

Doing Time and Marking Time

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In this country the worst thing courts can do is to send people to prison. When a prison sentence is passed, it is expressed in terms of the time for which freedom is to be denied, this time being almost always expressed in units of months or years. Deciding how long imprisonment should be for a particular offender could be fully rational, in an economic sense, only if all the following could be calculated:

- (i) the net cost to the community of his incarceration for a specified time relative to his incarceration for greater or lesser time, including such factors as the cost of further offences he is likely to commit, and the time relative to release at which he is likely to commit them.
- (ii) The effect, if any, upon the prisoner's future behaviour of his experience of imprisonment.
- (iii) The deterrent effect, if any, of his imprisonment on the behaviour of others.

The literature of criminology tells us, even if common sense did not, that none of these three kinds of calculation is possible (Zimring and Hawkins, 1973, Lipton *et al*, 1975, Brody, 1976). Given this, the sentencer is in the position of making decisions about the length of custodial sentences on, at best, quasi-rational grounds. His basic task is to express his and society's judgement of an offence and a person in units that just happen to be time units. To restate the matter in a slightly different way, we would argue that because, given the present state of knowledge, the decision as to length of a sentence of imprisonment cannot be fully rational, this makes the translation of individual or societal distaste into time units an arbitrary exercise. It is the same kind of exercise as measuring hatred in degrees centigrade or love in inches.

It is surprising to us that sentencers' use of time has not been empirically examined in its own right to date, given the central relevance of this issue to the problems of overcrowding in prisons. Our article is a start in this direction.

If one wishes to make a substantial reduction in the prison population (as distinct from receptions into prison), there is far more scope for this in reducing sentence lengths than in diverting from prison people currently given short sentences. For example, consider adult males aged 21 and over. 9417 of these were sentenced to six months' imprisonment or less (without option of fine) in 1975. This group comprises 34.5% of all receptions of adult males under sentence without option of fine. Estimating population as (Reception \times Sentence length), diverting all these from prison would produce a reduction of around 1700 in the prison population.^{1, 2} If, on the other hand, instead of diverting the most obvious 34.5% of receptions, one were to reduce all sentence lengths by 34.5, then the estimated reduction of prison population would be around 7,800.²

There is some evidence (to be interpreted with caution) that what distin-

guishes us from European countries with smaller prison populations is the greater length of sentences passed by our courts. Table 1 shows the proportion of people received into prison in a number of European countries, whose sentences were of less than six months' duration. It can be seen from this that England and Wales have proportionately far fewer short sentences.

TABLE 1

Short Term Custodial Sentences in Western Europe 1970

State	Proportion of Offenders Sentenced to 6 months or less	Total Number of Sentences of Deprivation of Liberty	Total Number of such Sentences 6 months or less
Netherlands	85%	13000 (app)	11000
Norway	71%	2275	1838 (A)
Denmark	67%	5531	3719
Italy (B)	58.8%	36060	22970
Austria (C)	58%	21594	12626
W. Germany (D)	57.3%	41276	23364
England & Wales	51.1%	45036	23019

(A) Does not include conviction for 'misdemeanours'

(B) Includes suspended sentences

(C) Data from 1969

(D) Includes penalties imposed on 18-20 year olds under adult criminal law.

Making a specific comparison with the Netherlands using 1973 statistics (the latest we have seen), we have calculated that if the people received into prison in England and Wales had sentence lengths distributed as in the Netherlands, the average prison population under sentence would, instead of being the actual figure of 31,665, have been less than 19,000. (There are, of course, many unstated conventions used to arrive at that figure, which we will be happy to enumerate upon request. We have used conventions which are likely to mean that the figure of 19,000 is an over-estimate.) Thus, the judicial decision as to sentence length is critical in determining the size of our prison population.

A Preliminary Study

To introduce the use of the time dimension in sentencing we need first to mention the concept of the just noticeable difference. If you won £100 on the football pools you would feel happy. If you won £110 you would feel just noticeably happier. If you won £100,000 on the football pools you would feel very happy. If you had won £100,010 you would feel no happier. It would take an extra £10,000 on top of the £100,000 to make a just noticeable difference. This notion, that the higher the level of input the greater the extra input has to be in order to be just noticeable, applies to all sensory dimensions. In a bright room you would need more extra light to make a just noticeable difference in illumination than you would in a dark room. If you applied the same principle to the notion of sentence length, you would predict that the longer the sentence, the greater the gap between it and the

next frequently given sentence. This would be much more difficult to test than it in fact is if sentencers did not use round numbers of months or years as sentences. As Williams (1976) has pointed out, sentences tend to conform to tidy whole numbers of months or years. Because sentences do aggregate around whole numbers of months in this way, the gaps between frequently given sentences become visible. Figure 1 shows the picture clearly.³

