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## Obsolescence and Immanence in Penal Theory and Policy

Michael Tonry

University of Minnesota Law School, tonry001@umn.edu

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# OBSCOLESCENCE AND IMMANENCE IN PENAL THEORY AND POLICY

*Michael Tonry\**

*To be useful, theories of punishment must speak to the issues of their times. Predominant modern theories centering on desert and proportionality took shape in the 1970s when they spoke to concerns about racial disparities, procedural unfairness, and beliefs in the ineffectiveness and injustice of rehabilitative programs. None of those concerns continues to galvanize policy-makers, practitioners, or the general public. Punishment theories are stuck in the 1970s, speaking still to 1970s issues and unable satisfactorily to address contemporary developments such as burgeoning interest in restorative and community justice, renewed faith in the effectiveness and appropriateness of rehabilitation, and proliferation of drug and other courts aimed at changing offenders. Punishment theories sometimes influence policymakers, and often they clarify understanding of the implications of policy choices. Consequently, there is a need for the development of new theoretical frameworks that can speak to the issues and temper of these times.*

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## INTRODUCTION

Writings on penal theory and punishment philosophy may be independent or dependent variables: They may cause changes in the world or result from them. It is unclear to me which of these is true. Do the ideas come first and in their application change the ways we think and the

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\* Sonosky Professor of Law and Public Policy, University of Minnesota, and Senior Fellow, Netherlands Institute for the Study of Crime and Law Enforcement, Leiden.

things we do, or does the world change and provide differently enriched soil in which ideas are born or revived? Did the emergence of writing in the 1950s and 1960s that challenged then-prevalent utilitarian ideas about punishment<sup>1</sup> lead to their rejection by most theorists, practitioners, and policymakers in the 1970s and 1980s? Did the espousal of retributivist, just deserts, and proportionality ideas by writers in the 1970s<sup>2</sup> lead in the 1980s and the 1990s to widespread adoption of penal policies aimed at providing offenders the punishments they deserved?

The answer, I believe, is that the seeds of normative ideas are always with us, but whether they hibernate or blossom depends on changing sensibilities and material conditions. This Essay shows how understanding of the origins of ideas, policies, and practices concerning punishment can be enhanced if we can become more self-aware about why and when particular ideas and normative beliefs come into fashion.

The 1970s were a time of transition in punishment practices and policies. In 1970, the highly discretionary and individualized punishment systems encapsulated in the phrase "indeterminate sentencing" were ubiquitous in the United States. In every state and the federal system (and in the Model Penal Code's prescriptions), statutes seldom did more than define crimes and set maximum penalties. Mandatory penalties were few in number and modest in scope, prosecutors had unaccountable power over charging and plea bargaining, judges' sentencing discretion was constrained only by statutory sentencing maximums, and parole boards had broad or plenary authority to release prisoners subject, usually, only to the maximum prison term set by the judge or the legislature.<sup>3</sup> Chicago law professor Albert Alschuler, commenting on unquestioning

1. See, e.g., Edmund L. Pincoffs, *The Rationale of Legal Punishment* 2 (1966) [hereinafter Pincoffs, *Legal Punishment*] (arguing that neither utilitarian nor retributive theories provide an adequate justification for punishment); Francis A. Allen, *Legal Values and the Rehabilitative Ideal*, in *The Borderland of Criminal Justice* 25, 25-28 (1964) [hereinafter Allen, *Legal Values*] (explaining rise of rehabilitative ideal and resulting controversies); H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in *Punishment and Responsibility* 1, 8 (1968) (claiming that main justification for punishment "lies in the fact that when breach of the law involves moral guilt the application to the offender of the pain of punishment is itself a thing of value"); John Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3, 3-5 (1955) (proposing that utilitarian justifications for punishment are appropriate for justifying practices, while retributive justifications should be applied to specific cases).

2. See, e.g., John Kleinig, *Punishment and Desert* 65-72 (1973) (rationalizing punishment on theory of just deserts); Norval Morris, *The Future of Imprisonment* 58 (1974) [hereinafter Morris, *Future*] ("In my view, penal purposes are properly retributive and deterrent."); Andrew von Hirsch, *Doing Justice: The Choice of Punishments* 69 (1976) [hereinafter von Hirsch, *Justice*] (arguing that principle of proportionality or just deserts "is a requirement of justice"); Joel Feinberg, *Justice and Personal Desert*, in *Doing and Deserving* 55 (1970) (analyzing concept of "just desert").

3. Kenneth Culp Davis, *Discretionary Justice* 126-41, 188-91 (1969). Sometimes judges could set minimum sentences up to one-third of the maximum, though this was a minority practice, and the minimum sentence itself was reduced through the operation of time off for good behavior. See, e.g., Model Penal Code § 305.1 (Proposed Official Draft

acceptance in the 1960s of the ideas underlying indeterminate sentencing, observed in 1978: "That I and many other academics adhered in large part to this reformatory viewpoint only a decade or so ago seems almost incredible to most of us today."<sup>4</sup>

By 1980, the empirical and conceptual foundations of indeterminate sentencing had been washed away. Many state and federal policymakers contemplated radical overhauls of their sentencing systems, and the beginnings of fragmented modern systems that promiscuously combined retributive, consequentialist, and expressive elements, had become apparent.<sup>5</sup> Some states developed parole guidelines, some developed sentencing guidelines, some developed both; some prosecutors created charging and bargaining guidelines and some "abolished" plea-bargaining; some states eliminated discretionary parole release.<sup>6</sup> Mandatory minimum sentences, out of vogue in the 1960s and comprehensively repealed in the federal system in 1970, proliferated.<sup>7</sup>

So what happened in the 1970s to effect wholesale rejection of the indeterminate sentencing system, which had survived nearly unchanged and unchallenged in most states for three-quarters of a century, and which in a richer, fuller form had in 1962 been enthusiastically endorsed by the American Law Institute?<sup>8</sup>

Answers can be offered at various levels. The simplest answers would identify policy entrepreneurs, such as federal district court judge Marvin Frankel, and trace out the influence of their proposals.<sup>9</sup>

Slightly more complicated answers look at the influence of prevailing policy critiques of the legal system: concerns about arbitrariness in criminal justice decisionmaking<sup>10</sup> motivated in general by unwarranted sen-

1962) (stating that reduction in prison sentence awarded for good behavior shall be deducted "from [the prisoner's] minimum term of imprisonment").

4. Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. Pa. L. Rev. 550, 552 (1978).

5. See Michael Tonry, *The Fragmentation of Sentencing and Corrections in America*, in U.S. Nat'l Inst. of Justice, No. 1, *Sentencing and Corrections: Issues for the 21st Century 1* (1999) [hereinafter Tonry, *Fragmentation*] (summarizing the collapse of indeterminate sentencing system).

6. See 1 *Research on Sentencing: The Search for Reform 130-40* (Alfred Blumstein et al. eds., 1983) [hereinafter *Research on Sentencing*] (describing these trends).

7. *Id.* at 132-33 (noting that "between 1977 and 1980, mandatory minimum sentencing laws were adopted by 27 states and were under consideration in at least 14 others").

8. See David J. Rothman, *Conscience and Convenience 3-4* (1980) (describing the "vigorous debate" challenging established programs and institutions within the criminal justice system during late 1970s and early 1980s); *supra* note 3 and accompanying text.

9. See Marvin E. Frankel, *Criminal Sentences: Law without Order passim* (1972) (decrying sentencing disparities and espousing creation of sentencing commissions charged with developing guidelines).

10. See Davis, *supra* note 3, at 29-30 (equating discretionary power with arbitrary power, and arguing that such power should be "eliminated to whatever extent it can be eliminated without undue sacrifice of other values that may be deemed more important").

tencing disparities<sup>11</sup> and in particular by disparities attributed to racial discrimination;<sup>12</sup> the maturation of the due process revolution of the 1960s heralded by *Goldberg v. Kelly*<sup>13</sup> and the Warren Court's criminal procedure jurisprudence;<sup>14</sup> and loss of confidence in correctional rehabilitative programs on ethical<sup>15</sup> and empirical<sup>16</sup> grounds.

The most complicated answers attempt to understand why particular ideas and policies about crime and punishment take hold at some places and times and not at others. They find explanations over time in changing social-structural and economic conditions<sup>17</sup> and across space in distinctive penal traditions, variant constitutional arrangements, and diverse political cultures.<sup>18</sup>

These works offer theories and hypotheses to explain postindeterminate sentencing penal policy changes in the United States between 1975 and 2005. They attempt to explain why particular new punishment edifices and ideologies have been built upon the ruins of indeterminate sentencing. To my knowledge, however, no similar literature exists to explain the equally dramatic penal policy changes embod-

11. See Frankel, *supra* note 9, at 5 (“[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”).

12. See Am. Friends Serv. Comm., *Struggle for Justice: A Report on Crime and Punishment in America* 130 (1971) (arguing that discretion within criminal justice system enables politically and economically dominant class to control minorities and other groups seen as threats to social order).

13. 397 U.S. 254 (1970).

14. See Francis A. Allen, *The Habits of Legality: Criminal Justice and the Rule of Law* 65–66 (1996) [hereinafter Allen, *Habits*] (describing how during the Warren Court in particular, but also “before and after, a formidable and highly volatile body of constitutional doctrine pertaining to the rights of suspected persons . . . emerged”).

15. See Allen, *Legal Values*, *supra* note 1, at 33 (arguing that “the rehabilitative ideal has been debased in practice and that the consequences resulting from this debasement are serious and, at times, dangerous”).

16. See Robert Martinson, *What Works: Questions and Answers About Prison Reform*, *Pub. Int.*, Spring 1974, at 22, 22–23, 49 (surveying two hundred controlled studies of treatments designed to rehabilitate offenders, and concluding that there is “very little reason to hope that we have in fact found a sure way of reducing recidivism through rehabilitation”).

17. See generally David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* viii (2001) (identifying “broad organizing principles that structure our contemporary ways of thinking and acting in crime control and criminal justice”); Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, 26 *Crime & Just.* 63, 65 (1999) (characterizing “contemporary imprisonment policies as efforts to answer a classic sociological question, that is, What drives trends in punishment?”).

18. See, e.g., Michael Tonry, *Thinking About Crime: Sense and Sensibility in American Penal Culture* 9–10 (2004) [hereinafter Tonry, *Thinking*] (arguing that U.S. sentencing policies are harsher than those of other countries because “[t]he organization of American government makes it especially vulnerable to emotional overreaction”); James Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between Europe and America passim* (2003) (examining why America’s criminal justice system metes out harsher punishments than those of other Western societies).

ied in the implosion of indeterminate sentencing that, with the benefit of hindsight, we now know began in the 1950s, although few noticed it at the time.<sup>19</sup> This Essay does not attempt to explain these changes.<sup>20</sup> Rather, it looks back to the midlevel policy concerns (rising crime rates, arbitrariness, disparities, racial discrimination, and ineffectiveness) that at least coincided with the collapse of indeterminate sentencing and the development of successor institutions and practices. It considers how effectively those concerns have been addressed over time, and attempts to demonstrate to what extent they remain topical today.

The galvanizing policy problems of the 1970s are no longer policy preoccupations in the twenty-first century. Racial disparities in punishment and risks of procedural unfairness to offenders are greater in 2005 than they were in the mid-1970s, as are sentencing disparities generally. Both the ethical and effectiveness critiques of rehabilitative programs have largely disappeared. Racial disparities in imprisonment are substantially higher in 2005 than they were in 1975, and patterns of drug law enforcement and sentencing have made them worse. Widespread adoption of mandatory sentencing guidelines, mandatory minimum sentence laws, and “three strikes” laws—and the adaptive responses they have provoked among practitioners—have produced sentencing disparities at least as great in 2005 as existed in 1975.<sup>21</sup> There is widespread support for the view that “treatment works” amidst few ethical compunctions against attempts to change people through coercion. As a result, policy-makers in the United States and England are happily increasing public

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19. See, e.g., Francis A. Allen, *Criminal Justice, Legal Values, and the Rehabilitative Ideal*, 50 *J. Crim. L. Criminology & Police Sci.* 226, 229–30 (1959) [hereinafter Allen, *Criminal Justice*] (arguing that rise of rehabilitative ideal was accompanied by measures that conflict with individual liberty and can therefore be justified by “only the most clear and compelling reasons”); C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 *Res Judicatae* 224, 224 (1953) (arguing that return to retributive theory of punishment would benefit defendants’ interests more than “humanitarian” theory); Norval Morris, *Sentencing Convicted Criminals*, 27 *Austl. L.J.* 186, 186 (1953) [hereinafter Morris, *Sentencing*] (criticizing judiciary for “fail[ing] to develop any agreed principles or practices” to achieve “uniformity and equality” in criminal sentencing).

20. On the converse question, why did indeterminate sentencing survive, little questioned, for so long? In its title, David Rothman’s *Conscience and Convenience* gives a standard answer: The ostensible dedication of indeterminate sentencing to reformation and rehabilitation of offenders rested comfortably with the welfare aspirations of the time (hence conscience), and the vast discretions it accorded officials acknowledged and reinforced their self-esteem (and power) and made management comparatively unchallenging, since no one looked over the managers’ shoulders (hence convenience). See Rothman, *supra* note 8.

21. See Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 *Iowa L. Rev.* 1043, 1049 (1983) (explaining that decline in average drug sentences is due in part to “a widespread perception among the foot soldiers of the criminal justice system—the prosecutors, defense attorneys, probation officers, and district judges—that drug sentences are often too high”).

investments in criminal justice treatment programs and just as happily coercing people to participate in them.

Modern penal theories and sentencing policies, however, have not yet substantially taken account of this changed context, and may correspond to theories and policies in the 1960s, when underlying norms and beliefs were changing rapidly but only barely discernibly. Desert theories have probably run their course. They will likely modulate into discussions of punishment's justifying aims and "negative" desert arguments asserting that desert considerations can tell us only how severely offenders *may* be punished, and not how severely they *ought* to be punished.<sup>22</sup> Punishment theorists will have to begin developing normative frameworks for greater individualization of punishment and for principled use of compelled treatment in just punishment systems. They will also have to take on an entirely new but related job: development of normative frameworks for the principled application of emerging institutions of restorative and community justice. These things are doable, but until now, the times have not required that they be done.

