Michael Tonry

Doing Justice in Sentencing

Punishment theories and policies have marched in different directions in the United States for nearly 50 years. Philosophers and others who try to understand what justice requires, policy makers who create the rules for dispensing it, and practitioners who try to achieve it don't communicate with each other very well, or at all. They lack a common vocabulary. More importantly, they lack a shared understanding of what punishment is and does, and what it should aspire to be and to do. This is unusual. Shared understandings exist in most countries and did in the United States through the 1960s.

The costs have been high. They include mass imprisonment, extraordinary injustice, assembly-line case processing, and moral impoverishment. Here are two concrete examples. California's three-strikes law required minimum 25-year prison sentences for many trifling property crimes. Notorious cases involved thefts of three pizza slices, three golf clubs, and a handful of DVDs. The golf clubs and DVDs made it to the US Supreme Court. Many states' laws authorized, sometimes mandated, life sentences without parole for young teenagers, some convicted of homicide but many convicted of lesser crimes. Those laws would have been unimaginable in the United States before the 1980s, and they are unimaginable today in other Western countries. That is because of widely shared agreements in most times and places that fierce punishments for minor crimes are unjust and that troubled young people should be dealt with sympathetically.

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Philosophers and others who write about punishment theory condemn decades-long prison sentences for minor property crimes and life without parole for children, and can explain why they are unjust. Policy makers in the 1980s and 1990s, however, happily enacted those and many comparable laws, and prosecutors enthusiastically applied them.

There is wide agreement in our time that mass imprisonment was a mistake of historic proportions, that many sentencing laws are deeply unjust, and that things have to change. Movements are afoot in most states and the federal system to make sentencing and correctional policies more rational and more humane. So far, however, only small, tentative steps have been taken. Fundamental changes are unlikely unless and until widely shared understandings about punishment and justice reemerge.

Most people who write about punishment theory and philosophy are retributivists of one sort or another who believe offenders should be treated justly and, with the Mikado, that the punishment should fit the crime. Policy makers in recent decades, to the contrary, have not much cared whether individual offenders are treated fairly or punished justly. Thence came mandatory minimum sentence laws in 50 states, three-strikes laws in 26, truth in sentencing laws in an overlapping 26, and life without parole in 49. They apply to all adults and to children whose cases are tried in adult courts. All exist in the federal system.

Those laws threaten such fearsome punishments that innocent defendants are sorely tempted to plead guilty rather than risk a wrongful conviction. Guilty defendants usually feel they have no choice. The late Harvard Law School professor William Stuntz observed in 2011 that "outside the plea bargaining process" prosecutors' threats to file any of those charges "would be deemed extortionate." Extortion works. Trials are much rarer than they were 30 or 50 years ago, punishments are incomparably harsher, unprecedented numbers of people are locked up, and wrongful convictions are sadly common. The most sophisticated analysis of the prevalence of wrongful convictions, by Charles Loeffler of the University of Pennsylvania and colleagues in 2019, estimated that, in Pennsylvania, wrongful convictions occur in six percent of convictions that result in imprisonment.

The discordance between theory and policy was not always thus. Before 1975, they dovetailed for nearly a century. Most theorists were consequentialists and believed that offenders should be rehabilitated and retributive impulses be resisted. Most practitioners and policy makers believed that sentencing and parole decisions should be individualized

to take account of offenders' circumstances, characteristics, and needs. Policy and theory came together in the American Law Institute's *Model Penal Code* (1962). It contains detailed proposals for individualized, indeterminate sentencing; judges, probation officers, parole board members, and prison officials are told to focus primarily on how best to rehabilitate most offenders and to incapacitate the dangerous and incorrigible few.

Herbert Wechsler, the Code's primary draftsman, in 1961 made its premise clear: "The rehabilitation of an individual who has incurred the moral condemnation of the law is in itself a social value of importance, a value, it is well to note, that is and ought to be the prime goal." Contemporaneous national commissions agreed, including the President's Commission on Law Enforcement and Administration of Justice in 1967, the National Commission on Reform of Federal Criminal Laws in 1971, and the National Advisory Committee on Criminal Justice Standards and Goals in 1973.

