2007

Looking Back to See the Future of Punishment in America

Michael Tonry
University of Minnesota Law School, tonry001@umn.edu

Michael Tonry

Looking Back to See the Future of Punishment in America

LOOKED AT FROM INSIDE THE UNITED STATES, IT IS DIFFICULT TO SEE how different the American system of punishment is from those in other Western countries. Most practitioners and informed scholars know that the United States has the highest imprisonment rates in the world and is the only Western country to retain and use capital punishment, but that is only the beginning.

Here are other major differences. In many European countries, the age of criminal responsibility is 15 (in Belgium, 18); in most American states it is typically 10 or 12. In most Western countries, only tiny numbers of young offenders are dealt with in adult courts;[1] in the United States, by contrast, automatic transfers for serious crimes, low upper-age limits for juvenile court jurisdiction (15 is the lowest), and waiver laws result in tens of thousands of young people being tried and punished in adult courts each year.[2]

The contrasts for adults are even starker. In most European countries, the longest prison sentence that may be imposed, except for murder, is 14 or 15 years; in the United States it is life without possibility of parole (more than 35,000 prisoners now serve such terms, with more than 3,000 others on death row). In most Western countries, a life sentence in practice means 10 to 15 years; in the United States, even when release is possible, times served are much longer. "Life" often means life. American-style mandatory minimum and three-strikes laws

exist nowhere in Europe except with minor and weaker exceptions in England.[3] In many European countries, prisoners are viewed as citizens behind bars. They retain the right to vote while in prison and resume normal citizenship roles and rights afterward (Whitman, 2003). Except in Vermont and Maine, American prisoners are not entitled to vote. In many states they are disenfranchised following release, and are forbidden to engage in numerous occupations or to exercise rights accorded other citizens (Manza and Uggen, 2006).

It was not always so. As recently as the early 1970s, American imprisonment rates were comparable to, often lower than, those of other Western countries, America was in the vanguard of countries moving away from the use of capital punishment, mandatory minimum sentencing laws were in disfavor, and national commissions appointed by Presidents Lyndon Johnson (President's Commission on Law Enforcement and Administration of Justice, 1967) and Richard Nixon (National Advisory Commission on Criminal Justice Standards and Goals, 1973) were calling for less use of imprisonment. American jurisdictions experimented with community service, other alternatives to imprisonment, and victim-offender reconciliation programs that soon blossomed in other countries (but faded in the United States). In the 1950s and 1960s, nearly all prisoners were eligible for parole release early in their terms. Most sentencing laws and punishment practices were predicated on the ideas that harsh mandatory sentences served no valid purpose, that decisions affecting offenders' liberty should be insulated as much as possible from punitive public attitudes, and that a primary purpose of imprisonment was to rehabilitate prisoners (Tonry, 2004, chap. 7).

The laws, practices, and beliefs of the 1950s and 1960s fell into disfavor in the 1970s, to be displaced by punitive ideas and repressive policies that launched America's punishment system toward its twenty-first century future. For a time, people spoke of a possible paradigm shift in which a system of individualized, indeterminate, consequentialist punishment, predicated at least officially on rationalist and humane values, was replaced with a system of uniform, determinate, retribu-

tive punishment, predicated at least officially on moral and expressive values (see, e.g., Frankel, 1972; Morris, 1974; von Hirsch, 1976).

In retrospect it is clear that no paradigm shift occurred. What followed indeterminate sentencing is unquestionably much harsher, but it reflects no coherent set of values or principles and causes immeasurable injustice. The old system fractured and fragmented. Many states retained major elements of indeterminate sentencing, including parole release. More than half enacted three-strikes laws. All enacted mandatory minimum sentencing laws. Nearly all adopted sentencing guidelines systems at state or local levels; many were abandoned but some survived. Most states implemented successive waves of alternatives to imprisonment (during the 1970s), community penalties (in the 1980s), and intermediate sanctions (in the 1990s). During the 1990s rehabilitative programs regained favor and support, drug and other problem-solving courts proliferated, restorative and community justice programs started, and the prisoner reentry movement took shape.

The aim of this essay is to look at where the American punishment system has been in hopes of finding lessons that can help shape where it goes. There are four sections. The first, short because it covers much trodden ground, sketches the reasons why indeterminate sentencing imploded and limns some of the ideas, proposals, and policies to which the implosion gave shape. The second, not much longer, outlines prevailing explanations for why the policies of the past quarter century took the shape they did, and concludes that most are unconvincing. The third demonstrates that prevailing ways of thinking about punishment are obsolete and incapable either of encompassing current policies and practices or of guiding development of emerging twenty-first-century punishment systems. The last immodestly sets out some of the elements of new ways of thinking that may do a better job.

The ideal of achieving equality and proportionality in sentencing will always be attractive in principle but unattainable in practice. That is why H. L. A. Hart long ago wrote of the "somewhat hazy requirement that 'like cases be treated alike'" (1968: 24) and the proposal that theorizing give "some place, though a subordinate one, to ideas of equality

and proportion in the gradation of the severity of punishment" (233). Desert theories (e.g., von Hirsch and Ashworth, 2005) and criminal law theory take account only of gradations in offenders' culpability and the harms they contemplate or cause. Real cases differ enormously on those bases but also in the characteristics and circumstances of offenders and victims. Efforts to disregard these differences or to collapse them into objective measures of harm or culpability ignore the world's complexity and, as important, ignore things that people handling real cases consider important. Punishment theories for the twenty-first century will need to reflect needs for greater individualization of punishment while still attending to Hart's hazy requirement.