This Essay consists of five Parts. The first introduces an analytical framework for thinking about changes in punishment norms and policies. What we think we see, believe, and know largely depends on where we are and when. Ideas come in and out of vogue depending on prevailing sensibilities—the ethoi of diverse times. Changing sensibilities shape the ways we understand the world, the problems we consider important, and the solutions we think viable. Much of the theorizing about crime and punishment in the past century, and much of the accompanying evolution in criminal justice policies, can best be understood as the by-product of prevailing sensibilities. Secular developments necessarily lag behind changing sensibilities. Much writing about punishment has lagged in this way, like a fly caught in amber, and therefore, predictably, often risks irrelevance. If we can become more aware of changing sensibilities, we can adapt analyses and policies to them in ways that honor important values.

Part II offers a brief recitative of the flowering of the sentencing reform movement of the 1970s and 1980s. The key points are that indeterminate sentencing was monolithic in 1970 and existed in mildly variant forms in every American jurisdiction, but went into rapid decline after 1975 to be replaced by a crazy quilt of diverse systems.

Part III presents "then and now" comparisons of the states of play in 1975 and 2005 concerning five key backdrops to the sentencing reform movement: crime trends, rehabilitation, racial bias and disparities, sentencing disparities generally, and fairness to offenders. These changes have important implications for normative analyses of punishment and

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22. Positive retributivism, or desert, specifies what punishments must be imposed in a just punishment system; negative retributivism specifies what punishments may, but need not, be imposed. See R.A. Duff, *Punishment, Communication, and Community* 12 (2001) (discussing limits of positive and negative retributivist rationales).

form the bounds of political permission within which policymakers must operate.

Part IV looks at the prevailing contemporary punishment jurisprudence, most notably desert theories, but also, briefly, communicative and limiting retributivist theories. It considers how well these theories take account of the policy concerns and climate of 2005 and of new attitudes and research findings concerning rehabilitation. The not very controversial main conclusion is that limiting retributivist theories can accommodate the new context and evidence; the more controversial conclusion is that desert theories cannot and to some extent stand exposed as cultural byproducts of a decade, the 1970s, the penal sensibilities of which have passed.

Part V shifts attention to penal policy and identifies a number of developments that retributive theories cannot accommodate: proliferation of restorative and community justice initiatives, increased investment in rehabilitative programs and sanctions, and institutionalization of drug courts and other special purpose courts patterned on them. New or significantly refined penal theories and philosophies are immanent in the changing sensibilities that underlie new policies and practices. They need to be drawn out and developed, or penal theory and punishment philosophy will become irrelevant. Though the world of affairs can get along just fine without paying much attention to theory, that would be a pity. Normative theories can help expose contradictions and anomalies and provide calipers by which the justness of policies, practices, and punishments can be measured.

## 1. THINKING ABOUT PUNISHMENT

Efforts to understand legal system changes are aided by distinguishing among sensibilities, theories, and policies. "Sensibility" is a term—popularized by German sociologist Norbert Elias<sup>23</sup> and revived by Scottish sociologist David Garland<sup>24</sup>—that describes the prevailing ethos, the *zeitgeist*, of a time. Sensibilities are shared assumptions and understandings, difficult to see in one's own time and easier to see in others', that shape perceptions of the world. Penal sensibilities in the 1930s, for example, included assumptions about the environmental and psychological causes of criminal behavior, the malleability of human beings, the ethical desirability of rehabilitating offenders, and the capacity of correctional

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23. Norbert Elias, *The History of Manners* 110 (Edmund Jephcott trans., Pantheon Books 1978) (1939) (referring to ways in which bourgeois language was "adapted to the standard of sensibility of the court circles" in seventeenth- and eighteenth-century France).

24. Garland, *supra* note 17, at 6 (suggesting that changing institutional responses to crime are reflective of "a new pattern of mentalities, interests, and sensibilities that has altered how we think and feel about the underlying problem").

and other programs to do so.<sup>25</sup> This set of largely unquestioned assumptions made it easy for practitioners, policymakers, and professors to accept utilitarian theories and ideas about punishment, and made it difficult for them to accept retributive ideas.

Punishment theories are efforts to make comprehensive normative statements about the justness both of broad punishment policies and practices and of punishments in individual cases.<sup>26</sup> The simplest partitioning is between deontological theories concerned with achievement of just outcomes in individual cases as ends in themselves and teleological theories concerned with achievement of just outcomes as means to ends. Conventionally, deontological theories of punishment, most famously associated with Kant and Hegel, are called retributive theories and are centrally concerned with the moral appropriateness of individual punishments in relation to offenders' culpability.<sup>27</sup> Teleological theories of punishment, in recent decades called consequentialist theories, are centrally concerned with maximization of some measure of aggregate social benefit, usually called general prevention.<sup>28</sup> Thus, for retributivists, a just punishment is one that is morally appropriate, or proportionate, for this offender for that offense. For consequentialists, a just punishment is one that minimizes the costs of crime and related institutions and practices. A punishment is unjust if it does not serve that end or is unnecessary to its achievement.<sup>29</sup>

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25. See Rothman, *supra* note 8, at 50–61 (describing environmental, psychological, and genetic assumptions underlying three different progressive-era approaches to deviancy).

26. When I use the word “theory,” I refer to both the “philosophy of punishment” and “penal theory.” A distinction is sometimes made between them. See, e.g., R.A. Duff & D. Garland, Introduction: Thinking About Punishment, in *A Reader on Punishment* 1, 1 (R.A. Duff & David Garland eds., 1994) (attempting to “establish[ ] a dialogue between [the] closely related endeavors of” the philosophy of punishment and penal theory). The distinction may be disciplinary, distinguishing writings by philosophers from those by lawyers and social scientists, or the distinction may be between theoretical writing at a fairly high level of abstraction and theoretical writing that addresses concrete policy choices, in effect a contrast between philosophy and applied philosophy.

27. See generally Georg W.F. Hegel, *Hegel's Philosophy of Right* 69–70 (T.M. Knox trans. 1967) (1821) (stating that important considerations for punishment are “first, that crime is to be annulled, not because it is the producing of an evil, but because it is an infringement of the right as right, and secondly, the question of what that positive existence is which crime possesses and which must be annulled”); Immanuel Kant, *The Metaphysical Elements of Justice*, in *Foundations of Criminal Law* 75 (Leo Katz et al. eds., 1999) (“Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime.”).

28. See generally Jeremy Bentham, *The Rationale of Punishment* 20 (1830) [hereinafter Bentham, *Rationale*] (“General prevention ought to be the chief end of punishment, as it is its real justification.”).

29. That is the origin of the utilitarian parsimony principle: Any punishment greater than is required to achieve its end is unjust.

"Policies" are public choices about institutions (e.g., parole boards, sentencing commissions, guidelines, mandatory minimums) and practices (e.g., plea bargaining, parole release, risk prediction, electronic monitoring, drug treatment). Policies are more or less consistent with theories and sensibilities, and can be characterized and criticized relative to both. Policies are likelier to coexist with inconsistent theories (as, for example, three strikes laws have coexisted with retributive theories) than with inconsistent sensibilities. Once the penal sensibilities associated with indeterminate sentencing passed away, for example, release decisions by parole boards became hard to explain and quickly lost legitimacy.<sup>30</sup>

This is not the place to write at length about interactions among sensibilities, theories, and policies. Much of the body of this Essay does that. Instead I offer two kinds of illustrations of the power of changing sensibilities.

#### A. *Punishment Theory*

During the peak periods of indeterminate (1935–1960) and determinate (1975–2000) sentencing, particular powerful ideas were conspicuously absent. The key ideas underlying indeterminate sentencing—environmental determinism, human malleability, the power of a benevolent state—left little room for retributive ideas. Likewise, the key ideas underlying determinate sentencing—equality, consistency, evenhandedness, procedural fairness, moral autonomy—left little room for consequentialist ideas.

Herbert Wechsler, Paul Tappan, and Louis Schwartz, the towering intellectuals who developed the Model Penal Code, knew about and no doubt had read Kant and Hegel. They knew and understood the Kantian argument that respect for offenders' moral autonomy requires that they be punished in proportion to the seriousness of their crimes.<sup>31</sup> Search, however, through the twelve years of American Law Institute proceedings on the Code's punishment and sentencing provisions, and you will find not one person arguing that the imposition of morally deserved or proportionate punishments should be a major objective; words like retribution and just deserts are entirely absent from the discussion.<sup>32</sup>

There is a reason for this: Retributive ideas were seen as atavistic and vengeful. Edmund Pincoffs summarized the conventional utilitarian critique as follows:

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30. See, e.g., Morris, *Future*, supra note 2, at 31–49 (describing attacks since 1975 on "arbitrariness" of parole); Andrew von Hirsch, *The Question of Parole* 4 (1979) (same).

31. See Kant, supra note 27, at 76 ("Only the Law of retribution . . . can determine exactly the kind and degree of punishment.").

32. See Tonry, *Thinking*, supra note 18, at 176–79 (stating that "the Model Penal Code . . . rarely mentions desert, retribution, or proportionality in its text or original commentary, and echoes of such ideas only occasionally appear in the transcripts of the American Law Institute ('ALI') meetings at which successive drafts were discussed").

[I]f only desert is relevant, what, as retributivists, can we say in justifying a particular sentence? Are we not confined to talking about the heinousness of the criminal's deed? . . . [A]re we not then using the language of revenge? . . . Is the language of retribution not just a smooth and sophisticated cover for a morally questionable motive, the motive to take vengeance . . . ?<sup>33</sup>

Conversely, in the 1970s and 1980s, philosophers Andrew von Hirsch, Antony Duff, and Jeffrey Murphy knew and understood Bentham's view that the ethical measure of a government practice is whether in the aggregate it maximizes human happiness or satisfaction. Search in their writings, however, for arguments about how criminal law and punishment can be used to maximize offenders' or aggregate social well-being, and you will search nearly in vain. In Herbert Morris, Murphy, and Duff, you will find communicative ideas about using punishment as a mechanism for moral education, for facilitating offenders' understanding of the moral character of their wrongdoing.<sup>34</sup> In Murphy, von Hirsch, and Duff, you will find discussion of the problem of "just deserts in an unjust world"—recognition that unequal distribution of life chances makes it far easier for some to be law-abiding than for others—but you will find no proposals for how punishment can be used to enhance life chances or to compensate for disadvantages.<sup>35</sup>

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33. Edmund L. Pincoffs, *Philosophy of Law: A Brief Introduction* 22 (1991). Similar characterizations of consequentialists' views of retributive arguments are offered in the first major modern American and English books on punishment theories. See, e.g., H.L.A. Hart, *Postscript: Responsibility and Retribution*, in *Punishment and Responsibility*, *supra* note 1, at 210, 231 (describing an extreme version of retributive theory, in which punishment is justified because "the return of suffering for moral evil voluntarily done, is itself just or morally good"); Pincoffs, *Legal Punishment*, *supra* note 1, at 43 ("Retributivists are often, and in a variety of ways, accused of wishing to have revenge upon the criminal, and deceiving themselves and others by disguising this wish as a demand of justice.").

34. See generally R.A. Duff, *Trials and Punishments* 8 (1986) [hereinafter Duff, *Trials*] (articulating desire that criminal justice system will become "one to which the defendant is meant to respond, and in which she is called to participate, as a rational moral agent"); Herbert Morris, *A Paternalistic Theory of Punishment*, 18 *Am. Phil. Q.* 263 (1981) (advocating that punishment carry a communicative component which "convey[s] to the wrongdoer . . . that the deprivation is imposed because of wrongdoing"); Jeffrie G. Murphy, *Retributivism, Moral Education and the Liberal State*, 4 *Crim. Just. Ethics* 3, 7-9 (1985) (acknowledging power and importance of moral education theory of punishment, but questioning how moral theories can fit within ideology of liberalism).

35. See generally Duff, *Trials*, *supra* note 34, at 294 (stating that if "deep and far-reaching social, political, legal and moral changes" occur in society, "we may find . . . that there will be no need for punishment"); von Hirsch, *Justice*, *supra* note 2, at 143-49 (discussing problem of "Just Deserts in an Unjust Society," and concluding that, "[a]s long as a substantial segment of the population is denied adequate opportunities for a livelihood, any scheme for punishing must be morally flawed"); Jeffrie Murphy, *Marxism and Retribution*, 2 *Phil. & Pub. Aff.* 217 (1973) [hereinafter Murphy, *Marxism*] (arguing that "retributivism, despite the bad press that it has received, is a morally credible theory of punishment").

## B. *Punishment Practices and Policies*

Prevailing sensibilities also predispose us to believe things about the world that we would not believe in other times. Emblematic crime control policies of the 1990s—"zero tolerance" policing in New York City<sup>36</sup> and three strikes sentencing laws in California (Three Strikes)<sup>37</sup>—offer examples. Though both policies may, at the margins, have influenced crime rates and patterns, there is no credible evidence that they affected levels or rates of crime generally.<sup>38</sup> Yet major politicians in both places, Mayor Rudolph Giuliani and Governor Pete Wilson, claimed that the new initiatives produced subsequent declines in crime rates, and policymakers in many other places appear to have believed them.<sup>39</sup>

All the evidence, however, suggests otherwise.<sup>40</sup> Violent crime rates in both places had begun to decline in 1990 and 1991, a few years before the initiatives were adopted in 1993 and 1994, and continued to decline. The declines are thus best characterized as the continuations of preexisting trends and not as the results of policy changes.

This is confirmed when crime rate patterns in the 1990s (invariably declines) are compared across state lines. All American cities experienced declines in violent crime rates generally and homicide rates particularly.<sup>41</sup> New York's declines were among the greatest, but that position was shared with San Diego and Houston, neither of which adopted zero tolerance policing.<sup>42</sup> Violent crime rates in California declined after enactment of Three Strikes in 1994, but when California's crime rates in the 1990s are compared with those of the other four most populous states, it can be seen that there is nothing special about California's declines, which are well within the standard pattern.<sup>43</sup> The weakness of claims that Three Strikes was a principal cause of California's decline in crime rates

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36. See National Problems, Local Solutions: Federalism at Work, Part I: Fighting Crime in the Trenches: Hearing Before the House Comm. on Gov't Reform, 106th Cong. 21–22 (1999) [hereinafter *Fighting Crime in the Trenches*] (statement of Rudolph W. Giuliani, Mayor, New York City) (describing crime fighting tactics in New York undertaken under Giuliani Administration, premised on "broken windows" philosophy that small things matter).

