

Q1. If legislators and judges all accepted the philosophical theory of determinism, what would be the effect on criminal sentencing? (Law)

INTRODUCTION

Determinism states that “acts of the ‘will’, occurrences in nature, or social or psychological phenomena are causally determined by preceding events or natural laws” (Merriam Webster). The human does not choose but is made to act in a certain way owing to his mental state, which in turn is determined by the biological, environmental, social, and historical forces around him.

The acceptance of determinism by legislators and judges would entirely overturn the legal doctrine of today - compatibilism, the idea that free will and determinism can coexist. This essay will examine how.

Criminal sentencing, the punishment imposed by a court of law on a defendant found guilty of a crime, consists of four pillars: retribution, rehabilitation, incapacitation, and deterrence. Retribution, a penalty imposed because the offender morally deserved it, presupposes that the defendant could have acted otherwise. Under determinism, though, the defendant never had that capacity; therefore, retribution has no basis, and ceases to be a reason for sentencing.

However, each of the other three pillars aim not towards moral condemnation, but towards the prevention of future crime. Furthermore, as the essay will argue, rather than dealing with the issue of free will, these reasons require only that future behaviour can be influenced. Thus, these reasons would continue to exist under a determinist regime, entailing that the focus of the law would shift entirely onto the prevention of future crime.

In its first two parts, the essay will address how the three remaining pillars of criminal sentencing - deterrence, incapacitation, and rehabilitation - will alter under determinism. In its third part, the essay will consider the implications of determinism through the idea of predictive sentencing.

PART I. The impact on deterrence under determinism

Among the principal functions of punishment are retribution and deterrence. As established above, meting out sentences for retribution would not exist under a determinist system. However, deterrence theory is built on Bentham's psychologically deterministic principle that all human behaviour - past, present, or future - is guided by the avoidance of pain and the pursuit of pleasure; therefore humans instinctually respond to expected consequences on the basis of how damaging, or beneficial, they are perceived to be. For this reason, deterrence would survive under determinism.

Furthermore, its existence as a legitimate reason for sentencing would cause punishment in criminal sentencing to remain necessary and justified, despite the end of retributivism. As Smilansky argues, systems of responsibility perform an essential social function. If society ceased to punish offenders on the grounds that they were not ultimately responsible for their actions, the deterrent force of the criminal law would be weakened, and so society would be threatened by greater crime.

In a deterministic system, the punishment of non-labile criminals for the utilitarian reason of benefiting the rest of society through deterrence would impact sentencing in the following ways:

- (a) Sentences for most crimes will possibly become shorter, achieving general deterrence (for society at large). As criminologist Nagin posits, the certainty of punishment is a significantly stronger deterrent than its severity; in addition, after a certain point, marginal increases in length yield little to no deterrent effect. As a result, legislators would cut costs by allowing sentences to remain short, not limited from doing so by the retributivist need to impose penalties that are proportional to the seriousness of the crime. The resources saved in this process would be allocated to preventing crime by strengthening policing systems and increasing surveillance so that the likelihood of criminals being detected rises; this adheres to Nagin's findings.
- (b) For specific cases, sentences could be far more severe. As von Hirsch argues, the principle of desert limits the extent of punishment by requiring proportional retribution. As determinism removes desert as a sentencing principle, courts are no longer constrained by how much punishment a criminal deserves relative to the nature of their crime. As a result, they could increasingly impose longer and harsher sentences for cases where they rule that it would set an example for the rest of society, thus augmenting crime prevention. In fact, there would be no argumentative barrier to this, because - as established - under determinism social utility remains the sole justification for punishment. In practical application, though, it may provide governments an excuse to justify using the law to punish dissenters or other targets, creating significant friction in democratic systems.
- (c) Sentences imposing non-custodial measures, such as community service or electronic monitoring, would increase. As argued by Smith, Goggin and Gendreau, prisons can be criminogenic to offenders by exposing them to criminal peers; they also cause familial disruption and social stigmatisation. Resultantly, in cases where offenders pose no great or immediate danger to society, non-custodial measures are superior, and are shown to decrease recidivism rates as compared to imprisonment (Bonta; Smith, Goggin, and Gendreau). Thus, under a determinist system that requires no proportional punishment, a far greater number of sentences would impose non-custodial measures. Sentencing, therefore, becomes far more selective as it distinguishes more sharply between high and low-risk offenders by changing the nature of punishment for each.