THINGS FELL APART

Indeterminate sentencing was ubiquitous in the United States from 1930 until 1975, when Maine abolished parole release. California the following year enacted its Uniform Determinate Sentencing Law of 1976. Arizona, Illinois, Indiana, Minnesota, New Jersey, North Carolina, and Pennsylvania soon enacted or implemented changes to their sentencing laws that would have been unthinkable 20 years earlier.[4] Eventually every state adopted policies that are irreconcilable with indeterminate sentencing (Tonry, 1996).

The development of indeterminate sentencing coincided with the invention of modern criminal justice systems and institutions. Before 1800, there were no professional police forces; prosecution offices; prison, probation, and parole systems; or juvenile courts. Enlightenment emanations embodied in Cesare Beccaria's proposals for fixed, proportionate punishments and Jeremy Bentham's for rational punishment systems maximizing human happiness soon produced modern justice systems. The prison as the modal punishment for serious crimes and professional police forces came into being in the first third of the nineteenth century. Training schools for delinquents, reformatories for young adults, and youth probation appeared in the second third. Full-blown probation and parole systems and juvenile courts appeared in the final third.

Adjudicating, sentencing, and punishing institutions were at least officially predicated on ideas that most offenders' wrongdoing results from defective socialization, psychological problems, or adverse social and economic circumstances, and that the goal of punishment should be to remedy those deficits. David Rothman (1980), the leading historian of indeterminate sentencing, describes consistent institutional failures and hypocrisies, but nonetheless observes that many practitioners much of the time spoke and acted as if they thought they were in the business of rehabilitating prisoners. My look at nearly 15 years of debates on the emerging punishment provisions of the *Model Penal Code* revealed broad support among practitioners for indeterminate sentencing and its rehabilitative goals, and broad aversion to the ideas and language of retributive punishment (Tonry, 2004, chap. 7). Both the *Model Penal Code* (American Law Institute, 1962) and the federal criminal code proposed by the National Commission on Reform of Federal Criminal Law (1971) were unabashedly premised on utilitarian ideas.

The changes that began in Maine resulted in abandonment of the ideas and institutions of indeterminate sentencing.[5] The utilitarian goals of incapacitation and rehabilitation were initially displaced by the retributive goal of punitive proportionality (e.g., Morris, 1974; von Hirsch, 1976) and later by the expressive goal of reassurance and the instrumental goal of politicians' re-election (Garland, 2001). Discretionary parole release was abandoned in about a third of the states and many others developed systems of numerical parole guidelines. In the interests of reduced sentencing disparities, counties and states developed various kinds of sentencing guidelines. State legislatures enacted mandatory minimum sentencing laws and later, in the 1990s, life without possibility of parole and three-strikes, truth-in-sentencing, and sexual psychopath laws.

INDETERMINATE SENTENCING

Indeterminate sentencing imploded. Its core methodology had been the grant of broad discretion to judges, probation officers, prison officials, and parole boards so that they could try to tailor punishments to

offenders' needs and circumstances. That no longer seemed acceptable. Researchers in America (Martinson, 1974) and England (Brody, 1976) reported that rehabilitative correctional programs could not be shown to be effective, and others raised ethical objections to coercive efforts to change people (Morris, 1974). Academic lawyers (Davis, 1969) decried the lack of procedural fairness and transparency in so discretionary a system. Liberal reformers criticized sentencing disparities generally (Frankel, 1972) and the opportunities individualized sentencing allowed for racially biased and stereotyped decisions (American Friends Service Committee, 1971). Politicians and activists on the left thought sentencing too harsh; those on the right thought it too lenient; both saw "determinate sentencing" as the solution (Messinger and Johnson, 1978). Those on the left were wrong.

In the academic world, but also to a considerable extent among practitioners and policy folk, utilitarian punishment theories fell out of favor. Retributive punishment theories came into vogue among philosophers.These included Feinberg (1970) with expressive theories, Murphy (1973) with equilibrium theories, and Herbert Morris (1981) with paternalistic theories. Legal scholars gave us limiting retributivism (Morris, 1974) and just deserts (von Hirsch, 1976). And from practitioners there was the "justice model" (Fogel, 1975). The Minnesota Sentencing Guidelines Commission adopted "modified just deserts" as its official rationale and Oregon's legislature did something similar (von Hirsch et al., 1987, chaps. 1 and 4). The shift from utilitarian to retributive ideas was fast and decisive. Law professor Albert Alschuler observed in 1978, "that I and many other academics adhered in large part to this reformative viewpoint only a decade or so ago seems almost incredible to most of us today" (1978: 552).

Retributive theories fit the mid-1970s like a glove. By shifting the focus of punishment away from the offender's circumstances and needs to his culpability, retributive theories addressed all the major criticisms of indeterminate sentencing. Ideas about punishments made proportional to the seriousness of crimes are inherent in retributivism. Sentences accordingly need not and should not be individualized

(except possibly in relation to blameworthiness).[6] This means that sentencing can be made subject to general rules, thereby enabling transparent processes, fair procedures, and accountable decisionmakers, and reducing the risk of racial and other disparities and stereotyped, idiosyncratic, or invidious decisions.

Many sentencing policy innovations of the 1970s and 1980s aimed to achieve those goals.[7] Parole abolition sought to make sentencing more transparent. Determinate sentencing statutes that specified sentence lengths in statutes sought transparency and greater consistency.[8] Parole and sentencing guidelines sought to reduce general and racial disparities, to foster fairer procedures and greater transparency, and to make judges and parole boards more accountable by setting published sentencing standards, often coupled with rights of judicial or administrative appeal. Some prosecutors' offices "abandoned" plea bargaining or established internal rules governing charging, plea bargaining, and dismissal policies.

