

# Dual Mode Sentencing UNMUDDLED

Dual Mode Sentencing provides a philosophical change which brings clarity to the criminal justice process. It is recognized that criminal justice professionals have a considerable investment of time, resources and tradition in their current jurisdiction's methods, whether they be Determinate Sentencing or Indeterminate Sentencing. So understanding Dual Mode Sentencing requires a step out of one's comfort zone, but not a step away from common sense. Dual Mode Sentencing is very logical, but it means you have to set-aside tradition, and not try to make Dual Mode Sentencing fit into one's tradition. It is assumed that the reader understands the philosophies of Determinate Sentencing and Indeterminate Sentencing. Dual Mode Sentencing is a combination of the best of both – hence "Dual Mode."

The concept came about as a result of studying recidivism statistics, and how they affect the crime rate in the State of Utah, U.S.A. Recidivism is when offenders who have been released from prison violate parole rules or commit another offense and are returned to prison. Of course, this number should be as low as possible. A low number would indicate that the corrections department was actually "correcting" the behavior of offenders. It is sad that current systems have a historical recidivism rate between 60% and 70%. That means most offenders released on parole end up back in prison. What it really means for society is that over half of all crime is committed in a revolving-door fashion. Reducing recidivism would remarkably lower the crime rate.

## How can we control recidivism?

To lower recidivism, one would think that those making the decision to release an inmate would place substantial emphasis upon the risk of recidivism of that individual inmate. In Utah, and other jurisdictions, a parole board makes the release decision. If the parole board were focused on making decisions based on risk of recidivism, they could lower recidivism crime by retaining high-recidivism-risk offenders and releasing low-recidivism-risk offenders. But this is not currently the basis for making the release decision. Rather, the thoughts of the parole board center on deciding if the offender has been punished enough. There is a cognitive difference between making the release decision based on punishment, and making the release decision based on recidivism risk.

Though risk of recidivism is the predominant motivation of society for keeping a person in prison, the most important motivation of society for putting a person in prison in the first place is that the offender has a debt to society to pay for his crime. Criminal justice professionals, such as judges, lawyers, corrections officials and parole boards, understand these motivations very well, but they often muddle their responses to them simply because of tradition in the way the criminal justice system operates. Dual Mode Sentencing was born out of a desire to bring clarity to the criminal justice process and consequently to improve the recidivism rate. One really needs to look at these motivations separately and know the appropriate individual responses in order to make progress dealing with the problem of high recidivism rates.

There is a world of difference between (1) putting a man in prison to pay his debt to society, and (2) keeping a man in prison to prevent recidivism. Both are individually applicable, but they are not interchangeable. Having a better understanding and appropriately applying this difference brings improved decisions to the criminal justice process, with better outcomes for victims, offenders, and all of society.

What difference does it make? Let us start first with the motivation of Risk of Recidivism. When an offender is in prison, a major motivation of society is to keep him there if there is any likelihood that

his release would result in him victimizing someone else again. If he were to commit another crime after release it would result in his returning to prison, i.e. recidivism. Recidivism means that there has been a violation of parole or another offense has been committed, resulting in another victim. High recidivism statistics are an indicator that the criminal justice system has not succeeded.

### **Indeterminate Sentencing is Muddled Thinking!**

Some jurisdictions have criminal justice systems built on the philosophy of Indeterminate Sentencing. That is where the judge sentences the offender for a long, long term, and the actual release decision is made by a parole board, with most offenders being released before the end of their maximum term. Ideally, the parole board would focus on the offender's risk of recidivism using evidence based practices, and by doing so they would be able to minimize the recidivism of those released from prison. It is granted that the parole board is not responsible for the parolee's bad decisions while on parole. Yet no one other than the parole board, including the offender, is responsible for the release decision. So the parole board must take responsibility for making the best release decision possible.