PART II. The impact on incapacitation and rehabilitation under determinism

Incapacitation is a forward-looking reason for criminal sentencing that is not undermined by determinism. Pereboom justifies incapacitation under determinism by likening it to quarantining carriers of dangerous disease: if a disease carrier (in this case, an offender) is left free in society, they pose a significant risk of harming others; therefore, despite offenders not being liable for their actions, they must be removed from contact with their community.

As argued by Pereboom, it follows that if an offender changes their behaviour and is no longer dangerous to others, they must be released from prison, as further incapacitation in a determinist system would be rendered unjustified. Consequently, criminal sentencing would

become highly flexible, fluctuating based on individual circumstances of behavioural changes. Criminals would be initially given standardised sentences that are just long enough so that punishment retains its social function as posited by Smilansky; these sentences would then decrease or increase in length while they are served based on the offender's conduct in prison.

However, this system of flexible sentencing requires that incapacitation is accompanied by rehabilitation programmes for prisoners. This is because, as argued by the criminologist Francis Cullen, incapacitation by itself rarely institutes behavioural shifts; it is an active attempt by the authorities to change behaviour that results in offenders transforming their tendencies.

Two impacts on criminal sentencing follow from the reasoning laid out above:

- (a) Sentence length will be determined by the time required to successfully complete rehabilitation programmes, because flexible sentences are decided by behavioural change and behavioural change occurs via rehabilitation programmes rather than incapacitation.

This implies that criminal sentencing becomes a process in which correctional facilities are actively involved, transforming them from institutions carrying out court orders to institutions that effectively hold judicial power.

It also entails that determinist sentencing has the potential to become more coercive than traditional punishment - as argued by Morris, treatment-based systems can theoretically permit potentially indefinite detention.

- (b) All sentences would mandate that rehabilitation continue post incapacitation, as the justice system would seek to drop custodial sanctions the moment prisoners become low-risk, whether or not they have been completely rehabilitated to function in society. This is because, as established in the previous section regarding deterrence, low-risk individuals would likely face noncustodial sanctions instead of prison sentences.

PART III. The impact of predictive sentencing on criminal sentencing

A.

According to determinism, all behaviour can theoretically be perfectly predicted by uncovering uncontrollable causes that lead to certain actions. These causes include genetic makeup, environmental, social, and cultural context, and psychological dispositions. Consequently, a determinist justice system could impart far greater legitimacy to predictive sentencing: the use of algorithms such as Northpointe's COMPAS that consider the causes listed above, alongside an offender's criminal history, to statistically determine their risk of recidivism.

Given legitimacy and importance, such risk assessment algorithms would be used to justify sentencing offenders to longer periods of incarceration; take, for instance, the case of

Loomis v. Wisconsin. In a determinist system that is not shackled by the need for proportionality in a sentence, offenders would remain incapacitated until the tool classifies them - as they undergo rehabilitation - as low-risk.

This would also have an impact on criminal sentence hearings: defendant and plaintiff lawyers would fight sentences entirely by disputing issues of the statistical reliability of, and the factors of crime used, by the risk model.

B.

While predictive sentencing revolves around the likelihood of recidivism for convicted offenders, a determinist system could theoretically extend it to everyday citizens. As criminal behaviour is viewed as the inevitable result of causal chains for certain people, the legislature could mandate the construction of comprehensive behavioural profiles for all citizens - or at minimum, for those from crime-conducive regions and backgrounds - to assess whether they are likely to break the law.

