealers who are above (below) average in terms of the threat they pose to society?

A. Are We Too Tough on Drug Dealers Generally?

Whether the average sanction imposed on low-level drug dealers is too severe, about right, or not severe enough is a matter for personal values and opinion, but it is useful to compare sanctions for drug selling with those imposed for other crimes.

Relatively speaking, are we tough on drug dealers? The answer depends on how one measures severity.

The minimum time served for a federal conviction for distributing 50 grams of crack cocaine (less than one-millionth of annual US consumption) is ten years, which is also the average time served for murder or non-negligent manslaughter.¹⁰ In New York State, both murder and selling two ounces of cocaine are class A-I felonies; both rape and selling one vial of crack are class B felonies.¹¹ However, the actual time served may be reduced by plea bargaining and, in states that do not have truth-in-sentencing laws, prison “release valves.”¹² For example, in New York someone charged with selling two ounces of cocaine could be prosecuted for an A-I felony, with a minimum sentence of 15 years to life. More likely, he or she would plead to a lesser charge. Even if the charge were reduced just one step to an A-II felony, the sentence would be three years to life. With a three-year lower end of the sentence range, the individual becomes eligible for a six-month shock (“boot camp”) program. Those who complete the program are parole eligible, and 90% are released immediately. So a 15-year to life minimum sentence often results, in practice, in less than a year served.¹³

In part because of plea bargaining and these “release valves” and in part because of the enormous number of drug sales, the expected incarceration time for making a drug sale is only about an hour.¹⁴ This is two orders of magnitude less than the expected incarceration time for a burglary, robbery, or car theft.¹⁵

¹⁰ US annual cocaine consumption is estimated to be 291 metric tons (Everingham and Rydell, 1994), a substantial portion of which is consumed as crack. Maguire and Pastore (1996, p.507) report that the average estimated time served for murder/manslaughter excluding negligent manslaughter is 120 months.

¹¹ Paul Schectman, personal communications, May 2nd, 1997.

¹² Indeed, less than 1% of those in New York Department of Corrections institutions in 1996 (695 of 69,709) were there for class A-I drug felonies. (Schectman handout, page 58 (last page))

¹³ The average stay in the New York prison system for those who go through the shock incarceration program is 222 days, which is the six-month program plus about six weeks to get to the program through intake. All information on the shock diversion program is from Paul Schectman, personal communication, May 2nd, 1997.

¹⁴ Retail drug sales total about \$50 billion. If the average value of a retail sale is \$20, that implies there are about 2.5 billion drug sales a year at the retail level alone. There are about 300,000 people incarcerated for drug selling at any given time, and there are $365.25 \times 24 = 8,766$ hours in a year, so there are about 2.63 billion hours of incarceration served for drug selling each year.

¹⁵ Wilson and Abrahamse (1992, p.377) estimate time served per offense to be 81 hours for burglary, 106 hours for auto theft, and 96 hours for robbery.

Some would justify or criticize our present sentences in terms of the number of violent or property crimes drug offenders commit. If a typical retail cocaine seller committed all of the non-consensual crimes associated with both the distribution and consumption of the cocaine he or she sold in a year, the expected incarceration time would be one to one and a half months (Caulkins, 1996). That is about half the time he or she should expect to serve for selling that cocaine.¹⁶

The expert consensus is that the US today is highly punitive toward drug sellers when compared to other Western industrialized countries (MacCoun and Reuter, forthcoming) or to ourselves fifteen years ago (Reuter, 1992; Reuter, forthcoming). Indeed, the strictness of the Rockefeller Drug Laws in New York State was the subject of a recent Human Rights Watch Report (Human Rights Watch, 1997).

The American public, in contrast, does not seem to think that low-level drug dealers are punished too severely. Survey respondents from the general population prefer punishments for low-level dealers greater than those specified in the federal sentencing guidelines (Maxfield et al., 19__). Similarly, a 1995 Gallup poll found that 84% of the public favored increasing criminal penalties for drug offenders, and only 14% thought law enforcement was doing enough to convict and punish people for the use and sale of illegal drugs (Maguire and Pastore, 1996, p.168).

There are at least three interpretations of this discordance between the wishes of the people and the judgment of the experts. The values of the experts may be systematically more liberal and more lenient than those of the masses.¹⁷ Or, experts may understand things about drug dealing that are relevant to its punishment and that are not widely appreciated. For instance, lay people may not realize how many dealers there are and, hence, may believe each dealer is responsible for a greater portion of the drug problem than is in fact the case. Likewise, lay people may not appreciate the extent to which incapacitation for consensual crimes such as drug dealing is undermined by

¹⁶ Reuter, MacCoun, and Murphy (1990, p.96) estimate that a retail cocaine dealer in Washington, DC in 1987 can “expect to serve 2 ¼ months of prison time as a consequence of a year’s selling”. Nationally, if there are 1,000,000 active and 250,000 incarcerated retail cocaine sellers at any one time, then every year of selling leads, on average, to one-fifth of a year, or 2.4 months, incarcerated.

replacement. Or, the public may be more distressed by aspects of the punishment process, such as pretrial release, than by sentence length, but express that frustration through calls for tougher sanctions.

B. Are We Tough on the Right Dealers?

Whatever the conclusion about whether we are sufficiently tough on low-level drug dealers on average, one might also be interested in how well correlated the heterogeneity in punishment is with heterogeneity in culpability within the class of low-level drug dealers. The short answer is deficiently and perhaps not well at all.

