

# IS SENTENCING REFORM A LOST CAUSE? A HISTORICAL PERSPECTIVE ON CONCEPTUAL PROBLEMS IN SENTENCING RESEARCH

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For Nietzsche, we are more likely to engage in the development of “semiotic fictions” that provide us with an illusory state of understanding and mastery of the universe. He has emphasized that rather than search for the “truth” resting on Logos, the search for a seemingly underlying logic, rationality, and certainty, we should focus on Pathos—struggle, contradiction, the unexpected, surprise, and the emergent.<sup>1</sup>

## I

### PROLOGUE: AN ANECDOTE

After a period of studying and working in Israel in the early 1960s, I was employed as a Research Officer in the English Home Office Research Unit at a time when the British government was contemplating the adoption of the suspended sentence of imprisonment as a means for stemming the tide of an increasing prison population. Israel, which on gaining independence in 1948 had inherited a criminal justice system based on the English model, had introduced a similar reform a few years earlier. On the basis of a somewhat rudimentary examination of the statistical data on the sentencing practices of the Israeli courts (broken down by court level and type of offense) during the years prior to and following their reform, I reached the following conclusions: “The assumption that custodial rates would decrease was borne out. They were in fact reduced to less than half their previous level . . . They were reduced in both district courts and magistrates’ courts, and for almost every category of offence.”<sup>2</sup>

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1. Dragan Milovanovic, *Introduction*, in CHAOS, CRIMINOLOGY AND SOCIAL JUSTICE: THE NEW ORDERLY (DIS)ORDER, at viii (Dragan Milovanovic ed., 1997).

2. Leslie Sebba, *Penal Reform and Court Practice: The Case of the Suspended Sentence*, in

The positive outcome of the Israeli reform might have been attenuated if large numbers of suspended sentences had subsequently been activated following the commission of a further offense during the suspension period. But activation rates did not prove to be high.<sup>3</sup> On this occasion, in an apparent reversal of the usual pattern, Britain could learn from the Israeli experience. I therefore drafted a position paper for the Home Office extolling the potential of using suspended sentences to reduce imprisonment. While I have no knowledge of the weight, if any, given to my position paper in the formulation of the British government's policy, the reform was incorporated in the subsequent legislation—the Criminal Justice Act of 1967.<sup>4</sup> Its main purpose, more explicitly than in Israel, was to avoid using imprisonment.<sup>5</sup> To ensure this would be the outcome rather than “net-widening” (whereby new softer sanctions serve as additions to the use of prison sentences rather than replacing them), a rule was introduced (first by the Court of Appeal, later by statute) to ensure that the suspended sentence would not serve as an alternative to *non-custodial* penalties:

[S]entencing courts must first consider and dismiss all non-custodial penalties (fine, probation, etc.) as inappropriate, then decide that a sentence of imprisonment had to be passed, fix the length of that sentence, and then and only then go on to ask whether the sentence of imprisonment could legitimately be suspended in the particular circumstances.<sup>6</sup>

The outcome, however, was very different from that which was intended—and indeed might have been anticipated on the basis of the Israeli experience. There was “extremely strong inferential evidence that after 1967 the courts at once used the suspended sentence not only in place of imprisonment, but also where they would previously have imposed the fine or probation.”<sup>7</sup> Moreover, the English magistrates' courts tended to impose longer terms than when imposing immediate imprisonment. Further, because the activation rates for breach of the conditions were high and the sentence for the new offense had to be served consecutively with the activated sentences, reduction in prison numbers was not achieved by the legislation.<sup>8</sup> Although a detailed academic analysis of these developments notes that the precise effects of the legislation

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STUDIES IN CRIMINOLOGY 133, 150 (Israel Drapkin ed., 1969).

3. *Id.* at 150–51.

4. Criminal Justice Act, 1967, c. 80, § 39–42 (Eng.).

5. *Cf.* Anthony E. Bottoms, *The Suspended Sentence in England, 1967–78*, 21 BRIT. J. CRIMINOLOGY 1, 2–4 (1981) (noting that some advocates of suspended sentences laid greater emphasis on the individual deterrent qualities of this sentence).

6. *Id.* at 4. The rule was identified with the name of the Court of Appeal case in which the principle was declared—*R v. O'Keefe*, [1969] 2 Q.B. 29—and was later incorporated into the Criminal Justice Act, 1972, c. 71, § 11–14 (Eng.).

7. Bottoms, *supra* note 5, at 5.

8. *Id.* at 8.

are disputed,<sup>9</sup> its author adopted an unequivocal heading for his discussion of these events: “The Failure of Legislative Intention.”<sup>10</sup>

## II

### INTRODUCTION

The present article was intended as a review of the conceptual and methodological issues arising in the course of sentencing research, particularly in the context of the evaluation of sentencing reforms. One message that appeared to emerge from the literature was the one reflected in the preceding anecdote, pointing to the unanticipated outcomes of sentencing reform. However, this message must be qualified owing to the uncertainty as to when such “outcomes” can indeed be attributed to the reforms that preceded them, given the methodological difficulties in attributing causal connection. Hence the negative tone of the article’s title.

The problematic nature of sentencing research seems inherent in the complexity of the sentencing process. Innumerable variables operating at both the micro and the macro levels may affect both the sentencing process and the outcomes of its reforms. Were there to be a metric on the complexity of social institutions, sentencing would surely attract a high score as one of the more complex, and thus difficult, to research.

There is an element of paradox in this observation, since the sentencing decision is usually a rather brief event occurring within the framework of an apparently highly structured process that in turn is governed by a panoply of rules. Such a view of the sentencing process is, however, misleading. Sentencing is a process that operates on many levels. In the first place it is the symbolic process that gives expression to society’s ability to impose social order and restrain the deviant. Secondly (and in large measure following from the previous point), the imposition of punishment may also constitute, in a literal sense, a communication to the general public, thereby attracting media interest. Public attention may be enhanced by the frequently contested character of one or other of the three main parameters of the sentencing decision: (a) its declared objective (to deter, rehabilitate, et cetera), (b) the choice of penalty selected (prison, fine, et cetera), and most particularly (c) its level of severity.

Thirdly and most practically, the sentencing decision (although generally short and formalized) can be considered the lynchpin of the criminal justice system connecting the punishment to the crime in both symbolic and practical senses. At the same time, and of greater significance in the present context,

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9. *Id.*

10. *Id.* Apparently, after a period of decline a revived form of the suspended sentence was introduced in England in 2003 but, once again, it was found that “sentencers . . . are not always using it for the intended purposes.” ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 304 (5th ed., 2010). Canadian research, however, which identifies this form of sentence as “community custody sentence,” describes how Canada has successfully introduced such sentences for reducing prison figures. See JULIAN ROBERTS, THE VIRTUAL PRISON 17 (2004).

sentencing may be seen as the final result of a sometimes long-awaited outcome of a process, the components of which may be difficult to identify and thus also hard to research. While the sentence on a syllogistic Beccarian model<sup>11</sup> should be a necessary product of the offense and the legal provision applicable to it, the sentencing literature draws attention to a wide array of variables potentially affecting the sentencing decision, including judicial precedents, the circumstances of the offense, the criminal antecedents of the offender, the offender's personality, circumstances, and socio-demographic characteristics, the personality and socio-demographic characteristics of the judge, prosecutorial and defense arguments, plea bargains, pre-sentence inquiry reports, victim input and conduct, court culture, local opinion, public opinion, and the media.

Identifying which among the preceding list of variables should be impacting the sentencing decision and what weight each should carry is frequently in issue. Views held as to the relevance and *legitimacy* of a particular variable will depend on the purposes of sentencing deemed just and desirable and on the way these purposes are seen to play out in individual cases. As will be elaborated below, variations in the legitimacy attributed to a variable—whether by the decision-maker or the critical researcher—will tend to reflect the sentencing paradigm or ideology to which they adhere. The confusion surrounding the issue of disparities (and the distinct but related concept of discrimination) derives from ideological and interpretational issues no less than from empirical ones.

The multiplicity of variables potentially impacting the sentence decision (whether directly or indirectly) and the potential interactions between them, together with value-laden questions relating to the legitimacy of such variables in light of competing sentencing aims, undoubtedly contribute to a lack of uniformity in the findings of evaluative research in this area. In spite of brave attempts to research this area in Israel, an unequivocal answer could probably not be given to the question raised in a comment on the government's proposed sentencing reform as to whether there was an empirical basis for the allegations of sentencing disparities.<sup>12</sup> And if researching the variables impacting sentencing practice is problematic, the ability to evaluate the effects of penal reform in this area is even more so: changes over time have to be measured and their causes must be identified, which requires controlling for all the other potential factors referred to above.

Moreover, where the object of consideration is sentencing reform (as opposed merely to sentencing patterns), account must be taken of the possibly diverse objectives of the reform, the dynamics of policymaking, and the

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11. See *infra* Part III.

12. Anat Horovitz et al., Position Paper on the Proposal for Penal Law (Amendment 92—Structuring Judicial Discretion in Sentencing), 5756-2006, at 2 (June 2006) (on file with author). For a similar theme in relation to the federal sentencing guidelines in the United States, see KATE STITH & JOSE CABRANES, FEAR OF JUDGING 104-42 (1998).

relationship between the reform of the component of the criminal justice system on which the reform is focused (in the present context, the sentencing process) and the other components of this system, as well as wider aspects of the relationship between legal and social change.<sup>13</sup> Such contextual issues will impact both the content of sentencing reforms and the manner of their implementation.

