



Sentencing And Sentencing Guidelines

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Background

A sentence is a formal judgment pronouncing a specific punishment to be imposed for the [CONVICTION](#) of a crime. It may involve the payment of a fine, community service, [INCARCERATION](#), or, in capital offenses, the death penalty. It also may consist of a term of [PROBATION](#) or [PAROLE](#) (although parole has been abolished in many states).

Sentences may be meted out directly following the entry of a verdict or at a "sentencing hearing" scheduled for a later date. In the interim, prosecutors prepare a "sentencing report" which advises the court of the defendant's prior criminal record, aggravating or [MITIGATING CIRCUMSTANCES](#), and other information about the [DEFENDANT](#) that may assist the court in deciding an appropriate punishment.

There have been concerted efforts over the years to standardize the approach toward sentencing, particularly in [FELONY](#) offenses, and to diminish judicial discretion in sentencing. These efforts reflect a vacillating but recurring perception by lawmakers and the public at large that arbitrary or discriminatory practices may interfere with fair and just sentencing in certain cases or for certain crimes.

Types of Sentences

Listed below are the types of sentences imposed:

- A concurrent sentence is served at the same time as another sentence imposed earlier or at the same proceeding.
- A consecutive (or cumulative) sentence occurs when a defendant has been convicted of several counts, each one constituting a distinct offense or crime, or when a defendant has been convicted of several crimes at the same time. The sentences for each crime are then "tacked" on to each other, so that each sentence begins immediately upon the expiration of the previous one.
- A deferred sentence occurs when its [EXECUTION](#) is postponed until some later time.
- A determinate sentence is the same as a fixed sentence: It is for a fixed period of time.
- A final sentence puts an end to a criminal case. It is distinguished from an interlocutory or interim sentence.

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- An indeterminate sentence, rather than stating a fixed period of time for [IMPRISONMENT](#), instead declares that the period shall be "not more than" or "not less than" a certain prescribed duration of time. The authority to render indeterminate sentences is usually granted by [STATUTE](#) in several states.
- A life sentence represents the [DISPOSITION](#) of a serious criminal case, in which the convicted person spends the remainder of his or her life in prison.
- A mandatory sentence is created by state statute and represents the rendering of a punishment for which a judge has/had no room for discretion. Generally it means that the sentence may not be suspended and that no probation may be imposed, leaving the judge with no alternative but the "mandated" sentence.
- A maximum sentence represents the outer limit of a punishment, beyond which a convicted person may not be held in custody.
- A minimum sentence represents the minimum punishment or the minimum time a convicted person must spend in prison before becoming eligible for parole or release.
- A presumptive sentence exists in many states by statute. It specifies an appropriate or "normal" sentence for each offense to be used as a baseline for a judge when meting out a punishment. The [STATUTORY](#) presumptive sentence is considered along with other relevant factors (aggravating or mitigating circumstances) in determining the actual sentence. Most states have statutory "presumptive guidelines" for major or common offenses.
- A straight or flat sentence is a fixed sentence without a maximum or minimum.
- A [SUSPENDED SENTENCE](#) actually has two different meanings. It may refer to a withholding or postponing of pronouncing a sentence following a conviction or it may refer to the postponing of the execution of a sentence after it has been pronounced.

Factors Considered in Determining a Sentence

Judges, not juries, determine punishments for a crime (in [CAPITAL PUNISHMENT](#) cases, the jury usually decides whether to recommend death or life in prison).

The Eighth Amendment to the U. S. Constitution made applicable to the states by the Fourteenth Amendment provides that "Excessive [BAIL](#) shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In addition to the sentencing prohibitions contained in the Constitution, Title 18 of the United States Code, Part II (**CRIMINAL PROCEDURE**), Chapters 227 (Sentences), 228 (Death Sentence), and 232 (Miscellaneous Sentencing Provisions) also govern sentencing in federal courts. Similarly, state court sentencing procedures are governed by state laws and constitutions as discussed below.