Often sentences are governed primarily by the amount of drug possessed, but amount possessed can be a poor indicator of the importance of the defendant (Caulkins et al., 1997). High-level dealers generally hire others, sometimes called “couriers” or “mules,” to physically possess the drugs the dealer owns and controls. In those cases, the risks associated with possession, including the risks of long sentences, fall on mere employees of the drug distribution system, not on those who own or control the drugs. Weight-driven sentences also create sharp differences in sentence length based on small differences in weight (just below vs. just above a threshold trigger quantity), location (e.g., in Michigan vs. Wisconsin), or type of drug (e.g., powder vs. crack cocaine).

Furthermore, sentences are typically based on the total weight of any mixture containing a detectable quantity of a controlled substance, not on the amount of the drug itself. Thus, possessing 8 grams of pure cocaine is punished less severely than possessing 10 grams of a powder that is only 10% cocaine by weight.

Other reasons why heterogeneity in time served is not well correlated with heterogeneity in culpability are less obvious. Most people charged with drug trafficking plead guilty, presumably to a lesser charge with a shorter sentence. The criminal justice system is spared an expensive trial; the defendant is spared the risk of a very long term. That means that the individuals who get the longest sentences are the ones who refused to

¹⁷ This interpretation is supported by the observation that there is similar disagreement between experts and the public with regard to penal policy generally, not just with respect to drug law violations. (Wilson, 1995)

accept a plea bargain; some of them are people whose roles were so peripheral that they mistakenly believed they would not be convicted in a trial.¹⁸

A similar perversity can occur with federal mandatory minimum sentences. The only way to avoid such a sentence is by offering “substantial assistance” to prosecutors in pursuit of other criminals. This occurs in about 15% of federal mandatory minimum cases (GAO, 1993). In general, larger drug dealers have more information to offer prosecutors than mules or couriers do, so again the longest sentences may fall on some of the least culpable (Schulhofer, 1993).

As mentioned above, prison systems have developed “release valves” to help relieve over crowding. Unfortunately eligibility for a “release valve” may have next to nothing to do with how dangerous the offender is. For example, 32% of those who enter the New York State shock incarceration program fail to complete the program, typically because they cannot handle its structure and discipline. Those who fail must serve their minimum sentence. There is little reason to believe that vicious, professional dealers are more likely to fail and, hence, serve a longer term, than are drug abusers who support their habit through infrequent low-level selling.

Similarly, eligibility criteria for New York State’s work release and Comprehensive Alcohol and Substance Abuse Treatment (CASAT) programs include having no prior history of absconding. Again, vicious but disciplined individuals may serve shorter sentences than others who are less dangerous but who have been less disciplined in the past. More generally, prison officials are motivated primarily by a desire to relieve over-crowding, not by a desire to ensure that the most culpable are held the longest. Even if prison administrators wanted to be selective in whom they released, they do not have ready access to as much information as is available to prosecutors and judges. Official criminal justice histories may give a less nuanced image of how dangerous an individual dealer is than could a community affairs officer from the neighborhood or a local prosecutor.

At one level the inability of the criminal justice system to ensure that the most dangerous dealers serve the longest sentences sparks a sense of outrage. At another, it is

¹⁸ Cohen (1997) describes one such individual.

quite understandable. Time served is determined by decisions made by individuals in many agencies (district attorneys' offices, courts, the prison system, etc.), representing multiple levels of government (city, county, state) and multiple branches of government (police from the executive branch, judges from the judiciary, laws set by the legislature), who often have conflicting objectives (e.g., the police may try to arrest as many people as possible and prison officials may strive to reduce over crowding). The system evolved while processing people who committed violent and property crimes, but an increasing fraction of those in the system are there for the consensual crime of selling drugs. Official records are the primary means of transmitting information across agency and jurisdictional boundaries, but those records carry little of the information that can meaningfully differentiate the merely bad dealers from the truly awful. In some respects the criminal justice system resembles an old country house that has grown over time and, though functional, is awkward.

That the failure to match sanction severity to culpability is explicable does not imply that it should be tolerated. An important collection of policy decisions and interventions are being made in a not particularly coherent manner. The nature of the problem makes clear, though, that it cannot be substantially ameliorated by tweaking rules at the margin. For example, the much-discussed proposal to shrink or eliminate the gap between crack and powder sentences under federal mandatory minimums might mollify those who view the disparity as discriminatory, but it would affect the sentencing of only a very small proportion of convicted low-level dealers. The problem is structural and can be summarized in three points.

- Determining sentences at the state (or federal) level with formulas based on a small set of consistently observable criteria (such as quantity possessed) results in “excessive uniformity” (Schulhofer, 1993) and fails to assign the toughest sentences to the most blameworthy dealers because they overlook important case-specific information.
- High minimum sentences imply that all but the most egregious offenders receive the minimum sentences. They also give prosecutors so much power to induce pleas that injustices can result if there are escape valves controlled by prosecutorial discretion.

- High case volumes make it difficult to examine cases on their individual merits. Coupled with high minimum sentences, they overwhelm the correctional system leading to the development of “release valves” that substantially reduce time served for a subset of those sentenced, and there is little reason to think that the reductions are targeted at the least dangerous or the least culpable offenders.

This discussion of how “just” are the sentences for low-level dealers can be summarized as follows. Whether the average sanction is more or less severe than the sanction for comparable non-consensual crimes depends on how one measures severity and what crimes one thinks are comparable. Experts tend to think the average sanction is too high; the public thinks it is too low. What can be concluded more definitely is that the heterogeneity in sanction severity both within and between states is not well correlated with heterogeneity in culpability. Furthermore, the sources of the disparities stem from the basic structure of the system.