37. Cal. Penal Code § 1170.12 (West 2004).

38. See *infra* note 40.

39. See *Fighting Crime in the Trenches*, *supra* note 36, at 22 (claiming credit for declines in crime rates); Fox Butterfield, 'Three Strikes' Rarely Invoked in Courtrooms, *N.Y. Times*, Sept. 10, 1996, at A1 (quoting spokesperson for Governor Pete Wilson as stating that Three Strikes has "lowered our crime rate precipitously").

40. This paragraph and those immediately following it summarize a substantial amount of data and a sizeable literature. Details and references can be found in Tonry, *Thinking*, *supra* note 18, at 97–139.

41. *Id.* at 119, 122.

42. *Id.* at 122.

43. *Id.* at 124.

is further demonstrated when crime rate trends are compared in counties that applied the law extensively with those that did not.<sup>44</sup>

There are two principal reasons why so many people mistakenly characterized events. The first is self-interest. We are all psychologically predisposed to want to believe things that are in our interest. Toughness on crime was a prominent feature of the political platforms and identities of Mayor Giuliani and Governor Wilson, and it must have been comforting when initiatives they promoted appeared to have worked.<sup>45</sup>

Probably more importantly, however, the historical work of David Musto shows that during periods of declining drug use (and by analogy declining crime rates) and greater intolerance towards deviance, both practitioners and policymakers become harsher and more punitive.<sup>46</sup> The twin logics that deviant behaviors warrant more severe responses and that the declining incidence of those behaviors is the consequence of the more severe responses fit together nicely. That both the harsher policy responses and the subsequent declines in deviant behavior could be the products of a preexisting trend is easy to overlook.

Prevailing sensibilities—the temper of the times—thus affect both the choice of ideas to honor and how we understand and explain the world. This is as true of punishment theory and policy as of anything else, as the development of sentencing policy over the past thirty years demonstrates.

44. See Franklin E. Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California* 103 (2001) (suggesting based on study that “no increment of general or special deterrence gives an advantage[] to counties with higher than average levels of Three Strikes enforcement”).

45. See Joyce Purnick, *Busy Being an Icon, Giuliani Keeps Political Future Alive*, N.Y. Times, Sept. 5, 2002, at A1 (“[Giuliani] was the tough, I’ll-do-it-my-way mayor, credited by fans with taming New York by cutting crime and the welfare rolls.”); Daniel M. Weintraub, *No More Mr. Moderate*, L.A. Times, Sept. 25, 1994, Magazine at 12 (describing Wilson’s repositioning for second term as a “tough talking . . . ex-marine” with an “immense story of credibility on the crime issue”).

46. See David F. Musto, *The American Disease: Origins of Narcotic Control* 296 (3d ed. 1999) (arguing that peaks of overestimation of number of drug users, and overestimation of percentage of crimes due to narcotic use or sales, have tended to come before or at the time of most repressive measures against narcotic use); see also Michael Tonry, *Malign Neglect—Race, Crime, and Punishment in America* 93 (1995) [hereinafter Tonry, *Malign Neglect*] (drawing on Musto’s work in claiming that “[t]he most intrusive laws and the cruelest penalties tend to be enacted *after* intolerance has reached its peak and when drug use is already falling”). David Kagan summarized Musto’s argument thusly: After drug use peaks and begins to decline,

[1] Public opinion turns against drugs and their acceptability begins to evaporate.

[2] Gradually, drug use becomes associated, truthfully or not, with the lower ranks of society, and often with racial and ethnic groups that are feared or despised by the middle class. [3] Drugs become seen as deviant and dangerous and become a potent symbol of evil. [4] Trailing behind this decline come large-scale legislative and law enforcement efforts . . . aimed at curtailing drug sales and use through energetic prohibition and enforcement and ever-harsher punishments against sellers and users.

Tonry, *Thinking*, *supra* note 18, at 130–31.

## II. THE DEMISE OF INDETERMINATE SENTENCING

Desert theories and determinate sentencing were responses to what widely were considered in the mid-1970s to be pressing problems. At the time, the shift from ubiquitous indeterminate sentencing systems to a crazy quilt of new approaches looked sudden and radical. In retrospect, this was a predictable manifestation of basic changes in sensibilities that had long been underway. Since the 1970s, however, sensibilities about crime and punishment have shifted again and in the first decade of the twenty-first century bear little resemblance to those of thirty years earlier. Theory and policy analysis need to catch up if they are to be of much use outside the classroom.

Indeterminate sentencing practices and institutions characterized every American system of criminal justice on New Year's Day 1975, as they had from 1930 onward.<sup>47</sup> Beginning in 1975, every state changed its sentencing system in material ways.<sup>48</sup> Maine was first, shifting from indeterminate to determinate sentencing by simply abolishing parole release and leaving the rest of the existing system in place.<sup>49</sup> California was next, enacting the Uniform Determinate Sentencing Law of 1976.<sup>50</sup> It ended the practice of parole release, but also prescribed how many years of imprisonment should be ordered for offenders committing standard, aggravated, and mitigated forms of particular offenses.<sup>51</sup>

Within a few years, every state jettisoned major features of indeterminate sentencing. By 1983, every state but Wisconsin had enacted mandatory minimum sentence laws for offenses other than murder and drunk driving.<sup>52</sup> By 1982, Alaska, Colorado, Indiana, Illinois, Maine, Minnesota, New Mexico, and North Carolina had followed California's lead and specified sentence lengths in their criminal codes; at least ten states had eliminated parole release; and at least nine had promulgated parole guidelines.<sup>53</sup> In addition, at least six states had statewide sentencing guidelines either in effect or under development, and more than fifty jurisdictions had developed local sentencing guidelines.<sup>54</sup>

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47. Research on Sentencing, *supra* note 6, at 39. See generally Rothman, *supra* note 8, at 43–81 (analyzing and explaining rapidly expanding implementation of individualized sentencing regimes during progressive era).

48. See generally Sandra Shane-DuBow et al., *Sentencing Reform in the United States: History, Content, and Effect* (1985) (reviewing changes to and status of each state system); Bureau of Justice Assistance, *National Assessment of Structured Sentencing 5–18* (1996), available at <http://www.ncjrs.org/pdffiles/strsent.pdf> (on file with the *Columbia Law Review*) (discussing historical trends in structured sentencing at state level).

49. Franklin E. Zimring, *Sentencing Reform in the States: Lessons from the 1970s*, in *Reform and Punishment* 101, 101 (Michael Tonry & Franklin E. Zimring eds., 1983).

50. *Id.* at 116.

51. Research on Sentencing, *supra* note 6, at 189–91.

52. Shane-DuBow et al., *supra* note 48, at 286 tbl.30.

53. Research on Sentencing, *supra* note 6, at 39–40, 133–34.

54. *Id.* at 40.

Political and normative developments concerning five subjects—race relations, proceduralism, civil liberties, rehabilitation, and lenient judges—were widely understood to have motivated sentencing law reformers. The civil rights movement's concern to reduce racial discrimination percolated through the criminal justice system, first in relation to prison conditions and subsequently to sentencing. Galvanizing riots in New York State, most notably at Attica Prison, highlighted the disproportionate number of blacks in confinement.<sup>55</sup> By 1971, the working group that wrote the American Friends Service Committee's *Struggle for Justice* was convinced that racial discrimination was a driving force behind imprisonment disparities and that the only way to ameliorate or eliminate it was to remove judges' and parole boards' discretion to discriminate.<sup>56</sup>

Second, prognosticated by Charles Reich's classic article *The New Property*,<sup>57</sup> and exemplified by *Goldberg*—a decision accepting Reich's argument about welfare entitlements<sup>58</sup>—the procedural rights movement emerged. The notion that government cannot invade primary personal interests except in accord with established procedural protections soon reached the criminal justice system. Kenneth Culp Davis famously observed that fair procedures were conspicuously absent from prosecutorial, judicial, correctional, and parole decisionmaking and argued that such discretionary decisions affecting liberty should be guided and structured.<sup>59</sup> In due course, the Supreme Court held that fair procedures must be observed in parole decisions,<sup>60</sup> prison disciplinary decisions,<sup>61</sup> and probation or parole revocation.<sup>62</sup> The discretions not reached were

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55. Cf. Bert Useem & Peter Kimball, *States of Siege* 219, 225 (1993) (noting that riots were in part galvanized by external groups agitating against rise in black prison populations, and speculating on implications of riots for black communities).

56. See Am. Friends Serv. Comm., *supra* note 12, at 107–12, 143–44.

57. Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733 (1964) (demonstrating that most citizens' important material interests relate to benefit claims against the government, and arguing that those claims warrant the same legal status as claims to tangible and traditional intangible properties).

58. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that entitlements could not be taken away unless specified rudimentary procedural protections were observed).

59. See *supra* note 3 and accompanying text. See generally Davis, *supra* note 3.

60. *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 7, 16 (1979) (reaffirming that “[t]he Due Process Clause applies when government action deprives a person of liberty or property” but deeming Nebraska's procedures in instant case sufficient to satisfy due process requirements).

61. *Sandin v. Conner*, 515 U.S. 472, 480, 483–84 (1995) (holding that “[t]he Due Process Clause standing alone confers no liberty interest in freedom from state action taken within the sentence imposed” (internal quotation marks omitted), but that “[s]tates may under certain circumstances create liberty interests which are protected by the Due Process Clause”).

62. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (concluding that procedures outlined in *Morrissey* for parole revocation should also apply to probation proceedings); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (“[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination

those of prosecutors and judges.<sup>63</sup> At least for judges, the sentencing reform movement aimed to set that oversight right.

Third, constituting the substantive version of the procedural justice argument, concerns were soon expressed, most famously by Judge Frankel, that the absence of substantive standards for sentencing and fair procedures to assure their just application produced unwarranted sentencing disparities.<sup>64</sup> The subtitle of his book was “Law Without Order” and within it he referred to American sentencing as “lawless.”<sup>65</sup>

Fourth, the preceding developments focused attention on the medical-model rationale of indeterminate sentencing—the claim that officials had to operate within wide discretionary bounds so that they could make individualized decisions about the rehabilitation (or its absence) of individual offenders. The necessary, if for too long unexamined, assumption was that judges and corrections officials had access to effective rehabilitative programs and knew how to classify offenders so they would get the treatment needed to turn them into law-abiding citizens. Literature reviews cast doubt on those assumptions and few people continued to claim that officials possessed those resources or skills.<sup>66</sup>

Fifth, constituting in retrospect a camel’s nose under the tent, social conservatives, presumably concerned about rising crime rates (but often with more cynical motives) decried the “lenience” of prevailing sentencing and parole practices, and saw determinate sentencing as a way to ensure that judges imposed appropriate sentences that would not be second guessed by parole boards.<sup>67</sup> Barry Goldwater raised “crime in the streets”

inflicts a ‘grievous loss’ on the parolee and often on others. . . . Its termination calls for some orderly process, however informal.”)

63. See *Nichols v. United States*, 511 U.S. 738, 747 (1994) (“As a general proposition, a sentencing judge ‘may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.’” (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972))); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

64. Frankel, *supra* note 9, at 5 (“[M]y first basic point is this: the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”).

65. See *id.* at ix–x.

66. See, e.g., James Robison & Gerald Smith, *The Effectiveness of Correctional Programs*, 17 *Crime & Delinq.* 67, 80 (1971) (“There is no evidence to support any [California correctional] program’s claims of superior rehabilitative efficacy.” (emphasis omitted)); Martinson, *supra* note 16, at 22–23, 49 (reviewing data from over two hundred studies and finding “very little reason to hope that we have in fact found a sure way of reducing recidivism through rehabilitation”).

67. Kevin Phillips, at its inception, and Thomas and Mary Edsall after its successful execution, describe the strategy of the ultraconservative wing of the Republican Party to use crime, welfare, and affirmative action as “wedge issues” to convert the Southern white Democratic voters into Nixon and later Reagan Democrats. See generally Thomas Byrne Edsall & Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights, and Taxes on*

as a campaign issue in the 1964 presidential election, and Richard Nixon followed suit in 1968 and 1972; calls for increased toughness characterized every subsequent presidential election until Bill Clinton nullified its emotive force by refusing to let Republicans get to his right on law and order.<sup>68</sup> The leading policy history of the adoption of California's Uniform Determinate Sentencing Law of 1976 describes the police unions, social conservatives, and prisoners' rights and civil liberties groups that improbably coalesced to support the new law.<sup>69</sup> The most influential crime policy book of the 1970s and 1980s provided an intellectual case for harsher and more certain punishments.<sup>70</sup> Those armies of the night have marched ever since.

In retrospect, 1975–1985 was the period of ferment, and the pace of innovation slowed thereafter. A single approach to sentencing no longer characterizes the United States.<sup>71</sup> All states have adopted mandatory minimum sentence laws, more than half have three strikes laws, and a third have abolished parole release.<sup>72</sup> Those laws, however, coexist in some states with statutory determinate sentencing and sentencing guidelines of various sorts and in others with largely intact indeterminate sentencing institutions and practices.<sup>73</sup>

The preceding constitutes a plausible account of the normative and policy developments that motivated at least the early years of recent sentencing policy changes. The next Part looks at the empirical evidence and policy concerns that inspired the early sentencing movement, and examines how the world has since changed.

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American Politics 190–92, 214, 224–25 (1991); Kevin P. Phillips, *The Emerging Republican Majority* 471 (1969) (“The emerging Republican majority spoke clearly in 1968 for a shift away from the sociological jurisprudence, moral permissiveness, experimental residential, welfare and educational programing [sic] and massive federal spending by which the Liberal (mostly Democratic) Establishment sought to propagate liberal institutions and ideology.”).

68. Ted Gest, *Crime & Politics: Big Government's Erratic Campaign for Law and Order* 223 (2001) (“Determined to seize on Bush's unexpected weakness on the crime-policy front, Clinton made a hard-nosed attack a centerpiece of his ‘New Democrat’ campaign for the White House in 1992.”).

