Sentencing in America, 1975–2025

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ABSTRACT

American sentencing policy has gone through four stages in the past 50 years. Indeterminate sentencing was followed by a sentencing reform period in which policy initiatives sought to make sentencing fairer and more consistent, a tough on crime period in which initiatives sought to make sentences harsher and more certain, and the current period, which is hard to characterize. Most tough on crime initiatives remain in place, coexisting with rehabilitative and restorative programs that aim to individualize sentencing and programming. Social science evidence was influential in the second period and to a limited degree in the current period. Indeterminate sentencing was broadly compatible with prevailing utilitarian ideas about the purposes of punishment and the sentencing reform period was broadly compatible with retributive ideas. The initiatives of the tough on crime period are difficult to reconcile with any coherent set of normative ideas. Current sentencing policies are a crazy quilt, making it impossible to generalize about prevailing normative ideas or an "American system of sentencing."

Sentencing policies, practices, and patterns in the United States have changed radically since the early 1970s. Were it possible for a representative group of time-traveling federal and state judges, prosecutors, defense lawyers, and correctional officials from 1970 to attend a national conference on American sentencing in 2013, they would find the contemporary system unrecognizable. Most would probably find it unimaginable.

In 1970, every American state and the federal system since at least

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the 1930s had operated an "indeterminate sentencing" system premised on rehabilitation as the primary aim of punishment and on the desirability of tailoring sentences in every case to the offender's circumstances and needs (e.g., Rothman 1971). Sentencing was seen as a professional matter requiring specialized expertise and best handled by knowledgeable officials behind closed doors. Details varied, but the broad picture was everywhere the same. Statutes defined crimes and set out broad ranges of authorized sentences. Few laws mandated minimum sentences, and when they did, it was typically for 1 or 2 years. Judges adjudicated cases; decided whether to impose prison, jail, probation, or monetary sentences; and set maximum and occasionally minimum prison terms. Sentence appeals were for all practical purposes unavailable. Since sentencing was supposed to be individualized and judges had broad discretion to do so, there were no standards for appellate judges to use in evaluating a challenged sentence. Parole boards decided who would be released and when and subject to what conditions. Prison systems operated extensive systems of time off for good behavior. Punishments were mostly moderate. In 1970, the incarceration rate for federal and state prisons had been fluctuating in a narrow band around 110 per 100,000 population since the 1920s. When jail inmates are added, the total rate was 150–60. Since 1961 the rate had been falling modestly but continuously (Blumstein and Cohen 1973).

Indeterminate sentencing was not controversial. The *Model Penal Code* (1962), under development by the American Law Institute for 13 years, endorsed it and contained numerous provisions meant to improve it. In 1972, the National Council on Crime and Delinquency's Advisory Council of Judges issued the second edition of its *Model Sentencing Act*; it too assumed the continuation of indeterminate sentencing. So did the National Commission on Reform of Federal Criminal Law (1971) in its *Proposed Federal Criminal Code*.

That is the tidy, familiar, and predictable world the time travelers would have left behind. It bears little resemblance to American sentencing systems in the second decade of the twenty-first century. In the intervening years, indeterminate sentencing imploded. All its premises and assumptions about rehabilitation, individualization, and broad discretion were challenged. Judge Marvin Frankel's *Criminal Sentences—Law without Order* (1973) referred to indeterminate sentencing as "lawless" because of the absence of standards for sentencing decisions and of opportunities for appeals. Criticisms piled up. Unwar-

ranted sentencing disparities were said to be common, and risks of racial bias and arbitrariness were said to be high (e.g., American Friends Service Committee 1971). Legal academics criticized the system's lack of procedural fairness, transparency, and predictability (e.g., Davis 1969; Dershowitz 1976). Researchers argued that the system did not and could not keep its rehabilitative promises (e.g., Kassebaum, Ward, and Wilner 1971; Martinson 1974). Others argued that parole release procedures were unfair and decisions inconsistent (e.g., Morris 1974; von Hirsch and Hanrahan 1979).

The criminal justice system in 2013 bears little resemblance to the one the time travelers would have left behind. Sentencing ceased being something best handled by experts behind closed doors but instead became a central issue in partisan politics (Edsall and Edsall 1991; Anderson 1995). The combined incarceration rate for federal, state, and local facilities quintupled to more than 750 per 100,000 in 2007 before beginning to fall (Carson and Sabol 2012; Minton 2012). One-third of the states had abandoned parole release, the signature characteristic of indeterminate sentencing, and all had abandoned it for some categories of prisoners. About one-third of the states, the District of Columbia, and the federal system operated some form of sentencing guidelines. All states and the federal government had enacted mandatory minimum sentence laws for drug and violent crimes or for "repeat" or "career" criminals, many requiring 5-, 10-, or 20-year or longer prison terms.

Complicating things further, a diverse set of new programs and policies in operation in 2013 aimed at individualizing sanctions to fit offenders' problems and needs. Most have emerged since the mid-1990s. They include drug and other problem-solving courts, reentry programs aimed at reducing reoffending, increased investment and confidence in treatment programs, and in many places programs incorporating ideas about restorative justice.

In retrospect, four distinct periods of sentencing policy are discernible. Indeterminate sentencing reigned from 1930 to 1975. From 1975 to the mid-1980s, the second period, a primarily liberal reform movement sought to make sentencing procedures fairer and outcomes more predictable and consistent. The totemic target was "racial and other unwarranted disparities," and the mechanisms for addressing them were guidelines for judges and parole boards (Blumstein et al. 1983).

During the third period, from the mid-1980s through 1996, sen-

tencing policy changes aimed primarily to make prison sentences longer and their imposition more certain. The principal mechanisms were mandatory minimum sentence, three-strikes, truth-in-sentencing, and life-without-possibility-of-parole laws (LWOPs). Three-strikes laws typically required minimum 25-year sentences for people convicted of a third felony. State truth-in-sentencing laws were enacted to obtain federal funds for prison construction under the Violent Crime Control and Law Enforcement Act of 1994, as amended in 1996; to qualify, states had to demonstrate that people sentenced to imprisonment for violent crimes would serve at least 85 percent of their nominal sentences.

Almost none of the initiatives characterizing the second and third periods would make sense to the time travelers. In 1970 it seemed obvious to most informed people that judges and parole boards needed broad discretion in order to individualize sentences. Lengthy prison terms were not in vogue: they violated a widely supported "least restrictive alternative" logic. Mandatory punishments were commonly seen as unwise and unjust. The US Congress, for example, in the Comprehensive Drug Abuse Prevention and Control Act of 1970 repealed most then-existing federal mandatory minimum sentence laws (US Sentencing Commission 1991). The *Model Penal Code* and the *Model Sentencing Act* disapproved of them.

Generalizing about the fourth, most recent, period is harder. It is not difficult to identify principal aims of the first three periods: rehabilitation for the first, greater fairness for the second, and greater severity for the third. The purposes of the initiatives of the fourth period cannot be encapsulated in any single term. Some aim at greater severity, some at greater fairness, some at reducing recidivism, some at reducing costs. New mandatory minimum sentence laws target firearms and immigration offenses, human trafficking, carjacking, and child pornography, but after 1996 few more of the severest laws that characterized the third period were enacted. Drug and other problem-solving courts, reentry programs, and diverse treatment programs sought in many states to tailor programs and dispositions to the circumstances of individual offenders. After 2000, many state legislatures, generally in search of cost savings, enacted laws limiting the scope of some harsh sentencing provisions, reducing the numbers of revocations of parole and probation, and authorizing earlier releases from prison for selected

offenders.[1] With few exceptions the statutory changes made minor adjustments and nibbled at the edges of correctional budgets and imprisonment rates (Austin et al. 2013).