Some of those innovations produced few of the sought-after effects. Determinate sentencing laws were not shown to reduce disparities or to enhance fairness. No new ones were adopted after the mid-1980s. Voluntary systems of local and state sentencing guidelines in the 1970s and 1980s likewise were not shown to be effective (though Virginia's voluntary guidelines dating from the 1990s seem to have helped reduce growth in the size of the state's prison population).

Other innovations were effective in some places. Parole guidelines reduced disparities in lengths of prison sentences, but by definition could not affect inconsistencies in their imposition. Presumptive sentencing guidelines developed by sentencing commissions were shown to make sentencing decisions more consistent and predictable, and thereby to reduce general, gender, and racial disparities. Because presumptive guidelines are published and judges' decisions to impose other than a presumptively appropriate sentence can be appealed, sentencing was made more transparent and judges were made more accountable. North Carolina's "mandatory" guidelines made sentencing more consistent and predictable.

DETERMINATE SENTENCING

By the mid-1980s, policy changes and retributive punishment ideas appeared to be walking together into the future, producing sentencing systems that successfully addressed indeterminate sentencing's major problems, necessarily imperfectly but significantly, and achieved outcomes that could to a significant extent be justified in terms of retributive principles. That appearance, however, was deceiving.

First, not all states shifted to indeterminate sentencing. Many, including populous ones like Texas, New York, and Pennsylvania, retained key features of indeterminate sentencing, including broad judicial discretion and discretionary parole release. Nearly two-thirds of states in 2006 retained parole release for a sizable fraction of inmates. Only about a third abolished parole release altogether. Less than a quarter developed meaningful systems of voluntary or presumptive sentencing guidelines (Reitz, 2001; Frase, 2005).

Second, even states that adopted sentencing innovations in the early 1980s addressing indeterminate sentencing's perceived defects—those that abolished parole release and established ambitious guidelines systems—subsequently either reneged or made fundamental compromises. In Oregon, for example, a referendum in 1994 superimposed severe mandatory minimums atop Oregon's presumptive guidelines and thereby nullified them for many serious crimes. A conservative incoming governor replaced the sentencing commission with a new, inexperienced, and much more political body (Bogan and Factor, 1997). In Washington, the legislature enacted mandatory minimum sentence laws for many crimes, a three-strikes law, and a sexual predator/civil commitment law; it also increased the severity of guideline sentences for many other offenses (Boerner and Lieb, 2001). In Minnesota, the legislature in one fell swoop doubled the lengths of presumptive prison sentences for many offenses (Frase, 2005).

The most ambitious and respected sentencing guidelines systems of the 1990s have different premises than their predecessors. Virginia's guidelines are explicitly based on incapacative premises, thereby basing punishments not on the offender's blameworthiness but on

his predicted future criminality. This completely breaks the link with retributive ideas and revives a primary rationale of indeterminate sentencing. North Carolina's much heralded guidelines are mandatory when they provide for prisons sentences, thereby disabling judges from adjusting sentences to account for differences in offenders' blameworthiness (Reitz, 2001; Frase, 2005).

Third, nearly all states adopted sentencing laws in the 1980s and 1990s that were inconsistent in principle with retributive punishment ideas.[9] Retributive theories inherently imply that punishments must be scaled mostly to some plausible measure of the offender's blameworthiness or culpability. This requires that the offender receive a sentence appropriate for his or her offense, and that the sentence be less severe than would be imposed for a more serious crime and more severe than for a less serious one. Most states enacted mandatory minimum or three-strikes laws that are irreconcilable with proportionality concerns. The extreme case is California's three-strikes law, which requires sentences from 25 years to life for any third felony, no matter how venial. Many mandatory minimum sentence laws require 10-year, 20-year, or life sentences for drug and firearms offenses, thereby requiring longer sentences than are required or typically imposed or served for much more serious violent or white-collar crimes. Such laws seldom have explicit normative rationales (other than decontextualized ideas that offenders committing particular crimes deserve very severe absolute punishments). The likeliest are deterrence and incapacitation. Whatever their implicit or explicit rationales, they fundamentally break the links between blameworthiness and punishment.

Fourth, rehabilitation has come roaring back. From the very beginning of its apparent rejection, rehabilitative programs retained support (Palmer, 1978; Cullen and Gilbert, 1982). By the late 1980s, drug treatment programs were widely recognized to reduce or eliminate drug dependence work often enough to justify sending drug-abusing offenders to them. Drug treatment programs have since proliferated in prisons and in the community, as have drug courts. Apparent successes of drug courts have led to extension of its underlying ideas about struc-

tured, individualized treatment to mental health, firearms, domestic violence, and other problem-solving courts. Throughout the criminal justice system, evidence of treatment effectiveness—of cognitive/behavioral skills programs, sex offender treatment, vocational training, among others—has been accumulating. Judges and policymakers want such programs used.

Fifth, a wide range of new programs and policies associated with emerging paradigms of restorative and community justice and therapeutic jurisprudence is gaining widespread support. They share the characteristic that their primary goals are other than imposition of punishments that are deserved in the sense that they are proportioned to the offender's blameworthiness. They share another characteristic in relying primarily on means other than adjudication. The share a third in that they are primarily concerned with outcomes: community problem solving, "healing" broken relationships, minimizing unintended adverse mental health effects other than deserved punishments or reduced recidivism.