III. What is the Effective Punishment for Low-Level Drug Dealing?

A. Ineffectiveness of “Muddling Through”

When it comes to punishing low-level drug dealers, the criminal justice system has been, to use Lindblom’s term, “muddling through” (Lindblom, 1959). As we have seen, that approach has not produced a *just* system of punishments, at least by our definition of what is just. Past research has shown that it has also failed to produce a system that is *effective* at achieving tangible policy objectives. Our primary interest is not in revisiting these criticisms of effectiveness but in suggesting how the system might be improved, so we will only sketch the broad outlines of those arguments.

Since the early 1980s, the US greatly increased the number of dealers incarcerated, both in absolute terms and relative to any growth in the market, but there is little evidence this reduced drug use or drug-related crime. During the period when policy was becoming progressively tougher toward dealers, trends in drug use and drug-related violence were not monotonic. During the late 1980s, drug-related violence grew, but drug use fell. In

the 1990s, violence fell, but use among youth rose while overall prevalence held relatively steady. So depending on the time period and the measure selected, one can find a positive or negative correlation between sentencing stringency and drug-related outcomes. Reviewing this evidence, Reuter (1997, p.267) concludes that “increasing toughness has not accomplished its immediate objectives of raising price and reducing availability.”

Similar conclusions are reached from other perspectives. Model-based studies of the cost-effectiveness of different interventions have concluded that expanding the sort of drug enforcement the US now pursues would reduce drug use and drug related crime, but it would achieve those benefits only at great cost (e.g., Rydell and Everingham, 1994; Caulkins et al., 1997). Many factors contribute to this conclusion, including replacement of incarcerated dealers, markets’ ability to displace and adapt, inability to target long sentences on the right dealers, and the high public cost of incarceration. These studies conclude that other interventions would be substantially more cost-effective at reducing both drug use and drug related crime. Furthermore, for other types of crime, it appears that well-designed sentencing policies can reduce crime much more cost-effectively than can some current mandatory sentencing policies. (Greenwood et al., 1994)

Given that the past approach of muddling through has created a system which does not seem to be either just or particularly effective, one might be tempted to try to approach the problem from a more comprehensive and rational framework.

B. The Rational Approach

To approach the problem of sentencing low level drug dealers systematically, one must begin by acknowledging that there are multiple relevant goals, and that no single sentencing policy is best with respect to every goal. To illustrate, one goal might be to reduce drug use. Another could be minimizing the cost to the taxpayers of incarcerating drug dealers. Making sentences tougher might help with respect to the first goal but be counter-productive with respect to the second. As another example, the deterrence power of a fixed number of prison cells is greater if they are used to give a larger number of shorter sentences than if offenders are subject to a lower probability of getting a very long sentence. I.e., certainty matters more than severity (Blumstein and Nagin, 1977; Nagin,

forthcoming). However, there is evidence that any spell of incarceration, no matter how long, can reduce one's potential earnings in the legal job market (Freeman, 1995). Thus giving many people short sentences might do more to reduce drug use, but it might also have a greater adverse impact on the number of dealers who can find productive work in legitimate enterprises.

Not only are there multiple, conflicting goals, but there also is no universal rule for weighting or combining them into one summary measure. Some people might care a great deal about reducing drug use. Others might care more about reducing drug-related crime. Still others might value most highly a reduction in our reliance on incarceration or the number of minority males who are disenfranchised by receiving a felony drug conviction.

Adding to the complexity, there are alternative enforcement policies, and the choices go beyond simply picking an average sentence severity. As a society we could arrest more or fewer drug dealers by expanding or contracting the intensity of drug law enforcement, or we could change the procedures for determining which dealers get the longest sentences.

To help order this complexity, one could imagine creating a matrix with a row for each sentencing alternative and a column for each outcome or goal. The entries of the matrix would indicate how effective each alternative is at achieving each goal. Figure 1 shows an example of such a matrix.

Figure 1. Matrix of Sentencing Options and Outcomes

	Public Outcomes					CJS Effects			Justice
	Use by Current Users and Related Problems	Initiation of New Users	Harm to Dealers and their families	Drug-related Crime and Violence	Community Effects (Other than Crime and Violence)	Cost of enforcement /prison	Number of Trials	Ability to prosecute higher level dealers	Public sense of justice about system
B1 Status Quo									
B2 Status Quo w/ half as many arrests									
B3 More certain but shorter sentences									
B4 More certain and more severe									
B5 Focus on recidivists									
B6 Focus on amount sold									
B7 Focus on context of dealing									

Descriptions of Sentencing Options

B1: Status Quo: A mixture of sentences from 0 (if the case is not prosecuted or the sentence is probation) to 5 years or more, depending largely on prior drug convictions and the amount of drugs possessed at the time of arrest. Currently, half those arrested are convicted. Of those, 24% received a sentence of probation, 25% jail, and 51% prison.

B2: Status Quo with Half as Many Drug Arrests: Cut enforcement in half by reducing all types of drug arrests by 50%. No change in the type of arrests made, the probability of prosecution given arrest, the probability of conviction given prosecution, or the distribution of sanctions given conviction.

B3: More Certain but Shorter Sentences: Increase by 50% the number of people incarcerated by increasing prosecution given arrest and reducing the probability of probation given conviction. Reduce length of longer sentences by enough to hold constant the number of people incarcerated.

B4: More Certain and More Severe Sentences: Two to five year sentences for everyone convicted of drug selling who does not offer substantial assistance in developing a case against someone else.

B5: Focus on Recidivists: First-time offenders would receive probation, a suspended sentence, or a diversionary punishment that does not create a criminal record. Subsequent convictions would lead to sentences comparable to those given today, with longer sentences for those with the longest records.