In this essay, in an effort to explain what happened and why, I explore interactions among ideas, research findings, and policy making. Section I surveys changes in sentencing laws and practices since 1975 and what we know about their effects.

Section II discusses the influence of normative ideas on those changes. It is common to link the decline of indeterminate sentencing in the 1970s to a shift away from utilitarian (or, as now would be said, consequentialist) ways of thinking and toward retributive ones. Through the mid-1980s there was some basis for believing that such a shift occurred and that newly enacted sentencing laws and guidelines reflected it. After the mid-1980s it is difficult to identify initiatives that are reconcilable with retributivist values. There are many slightly different retributivist theories of punishment, but all have at their core the idea that criminal punishments, to be just, must in some meaningful way be proportionate to the seriousness of the offender's crime. Many recent initiatives—three-strikes and other mandatory minimum sentence laws, LWOPs, drug courts, restorative justice programs—are flatly incompatible with retributive theories of punishment. None of them, whether aiming for harsher, more humane, or more crime-preventive handling of offenders, attaches significant importance to achievement of proportionality or to treating like cases alike.

Section III discusses the influence of research findings on policy making. Credible research findings had no role in the first period; it was simply assumed that correctional programs can rehabilitate offenders. Research influenced sentencing policy significantly in the second period and little or not at all in the third. Parole guidelines and presumptive sentencing guidelines were shown to be effective at achieving their goals, but parole guidelines were quickly abandoned and presumptive sentencing guidelines were seldom adopted after the

[1] Summaries such as this have to be hedged because no organization maintains a comprehensive database on sentencing law changes. The National Conference of State Legislatures for many years compiled annual summaries (of uncertain comprehensiveness) and maintains a searchable database beginning with developments in 2010 (http://www.ncsl.org/issues-research/justice/state-sentencing-and-corrections-legislation.aspx), and organizations such as The Sentencing Project (e.g., Porter 2013), the Vera Institute of Justice (e.g., Austin 2010), and the Public Safety Performance Project of the Pew Charitable Trusts issue occasional selective summaries of major legislative changes. None of these, however, is comprehensive or cumulative.

first burst of activity. Conversely, mandatory minimum sentence and three-strikes laws were repeatedly shown not to achieve their goals, but almost all those enacted remain in effect in 2013.

Section IV offers explanations for the divorces between sentencing policy and either evidence or normative theory. Conceivably, the recent flattening out of the American prison population, many nibbles at the edges of harsh laws, and the emergence of less punitive restorative and rehabilitative programs signal a change of direction. On the possibility that it does, I conclude with a laundry list of policy changes that would move the United States back into the mainstream of developed countries' approaches to addressing the perplexing problems of crime and punishment.

I. Changes in American Sentencing Laws and Policies since 1975

The explanations for the first and second periods of recent American sentencing policies are straightforward. Indeterminate sentencing originated in the mid-nineteenth century and reflected Progressive Era ideas about causes of crime that are well understood and expressed views that were widely held through the 1970s (Rothman 1971). The explanations for the sentencing reform period—principally the conjoint influence of the due process and civil rights movements of the 1960s and 1970s and the decline in support for the rehabilitative ideal—are likewise well documented (Blumstein et al. 1983). The most recent period, as Winston Churchill once said of puddings, lacks a theme and inevitably lacks a simple general explanation. Its components include inertia, reactions to the excesses of the tough on crime period, renewed belief in human malleability, and the emergence of new paradigms of restorative and community justice.

What needs explanation is the tough on crime period. What happened is clear enough. Crime became a central issue in partisan politics. From the 1964 presidential campaign of Barry Goldwater, "crime in the streets" as it was first called and "law and order" later on was emphasized by Republican politicians as an indirect appeal to white voters threatened by the civil rights movement and as a "wedge" issue meant to separate white working class and southern voters from their earlier support of the Democratic Party (Edsall and Edsall 1991). Both crime policy and drug policy became highly moralized, black-and-

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white subjects of right and wrong (Windlesham 1998; Musto 1999). Evidence about the effectiveness of policies was unimportant. Sentencing laws and policies of increasing severity were adopted. Minority defendants were the group most affected, and both the prison population and racial disparities grew to record highs (Tonry 2011*b*). Though we know what happened, we know much less about why it happened, a subject to which I return in Section IV.

What we know about the effects of sentencing policy changes during all these periods can, broadly brushed, be summarized in comparatively few words. Parole guidelines and presumptive sentencing guidelines, when well designed and implemented, reduce unwarranted racial and other disparities, make decisions more consistent and predictable, and facilitate improved programmatic and budgetary planning. Statutory determinate sentencing systems in which laws specify typical sentences and voluntary systems of sentencing guidelines have few if any discernible effects on sentencing patterns. Mandatory minimum and three-strikes laws have little or no effect on crime rates, shift sentencing power from judges to prosecutors, often result in imposition of sentences that practitioners believe to be unjustly severe, and for those reasons foster widespread circumvention. Mandatory minimum, three-strikes, and truth-in-sentencing laws have greatly increased the lengths of prison terms and for that reason are a major cause of the fivefold increase in America's imprisonment rate between 1972 and 2007 (Blumstein and Beck 1999; Blumstein and Wallman 2006; Spelman 2009).

A. A Bird's-Eye View of 40 Years of Sentencing Policy

Table 1 provides an overview of the four periods along four dimensions. For each it shows representative institutions, the policy goals each implicitly or explicitly sought to achieve, the normative values or purposes each implicitly or explicitly expressed, and a summary of such evidence as exists concerning whether it achieved its goals or purposes.

Indeterminate Sentencing. From 1950 through 1975, the states and the federal government had broadly similar sentencing systems in which judges decided who went to prison and sometimes set minimum or maximum sentences, parole boards decided who was released and when, and offenders had few opportunities to challenge or appeal decisions. Normative ideas lined up nicely with practice. Philosophers and practitioners described the system as utilitarian and believed that

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TABLE 1
Periods of American Sentencing Reform

	Representative Institutions	Goals	Values	Evidence
Indeterminate sentencing (1930–75)	Broad judicial discretion Presentence investigations Parole release Large prison Good time	Rehabilitation (Incapacitation) Least restrictive alternative	REHABILITATION Compassion Restraint Reintegration Crime reduction Social welfare	Rehabilitation—little Prevention—little Social welfare—some Restraint—some
Sentencing reform (1975–84)	Parole: 1. Guidelines 2. Abolition Sentencing guideline: 1. Presumptive 2. Voluntary Determinate sentencing Sentence appeals	Equality Consistency Transparency Proportionality Accountability	JUSTICE AS FAIRNESS Fairness Equal treatment Proportionality Nondiscrimination	Disparity—yes Parole guidelines Presumptive sentencing guidelines Disparity—no Determinate sentencing Voluntary guidelines Mandatory minimums Crime Prevention—no Mandatory minimums
Tough on crime (1984–96)	Mandatory minimums Three strikes LWOPs Juvenile transfers "Sexual predator" laws	Crime prevention Political support Public confidence Severity Reduce political risk	EXPULSION/OUTLAWS Severity Populist democracy Denunciation Ostracism	Disparity—no Mandatory minimums Three strikes Capital punishment Crime prevention—no Mandatory minimums Three strikes Capital punishment LWOPs
Equilibrium (1996–2013)	All tough on crime policies Sentencing guidelines Risk prediction Treatment programs Reentry programs Drug courts Nibbling at the severity edges	Cost containment Reduce reoffending Reduce political risks Crime prevention	AMBIVALENCE Severity Bifurcation Reintegration Compassion	Tough on crime, as above Sentencing reform, as above Reduce recidivism—yes Treatment programs Reduce recidivism—mixed Drug courts Reentry programs

retributive ideas were cruel and anachronistic.[2] The principal aim was to individualize treatment of offenders in order to rehabilitate most and incapacitate the rest. Policies sometimes referred to as "the least restrictive alternative" or parsimony created presumptions that punishments should be as unrestrictive as possible and that prisoners should ordinarily be released when first they became eligible. Underlying implicit values included compassion, reintegration, rationality, and social welfare. The evidence showing that rehabilitation programs were effective or that punishment regimes prevented crime better than other possible programs or policies was weak to nonexistent. The imprisonment rate, including jail inmates, for many years through the early 1970s fluctuated within a narrow range around 150–60 per 100,000 population.[3]