Most crimes are specifically enumerated in constitutions or statutes, and the provision that identifies the specific crime will also identify the appropriate punishment. For example, a statute may read, "Violation of this statute constitutes a [MISDEMEANOR](#), punishable by a fine not to exceed \$500 or imprisonment not to exceed 30 days, or both." Given this range of potential punishment, a judge will then consider certain "aggravating" or "mitigating" circumstances to determine where along the prescribed spectrum a particular criminal's punishment should fall. Common factors considered by judges include:

- Whether the offender is a "first-time" or repeat offender
- Whether the offender was an [ACCESSORY](#) (helping the main offender) or the main offender
- Whether the offender committed the crime under great personal stress or duress
- Whether anyone was hurt, and whether the crime was committed in a manner that was unlikely to result in anyone being hurt
- Whether the offender was particularly cruel to a victim, or particularly destructive, vindictive, etc.

- (Sometimes) whether the offender is genuinely contrite or remorseful

Under Federal Rule of Criminal Procedure 32(a), before imposing a sentence, the court must afford [COUNSEL](#) an opportunity to speak on behalf of the defendant. The court will address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the government will have an equivalent opportunity to speak to the court. Similar provisions are contained in most state procedural statutes and rules. In many state courts, a victim or the survivors of a victim may also have the opportunity to address the court and recommend leniency or strictness for the sentence.

"Three Strikes" Sentencing Laws

Under the Violent Crime Control and Law Enforcement Act of 1994, the "Three Strikes" statute (18 U.S.C. 3559(c)) provides for mandatory life imprisonment if a convicted felon:

- Been convicted in federal court of a "serious violent felony" and
- Has two or more previous convictions in federal or state courts, at least one of which is a "serious violent felony." The other offense may be a serious drug offense.

The statute goes on to define a serious violent felony as including murder, [MANSLAUGHTER](#), [SEX OFFENSES](#), [KIDNAPPING](#), robbery, and any offense punishable by 10 years or more which includes an element of the use of force or involves a significant risk of force.

The State of Washington was the first to enact a "Three Strikes" law in 1993. Since then, at least half of all states, in addition to the federal government, have enacted three strikes laws. The primary focus of these laws is the containment of recidivism (repeat offenses by a small number of criminals). California's law is considered the most far-reaching and most often used among the states.

Uniformity and Consistency

In addition to "three strikes" laws, other state and all federal criminal statutes include mandatory sentences that require judges to impose identical sentences on all persons convicted of the same offense. Mandatory sentences are a direct result of state legislatures' or Congress' response to the public perception of judicial leniency or inconsistency in sentencing practices.

However, most crimes do not carry mandatory sentences. If sentencing is not mandatory, judges may "fit the punishment to the offender" rather than "fit the punishment to the crime." Competing theories about criminal justice help to fuel the different approaches to sentencing and punishment. These include the severity of punishment meted, and the specific objective sought by the punishment:

- **Retribution:** Some believe that the primary purpose of punishment should be to punish an offender for the wrong committed, society's vengeance against a criminal. The sentiment is to punish criminals and promote public safety by keeping them "off the streets."
- **Rehabilitation:** Others believe that the primary purpose of punishment should be to rehabilitate criminals to mend their criminal ways and to encourage the [ADOPTION](#) of a more socially acceptable lifestyle. Most experts agree that this theory is commendable but not practical in prisons. Many criminals boast of coming out "better criminals" than they were when they entered prison.

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- Deterrence: Still others argue that the perceived punishment for a crime should be so undesirable as to result in deterring someone from actually committing a crime for fear of the likely punishment. Again, the theory is commendable, but many crimes are committed on impulse or under the influence of alcohol and other drugs. Fear of punishment is usually not a deterrent under these circumstances. Moreover, repeat offenders do not fear incarceration the way that people who have been free all their lives might.