Unfortunately the parole board does not focus their thinking on whether or not an offender is safe to release from prison. Rather, their focus when they review an offender's case is on how much more the offender needs to be punished. This is an example of muddled thinking. They look at the seriousness of the crime in determining the length of punishment – and the problem is that this carries over into the release decision. But the seriousness of the crime has to do with debt to society, not with risk of recidivism. Therefore the release decision of the parole board gets distracted from what would make the most sense from the standpoint of reducing recidivism.

I'm sure that the parole board would argue that they do in fact consider risk of recidivism in the release decision. Yes, and you can believe that until you hear a parole hearing officer say something like, "You have been in prison for six years. Records show you have never violated the prison rules. You have taken all of the training you could. You have expressed your regret for your crime. Your family stands ready to help you integrate into society. But your sentence is indeterminate for up to 15 years. These are serious charges. I'm going to recommend that we have another hearing in four years to review your case." Let's analyze that statement. What did the hearing officer do? He acknowledged, or "considered," risk of recidivism, but did not make the decision on that basis. Rather he harkened to the debt to society not yet being sufficient punishment.

In the above case, what is the debt to society for the crime? Do we know? In an actual case a criminal justice professional does know everything they need to know to decide an appropriate term for debt to society at the time of initial sentencing. Criminal justice professionals do not have to keep reviewing the case to determine if the punishment has been sufficient. They simply need to set the debt to society for the crime up-front. Then later, when it's done, it's done. Then they should stop considering it. Why? Because re-considering the debt to society muddles the thinking of the criminal justice professional, keeping them from making the release decision based on risk of recidivism.

This begs the question: Is it not the worst crimes which also have the highest risk of recidivism? No! In fact recidivism studies show that the highest recidivism rates come from offenders convicted of less serious crimes. Released burglars have a recidivism rate of about 70%. Drug offenders recidivate about 80% of the time. Contrast this with released sex offenders, who have a recidivism rate of only about 5%. (Contrary to public opinion most sex offenders do not re-offend after being in prison.) Simply because a crime is "bad" does not mean that it has a high risk of recidivism. Simply because a crime is less damaging to victims does not mean that it has a low risk of recidivism. Classes of crimes

need to be considered and treated separately. The factors that drive debt to society are not the same factors that drive risk of recidivism.

Let us consider the state of an offender of a serious offense, say a sex offense, shortly after initial incarceration. The offender might have a very low risk of recidivism. So would the appropriate response be to let that offender out after having served only a short term? Wait! The offender has not yet paid his debt to society! You see, under Dual Mode Sentencing appropriate consequences are not forgotten! But neither are they exacerbated. Dual Mode Sentencing insists that appropriate incarceration to satisfy debt to society be fully served.

How does the parole board know when the offender has satisfied his debt to society? That is the problem with their muddled thinking. They try to make up the answer as they go. Unfortunately in the end, that results in an overall recidivism rate of about 60% in most jurisdictions. Is 60% recidivism a good number? No! That is how we know that in their muddled thinking they are not focusing on risk of recidivism as a defining factor in the release decision.

So in order for a parole board to focus on risk of recidivism as the main factor of the release decision, they have to dispense with thinking about the debt to society. This is only possible if the debt to society is completely satisfied. To make sure this is the case the prison term to satisfy the debt to society has to be defined, in writing, and in advance of the term being served. This approach forms the basis of Dual Mode Sentencing, which is 1) define the debt to society, 2) serve it completely, and then 3) forget about the debt to society and make the release decision based on the risk of recidivism only.

### **Determinate Sentencing is Muddled Thinking!**

Now let us consider the first motivation, which is the offender's debt to society. This is the basis of another philosophy of sentencing used in many jurisdictions, called Determinate Sentencing. In determinate sentencing, the judge sets the term of incarceration. The term is served unmodified, except time-off-for-good-behavior in some jurisdictions. When the sentence is fully served the offender is released without further consideration. Determinate Sentencing has problems of its own, again resulting from muddled thinking.