Sentencing Reform. From 1975 through 1986, many jurisdictions in one way or another—parole guidelines, voluntary and presumptive sentencing guidelines, determinate sentencing statutes, appellate review of sentencing—attempted to make sentencing fairer, more consistent, and more transparent. As in the preceding period, the prevailing views of theorists and of practitioners lined up nicely. Utilitarian ideas and aims were not entirely excluded (e.g., Morris 1974), but the overall logic was retributive (e.g., Murphy 1973; von Hirsch 1976; Morris 1981). Crime prevention was seldom an explicit goal, or even an implicit one.[4]

[2] Herbert Wechsler, later the reporter for the *Model Penal Code*, and his Columbia Law School mentor Jerome Michael observed that retribution may represent "the unstudied belief of most men" but asserted that "no legal provision can be justified merely because it calls for the punishment of the morally guilty by penalties proportioned to their guilt, or criticized merely because it fails to do so" (Michael and Wechsler 1940, pp. 7, 11). Jerome Michael and University of Chicago philosophy professor Mortimer Adler earlier explained that there are two incompatible theories of punishment: the "punitive" (retributive) and the "non-punitive" (consequentialist) and that "it can be shown that the punitive theory is a fallacious analysis and that the non-punitive theory is correct. . . . The infliction of pain is never justified merely on the ground that it visits retributive punishment upon the offender. Punitive retribution is never justifiable in itself" (Michael and Adler 1933, pp. 341, 344).

[3] The text is imprecise because annual jail population data became available only in the 1980s. Jail populations typically average about half of combined federal and state prison populations. The 100–110 per 100,000 population rates for the latter in 1970–73 suggest a total incarceration rate of 150–60.

[4] Crime prevention was sometimes the goal of more narrowly focused sentencing law changes. During the 1970s and early 1980s, every state but Wisconsin enacted one or more mandatory minimum sentence laws. With the conspicuous exception of the Rockefeller Drug Laws in New York, which mandated lengthy prison sentences (Joint Committee on New York Drug Law Evaluation 1978), those laws were typically much less severe than the minimum sentence laws enacted in the 1980s and 1990s. Most

The focus was on the sentencing process and on individual sentences, but not on their effects. The underlying values were procedural fairness, proportionality, equal treatment, and rationality. Evaluations showed that some initiatives were successful and others were not. With the exception of a few studies of mandatory minimum sentence laws, evaluations did not attempt to measure crime prevention effects. The total incarceration rate rose rapidly, reaching 313 per 100,000 in 1986, principally because of increases in the number of cases being processed, the probability of imprisonment given a conviction, and the lengths of sentences imposed (Gilliard and Beck 1997; Blumstein and Beck 1999).

Tough on Crime. From 1984 through 1996, most jurisdictions enacted some or all of mandatory minimum sentence, truth-in-sentencing, "sexual predator," "career criminal," three-strikes, and LWOP laws (Sabol et al. 2002; Stemen, Rengifo, and Wilson 2006). These initiatives sought to make punishments more severe and express moral outrage. In contrast to the preceding two periods, prevailing normative ideas among philosophers and other theorists were not reconcilable with the logic of policy making (Tonry 2011*a*). Theorists remained mostly retributivist (e.g., Hampton 1984; von Hirsch 1985; Duff 1986; Robinson 1987; Moore 1993), but sentencing policies were hard to reconcile with ideas about proportionality in punishment. They also found little support in research findings. Research showed that severe punishments have little if any effect on crime rates (e.g., Nagin 1998; von Hirsch et al. 1999) and often resulted in circumvention by practitioners in some cases and in others in imposition of sentences everyone directly involved believed to be unjust (Tonry 2009*b*). The imprisonment rate continued to increase rapidly, reaching 615 per 100,000 in 1996, principally because of increases in sentence lengths and sharply increased arrest and imprisonment rates for drug offenders (Gilliard and Beck 1997; Blumstein and Beck 1999).

Equilibrium. A huge amount of state and federal sentencing legislation was enacted after 1996, but generalizations are difficult to offer. New mandatory minimum sentence laws were enacted for child pornography, carjacking, and human smuggling, but they typically lack the breadth and severity of the preceding generation of mandatories. Few

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mandated short jail terms for driving while intoxicated or 1- or 2-year prison terms for offenses involving firearms (Shane-DuBow, Brown, and Olsen 1985).

of the laws characteristic of the tough on crime period were enacted.[5] No major ones have been repealed, but a few have been revised in minor ways. New York's Rockefeller Drug Law was moderated, and California voters in 2012 narrowed the scope of the three-strikes law (New York State 2012; *New York Times* 2012). Many hundreds of laws were enacted that slightly narrowed the scope of severe existing laws, made limited categories of prisoners newly eligible for release, and reduced the frequency of parole and probation revocations (Austin et al. 2013). Drug and other problem-solving courts and prisoner reentry courts proliferated. Various recent initiatives, including drug courts, prisoner reentry programs, and new treatment programs, seek to reduce reoffending. No general theoretical logic is discernible in the crazy quilt of diverging policies; within the theory class, retributivism remains predominant (e.g., von Hirsch and Ashworth 2005; Robinson 2008, 2013). The imprisonment rate continued to increase rapidly for a few years and then slowly until it peaked at 762 per 100,000 in 2007 and fell slightly thereafter (Blumstein and Wallman 2006; Sabol and Couture 2008; Carson and Sabol 2012).

The remainder of this section mostly discusses the second and third periods, summarizing more fully the policies adopted, and what was learned about their effectiveness and effects.

B. The Sentencing Reform Period

By the mid-1970s every major element of indeterminate sentencing was contested and all of its underlying premises were challenged. Indeterminate sentencing was widely thought to be unjust (e.g., von Hirsch 1976) and to be predicated on a capacity to rehabilitate offenders that did not exist (e.g., Martinson 1974). Broad, unregulated discretions were said to permit idiosyncratic, arbitrary, and racist decisions (e.g., American Friends Service Committee 1971; Fogel 1979). Unwarranted sentencing disparities were seen as inherent in the system (Frankel 1973). Procedural informality was seen as fundamentally unfair (Davis 1969).

The solutions seemed obvious: constrain judicial discretion, establish rules for sentencing, abolish or systematize parole release, and allow offenders to file appeals (Morris 1974; Dershowitz 1976). The primary

[5] I know only of Alaska's adoption in 2006—the first in any state since 1996—of a three-strikes law (Chen 2008, table 1).

aims were to make sentencing and parole fairer, more consistent, and more just: reduction in unwarranted sentencing disparities was the mantra. Although law and order had begun to emerge as a partisan political issue, the major goals of the early sentencing reform movement were fairness and consistency. This can be seen in the work of the National Academy of Sciences Panel on Sentencing Research; the primary emphases of its report and the literature reviews it commissioned were on the determinants of sentencing, disparity, and discrimination and the effects on disparities and court operations of recent reform initiatives; effects on crime rates, recidivism, and prevention received little attention (Blumstein et al. 1983, chaps. 1, 4). The focus on procedural fairness and disparities can also be seen in the work of the earliest sentencing commissions. The Minnesota commission deliberated over two guidelines options—the Just Deserts and Modified Just Deserts Models—before selecting the latter. The Oregon guidelines enabling legislation unambiguously indicated that "punishment" was the purpose of sentencing (von Hirsch, Knapp, and Tonry 1987, chap. 4).