B6: Focus on Amount Sold: Sentences would increase sharply in the amount possessed and/or amount found to have been sold previously. E.g., sanctions for cocaine might be one week for a gram or less, two months for 1-10 grams, one year for 10-100 grams, five years for 100-1,000 grams, and more than five years for more than a kilogram.

B7: Focus on Context of Dealing: The base sentence for drug dealing would be no more than six months for low-level selling, but there would be significant (e.g., five year) add-ons for selling while in possession of a firearm; employing a minor in the drug trade; exercising violence in the course of drug dealing; selling within a certain distance of a school or drug treatment clinic; open and notorious taking over of a neighborhood; etc.

Obviously one could refine Figure 1 by adding more rows and/or columns. Likewise, one could imagine composite policies that combined the themes of two or more of the given rows. Furthermore, one would like to have more detailed descriptions of what the various rows and columns mean to ensure a common, unambiguous understanding. The matrix in Figure 1 is meant to be illustrative, not definitive.

Theoretically, experts could fill in such a matrix with descriptions of the likely impact of each sentencing alternative on each outcome. Then every decision maker, whether a legislator, a voter, or a member of a sentencing commission, could draw inferences from the completed matrix. For example, if the decision maker cared most about one or a few goals (columns), he or she could support whatever sentencing option (row) was judged to be most effective at achieving those goal(s). Or, if one row were inferior to another row with respect to every attribute about which the decision maker cared, the decision maker could rule out the sentencing policy represented by the first row.

Unfortunately, using such a matrix is not likely to be a practical way to compute the optimal policy. Distressingly little is understood about how drug markets respond to sentencing changes, so there is enormous uncertainty concerning many if not most of the cells in the matrix, particularly those concerning how interventions would affect behavior outside the criminal justice system (e.g., levels of drug use and levels of drug-related crime) as opposed to inside (e.g., numbers of trials, people incarcerated, etc.).¹⁹ There are methods for dealing with such uncertainty. As posed, the problem of choosing a sentencing strategy is a classic multi-attribute decision problem (Keeney and Raiffa, 1976). However, the standard tools are unlikely to be useful in this context because there are too many decision makers. Applying the standard tools is an elaborate and time-consuming

¹⁹ The extent of the uncertainty was highlighted by having a group of experts largely drawn from the Drugs and Addictions Working Group of Harvard University's Mind/Brain/Behavior Interfaculty Initiative individually fill in the matrix and then compare cell entries. It was rare for the group to hold anything close to a consensus view on the impact any given policy would have on any particular outcome. The extent of these differences is all the more striking given the nature of the group, which, by virtue of repeated meetings over the course of several years, had developed consensus on a number of other difficult issues, as is reflected in other chapters of this volume. The disagreement also highlights the need for more research on how drug enforcement affects drug markets. As Reuter has observed (1997), the US spends hundreds of millions of dollars trying to evaluate and improve the effectiveness of the few billion dollars it spends on drug treatment and prevention, but only a few millions of dollars studying or evaluating the much greater level of resources committed to enforcement and incarceration.

process. If there were just one or a few decision makers, it might be worth the investment. However, there are literally thousands of stakeholders, each with a diffuse interest, and it is not practicable for each to work through the exercise of identifying weights, quantifying uncertainty, eliciting utility functions, and so on.

A more fundamental problem, though, may be with the perspective Figure 1 encourages one to adopt, both with respect to jurisdiction and with respect to scope within the criminal justice system. The questions raised by Figure 1 implicitly adopt a state-level perspective because they focus on formal sentencing policy, which is now made primarily by legislatures and sentencing commissions. However, any given policy could have different effects in different communities and at different stages in an epidemic of drug abuse. I.e., the entries in the matrix may vary across communities and over time.

Furthermore, the figure focuses attention on the question of how long a convicted dealer should be incarcerated, but that decision is just one of a set of policies that collectively determine which dealers will be punished and how. Policies of the police, prosecutors, prisons, probation, and parole also matter.

These observations might be summarized as follows. It is common to address the question of what should be done with low-level drug dealers by thinking broadly in jurisdictional terms (i.e., state-level policies) but narrowly within the overall flow of criminal justice system processing (i.e., focusing on sentence given conviction). Perhaps just the opposite perspective would be more appropriate, thinking in terms of smaller jurisdictions but encompassing arrest, prosecution, and the adjudication and punishment processes more generally, not just sentencing.

We will explore this proposition below in two ways. First, we will elaborate on some of the disadvantages of the “state level, sentences for those convicted” perspective relative to a “local level, entire punishment process” perspective. Then we will propose a mechanism for shifting decision making over sentencing from the state level to a more local level. One could argue that the greatest potential for improving the current system is associated not with the “state” to “local level” shift but with moving from the “sentence given conviction” to the “entire punishment process” perspective. Indeed, we briefly mention a few such opportunities below, but defer elaboration of those to another time.

Given the earlier discussion of heterogeneity in the destructiveness of dealing behaviors, the analysis below will assume that an ability to selectively target sanctions is desirable. Giving tougher sanctions to the worst offenders is not only just, but also pragmatic; through both incapacitation and deterrence, it has the capacity to push dealing into less destructive forms even when it cannot suppress dealing altogether.²⁰ In particular, we have in mind that some small fraction (perhaps 5-10%) of low-level dealers stand out from the rest as unusually vicious and that on both justice and efficiency grounds, it would be desirable to target those dealers with unusually long prison terms. By definition, selectivity implies that the other low-level drug dealers, those who are not unusually vicious, would be treated more leniently. This philosophy has something in common with the 1980s priority prosecution program for special violent offenders, (Moore et al., 1984) and is appealing in view of indications that recent successes in crime control stem from the use of community policing and community prosecution to target the most dangerous individuals.