69. See Sheldon L. Messinger & Philip E. Johnson, *California's Determinate Sentencing Statute: History and Issues*, in *Determinate Sentencing: Reform or Regression?* 13, 21–29 (1978).

70. See James Q. Wilson, *Thinking About Crime* 162–82 (1975).

71. Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, in *Sentencing and Sanctions in Western Countries* 222, 253 (Michael Tonry & Richard S. Frase eds., 2001) (concluding that “U.S. jurisdictions are notable for their diversity of approaches, much more so than for their similarities”).

72. See *Research on Sentencing*, supra note 6, at 132–35 (discussing mandatory minimum sentences and abolition of parole); Shane-DuBow et al., supra note 48, at 286 tbl.30 (highlighting mandatory terms for certain offenders).

73. See Reitz, supra note 71, at 222–33 (providing an overview of U.S. sentencing practices); Tonry, *Fragmentation*, supra note 5, at 1–6.

### III. HOW THE (RELEVANT BITS OF) THE WORLD CHANGED FROM 1975 TO 2005

Many of the background conditions that catalyzed the sentencing policy reforms of the 1970s have fundamentally changed; it is reasonable to expect prevalent attitudes and beliefs to change with them. In particular, changes regarding five background conditions stand out: crime trends, support for rehabilitative programs, concerns about racial disparities, fairness, and disparities in sentencing. Comparing 2005 with 1975, crime rates are falling not rising, support for rehabilitation is increasing rather than decreasing, and concerns about racial and other sentencing disparities and fairness are far less acute than they once were.

#### A. Crime Rates

Crime rates in 1975 had been rising for over a decade; by 2005, they had been declining for at least fifteen years. Tables 1 and 2 tell the story.

TABLE 1: POLICE-RECORDED OFFENSE RATES, PER 100,000 POPULATION, 1960–2003<sup>74</sup>

	Violent Crime	Murder	Robbery	Burglary	Motor Vehicle Theft
1960	161	5.1	60	509	183
1964	191	4.9	68	635	247
1968	298	6.9	132	932	393
1972	401	9.0	181	1141	426
1976	468	8.8	199	1448	450
1980	597	10.2	251	1684	502
1984	540	7.9	206	1266	438
1988	641	8.5	222	1316	586
1992	758	9.3	264	1168	632
1996	637	7.4	202	945	526
2000	506	5.5	145	729	412
2002	495	5.6	146	746	432
2003 <sup>75</sup>	475	5.7	142	741	433

74. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics Online tbl.3.103, available at <http://www.albany.edu/sourcebook/pdf/t3103.pdf> (last visited Feb. 5, 2005) (on file with the *Columbia Law Review*) [hereinafter BJS, Sourcebook of Criminal Justice]; FBI, Crime in the United States: 2004 Preliminary (Dec. 13, 2004), available at <http://www.fbi.gov/ucr/2004/6mosprelim04.pdf> (on file with the *Columbia Law Review*) [hereinafter FBI, Crime 2004].

75. See FBI, Crime in the United States: 2003, § II, at 11, 15, 31, 37, 55 (2004), available at [http://www.fbi.gov/ucr/cius\\_03/pdf/03sec2.pdf](http://www.fbi.gov/ucr/cius_03/pdf/03sec2.pdf) (on file with the *Columbia Law Review*) [hereinafter FBI, Crime 2003].

TABLE 2: VICTIMIZATION RATES—SELECTED OFFENSES, 1975–2003

Part A. 1975–1991, Rates per 1,000 Households or per 1,000 Individuals Twelve and Over<sup>76</sup>

	Any Violent Crime†	Robbery†	Aggravated Assault†	Household Burglary*	Motor Vehicle Theft*
1975	32.8	6.8	9.6	91.7	19.5
1978	33.7	5.9	9.7	86.0	17.5
1981	35.3	7.4	9.6	87.9	17.1
1984	31.4	5.7	9.0	64.1	15.2
1987	29.3	5.3	8.0	62.1	16.0
1989	29.1	5.4	8.3	56.4	19.2
1991	31.3	5.6	7.8	53.1	21.8

† per 1,000 households

\* per 1,000 individuals aged twelve and over

Part B. 1994–2003, Percentage of Households Reporting at Least One Incident<sup>77</sup>

	Any NCVS Crime	Violence	Robbery	Aggravated Assault	Household Burglary	Motor Vehicle Theft
1994	25.0	7.0	1.0	1.9	4.6	1.7
1997	20.9	5.5	0.7	1.4	3.7	1.2
2000	16.2	3.9	0.5	0.9	2.7	0.8
2002	14.6	3.2	0.4	0.7	2.4	0.8
2003	14.7	3.0	0.4	0.7	2.6	0.8

Table 1 shows offenses recorded by the police between 1960 and 2002 for all violent crimes, murder and nonnegligent manslaughter, robbery, burglary, and motor vehicle theft. I selected these offenses to reflect trends in serious violent and property offenses and to minimize distortions resulting from cultural changes that influence citizen reporting and police recording of alleged crimes. For example, declining tolerance of sexual and violent offenses has increased citizen reporting and police recording of certain crimes, such as aggravated assault.<sup>78</sup> These phenomena have led to an artificial increase in apparent offending rates.<sup>79</sup>

The data in Table 1 tell two well-known stories. First, police-recorded crime rates for all offenses increased steadily from the early 1960s

76. Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics 1992*, at 245 tbl.3.2 (Kathleen Maguire et al. eds., 1993); Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics 1990*, at 252 tbl.3.2 (Kathleen Maguire & Timothy J. Flanagan eds., 1991).

77. BJS, *Sourcebook of Criminal Justice*, supra note 74, at tbl.3.30.

78. Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 *Crime & Just.* 17, 54 (1999).

79. *Id.*

through the early 1980s, declined through the mid-1980s, rose until the early 1990s, and thereafter fell steadily and precipitously through 2003.<sup>80</sup> Rates for 2003 for the individual offenses were the lowest since various years in the 1960s: murder (1966), robbery (1968), burglary (1966), and motor vehicle theft (1968).<sup>81</sup>

Second, when the sentencing reform initiative of the mid-1970s took hold, crime rates had been rising for fifteen years. By contrast, in 2005 the crime rate has been in decline for fifteen years if the continuous decline since 1991 is deemed the appropriate measure, or for twenty-five years if the short upturn in the late 1980s is disregarded.

As Table 2 shows, the trends revealed by the police data can be substantiated with data from the National Crime Victimization Survey—a victimization survey of 40,000–60,000 households carried out every six months. Because major methodological changes to the survey were made in the early 1990s to capture and measure domestic assaults more accurately, Table 2 is split into two parts.

Part A presents data from 1975–1991 on burglary and motor vehicle theft rates per one thousand households and aggregate violent crime, robbery, and aggravated assault rates per one thousand individuals aged twelve and over. Burglary victimization rates declined continuously and steeply. Robbery and aggravated assault rates, as in the police data, rose through 1981 and then fell. Motor vehicle theft rates, again as in the police data, rose, fell, and then rose again.

The data listed in Part B are expressed per one thousand households and are derived from the altered methodology. Consequently, the data cannot be strictly compared with those presented in Part A. Nevertheless, Part B shows continuous and steep declines since 1994 in victimization rates for all four offenses and in the aggregate for violence and “any crime.”

This difference in crime trends between the 1970s and the first decade of the twenty-first century is important. We know with some confidence that in relation to drug crime, and more speculatively in relation to other crimes, public attitudes become less vindictive and uncompromising at times when the incidence of deviant behavior has been declining for a considerable period.<sup>82</sup> A window of opportunity has thus opened

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80. Compared with 2003, preliminary data for the first six months of 2004 show continued year-on-year declines of about five percent for murder and robbery, and two percent for burglary and motor vehicle theft. See FBI, *Crime 2004*, *supra* note 74, at 3, 5, 8, 10 (listing data for murder, robbery, burglary, and vehicle theft, respectively).

81. Compare BJS, *Sourcebook of Criminal Justice*, *supra* note 74, at tbl.3.103, with FBI, *Crime 2003*, *supra* note 75, § II, at 70 tbl.1.

82. See Tonry, *Thinking*, *supra* note 18, at 97–139 (describing relationship between crime trends and crime control policies); *supra* text accompanying note 46 (noting that initial stages of a falling incidence of deviant behavior may be associated with public overreaction). Tonry, *Thinking*, *supra* note 18, at 21–96, develops this analysis, and the evidence and analyses on which it is based, at some length.

for the adoption and execution of more humane social policies. This is a point to which I return below.<sup>83</sup>

### B. *Rehabilitation*

Although it was not widely recognized at the time, by 1975, confidence in the efficacy of rehabilitative programs had been on the decline for decades, and the prevailing evaluation of the empirical evidence suggested that rehabilitation did not work. By contrast, in 2005, faith in rehabilitation has been increasing for decades, and the prevailing empirical evidence suggests that a wide range of treatment programs can reduce the likelihood of recidivism.

Although Robert Martinson's famous article, *What Works—Questions and Answers About Prison Reform*, was not published in *The Public Interest* until 1974, the harbingers of decline in faith in the rehabilitative ideal were evident earlier. Early in the 1950s in Australia, C.S. Lewis—writing as a Christian apologist and Kantian moralist—and Norval Morris—writing as a liberal lawyer—raised normative objections to efforts coercively to change people in the pursuit of crime prevention.<sup>84</sup> Soon after, Francis A. Allen raised similar objections in the United States.<sup>85</sup>

Skepticism about the effectiveness of rehabilitative programs significantly preceded Martinson's article, which was itself a byproduct of a literature review commissioned by New York State in the late 1960s.<sup>86</sup> The California Department of Corrections had earlier commissioned a similar review of the evidence; a summary was published in 1971.<sup>87</sup>

Thus, what to many seemed to constitute a stunning turn in direction away from indeterminate sentencing and the rehabilitative ideal was simply an acknowledgment of normative doubts and empirical skepticism that had been bubbling away for decades.<sup>88</sup> That is not to say no one continued to support rehabilitative goals and programs; some did.<sup>89</sup>

83. See *infra* Part IV.B.

84. See generally Lewis, *supra* note 19; Morris, Sentencing, *supra* note 19.

85. See Allen, Criminal Justice, *supra* note 19, at 229–32 (criticizing shortcomings of “rehabilitative ideal in the areas of corrections and criminal justice”); Allen, Legal Values, *supra* note 1, at 25–41 (reexamining rehabilitative ideal).

86. This study eventually was published in full. Douglas Lipton et al., *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (1975).

87. See Robison & Smith, *supra* note 66.

88. The American Law Institute, however, seems not to have noticed: In 1962, it approved the Proposed Official Draft of the Model Penal Code, which recommended a refined system of indeterminate sentencing premised primarily on rehabilitative aims. Tonry, Thinking, *supra* note 18, at 176–86.

89. See, e.g., F.T. Cullen & K.E. Gilbert, Reaffirming Rehabilitation 246–91 (1982) (“[I]t is our firm belief that the most promising option for liberal reform is to reaffirm and not to reject the ideology of criminal justice rehabilitation.”); Ted Palmer, Martinson Revisited, 12 J. Res. Crime & Delinq. 133, 149–51 (1975) (arguing that Martinson's study challenging effectiveness of rehabilitative measures in fact contained evidence that some rehabilitative methods were effective for at least some types of offenders).

However, the eventual post-Martinson review of rehabilitative programs by the National Academy of Sciences, which broadly confirmed Martinson's skeptical conclusions, was plowing well-tilled soil.<sup>90</sup>

In 2005, things look very different. Numerous literature reviews,<sup>91</sup> meta-analyses,<sup>92</sup> and government reports<sup>93</sup> proclaim the effectiveness of a wide range of treatment programs. They uniformly insist that programs must be well-targeted and well-implemented but, assuming those (difficult to satisfy) conditions can be met, they almost always conclude that rehabilitative programs can significantly reduce reoffending.

Taking such findings seriously, a recent English government report, which served as the foundation for a massive overhaul of the English criminal justice system,<sup>94</sup> observed in its executive summary, "The available evidence suggests that greater support for reform and rehabilitation . . . to reduce risks of offending, offers the best prospects for improved outcomes."<sup>95</sup> The body of the report explained why: "A reasonable estimate at this stage is that, if the programmes are developed and applied as intended, to the maximum extent possible, reconviction rates might be

90. See Panel on Research on Rehabilitative Techniques, Report of the Panel, *in* *The Rehabilitation of Criminal Offenders: Problems and Prospects* 3, 29–34 (Lee Sechrest et al. eds., 1979).

91. See, e.g., M. Douglas Anglin & Yih-Ing Hser, Treatment of Drug Abuse, 13 *Crime & Just.* 393, 394 (1990) (insisting "greater social investment in treatment may be the most cost-effective way to achieve [the] public policy goals" of reducing drug use and thereby reducing the user's criminal activity); Gerald G. Gaes et al., Adult Correctional Treatment, 26 *Crime & Just.* 361, 366–411 (1999) (summarizing and offering general critique of correctional treatment literature).

92. See, e.g., Mark W. Lipsey, What Do We Learn from 400 Research Studies on the Effectiveness of Treatment of Juvenile Delinquents?, *in* *What Works: Reducing Reoffending* 63, 78 (James McGuire ed., 1995) [hereinafter *What Works*] (concluding "[i]t is no longer constructive . . . to argue about whether delinquency treatment and related rehabilitative approaches 'work' because "[a]s a generality, treatment clearly works"); Friedrich Lösel, The Efficacy of Correctional Treatment: A Review and Synthesis of Meta-Evaluations, *in* *What Works*, supra, at 79, 103 (concluding "it will be worthwhile to continue along [the] path" of rehabilitative offender treatment).

93. See, e.g., President's Comm'n on Model State Drug Laws, The White House, Final Report—Executive Summary 2 (Dec. 1993) (recommending sanctions "designed to be constructive, attempting to leverage alcohol and other drug abusers into treatment, rehabilitation, and ultimately, recovery"); U.S. Surgeon Gen., Youth Violence: A Report of the Surgeon General ch. 5 (2001), available at <http://www.surgeongeneral.gov/library/youthviolence/toc.html> (on file with the *Columbia Law Review*) (asserting that "effective treatment can divert a significant proportion of delinquent and violent youths from future violence and crime").