The foregoing analysis suggests that the methodological problems inherent in evaluating sentencing reforms are likely to be almost insuperable.<sup>14</sup> To measure the impact of the variables referred to within the judicial process, and *a fortiori* of external institutions and underlying social processes (not to speak of the interaction between these two sets of variables), presents an overwhelming challenge. If evaluations of sentencing reforms give rise to inconsistent results, this may be attributable to the aforementioned problems—thereby compounding the unpredictability of the effects of the reforms themselves.

The development of criminology in general, and penology in particular, may be identified with the modernist project—or what David Garland has called “penal welfarism.”<sup>15</sup> Nineteenth and twentieth century scholars of the positivist school were confident of their ability to progress consistently towards the goal of an enlightened and reforming penal system;<sup>16</sup> and, as indicated above, the sentencing process is necessarily at the heart of this project. While reformist ideas have generally been in retreat—or at least on the defensive—in the last decades, the discourse of sentencing reform seems to be resilient. According to Garland, both these developments are consistent with “late modernity,” whereby comprehensive reintegrationist policies that characterized modernity are replaced by ad hoc law enforcement initiatives.<sup>17</sup>

The purpose of this article is to consider the numerous constraints—and the resultant confusions—that constitute obstacles both to sentencing reform and sentencing research. Some of these constraints and confusions are embedded in the ambiguities of the concepts incorporated in the sentencing discourse, including commonly used terms such as “disparities” (and “legal” and “extralegal” variables), as well as fundamental penological concepts such as “desert” and “severity.” The meanings of some of these concepts may change as ideologies are replaced and new sentencing paradigms emerge, thereby

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13. ROGER COTTERELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* 44–70 (2d ed., 1992).

14. Cf. David Weisburd, *Magic and Science in Multivariate Sentencing Models: Reflections on the Limits of Statistical Methods*, 35 *ISR. L. REV.* 225, 226, 238 (2001). The theme of the article is that “the boundaries between science and magic are often blurred in sentencing research.” The author states, “[I]n the end, the assumption of correct model specification challenges the validity of nearly every sentencing study.”

15. DAVID GARLAND, *PUNISHMENT AND WELFARE* 231–64 (1985).

16. *Id.*; DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 294–95 (1971).

17. See David Garland, *Penal Modernism and Postmodernism*, in *PUNISHMENT AND SOCIAL CONTROL* 45 (Thomas G. Blomberg & Stan Cohen eds., 2003); see *infra* Part VII.

compounding the ambiguity inherent in the terminology.<sup>18</sup> Other types of constraint may derive from elements in the criminal justice system or the sentencing process itself (“internal” constraints), or from political, cultural pressures or other societal developments (“external” constraints). The cumulative effect of these constraints is to raise doubts both as to the potential for the adoption of meaningful sentencing reforms and for achieving accuracy in their evaluation.

The following sections of the article will examine some of these issues in the context of the two main sentencing paradigms<sup>19</sup> that have guided reformers in the era of modern penology and been the subject of sentencing research—the positivist model and the “just deserts” model.<sup>20</sup> Particular attention will be paid to conceptual and research issues that have a bearing on contemporary work in this field. This will be followed by some brief observations on the outcomes of the researchers’ evaluations and their ability to address the issues raised. Since one of the salient issues in sentencing has always been its severity, consideration will be given (if only briefly) to the relevance of the contemporary literature on penal punitiveness, its causes, and the potential for its control, in order to assess its relevance for an understanding of sentencing policy and its evaluation. In light of these analyses, the concluding section will consider how far the anecdote with which the article opened, while portraying what has come to be known as the issue of “transplants”<sup>21</sup> or policy transfers,<sup>22</sup> should be seen to exemplify the field of sentencing policy. This section will also consider possible theoretical frameworks for a better understanding of sentencing reform and the sentencing process in the contemporary world.

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18. The term “disparities” may connote differences that are unjustified, but for some writers this attribution will require addition of the epithet “unwarranted.” Cf. STITH & CABRANES, *supra* note 12, at 104–42. Similar ambiguity attaches to the term “extralegal variables,” given the uncertainty as to which variables will be perceived as legally relevant under the alternative paradigms.

19. The different conceptual approaches to sentencing that have prevailed in different periods are variously—but not necessarily accurately—described in the penological literature as “schools,” “models,” “paradigms,” or “ideologies.” The term paradigm is helpful in the present context in connoting Kuhn’s account of the manner in which a particular approach may dominate academic thinking that may be slow to change even when faced with contradictory empirical evidence. On the other hand, Kuhn was more concerned with scientific explanations of the (natural or social) world, whereas sentencing “paradigms” (especially just deserts) may be more associated with policy and ideology.

20. Less space will be devoted to Beccaria’s “classical” paradigm, since the sentencing practices advocated therein—notably deterrence—were not, at the time, the subject of empirical research.

21. See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1993).

22. CRIMINAL JUSTICE AND POLITICAL CULTURES: NATIONAL AND INTERNATIONAL DIMENSIONS OF CRIME CONTROL 3–7 (Tim Newburn & Richard Sparks eds., 2004).

### III SENTENCING PARADIGMS

I have referred to the myriad factors that may influence the sentencing decision. Sentencing, however, is a normative matter par excellence. Rather than being the product of a chance combination of variables, sentencing should be a reflection of the values and policies expressed in the legislation, precedents, or guidelines that form the sentencing framework. By implication, variables affecting sentencing will be legitimate if they give expression to the intended values and policies, but may cease to be so in the event of changes in the aims of sentencing.

The status of the various sentencing aims is generally evident at any given time and place by virtue of the adherence of the dominant penological discourse to a particular sentencing paradigm. The modern history of penology and sentencing has been characterized by a succession of such paradigms, each with its own clear rationale and implications for sentencing policy. Beccaria's paradigm, based on deterrence and the certainty and proportionality of punishment,<sup>23</sup> represented the views of the eighteenth century enlightenment and the "classical school" of criminology. The second half of the nineteenth century produced the birth of the social sciences and the positivist school, with the new paradigm oriented towards treatment and the individualization of punishment.<sup>24</sup> Following the critique of the abuses of excessive discretion inherent in this paradigm,<sup>25</sup> with its potential for wide disparities in sentencing,<sup>26</sup> together with the alleged failure of rehabilitation as an achievable objective,<sup>27</sup> the individualization paradigm was in turn replaced by "just deserts." Under this paradigm, punishment would once again be proportional to the seriousness of the offense, but now conceptually based on principles of retributivism rather than the deterrence ideology of the classical school.

Such changes in the prevailing paradigm create problems for the researcher, since, as we move from paradigm to paradigm, the key concepts of the sentencing literature such as disparities, discrimination, and the differentiation between "legal" and "extralegal" variables will change their meaning.<sup>28</sup> The adoption of a paradigm should, on the other hand, bring the benefits of clarity and consistency. Uniformity or consistency of sentencing based upon the type or seriousness of the offense would, under an individualized sentencing model,

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23. CESARE BECCARIA, *CRIMES AND PUNISHMENT* (J.A. Farrer ed., 1880).

24. See RAYMOND SALEILLES, *THE INDIVIDUALIZATION OF PUNISHMENT* (1911).

25. See, e.g., AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE* (1971).

26. This was particularly the case in the United States. See MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972). On comparisons between the United States and Europe, see Ely Aharonson, *Determinate Sentencing and American Exceptionalism: The Underpinnings and Effects of Cross-National Differences in the Regulation of Sentencing Discretion*, 76 *LAW & CONTEMP. PROBS.*, no. 1, 2013 at 161; see also *infra* Part VII.

27. Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 *PUB. INTEREST* 22, 49 (1974).

28. See *supra* note 18 and accompanying text.

constitute a departure from the prevailing ideology, which links the sentence to the rehabilitative needs of the individual offender. Radically differentiated sentences for like offenses will, on the other hand, be entirely acceptable if the personal circumstances warrant it.

Nevertheless, paradigms (as broadly conceived in the context of this article),<sup>29</sup> although helpful for conceptualization, are no more than ideal-types, and specific policies and practices are likely to diverge from the prevailing paradigm. Competing paradigms may co-exist over long periods, and hybrid and compromise models may be adopted.<sup>30</sup> Such mixed transformations, coupled with the instability of the meaning attributed to such expressions as disparity in sentencing, may cause confusion and hamper any attempt to evaluate the effects of a reform.

A further dimension may be added if a sentencing paradigm based on deontological aims is replaced by a consequentialist scheme or vice versa. To evaluate a consequentialist sentencing aim, it will be necessary not only to examine the decision-making practices of the courts, but also the subsequent conduct of the convicted offender (as well as of law enforcement personnel) if the purpose is rehabilitation or individual deterrence, or of the general public if the objective is general deterrence—with the potential for an exponential increase in the complexity of the research. However, although operating within the positivist paradigm, the first significant group of sentencing researchers was more modest in its objectives and focused on judicial decision-making.

#### IV

##### THE POSITIVIST PARADIGM

Positivism in criminology may be identified by some with etiological theories based upon born criminality and stigmata,<sup>31</sup> and with a penal system characterized by the indeterminate sentence, uncontrolled discretion, and the failed treatments and injustices exposed in such works as *The Struggle for Punishment*.<sup>32</sup> However, positivism also heralded the birth of criminological and other societal research purporting to invoke “scientific” methods and to seek the incorporation of research findings into social policy. Although the “just deserts” paradigm in sentencing, which gave rise to the policies on which the present symposium is focused, is perceived as anti-positivist from a criminological perspective,<sup>33</sup> positivist methodologies continue to guide much of the accompanying research.