Some might wonder whether local agencies know who the most dangerous offenders are, but acquiring such knowledge is a central objective of community policing and recent interventions show it is eminently feasible. For example, the Boston Gun Project (Kennedy, 1997) demonstrated that the identities of the most violent offenders were known to the police so well that the project team could literally meet with them and their gangs. The characteristics that make such individuals a great concern, such as their repeat serious offending, also make them vulnerable to criminal justice intervention. Kennedy (1997, p.461) describes the “enormous sanctioning power that the enforcement community could bring to bear against particular gangs and gang members” through cooperation of a collection of agencies including local police, federal agencies, parole, probation, youth outreach workers, school police, and others. Conspicuously absent from Kennedy’s list is formal sentencing, which is seen as relatively unhelpful in its present form. Our proposal is intended to help make sentencing responsive to how dangerous the

²⁰ This parallels the ability of interdiction to push smugglers from one route or mode of shipment to another even though it cannot “seal the borders” (Caulkins, Crawford, and Reuter, 1993).

community perceives offenders to be so that it can play a greater role in responding to the concentration of serious offending among a minority of all offenders.

C. Problems with a “State Level, Sentence Given Conviction” Perspective

In theory state-level sentencing policy can focus severe sanctions on the most destructive dealers by giving short sentences for dealing itself and augmenting those sentences with significant add-ons for particularly destructive forms of dealing. However, the results of past efforts to write such a focus into sentencing policy have been discouraging. For example, in Massachusetts, the School Zone Statute imposes a mandatory two-year sentence on those caught dealing within 1,000 feet of a school.²¹ That sounds like a useful distinction until one realizes that most parts of most urban areas are within 1,000 feet of a school, so the statute does not achieve much in the way of focusing. In New York State, a similar statute raises the felony level by one for selling to someone under the age of 18 near a school. (For example, a quantity of drugs that would normally be charged as a B felony would elicit an A-II felony charge.) However, minors who buy drugs are not likely to turn in their supplier, and if a police officer poses as a sixteen year old, the charge would be “attempted” sale to a minor near a school because the police officer is not actually under the age of 18. Attempted felonies are charged at one level below the level for completed offenses. So attempted sale to a minor near a school would be charged at the same level as a completed sale generally is. As a result, the New York State school zone statute has almost no effect on enforcement or sentencing.²² Even add-ons for possessing a firearm while dealing may be less useful than it would at first seem since dealers often keep their guns in their apartments instead of on their persons. Inasmuch as the law is what deters dealers from carrying their guns, the law might be reducing the incidence of spontaneous lethal violence, but it has not succeeded in

²¹ Massachusetts General Laws, C.94C, s.32J.

²² Paul Schectman, personal communications, May 3rd, 1997.

“disarming” dealers if they can go back to their apartments at any time and retrieve a gun.²³

The need for, and difficulty of, identifying and targeting particular behaviors is complicated by the interaction between behaviors and contexts. A policy that is effective at targeting long sentences at the worst dealers in one community or at one point in time might not achieve the same result elsewhere. A rural area might be well-advised to protect its children by enhancing sanctions for selling drugs within 1,000 feet of a school, but the same statute could have absolutely no ability to target the worst dealers in an urban area where every street corner is within 1,000 feet of a school. The urban area may prefer to focus sanctions on dealers who operate within 500 feet of a school or perhaps discard a distance criteria altogether and focus instead on those who employ youth as runners or look-outs, regardless of the location. One neighborhood may have particular problems with street corner markets and want to punish public dealing severely; the same policy could be perverse in a neighborhood where crack houses are associated with more violence than are street markets.

Furthermore, drug markets and market behaviors are constantly evolving, so the type of dealing that constitutes the gravest threat to a community may change over time. Ideally policy should be able to respond to these changes by quickly increasing and decreasing sanctions for particular behaviors as they become more or less problematic. Unfortunately, these changes can occur more often and more quickly than state legislatures can redesign sentencing statutes. Also, although legislatures have increased sanctions on certain behaviors as they become problematic, they have not demonstrated a similar ability to reduce sanctions on behaviors as they become less problematic. This asymmetry tends to drive up average sentence length over time, thereby undermining efforts to selectively target the worst offenders.

²³ Preventing dealers from carrying guns may also increase their vulnerability to robbery, and both retribution for past robberies and preemptive acts of violence by dealers to establish a reputation that deters robbery may be among the more common types of violence for dealers.

D. Advantages of a “Local Level, Entire Punishment Process” Perspective

This inability to achieve the desired focus through mandatory sentences triggered by statutory provisions can be contrasted with the large number of opportunities for useful reform suggested by a “local level, entire punishment process” perspective. We focus below on a suggestion for how sentencing decisions might be moved to the local level, but first briefly sketch possibilities arising at other stages of the punishment process.

Arrest

Police have considerable potential to focus punishment on particular subsets of dealers by focusing arrests on those groups. Arresting as many low-level dealers as possible is not the best strategy. Large numbers of arrests force the rest of the criminal justice system into mass production mode, making it harder to make distinctions among different types of dealers. If the police arrested fewer people but increased the proportion who were particularly vicious, that would go a long way toward achieving the desired targeting even if the rest of the system failed to reform its practices.