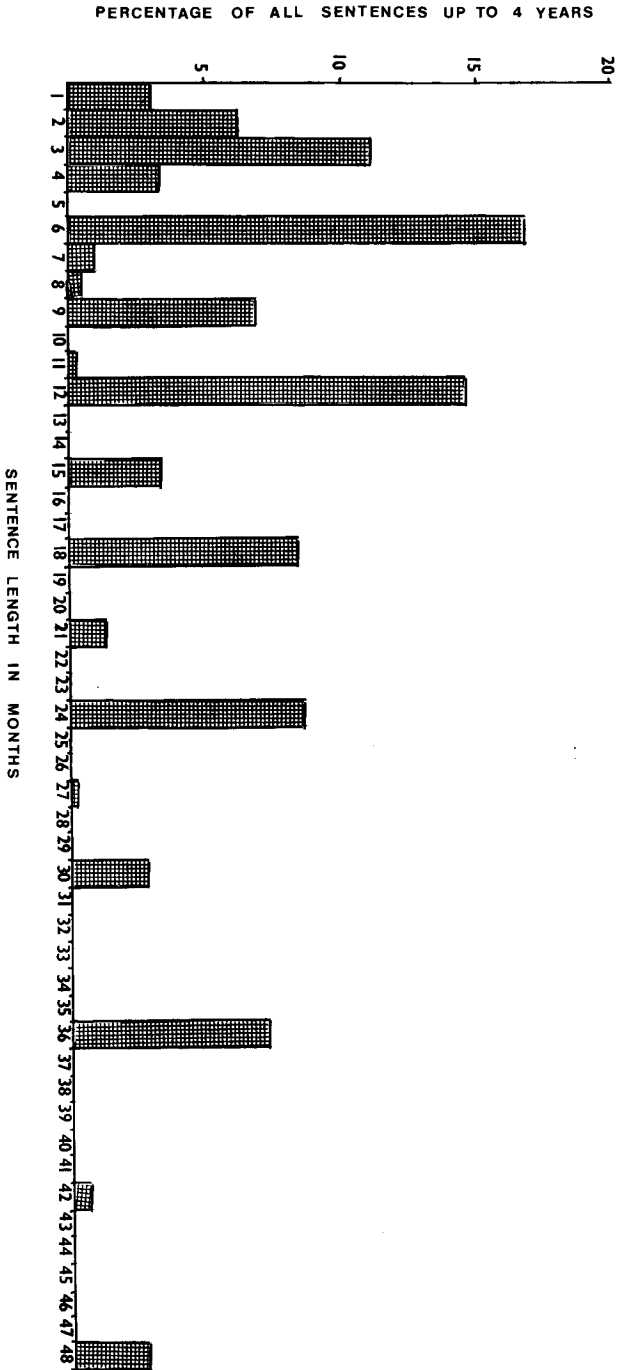
The data for this figure come from a variety of sources, the great majority coming from sentences passed in cases in which social enquiry reports were prepared by two Probation and After-Care Services in England. This was supplemented by information supplied in local newspapers, in a number of cases in which there had been appeals against conviction or sentence reported in the Criminal Law Reports, and finally by a small number of cases involving a barrister friend of one of the writers. Seven hundred cases in all are included. It will be noticed that up to and including four month sentences, there are many sentences at each month interval. There are no cases sentenced to five months, so one would suggest that a just noticeable difference on a four months' sentence is two months. In most cases a just noticeable difference above six months takes you to a nine month sentence, but by the time you are above a sentence of eighteen months, the just noticeable difference is an extra six months. After sentences of three years, the just noticeable difference is arguably one year. Lawyers to whom we have spoken agree that this description of sentencing practice is a fair one and suggest that a just noticeable difference on five years is an extra two years, and on seven years an extra three. Unfortunately, we had too few cases of such sentence lengths to make a formal analysis useful. The analysis shows that the use of increments of time in sentencing is an extremely crude matter. If a sentencer regards an offence as just more serious than one which will attract a three year sentence, he gives it a four year sentence. This one extra unit of seriousness for the sentencer works out at 243 nights locked up for the offender, assuming he is denied parole, and an extra 121 nights assuming he is paroled at the earliest possible date.