As those reports were being written, however, the winds were changing direction. Crime rates had begun a seemingly inexorable rise in the early 1960s. Conservatives accused indeterminate sentencing of paying too much attention to rehabilitating offenders and too little to preventing crime. Civil rights groups, prisoners' rights groups, and proponents of procedural fairness accused it of inconsistency, racial bias, unfairness, and opaqueness.

The criticisms bit. Indeterminate sentencing, in place in every state and the federal system since the 1930s, imploded. Maine in 1975 abolished parole release. California in 1976 enacted its Uniform Determinate Sentencing Law. Reform was in the air. Every state changed its laws and policies in the 1970s and 1980s, most repeatedly. Almost no one, and that included philosophers and other theorists, defended indeterminate sentencing or its rehabilitative premises. University of Chicago law professor Albert Alschuler in 1978, for example, bewilderedly observed: "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." Scholarly books and journals abounded with "determinate" sentencing proposals and elaboration of retributive theories.

For a time it looked as if prevailing ways of thinking had shifted from consequentialism to retributivism. Most sentencing reform initiatives, including sentencing guidelines, appellate sentence review, and laws like California's sought to structure decision making, reduce disparities, and

lessen the influence of racial bias and officials' idiosyncrasies. Philosophers and other theorists followed suit. Retributive theorizing blossomed, and conformed comfortably to the new policy emphases: do the crime, suffer the deserved time. Policy and theory appeared to be in sync. That soon ended.

Policy makers in the mid-1980s lost interest in procedural unfairness, sentencing disparities, and racial injustice. Instead, they enacted rigid, severe laws that promoted personal, political, and ideological agendas. The new laws ostensibly sought to prevent crime by means of deterrence and incapacitation. "Ostensibly" because the empirical evidence did not show then, and does not show now, that deterrence and incapacitation have significant effects on crime rates or patterns.

The toughest laws, enacted mostly between 1984 and 1996, are incompatible with retributive theories of punishment. Retributive theories vary in details but all insist on proportionality, on scaling the severity of punishments to the seriousness of crimes. Horizontally, this requires that comparably serious crimes be punished comparably severely and, vertically, that more serious crimes be punished more severely than lesser ones, and vice versa.

Mandatory minimum sentence, three-strikes, and life without parole laws by contrast require starkly disproportionate punishments. The federal 100-to-1 law for cocaine sentencing required vastly longer prison sentences for small sales of crack than for sales of the same amount of pharmacologically indistinguishable powder, and a longer sentence for sale of a sixth of an ounce of crack than for robbery, child abuse, or major white-collar crimes. California's three-strikes law until recently required minimum 25-year prison terms, and sometimes life, for many minor property and drug offenses even though robberies, rapes, and serious assaults are often punished much less severely. Many life without parole laws apply to offenses other than homicide and some even to property crimes, implying that murders, rapes, robberies, and property crimes are equally serious, something no one believes. How severely people are punished often depends less on what they have done than on the charges prosecutors choose to file, and the plea bargains they are willing to offer.

Theorists in the 1980s and 1990s continued to assert that proportionality is a fundamental requirement of justice. Policy makers, and practitioners who applied the new laws, behaved as if they disagreed. Many in their hearts probably agreed, but because of political considerations, personal self-interest, or ideological commitments, pretended they didn't.

There are signs, however, that the winds are again changing direction. Crime rates peaked in 1991 and have since fallen continuously (with recent pandemic hiccups). Violent crime has fallen by two-thirds. Few harsh sentencing laws have been enacted since the mid-1990s. Almost none have been repealed, but some have been slightly moderated. The imprisonment rate rose continuously, quintupling, beginning in 1973, peaked in 2007 and has since declined by 10 percent. That is small change. The rate remains near 650 per 100,000 population, by far the world's highest and 4 to 10 times higher than in other Western countries. Conservative and liberal law reformers, including the ACLU and George Soros on the left, and Right on Crime and the Koch brothers on the right, often join forces to try to reduce the use of imprisonment, change sentencing laws, and help offenders live law-abiding lives.