To determine the length of a determinate sentence, the judge takes several factors into consideration. The severity of the offense is one factor, but other factors are criminal history, which shows the pattern of prior offenses, and the attitudes and abilities of the offender to change. The problem is that criminal history and the attitudes and abilities of the offender are linked to the offender's risk of recidivism. Assuming that the offender has already served prison or jail time for his prior crimes, the criminal history may show a higher risk of recidivism, but it does not have a bearing on the debt to society for the crime at hand for which the judge is currently sentencing. So the judge has a tendency to pad the sentence for what he thinks may be the attitude of the offender many months or years into the future when the offender will be released. Can the judge see into the future? No. Risk of recidivism cannot be analyzed up front. Again, this is muddled thinking! Risk of recidivism changes as the offender is "corrected." Trying to guess the attitude of the offender months or years in advance is a poor basis on which to make the release decision. This is also reflected in excessively high recidivism statistics.

The previously used sentencing philosophies, Determinate Sentencing and Indeterminate Sentencing, are both flawed! Neither one places appropriate emphasis on using evidence based practices to determine the correct risk of recidivism.

Dual Mode Sentencing brings clarity to the criminal justice process by recognizing that there are some decisions that it makes sense to address up front, and there are some decisions that it makes sense to reevaluate closer to the time of release. To avoid muddled thinking, the criminal justice professional must have an accurate recognition of which factors relate to making a debt to society decision, and which factors relate to the release decision based on risk of recidivism. (Not saying that everything can be pigeonholed. Some factors may relate to debt to society, and may also be found by statistical evidence to have an effect on recidivism.)

The severity of the offense, the number of offenses considered together, and effect on victims has a bearing on the debt to society. The legislature or other governing body likely sets standards for the relative severity of crimes, and may produce guidelines for a proposed range of sentence lengths. Under Dual Mode Sentencing, these guidelines cannot be the same as previous guidelines based on determinate sentencing or indeterminate sentencing. The guidelines must be strictly fabricated based on the factors affecting debt to society only.

This is also the point where victims have a right to be heard. The victim's damage or pain should be fundamentally addressed in determining the offender's debt to society. That the victim has had a bad deal in life is the definition of being a victim. Yet they should not be required by the criminal justice system to recount the damage months or years later. The victim, after being thoroughly heard at initial sentencing, should be mercifully excused to move on with the rest of their life. Of course, the victim may be scared of re-offense when the offender is released. But if appropriate consideration to the risk of recidivism is applied in the release decision, the victim's actual risk is minimized. Victims should be able to trust criminal justice professionals in making an appropriate release decision. But can they, given a current recidivism rate of 60%? No. Fixing recidivism is a precursor to victim satisfaction. Properly applied, Dual Mode Sentencing responds to the best interest of victims at both the Debt to Society stage and the Risk of Recidivism stage better than any muddled thinking.

The risk of recidivism is denoted by a combination of criminal history, the offender's performance in prison, the training or programming completed in prison, and the attitude of the offender near the time of release. Other factors affecting recidivism are the proposed stability of the offender following release, including education, employment, and community and family support. There is a growing movement towards using statistical modeling and data mining to assist the criminal justice professional in projecting risk of recidivism. Considering that over half of the crime in society is committed by parolees, reducing recidivism has a profound effect on the crime rate.

### **Dual Mode Sentencing provides clarity.**

Criminal justice professionals are looking for ways to improve on our current criminal justice process, to control the expenditure of funds on corrections, and to provide treatment to offenders in the best way to create a more safe society. Dual Mode Sentencing is a philosophical change. It is a process which focuses on the core principles and procedures of criminal justice, and by doing so drives more correct decisions. The core principle of Dual Mode Sentencing is a separation of motivations. When criminal justice professionals start recognizing and applying the differences between debt to society and risk of recidivism, they will have the basis of making better decisions.

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