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29. See *supra* note 19 and accompanying text.

30. Cf. TED BENTON & IAN CRAIB, *PHILOSOPHY OF SOCIAL SCIENCE* 58–63 (2d ed. 2010).

31. RAYMOND PATERNOSTER & RONET BACHMAN, *EXPLAINING CRIMINALS AND CRIME* 47 (2001).

32. See AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 25; THOMAS BLOMBERG & KAROL LUCKEN, *AMERICAN PENOLOGY* 66–68 (2000).

33. See Roger Hood, *Penal Policy and Criminological Challenges in the New Millenium*, 34 *AUSTL. & N.Z. J. CRIMINOLOGY* 1 (2001). A legal perspective may lead to a different conclusion, since desert



The positivist school believed that the punishment should be determined by the needs of the individual offender rather than by the seriousness of the offense. However, while academic and policy discourses underwent substantial transformations with the rise of positivism at the onset of the twentieth century, practices were almost certainly slower to do so and, more particularly, remained more diverse. Moreover, outside the United States the influence of the individualized sentencing paradigm seems to have been more marginal to actual sentencing practice. While Raymond Saleilles was preparing his seminal manuscript on *The Individualization of Punishment* in the 1890s,<sup>34</sup> publications appearing in Britain were more concerned with disparities in the sentences imposed for the same offenses<sup>35</sup>—suggesting adherence to a more traditional paradigm.

The individualization of punishment was further promoted at the sentencing level at the turn of the century by the adoption of such reforms as the invention of the juvenile court,<sup>36</sup> the concept of the pre-sentence report with its implicitly clinical overtones—and the emergence of the professional role of the probation officers.<sup>37</sup> In Europe, the ideological orientation towards individualized sentences was strengthened by the developing school of social defense,<sup>38</sup> with its focus on the perpetrator's dangerousness as a basis for the sentence, and the emergent laws for habitual, recidivist, and, later, psychopathic offenders—paralleling similar developments in the United States.<sup>39</sup> Under the European penal system, however, the individualization principle seems not to have eroded underlying classical principles.

These tensions may be detected in the early empirical research on sentencing. Empirical research was one of the defining characteristics of the positivist movement, and was perhaps inspired by a seminal article published by Everson in 1919,<sup>40</sup> followed by a series of publications by Gaudet and his colleagues.<sup>41</sup> A number of studies were conducted around mid-century—

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sentencing dictates that the court abides closely by the legal code. Cf. Hugo Adam Bedau & Erin Kelly, *Punishment*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 19, 2010), <http://www.plato.stanford.edu/entries/punishment/>.

34. SALEILLES, *supra* note 24.

35. LEON RADZINOWICZ & ROGER HOOD, THE EMERGENCE OF PENAL POLICY IN VICTORIAN AND EDWARDIAN ENGLAND 741 n.2 (1990) (quoting Anon, *The Way of Escape by Death*, 976 WHITEHALL REV. 5–6 (1895)).

36. The first juvenile court was established in Cook County, Illinois in 1899. See BLOMBERG & LUCKEN, *supra* note 32, at 83–98.

37. *Id.*

38. See generally MARC ANCEL, SOCIAL DEFENCE (1966).

39. See generally YSABEL F. RENNIE, THE SEARCH FOR CRIMINAL MAN: A CONCEPTUAL HISTORY OF THE DANGEROUS OFFENDER (1978).

40. George Everson, *The Human Element in Justice*, 10 J. AM. INST. CRIM. L. & CRIMINOLOGY 90 (1919).

41. See, e.g., Frederick J. Gaudet, George S. Harris, & Charles W. St. John, *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. AM. INST. CRIM. L. & CRIMINOLOGY 811 (1933).

facilitated at this time by the gradual emergence of more sophisticated methodologies, including multivariate analysis and the use of significance tests.<sup>42</sup>

Among these studies was Shoham's empirical study of the sentencing objectives of Israel's district court judges and of the extent of the disparities in their sentencing practice.<sup>43</sup> Other studies, each with its distinctive orientation, were conducted at this time by Edward Green in the United States, Roger Hood in Britain and, a few years later, by John Hogarth in Canada.<sup>44</sup> Seeing that, by and large, the positivist penology of this period favored a sentencing process that was oriented towards the personality and circumstances of the offender and was opposed to a formalist sentencing philosophy focusing on the seriousness of the offense, it is of interest to consider why these scholars should have been so concerned with sentencing disparity: disparities might have been perceived as an inseparable component of the prevailing rehabilitation model.

A perusal of the research publications at the time suggests that the driving force for these studies was fascination with the judicial personality and its likely effect on sentencing outcomes. One factor was the influence of Freudian psychoanalysis, which led to speculation as to the unconscious drive motivating judges to punitiveness, as reflected in such works as Alexander and Staub's *The Criminal, the Judge and the Public* and Weihofen's *The Urge to Punish*.<sup>45</sup> There was also a growing interest in the work of social psychologists on the impact of social attitudes on public (including legal) policy;<sup>46</sup> this was reflected in the American realist movement, particularly in the work of Glendon Schubert on "jurimetrics."<sup>47</sup> These influences were felt in the sentencing studies referred to here.

While the rehabilitation ideology required that the courts have wide discretion in their sentencing decisions, the intention was that the choice of sentence would accord with the characteristics of the individual offender, and not with the personality of the individual judge. Thus, while the concern with disparities is today identified with desert-oriented scholarship, it seems that it was also a concern for these positivist scholars. Unlike the reformers of the 1970s, however, the literature drawing attention to judicial disparities during the earlier period seems to have been less acutely concerned with issues

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42. See, e.g., EDWARD GREEN, JUDICIAL ATTITUDES IN SENTENCING 26–28 (1961).

43. Shlomo Shoham, *The Sentencing Policy of Criminal Courts in Israel*, 50 J. CRIM. L. & CRIMINOLOGY 327 (1959).

44. See GREEN, *supra* note 42; ROGER HOOD, SENTENCING IN MAGISTRATES' COURTS: A STUDY IN VARIATIONS OF POLICY (1962); JOHN HOGARTH, SENTENCING AS A HUMAN PROCESS (1971). The first of these studies focused on the individual judges in an urban criminal court, the last two on the variations among magistrates' courts in widely differing geographical areas. For a review of earlier studies, see HOGARTH, *supra*, at 1.

45. FRANZ ALEXANDER & HUGO STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* (1956); HENRY WEIHOFEN, *THE URGE TO PUNISH* (1956).

46. The earlier study by GAUDET ET AL., *supra* note 41, seems to have been motivated by curiosity with regard to individual differences among judges, which in turn was inspired by a study of exam-marking in an educational setting.

47. See GLENDON A. SCHUBERT, *THE JUDICIAL MIND REVISITED* (1974).

pertaining to justice and rights<sup>48</sup>—rights consciousness (and the related civil rights movement) only having begun to emerge as a powerful movement somewhat after the period in question. Researchers in the earlier period were rather concerned that the sentence should reflect a “scientific” process, related to the characteristics of the offender—although also aware of the relevance of the “legal” offense-related variables. It will be instructive to examine these studies from this perspective.

The seminal study by Gaudet et alia,<sup>49</sup> which seems to have inspired many of the later studies, was originally titled “A Study of Some Factors Other than Guilt and Nature of Offense Which Determine the Length of a Prisoner’s Sentence.”<sup>50</sup> The article lists these factors that, in addition to judge-related variables, include the prisoner’s “marital condition, his color, his race, his political affiliations . . . the age of the prisoner, his religion, general business conditions, etc.”<sup>51</sup> It might be anticipated that many of these factors would, like the judge-related factors, be perceived by the authors as non-legitimate considerations at sentencing. However, later in the article the authors refer to the *judge-related* variables as relevant to the question of whether differences in sentencing tendencies “are to be found outside of the crime *and those of the offender*.”<sup>52</sup> This formulation seems to imply that this open-ended list of offender-related variables, like the crime-related ones<sup>53</sup>—but unlike those that were judge-related—was seen to play a legitimate role in the sentencing decision.

Hood’s study was mainly aimed at describing sentencing patterns by area in order to determine how far variations are accounted for by geographical influences, in addition to those factors that might normally be expected to influence the sentence. The latter category then had to be identified for the purposes of the study (that is to say, for control purposes). This issue was addressed by Hermann Mannheim in his introduction:

For technical reasons, not every conceivable factor potentially affecting magisterial policy can possibly be examined, but there are a number of them which by common experience form the basis of sentencing, such as the seriousness of the offence, the number and kind of previous convictions, work habits, age, marital status, and the like.<sup>54</sup>

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48. *But see infra* note 56 and accompanying text (discussing Hood’s concern with “equality of consideration”).

49. Gaudet et al., *supra* note 41.

50. *Id.*

51. *Id.*

52. *Id.* at 813 (emphasis added).

53. A positivist purist might of course argue that crime-related variables should also be irrelevant to sentencing except insofar as they reflected upon the offender’s personality. *See, e.g.*, FILIPPO GRAMATICA, *PRINCIPES DE DEFENSE SOCIALE* (1963); BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST* (2d ed. 1981). But most criminologists probably accepted the “neo-classical” compromise. *Cf.* SHLOMO SHOHAM, *OFFENCES AND PUNISHMENTS IN ISRAEL* 14 (1963) (in Hebrew).