Prosecution

Current tough sentencing laws give prosecutors considerable power to induce defendants to plead guilty to some lesser charge. That power is not typically used, however, to differentiate unusually vicious dealers from run-of-the-mill dealers. The crush of heavy caseloads encourages setting plea policies based on the simplest facts, such as “First-time offenders charged with a class B felony will be given the chance to plead to a class D felony.” A superior strategy might be to invest more prosecutors’ time on each case, talking with police about the defendant, examining past arrests to see if they were overcharged misdemeanors or reflected true felonious behavior, etc. Then for the subset of charged dealers who seem to pose the gravest threat to the community, the prosecutor might offer only the chance to plead to a class C felony, not a class D.

This would increase case processing time, require better information retrieval systems, and increase the number of trials. Applying greater discretion requires greater resources, but the cost of those resources would be small compared to the potential

benefit of improving the effectiveness of drug enforcement. The situation is similar to the bumper sticker slogan, “If you think education is expensive, try ignorance.” If doubling case processing expenditures improved the efficiency of incarceration by even 10%, in the sense of being able to use 10% fewer prison cells to keep the same number of particularly vicious offenders behind bars, the same level of public safety could be achieved at less cost to the taxpayers.²⁴

Pretrial Release

One source of public mistrust of the current system is the observation that drug dealers arrested today are often back out selling on the street tomorrow. That can happen when arrest does not lead to incarceration. It can also happen if arrest leads to a very long prison sentence – if that sentence is imposed after a period of pretrial release. Judges can make pretrial release conditional on a variety of behaviors, not just posting bail. This discretion might be used more aggressively than is currently done. For example, it could be a routine condition of release that arrestees not enter the neighborhood where they were arrested or any other known dealing locations.

Community Supervision

Another source of public frustration with current processing of convicted drug dealers is that those sentenced to probation can resume their dealing activities with relative impunity. Coerced abstinence (discussed elsewhere in this volume) responds to the observation that a large proportion of the cocaine and heroin used in the US is consumed by people who are nominally under criminal justice supervision. In particular, it responds by using a technology (drug testing) to closely monitor behavior between contacts with criminal justice system personnel (e.g., probation officers). One could imagine a parallel approach to controlling drug dealing, and criminal activity more generally.

A distressing proportion of crimes – including drug dealing – are committed by people on probation or parole. Technology could be employed to monitor the behavior of

²⁴ ONDCP (1993) reports that in 1991, drug control spending by state and local governments for corrections was \$6.827 billion, which is more than ten times the \$649 million that was spent on

these individuals between contacts with the criminal justice system. For example, those under supervision could be required to wear a transponder that pinpoints their location at all times to within a few meters. This would facilitate verification of compliance with positive terms of release, such as attending drug treatment or maintaining employment, and enhance enforcement of prohibitions against entering known drug markets. The system could even include an alarm that sounds if the individual entered a proscribed area. If crimes were logged into a geographic information system, that system could list all probationers and parolees who were in the area of the crime during the time window when the crime is known to have occurred.

There are clearly many opportunities for reforming the criminal justice system in ways that would improve the punishment and control of low-level drug dealers by adopting the “local level, entire punishment process” perspective. In the interests of brevity, we will detail only one – a method for moving discretion over sentencing decisions to the local level.

IV. Proposal for Shifting Sentencing Decisions to the Local Level

One possible reform of the current system would be to shift sentencing decision making power away from state (and federal) level institutions (legislatures, sentencing commissions, and prison authorities who implement “release valves”) to the criminal justice system operating at the local level. We stress the generality of the term “criminal justice system” in the latter option. We are not advocating a return to the old system of judicial discretion, but rather envision a partnership of judges, prosecutors, and police working together to solve the problem of identifying and targeting those low level drug dealers who are the most destructive to their communities.

Such a shift is not without its disadvantages, so before describing one model of how such a system might work, it is important to think through other desirable characteristics of a system for sentencing low-level offenders. The ability to target long

prosecution and legal services related to drug control.

sentences at the most heinous offenders is clearly an important characteristic and may even be the most important characteristic, but it is not the only one.

A. Desirable Characteristics of An Approach to Sentencing Low Level Dealers

In addition to the capacity to identify and target behaviors that are particularly noxious in a given context, one would like a sentencing system to be manageable, to not violate norms of equity, to send a clear warning for purposes of deterrence, and to give those making sentencing decisions an incentive to consider the opportunity cost of giving out long sentences. In this section we contrast the current approach with the alternative of local criminal justice system control with respect to these four characteristics.

Manageability

In order for a government entity to use policy to achieve ends the public desires, at least three conditions must hold. First, the government entity must be cognizant of and responsive to the public's desires. Second, the policy must actually be implemented. Third, implementing the policy must have the expected desirable effects.

It is not clear whether moving sentencing decisions to the local level would make them more or less responsive to the public's desires. State legislators are elected, but so are most prosecutors and some judges. Law enforcement officials are generally not elected, but neither are sentencing commissions, and both are fairly responsive to elected officials.

It seems likely, however, that policies devised by the local criminal justice system would be more likely to be implemented simply because the local criminal justice system plays the dominant role in implementing sentencing policy. (Prison release decisions would be the one aspect not directly under their control.) In contrast, it is not uncommon to hear of a state legislature's intentions being thwarted by the actions of the local criminal justice system. California judges ignoring prior convictions in order to avoid triggering a third strike sentence of 25 years to life is a prime example.

In terms of manageability, the greatest advantage of local control over sentencing policy for low level drug dealers may be a greater ability to predict the consequences of

policy changes. It would not be easy for a local criminal justice system to predict how drug use and selling in its community would respond to a policy change. Predicting statewide outcomes would be even harder, however, because it requires not only understanding effects at the community level, but also achieving that level of understanding for a large number of different communities and somehow “averaging” the different effects.