The theory class has not kept up. Retributivism remains intellectually predominant, and nonretributivists remain largely silent, but signs of rethinking are appearing. Americans may once again want to have morally coherent criminal justice systems in which offenders are punished as they deserve to be and crime is effectively prevented.

The rudiments of just punishment systems are clear. If political posturing and cynicism, passions provoked by notorious crimes, and irrational fears and anger could be set aside, there is wide agreement about what a just system should look like. The best way to think about this is to ask yourself how you would want the system to work if someone you love was ensnared in it. Here are my answers. Most people would offer similar ones.

I would want them to be treated fairly and respectfully.

I would want the officials involved to be objective, unbiased, and fair-minded.

I would want them to be treated as others in their sad situation are. That doesn't mean that everyone should be treated mechanistically, in exactly the same way, but that everyone's circumstances and interests should be considered sympathetically, with equal respect and concern.

I would want them to be punished no more severely than they deserve or, if there were good reasons to justify it, less severely.

If the wrongdoing resulted partly from mental illness, drug or alcohol dependence, lack of fundamental skills and capacities, or comparable disabilities and handicaps, I would want them helped to address those challenges.

If you doubt that most people in their hearts support those propositions, think about what happens when prominent people, or their children or others they care about, are charged with crimes. Even politicians who support harsh sentencing laws, rail against "technical" procedural protections, and decry "lenient" sentencing want to benefit from all available protections. They want to be treated fairly and sympathetically and want judges to take account of the circumstances, pressures, and challenges that influenced their wrongdoing. What I would want for myself and my children, and what prominent people want for themselves and their children, should be provided to everyone's children.

Decades of research on public opinions, attitudes, and beliefs show that none of those propositions is likely—in the abstract, without politics, ideology, or emotion taking over—to be controversial. Almost everyone has opinions and intuitions about why crimes are committed and what should happen to people who commit them. Most people say they believe that offenders should be punished as much as they deserve, but not more, and all else being equal that more serious crimes deserve harsher punishments than lesser ones. Most people understand that many crimes result in part from offenders' disadvantaged backgrounds, drug, alcohol, and mental health problems, and similar calamities, and believe that appropriate treatment and services should be provided to them—for their sake and everyone else's. Reconciling support for deserved punishment with recognition of human frailty is, of course, not easy, but it can be done. Good judges do it all the time, when applicable laws allow. Judges in western and northern European countries, where laws are less rigid and severe, justice systems are better insulated from political influence and public emotion, and social welfare systems are more extensive, do it more often than American judges.

The five propositions that encapsulate what I would want to happen if people I love were caught up in the criminal system can be, and usually are, presented more abstractly. In that language, here are the concepts and principles that characterize just punishment systems.

- *Justice as Proportionality*: Offenders should never be punished more severely than can be justified by their blameworthiness in relation to the severity of punishments justly imposed on others for the same and different offenses.
- *Justice as Fairness*: Processes for responding to crimes should be publicly known, implemented in good faith, and applied evenhandedly.

- *Justice as Equal Treatment*: Defendants and offenders should be treated as equals; their circumstances and interests should be accorded equal respect and concern when decisions affecting them are made.
- *Justice as Parsimony*: Offenders should never be punished more severely than can be justified by appropriate, valid, normative purposes.

Until recently, most punishment theories were classified as being retributive or utilitarian. That isn't exactly right semantically. Retributive theories, often said to derive from the writings of the German idealist philosophers Immanuel Kant and Georg Wilhelm Friedrich Hegel, assert that punishment is a Good Thing and should be proportionate in severity to the seriousness of the crime for which it is inflicted. Utilitarian theories, most famously associated with the British polymath Jeremy Bentham, assert that punishment is a Bad Thing, an "evil" he said, because it inflicts suffering and can be justified only if through its deterrent effects it averts greater suffering by others.

Retributivism thus centers on imposition of deserved punishment and utilitarianism on crime prevention through deterrence. Indeterminate sentencing, by contrast, focused on both rehabilitation and incapacitation. Although it and its epitome, the *Model Penal Code*, were often referred to as utilitarian, they were not utilitarian in Bentham's narrower deterrent sense. As a result, in our time many people contrast retributive with "consequentialist" or "instrumental" theories that justify punishment in terms of all its crime-preventive effects.