54. Hermann Mannheim, *Introduction* to HOOD, *supra* note 44, at xv.

It will be noted that the list includes offender-related variables such as work habits, age, and marital status—and that Mannheim’s formulation suggests, again, that the consideration of these variables in the sentencing decision was *legitimate*. Hood’s own list of variables to be taken into account also included “occupation.”<sup>55</sup> He then elaborated the principle of “equality of consideration,” implying that all such variables could legitimately be taken into consideration as long as the courts behaved consistently in this respect. He was particularly concerned as to whether courts were using imprisonment for the same “type” of offender.<sup>56</sup>

Edward Green, in the introduction to his study of sentencing practices in Philadelphia, devotes one section of this chapter to the criteria for sentencing.<sup>57</sup> These are divided into three categories. The first is entitled “statutory criteria” and focuses on the provisions of the law. Here he posits that “the law requires that the punishment fit the crime,” while adding that “the standards of measurement are vague.”<sup>58</sup> His third category is titled “legally irrelevant criteria.” Here he refers not only to the personality of the judge but also to “political or journalistic pressures, public hysteria, [and] prejudice against minority groups.”<sup>59</sup> Of particular interest in the present context, however, is his *second* category, which he calls “discretionary criteria.” Here he asserts that “the standards available to the judge for determining the penalty in a given case emanate from the ethical and moral order of which the law is a part.”<sup>60</sup> These standards “pertain to the circumstances of the criminal act, the characteristics of the offender, and the attitudes and sentiments of the community towards certain types of crimes or criminals.”<sup>61</sup>

Thus, despite Green’s earlier declaration in relation to the punishment fitting the *crime*, *offender*-related and *community*-related criteria are also perceived as a part of the sentencing equation. For the purposes of elaborating the meaning of “offender-related criteria,” Green cites—apparently with approval—an article by Judge Theodore Levin, which addresses various utilitarian considerations relating to the likely effects of different sanctions on the offender in question, and asks, “Are the offender’s emotional and mental characteristics, his family ties, and his business interests such as to offer encouragement and hope for his reformation . . . ?”<sup>62</sup> Once again, we see here a very open-ended (and some would say problematic) account of the variables designated as relevant; in spite of Green’s apparently clear-cut threefold

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55. *Id.* at 15.

56. *Id.* at 16.

57. GREEN, *supra* note 42, at 3–20.

58. *Id.* at 4.

59. *Id.* at 6.

60. *Id.* at 5.

61. *Id.*

62. *Id.* (quoting Judge Theodore Levin, *Sentencing the Criminal Offender*, 13 FED. PROBATION 3, 3–4 (1949)).

categorization of sentencing variables, any attempt to develop a structured sentencing process based upon this analysis would be fraught with difficulty.

Shoham's account of the criteria invoked in the sentencing decision was similar, but less open-ended. In his 1959 article he, too, adopted a three-fold category for analyzing these criteria: (1) the offense and its circumstances, (2) the offender and his background, and (3) the attitude of the trial judge.<sup>63</sup> The second category includes "the offender's economic means and position, his family, age, social background, physical and mental health," as well as his criminal record. The article referred to by Shoham makes no judgment as to the legitimacy of these variables as determinants of the sentence. Even in his conclusion, where he refers to the variations among judges that cannot be explained by offense and offender differences, he leaves open the question of the "penal or social consequences of these variations" and "to what extent they are remediable."<sup>64</sup> However, it is clear from other parts of his article that Shoham attributes overriding importance to offender-related considerations.<sup>65</sup>

It has surely become clear that the somewhat vague and open-ended lists of variables—particularly offender-related variables, which were apparently perceived by Shoham and his contemporaries as legitimately influencing the sentencing decision—would present a serious obstacle in any attempt to introduce a rigid system of structured sentencing, which was not a priority among these researchers. Even the influence of the identity of the judge on the sentence, while an object of special fascination to these researchers, seems to have attracted no more than implicit reservations, if at all.

The "last word" in this line of research studies was surely the wide-ranging and meticulous study by Hogarth of magistrates in Ontario.<sup>66</sup> Conducted a few years after the other studies mentioned, this study went far beyond its predecessors in the comprehensiveness and sophistication of its analysis, employing a range of multivariate analyses.<sup>67</sup> Moreover, rather than deducing the personality differences among his sample from the differences in their sentencing practices, he studied the attitudes of the magistrates (both in terms of penal philosophy and other matters) directly, by interviews and attitude questionnaires.<sup>68</sup> Hogarth found that most of the considerable variation in their sentencing practices could be explained by their personality and attitude differences.<sup>69</sup> Information relating to the magistrates' attitudes increased a researcher's power to predict the outcome of a case five- or six-fold.<sup>70</sup> Sentencing should be seen not as a "black box" that simply translates input

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63. Shoham, *supra* note 43.

64. *Id.* at 337.

65. *Id.* at 331.

66. HOGARTH, *supra* note 44.

67. *Id.* at 15–33.

68. *Id.* at 27, 103–37.

69. *Id.* at 47–165.

70. *Id.* at 382.

variables into appropriate decisions, but rather as a lively interactive locus for the processing of information in accordance with the magistrate's personality.

The value-free language of Hogarth's study is striking. Hogarth expressed no views of his own on the purposes of sentencing, which he believed to be beyond the parameters of his study (he found that the dominating purpose of sentencing among the magistrates at that time was reformative),<sup>71</sup> but he did conclude that outcomes deriving from the personalities of individual magistrates were "likely to be repugnant to the average man's sense of justice."<sup>72</sup>

A remarkable feature of these studies from a contemporary perspective—particularly striking in relation to Hogarth's because of its general comprehensiveness—is the relative lack of interest in socio-demographic variables,<sup>73</sup> particularly race. Nonetheless, a review of the evidence regarding the role of "non-legal variables" published in 1974 by John Hagan was able to locate twenty studies from the preceding decades (all from the United States) in which data were presented on these topics.<sup>74</sup>

The somewhat marginal status of court sentencing research at this time may be explained by the fact that there was almost certainly less interest in judicial sentencing patterns than in the impact of sentences, both on the offenders on whom they were imposed (rehabilitation, individual deterrence, and incapacitation) and on other potential offenders (general deterrence). The methodologies for such evaluations were continually improving, with the fifty U.S. states constituting a natural laboratory for cross-jurisdiction comparisons.

The accumulation of research findings on the effects of offender interventions led to "systematic reviews," notably by Martinson and his colleagues.<sup>75</sup> The disappointing evidence that emerged from the research fed into the increasing dissatisfaction with the traditional paradigm as reflected in the publications of the 1970s referred to above, emphasizing the arbitrariness and unpredictability of penal practices under this paradigm. As noted earlier, these perceptions contributed to the acceptance of the new paradigm of just deserts, to be based upon structured and proportionate sentencing, and epitomized by the establishment of sentencing commissions and the introduction of sentencing guidelines.

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71. *Id.* at 73, 288–91.

72. *Id.* at 386.

73. Green's study, however, was included in Hagan, *infra* note 74.

74. John Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 *LAW & SOC'Y REV.* 357, 358 (1974). The study can be seen as a pioneering exercise in meta-analysis in that Hagan re-analyzed the findings of many of the studies he reviewed. On the other hand, the fact that he found the need to explain somewhat basic statistical interpretations to the readership (such as the difference between statistical significance and the magnitude of the association) suggests that familiarity with such methodology was limited at this time.

75. See Martinson, *supra* note 27 and accompanying text.

## V

## THE JUST DESERTS PARADIGM AND ITS AFTERMATH

The new paradigm generated statutory and policy reforms across the United States, as well as other, mainly common law jurisdictions, and was accompanied by a vast academic literature. More particularly, in addition to the extensive policy debates,<sup>76</sup> the reforms have inspired new waves of empirical research.<sup>77</sup> In the wake of the disillusion with the consequentialist achievements of the correctional system under the “outgoing” rehabilitation-oriented paradigm, the dependent variable on which researchers were now focused was the sentence of the court rather than its social outcomes<sup>78</sup>—in principle a much simpler research objective. Interest has focused on such issues as whether the elimination of disparities has been hampered by such institutional obstacles as prosecutorial discretion.<sup>79</sup> The present article, however, focuses on a number of conceptual issues that may have given rise to uncertainties or constrained the implementation of the reforms, thereby impeding their evaluation.

## A. Process of Reform and its Rationale

Evaluation of the success of any penal reform requires an understanding of its purposes or rationale, a point that arose in the context of the anecdote presented at the beginning of this paper. Identification of the rationale may not seem to be a major problem in the context of the adoption of the just deserts paradigm and structured sentencing in the United States in the 1970s, the main aim of which seems to have been the reduction of judicial discretion in order to reduce disparities among judges. However, beyond the concern with disparities in general, there was also specific concern regarding discrimination against minorities, as well as some class and gender concerns. Moreover, some proponents of these reforms may have had expectations regarding the severity of the sentences—whether an increase or a decrease.<sup>80</sup>

This leads to the question as to how “the purposes” of a penal (or other legal) reform may be identified. The literature of jurisprudence alludes to the varied traditions of different legal systems with regard to the interpretation of

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76. See, e.g., MICHAEL TONRY, *OVERCROWDED TIMES* (1989–2000); STITH & CABRANES, *supra* note 12; Symposium, *Sentencing: What's at Stake for the States?*, 105 COLUM. L. REV. 933–1416 (2005).