Sixth, racial disparities no longer much seem to move policymakers or anyone else. Minority and other politicians no longer devote much rhetoric or any political capital to repealing the federal 100-to-1 crack/powder cocaine sentencing differential that is the primary cause of racial disparities in federal prisons. Nor is sustained political attention paid to racial disparities in the imposition and execution of death sentences despite longstanding evidence that a combination of the offender's (black) and victim's (white) races is a primary determinant of capital sentencing. Overall, the black fraction of American prison populations increased from 40 percent in the 1970s when the determinate sentencing movement took shape, to around 50 percent by the late 1980s, a level around which it has fluctuated ever since (Tonry, 1995, chap. 2; 2005). Many of the most popular sentencing initiatives of the past 20 years—the war on drugs, mandatory and three-strikes laws, longer prison sentences for violent and drug crimes—could have been seen to be likely to affect minority offenders disproportionately. They did.

Taken together, the preceding developments make it clear that the concerns that undermined indeterminate sentencing and animated determinate sentencing no longer have policy bite. Most of the major critiques of indeterminate sentencing have lost their power. Concerns about the absence of evidence about the crime-reducing effects of rehabilitative programs have largely disappeared, as have ethical concerns about coercing people into participation in treatment programs. Concerns about racial and other disparities appear much reduced, as evidenced by the proliferation of programs and institutions premised on discretionary and individualizing decisions, and the adoption of laws that foreseeably worsened disparities. Concerns about fair procedures, transparency, and accountability have not disappeared but their influence has waned.

Similarly, the positive arguments for determinate sentencing have lost traction. Insofar as determinate sentencing's appeal was its capacity to address problems of indeterminacy, the decline of urgency about those problems undermines determinate sentencing. Insofar as determinate sentencing's appeal was positive—that it was seen as a Good Thing that punishments be proportionate and scaled to blameworthiness—the plethora of laws requiring disproportionately severe punishments, and of new programs premised on individualization, suggests that support for that view was in decline by the mid-1980s, and by 2007 is mostly gone.

THEORIES THAT MIGHT WORK

In this first decade of the twenty-first century, there is neither a prevailing punishment paradigm in practice nor a prevailing normative framework for assessing or talking about punishment in principle. It is equally clear that full blown utilitarian ideas about punishment have not taken hold—lip service to ideas about deserved punishments is too common for that to have happened—and that retributive ideas are honored more in rhetoric than in substance. The result is a normative vacuum within which punishment institutions work and practices unfold, but which contain no widely recognized criteria by which they can be assessed or criticized.

A principal critique of indeterminate sentencing was that its overt allegiance to deterrence, incapacitation, rehabilitation, and moral education, and its implicit allegiance to retributive ideas (because proportionality is a widely shared intuition, defiance of which would undermine punishment's perceived legitimacy and therefore effectiveness), provided neither meaningful guidance for handling of individual cases nor a metric for normative analysis of the punishment system and its workings. Put differently, if all possible aims are available in all cases, depending on their circumstances, the aims provide no basis for saying what should happen in any particular case or for constraining idiosyncratic exercises of discretion.

So far as I am aware, no one has recently offered systematic and comprehensive utilitarian analyses of contemporary punishment policies and practices. Retributive analyses either discuss punishment in ideal conditions or explain why current practices are unprincipled. Sentences under most three-strikes laws and many mandatory minimum laws are unprincipled because their severity violates vertical proportionality requirements.[10] The outcomes of many restorative justice conferences do likewise. So do the operations of many drug courts to the extent that participation is based on drug dependence rather than the offense committed and outcomes are based on success in treatment rather than completion of a deserved punishment. The solutions usually proposed for dealing with these perceived problems are to reduce three-strikes and mandatory minimum sentences to levels reconcilable with proportionality limits, to restrict drug court eligibility to cases not otherwise bound for prison, and to limit dispositions in restorative justice conferences to issues consonant with applicable offense-based desert limits (see the essays in Bottoms et al., 2005). In other words, modern sentencing institutions and practices are said to be normatively tolerable only to the extent that they operate within retributive/proportionality restraints (Robinson, 2003).

That will not do. Many practices will continue whatever academics or punishment theorists say and they will be effectively immune from normative critique. A theoretical framework or set of ideas is

needed that can encompass punishment practices ranging from three-strikes laws through required participation in treatment programs to conferences based on restorative justice premises. Neither traditional utilitarian ideas nor traditional retributive ideas will suffice, the former because they are too elastic and indeterminate and the latter because they are too constraining.

A normative framework for punishment in the early twenty-first century will need to be more constraining than the utilitarian ideas that underlay indeterminate sentencing and more open-textured than recent retributive ideas. They will need to address three core issues: procedural conceptions of justice, the importance of context, and avoidance of unjustly severe or intrusive punishments. I discuss these issues in relation to the widely divergent outcomes of two hypothetical restorative justice conferences described in the next three paragraphs, though similar analyses could be developed to discuss divergent outcomes from drug courts or assignments to treatment programs.

Procedural Conceptions of Justice

Outcomes of many restorative, community, and therapeutic programs are irreconcilable with most retributive punishment theories. Retributive punishment theories feature a substantive measure of justice: a punishment is just if it is commensurate with the offender's blameworthiness and if it is appropriately scaled between greater and lesser punishments accorded more and less blameworthy offenders. Many proponents of restorative justice by contrast argue for a procedural measure of justice validated by the offender's assent to the outcome.