Positive Retributivism. Just systems of punishment incorporate elements from classical retributivism and classical utilitarianism. From retributivism comes the idea that people should never be punished more than they deserve. This takes two forms. "Positive" retributivists say that offenders may and must be punished precisely as much as they deserve. Positive retributivism is, however, humanly impossible to achieve. God may know what any offender absolutely deserves, but human beings have only intuitions and opinions to draw on, and these vary widely. God may know everything there is to know about an offender's life, characteristics, virtues, vulnerabilities, accomplishments, and misdeeds, but humans do not and lack processes and methods reliably to learn about them. Oxford philosopher H. L. A. Hart, the twentieth century's most influential writer about punishment philosophy, observed in 1968 that punishment systems cannot achieve "any precise assessment of an individual's wickedness in committing a crime (who can?)."

Negative Retributivism. "Negative" retributivists say that offenders may be punished as much as they deserve, but need not be. This is much more achievable than positive retributivism because precisely deserved punishments need not somehow be determined. A simple system of proportionate upper limits for all crimes based on widely shared intuitions will ensure that comparably serious crimes are potentially subject to comparably severe punishments and more and less serious crimes to more and less severe ones. This fits with the widely held ideas that offenders should be punished no more severely than they deserve and, because much crime derives in part from offenders' disadvantaged backgrounds and drug, alcohol, mental health, and comparable problems, often less.

Negative retributivism can be reconciled with tailoring punishments to offenders' characteristics, disabilities, and needs and, when a credible base of reliable evidence exists to justify it, to crime prevention considerations. Negative retributivism, however, by itself faces a fundamental problem: How can the values underlying proportionality, equal treatment, and parsimony be made manifest? Classical utilitarianism provides the answer.

Utilitarianism. Bentham offered a sizable number of detailed rules for calculating the optimal deterrent punishment for any offense and offender, but subject to one overriding constraint: no punishment is justifiable that imposes more suffering on the offender than the suffering to be avoided, or that imposes more suffering than is needed to accomplish its aims. He referred to this as the principle of "frugality." In our time, following the usage of the Australian-American legal scholar Norval Morris, the term "parsimony" is more often used. The term was new, but not the idea. The drafters of the *Model Sentencing Act*, among many others in the indeterminate sentencing era, called for use of the "least restrictive alternative."

Parsimony provides the mechanism to address the looseness of negative retributivism. If offenders may justly be punished by a certain amount, but need not be, how much should they be punished? Jargon of our electronic times provides the answer. The default should always be the least severe punishment that the seriousness of the crime allows. In our time when the coin of punishment is imprisonment, the default for most crimes should instead normally be a community punishment though sometimes with a variety of controlling and rehabilitating conditions. For the most serious crimes, the default should normally be a specific term of confinement or something roughly equivalent.

Rebutting Presumptions. Negative retributivism sets limits on punishment severity, and parsimony creates a presumption that the least severe appropriate punishment should normally be imposed. An important question remains unanswered: What kind of evidence adequately rebuts the default parsimony presumption? In earlier times, this was impossible to answer because there were no systematic bodies of reliable knowledge about the deterrent, incapacitative, and rehabilitative effectives of punishment. Judges had only idiosyncratic intuitions and conventional wisdom to draw on. In our time, massive literatures have accumulated on the crime-preventive effects of criminal sanctions and treatment programs. There will seldom be adequate evidence-based reasons to overcome the default parsimony presumption though, sometimes, aggravating characteristics of the crime may.

Many individuals and organizations have recently surveyed the pertinent bodies of knowledge. The most exhaustive and authoritative analysis, by the National Academy of Sciences Committee on the Causes and Consequences of High Rates of Incarceration, concluded in 2014 that deterrent and incapacitative effects of punishment are, if any, modest at best and that imprisonment is on balance criminogenic, making ex-prisoners more, not less, likely to reoffend.

Another exhaustive National Academy of Sciences survey, this time by the Committee on Community Supervision and Desistance from Crime, concluded in 2008 that the evidence on rehabilitation is more positive. Well-designed, targeted, managed, and funded programs can reduce reoffending. Assignment to diagnostically appropriate treatment programs does not, however, require that people be imprisoned, or held longer than they otherwise would be. Treatment programs are more effective in the community. Taken as a whole, evidence-based knowledge about the effects of punishment will seldom overcome the default parsimony presumption and will often provide justification for diverting people from imprisonment.