77. See, e.g., CASSIA SPOHN, *HOW DO JUDGES DECIDE?* (2d ed., 2009); *The Symposium on Crime and Justice: The Past and Future of Empirical Sentencing Research*, UNIVERSITY OF ALBANY SCHOOL OF CRIMINAL JUSTICE (2010), [http://www.albany.edu/scj/symposium\\_home.php](http://www.albany.edu/scj/symposium_home.php). For an early attempt of a comprehensive multi-disciplinary evaluation, see NATIONAL RESEARCH COUNCIL, *RESEARCH ON SENTENCING: SEARCH FOR REFORM 1* (1983).

78. Research on the consequentialist objectives of sentencing did not cease entirely, of course, and was subsequently encouraged by the movement towards “evidence-based” policies. See, e.g., DORIS MACKENZIE, *WHAT WORKS IN CORRECTIONS?* (2006).

79. See STITH & CABRANES, *supra* note 12, 130–42; see also Aharonson, *supra* note 26.

80. This question has been prominent in the context of the recent Israeli reform, owing to conflicting indications by Ministry of Justice personnel in this regard, which served to enhance opposition to its adoption among liberals.

legislation, focusing on the legislative texts, preambles and *travaux préparatoires*.<sup>81</sup> This task was realistic in an era when law reform was primarily a matter of government initiatives based on the advice of “experts,” and the reports of public and professional committees (characteristics of the positivist era considered in the previous section), and when societies were culturally more homogeneous. Today, legislation in many societies rather reflects the activities and initiatives of individual parliamentarians (especially if introduced as private members’ bills), the media, and innumerable interest groups, NGOs, moral entrepreneurs, and other components of civil society.<sup>82</sup> Legislation might also be the product of a political deal.<sup>83</sup> These phenomena may render identification of the rationale even more problematic.

## B. Sentencing Philosophy

While the sentencing philosophy incorporated in the reform will inevitably be related to the reform’s rationale, the former is more likely to be specified explicitly in the legislation—or the sentencing guidelines, if any. Such reference to specific sentencing purposes does not, however, ensure clarity and the purity of a particular sentencing paradigm.

As indicated above, academic tradition identifies the contemporary structured sentencing movement with a retributivist or desert philosophy—more specifically the “just deserts” model as espoused in *Doing Justice* and the other writings of Andrew von Hirsch.<sup>84</sup> This view, however, has by no means been universally accepted by policy-makers. Notoriously, the U.S. Congress’s enabling statute saw sentencing guidelines as being consistent with all the traditional aims of sentencing.<sup>85</sup> Another approach has been to adopt “limiting retributivism” as the guiding philosophy,<sup>86</sup> which, in effect, also opens the door to a variety of *consequentialist* aims.<sup>87</sup> The English model of structured sentencing adopted in 1991 (since amended) and the Israeli model have

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81. See, e.g., Jerry L. Marshaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV 827 (1991).

82. For studies illustrating two contrasting legislative processes (although both oriented towards victims), see CANDACE MCCOY, *POLITICS AND PLEA-BARGAINING* (1993); PAUL ROCK, *HELPING VICTIMS OF CRIME* (1990). AHARONSON, *supra* note 26, argues that the more populist characteristics referred to here and other features of “direct democracy” are what distinguish U.S. legislative processes from those of Europe.

83. In a sense this is true of the federal sentencing reform of 1984, which was adopted as a result of an informal coalition between supporters of reform from among both Democrats and Republicans. See STITH & CABRANES, *supra* note 12, 33–77.

84. See ANDREW VON HIRSCH, *DOING JUSTICE* (1976); see also ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES* (1985).

85. STITH & CABRANES, *supra* note 12, at 48–59.

86. Richard Frase, *Limiting Retributivism*, in *THE FUTURE OF IMPRISONMENT* 83 (Michael Tonry ed., 2004).

87. Limiting retributivism sets the upper (and some would say lower) limits for the sanction according to desert principles, but subject to these limits consequentialist aims may be applied in determining the sentence.



attempted to structure the relationship as among the various aims.<sup>88</sup> However, the multiplicity of aims under the federal model, the adoption of a hybrid model, or the superimposition of extraneous sentencing norms such as “Three Strikes” legislation may further impede the possibility of evaluating the extent to which the implementation of the reform has been successful.

### C. Desert and the Components of Offense Seriousness

Even desert purists, who would link the sentence exclusively with offense seriousness—defined as comprising harm and culpability<sup>89</sup>—are not in agreement as to the precise identity of these components. The relevance of various surrounding circumstances remains in dispute.<sup>90</sup> Particularly controversial has been the degree of relevance of the offender’s prior record.<sup>91</sup> Clarity on the question of the relevance of such variables is critical to evaluative research, because variance in sentencing patterns will only be designated as sentencing “disparity” where it is attributable to factors held to be normatively irrelevant. Even under a desert-oriented scheme (ostensibly focusing exclusively on the seriousness of the offense) policy-makers may be tempted to take into account personal characteristics of the offender—for example via the “back door” of their linkage to culpability. Disadvantaged background may be a case in point.<sup>92</sup>

Uncertainty with respect to the components of offense seriousness may hamper the attempt to assess the success of the law in giving rise to “just” sentencing. The problem is inevitably exacerbated where the reform additionally provides for the adoption of consequentialist rationales,<sup>93</sup> even where restricted to special cases defined in the statutory norm, as under the English legislation of 1991 and the new Israeli law, since the criteria for opting for these rationales are somewhat open-ended, and rely upon assessments of future conduct.<sup>94</sup>

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88. See *infra* Part V.C.

89. VON HIRSCH, *DOING JUSTICE*, *supra* note 84, at 79.

90. See RICHARD SINGER, *JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT*, at xvii (1979) (“As the work itself demonstrates, there is no consensus among commensurate deserts theorists themselves on the implementation of the philosophy.”)

91. See *generally* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES (Julian V. Roberts & Andrew von Hirsch eds., 2010).

92. Cf. Barbara Hudson, *Punishing the Poor: Dilemmas of Justice and Difference*, in *FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW* 189 (William C. Heffernan & John Kleinig eds., 2000).

93. See *supra* Part V.B.

94. The English law provided for non-commensurate sentencing on the grounds of preventing future serious harm by the offender. Criminal Justice Act, 1991, c.53 § 2(2)(b) (U.K.). Israel’s Penal Law now provides that the court may depart (downwards) from the range of “appropriate” sentences under section 40D where “the defendant has been rehabilitated or there is a real chance that he will be rehabilitated,” and (upwards) under section 40E “where there is a real fear that the offender will recidivate.” In the latter case there is a proviso that the upward departure should not substantially exceed the “appropriate sentencing range.” Even circumscribed by conditions, however, these criteria will remain vague.

#### D. Severity of Punishment

Under retributivist (or desert) theory, the punishment must be proportional to the crime, a principle reflected in much of the relevant jurisprudence, both domestic and international, although more rarely explicit in the relevant legislation.<sup>95</sup> Retribution in sentencing, with its Kantian associations, connotes certainty, and—as indicated earlier—the main reason for the adoption of this paradigm was to provide clarity in sentencing. However, although the scholarship of penology and penal philosophy offers solutions to the question of “ordinal” proportionality (whereby the severity of the sentence will increase with the seriousness of the offense), as illustrated by the work of von Hirsch and Jareborg on “gauging seriousness,”<sup>96</sup> satisfactory solutions have not been offered for determining the level of severity in *absolute* terms (“cardinal” severity).<sup>97</sup> Although desert is a normative theory par excellence, it is not a unitary theory and is underpinned by a variety of theoretical rationales, such as censure and the “benefits and burden” theory.<sup>98</sup> The few desert philosophers who have expressed views on the *quantum* issue offer diverse sentencing ranges, varying from the talionic<sup>99</sup> to the very moderate penalty scale put forward by von Hirsch in *Doing Justice*,<sup>100</sup> and reference to “community values” as the yardstick may aggravate the problem of determining the appropriate sentencing level rather than resolve it.<sup>101</sup> Thus, no theoretically founded guidance has been available as to the appropriate level of the sentencing scale, and guideline commissions have to choose between using existing practice as their point of departure<sup>102</sup> (“descriptive guidelines”), or somewhat arbitrary innovations (“prescriptive guidelines”). Similarly, a statutory provision exhorting the courts

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95. Richard Frase, *Comparative Perspectives on Sentencing Policy and Research*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 259 (Michael Tonry & Richard S. Frase eds. 2001). Sweden is seen as an exception in this respect in specifying the principle and elaborating its components. See ASHWORTH, *supra* note 10, at 4. The recent Israeli reform, which adopts “appropriateness” as the underlying principle, follows a similar pattern. See Penal Law, 5737-1977, § 40B (1977) (Isr.).

96. Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 O.J.L.S. 1 (1991).

97. See Leslie Sebba (with Iris Weinrib), *Sentencing Severity in Search of a Theory*, 3 HUKIM 99 (2011) (Isr.).

98. See Antony Duff, *Legal Punishment*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Apr. 14, 2008), <http://plato.stanford.edu/entries/legal-punishment>.

99. See, e.g., IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 79–81 (1997) (“On the question of the measure of punishment, retributivism entails the *lex talionis* [of Roman law]: as the offender has done, so it should be done to him.”).