In the aftermath of the implosion of indeterminate sentencing and its primarily rehabilitative rationale, sentencing reform initiatives proliferated. The process was primarily technocratic—systematic, evidence-based, and cumulative. The earliest and most incremental initiatives sought to reduce disparities through development and use of parole guidelines and "voluntary" sentencing guidelines. These were followed by statutory determinate sentencing systems and presumptive sentencing guidelines.

1. *Parole Guidelines.* The early pilot projects for development of parole guidelines took place under the aegis of the US Parole Commission.[6] The logic of a team headed by Leslie Wilkinson and Don M. Gottfredson was that, with the use of "salient factors" that predict recidivism, parole release guidelines could be developed that would simultaneously reduce disparities in release dates and tie decisions to predictions of parolees' prospects of living law-abiding lives. They reasoned that a well-run administrative agency could supervise parole ex-

[6] Many states today use risk prediction instruments of various sorts in making release decisions. Sometimes they are referred to as "parole guidelines." Unlike the systems developed in the 1970s, however, they are not typically meant to serve as primary means to achieve greater procedural fairness and greater consistency in time served but to classify offenders on the basis of risks of recidivism (Burke and Tonry 2006).

aminers and operate a system of administrative appeals that would allow prisoners to contest their decisions. Evaluation of the pilot project showed that the system worked as intended and, compared with prior practice, produced more consistent decisions. The US Parole Commission formally adopted a guideline system. Parole boards in Minnesota, Oregon, and Washington did likewise. All sought to increase procedural fairness, reduce unwarranted disparities in time served, and make the release system more transparent and predictable (Gottfredson, Wilkins, and Hoffman 1978). A federally funded evaluation concluded that the federal and Minnesota systems operated as intended and improved consistency in release dates and time served; the Oregon and Washington systems were less effective (Arthur D. Little and Goldfarb and Singer 1981; Blumstein et al. 1983).

Parole guidelines have two important potential advantages as a sentencing policy mechanism and one major disadvantage. One advantage is that case-by-case decision making within a well-run administrative agency can be expeditious and economical—faster, less costly, and more easily appealable than are decisions by judges. There is nothing inherently complicated about establishing an effective system of management controls. A second advantage is that, as commonly happened during the indeterminate sentencing era, parole boards can expeditiously address prison overcrowding problems by adjusting release dates (e.g., Messinger et al. 1985). The disadvantage is that parole boards have authority only over offenders sentenced to imprisonment. Parole guidelines can reduce disparities among people sentenced to imprisonment, but not between them and people sentenced to local jails or community punishments.

The logical next step was to create comparable but more comprehensive guidelines for judges. That was attempted in all four of the pioneering jurisdictions. Parole guidelines in each were succeeded by presumptive sentencing guidelines systems. I discuss them below, but in the interest of chronology, I take a detour first to discuss an earlier generation of "voluntary" sentencing guidelines and a separate reform approach generally referred to as "statutory determinate sentencing."

2. *Voluntary Sentencing Guidelines.* The team of researchers who created the federal parole guidelines persuaded judges in Colorado and Vermont to collaborate with them in developing guidelines for sentencing. They hypothesized that judges are less likely than parole examiners to accept guidelines whose existence might give rise to appeals.

As a consequence, the guidelines were to be "voluntary" and thereby to pose no threat to judges' discretionary authority. Moreover, they would be based on research on past sentencing practices in the jurisdiction and would do no more than indicate ranges of sentences that encompassed 80 percent of those previously imposed on people convicted of particular offenses and having similar records of prior convictions. The modest goal was to highlight past outliers and lessen their future frequency. The developers reasoned that judges would want to comply with local sentencing patterns once guidelines made them evident and that over time compliance with the guidelines would become part of the local judicial culture and make outliers less common and sentencing disparities less pronounced (Gottfredson, Wilkins, and Hoffman 1978).

The underlying assumptions proved to be wrong. Judges were not much interested in knowing about past sentencing patterns nor in taking them into account in making their own decisions.[7] An evaluation of the first federally funded pilot projects in Vermont and Colorado concluded that the guidelines had no effect on sentencing disparities or consistency (Rich et al. 1982). One possible reason was that the participating judges felt little sense of local ownership or commitment because the initiative for the guidelines had come from the research team. However, a subsequent evaluation of statewide voluntary guidelines in Florida and Maryland developed at the initiative of the state judiciaries reached the same conclusions (Carrow et al. 1985).

Those evaluations were not finished or published until the 1980s. In the meantime, voluntary guidelines had been established at state or local levels in every state (Blumstein et al. 1983; Tonry 1996, chap. 3). Nearly all of those early voluntary guidelines systems were abandoned or fell into desuetude.

Even so, a number of states established voluntary guidelines systems in the 1980s and 1990s, despite a continuing absence of evidence from credible evaluations or other research showing that they reduce the

[7] A parallel initiative in the Canadian provinces of British Columbia, Manitoba, Newfoundland, and Saskatchewan, creating "sentencing information systems" that informed judges of patterns of sentences previously imposed for particular offenses in their courts, was no more successful (Doob and Park 1987; Doob 1989, 1990). It was terminated after several years of pilot projects. The problem was that a key premise—that judges would want to know what sentences other judges had imposed in similar cases—proved to be faulty. In the project's final report, the director, Anthony N. Doob, observed, "Judges do not, as a rule, care to know what sentences other judges are handing down in comparable cases" (1989, p. 6).

extent of unwarranted sentencing disparities. Prison population increases in two especially well-known voluntary guidelines systems, in Delaware and Virginia, have been less than elsewhere, and their proponents claim and believe that they have managed to improve consistency and reduce disparity. If that is true, Gottfredson, Wilkins, and Hoffman (1978) in the long term may have been correct in their hope that compliance with guidelines would eventually become part of the local judicial culture and part of what judges believe is a component of doing their work responsibly.

Voluntary guidelines have attracted renewed interest in recent years because of two US Supreme Court decisions (*U.S. v. Booker*, 543 U.S. 220 [2005], and *Blakely v. Washington*, 542 U.S. 296 [2004]), which created new procedural requirements for presumptive sentencing guidelines systems. Presumptive guidelines, discussed below, have been shown to be capable of reducing disparities and achieving other sought-after goals. Ohio in 2006 nonetheless converted its presumptive guidelines system into a voluntary one.

3. *Statutory Determinate Sentencing.* Some states followed another path, although to a dead end. The most influential reform proposals called for abolition of parole release and creation of enforceable standards to guide judges' decisions in individual cases (e.g., Morris 1974; von Hirsch 1976). Policy makers in some states responded by building standards into their criminal codes. Maine in 1975 went part way, abolishing parole release and thereby becoming the first modern "determinate" sentencing state in the sense that the length of time to be served under a prison sentence could be known, "determined," when it was imposed. Maine, however, did not establish standards for sentencing. California did. It enacted the Uniform Determinate Sentencing Act of 1976, abolishing parole release and specifying normal, aggravated, and mitigated sentences for most offenses in statutes. Other states—including Arizona, Indiana, Illinois, and North Carolina—quickly followed California's lead, though in somewhat different ways. Evaluations concluded, however, that such laws had little if any effect on sentencing disparities.[8] No additional states since the mid-1980s have created statutory determinate sentencing systems.

4. *Presumptive Sentencing Guidelines.* Acting on Judge Marvin

[8] The evaluations are discussed in detail and citations to them are provided in Cohen and Tonry (1983) and Tonry (1987).