94. The Halliday Report, the foundation document upon which the Criminal Justice Act 2003 builds, discusses the new initiatives and the issues they raise. See John Halliday et al., Home Office, Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales *passim* (2001); see also Michael Tonry, Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy 1 (2004) [hereinafter Tonry, Punishment].

95. Halliday et al., supra note 94, ¶ 0.4.

reduced by five to fifteen percentage points (i.e. from the present level of 56% within two years to (perhaps) 40%)."<sup>96</sup>

Halliday's predictions are no doubt optimistic, but they do reflect a sea change in attitudes toward rehabilitation. Where a quarter of a century ago public officials and researchers were predisposed to pessimism, the modern predisposition is otherwise. This is important because, while the pessimism of the mid-1970s rested comfortably with normative arguments that sentencing should be backward-looking and predicated on ideas about proportionality, modern optimism can easily be reconciled with other views.

### C. *Racial Disparities*

Concerns about racial discrimination and disparities in the criminal justice system were major challenges to the legitimacy of indeterminate sentencing in the 1970s. By 2005, they have largely disappeared as major considerations in the formulation of sentencing policy.

The civil rights movement reached full stride in the 1960s, searing the nation's conscience; making national celebrities of people as diverse as Martin Luther King, Jr., Julian Bond, Bobby Seal, and Stokely Carmichael; and fundamentally challenging the ways America organized and distributed education, housing, and social welfare. Perhaps a bit surprisingly in retrospect, because real and alleged criminals seldom elicit widespread solicitude, the movement included the police, courts, and prisons within its focus. It gave rise, among other things, to the prisoners' rights movement<sup>97</sup> and to fundamental critiques of the capacity of indeterminate sentencing to deal with offenders fairly and evenhandedly.<sup>98</sup> The capacity of every judge, probation officer, prison system, and parole board to exercise individualized discretion within broad ranges of authority created nearly limitless risks of contamination of decisions by deliberate racial animus and unconscious stereotyping.

America is a different place in terms of race relations and equal opportunity in 2005 than it was in 1975, even though aspirations for racial equality remain in important respects insufficiently satisfied. Still, it would not be unreasonable to suppose that problems of racial disparity and discrimination in the criminal justice system are less acute. It would not be unreasonable, but it would be wrong. Racial disparities in impris-

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96. *Id.* at 7. This is even more heroic than it appears because of the way Halliday presents the numbers. A reduction from fifty-six percent reconviction within two years to forty percent is a twenty-seven percent reduction relative to the starting point.

97. E.g., James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960-80*, 2 *Crime & Just.* 429, 436-37 (1980) (suggesting the civil rights movement aroused the consciousness of minority prisoners and was the impetus for the ensuing prisoners' rights movement).

98. See, e.g., Am. Friends Serv. Comm., *supra* note 12, at 67-82 (highlighting preventive detention through indeterminate sentencing as "particularly vivid example of depersonalization" and "a major setback in the struggle for justice").

onment are worse in the early years of the twenty-first century than they were in the 1970s.

Table 3, showing the percentages of blacks among state and federal prison inmates, tells the tale. In 1970, in the bad old days, 41% of prison inmates were black. By 1980, the percentage had climbed to 44% and by 1986 to 46%. By 1990, it was 49%, around which it has since hovered, occasionally slightly exceeding 50%.<sup>99</sup>

TABLE 3: PERCENTAGE OF BLACK STATE AND FEDERAL PRISONERS IN SELECTED YEARS, 1960–2002.<sup>100</sup>

Year	Percentage Black
1960	37
1970	41
1975*	42.5
1980	44
1985	45.9
1990	49.2
1995	49.9
2002*	49.4

\* Estimated from published sources.

Racial disparities in imprisonment can be expressed in other ways. On December 1, 2002, 3.4% of black American men were prison inmates

99. Before the mid-1990s, the Bureau of Justice Statistics (BJS), like the U.S. Bureau of the Census, used “black,” “white,” and “other” to characterize race, and separately counted Hispanics and non-Hispanics. More recently, the BJS reports “race” data for whites, blacks, and Hispanics. Approximately one-fourth of Hispanics were formerly counted as “black,” and I have adjusted the 2002 figure in table 3 to take account of this. The official BJS report for 1997 lists the percentage of black inmates, including Hispanic blacks, as 49.9% in 1995; the 2003 BJS report lists the percentage of black inmates, not including Hispanics, as 45.7% in 1995. See Bureau of Justice Statistics, U.S. Dep’t of Justice, *Prisoners in 2002*, at 9 (July 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf> (on file with the *Columbia Law Review*) [hereinafter BJS, *Prisoners 2002*]; Bureau of Justice Statistics, U.S. Dep’t of Justice, *Prisoners in 1996*, at 9 tbl.11 (June 1997), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p96.pdf> (on file with the *Columbia Law Review*) [hereinafter BJS, *Prisoners 1996*]. In 1995, 17.6% of prisoners were reported to be Hispanic, which means that about a fourth (4.4%) were previously counted among black prisoners; in 2002, 18.1% were Hispanic. See BJS, *Prisoners 2002*, supra, at 9. See generally Tonry, *Malign Neglect*, supra note 46, at 49–123 (providing more detailed data on racial trends in crime and punishment).

100. BJS, *Prisoners 2002*, supra note 99, at 9 tbl.13; BJS, *Prisoners 1996*, supra note 99, at 9 tbl.11; Margaret Werner Cahalan, U.S. Dep’t of Justice, *Historical Corrections Statistics in the United States, 1850–1984*, at 65 tbl.3-31 (1986). For how 2002 percentages are calculated, see supra note 99.

(add jail inmates and the percentage climbs to 4.8%)<sup>101</sup> and 10.4% of black males twenty-five to twenty-nine years old were in prison. Relative to population, black men in 2002 were 7.6 times likelier to be in prison than white men, and black women 5.5 times likelier than white women.<sup>102</sup>

However the phenomenon is characterized, racial disparities in imprisonment—and the damage they do to black people's lives and life chances—have not diminished over the past thirty years. They have worsened.

We know why the black presence in American prisons increased so greatly in the 1980s. The problem was not an increase in biased decision-making in individual cases.<sup>103</sup> Nor did it occur because blacks' involvement in serious crimes increased.<sup>104</sup> The increase was instead the foreseeable consequence of conscious policy decisions to focus on street-level trafficking in the War on Drugs and on street-level violence in the War on Crime.<sup>105</sup> Inner-city drug dealing networks, operating mostly on the streets and in deteriorated neighborhoods, are much easier to penetrate, and dealers are much easier to arrest, than are middle-class drug dealers working behind doors and in less penetrable settings. Among people arrested for violent crimes, blacks, who make up 13% of the U.S. population, are heavily overrepresented. In 2003, 48.5% of those arrested for murder were black, and the figures for other serious violent crimes were also disproportionately high: forcible rape (33.3%), robbery (54.4%), and aggravated assault (33.0%).<sup>106</sup> Policies meant to increase the severity of punishments for violent crimes will, in the nature of things, disproportionately affect black offenders.

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101. See Bureau of Justice Statistics, U.S. Dep't of Justice, Prison and Jail Inmates at Midyear 2002, at 11 tbl.14 (April 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim02.pdf> (on file with the *Columbia Law Review*).

102. See BJS, Prisoners 2002, *supra* note 99, at 9 tbl.14.

103. See Randall Kennedy, *Race, Crime, and the Law* 352 (1997) (arguing that, in regard to charges of selective prosecution, "allegations of racial discrimination have been insufficiently substantiated"). See generally Tonry, *Malign Neglect*, *supra* note 46, 68–74 (documenting and discussing racial disproportion in criminal justice system and racially disproportionate effects of war on drugs).

104. See *infra* note 106.

105. See Tonry, *Malign Neglect*, *supra* note 46, at 104–16; Tonry, *Thinking*, *supra* note 18, at 130–39.

106. FBI, *Crime 2003*, *supra* note 75, at 288 tbl.43. FBI arrest data, unlike BJS prison data, continue to use a "black," "white," and "other" racial breakdown, and thus include Hispanics within the "black" and "white" classifications. Although blacks' shares among arrests for violent crimes are disproportionately high, they have declined substantially. The black share of homicide arrests in 2003 (48.5%) is much lower than in 1992 (55.1%), 1982 (49.7%), and 1976 (53.5%). The patterns from 2003, 1992, 1982, and 1976, for robbery (51.8%, 60.9%, 60.7%, 59.2%), rape (33.3%, 42.8%, 49.7%, 51.2%), and aggravated assault (32.2%, 38.3%, 38.8%, 41.0%) are similar. See *id.*; Tonry, *Malign Neglect*, *supra* note 46, at 64 tbl.2-2.

Although racial disparities have worsened, concern about them has abated and is no longer a major pressure on the shaping of sentencing and penal policies.<sup>107</sup> This is important because concern about racial disparities was a major impetus to sentencing initiatives that sought to reduce and constrain officials' exercise of discretion, and consequently rested comfortably with desert theories aimed at making sentences proportionate and predictable.

#### D. *Sentencing Disparities*

There was also widespread concern about sentencing disparities generally during the 1970s. The earliest reform initiatives were heavily motivated by the desire to reduce unwarranted disparities because they were unjust. That was the gravamen of Judge Marvin Frankel's proposal for creation of sentencing commissions<sup>108</sup> and of a series of other contemporaneous and, for a time, influential books.<sup>109</sup> However, substantive concern about disparities seems largely to have disappeared. This can be shown in several ways.

First, although sentencing commissions have been attempted or institutionalized in more than twenty states and the federal system, the time is long past when they were motivated primarily by a desire to reduce disparities and discrimination.<sup>110</sup> Most contemporary systems are motivated either to achieve "truth in sentencing" or to make sentencing outcomes predictable so that correctional resource needs can be predicted and managed. Seeking truth in sentencing, however, is not at all the same as trying to reduce disparities. Generally, truth in sentencing—usually involving abolition of parole release, time off for good behavior (good time), or both—aims to assure that whatever sentence the judge imposes is carried out. Whether the sentence is appropriate or proportionate is an altogether separate matter. Virginia's guidelines, for example, aim to reduce crime through the incapacitation of higher-rate offenders and offenders with predicted long residual offending careers, an

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107. Racial disparities in capital punishment and allegations of racial profiling by police continue to galvanize powerful emotions and concern, but disparities in sentencing and imprisonment do not. The federal government's sustained failure to repeal or amend the notorious 100-to-1 law, which punishes traffickers in crack cocaine—mostly black—as much as traffickers in powder cocaine who deal in amounts 100 times larger, is one example. See, e.g., Tonry, *Thinking*, supra note 18, at 4, 15; see also supra p. 1255 tbl.3 (displaying data on black imprisonment rates).

108. See Frankel, supra note 9, at 3–11.

109. See, e.g., David Fogel, ". . . We Are the Living Proof . . .": The Justice Model for Corrections 192–93 (1975) (describing sentencing system as "anomic" and challenging its fairness).

110. See Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 *Colum. L. Rev.* 1190, 1204–06 n.72–80 (2005) (explaining new reasons for sentencing commissions); Reitz, supra note 71, at 225–28 (describing changes in motivations for sentencing commissions).

approach that inherently has nothing whatsoever to do with horizontal equity for people convicted of comparable crimes.<sup>111</sup>

Nor does efficient management of correctional resources imply much about sentencing disparities. The goal of such an approach is to make sentences predictable, which implies making them consistent within categories. Unlike Judge Frankel's normative approach, efficiency constitutes both a backdoor and an instrumental goal: Sentences should be made consistent because that makes them predictable and therefore makes resource allocation decisions better informed. That is some distance from the normative claim that sentences should be made consistent because inconsistent sentences are unjust.<sup>112</sup>

Second, it has been several decades since policymakers showed much concern about sentencing disparities. Most of the ballyhooed sentencing initiatives of the past twenty years—three strikes rules, mandatory minimums, sexual psychopath laws, and truth in sentencing—display no sensitivity to proportionality and consistency. Mandatory minimum sentences for drug crimes, for example, often require imposition of longer sentences than are received by people convicted of serious violent and sexual crimes. California's Three Strikes, for another example, requires minimum twenty-five-year-to-life sentences following any third felony conviction, including (notoriously) trivial drug and property offenses, thus defying all conventional notions of proportionality and consistency.<sup>113</sup>

Third, everything we know about the operation of severe mandatory sentences instructs that they increase disparities in the handling of similar cases. In California, for example, there are enormous differences in the extent to which prosecutors in different cities invoke the third-strike provisions, which means defendants in some cities will receive twenty-five year sentences for crimes for which offenders in other cities receive much lesser sentences.<sup>114</sup> More generally, several centuries of experience and evidence show that mandatory penalties foreseeably provoke adaptive responses and circumvention by judges and other practitioners to save offenders from sentences that everyone involved considers unduly harsh.<sup>115</sup> As a result, among like-situated offenders, some will be sentenced as the

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111. See Va. Crim. Sentencing Comm'n, 1997 Annual Report 41–60 (detailing new risk assessment instrument designed for integration into existing guidelines system, with primary purpose of assessing probability of reconviction for felony crime within three year period).

112. Policy makers could, for example, decide that convicted offenders who are noncitizens (or Muslim or black or female) should always be sentenced to terms twice those of citizens, non-Muslims, whites, or men. Such a policy, consistently applied, would make sentences predictable, but it would be far from just.

113. Zimring et al., *supra* note 44, at 117–23.

114. *Id.* at 81–83 (comparing the number of twenty-five-year-to-life sentences for third-strike felons in Los Angeles, San Diego, and San Francisco); see *supra* note 44 and accompanying text.

115. Michael Tonry, *Sentencing Matters* 147 (1996).

mandatory sentence law prescribes and others will receive a wide range of sentences made possible by circumvention.<sup>116</sup>

This reduced visceral concern for the injustice of imposition of disparate sentences on like-situated offenders is important because it demonstrates the weakening influence of the idea that equality and proportionality are key elements of just punishment.

### E. *Fairness*

This point can be made by affirmation. Concerns for procedural and substantive fairness in the criminal justice system waxed through the 1970s and have waned ever since. Rawls's notion of "justice as fairness,"<sup>117</sup> made manifest in Dworkin's conception of rights as trumps,<sup>118</sup> and Dworkin's argument that fairness requires "equal concern and respect" to be shown for the interests of each individual<sup>119</sup> were vital and influential ideas in relation to the criminal justice system in the 1970s. They no longer are.