100. VON HIRSCH, *DOING JUSTICE*, *supra* note 84.

101. See *infra* Part V.F. For possible techniques, see Andrew von Hirsch, *Seriousness, Severity and the Living Standard*, in PRINCIPLED SENTENCING 143 (Andrew von Hirsch, Andrew Ashworth & Julian Roberts eds., 3d ed. 2009); David Indermaur, *Dealing the Public In: Challenges for a Transparent and Accountable Sentencing Policy*, in PENAL POPULISM, SENTENCING COUNCILS AND SENTENCING POLICY 45 (Arie Freiberg & Karen Gelb eds. 2008).

102. See Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005).

to impose a proportionate or “appropriate” sentence<sup>103</sup> is not easily given to evaluation in terms of “success.”

#### E. Sentencing Procedures and Extraneous Influences

Sentencing research in common law countries has generally been reliant for its sources on records generated by the traditional role-players in the system—judges, prosecutors, defense attorneys, and probation officers—in accordance with standardized procedures. The structured character of the system gave rise to a sense of predictability as to the possible variables affecting the sentence.<sup>104</sup>

It should be recalled, however, that the just deserts movement was accompanied or closely followed by the victims’ rights movement,<sup>105</sup> and recent decades have increasingly recognized the victim’s right to input in the criminal process in adversarial systems, notably by means of victim-impact statements—and in some U.S. jurisdictions, victim statements of opinion.<sup>106</sup> The link between just deserts and victim-related considerations is not *prima facie* inconsistent, victim harm being a primary component of offense seriousness. However, the possible emotional overtones and vengeful or otherwise idiosyncratic views of victims may detract from the predictability of the sentencing outcome.<sup>107</sup>

It is also widely believed that courts are influenced by media pressure, and what is presumed to reflect “public opinion.” Judges do not want to be viewed as “out of touch,” and their supposed need for “public trust” is sometimes incorporated into the formal legal norm.<sup>108</sup> In cases of criminal victimization involving race, gender, class, or other topics of public interest, feelings may run high and pressure may be exerted. This may be enhanced by NGO or other civil society activity, which may in turn interact with the media or the victim. Such variables may impact sentencing decisions, but are unlikely to be taken into account by sentencing researchers.

#### F. Reference Groups

Desert sentencing posits that the offender will receive his or her due: the sentence to be imposed is that which “fits the crime”—and that others would

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103. *Cf.* Frase, *supra* note 95 and accompanying text.

104. The procedures, however (and more particularly the rules of evidence), were much more flexible at sentencing than at the trial stage—an issue only partly addressed by recent Supreme Court jurisprudence. *See Blakely v. Washington*, 542 U.S. 296, 311 (2004).

105. The First International Symposium on Victimology was held in 1973, precisely the period in which the key publications identified with the advent of the just deserts movement were appearing.

106. *See* DOUGLAS E. BELOOF, PAUL G. CASSELL, & STEVEN J. TWIST, *VICTIMS IN CRIMINAL PROCEDURE* 625–67 (3d ed., 2010).

107. Leslie Sebba, *Sentencing and the Victim: The Aftermath of Payne*, 3 INT’L REV. VICTIMOLOGY 141 (1994).

108. On the attempts by sentencing commissions and sentencing councils to take public opinion into account in norm-setting, *see* ARIE FREIBERG & KAREN GELB, *PENAL POPULISM, SENTENCING COUNCILS AND SENTENCING POLICY* (2008).

receive in the same situation. It is this feature above all that distinguishes the just deserts model from the individualization model that preceded it.<sup>109</sup>

But who are the “others” to whom this equalization principle applies?<sup>110</sup> The interest of sentencing researchers in the extent to which sentencing practices reflect the values of the local community (thus by implication legitimizing within-jurisdiction geographical variation) dates back to the positivist tradition of the mid-twentieth century<sup>111</sup> and continues to generate positive findings in contemporary sentencing research, as well as attracting support.<sup>112</sup> Yet in a post-modern world of identity politics and diverse cultures, even local communities may lack a Durkheimian consensus as to the degree of censure “deserved” for a particular offense.

On the other hand, not only does desert theory, with its Kantian associations, seem to presuppose that there is a just (or “appropriate”)<sup>113</sup> sentence for every crime, but the development of international human rights norms, in particular the creation of international institutions for dispensing penal justice such as the International Criminal Court and the various ad hoc tribunals, indicates an orientation towards universally approved sanctions.<sup>114</sup> However, while liberal doctrine identified with the promotion of the just deserts model might support such an orientation, the practice of domestic penal systems reveals substantial variation in their levels of penalty.<sup>115</sup>

The next section will take a brief look at the research literature relating to the reforms generated under the just deserts paradigm and in the aftermath of the paradigm’s adoption, noting indications of interpretational or other problems deriving from the conceptual or methodological issues that have been raised here.

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109. *But see* R.A. Duff, *Guidance and Guidelines*, 105 COLUM. L. REV. 1162 (2005). Duff, although an adherent to desert philosophy, would allow the penalty to be negotiated in the individual case between judge, offender, and victim through a communicative process.

110. The issue here is possible differentiation not among perpetrators, which was referred to in Part V.C, *supra*, but among sanctioning agencies.

111. *Cf.* HOOD, *supra* note 44.

112. *See* JOHN H. KRAMER & JEFFERY T. ULMER, *SENTENCING GUIDELINES: LESSONS FROM PENNSYLVANIA* (2009).

113. *Cf. supra* note 94.

114. While most of the relevant international human rights conventions deal only with penal excesses such as torture and inhumane or degrading punishment, The Convention on the Rights of the Child, G.A. Res. 44/25 ¶ 40, U.N. Doc. A/RES/44/25 (Sept. 2, 1990) refers explicitly to proportionality.

115. *See infra* Part VII; Aharonson, *supra* note 26. On the potential for increased universalization of sanctioning norms, see Frase, *supra* note 95; Leslie Sebba, *Punitiveness in International Criminal Justice: Some Explorations*, in *INTERNATIONAL PERSPECTIVES ON PUNITIVITY* 187 (Helmut Kury & Theodore Ferdinand eds., 2008).

## VI

## RESEARCH FINDINGS—AMBIVALENCE AND AMBIGUITIES

During the thirty-five years since the publication of *Doing Justice* in 1976,<sup>116</sup> more than twenty U.S. states—in addition to the federal system—have reformed their sentencing system by means of a “guideline” system,<sup>117</sup> and some developments of this type have occurred outside the United States.<sup>118</sup> Sentencing commissions have been charged with conducting research (or have chosen to do so) in order to monitor the effects of the reforms. There have also been numerous evaluation initiatives by other agencies and academics.

Clearly no serious attempt can be made in a few lines even to summarize the findings of these publications. However, the impression gleaned from the more comprehensive overviews, including such sources as Spohn,<sup>119</sup> Kramer and Ulmer’s recent study of the sentencing reforms in Pennsylvania,<sup>120</sup> and Michael Tonry’s well-known overview *Sentencing Matters*,<sup>121</sup> is that scholars perceive the research findings to be equivocal as to the extent to which the reforms have achieved their objectives (hence *ambiguities*),<sup>122</sup> while the researchers themselves seem to be *ambivalent* as to what can or should be done about it. Although some positive findings are reported—particularly in relation to the reforms in Minnesota and Pennsylvania—doubts generally remain, *inter alia*, as to the extent to which disparities and discrimination have been reduced,<sup>123</sup> and to the extent to which the courts have taken into account “extralegal” variables. Differences by localities are also widely reported.

More specifically, Spohn reports on a meta-analysis conducted by Mitchell in 2005, which “revealed that the amount of unwarranted disparity in sentencing had not changed appreciably since the 1970s”;<sup>124</sup> and Tonry puts forward detailed arguments as to why the claims of sentencing commissions that they have succeeded in reducing disparity should be doubted. In her earlier publication, which focuses specifically on racial discrimination, Spohn concludes:

The fact that racial discrimination persists despite these policy changes suggests that reformers may have had unrealistic expectations about the ability of the reforms to

116. VON HIRSCH, *supra* note 84.

117. See Frase, *supra* note 102. Some states introduced such a system but subsequently repealed it.

118. See Indermaur, *supra* note 101.

119. SPOHN, *supra* note 77; see also Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, in 3 POLICIES, PROCESSES AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM 427 (2000); Julian V. Roberts, *Structured Sentencing Outside the United States*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (forthcoming).

120. KRAMER & ULMER, *supra* note 112.

121. MICHAEL TONRY, *SENTENCING MATTERS* (1996).

122. Of course since it may not be clear what precisely were the objectives of the reform, the issues discussed (for example, elimination of discrimination) may rather reflect the agenda of the researcher.