Equity

Expanding local discretion raises concerns with accountability and potential abuse of power. There are at least three reasons why state-level decision making is not as vulnerable to abuses. Policies are not made on a case by case basis, policies must be defended in public statements or documents, and departures from routine behaving, such as variations from presumptive guidelines, must be justified. Unless a system that involves local discretion has these characteristics, it may be inferior with respect to equity concerns.

Clear Deterrent Signal

One might at first expect state-level decision making to have the greatest potential to communicate a clear and credible threat to criminals, but plea bargaining and prison release valves can make the actual time served much less than the statute would predict, undermining the deterrent effect. Furthermore, even though criminals may respond to the messages they hear, criminals do not necessarily follow legislative actions closely, so street lore concerning sentencing policy is not always be up to date or accurate.

Determining policy at the local level risks sending mixed messages because the policies are geographically fragmented. However, many low-level dealers operate within a relatively small geographic area, and local police can directly communicate the threat of tough sentences to offenders. For example, part of Boston’s sharp decline in youth homicides has been attributed to police confronting gang leaders and threatening to come down hard on whichever gang was the first to break a truce.

Avert a Tragedy of the Commons

One concern with increasing local discretion is that prison costs are borne by the entire state, not just a local community. This creates the potential for a tragedy of the commons, in which every community has an incentive to label all of its dealers as particularly dangerous and send them to prison at little cost to themselves but great cost to the rest of the state. To a significant degree this problem already exists even with sentences set at the state level because charging decisions are made locally. Also, to the extent that a local community is reluctant to have its own people sent to prison for long periods of time, local control might moderate sentence length. Nevertheless, the problem of harmful local incentives to ignore costs that can be shifted to a common, shared cost bearer could conceivably be even worse with local control.

An economist's answer might be to have each community pay for its share of prisoners in the state system. However, that could generate some of the same inequities between need and ability to pay that occur with public schools financed predominantly by property taxes. Indeed, Brownsberger and Piehl (1997) have shown just how concentrated the neighborhoods of incarcerated drug dealers are in urban poverty areas. An alternative would be to assign a "budget" limiting the number of people each community could have in prison for low-level drug dealing at any given time. That too might be too radical a change. A more mundane solution would have a periodic comparison of what proportion of dealers each prosecutor's office treats as particularly vicious to legislated targets concerning those proportions. Individual cases or criteria used to determine what constitutes a vicious case would remain a purely local decision.

Summary

Giving local officials control would likely be superior to the current, state-level approach with respect to ability to target long sentences on the most dangerous offenders and the ability to adapt policy to spatial and temporal variation in the nature of the drug problem. It offers some advantages with respect to being manageable and being able to communicate a clear deterrent message. The biggest concerns pertain to equity and the possibility that every locality will have an incentive to label all of its offenders as deserving

long sentences in (state funded) prisons. However, the current system does quite badly on those dimensions already, so it is not clear that local control would be any worse.

B. A Proposed System

Since giving local criminal justice officials more control seems promising, it is worth asking how a sentencing structure that was respectful of these concerns would operate? And how much of the values that have led the Congress and a number of our states to sentencing guidelines and even mandatory minimum sentences would be sacrificed? A hard look suggests that we can design a system that preserves much of the benefits of recent sentencing changes without their enormous costs.

The four primary objects of guideline systems designed to limit judicial discretion and sentencing are these. They are intended to prevent unfairness and bias in the different treatment by two judges of people who are morally and practically the same — i.e., to prevent horizontal inequality. They are designed, through the elimination of parole that generally accompanies them, to obtain truth in sentencing — i.e., an actual sentence which corresponds closely to the sentence announced by a judge. They are intended to guarantee that a high level of thought and information is brought to bear in deciding on a sentence. Finally, they are intended to guarantee that the precise threat for a particular action is made clear in the hope of maximizing the deterrence that comes with punishment. When high mandatory minimums are imposed on the sentencing structure by the legislature, an additional purpose is obviously to convey the legislature's view of the seriousness of the offense.

The price of pursuing these purposes is inevitably a reduced capacity to recognize variations based on the differing life histories of different defendants. Disagreement about the moral significance of such factors, which have been ruled out by guidelines or legislative sentences, makes the price less than it might seem. But another cost has been ignored. In reducing greatly the way sentences can vary with individual characteristics, the state and federal-wide guidelines systems and the mandatory sentences have also reduced desirable variation of sentence which depend upon the differing situations two communities may face or the same community may face at two different times. And the

structure of uniform sentences across a state prevents prosecutors and police from using the threat of more severe punishment to focus enforcement efforts strategically on particularly dangerous groups or individuals.

How can we respect most of the values sought in the guideline systems without these latter costs? The answer is straightforward: we can design a system that gives judges greater discretion but simultaneously gives the local prosecutor the ability to discourage judges from using that discretion to give lenient sentences to individuals who meet the local community's definition of what constitutes an unusually destructive dealer. The system would work like this.

The legislature or a sentencing commission in the state (or, for the federal system, in Washington DC) would define two ranges of allowable sentences. The tougher "A" range would apply in jurisdictions where "community sentencing" was in effect to individuals who met the community's definition of being an unusually destructive dealer. The "B" range, which applied in all other cases, would be substantially broader than the range common in jurisdictions with determinant sentencing today. In particular, the lower end of the allowable range would be reduced; sanctions for typical dealers should be modest enough to preserve a sharp differential between sanctions for typical dealers and those for unusually destructive dealers.²⁵

The "A" range would be narrower and would have a higher minimum sentence than the "B" range. The minimum sentence could be set aside where the defendant had provided needed information. Finally, the legislature or sentencing commission would specify an upper bound on the proportion of charged dealers one would expect to meet the criteria of committing "unusually destructive" dealing. This bound would help alleviate the tendency for local prosecutors to overuse expensive prison resources that are funded by state, not local, tax dollars.