Frankel's proposal in *Criminal Sentences—Law without Order* (1973), Minnesota in 1978 enacted legislation to create a specialized administrative agency, a "sentencing commission," with authority to promulgate "presumptive" sentencing guidelines. They were to be presumptive in the sense that judges had to provide reasons for imposing sentences that were not encompassed in the guidelines; the adequacy of those reasons could be reviewed by appellate courts. Judge Frankel argued that permanent administrative agencies would be much better situated than legislatures—afflicted by high turnover, short attention spans, and tendencies to react impulsively to short-term emotions and political concerns—to develop rational, evidence-based policies. An independent sentencing commission, he hoped, would be somewhat insulated from political pressures. Because of its permanence, a commission over time would develop specialized expertise and an institutional memory and could revise and amend the guidelines to respond to changing priorities and conditions.[9]

Minnesota's guidelines took effect in 1980. The Minnesota commission made a number of unprecedented decisions. It sought—the first time a jurisdiction did this explicitly—to base its guidelines on an agreed normative framework, which it called "Modified Just Deserts." It developed comprehensive guidelines for all felony offenses, classifying them into groups on the basis of assessments of each offense category's seriousness, and not on the basis of statutory maximum sentences, which were highly inconsistent. It construed ambiguous language in its enabling legislation to require that a "capacity constraint" guide its decisions and accordingly that the projected application of its guidelines not produce a prison population exceeding 95 percent of the rated capacity of Minnesota's existing or planned prisons. This meant that the commission forced itself to make trade-offs. If commissioners wanted to increase sentence lengths for particular offenses, they would have to be reduced for others. In order to monitor compliance with the guidelines, the commission required that judges, or clerks working for them, prepare a report on each sentence imposed; commission chair Douglas Amdahl, later Minnesota Supreme Court Chief Justice, personally telephoned laggards to obtain the reports. This meant that for the first time, a state had comprehensive data on statewide sentencing

[9] Frase (2013) provides a comprehensive summary of state presumptive guidelines systems.

patterns. The statute authorized defense and prosecution appeals of sentences; judges who imposed a sentence inconsistent with the guidelines were required to offer "substantial and compelling" reasons for doing so (Knapp 1984; Parent 1988).

The guidelines worked. Judges complied with the guidelines in most cases and gave reasons when they did not. Racial and other unwarranted disparities were reduced. The commission from time to time revised the guidelines to change presumptive sentences for particular offenses and altered sentences for other offenses to comply with the capacity constraint. Minnesota prisons operated within their capacities, during a period when prison populations were rising rapidly in most states and prisons in most states were overcrowded. The prison population increased during the 1980s, but in line with increased capacity resulting from construction of new prisons. The appellate courts created a sentencing appeal jurisprudence (Parent 1988; Reitz 1997; Frase 2005).

Pennsylvania, Oregon, and Washington created similar systems in the 1980s, and Florida, Kansas, North Carolina, and Ohio in the 1990s. Their experiences differed, but Washington (Boerner and Lieb 2001), Oregon (Bogan and Factor 1997), and North Carolina (Wright 2002) had successes comparable to Minnesota's.

Evaluations showed that well-designed and well-implemented presumptive guidelines systems can make sentencing more predictable, reduce racial and other unwarranted disparities, facilitate systems planning, and control correctional spending. "Population constraint" policies in Minnesota, Washington, and North Carolina worked. During the periods when they were in effect, prison systems in all three states operated within capacity and limited prison population growth well below national and regional averages (Tonry 1996).

North Carolina has been the most successful at controlling prison population growth. In 1970, North Carolina had the highest incarceration rate in the country but had fallen to thirty-first by 1999 (Wright 2002). It ranked thirtieth or thirty-first for the following 10 years and was thirty-third in 2011 (Carson and Sabol 2012). From 1994, when the guidelines took effect, through 2011, the North Carolina imprisonment rate was essentially flat, fluctuating between 340 and 370 per 100,000 population and well below the rising national rate.

A handful of studies have concluded that presumptive guidelines, especially with population constraints, help control prison population

size (Marvell 1995; Nicholson-Crotty 2004; Stemen, Rengifo, and Wilson 2006). Marvell (1995) examined prison population growth from 1976 to 1993 in nine guidelines states, compared with the national average, and concluded that guidelines based on population constraints produced lower rates of increase. Nicholson-Crotty (2004), using 1975–98 prison data in a 50-state analysis, concluded that guidelines incorporating capacity constraints tend to moderate imprisonment growth and that those not based on constraints exacerbate it. Stemen, Rengifo, and Wilson (2006) analyzed state sentencing patterns in the period 1975–2002 and concluded that states that adopted presumptive guidelines and abolished parole release had lower incarceration rates and lower rates of prison population growth than other states.

Notwithstanding those positive findings, things quickly changed. The successes of presumptive sentencing guidelines proved much less important to policy makers after the early 1990s than in earlier years. Presumptive sentencing guidelines fell from favor. The three most recent presumptive systems, in Kansas, North Carolina, and Ohio, were established in 1993–96. A few voluntary or advisory systems have been developed since then. In Oregon, the committee that drafted and monitored the guidelines was closed down (Bogan and Factor 1997). Sentencing commissions in Florida, Louisiana, Tennessee, and Wisconsin were abolished and Washington's lost its staff and budget in 2011 (Frase 2013). The Pennsylvania Commission on Sentencing survived, but Pennsylvania Supreme Court decisions effectively converted the nominally presumptive guidelines into voluntary ones (Reitz 1997; Kramer and Ulmer 2008).

Policy making ceased to be greatly concerned with evidence, fairness, and consistency. In Minnesota, the legislature in 1989 instructed the commission to give much less weight to its population constraint policy (Frase 2005). In Oregon, a broad-based mandatory minimum sentence law was enacted in 1994 that trumped the guidelines (Merritt, Fain, and Turner 2006). The Washington commission gave up the policy on its own (Boerner and Lieb 2001). The Ohio guidelines were converted from presumptive to voluntary in 2006 (Frase 2013). The North Carolina and Minnesota commissions continue, however, to develop correctional impact projections of proposed new sentencing laws; the projections are commonly believed to have slowed the enactment of laws that would have required additional prison space (Frase 2013).

The presumptive guidelines systems in the 1980s were developed in

a period before American crime control policy became highly politicized and when the primary policy goal was to reduce disparities and unfairness. They focused primarily on developing systems for achieving greater fairness and consistency and on the use of population projection methods for financial and facilities planning. Population constraint policies made obvious sense to the early guidelines commissions and to the legislatures that established them. Concern for managing prison population growth and corrections budgets, not reduction of sentencing disparities, was the primary policy goal underlying creation of the North Carolina, Kansas, and Ohio commissions in the 1990s.

The promulgation of federal sentencing guidelines, which took effect in 1987, signaled the beginning of the end of the sentencing reform period that targeted disparities and the beginning of the tough on crime period that sought increased certainty and severity. The Sentencing Reform Act of 1984 created the US Commission on Sentencing and directed it to develop guidelines to reduce disparities, to provide for use of nonincarcerative punishments for most first offenders, and to develop population constraint–based guidelines that would not result in larger numbers of prisoners than federal prisons could accommodate. The commission ignored the directives concerning first offenders and the prison population constraint and instead promulgated "mandatory" guidelines that greatly increased the percentage of offenders receiving prison sentences and greatly increased sentence lengths for many offenses (Tonry 1996, chap. 2; Stith and Cabranes 1998). The federal guidelines were converted from presumptive to voluntary by *U.S. v. Booker* (543 U.S. 220 [2005]), a US Supreme Court decision that declared some of their features unconstitutional.

The sentencing reform period basically ended by the mid-1980s. Nominally, the tough on crime initiatives aimed at crime prevention through deterrence and incapacitation. Partisan political considerations were at least equally important (Windlesham 1998; Gest 2001).