123. These doubts seemed to be shared by Aharonson, *supra* note 26, at 181.

124. SPOHN, *supra* note 77, at 190.

alter the sentencing process and/or that the reforms themselves have not been implemented as intended.<sup>125</sup>

All these authors question the failure of guidelines to take into account what they perceive to be relevant variables—thus questioning the concept of “legal” variables.<sup>126</sup> Tonry claims that the just deserts approach fails “to ‘treat different cases differently.’”<sup>127</sup> Kramer and Ulmer, too, believe that substantive (as distinct from formal) justice would be achieved by greater flexibility in the guidelines. Paternoster, however, claims in a recent article that guidelines do indeed reduce disparities and that relaxation of the mandatory force of the federal guidelines has been shown to have increased disparities—attributing arguments to the contrary to the antipathy of their advocates to the supposed punitiveness of guideline policies.<sup>128</sup>

One can only speculate as to how far uncertainties regarding the outcome of the sentencing reforms derive from the complexities of sentencing research alluded to above, from unsatisfactory features attaching to the reforms in question, or from obstacles to implementation—such as resistance on the part of key role-players in the criminal justice system<sup>129</sup> or of “court cultures.” It should be noted, however, that academic analysis has been devoted specifically to the impact on the research findings in this area of the methodology applied.<sup>130</sup>

Finally, while it is undoubtedly true that since the change in the sentencing paradigm in the 1970s incarceration rates in the United States have dramatically increased, a widely-held view that this increase is attributable to the sentencing guidelines<sup>131</sup> has been challenged.<sup>132</sup> The causes of punitiveness and its relationship to sentencing policies will be further considered in the next section.

## VII

### PUNITIVENESS AND ITS CORRELATES

Soaring rates of imprisonment in the United States (the “mass incarceration” phenomenon), coupled with the publication of “league tables” of

125. SPOHN, *supra* note 119, at 427.

126. *Id.* at 142. For further discussion of this topic, see *supra* note 18 and accompanying text.

127. TONRY, *supra* note 121, at 14.

128. Raymond Paternoster, *Racial Disparity under the Federal Sentencing Guidelines Pre- and Post-Booker: Lessons Not Learned from Research on the Death Penalty*, 10 CRIMINOLOGY & PUB. POL'Y 1063 (2011).

129. With reference to the prosecution, see *supra* note 79 and accompanying text.

130. Weisburd, *supra* note 14; Belinda Rodgers McCarthy & Charles A. Lindquist, *Ambiguity and Conflict in Sentencing Research: Partial Resolution Through Crime-Specific Analysis*, 13 J. CRIM. JUST. 155 (1985).

131. It may be that this view is more widely held outside the United States. It has certainly fuelled the arguments of opponents. See Boaz Sangero, *Who is Interested in More and Longer Prison Sentences? On the Penal Law (Amendment: Structuring of Judicial Discretion in Sentencing) Bill, 2005*, 5 ALEI MISHPAT 247 (2006) (Isr.); see also Oren Gazal-Ayal & Rutie Lazar, *Anticipated Outcomes of Departure Sentences*, 3 HUKIM 41 (2011) (Isr.).

132. See Kevin Reitz, *Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 TEX. L. REV. 1787 (2006).

prison populations per 100,000 population around the world,<sup>133</sup> have provoked a strong interest among criminologists in identifying the roots of punitiveness and thus explaining the differences observed between nations and cultures. The debate has been further stimulated by the comparative analyses of Whitman, Cavadino and Dignan, and Lacey.<sup>134</sup> While Whitman emphasized historico-cultural factors, the other studies attributed considerable significance to the political economy of the nations compared. Under the typology of Cavadino and Dignan, the most punitive nations in their sample were those that had adopted neoliberal economies (the United States, England, South Africa, and New Zealand); in the middle were the “corporatist” states of western Europe; and the least punitive<sup>135</sup> were the social democracies of Scandinavia. The connection between the economic regime and punitiveness has been explained in terms of the economic insecurities and other fears related to globalization and migration policies that are perceived as being more threatening in neoliberal societies where the welfare infrastructure is more tenuous; and politicians—with the assistance of the media—have been accused of manipulating the public’s concerns, thereby fostering the fear of victimization, suspicion of “the other,” and the need to be “tough on crime.”<sup>136</sup>

This idea that punitiveness may be connected with a nation’s social, political, economic, or cultural patterns or orientations is of course not new. Durkheim’s thesis that societies would move from repressive to restitutive norms was further supplemented by his “Two Laws of Penal Evolution.”<sup>137</sup> Rusche and Kirchheimer explained the prevailing forms of punishment in terms of economic interests, while Elias—and to some extent Foucault—emphasized cultural characteristics.<sup>138</sup> Tonry, however, who has written extensively on developments in penal policy, including “American exceptionalism,” attributes the punitiveness of the United States to the excessively populist character of its democratic institutions<sup>139</sup>—a thesis further developed in this symposium by Ely Aharonson.<sup>140</sup> Examples of this are electoral primaries, the use of referenda, and the election of judges and prosecutors. These phenomena contrast with the modifying effects of the professional bureaucracies charged with policy-making in European governmental departments. Savelsberg emphasizes the role of the

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133. ROY WALMSLEY, *WORLD PRISON POPULATION LIST* (8th ed., 2009).

134. See MICHAEL CAVADINO & JAMES DIGNAN, *PENAL SYSTEMS: A COMPARATIVE APPROACH* (2006); NICOLA LACEY, *THE PRISONERS’ DILEMMA* (2008); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

135. Less punitive still was Japan, but Japan was considered *sui generis* among the group and designated “oriental corporatist.”

136. Cf. DAVID GARLAND, *THE CULTURE OF CONTROL* (2001).

137. For example, see ALAN HUNT, *THE SOCIOLOGICAL MOVEMENT IN LAW* 68–72, 79–85 (1978).

138. An in-depth analysis of some of these theories is found in DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* (1990).

139. Michael Tonry, *Determinants of Penal Policies*, in 36 *CRIME, PUNISHMENT, AND POLITICS IN COMPARATIVE PERSPECTIVE* 1 (Michael Tonry ed., 2007).

140. Aharonson, *supra* note 26.

state in these societies in generating knowledge and determining priorities in this field,<sup>141</sup> while Garland and Sparks note that the irrationality of penal policies in neoliberal states can be explained by the fact that crime and punishment have become too important to politicians for them to leave policy formation in this field to professionals (such as criminologists).<sup>142</sup>

These analyses raise profound issues in relation to both the dynamics and substance of penal reform. While early positivist criminology was characterized by its deterministic approach to criminality and confidence that researching the causes would enable experts to prescribe the appropriate criminal justice policies, the literature on the origins of punitiveness suggests that in neoliberal countries today, criminal justice policy, of which sentencing policy must be considered an integral part,<sup>143</sup> is itself increasingly determined by external or constraining forces over which the actors in the system have little influence. The control of criminal justice policy-making by the professional bureaucracy in these countries has declined; and its subjection to the vicissitudes of media-sensitive politicians could surely be a contributing factor to the unpredictability of sentencing policies and their outcomes.

## VIII

### CONCLUDING REFLECTIONS

This article opened with an account of a “legal transplant” or policy transfer, which served to illustrate the uncertainties that arise in the course of attempts to achieve penal reform—particularly sentencing reform, including uncertainties as to its objectives. The article then pursued the theme of uncertainties which arise in the course of research on sentencing—particularly when attempting to evaluate its reform. It focused on the obstacles deriving from the almost limitless number of variables potentially affecting the sentencing decision, which may frustrate the implementation of reforms as well as their evaluation. Uncertainties associated with the open-ended individualization of the sentencing model of the positivist era have been replaced, or perhaps supplemented, by new uncertainties accompanying the adoption of the just deserts paradigm and its aftermath.

Analyses of the research findings derived from the evaluations of desert-related reforms in the United States indicated at least ambivalence, if not dissatisfaction, with outcomes. The literature on punitiveness pointed to societal forces that may be impacting sentencing structures in unpredictable directions. This same literature, however, indicates that many of the characteristics of penalty and penal reform referred to in this article may be socio-culturally or

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141. Joachim Savelsberg, *Punitiveness in Cross-National Comparison: Toward a Historically and Institutionally Founded Multi-factorial Approach*, in INTERNATIONAL PERSPECTIVES ON PUNITIVITY 13 (Helmut Kury & Theodore Ferdinand eds., 2008).

142. David Garland & Richard Sparks, *Criminology, Social Theory, and the Challenge of Our Times*, in CRIMINOLOGY AND SOCIAL THEORY 1 (David Garland & Richard Sparks eds., 2000).

143. On the autonomy of sentencing policies, see *infra* Part VIII.C.



politically determined, and pertain primarily to so-called neoliberal societies. Comparative materials from Germany and Scandinavia serve to add credence to this impression.<sup>144</sup>

Given the problematic picture emerging from both historical and contemporary accounts of sentencing reform and sentencing research in the United States and other neoliberal countries, coupled with the complex patterns of national or cultural diversity, it may be appropriate to consider new theoretical frameworks (or revise old ones) in an endeavor to enhance our comprehension of current developments. By comparison with the proliferation of research on sentencing outcomes in recent years, there may be room for more theoretical writing on the sentencing process, as well as on the processes of sentencing reform. Some possible directions will be indicated.

#### A. Modeling the Dynamics of Sentencing Reform

While there has been extensive literature on penal policy-making in recent years, particularly in the context of punitiveness and mass incarceration, there is nevertheless room for more systematic research that would focus on the manner in which reforms (and in the present context, sentencing reforms) emerge and are debated, identifying the respective roles of government departments, legislators, NGOs, the public, and the media. This appears to have been recognized in a recent article by Lynch that triggered a symposium in *Criminology and Public Policy*, in which she seeks a new theoretical framework in order to understand the relationship between the local and the national in mass incarceration.<sup>145</sup> Lynch criticizes researchers for focusing on the outcome of policy changes “with little attention given to the conditions and contexts in which sentencing laws were devised or transformed.”<sup>146</sup>

Systemic accounts of legislative reforms could be supplemented by the in-depth ethnographic methodologies employed by Paul Rock when researching the emergence of victim policy in Canada and the United Kingdom in an earlier era.<sup>147</sup> Insights emerging from such research could produce models that might improve our understanding of the dynamics of sentencing reforms and their related outcomes.