The legislature or a sentencing commission would also specify the culpability factors which a smaller jurisdictional unit might consider relevant in defining aggravated dealing for purposes of the "A" range. The list of factors might be quite long, including:

the vulnerability of the customers sought, the danger of the drug, the amount of the drug, the violence or dangers of violence associated with the drug market, the likelihood that severe punishments in the particular location would reduce the availability of drugs, the effect on neighborhood life of the dealing, the impact on the neighborhood of drug sentences, and more. Then, the legislature would announce that the narrower, more severe, “A” sentencing range would apply to defendants who met the criteria of being unusually destructive in any prosecutorial jurisdiction where “community sentencing” was in effect.

For these purposes, “community sentencing” would mean that the District Attorney or his representatives had met with police and community groups from the neighborhoods or towns within his jurisdiction and discussed their views as to appropriate criteria for sentencing and that he had followed these meetings with a written policy statement as to the effect he believed should be given to each of the culpability factors (a statement that would be readily available to voters).

Note that the district attorney would have a strong incentive to establish community sentencing; without it, he would not have a “stick” comparable to mandatory minimum sentences with which to induce cooperation. However, the fact that publicly announced criteria would have to be met for a dealer to be defined as unusually destructive would limit the prosecutor’s ability to wield this heavy stick against defendants who played only a peripheral role in the drug distribution system. This would ameliorate the problem of minor players who do not have useful information to offer being perceived of as being uncooperative and receiving very long sentences.

The local judge could set sentences anywhere within the broad “B” state-wide sentencing requirements in jurisdictions without community sentencing. Where community sentencing was in effect the narrower “A” ranges would be the presumptive guidelines for defendants who the prosecutor argues meet the local definition of being unusually destructive. The guidelines would be presumptive, allowing the judge to depart if she gave a written reason. (One valid reason would be that the prosecutor was trying to

²⁵ As Bentham (1843) observed, “The great inconvenience resulting from the infliction of great punishment for small offenses, is, that the power of increasing them in proportion to the magnitude of the

classify a larger proportion of defendants as unusually destructive than the legislature defined as being a reasonable upper bound.) However, public pressure would lead the judge to give very serious attention to the prosecutor's recommendation. Likewise, if the prosecutor's argument and judge's assent to that argument became part of the defendant's official record, that information could be available to prison officials deciding who should be eligible for early release programs.

The result of this system would be some, but limited, differences between two prosecutorial jurisdictions. It would also be different punishment schemes at different times within the same jurisdiction. But the basis would be stated in advance with a clarity that reduced substantially the chance of bias in individual cases by particular judges or prosecutors. The threat of punishment would be made clear for maximum deterrence but focused where the community wanted it. The public would understand the truth about the sentence being imposed. The sentence would be based on thought and information reflected in an explanation made public. The result might or might not be more severe sentences than those imposed at a state level. That would depend upon the views of the people in the jurisdiction about different types of drug dealing.

VI. Summary and Recommendations

Punishing low level drug dealers is an important policy issue, but the current system evolved in a haphazard manner into one that is neither particularly just nor particularly effective. The remedy is not likely to be found in modifying state laws and guidelines mandating what sentences to give convicted defendants. Standard considerations (weight or type of drugs, prior record, etc.) do not adequately differentiate between typical and unusually vicious dealers, and that deficiency cannot be remedied by tinkering with drug statutes. Legislators attempting to write algorithms into statutory law that differentiate the worst dealers from the average dealers is a grievous example of bureaucratic micromanagement by people who are not experts. The true experts at what

offense is thereby lost.”

constitutes a particularly vicious dealer must reside at the local level because behaviors that are vicious in one community and time may not be as problematic in another.

The remedy is more likely to be found by looking beyond sentencing decisions (to include, e.g., decisions about whom to arrest and prosecute and about how to control those not incarcerated) and by moving discretion over sentencing decisions to the local level. Given differences in drug problems between communities and over time, local control offers greater potential for targeting the most severe sanctions on the most destructive forms of dealing.

We propose one system (“community sentencing”) for achieving such local control without reverting to the old system of pure judicial discretion. This system could be accomplished by implementing the following:

- Legislatures should allow local jurisdictions to apply tougher, tighter sentencing guidelines to the subset of dealers in their jurisdiction who meet that jurisdiction’s definition of “unusually destructive” patterns of dealing. To do this they would: (1) specify factors that a smaller jurisdiction could consider in designing community sentencing policies, (2) specify what the narrower guidelines are, and (3) specify an upper bound on the proportion of individuals who might be expected to be “unusually destructive”.
- Legislatures should make the primary or default policy (“B” policy) be indeterminate sentencing for low-level dealers with ranges broad enough to permit departures either above or below the modal sentence.
- Prosecutors wishing to pursue a community sentencing model should consult with police and other local representatives and produce a written policy statement describing how factors from the specified list would affect prosecution decisions.
- Prosecutors should argue for tougher sentences for those individuals who meet the local definition of being “unusually destructive” up to the proportion set by the state legislature.
- Judges should sentence under the tougher policy “A” guidelines when prosecutors ask for that as long as the proportion of such requests is within the bound set by the legislature.

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