Restorative justice conferences typically include the victim, the offender, family members of each, a facilitator, and criminal justice practitioners such as police or probation officers. Successful conferences result in negotiated outcomes unanimously accepted by all participants including, most importantly, the offender and the victim. It is not difficult to imagine that simultaneous conferences in adjoining rooms concerning highly similar offenses—for example, a night-time

recidivist burglary of a residence by a drug-dependent offender in which goods worth $500 were stolen—might result in significantly different but unanimously approved outcomes. One conference might decide that a few days of community service and participation in community-based drug treatment is an appropriate outcome. The other might decide that an 18-month prison term featuring in-prison drug treatment, followed by 18 months probation with a vocational training condition is appropriate.

Proponents of restorative justice have little difficulty with such hypotheticals. The two results are by definition just, they would say, since the conference participants, those most directly concerned, believe them just and agree on them. If all the participants in conference A think its outcome just, and all the participants in conference B think its outcome just, it is unimportant that the outcomes are different. Everyone with a firsthand stake or interest in the particular cases agrees that the outcomes are just, and bystanders' views are unimportant.

Within limits, the process and the unanimity requirement are seen by restorative justice proponents to be what is important, not the outcome. The principal limits relate to voluntariness, informed consent, and avoidance of unjustly severe punishments. For the process to meet minimum acceptable standards, it is important that the offender not be coerced by threats or intimidating circumstances to agree on a particular outcome, and that the offender fully understand what the agreed outcome entails and what its implications are. The substantive limit is that the aggregate burdens on the offenders not exceed the most severe punishment that a court could justly impose. Subject to those limits, and assuming them to be met in the two hypothetical cases, a restorative justice proponent should not be troubled by the widely divergent outcomes.

A retributivist would say, however, that the public interest, or the state on behalf of the public interest, also has a stake—in assuring equal or comparable treatment of like-situated offenders (von Hirsch, 1993; von Hirsch and Ashworth, 2005). The usual proposal is that any

agreed outcomes of restorative conferences must fall within limits based on retributive considerations.

If retributivist thinking were universal, there would be no difficulty. Everyone would agree that conference outcomes necessarily must be restrained by retributive limits. In practice, however, retributive thinking is not universal, and restorative programs will continue to produce outcomes that conflict with it. Retributivists and restorativists will continue to talk past one another.

Similar problems arise for rehabilitative programs. Program evaluators commonly conclude and operators argue that well-managed programs that are well targeted to offenders' risks and needs can positively affect primary outcomes (for example, drug dependence, empathy, vocational skills, anger management) and secondary outcomes (recidivism, for example). The difficulty is that program classification criteria relate primarily to offenders' personal histories and characteristics and not to their current crimes. That is why drug courts can result in diversion from prosecution or confinement of offenders who have committed more serious crimes than other offenders who were prosecuted, convicted, and sent to prison.

If theory is to inform policy and provide a basis for critiques, a framework and a vocabulary are needed that will permit explorations of the requirements of justice in which assessments of whether outcomes are just turn primarily on compliance with procedural requirements.

The Importance of Context

The hypothetical case of two very similar crimes resulting in widely divergent outcomes from restorative justice conferences, but each unanimously approved, exposes a "geographical" problem that is generally ignored, but that punishment theories need to address. It is conventionally believed to be true, and was shown by every U.S. sentencing commission that examined pre-guidelines sentencing patterns in its jurisdiction to be true, that sentencing norms for many crimes are harsher in rural areas than in cities with suburban areas falling in-between. That consistent finding is an indication that there

are geographical differences in local legal cultures, the sets of norms and understandings about appropriate punishments that characterize specific places and are shared by the lawyers and judges who work there. Local legal cultures are durable, changing only slowly over time. New practitioners coming to work in a local legal culture are quickly socialized into acceptance of its conventions and implicit underlying norms.

The policy problem has been to reconcile abstract norms of equal treatment with empirical realities of durable differences in local legal cultures. If sentencing laws and guidelines are conceived of as "law," then it appears obvious that the law should be the same throughout a jurisdiction. That is what every sentencing commission decided: sentencing standards should be the same everywhere. Those decisions were in one sense hypocritical because the people making them, usually experienced practitioners and seldom naïfs, will have understood that geographical differences in sentencing patterns would persist, as they did, though sometimes they became less pronounced (Knapp, 1984). Policymakers thought about the subject on two levels simultaneously. They saw a need symbolically to affirm abstract norms of equal treatment while at the same time they understood that sentencing outcomes in practice would vary systematically from place to place because local notions of just punishment vary from place to place.

Similar ways to think about different outcomes in adjacent conference rooms need to be developed. At least three lines of analysis could be developed. One might parallel sentencing policy: recognize that differences between formal and abstract statements of norms can coexist legitimately. A second might extend the local legal culture model to encompass the distinctive characters and compositions of individual conferences. A third might explore the question of whether a fair process coupled with unanimity requirements—necessarily including the offender's assent to the disposition—should be regarded as a substantively just outcome per se, with no need for validation according to notions of horizontal equity. Each of these analyses needs working out and each presents distinctive challenges. The fair process plus

unanimous consent analysis, for example, will have to address issues of offender voluntariness in order to minimize dangers of situational coercion and insufficiently informed consent.

Although retributive writers have had difficulty coming to grips with divergent restorative results (Robinson, 2003), the problems are less difficult than is generally recognized. No one seems normatively troubled by state-by-state differences in sentencing laws and practices. Objections are made to the substance of particular states' laws (that they are too harsh or too rigid, or do or do not authorize capital punishment, or do or do not allow parole release) but are seldom made to the fact that they are different per se with the necessary result that citizens of different states suffer different punishments for comparable crimes. Within states, sentencing policymakers feel obliged symbolically to aver the need for equal standards throughout the state while recognizing that practices differ systematically from place-to-place across the state.