We believe we have shown that sentences that appear to be *just* noticeably different to the sentencer are substantially different when expressed in terms of extra days spent in prison. This finds supportive evidence from examples like that in Thomas (1970, p.xlix, footnote 2). Here the Appeal Court reduced a sentence from five years to four and referred to such changes as '*minimal alterations*' (our emphasis).

So a question of importance is: are there any simple devices which could be used to refine the currently crude use of time limits by sentencers? We will report an exploratory study which has relevance. Our reasoning was as follows: if we wish sentencers to appreciate that it is time in prison that is the substance of the sentence, then unconventional time units may well bring home this awareness to them. If sentences passed with the unconventional unit turn out to be markedly shorter, it may be that this is because the recognition of the time nature of the sentence serves to reduce sentence length. Unconventional time units, for sentences, are such things as days, weeks, months (to a certain extent) and decades. Accepted wisdom indicates that innumeracy is widespread so we rejected days or decades as units of measurement.

Another possible explanation for shorter time units producing shorter sentences could well be the likely response to large numbers irrespective of

FIGURE 1 FREQUENCY OF PRISON SENTENCE BY LENGTH



. NB Consecutive activated suspended sentences are omitted. The numbers on the abscissa refer to the upper boundary of each range.

what they represent. Thus a sentence of 200, whether weeks or months, would tend to be reduced because it sounds a lot.

However, since ours is only an exploratory study and either of the two kinds of explanation outlined above would be interesting, we are content to see if there is anything there to be explained.

For the study we used 66 subjects; 22 in each of three experimental conditions. Subjects were twelve police officers, four prison officers, and the remainder students, friends or acquaintances of the experimenters. Each person was invited to judge four cases (on which written information on offence and criminal history was provided) in terms of one of three time units. The cases were identical for all three experimental conditions. The experimental conditions differed only in the unit of time subjects were invited to use to express their sentence. Average age of subjects did not differ as between conditions. The mean age of our subject was 31. Thirty four men and thirty two women took part.

Table 2 shows mean sentence length in months passed by people on the four cases in each of the three experimental conditions. It will be noticed that when the units people were invited to use were weeks, the average sentence length chosen was consistently and substantially lower than when months or years were used. Analysis of variance yielded significant case ($F_{3,189} = 49.37$ $p < .01$) and time ($F_{2,63} = 6.31$ $p < .01$) main effects, and no significant case x time interaction ($F_{6,189} = 1.77$). A multiple comparison test (Newman-Keuls) yielded significant differences between weeks and months ($p < .01$) and between weeks and years ($p < .01$). The comparison between months and years did not reach statistical significance at the .05 level.

Clearly time unit affects sentence lengths. Whether this effect holds for judges is as yet undemonstrated, although obviously important.

One interesting point was the high frequency with which people when using week units still tended to use multiples of weeks which correspond to years (e.g. 52 weeks, 104 weeks). Thus the difference found appears to override even habits of thought which demand mental expression of sentence in year units.

TABLE 2

Mean Sentence Length (in months) by Case and Time Unit Employed

	Weeks	Months	Years
Case 1	6.0	7.5	21.4
Case 2	19.7	40.4	55.1
Case 3	35.1	59.5	66.0
Case 4	43.3	80.6	90.3

Summary

We have argued that length of imprisonment is determined at best on a quasi-rational basis. Western European countries tend to differ from England and Wales in the proportion of short prison sentences their courts hand down. Sentences cluster around whole time units, and the gaps between clusters lengthen as sentence length increases. We have shown that (for non-judicial

subjects) the unit in terms of which sentence length is couched substantially affects sentence length decided upon, with a short unconventional time unit leading to shorter sentences.

FOOTNOTES

- ¹ Prison Department Statistical Tables give only bands of sentence length. For the purposes of the estimate, all sentences are taken to lie at the mid-point of the band concerned. Full remission is assumed granted at the rate of one-third of sentence and parole-eligible groups are assumed to serve one-half of their sentence, with the longest determinate sentence band and lifers assumed to serve ten years.
- ² This will be an overestimate because of the likely earlier reappearance in court of those left at liberty.
- ³ A similar picture is derivable from the Statistical Tables of the Report of the Work of the Prison Department up to 1972, when sentence lengths were grouped into much narrower bands than was subsequently the case.

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