Alternative Sentences

Forced to face prison overcrowding and failed attempts at deterrence or rehabilitation, many professionals in the criminal justice system have encouraged "alternative sentencing," which refers to any punishment other than incarceration. Most alternative sentences are really variations of probation, e.g., a fine and community service, along with a set period of probation. Some judges have gotten more creative in their sentencing. In many jurisdictions, convicted persons have been required to do the following:

- Install breathalyzer devices in their vehicles ("ignition interlocks") to prevent their operation of the vehicle without blowing into the device to determine whether their breath is free of alcohol
- Carry signs which inform the community of their offense
- Stay at home under "house arrest"
- Complete alcohol or other drug treatment programs
- Attend lectures given by crime victims

Sentencing Commissions

The U. S. Sentencing Commission was created in 1984 as part of the Sentencing Reform Act provisions that were included in the Comprehensive Crime Control Act of 1984 (28 U.S.C. 994). The Commission's principal purpose is to establish uniform sentencing guidelines and practices for the federal court system. The guidelines provide 43 levels of offense seriousness that take into account not only the seriousness of the crime, but also the offender's criminal history. They apply to all federal felonies and most serious misdemeanors. Federal courts use the guidelines for presumptive sentencing and all determinations are subject to intensive [APPELLATE](#) review. Parole also has been abolished in the federal system.

Now and then, the U. S. Supreme Court may rule on a matter involving sentencing guidelines. In *Buford v. United States*, 000 U.S. 99-9073 (2001), the U. S. Supreme Court affirmed the earlier decision of the 7th Circuit Court of Appeals, which held that appeals courts should be "deferential" to a trial court's decision when reviewing the trial court's interpretation of federal Sentencing Guidelines (at least as to determinations on whether an offender's prior convictions were "consolidated" for purposes of sentencing).

Many states have established their own sentencing commissions. The National Association of Sentencing Commissions (NASC), which includes the federal sector as a member, provides a forum, complete with national conferences, to promote the adoption of uniform or similar presumptive sentencing guidelines among jurisdictions. Most state sentencing guidelines incorporate or adopt provisions from the Model Penal Code (MPC).

Selected State Sentencing Provisions

ALABAMA: As of 2001, the Alabama Judicial Study Commission was finalizing its creation of a permanent sentencing commission for the state.

ALASKA: Alaska has judicially-created "benchmark" guidelines for felonies, with moderate appellate review. Parole has been abolished for most (two-thirds) felonies. There is no active sentencing commission for the state.

ARKANSAS: State courts employ voluntary guidelines for felonies. There is no appellate review. Arkansas has retained its parole system. There are guidelines which incorporate intermediate sanctions, with preliminary discussions for guidelines in juvenile cases. State sentencing commission was established in 1994.

DELAWARE: Delaware utilizes voluntary guidelines for felonies and misdemeanors. Parole has been abolished in the state since 1990. There is moderate appellate review of sentencing decisions. The state's sentencing guidelines incorporate intermediate sanctions.

DISTRICT of COLUMBIA: The district has created a temporary commission to study sentencing guidelines and report directly to the City Council.

FLORIDA: In Florida, guidelines were repealed in 1997 and replaced with statutory presumptions for minimum sentences for felonies. The state sentencing commission was abolished in 1998 after the adoption of the new statutory presumptive sentences. There is moderate appellate review of sentencing determinations. Parole has been abolished in the system.

IOWA: Iowa has established a legislative commission to study sentencing reform.

KANSAS: Kansas uses presumptive guidelines for felonies, with moderate appellate review. Parole has been abolished in the state. There are no guidelines for intermediate sanctions.

MARYLAND: Maryland's legislature created a permanent sentencing commission in 1998. There are voluntary guidelines for felonies, with no appellate review. Parole has been retained.

MASSACHUSETTS: In Massachusetts, there are presumptive guidelines for felonies and misdemeanors. A proposal is pending in the legislature for appellate review of sentencing determinations. Parole has been retained.