C. Tough on Crime

Between the passage of the federal Sentencing Reform Act of 1984 and the October 1, 1987, implementation of federal sentencing guidelines, the US Congress enacted the Anti–Drug Abuse Act of 1986. It created a new set of mandatory minimum sentences for drug and violent crimes, including the federal 100-to-1 law that mandated sentence lengths for crack offenses that were the same as for powder co-

caine offenses involving quantities 100 times larger (e.g., 5 grams of crack compared with 500 grams of powder). Two years later, the Congress enacted a more comprehensive and severe set of mandatory minimums in the Omnibus Anti–Drug Abuse Act of 1988. In 1994, the Congress enacted the Violent Crime Control and Law Enforcement Act of 1994, which promised federal funding for state prison construction to states that enacted "truth-in-sentencing laws" requiring selected prisoners to serve 85 percent of their nominal prison sentences. It also enacted additional mandatory minimum laws, including the federal three-strikes law. The federal laws paralleled, presaged, and encouraged passage of mandatory minimum laws in all 50 states and three-strikes and truth-in-sentencing laws in (slightly different) majorities of the states.

Sentencing policy changes developed during the sentencing reform period primarily sought to make sentencing processes fairer and more transparent and to make sentences more predictable and consistent. In those ways they were centered on the offender and whether he or she was sentenced fairly, justly, and appropriately. Most policy initiatives during the tough on crime period sought to make sentences harsher and more certain and, implicitly or explicitly, to prevent crime through deterrence and incapacitation. The primary focus shifted from fairness to offenders to harshness, crime prevention, and symbolic denunciation of crime and criminals.

The policy initiatives of the tough on crime period undermined pursuit of the aims of the preceding period. Two centuries of experience have shown that mandatory punishments foster circumvention by prosecutors, juries, and judges and thereby produce extreme inconsistencies between cases (Dawson 1969; Hay 1975; Tonry 2009*b*). They also transfer dispositive discretion about the handling of cases from judges, who are expected to be nonpartisan and dispassionate, to prosecutors, who are comparatively more vulnerable to influence by political considerations and public emotion (Tonry 2012). This transfer did not trouble legislators, David Boerner (1995), a former Seattle (King County) deputy district attorney explained, because they trusted prosecutors to be tough on crime and insist on severe sentences but were much less trustful of judges.

Federal legislation highlights the problems of foreseeable injustice associated with mandatory minimum sentencing laws. The 1984 Sentencing Reform Act contemplated that guidelines aimed at reducing

disparities would be developed and implemented. One principal element of guidelines development is to agree on rankings of crimes by seriousness and of punishments by severity so that a rational, proportionate sentencing system can be developed that will punish serious crimes more harshly than less serious ones. The Anti–Drug Abuse Act of 1986, however, mandated minimum sentences for many drug crimes that trumped the guidelines and made the development of a comprehensive set of proportionate sentencing standards impossible (Stith and Cabranes 1998).

In this subsection I discuss sentencing policy initiatives during the tough on crime period. It is difficult to provide a comprehensive summary of the numbers of states that adopted particular kinds of laws. Because state laws vary substantially, the writers of summary reports define initiatives in different ways. For example, a Vera Institute of Justice analysis of the effects of sentencing law changes since 1975 defined as three-strikes laws all described by that term that were enacted in the 1990s but also included states that enacted "habitual offender" laws from the 1920s onward (Stemen, Rengifo, and Wilson 2006). In most states, such laws long ago largely fell into disuse and in any case were usually applied to chronic property offenders, not to the violent and drug offenders targeted by modern three-strikes laws. Likewise, an Urban Institute analysis of the effects of truth-in-sentencing laws cites 42 states with some form of such laws as the evaluators defined them, although many were not characterized that way when enacted, and only 28 (plus the District of Columbia) satisfied criteria for federal prison construction funding (Sabol et al. 2002).

1. *Truth-in-Sentencing Laws.* The term, a 1980s neologism, is a play on words alluding to the development in the 1970s of federal "truth-in-lending" laws that required consumer lenders and merchants to disclose interest rates and other key financing terms in order to eliminate deceptive lending practices. The implication is that there is something untruthful about discretionary parole release. Under the indeterminate sentencing systems that blanketed the United States for more than four decades before 1975, however, there was nothing unwarranted or untruthful about parole release. The system was meant to allow for individualized sentences tailored to the rehabilitative prospects and other circumstances of individual offenders; maximum prison sentences were not meant to indicate how long an individual would remain in prison but to set an absolute final date by which he or she must be released

(e.g., in the American Law Institute's *Model Penal Code* [1962] and the *Model Sentencing Act* [1972] of the Advisory Council of Judges of the National Council on Crime and Delinquency).

Conservative policy advocates in the tough on crime period, however, defined the differences between the sentences judges announced and the times prisoners served as a problem that needed fixing. A Department of Justice report called *The Case for More Incarceration* (1992), promoted by US Attorney General William Barr, for example, argued that "prison works," urged that the number of people in prison be increased, proposed a major national program of prison construction, and called for the abolition of parole release.[10] Barr's proposals were embodied in proposed legislation that became the Violent Crime Control and Law Enforcement Act of 1994, as amended in 1996. The law unambiguously sought to increase the number of people in prison and the times they spent there. To obtain federal funds for prison construction, a state had to demonstrate that it "(A) has increased the percentage of convicted violent offenders sentenced to prison; (B) has increased the average prison time which will be served in prison by convicted violent offenders sentenced to prison; (C) has increased the percentage of sentence which will be served in prison by violent offenders sentenced to prison." To qualify for funding, states were required to demonstrate that violent offenders would be required to serve at least 85 percent of the sentence imposed.

Evaluators at the Urban Institute sought to determine how truth-in-sentencing laws affected sentencing patterns and prison populations. They used Bureau of Justice Statistics prison data for 1991, 1993, and 1996 (1998 for Ohio). They were unable "to draw general conclusions about the effects of truth-in-sentencing on sentencing practices throughout the nation" (Sabol et al. 2002, p. vi). However, they did find that truth-in-sentencing laws had large projected effects in some of the seven states they examined closely. When implemented as part of a comprehensive change to the sentencing system, "truth-in-sentencing laws were associated with large changes in prison populations" (p. vii). Patterns varied in states where truth-in-sentencing was

[10] Parole abolition was also a goal of policy advocates in the first sentencing reform phase but for different reasons: because parole release disparities were unfair to prisoners and frustrated goals of consistency and proportionality (Morris 1974; von Hirsch and Hanrahan 1979). Sixteen states abolished parole for those reasons in the 1970s through the 1990s. Barr's reasons were different: he wanted to make sentences harsher and more effective at incapacitating offenders.

TABLE 2

Estimated Percentage of Sentence Served Prior to Enactment of Truth-in-Sentencing and Expected to Be Served in Future

State	Percentage of Sentence Served by Offenders Released from Prison during 1993	Estimated Percentage for Offenders Entering Prison during 1991	Expected Percentage under Truth-in-Sentencing
Georgia	42	51	100
Washington	76	76	85
Illinois	44	43	85
Ohio	26	83*	97
New Jersey	39	37	85
Pennsylvania	46	108*	100*
Utah	36	32	Indeterminate

SOURCE.—Ditton and Wilson (1999); Sabol et al. (2002, table 3.3).

* Minimum sentences (all others refer to maximum sentences).

not embedded in a comprehensive sentencing system overhaul, but in one such instance, "the increase in the percentage of sentences required to be served before release led to larger increases in length of stay and consequently a larger effect of length of stay on the expected number of prisoners" (p. vii). Truth-in-sentencing and lengthy mandatory minimum sentence laws have a sleeper effect that has contributed heavily to increases in prison populations: prisoners subject to them accumulate year by year, and many years pass before the first of them are eligible for release.