Accepting that outcomes can legitimately vary between adjacent conference rooms is just the next step. Adjacent courtrooms are another matter. It is easy to distinguish between outcome differences resulting from adjacent conference proceedings and differences attributable to the identities of judges. Presumably (were they both alive and hearing cases in adjacent courtrooms), Justices Thurgood Marshall and Clarence Thomas would handle their cases differently. The differences would be attributable not to differences between cases but to differences in the judges' personalities and sentencing philosophies, concerns that have no substantive relation to determination of an appropriate punishment. Retributivists and utilitarians agree that sentencing should be about crimes and criminals and not about judges. There is widespread agreement that sentencing disparities attributable to differences between judges are inappropriate and unjust. Reduction of sentencing disparities was after all a primary goal of the sentencing reform movement of the 1970s and 1980s. Different outcomes from conferences can be justified on the basis of the fairness of the process, the unanimity of the agreement, and the consent of the offender. None of these considerations justify judicial disparities.

Unjustly Severe Punishments

At day's end, things that happen to people subject to state authority because they have committed crimes are punishments, whether they are called treatments, negotiated agreements, or prison sentences, and it is important that they not be excessively severe in relation to the crime that precipitates them. To retributivists this is obvious and a minimum requirement of any punishment deemed just. It is just about as obvious to utilitarians, as H. L. A. Hart observed: "The guiding principle is that of a proportion within a system of penalties between those imposed for different offences where these have a distinct place in a commonsense scale of gravity. . . . For where the legal gradation of crimes expressed in the relative severity of penalties diverges sharply from this rough scale, there is a risk of either confusing common morality or flouting it and bringing the law into contempt" (Hart, 1968: 25). The American Law Institute's *Model Penal Code*, for example, adopted at a time when support for utilitarian approaches to punishment was at its height, nonetheless specified as the first three general purposes of sentencing and treatment of the offender: "To prevent the commission of offenses; To promote the correction and rehabilitation of offenders; To safeguard offenders against excessive, disproportionate, or arbitrary punishment" (American Law Institute, 1962: 2-3).

Emergent theories of punishment will need to accommodate significant differences in punishments imposed in comparable cases while assuring that no one is punished more severely than the seriousness of his or her offense justifies. Achieving this accommodation is, perhaps surprisingly to some, not difficult. Two things are required: recognition that determination of exactly how much punishment an offender deserves is impossible; and recognition that a just sentencing system necessarily will set upper limits of deserved but will only seldom if ever set lower limits.

The first point is almost metaphysical. God no doubt knows precisely how much any human being deserves to be punished, but human beings do not. Some individuals, usually paranoid, may believe they know but there is no way to reach universal agreement. People's

intuitions in such matters vary too widely. Hart, making this point, observed that his commonsense scale of gravity "cannot cope with any precise assessment of an offender's wickedness in committing a crime (Who can?)" (1968: 25).

Retributive theorists, most famously Andrew von Hirsch (1985, 1993), have devised ways to achieve considerable specificity in punishments deemed appropriate. Von Hirsch acknowledges that people's intuitions about deserved punishments vary widely (he calls these "cardinal desert" judgments) but observes that intuitions about the relative seriousness of generic categories of crimes are much more widely shared (for example, armed robbery is more serious than unarmed robbery which is more serious than theft; homicide is more serious than attempted homicide or rape than burglary). The latter are judgments about "ordinal" desert. Scales of offense seriousness can be devised. Once "anchoring points" (the harshest and least harsh allowable punishments) are set, offenses can be ranked along Hart's commonsense scale. Some technical issues need to be addressed, such as how many categories of crimes there should be, and whether the gaps between points on the scale should be equal, but these are amenable to mechanical or negotiated solutions. If, in addition, as von Hirsch (1976, 1993) proposes, punishments are set primarily on the basis of offense severity (and to a much smaller extent criminal record), a punishment system can prescribe both upper and lower levels of deserved punishment for every crime.

Von Hirsch has thus shown how a highly prescriptive punishment system can be achieved, and to his own satisfaction has explained why one should be. However, that it can be done does not mean it should be done. Most judges setting sentences believe, as indeterminate sentencing systems assumed, that myriad details about the seriousness of crimes, the circumstances in which they were committed, and the characteristics and circumstances of offenders are germane. Contemporary proponents of restorative justice, drug courts, offender rehabilitation, and reentry programs in various ways argue that punishments should be individualized. Practice has moved well ahead of theory. Theory to be relevant must catch up.

The second point derives from the first. While widespread agreements can be reached about punishments that are too severe, agreements are less widespread about punishments that are too lenient. Concepts have long been available to express this. Philosophers of punishment distinguish between "positive" and "negative" retributive theories. The former specify what punishments must be imposed, the latter what punishments may be imposed. Von' Hirsch's (1993) just deserts theory calls for positive retribution, Norval Morris's (1974) limiting retributivism for negative. The Finnish doctrine of asymmetric proportionality (Lappi-Seppälä, 2001) insists that retributive concerns set upper limits on deserved punishment but that there are no lower limits. The draftsmen of the *Model Penal Code* agreed and made probation an authorized punishment for every crime, including murder (American Law Institute, 1962; Tonry, 2004, chap. 7)

The tools thus exist to develop principled analyses of punishment in twenty-first-century America that can accommodate some but not all recent policy initiatives. Drug courts, rehabilitative sentences, and restorative justice programs can be implemented in principled ways so long as the punishments they impose do not exceed the upper limits of what individual offenders deserve. Some kinds of policies—sentences to life without the possibility of parole, three-strikes laws encompassing property offenses and lesser violent crimes—probably will prove no more justifiable in principle under new punishment theories than they were under existing ones.