Concern for procedural fairness for criminal suspects and defendants expanded in the 1950s and 1960s under the aegis of the Warren Court, declined somewhat under the Burger Court, and has declined markedly under the Rehnquist Court.<sup>120</sup> Concern for substantive fairness, high in the 1970s and exemplified by concerns about racial and other disparities and ambitions to reduce them, has also since declined.<sup>121</sup>

Why these changes happened—why society at large and policymakers in general became less concerned about fairness to offenders and less able to empathize with the unfortunate and the dispossessed—is a complicated question. Answers range from the simple and simpleminded (crime rose, people became frightened, policymakers responded<sup>122</sup>) to the eloquent and elegant (conditions of late modernity reshaped sensibilities in relation to tolerance of risk, difference, and confidence in govern-

116. Although evaluations in the early years of implementation of sentencing guidelines showed that some significantly decreased disparities generally and racial and gender disparities specifically, the proliferation of mandatory minimum and three strikes laws, and the adaptive responses they engender, have no doubt greatly increased the prevalence of sentencing disparities. *Id.* at 40–49.

117. John Rawls, *Justice as Fairness*, 67 *Phil. Rev.* 164 (1958).

118. Ronald Dworkin, *Taking Rights Seriously* 184–205 (1977).

119. *Id.* at 180.

120. See Allen, *Habits*, *supra* note 14, at 65 (stating that Warren Court was leader in development of "constitutional doctrine pertaining to the rights of suspected persons," which subsequently was limited by "the restiveness of the modern Court").

121. See *supra* Part III.C–D.

122. William J. Bennett et al., *Body Count: Moral Poverty . . . and How to Win America's War Against Crime and Drugs* 14–17 (1996).

ment<sup>123</sup>). None is or can be completely convincing, but all agree that sensibilities have changed in important ways over the last forty years.

#### IV. NORMATIVE CONSEQUENCES

The changes in normative and cultural backdrop sketched in Part III have important implications for thinking about punishment. They can help us understand why retributivist ideas about proportionality and desert found receptive minds in the 1970s but find fewer now, and why thinking about punishment will and should change in coming years. In refusing to name names to the House Unamerican Activities Committee, Lillian Hellman famously refused to cut her conscience to fit the fashion of the times.<sup>124</sup> The prevailing sensibilities of a time do, however, powerfully shape what people believe and, even more powerfully, what they say. In the 1980s, many fewer voices were raised against the extraordinarily harsh penalties authorized and imposed in conducting the War on Drugs than would have been ten or twenty years earlier or than would be raised in 2005 were they new proposals. Likewise, post-9/11, many fewer people opposed policies denying basic human rights and procedural protections to alleged national security suspects than would have before 9/11 or than do in 2005. The fewer, quieter voices of principled opposition resulted partly from the chilling effect of not wanting to appear unreasonable or radical or naïve, but also because in those times on those issues many more people for a while believed the repressive measures were ethically justifiable and made good policy sense.

And so it is with thinking about punishment. The prevailing structural conditions and sensibilities of a time shape what people think and believe. Most practitioners and policymakers in the 1950s speculated that crime was in significant part the deterministic outcome of defective socialization, social disadvantage, and personal pathology, and that the most ethically defensible punishment policies involved rehabilitation of the corrigible and incapacitation of the rest.<sup>125</sup>

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123. See Garland, *supra* note 17, at 23–24. Less cryptically, Garland suggests that several major influences are important in a postmodern world of heightened insecurity and instability: increased and more widely distributed victimization and a heightened sense of risk, particularly among the privileged; adoption of primarily expressive policies by governments that recognize there is relatively little they can do about crime but wish to be seen to be acknowledging public anxiety and insecurity; and reification of typically poor and often minority offenders as the criminological “other” who can be scapegoated. *Id.* at 10–20, 135–37.

124. Mark Jarman, Ovid, *Our Contemporary*, Hudson Rev., Summer 2004, available at <http://www.hudsonreview.com/JarmanSu04.html> (on file with the *Columbia Law Review*) (“To paraphrase Lillian Hellman’s famous rebuke to the House Unamerican Affairs Committee, art will not cut its cloth to suit the fashion of the times . . .”).

125. For an example from England, see Barbara Wootton, *Social Science and Social Pathology* 80–135, 334–35 (1959) (reviewing a number of deterministic theories, and concluding there is “encouraging” evidence that rehabilitation is more successful than standard forms of punishment). For an American example, see Karl Menninger, *The Crime of Punishment* 96–97, 251, 257–64 (1968) (arguing that the existence of free will is

### A. *Ideas for the 1970s*

The calls for adoption of retributive punishment schemes set out in Norval Morris's *The Future of Imprisonment*<sup>126</sup> and Andrew von Hirsch's *Doing Justice*<sup>127</sup> at the time appeared radical. The Model Penal Code's draftsmen a dozen years earlier,<sup>128</sup> and the Brown Commission (National Commission on Reform of Federal Criminal Laws)<sup>129</sup> just a few years earlier had called for the creation of full-blown systems of indeterminate sentencing premised on utilitarian ideas. Yet von Hirsch was ready to jettison rehabilitative and other utilitarian goals of punishment, except as incidental byproducts of the imposition of deserved punishments, and Morris called for strict limits on and presumptions against their pursuit in individual cases.<sup>130</sup>

Academic philosophers beginning in the 1960s and 1970s showed renewed interest in deontological theories of punishment,<sup>131</sup> although in retrospect, as I have already shown, precursors to popular acceptance of desert and proportionality ideas in the mid-1970s can be seen at least twenty years earlier.<sup>132</sup> The basic ideas expressed in these retributive punishment theories had been around in well-elaborated form since Kant and Hegel developed them in the nineteenth century, and were ready to be taken off the shelf and applied.<sup>133</sup> For most of those years, at least in the English-speaking countries, they gathered dust.

Glimmerings of interest appeared in the 1950s. Suddenly, in the 1970s, they were taken down and celebrated. Why? Because the times were ready for them. They fit comfortably with the civil rights movement,

an unproven hypothesis, thus "blame" is an unsound basis for punishment; further arguing that crime should be treated as an illness, and that rehabilitative treatment for criminals is both desirable and possible).

126. See Morris, *Future*, supra note 2, at 58 (rejecting rehabilitation in favor of retribution and deterrence).

127. See von Hirsch, *Justice*, supra note 2, at 11–18 (criticizing rehabilitation as preeminent goal of punishment).

128. See Model Penal Code § 6.02 cmt. 9 (1985) ("When Section 6.06 was discussed and approved by the Institute [in 1962] there was little dissent from the objectives of having some judicial discretion in choice of sentence and considerable indeterminacy of prison terms.").

129. Nat'l Comm'n on Reform of Fed. Criminal Laws, Proposed New Federal Criminal Code § 3201(2) & cmt. (1971).

130. See Morris, *Future*, supra note 2, at 15, 18 (arguing that "rehabilitation can be given only to a volunteer" and that "sentencing judge should never extend a term of imprisonment, or impose a term of imprisonment, on the basis that the offender needs it for his retraining"); von Hirsch, *Justice*, supra note 2, at 11–18 (criticizing rehabilitation); id. at 127–30 (arguing that even if rehabilitation were to be effective, with few exceptions, principle of commensurate deserts should define limit of punishment).

131. See, e.g., Herbert Morris, *Persons and Punishment*, 52 *Monist* 475, 476 (1968) (arguing that humans have right to punishment that stems from "a fundamental human right to be treated as a person"); Murphy, *Marxism*, supra note 35, at 222 (proposing that retributive theory of punishment is reasonable and morally justifiable).

132. See supra notes 84–90 and accompanying text.

133. See supra note 27.

the prisoners' rights movement, the procedural rights movement, the elaboration of rights theories in philosophy by Rawls, Dworkin, and others, and the decline in confidence in the ethics and efficacy of rehabilitative programs. They provided a logical and a normative rationale for punishment schemes that could constrain officials' discretion and ameliorate racial bias and disparities of various sorts. Because retributive ideas fit so comfortably with the policy and normative imperatives of the 1970s and early 1980s, they escaped some of the scrutiny to which a less predisposed age would have subjected them.

Andrew von Hirsch is the paradigmatic writer in the modern retributive tradition. Professional philosophers have written creatively on this subject, if often rather abstrusely. Von Hirsch, however, has tried to develop an applied philosophy to address practical policy choices in an imperfect world;<sup>134</sup> I use some of his ideas to show the limits of retributive theories, starting with the most familiar. There are six major problems of successively greater importance.

First, in the initial iteration of von Hirsch's ideas in *Doing Justice*, it was unclear why he adopted retribution in determination of the amount of punishment as a defining principle at all. H.L.A. Hart had, to most people's satisfaction, explained that punishment theories need to address three different subjects: Justification—why punish at all? Liability—whom to punish? Amount—how much to punish?<sup>135</sup> Hart suggested that the three questions can coherently be answered in different ways. For example, for Hart himself, if general prevention, a utilitarian aim, were to be the justification for punishment, retribution often would be at least part of the rationale for decisions about liability and amount.<sup>136</sup> Norval Morris also relies on general prevention<sup>137</sup> but argues that the concept of desert should be used in defining the maximum amount of punishment appropriate.<sup>138</sup> Some justifications, however, might entail (that is, logically require) specific answers to the other questions. A thorough-going retributivist, for example, like Kant or Hegel, for whom the justification of punishment is positive retribution (that is, a belief that it is morally required that offenders be punished in strict proportion to their culpability) would have difficulty coherently offering other than positive retributivist answers to the other two questions.<sup>139</sup>

Von Hirsch adopted a positive retributivist position on amounts of punishment that could justly be imposed, but gave an unsatisfactory ex-

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134. See von Hirsch, *Justice*, supra note 2, at 6 (describing his book as an attempt to "provide a structure of ideas, against which specific programs may be judged," and acknowledging that "reformers, pursuing the practical business of change, have to accommodate their aims to political and institutional realities").

135. See Hart, supra note 1, at 3.

136. See id. at 9.

137. See Morris, *Future*, supra note 2, at 79.

138. See id. at 74–75.

139. In positive retributivist accounts, the deserved punishment *must* be imposed. In negative retributivist accounts, punishment *may* be imposed up to the deserved amount.

planation as to why.<sup>140</sup> The stance was not entailed in the justification he offered for punishment as an institution: an amalgamation of Benthamite utilitarian ideas and general prevention with retributive ideas about moral desert.<sup>141</sup> Von Hirsch's justification could easily have accommodated utilitarian goals in distribution (liability and amount combined), but he opted instead for a strict desert scheme. Although he later recanted it, he offered as a partial justification for the existence of punishment the benefits-and-burdens claim that offenders, who by offending have unfairly benefited from others' compliance with the social contract, must be subjected to offsetting burdens so as to restore social equilibrium.<sup>142</sup> In later writings, von Hirsch abandoned the benefits-and-burdens argument in favor of a censure theory which posits that respect for offenders' moral autonomy requires that we blame them for their wrongdoing in proportion to the moral gravity of the wrong.<sup>143</sup> All of his arguments are graceful and persuasive, and suggest a powerful intuitive commitment to retributive ideas and values. What isn't clear, and isn't required by the punishment justification be offered, is why he held that intuition so strongly.

Second, even assuming retribution in distribution is appropriate, there is a classic epistemological problem. How do we know how much censure, or "deserved punishment," a particular wrongdoer absolutely deserves? God may know, but as countless sentencing exercises have shown, people's intuitions about individual cases vary widely. Von Hirsch conceded that questions of "cardinal desert" are beyond us, but offered as a practical equivalent what he called "ordinal desert."<sup>144</sup>

An ordinal desert scheme ranks crimes by their comparative generic seriousness, ranks punishments by their comparative severity, sets "anchoring points" specifying the tops and bottoms of the punishment scale, and lines the two scales up against one another. There are still some well-known problems such as determining the anchoring points, the number of steps in the two scales, and the intervals between steps, but the scheme does what von Hirsch wanted it to do. What isn't clear is why he wanted to do it.

140. See von Hirsch, *Justice*, supra note 2, at 69 ("The principle of commensurate deserts, in our opinion, is a requirement of justice . . .").

141. See *id.* at 49–55 (concluding that criminal sanction rests on interdependent concepts of deterrence and desert).

142. See *id.* at 47–48 (emphasizing that Kant's theory explains only why some kind of deprivation should be suffered by the offender to offset his advantage, not why the deprivation should take the peculiar form of punishment).

143. Andrew von Hirsch, *Censure and Sanctions* 7–14 (1993) [hereinafter von Hirsch, *Censure*].

144. Andrew von Hirsch, *Past or Future Crimes* 44–45 (1985) ("Once, however, the magnitude and anchoring points of the scale have been chosen (with whatever uncertainties this choice involves), then the *internal* scaling requirements of proportionality—the ordinal requirements—become binding. The imprecision of cardinal proportionality is not a warrant for infringing on these principles of comparative scaling.").

Third, even accepting the logic of ordinal proportionality, is the problem that Bentham called "sensibility."<sup>145</sup> By this he meant the individual's idiosyncratic and circumstance-dependent susceptibility to pain. Bentham wanted punishment to be individualized, and wanted the subjective individualized weight of the sanction to be severe enough to deter that individual and others, and not a bit severer. Severer punishment than circumstances require would violate the parsimony principle's prohibition of needless and hence unjustifiable infliction of pain.<sup>146</sup>

For a variety of reasons, later utilitarian writers rejected the need (or feasibility) of making interpersonal comparisons of utility,<sup>147</sup> but it is far from obvious why a retributive punishment theory would reject interpersonal subjectivity. In everyday life, for example, we all know that a year's imprisonment will be a different experience in house arrest, a halfway house, a minimum-security camp for white collar offenders, a medium-security custodial prison, and a twenty-three-hour-a-day lockdown super-maximum security prison. Within any one of those types of prisons, the experience will differ for a recidivist gang member, a twenty-year-old middle-class college student, a welfare mom, a forty-year-old head of household, and a terminally ill septuagenarian. And beyond all that, the experience will vary with the individual's psychological robustness and vulnerabilities.