MICHIGAN: Michigan has been a member of the National Association of Sentencing Commissions since 1999. The state employs presumptive guidelines for felonies, with appellate review as authorized by statute. The state also maintains a restricted parole system.

MINNESOTA: The state has presumptive guidelines for felonies, with moderate appellate review. Parole has been abolished in the state. There are no guidelines for intermediate sanctions.

MISSOURI: Missouri uses voluntary guidelines for felonies, with no appellate review. Parole has been retained in the state.

NORTH CAROLINA: In North Carolina, there are presumptive guidelines for felonies and misdemeanors, with minimum appellate review. Since 1999, the state has incorporated a special dispositional grid for juvenile cases. Parole has been abolished in the state.

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OHIO: Ohio uses presumptive narrative guidelines for felonies. There is limited appellate review. Parole has been abolished and replaced with a judicial release mechanism. The state legislature is also considering structured sentencing for juvenile offenders.

OKLAHOMA: In Oklahoma, presumptive guidelines are in place for felonies. The state has retained a limited parole system. Legislative proposals are pending for appellate review of sentencing determinations.

OREGON: Oregon has presumptive guidelines for felonies, with moderate appellate review. Parole has been abolished.

PENNSYLVANIA: Presumptive guidelines are in place for felonies and misdemeanors, with minimum appellate review. Parole has been retained.

SOUTH CAROLINA: The state employs voluntary guidelines for felonies and misdemeanors with potential sentences of one year or more.

TENNESSEE: There are presumptive guidelines for felonies, with moderate appellate review. Parole has been retained. The sentencing commission was abolished in 1995.

UTAH: The state uses voluntary guidelines for felonies and select misdemeanors (sex offenses). There is no appellate review. Parole has been retained in the state. The state also uses voluntary guidelines for its juvenile sentencing.

VIRGINIA: Virginia has voluntary guidelines for felonies, with no appellate review. Parole has been abolished. The state is studying juvenile sentencing guidelines.

WASHINGTON: The state employs presumptive guidelines for felonies, with moderate appellate review. Parole has been abolished in the state. Special guidelines for juvenile sentencing are in effect.

WISCONSIN: In Wisconsin, the state employs voluntary guidelines for felonies. Legislative proposals are pending, which do not contemplate appellate review. The proposals also contemplate the abolishment of the state's parole system, as well as the creation of a new permanent sentencing commission.

Additional Resources

"An Overview of the Federal Sentencing Guidelines" United States Sentencing Commission. Available at <http://www.ussc.gov>

The Court TV Cradle-to-grave Legal Survival Guide. Little, Brown and Company, 1995.

Federal Rules of Civil Procedure. Available at http://www.law.cornell.edu/topics/civil_procedure.html

"Federal Sentencing Statistics by State." Available at <http://www.ussc.gov/linktojp.htm>

"How Sentencing Works." Available at <http://www.nolo.com/lawcenter/ency/article.cf>

"The Impact of 'Three Strikes and You're Out' Laws: What Have We Learned." 1996. Available at <http://www.soc.umn.edu/~samaha/cj4e/ch11/j11H1.html>.

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Memorandum For All United States Attorneys." Jo Ann Harris, Jo Ann. 15 March 1995. Available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/titl...

"Sentencing Alternatives: From Incarceration to Diversion." Available at <http://www.nolo.com/lawcenter/ency/article.cf>

"State Sentencing Commissions." National Association of Sentencing Commissions. Available at <http://www.ussc.gov/states.htm>

The Court TV Cradle-to-grave Legal Survival Guide. Little, Brown and Company. 1995.

"The Impact of 'Three Strikes and You're Out' Laws: What Have We Learned," 1996. Available at <http://www.soc.umn.edu/~samaha/cj4e/ch11/j11H1.html>.

U. S. Code, Title 18: Crimes and Criminal Procedure, Part II: Criminal Procedure, Chapter 227, 228, and 232. U. S. House of Representatives. Available at http://uscode.house.gov/title_21.htm

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