NOTES

1. An important qualification here is that some countries (e.g., Finland [Lappi-Seppälä, 2007], Norway [Kyvsgaard, 2004], Sweden [Janson, 2004]) do not have separate juvenile courts. The criminal courts do, however, have separate sentencing policies for offenders younger than 18 that, among other things, strongly discourage any use of imprisonment.
2. German law by contrast provides for adult court sentencing of most 18- and 19-year-olds under the laws governing younger offenders (Albrecht, 2004).

3. England enacted three such laws (for burglary, drug crimes, and repeat violent crimes), but subject to "provided however" clauses that allow judges to impose other sentences. England also has "mandatory life sentences" for murder but people receiving them are eligible for parole release (Newburn, 2007).
4. The 1983 National Academy of Sciences report on sentencing (Blumstein, Cohen, Martin, and Tonry, 1983) and my Sentencing Reform Impacts (Tonry 1986) describe the first decade's changes.
5. Compendial reports funded by the US National Institute of Justice (Shane-Dubow, Olsen, and Brown, 1985) and the US Bureau of Justice Statistics (Austin, Jones, Kramer, and Renninger, 1994) indicate which states did what when.
6. Retributivist writers differ vigorously about this. Some insist that meaningful assessments of blameworthness must be deeply biographical and take account of all circumstances of an offender's life that bear on why this crime by this offender at this time (Murphy, 1973). Others argue that the only practical way to assess blameworthiness is in terms of the severity of the offense committed, with minor modulations to take account of prior convictions (von Hirsch, 1985).
7. Sources for assertions in this and the preceding paragraphs can be found in Blumstein et al. (1983), Tonry (1986, 1996), Reitz (2001), and Frase (2005).
8. A primer for readers new to the subject. "Determinate sentencing laws," which made it possible to determine or accurately predict the lengths of prison sentences, were responses to the rejection of indeterminate sentencing laws under which prison sentence lengths could not be known until a parole board made a release decision. Determinate sentencing laws usually encompassed parole release abolition. They took three primary forms. "Statutory determinate sentencing" specified appropriate sentences in statutes enacted by the legislature. "Voluntary guidelines" were created by judicial committees or sentencing commissions. They established "normal" or "standard" ranges of sentences for particular crimes (usually with adjustments for prior records); judges were not obliged to follow

the guidelines and no appeals could be filed when they did not. "Presumptive guidelines" were developed by sentencing commissions and set presumptive ranges. Judges were not required to impose sentences from within the presumptive range, but when they imposed some other sentence they were required to give reasons; the adequacy of those reasons was subject to possible appellate review.

9. For self-evident epistemological reasons, no uniquely appropriate punishments exist for individual offenses (this is sometimes referred to as "cardinal" desert). Offenses can, however, be ranked according to widely shared views about their relative seriousness and penalties scaled in ways plausibly related to seriousness, thereby makes systems of proportionate sentences achievable (sometimes referred to as "ordinal" desert) (von Hirsch, 1985).
10. Horizontal proportionality requires that comparably blameworthy offenders receive comparable punishments; vertical proportionality that more blameworthy offenders receive severer punishments than less blameworthy ones, and vice versa.

REFERENCES

Albrecht, Hans-Jörg. *"Youth Justice in Germany." Youth Crime and Youth Justice: Comparative and Cross-national Perspectives.* Eds. Michael Tonry and Anthony N. Doob. Vol. 31 of *Crime and Justice: A Review of Research.* Ed. Michael Tonry. Chicago: University of Chicago Press, 2004.

Alschuler, Albert. "Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for 'Fixed' and 'Presumptive' Sentencing." *University of Pennsylvania Law Review* 126 (1978): 550-77.

American Friends Service Committee. *Struggle for Justice.* New York: Hill andWang, 1971.

American Law Institute. *Model Penal Code.* Philadelphia: American Law Institute, 1962.

Austin, James, Charles Jones, John Kramer, and Phil Renninger. *National Assesment of Structured Sentencing.* Final Report to the Bureau of JusticeAssistance. San Francisco: National Council on Crime and Delinquency, 1994.

Blumstein, Alfred, Jacqueline Cohen, Susan E. Martin, and Michael Tonry, eds. *Research on Sentencing: The Search for Reform.* Vol 2. Washington, D.C.:National Academy Press, 1983.

Boerner, David, and Roxanne Lieb. "Sentencing Reform in the Other Washington." *Crime and Justice: A Review of Research.* Vol. 28. Ed. Michael Tonry.Chicago: University of Chicago Press, 2001.

Bogan, Kathy, and David Factor. "Oregon Guidelines, 1989-1994." *Sentencing Reform in Overcrowded Times.* Eds. Michael Tonry and Kathleen Hatlestad. Oxford: Oxford University Press, 1997.

Bottoms, Anthony, Kent Roach, Julian Roberts, and Andrew von Hirsch, eds. *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* Oxford: Hart, 2005.

Brody, Stephen. *The Effectiveness of Sentencing: A Review of the Literature.* London: H. M Stationery Office, 1976.

Cullen, Frank, and Karen Gilbert. *Reaffirming Rehabilitation.* Cincinnati: Anderson, 1982.

Davis, Kenneth Culp. *Discretionary Justice: A Preliminary Inquiry.* Baton Rouge: Louisiana State University Press, 1969.

Feinberg, Joel. "The Experiment Function of Punishment." *Doing and Deserving: Essays in Theory of Responsibility.* Ed. Joel Feinberg. Princeton: Princeton University Press, 1970.