Skeptics or crime control enthusiasts might take umbrage at the proposition that deterrence and incapacitation have no or only modest roles in punishing offenders. Their umbrage would be misplaced. Any system of punishment necessarily has deterrent and incapacitative dimensions. Even Kant and Hegel, positive retributivists who insisted that blameworthiness is the only morally relevant consideration to be taken into account in determining punishments, observed that imposition of deserved

punishments necessarily sends deterrent messages and restrains offenders. C. S. Lewis long ago, in 1949, wrote that retributive punishment, "as the saying goes, kill[s] two birds with one stone; in the process of giving him what he deserved, you set an example for others." Imposition of punishments inexorably conveys the message to citizens that wrongful acts have painful consequences. Scaling punishments to the seriousness of crime communicates that some crimes are more serious than others. Confining people and subjecting them to controls on their movements and actions incapacitates them.

The critical policy question is whether increasing punishments beyond levels that a retributive/parsimonious system would allow has significant additional preventive effects. The evidence is clear that it would not. To the extent that punishment has deterrent and incapacitative effects, they are important but incidental consequences of treating people justly.

No doubt there will be exceptional cases that require exceptional handling. Responses to some mentally disturbed or pathologically dangerous people may sometimes justify more extended or intrusive measures than would normally be deployed. Those individuals are, however, better dealt with by mental health professionals who have special knowledge, resources, and skills than by criminal justice professionals who don't.

Émile Durkheim, the pioneering French sociologist, a century ago observed that the criminal justice system has only a marginal but nonetheless crucial role to play in shaping behavior. Deterrent effects, he wrote, if any, are likely to be minor but are in any case not especially important. Whether individuals do or do not commit crimes, he said, is not because they calculate risks of punishment, but because they have or have not been socialized into good values. That heavy lifting is done by primary institutions—families, churches, schools, neighborhoods, workplaces. The criminal justice system comes much too late in peoples' lives to play a major role. However, he said, it is important that the legal system reinforces important norms and values and does not undermine them. Significant wrongdoing should have consequences, and the consequences should be scaled to the degree of wrongdoing. Otherwise, prevailing norms will be undermined if, for example, minor property crimes are punished more severely than sexual assault, as long happened in the United States when auto theft was taken seriously but domestic violence was not. Prevailing norms are systematically undermined in our time when minor drug and property offenders receive harsher punishments than many violent and white-collar offenders.

Not all prevailing norms deserve respect, of course. Think only of widespread beliefs in earlier generations about racial inferiority, sexual preferences, and women's roles and capacities. To the extent such beliefs exist, they should be repudiated both in the larger society and in the law. Most of the norms Durkheim was concerned about are not like that. They involve basic standards of right and wrong and mutual respect for one another's well-being and interests.

Americans could easily establish punishment systems that are both retributive and parsimonious. The tools exist and are in use, though they are crude and need to be adapted. Some states operate presumptive sentencing guidelines systems that rank crimes in relation to their seriousness and for each ranking establish upper and lower limits of punishments that should normally be imposed. For many crimes, both limits involve confinement. For others the upper limit is a term of confinement and the lower a community punishment or a fine. Occasionally only community punishments are specified.

Existing guidelines systems are typically much too severe in general and too often require confinement. They are fundamentally undermined in most states by mandatory minimum sentence and similar laws that trump the otherwise applicable standards and require disproportionately severe punishments. Setting that problem aside, and it is a big one and implies that all such laws should be repealed, presumptive guidelines could be adapted to be consistent with a punishment philosophy premised on negative retributivism and utilitarian parsimony. Most sentences would normally be set at the established minimum, though could be reduced when the judge believed that necessary in the interest of justice, and could be increased up to the established maximum when good evidence-based reasons or aggravating characteristics of the offense justified doing so. In a system governed by the rule of law, decisions to impose sentences below or above the minimum would require judicial explanations and be subject to appeals to higher courts.

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