#### B. Sentencing Decision-Making Processes

The debates on the structuring of sentencing may have diverted our attention from its core element—the decision-making process of the judge. This

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144. See Hans-Jörg Albrecht, *Sentencing in Germany: Explaining Long-term Stability in the Structure of Criminal Sanctions and Sentencing*, 76 *LAW & CONTEMP. PROBS.* no. 1, 2013 at 211; Tapio Lappi-Seppala, *Penal Policy in Scandinavia*, in *CRIME, PUNISHMENT, AND POLITICS IN COMPARATIVE PERSPECTIVE*, *supra* note 139, at 217.

145. Mona Lynch, *Mass Incarceration, Legal Change, and Locale: Understanding and Remediating American Penal Indulgence*, 10 *CRIMINOLOGY & PUB. POL'Y.* 673 (2011).

146. *Id.* at 677.

147. ROCK, *supra* note 82; PAUL ROCK, *A VIEW FROM THE SHADOWS* (1986).

was the focus of the early studies under the individualization paradigm, when discretion was almost unlimited. Hogarth's sophisticated analysis of the Canadian magistrates at that time gave rise to a model in which the key to predicting the outcome was an understanding of how the individual judge would interpret the facts of the case in the light of "the social system and other features of the external world."<sup>148</sup> The recent study by Kramer and Ulmer, on the other hand, focused on a variety of court-level, community-level, state-level and "society-wide" factors.<sup>149</sup> As in the case of policy-making models, in an age of globalized media, the sentencing model must reflect an ever-widening spectrum of agencies with potential influence over the outcome. Hogarth's model, whereby it is the judge at the end of the day who will process the information, should be incorporated. Since many of the influences affecting the decision will not be reflected in the formalized sentencing structure, the tensions observed by Kramer and Ulmer between formal and informal rationality will come into play. Alternative processes for reaching a decision within the model developed could serve as a basis for research on the perceived legitimacy of different procedural options—as well as the decisional outcomes likely to follow therefrom.

### C. Sentencing Autonomy

The discourse on sentencing generally seems to regard the choices faced by sentencing policy as autonomous. The literature on punitiveness, however, points to a deterministic dynamic: if your nation has a neoliberal regime, or your state elects its judges, incarceration rates will increase.

There are essentially two issues here. The first is whether sentencing patterns can change irrespective of other components of the criminal justice "system."<sup>150</sup> Opponents of sentencing guidelines claim that discretion "lost" to judges emerges elsewhere. The second is whether the criminal justice system is in itself a reflection of other socio-political indicators, as indicated above. Interdependence between sentencing and other institutions—whether part of the criminal justice system or otherwise—would certainly account for the failure of "transplants" when a legal institution is imported from a different type of legal or socio-political system. Teubner, on the other hand, perceives the failure of transplants as a natural concomitant of his belief that the law is an autopoietic system<sup>151</sup>—self-referential and normatively closed, but cognitively open to its environment. The differences in their social settings give rise to incompatibilities between legal systems such that legal transfers serve as "legal

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148. HOGARTH, *supra* note 44, at 343.

149. See KRAMER & ULMER, *supra* note 112 and accompanying text.

150. The term "system" suggests it cannot—but the terminology has been challenged. See generally LUCIA ZEDNER, *CRIMINAL JUSTICE* 20 (2004).

151. GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (1993). The theory is biological in origin and was applied to social systems by Niklas Luhmann.

irritants” causing unpredictable changes in the recipient system.<sup>152</sup>

The implications of this theory for sentencing reforms in a volatile political environment are unclear.<sup>153</sup> Wandall adopted the above theoretical framework for a study of sentencing in Denmark in the belief that it was particularly suited to elucidating the rule-oriented sentencing reforms in contemporary legal systems, specifically citing guideline systems.<sup>154</sup> Nevertheless, consistent with the cognitive openness of the theory, “court organization provides space for . . . courts [to] respond to local social and political pressures.”<sup>155</sup>

Replication of the study in the United States and other settings may produce insights regarding such issues as the relative weighting of legally-specified variables versus other variables within the different systems, as well as the role of reforms. The qualitative methodology of such studies could prove particularly insightful.

#### D. Changing Paradigms or Postmodern Chaos?

Insofar as the research considered earlier casts doubt on the ability of the desert model to reduce disparities in sentencing—might this give rise to a change in paradigm?<sup>156</sup> A revival of interest in consequentialist objectives (especially rehabilitation) was noted earlier,<sup>157</sup> although not necessarily as the basis of a new sentencing structure.<sup>158</sup> Desert sentencing may be more threatened by the desire to enhance victims’ rights<sup>159</sup> or the growing interest in restorative justice.<sup>160</sup>

Given, however, the populist and somewhat arbitrary character of the penal policies taking place in some western countries (whether or not we choose, with Garland, to describe these features as late modernity),<sup>161</sup> the likelihood of

152. See Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies*, 61 MOD. L. REV. 11, 15 (1998); see also Roger Cotterrell, *Comparatists and Sociology*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 131 (Pierre Legrand & R.J.C. Munday eds., 2003).

153. It should be observed that insofar as the reform involves a borrowing (or transplanting), this has usually been from a legal system belonging to the same “family.”

154. RASMUS H. WANDALL, *DECISIONS TO IMPRISON: COURT DECISION-MAKING INSIDE AND OUTSIDE THE LAW* 18 (2008).

155. *Id.* at 17.

156. The term paradigm is, again, used here loosely. *Cf. supra* note 19. However, the idea of changing the paradigm because of doubts arising from the accumulation of research findings is, of course, close to the Kuhnian application of this concept.

157. See *supra* note 78.

158. Research findings related to the effectiveness of rehabilitation programs are based on categories of offenders rather than individual pathologies and can largely be implemented within a structured sentencing scheme.

159. See *supra* notes 106–107 and accompanying text.

160. See, e.g., *HANDBOOK OF RESTORATIVE JUSTICE* (Gerry Johnstone & Daniel W. Van Ness, eds., 2007). Restorative justice has been conceptually developed as an alternative to just deserts. See JOHN BRAITHWAITE & PHILIP PETTIT: *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* (1990).

161. Garland, *supra* note 17 and accompanying text.

cohesion around a new model that can be effectively translated into government policies seems unlikely, and the academic literature reviewed above relating to neoliberal regimes and the United States in particular surely indicates quite another direction. Garland and Sparks note that the pace of change renders our “long established research agendas . . . outmoded and irrelevant.”<sup>162</sup>

The uncertainty and unpredictability that seem to characterize sentencing are qualities emphasized in chaos theory. According to Milovanovic “chaos theory has emerged as one of the key threads of postmodern analysis that fundamentally challenges the assumption of an orderly world.”<sup>163</sup> However, “chaos should not . . . be seen as purely randomness and chance events: rather, ‘what makes chaos confounding is the way measurement uncertainties expand.’”<sup>164</sup> Classified as a mode of non-linear analysis pertaining to complex system science,<sup>165</sup> chaos theory has been applied to a variety of legal and criminological contexts in the past two decades,<sup>166</sup> including judicial decision-making.<sup>167</sup> While it may be difficult, on the one hand, to isolate this theory from its anchorage in the physical sciences or, on the other, to separate it from other related concepts pertaining to postmodernism, the hypothesis that “seemingly insignificant events can sometimes have a major impact on the long-term behavior of systems”<sup>168</sup> is surely worth testing in the sentencing context. The idea that a minor detail could skew the outcome of a case would be the obverse of Sudnow’s well-known thesis whereby the processing of cases becomes standardized on the basis of a small number of significant variables.<sup>169</sup>

In conclusion, it is suggested that, given the many imponderables of sentencing reform and sentencing research, the time may be ripe for sentencing scholars to take a “time out” for a period of stock-taking and the exploration of theoretical modeling, whether on the lines suggested or otherwise.<sup>170</sup>

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162. Garland & Sparks, *supra* note 142, at 21.

163. Milovanovic, *supra* note 1, at vii.

164. *Id.* (citing D. PEAK & M. FRAME, CHAOS UNDER CONTROL 158 (1994)).

165. Jeffery T. Walker, *Advancing Science and Research in Criminal Justice/Criminology: Complex Systems Theory and Non-Linear Analyses*, 24 JUST. Q. 555, 557 (2007).

166. Milovanovic, *supra* note 1, at viii.

167. Caren Schulman, *Chaos, Law and Critical Legal Studies: Mapping the Terrain*, in CHAOS, CRIMINOLOGY AND SOCIAL JUSTICE 123 (Dragan Milovanovic ed., 1997).

168. Glenn D. Walters, *Crime and Chaos: Applying Nonlinear Dynamic Principles to Problems in Criminology*, 43 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 134, 137(1999).

169. David Sudnow, *Normal Crimes*, 12 SOC. PROBS. 255 (1965).

170. For other possible theoretical frameworks see KRAMER & ULMER, *supra* note 112, who applied Weberian theory, and Ralph Henham, *Problems of Theorizing Sentencing Research*, 28 INT’L J. SOC. L. 15 (2000), who applied Giddens’ structuration theory.