Table 2 shows that the percentages of sentences projected to be served in the seven states under truth-in-sentencing were much higher than for those released in 1991 and 1993. In most states they at least doubled. The Urban Institute evaluators observed that the effects of truth-in-sentencing on prison population were much less than they would have been had violent crime rates not begun a substantial decline after 1991. They elaborated: "Were the sentencing practices of 1996 to persist during a time when the number of violent offenses increases, the impacts on prison populations and corrections management could be dramatic" (Sabol et al. 2002, p. 31).

The Urban Institute's was the most comprehensive assessment of the effects of truth-in-sentencing laws. A Vera Institute of Justice study in a 50-state analysis looked at the effects on prison populations of a wider range of sentencing policy changes during the period 1975–2002

(Stemen, Rengifo, and Wilson 2006). Truth-in-sentencing laws were included among a larger set of changes that increased time-served requirements for violent crimes; they concluded that "states with separate time served requirements for violent offenders had higher incarceration rates than other states" (p. iii).

The RAND Corporation also carried out a federally funded evaluation of the effects of the federal truth-in-sentencing initiative (Turner et al. 2001). It covered data only through 1997, however. Even so, it concluded, "We do know that nationwide, the imposed maximum sentence length, the average length of prison term, and the percent of term served for violent offenses have increased for TIS states between 1993 and 1997. For non-TIS states, sentence lengths have been dropping, and months served have dropped slightly" (p. 134).

The Urban Institute, Vera, and RAND studies inevitably underestimate the effects of truth-in-sentencing laws on prison population growth because their data cover periods ending, respectively, in 1996 (1998 for Ohio), 2002, and 1997. Because of the sleeper effect mentioned above, the ultimate effects of enactment of truth-in-sentencing legislation are not yet apparent. This is also true of all laws enacted during the tough on crime period that mandated sentences of historically unprecedented lengths. Under California's and other states' three-strikes laws mandating 25-year minimum sentences, mostly enacted in the period 1993–96, not a single prisoner's 25-year term had expired by 2013. Under an 85 percent rule, a prisoner serving a 25-year sentence is not eligible for release before serving at least 21 years and 3 months. Each year's entry cohort so far has been a net addition to the state's prison populations. Only after the passage of several more years will prisoners newly admitted begin to be offset by the release of prisoners admitted two or more decades earlier.

The Urban Institute study defined any state that had eliminated the possibility of parole release for some or all prisoners as a "truth-in-sentencing state." Marvell and Moody (1996) examined prison population effects of parole abolition and, using 1971–93 state prison data, found that only one of 10 abolition states experienced a higher rate of increase than the 50-state average. The lowest rates of growth were in Minnesota and Washington. The states included in that study, however, abolished parole release as part of the sentencing reform period, and none during that period had enacted a modern truth-in-sentencing law with a requirement that at least 85 percent of the sentence be

served. The early parole abolition initiatives aimed at greater transparency and in some cases at reductions in unwarranted sentencing disparities. Several abolition states had adopted presumptive sentencing guidelines that incorporated prison capacity constraints in their policy development processes. Findings that the early abolitions of parole release operated to restrain prison population growth are thus not inconsistent with the Urban Institute, Vera, and RAND findings that truth-in-sentencing laws operated to increase it. Unlike the truth-in-sentencing initiatives, the earlier abolitions of parole were not typically intended to increase durations of prison sentences.

2. *Mandatory Minimum Sentence and Three-Strikes Laws.* Between 1975 and 1996, mandatory minimums were America's most frequently enacted sentencing law changes. By 1983, 49 of the 50 states had adopted mandatory sentencing laws for offenses other than murder or drunk driving (Shane-DuBow, Brown, and Olsen 1985, table 30). By 1994, every state had adopted mandatory penalties; most had several (Austin et al. 1994). Most mandatory penalties apply to drug offenses, murder or aggravated rape, felonies involving firearms, or felonies committed by people who have previous felony convictions. Between 1985 and mid-1991, the US Congress enacted at least 20 new mandatory penalty provisions; by 1991, more than 60 federal statutes subjected more than 100 crimes to mandatory penalties (US Sentencing Commission 1991, pp. 8–10). More followed.

Three-strikes and mandatory minimum sentence laws are variations on the same theme: conviction of an offense triggers a statutory mandate that the judge impose a prison sentence of a specified minimum length. Knowledge about mandatory minimum sentences has changed remarkably little in the past 30 years. Their ostensible primary rationale is deterrence. Although it would not be unreasonable for someone new to the subject to assume that the threat of a mandatory prison sentence deters would-be offenders—after all, nearly everyone is careful to avoid overstaying a parking meter when there is a tow truck or a traffic officer nearby, and slows down when seeing a police car—the overwhelming weight of the evidence is that they have few if any deterrent effects. Those surveys that conclude that deterrent effects can sometimes be demonstrated also note that existing knowledge is too fragmentary or the estimated effect so small as to have no relevance to policy making. The evidence is equally overwhelming that practitioners often evade or circumvent mandatory penalties, that they create stark

disparities between cases in which they are circumvented and cases in which they are not, and that they often result in imposition of sentences in individual cases that everyone directly involved believes are unjust. Here I discuss evidence on implementation of mandatory penalty laws. The evidence concerning their deterrent effects is discussed in Section III.

The evidence concerning case processing comes primarily from six major studies. One is an evaluation of the Rockefeller Drug Laws, which required lengthy mandatory minimum sentences for a wide range of drug offenses (Joint Committee on New York Drug Law Evaluation 1978). One concerns a Michigan law requiring imposition of a 2-year mandatory prison sentence on persons convicted of possession of a gun during commission of a felony (Loftin and McDowall 1981; Loftin, Heumann, and McDowall 1983). Two concern a Massachusetts law requiring a 1-year prison sentence for persons convicted of carrying a firearm unlawfully (Beha 1977; Rossman et al. 1979). One concerns a 1994 Oregon law that established lengthy minimum sentences for 16 offenses (Merritt, Fain, and Turner 2006). The last is an evaluation of the effects of a truth-in-sentencing law in New Jersey (McCoy and McManimon 2004). All six studies found that prosecutors and judges (and sometimes police) in many cases in various ways changed their practices to avoid imposition of the mandatory penalties, that the harsher punishments were imposed in the remaining cases, and that overall there were no effects on conviction rates.

The Massachusetts, Michigan, and New York laws are especially good illustrations of the operation of mandatory sentencing laws. Vigorous and highly publicized efforts were made to make them effective. The New York law attracted massive media attention of which prospective drug dealers could not have been unaware. Amid enormous publicity, the legislature authorized and funded 31 new courts to handle drug cases and expressly forbade some kinds of plea bargaining to assure that the mandatory sentences were imposed. The Massachusetts statute expressly forbade "diversion in the form of continuance without a finding or filing of cases," both devices used in the Boston Municipal Court for disposition of cases other than on their merits.[11] In Michigan, the Wayne County prosecutor established and enforced a ban on

[11] Filing is a practice in which cases are left open with no expectation that they will ever be closed; continuance without finding leaves the case open in anticipation of eventual dismissal if the defendant avoids further trouble.

plea bargaining. He also launched a major publicity campaign, promising on billboards and bumper stickers that "One with a Gun Gets You Two."

a. Rockefeller Drug Laws. Practitioners made vigorous efforts to avoid application of the mandatory sentences and often succeeded; the remaining cases were dealt with as the law dictated (Blumstein et al. 1983, pp. 188–89). Drug felony arrests, indictment rates, and conviction rates all declined after the law took effect. For those who were convicted, the likelihood of being imprisoned and the average length of prison term increased. The likelihood that a person arrested for a drug felony was imprisoned was the same after the law took effect—11 percent—as before (Joint Committee on New York Drug Law Evaluation 1978).

b. Massachusetts's Bartley-Fox Amendment. Massachusetts's Bartley-Fox Amendment required imposition of a 1-year mandatory minimum prison sentence, without suspension, furlough, or parole, for anyone convicted of unlawful carrying of an unlicensed firearm. An offender need not have committed any other crime. Two major evaluations were conducted.