Fourth, the ordinal desert scheme's reliance on nominal offenses generically ranked presents similar problems. Owing to sentencing concessions awarded to defendants who plead guilty compared with those convicted following a trial, divergent approaches to plea bargaining, and the widely heterogeneous behaviors that can fall within generic offense definitions (robberies range from schoolyard takings of pizzas by threat to professional, armed, and elaborately planned operations), a nominal conviction offense can encompass an enormously wide range of behaviors.

Fifth, and constituting an important problem seldom discussed, von Hirsch's scheme falls prey to the classic retributive critique of utilitarian punishment. It treats offenders as means, not ends.<sup>148</sup> When a utilitarian

145. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 51 (J.H. Burns & H.L.A. Hart eds., University of London 1970) (1789) ("The disposition which any one has to have the proportion in which he is affected by two such causes, different from that in which another man is affected by the same two causes, may be termed the quality or *bias* of his sensibility.").

146. See Bentham, *Rationale*, *supra* note 28, at 23 ("All punishment being in itself evil, upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.").

147. See, e.g., Lionel Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 *Econ. J.* 635, 636-37 (1938) (criticizing interpersonal comparisons of utility in economic theory).

148. See Pincoffs, *Legal Punishment*, *supra* note 1, at 33-37 (critiquing utilitarianism on ground that it permits punishment of an innocent if such punishment yields more benefits (measured in terms of deterrence) than harms).

system holds an offender longer than the gravity of his crime requires to rehabilitate or incapacitate him, or to deter or morally educate others, then, and to that extent, it uses him as a means to the ulterior end of crime prevention.

Von Hirsch's theory does the same thing. Insofar as it ignores offenders' differing sensibilities to pain and employs generic offense definitions to build ordinal punishment scales to set amounts of punishment, it punishes many offenders more (or less) than they deserve to achieve a nominally retributive punishment system. The naïve defendant who insists on going to trial on a minor robbery charge and is convicted will receive a much harsher punishment than an experienced offender charged with a more serious robbery who pleads guilty to a reduced charge of simple assault. The naïve offender is a sacrifice to the formal logic of the punishment scheme.<sup>149</sup>

Sixth, von Hirsch's theory calls for the imposition of unduly harsh penalties in individual cases, thereby violating the parsimony principle. This occurs because of interactions among the ordinal desert concept, reliance on generic offense definitions, and refusal to take account of interpersonal subjectivities.<sup>150</sup> An offender must be punished as the scheme prescribes even though the offense was less serious than the average offense of its type, or the offender will, as a subjective matter, suffer more pain from a generic punishment than would the average offender. This point is a variation on the preceding critique that von Hirsch's theory uses offenders as means to the end of making practice follow theory. Offenders will be punished more than would otherwise be deemed appropriate or necessary because that is what the theory calls for.

I have focused solely on von Hirsch because he has been so central and influential a figure and has illuminated thinking about most of the hard problems. Other examples can be given, however, of ideal punishment theories shaped to fit the temper of their times. A considerable number of serious philosophers in the 1970s and 1980s developed retributive punishment theories, even though they felt unable to urge their adoption in the real world because they were premised on unrealistic and unattainable assumptions about social justice and equal life chances that in the real world cannot be satisfied.<sup>151</sup>

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149. Plea bargain incentives, of course, exist independently of ordinal desert schemes and can be subjected to ethical critique independently of them. I use this hypothetical merely to illustrate that the conviction offense is an artifact, sometimes an arbitrary one, of plea bargaining and other organizational processes; necessarily, a punishment scheme that rigidly ties punishment to those artifactual labels often will ignore meaningful differences between cases.

150. See von Hirsch, *Justice*, supra note 2, at 133 (suggesting that there could conceivably be as few as five gradations of seriousness in a penalty scale).

151. For example, Ted Honderich argues,

No doubt punishment raises many questions, but there is nothing that can be called the question of its moral justification which is left to be considered if one puts aside the great question of the distribution of goods in society. . . . Are our

"Communicative" theories came into vogue in the 1970s and 1980s, arguing that the aim of punishment is to communicate with the offender, and sometimes observers, about his or her wrongdoing.<sup>152</sup> Although often said not to be consequentialist, most such theories were. Whether the aim is to change the offender's understanding of his behavior per se, or to make him a right-thinking person less likely to misbehave, both are sought-after consequences. Some seem motivated to socialize bystanders into better values (and behavior); those too are sought-after consequences.

In any case, none of the leading communicative theories eschew hard treatment for offenders when the logic of its position should so prescribe. When the communication is unnecessary because the offender has already come to understand the wrongfulness of his act, and to regret it, hard treatment should be unnecessary. Likewise, if the offender is incorrigible, communication cannot succeed, and if the process is the goal, there is no point. Even von Hirsch—whose later censure (or blaming) theory is a variant of communicative theory (to the offender and to the community)<sup>153</sup>—calls for hard treatment in every case to give offenders and bystanders prudential reasons to behave.<sup>154</sup>

Like the retributive theorists discussed above, those who endorsed communicative theories also expressed doubts about the possibility of implementation.<sup>155</sup> What all these examples demonstrate is that punishment theorists in the contemporary sentencing reform era felt obliged to develop and work out the details of retributive or communicative theories in which, for use in the real world, they themselves did not really believe.

Von Hirsch's ideas were remarkably influential among policymakers for at least ten years after he made "just deserts" into a term of art. The Minnesota Sentencing Guidelines Commission explicitly adopted the

contemporary societies directed by the Principle of Equality? Is our punishment in accord with it? The answer is no, more so in this time than it has recently been. Does it follow that punishment in our societies lacks moral justification? That it is wrong? The short answer is yes.

Ted Honderich, *Punishment: The Supposed Justifications* 238–40 (1989); see also Murphy, *Marxism*, *supra* note 35, at 222 (asserting that Marxist analysis of society would undercut practical applicability of a retributive theory of punishment, however morally credible the theory may be).

152. See, e.g., Duff, *Trials*, *supra* note 34, at 267.

153. See von Hirsch, *Censure*, *supra* note 143, at 10 ("Censure addresses the victim. . . . Censure also addresses the act's perpetrator.").

154. See *id.* at 12–13 (noting that hard treatment can provide a morally aware potential wrongdoer "a further reason—a prudential one—for resisting the temptation" to commit a crime).

155. See, e.g., Duff, *Trials*, *supra* note 34, at 292 ("But insofar as the society in which the offender lives does not constitute a genuine community, united by shared values and mutual concern and respect . . . neither her crime nor her punishment can have the meaning which this [communicative and penitential] account ascribes to them.").

term as shorthand for the approved purposes of punishment.<sup>156</sup> The Australian Law Reform Commission and the Canadian Sentencing Commission also approved “just deserts” as sentencing rationales.<sup>157</sup> The time was right for the ideas and the vocabulary, and they were enthusiastically received. That is no longer true, however, and it may help make future options clearer and improve both normative and policy analyses if we try to discern the normative dimensions along which future developments are likely to occur.

### B. *Ideas for the Twenty-First Century*

So what normative ideas about punishment are likely to prove useful in coming decades? They must take account of different cultural and political climates from those prevalent thirty years ago and acknowledge different prevailing sensibilities.

The basic elements of normative frameworks will be the same—consequentialist ideas about crime prevention and moral education, retributive ideas about deserved punishments, equality, and proportionality—but the mix will be different. Partly because of revived interest and confidence in rehabilitative programs, and partly because the last fifteen years’ decline in crime rates has created a public and policy climate more amenable to humane policy initiatives,<sup>158</sup> both rehabilitative dispositions and individualized processes will figure prominently. Two directions of theory development are likely.

1. *Refinement of Limiting Retributivism.* — Limiting retributivist theories, of which Norval Morris’s is the best known, are likely to provide a normative framework that will be compatible with the sensibilities and secular developments of coming decades.<sup>159</sup> Morris, though working within a retributivist framework, managed to avoid most of the problems—arbitrariness, using offenders as means, unnecessary severity—that bedevil von Hirsch’s theory.<sup>160</sup>

156. See 1987 Or. Laws 619; Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 *Crime & Just.* 363, 393 (1997) [hereinafter Frase, *Sentencing Principles*] (“One of the [Minnesota] commission’s earliest prescriptive choices was its decision to adopt just deserts as the ‘primary’ sentencing goal under the guidelines . . .” (citing Minn. Sentencing Guidelines Comm’n, *The Impact of the Minnesota Sentencing Guidelines: Three-Year Evaluation*, at v, 10–14 (1984))).

157. See Austl. Law Reform Comm’n, *Sentencing of Federal Offenders* 34 (1980) (noting “renaissance of support for ‘just deserts’ and retribution,” although declining to apply it as guiding principle in sentencing reform); Canadian Sentencing Comm’n, *Sentencing Reform: A Canadian Approach* 143 (1987) (endorsing “just deserts” as rationale for sentencing).

158. A number of illustrations of this are given in Tonry, *Thinking*, supra note 18, at 3–20 (noting creation of special drug courts for drug-abusing offenders, diversion of drug abusers into treatment programs, and support for medical use of marijuana).

159. See Frase, *Sentencing Principles*, supra note 156, 407–26 (describing how Minnesota has successfully adopted Morris’s sentencing approach).

160. See Morris, *Future*, supra note 2, at 58–84 (citing parsimony, dangerousness, and desert as three primary justifications for imprisonment).

Rather than mechanically solving the problem of cardinal desert's unknowability, by means of the ordinal desert device, Morris acknowledged it. Rather than proposing a framework for imposition of "deserved punishments," he promoted "not undeserved" punishments. By this, he meant to take account of two empirical realities: First, people differ significantly in their judgments of what punishment an offense absolutely deserves, and second, there is much wider agreement about undeserved punishments—punishments that are too severe (or, less often, punishments that are too lenient). A normative theory that allows punishments that are not undeserved will be compatible with prevailing norms about punishment and provide a framework within which policymakers can specify punishments.<sup>161</sup>

Rather than using offenders as means to an instrumental end (that of protecting the scheme's theoretical integrity and formal logic), Morris would allow punishments above the minimum if fairly exacting empirical tests could be satisfied, but never above the maximum.<sup>162</sup>

Rather than requiring unduly harsh punishments because the machinery requires it, Morris would prescribe, consistent with Bentham's parsimony principle, that every offender be sentenced at the bottom of the range of not undeserved punishments unless there were good, articulable, empirically validated reasons for doing otherwise.<sup>163</sup>

In sum, rather than treating offenses, offenders, and punishments generically, Morris would allow judges to take account of individual differences.

2. *Emerging Conceptions of Justice.* — Morris's limiting (or "negative") retributivism is more flexible than von Hirsch's positive-retributivist desert theory, but more divergent theories of restorative and community justice are waiting to be elaborated. Restorative justice programs and ideas are proliferating in most western countries, but mainstream punishment theory has not yet been able to encompass them.<sup>164</sup> The principal

161. See *id.* at 78 (noting that criminal law as "moral teacher" requires both a punishment floor and ceiling); Norval Morris & Michael Tonry, *Between Prison and Probation* 87 (1990) ("[W]hy may policymakers not justly create standards that authorize imposition of any sentence that is not undeserved (that is, that falls within the range of punishments that reasonable people would regard as deserved)?").

162. See Marc Miller & Norval Morris, *Predictions of Dangerousness: Ethical Concerns and Proposed Limits*, 2 *Notre Dame J.L. Ethics & Pub. Pol'y* 393, 431–33 (1986) (noting that punishment term should not be extended by prediction of dangerousness "beyond that which would be justified as deserved punishment independently of that prediction" and that finding of greater than average dangerousness "must be shown by reliable evidence" before "intensify[ing] or extend[ing]" punishment).

163. See Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 *Crime & Just.* 1, 35, 37 (1985) (describing how predictions of dangerousness would only serve as upward departures from a base).

164. See John Braithwaite, *Principles of Restorative Justice*, in *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* 1, 5–6 (Andrew von Hirsch et al. eds., 2003) ("If there were an award for the intellectual tradition least likely to nourish an integrated theory of restorative justice, the *philosophy of punishment* would surely be a

problem is that proponents of restorative justice want to allow participants in restorative processes to decide upon resolutions that emerge from particular circumstances, whereas desert theorists and most lawyers want to impose external constraints and consistency rules on outcomes. Restorative programs are likely to continue to expand, and theorists will eventually have to cease merely deploring them and instead develop normative analyses concerning their application.

Similarly, proponents of recent British Labour Government crime control initiatives need to develop sustained normative justifications on communitarian grounds for policies that, to critics, appear to be profoundly illiberal.<sup>165</sup> So far, to my knowledge, no serious scholarly efforts have been devoted to developing a principled justification for policies such as these.<sup>166</sup>

Restorative and communitarian theories, if they are to be compatible with ideas about individual rights and social contract conceptions of limited governmental powers, must solve two problems. First, they must provide plausible reasons for looking to local, compared with general, standards of just punishment. It is easy to conceive of a series of restorative panels dealing with comparable cases and comparable offenders but resulting in radically different outcomes that have been unanimously agreed to by all participants, including the victim, the offender, and their loved ones.

Restorative justice proponents see little difficulty. What can be wrong, they would ask, with a negotiated outcome to which all involved have agreed under circumstances free from coercion or intimidation? What could be more just than an outcome that all involved agree resolves the problem it is meant to address? What happens in one conference room has nothing to do with what happens in another. Even if two substantially similar cases result in substantially different outcomes, so long as everyone involved in each case believes the outcomes in their cases are just, then they are. That the outcomes might be very different across cases is unimportant. Many lawyers would respond that injustice lies in the violation of notions of horizontal equity: Similarly situated offenders

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contender."); Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of "Restorative Justice,"* 2003 Utah L. Rev. 375, 380–86 (describing conflict between restorative justice and conceptions of just punishment).

165. The British government, for example, is aggressively promoting use of antisocial behavior orders (ASBO) as a solution to local disorder and problem behavior. The order is the outcome of a civil proceeding, with civil procedure and evidence rules and a civil law burden of proof, and need not and generally does not concern criminal behavior; however, violation of the resulting ASBO is a criminal offense punishable by imprisonment. *Crime and Disorder Act, 1998, c. 37, § 1* (Eng.).