This would lead to criminal sentences such as mandatory rehabilitation programmes or surveillance for citizens who have not yet committed a crime, but are seen as expected to. This policy would, of course, be justified by the idea that intervening before a crime is committed could prevent potential damage to society and potential suffering both for the victim and for the perpetrator.

However, despite its seemingly enormous preventative power, this system of predictive sentencing would, in democratic societies, likely fail to gain traction. It relies on a high level of surveillance to collect the necessary personal data, and the creation of such profiles would lead to what Harcourt sees as the disadvantages of prediction-based governance: segregation and discrimination by employers and institutions on the basis of the likelihood of dangerous or criminal behaviour.

CONCLUSION

Under a determinist system, retribution would cease to be a justification for criminal sentencing, causing sentencing to focus entirely on the prevention of future crime through deterrence, incapacitation, and rehabilitation. Sentences for most offences would become shorter, only long enough to fulfill the social function of punishment. Meanwhile, specific, rare cases could become substantially longer and harsher to serve as public examples for society. A greater number of sentences would impose non-custodial sanctions such as community service and electronic monitoring, especially for low-risk or petty crime offenders.

Fixed sentences would give way to flexible ones that increase or decrease according to behavioural change, with sentence length determined primarily by rehabilitation progress. Correctional institutions would assume a greater role in determining how long offenders remain under sanction, and detention could, in rare cases, become potentially indefinite. Rehabilitation requirements would also continue after release through ongoing non-custodial measures. Predictive risk-assessment algorithms would become central to sentencing decisions, leading high-risk offenders to receive longer periods of incarceration and remain

incapacitated until they are classified as low-risk. Criminal sentence hearings would increasingly revolve around disputes concerning predictive models and risk assessments. Finally, sentencing could extend beyond convicted offenders to individuals assessed as likely to commit crimes in the future, resulting in pre-emptive sanctions such as mandatory rehabilitation programmes and surveillance measures.

BIBLIOGRAPHY

1. Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation*. 1789.
2. BONTA, JAMES, et al. "A Quasi-Experimental Evaluation of an Intensive Rehabilitation Supervision Program." *Criminal Justice and Behavior*, vol. 27, no. 3, June 2000, pp. 312–329, <https://doi.org/10.1177/0093854800027003003>.
3. Cullen, Francis T., and Paul Gendreau. "Assessing Correctional Rehabilitation: Policy, Practice, and Prospects." *Policies, Processes, and Decisions of the Criminal Justice System*, edited by Julie Horney, National Institute of Justice, 2000, pp. 109–175.
4. "Dangerousness and Incapacitation: A Predictive Evaluation of Sentencing Policy Reform in California." *National Institute of Justice*, 2025, nij.ojp.gov/library/publications/dangerousness-and-incapacitation-predictive-evaluation-sentencing-policy.
5. Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. Translated by Alan Sheridan, Pantheon Books, 1977.
6. Harcourt, Bernard E. *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age*. University of Chicago Press, 2007.
7. Hirsch, Andrew von. *Doing Justice*. 1986.
8. Monahan, John, et al. *Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence*. Oxford University Press, 2001.
9. Morris, Norval. *The Future of Imprisonment*. University of Chicago Press, 1974.
10. Nagin, Daniel. "Deterrence in the Twenty-First Century." *Crime and Justice*, vol. 42, no. 1, 2013, pp. 199–263, <https://doi.org/10.1086/670398>.
11. Park, Andrew Lee. "Injustice Ex Machina: Predictive Algorithms in Criminal Sentencing." *UCLA Law Review*, 19 Feb. 2019, www.uclalawreview.org/injustice-ex-machina-predictive-algorithms-in-criminal-sentencing/.
12. Pereboom, Derk. *Living Without Free Will*. Cambridge University Press, 2001.
13. Smilansky, Saul. *Free Will and Illusion*. OUP Oxford, 30 Mar. 2000.

14. Smith, P., Goggin, C., & Gendreau, P. (2002). The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences
15. Webster, Merriam. "Definition of DETERMINISM." Merriam-Webster.com, 2018, www.merriam-webster.com/dictionary/determinism.