Fogel, David. *We Are the Living Proof: The Justice Model for Corrections.* Cincinnati: Anderson, 1975.

Frankel, Marvin. *Criminal Sentences: Law without Order.* New York: Hill and Wang, 1972.

Frase, Richard S. "Sentencing Guidelines in Minnesota, 1978-2003." *Crime andJustice: A Review of Research.* Vol. 32. Ed. Michael Tonry. Chicago:University of Chicago Press, 2005.

Frase, Richard S. "State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues in Symposium, Sentencing: What's At Stake for the States?" *Columbia Law Review* 105 (2005): 1190-1232.

Garland, David. *The Culture of Control.* Chicago: University of Chicago Press, 2001.

Knapp, Kay A. *The Impact of Minnesota Sentencing Guidelines: Three-Year Evaluation.* St. Paul: Minnesota Sentencing Guidelines Commission, 1984.

Kyvsgaard, Britta. "Youth Justice in Denmark." *Youth Crime and Youth Justice: Comparative and Cross-national Perspectives.* Eds. Michael Tonry and Anthony N. Doob. Vol. 31 of *Crime and Justice: A Review of Research.* Ed. Michael Tonry. Chicago: University of Chicago Press, 2004.

Janson, Carl-Gunnar. "Youth Justice in Sweden." *Youth Crime and Youth Justice: Comparative and Cross-national Perspectives.* Eds. Michael Tonry and Anthony N. Doob. Vol. 31 of *Crime and Justice: A Review of Research.* Ed. Michael Tonry. Chicago: University of Chicago Press, 2004.

Lappi-Seppälä, Tapio. "Sentencing and Punishment in Finland: The Decline of the Repressive Ideal." *entencing and Sanctions in Western Countries.* Eds. Michael Tonry and Richard S. Frase. Oxford: Oxford University Press, 2001.

———. "Penal Policy in Scandinavia." *Crime and Justice: A Review of Research.* Vol. 36. Ed. Michael Tonry. Chicago: University of Chicago Press, 2007.

Manza, Jeff, and Christopher Uggen. *Locked Out: Felon Disenfranchisement and American Democracy.* New York: Oxford University Press, 2006.

Martinson, Robert. "What Works? Questions and Answers about Prison Reform."*Public Interest* 35:2 (1974): 22-54.

Messinger, Sheldon, and Philip Johnson. "California's Determinate Sentencing Laws." *Determinate Sentencing: Reform or Regression.* Washington, D.C.: U.S. Government Printing Office, 1978.

Morris, Herbert. "A Paternalistic Theory of Punishment." *A Reader on Punishment.* Eds. Antony Duff and David Garland. New York: Oxford University Press, 1981.

Morris, Norval. *The Future of Imprisonment.* Chicago: University of Chicago Press, 1974.

Murphy, Jeffrey M. "Marxism and Retribution." *A Reader on Punishment.* Eds. Antony Duff and David Garland. New York: Oxford University Press, 1973.

National Advisory Commission on Criminal Justice Standards and Goals.

Report. Washington, D.C.: U.S. Government Printing Office, 1973.

National Commission on Reform of Federal Criminal Law. *Report*. Washington,D.C.: U.S. Government Printing Office, 1971.

Newburn, Tim. "Tough On Crime: Penal Policy in England and Wales." *Crime and Justice: A Review of Research*. Vol. 36. Ed. Michael Tonry. Chicago: University of Chicago Press, 2007.

Palmer, Ted. *Correctional Treatment and Research: Current Issues and Future Prospects*. Lexington, Mass.: Lexington Books, 1978.

President's Commission on Law Enforcement and Administration of Justice. *The Challenge of Crime in a Free Society*. Washington, D.C.: U.S. Government Printing Office, 1967.

Reitz, Kevin. "The Disassembly and Reassembly of U.S. Sentencing Practices." *Sentencing and Sanctions in Western Countries*. Eds. Michael Tonry and Richard S. Frase. New York: Oxford University Press, 2001.

Robinson, Paul. "Virtues of Restorative Processes, the Vices of 'Restorative Justice.'" *Utah Law Review* 1 (2003): 375-88.

Rothman, David J. *Conscience and Convenience*. Boston: Little, Brown, 1980.

Shane-Dubow, Sandra, Alice P. Brown, and Erik Olsen. *Sentencing Reform in the United States: History, Content, and Effect*. Washington, D.C.: U.S. Government Printing Office, 1985.

Tonry, Michael. *Sentencing Reform Impacts*. Washington, D.C.: U.S. GovernmentPrinting Office, 1986.

———. *Malign Neglect-Race, Crime, and Punishment in America*. New York: Oxford University Press, 1995.

———. *Sentencing Matters*. New York: Oxford University Press, 1996.

———. *Thinking about Crime: Sense and Sensibility in American Penal Culture*. New York: Oxford University Press, 2004.

———. "Obsolescence and Immanence in Penal Theory and Policy." *Columbia Law Review* 105 (2005): 1233-75.

von Hirsch, Andrew. *Doing Justice: The Choice of Punishments*. New York: Hilland Wang, 1976.

———. *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*. New Brunswick: Rutgers University Press, 1985.

———. *Censure and Sanctions*. Oxford: Oxford University Press, 1993.

von Hirsch, Andrew, and Andrew Ashworth. *Proportionate Sentencing: Exploring the Principles*. Oxford: Oxford University Press, 2004.

von Hirsch, Andrew, Kay Knapp, and Michael Tonry. *The Sentencing Commission and Its Guidelines*. Boston: Northeastern University Press, 1987.

Whitman, James Q. *Harsh Justice*. New York: Oxford University Press, 2003.