166. There have been serious efforts to reconcile communitarian ideas with retributive punishment theories. See, e.g., Duff, *Trials*, *supra* note 34, at 195–204 (discussing synthesis of retribution and consequentialism).

who have committed comparable offenses have received very different penalties, and that is unjust.<sup>167</sup>

Different conceptions of punitive justice are involved: One is processual (a unanimously agreed-upon outcome of a fair deliberation is just), and the other is substantive (only a deserved, or not undeserved, punishment is just). The respective calculi are fundamentally different. For restorative justice proceedings, the aim is constructively to solve a problem in a way that all involved agree is just and appropriate. For a retributive theorist, the aim is to impose a sentence that adequately reflects the harm and culpability embodied in the current crime, in light of the offender's prior criminal record.

For processual restorative conceptions of justice to be reconciled with prevailing conceptions of deserved punishment, the range of allowable comparison will probably have to shrink. Few people seem to care much about disparate sentences across state lines. Theorists and policy-makers (in theory) worry about disparities across county lines, or urban-suburban-rural divides, but few people become very exercised about them, presumably because of a notion that local culture or subculture shapes local conceptions of justice and practitioners who have been shaped by those conceptions will reflect them in their actions and decisions. As the range for comparison narrows, we become less comfortable in theory or practice. Theorists will have to begin to develop plausible arguments for why more local conceptions (limited ultimately, reductively, to the individual restorative panel) may legitimately shape decisions that deserve to be called just.

Second, more fully than they have in the past, restorative and communitarian theories must supply plausible accounts for why it is just to take community considerations into account in resolving individual cases. This is, however, merely an application of the more general conflict between collective interests and individual rights that communitarian theorists must address.

What seems clear is that conditions in the early twenty-first century are sufficiently different from those in the 1970s that new theoretical ideas, and new policies consistent with them (or vice versa), are likely to emerge. The sooner we put aside the conventional views and wisdoms of the recent past in order to work in a new reality, the sooner new ideas about justice and new policies and programs reconcilable with them will emerge.

## V. POLICY IMPLICATIONS

Few would claim that policymakers are heavily influenced by academics' theorizing. They are influenced instead by their own normative pref-

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167. See, e.g., Robinson, *supra* note 164, at 382 (discussing importance of guidelines in maintaining sentencing uniformity).

erences, beliefs, and self-interest, by institutional considerations, and by their sense of public opinion.

In relation to punishment, the public is ahead of policymakers and penal theorists. The public resonance of retributive ideas and the public's commitment to punitive policies have been changing for at least five years. By 2002, in the face of fierce opposition from the federal government and law enforcement agencies, voters in eight states had approved the medical use of marijuana.<sup>168</sup> In 2000, California voters approved Proposition 36, which required large numbers of first and second time drug-dependent offenders to be diverted from prosecution and imprisonment to treatment;<sup>169</sup> District of Columbia voters in 2002 approved the comparable Ballot Initiative 62, although a federal court subsequently struck down the measure as impermissibly encroaching on the District's freedom to allocate funds.<sup>170</sup>

The general public no longer regards crime as among America's most pressing problems. From 1980 to 1990, according to the Gallup poll, crime consistently ranked among the top three. In March 2002, crime ranked fifteenth and drugs twelfth, way behind poverty, dissatisfaction with government, and the high cost of living.<sup>171</sup>

Public attitudes to punishment also have changed dramatically. In a 1994 poll by Peter D. Hart Associates, forty-eight percent of Americans said their preferred crime control strategy would be to address the underlying causes of crime, while forty-two percent preferred stricter sentencing. In a 2001 Hart Poll, sixty-five percent of Americans preferred the root causes approach, and only thirty-two percent favored stricter sentencing.<sup>172</sup>

A school of thought associated with Dan Yankelovich, longtime head of a major public opinion polling company, asserts that policymakers must operate on any subject in any place at any time within the bounds of public permission on that subject and in that place and time.<sup>173</sup> On the subject of punishment, in this place and in this time, the boundaries are wider than they have been for decades, and practitioners can be expected

168. Sam Howe Verhovek, *Oregon Doctor Stands Out in Marijuana Prescriptions*, N.Y. Times, Feb. 9, 2002, at A10.

169. Evelyn Nieves, *California Gets Set to Shift on Sentencing Drug Users*, N.Y. Times, Nov. 10, 2000, at A18.

170. See *Judge Strikes Down D.C. Treatment Ballot Initiative*, *Alcoholism & Drug Abuse Wkly.*, Feb. 17, 2003, at 1.

171. Tonry, *Thinking*, supra note 18, at 16.

172. *Id.*

173. See John Doble & Stephen Immerwahr, *Delawareans Favor Prison Alternatives, in Sentencing Reform in Overcrowded Times* 259, 259-65 (Michael Tonry & Kathleen Hatlestad eds., 1997) (describing study examining "limits set by public opinion on policy makers' choices" with regard to intermediate sanctions). See generally Daniel Yankelovich, *Coming to Public Judgment: Making Democracy Work in a Complex World*, at xi-xiii (1991) (recounting experience in opinion polling and acknowledging contributions by John Doble and John Immerwahr).

to range more widely within them than they have in the recent past. In many places, they already are. The proliferation of treatment-premised drug courts,<sup>174</sup> the easing in many states of mandatory minimum sentence laws,<sup>175</sup> and the creation of new diversionary programs from prosecution are examples.<sup>176</sup>

Changing public attitudes—in particular a widening of the bounds of political permission concerning crime within which policymakers can operate—will result in significant changes in criminal justice policies and practices in coming years, whether or not punishment theories change to accommodate, interpret, explain, and assess them.

The following significant policy changes are underway in various places and are likely to develop in the United States:

(1) The reach of restorative justice programs outside the criminal justice system into much more serious crimes than heretofore, with the possibility that judges and prosecutors in practice often will defer to their outcomes;<sup>177</sup>

(2) The incorporation of restorative justice initiatives inside the criminal justice system. For example, New Zealand's juvenile justice system assigns all cases to a conference, either in lieu of court processing or—for the most serious cases—between adjudication and sentencing;<sup>178</sup>

(3) The development of prosecutorial diversion systems that will divert increasingly serious cases from the justice system altogether, as German prosecutors have been doing for thirty years;<sup>179</sup>

(4) The increased individualization of sentencing by judges, as has been happening year-by-year in the federal system;<sup>180</sup>

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174. See Nat'l Ass'n of Drug Court Prof'ls, *What Is a Drug Court?*, at <http://www.nadcp.org/whatis> (last visited Mar. 28, 2005) (on file with the *Columbia Law Review*) (describing drug courts in general).

175. E.g., Fox Butterfield, *States Ease Laws on Time in Prison*, *N.Y. Times*, Sept. 2, 2001, at A1 (tracing developments in a number of states rolling back mandatory minimum laws—particularly Louisiana, Connecticut, Indiana, and North Dakota—to change in political climate due to falling crime rates, cost of exploding prison populations, and slowing economy).

176. See, e.g., Cal. Penal Code § 1210.1 (West 2004) (commonly known as Proposition 36; establishing that “any person convicted of a nonviolent drug possession offense shall receive probation”).

177. See, e.g., John Braithwaite, *Restorative Justice & Responsive Regulation* 16–26 (2002) (discussing restorative justice in context of nursing home regulation, Asian community policing, trade practices enforcement, and describing restorative justice conferences).

178. See, e.g., Allison Morris, *Youth Justice in New Zealand*, 31 *Crime & Just.* 243, 260–68 (2004) (describing in detail how juvenile offenders move through New Zealand system and are sent into conferences).

179. Thomas Weigend, *Sentencing and Punishment in Germany*, in *Sentencing and Sanctions in Western Countries*, supra note 71, at 188, 197–99, 207 (describing German practice of conditional dismissal, where accused can avoid conviction by agreeing to restitution or charitable donation).

180. Bowman & Heise, supra note 21, at 1126 (arguing that individual discretion on part of judiciary caused drop in average drug sentences at federal level).

(5) The development by sentencing commissions and state legislatures of schemes for assigning treatments to offenders, from those on probation to those who are incarcerated. Judges in such schemes act as sentence managers and will, with advice, set the initial conditions of sentences and oversee their gradual modification as offenders stumble or thrive. Delaware judges in theory have long performed such a role;<sup>181</sup>

(6) The evolution of increasingly porous and contingent lower bounds on the sentences that judges may impose in relation to conviction offenses, just as *Blakely v. Washington*<sup>182</sup> and *United States v. Booker*<sup>183</sup> have now set absolute upper bounds.

(7) The development of communitarian crime control schemes that weight community interests substantially more heavily relative to offenders' liberty and procedural interests than most criminal justice systems now do, as England's government now does with antisocial behavior orders and will do across a wide range of processes when the Criminal Justice Act 2003 is fully implemented.<sup>184</sup>

I have mixed personal views about many of these developments, but they are likely to happen, even if philosophers and other penal theorists do not begin to develop analytical tools for assessing them.

Traditional desert theories cannot encompass these changes. Limiting retributivist theories may be able to, but they will have to stretch to encompass restorative, communitarian, and pretrial diversionary processes. The greatest need, though, is for entirely new consequentialist theories that can balance competing values in a new era characterized by very different sensibilities than those that characterized the 1970s, when much current theorizing about punishment took shape. There is plenty of work to be done.

Grant Gilmore offered a theory of statutory obsolescence in commercial law: By the time issues percolate through court systems and judicial preconceptions enough to become sufficiently ripe to attract legislative attention, the commercial world will long since have addressed the problems in practice, and the legislation will be obsolescent when en-

181. See Richard Gebelein, Sentencing Reform in Delaware, *in* Sentencing Reform in Overcrowded Times, *supra* note 173, at 88, 89–90 (explaining that at any level of supervision or incarceration, courts can order variety of treatments; “[s]uccess can result in accelerated movement through and out of the criminal justice system; failure can result in additional sanctions . . .”). This was a major proposal of England’s Halliday report. See Halliday et al., *supra* note 94, at ch. 7. Halliday was explicit about the theoretical implications of his proposals: “The proposed guidelines should look for consistency of approach, rather than uniform outcomes, and recognize justifiable disparity . . .” *Id.* at iv.

182. 124 S. Ct. 2531 (2004).

183. 125 S. Ct. 738 (2005).

184. See Tonry, Punishment, *supra* note 94, at 32–33 (explaining how under Criminal Justice Act 2003, prior convictions trigger increased incarceration despite fact that evidence suggests incarceration of any length will not prevent perpetrators of minor crimes from offending again, and despite feasibility of rehabilitation programs that *would* treat offenders).

acted.<sup>185</sup> Punishment theorizing is not in exactly that place, but the risk is the same. Theories that speak to yesterday's problems are not likely to influence substantially tomorrow's solutions.

There are good reasons why writers on penal theory should attempt to recast their theorizing so that it speaks to today's and tomorrow's problems and sensibilities and not primarily to yesterday's.

Writings on penal theory and punishment philosophy seldom have much discernible influence on penal policies or practices, but they sometimes provide analytical frameworks that help policymakers think through problems. This occasionally happens directly, as when policymakers explicitly invoke ideas or theories they have encountered. More often it happens indirectly, as ideas learned early in life percolate through people's consciousness and experience to shape the ways they think.

Occasionally, policymakers acknowledge the existence of the academic literature, as in the 1980s when Minnesota's sentencing commission expressly adopted "Modified Just Deserts" and "Punishment" as its guideline rationales, and the U.S. Sentencing Commission felt obliged to explain why it had not done so.<sup>186</sup>

The literature is important in its own right, however, because it influences the thinking of successive generations of teachers, students, and practitioners.<sup>187</sup> What academics believe inevitably shapes how and what they teach, in effect creating the intellectual air that students breathe, and not surprisingly becoming rooted in students' understanding and normative beliefs. The more theory speaks to today's problems and re-

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185. Cf. Grant Gilmore, *On Statutory Obsolescence*, 39 U. Colo. L. Rev. 461, 476 (1967) (arguing that Uniform Commercial Code was obsolescent when it was drafted, and that "[t]he true function of a codifying statute is to reduce the past to order and certainty—and, thus, to abolish it").

186. As the U.S. Sentencing Guidelines Manual explains,

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes [crime control and "just deserts"] of criminal punishment. . . . Adherents of these points of view have urged the Commission to choose between them, to accord one primacy over the other. Such a choice would be profoundly difficult. . . . A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation. As a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result.

U.S. Sentencing Guidelines Manual appx. § 1A1.1, at 3 (2004), available at <http://www.ussc.gov/2004guid/Chap1.pdf> (on file with the *Columbia Law Review*).

187. See, e.g., *id.* at 9 (describing how guidelines were developed through "extensive hearings, deliberation, and consideration of substantial public comment" and that the Guidelines will continue to evolve with further "research, experience, and analysis"); Andrew von Hirsch, *Structure and Rationale: Minnesota's Critical Choices*, in *The Sentencing Commission and Its Guidelines* 84, 84–85 (Andrew von Hirsch et al. eds., 1986) (discussing how Minnesota guidelines incorporate policy choices that could have been influenced by substantial academic literature).

flects or at least acknowledges today's sensibilities, the more useful it will be.

The early twenty-first century is a time when crime rates are falling, which makes people less judgmental and vindictive, and thus open to new, more constructive, and less punitive responses to crime. It is a time when people believe that treatment works and are willing to put money and political capital where their mouths are.<sup>188</sup> It is a time when new ideas about restorative and community justice are emerging. It is also a time, however, when people are less troubled than in recent decades about racial and other disparities and are less supportive of civil liberties and procedural rights. It is a complicated time, full simultaneously of promise and peril for those who believe that what we do to offenders and prisoners matters.

Academics have no greater access to truth or wisdom than anyone else, but they do occupy a privileged position as observers, commentators, and kibitzers. Philosophers and other theorists, if they are lucky, can help shape the directions of future policy by helping practitioners and policymakers recognize ethically difficult new issues and think through alternate ways in which they might be addressed and at what ethical costs. To play that role, they will have to work hard to escape the blinkered thinking of the past. There is no view from nowhere. What we see depends on where and when we stand. Nonetheless, academics stand in places that may allow broader lines of sight than are available to most other people.

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188. See *supra* note 172 and accompanying text.