The primary findings: Police altered their behavior, becoming more selective about whom to frisk, decreasing the number of drug offense arrests, and seizing many more weapons without making an arrest. Both charge dismissals and acquittals increased significantly. The percentage of defendants who entirely avoided a conviction rose from 53.5 percent to 80 percent. Of those finally convicted, the probability of receiving an incarcerative sentence increased from 23 percent to 100 percent (Beha 1977; Rossman et al. 1979; Carlson 1982).

c. The Michigan Felony Firearms Statute. This statute created a new offense of possessing a firearm while engaging in a felony and specified a 2-year mandatory prison sentence that could not be suspended or shortened by release on parole and had to be served consecutively to a sentence imposed for the underlying felony. The law took effect on January 1, 1977. The Wayne County prosecutor banned charge bargaining in firearms cases and took measures to enforce the ban.

The findings paralleled those in the earlier studies. There were sizable increases in dismissals. Conviction probabilities declined. The probability of imprisonment did not increase, but lengths of sentences increased for those sent to prison. Overall, the percentage of defendants incarcerated among those potentially covered by the law did not

change markedly (Heumann and Loftin 1979; Loftin, Heumann, and McDowall 1983).

Trial rates remained roughly comparable except for the least serious category of offenses, felonious assaults, for which the percentage of cases resolved at trial increased from 16 percent to 41 percent of cases (Heumann and Loftin 1979, table 4). This was attributed to an innovative adaptive response, the "waiver trial." The judge would convict the defendant of a misdemeanor rather than the charged felony (the firearms law applied only to felonies) or, with the prosecutor's acquiescence, acquit the defendant on the firearms charge. Another circumvention technique was to decrease the sentence that otherwise would have been imposed by 2 years and then add the 2 years back in compliance with the firearms law (Heumann and Loftin 1979, pp. 416–24).

d. Oregon's Measure 11. The measure, adopted by referendum in 1994, required imposition of mandatory minimum prison sentences from 70 to 300 months on anyone convicted of any of 16 designated crimes. The law's coverage was later extended to include five additional crimes.

On the basis of the earlier research findings, RAND Corporation evaluators supposed that judges and lawyers would alter previous ways of doing business, especially in filing charges and negotiating plea bargains, in order to achieve results that seemed to them sensible and just (Merritt, Fain, and Turner 2006). They expected that relatively fewer people than before would be convicted of Measure 11 offenses and more of non–Measure 11 offenses and that those convicted of Measure 11 offenses would receive harsher sentences. The research confirmed the hypotheses and showed that the changed sentencing patterns resulted primarily from changes in charging (fewer Measure 11 crimes, more lesser crimes) and plea bargaining (fewer pleas to initially charged offenses, more to lesser included offenses).

e. New Jersey Truth-in-Sentencing. McCoy and McManimon (2004) examined sentencing patterns and case processing in New Jersey following enactment of a truth-in-sentencing law requiring people convicted of designated offenses to serve 85 percent of the announced sentence. This was not a mandatory minimum sentence law, but similar hypotheses apply: that charging and bargaining patterns would change to shelter some defendants from the new law and that sentences would be harsher for those not sheltered. Both hypotheses were confirmed.

Truth-in-sentencing and mandatory minimum sentence (including

three-strikes) laws contributed substantially to prison population growth. These laws are difficult to reconcile with any mainstream, or even coherent, theory of punishment, as Section II shows. Many require sentences that are highly disproportionate to sentences received by prisoners convicted of other offenses and, as Section III shows, are impossible to justify on the basis of their crime-preventive effects.

II. Normative Analyses

Changing ideas about justice were an important part of the changes associated with the decline in support for indeterminate sentencing in the 1970s and with the initiatives adopted during the sentencing reform period. In legal, philosophical, and policy worlds, utilitarian ideas were predominant in the English-speaking countries from the middle of the nineteenth century through the 1960s. For a time, in the 1970s and early 1980s, it appeared that retributivism might replace the utilitarian framework that long shaped policies and practices and the thinking of philosophers and other theorists. That did not happen.

The major tough on crime initiatives of the 1980s and 1990s neither implicitly nor explicitly take into account the interests of affected offenders. None of them is predicated on the retributive premise that responses to crime—if they are to be just—must take account of concerns about horizontal (treat like cases alike) and vertical (treat different cases differently) equity in the distribution of punishment. Nor do they honor the two utilitarian "parsimony" principles that punishments should not be more painful or intrusive than is necessary to achieve their preventive aims and that punishments are not justifiable if their aims can be achieved as well or better through other nonpunitive means (Frase 2009).[12] Nor do they honor the utilitarian "least restrictive alternative" idea that the draftsmen of the *Model Penal Code* (1962) and the *Model Sentencing Act* (1972) regarded as fundamental.

The harshest contemporary laws prescribe prison sentences measured in decades and lifetimes. Drug laws often mandate sentences for

[12] The two utilitarian principles are predicated on the belief that causing suffering, including to offenders in the name of punishment, is an evil to be avoided. The ends-benefits test requires that the pain to victims to be avoided by punishment be greater than the pain the offender would suffer. The alternative means test requires that there be no less costly way to achieve the sought-after goal. No punishment may properly be imposed if some approach other than punishment would do as well. If not, punishment cannot be justified.

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minor trafficking offenses far longer than many that are imposed on violent and sexual offenders. Three-strikes laws typically require minimum 25-year sentences for a wide range of violent offenses but also for some property and drug offenses (Zimring, Hawkins, and Kamin 2001). LWOPs are often imposed for offenses other than murder (Ogletree and Austin 2012, chap. 1). None of that can be squared with either the retributive proportionality principle or the utilitarian parsimony principle.

Failure to satisfy requirements of traditional frameworks for thinking about just punishments is not necessarily a fundamental defect if there is some other plausible set of normative justifications. It is conceivable—though unlikely inasmuch as, from Aristotle and Plato on, no one has developed a third framework—that the severe and disproportionate burdens recent laws impose on offenders can be justified in other ways. No one, however, has offered any. Below I discuss what I call "anormative" theories of punishment, but as the term indicates, these are not normative ideas about punishing individual offenders.

People offer political justifications for tough on crime policies, such as that the public wants or is reassured by harsh sentencing laws, is morally affronted by drug use and trafficking, or supports electoral candidates who are tough on crime, and assert that programs should be adopted for those reasons. Some observers assert that criminal justice policies are often adopted as much or more for expressive reasons—to reassure a frightened public, to acknowledge public anger or hatred, to demonstrate that something is being done—as because policy makers believe that they will have any effects on crime (e.g., Garland 2001; Freiberg 2007; Simon 2007). None of these political and policy arguments, however, addresses the question, "How can we justify doing *that* to *this particular* offender?" Both the traditional frameworks viewed that as the critical question.

From early in the nineteenth century until the 1970s, punishment theories, institutions, policies, and practices in the English-speaking countries were based largely on consequentialist ideas. The academic and real worlds lined up nicely. Practitioners and policy makers may not have read Cesare Beccaria ([1764] 2007), Jeremy Bentham ([1830] 2008), or Enrico Ferri (1921) or known who they were, but they were in broad agreement with them that the primary purpose of punishment is to minimize harms associated with crime and state responses to it. Most of the institutions that constitute contemporary criminal

justice systems—penitentiaries, training schools, reformatories, juvenile courts, probation, parole—were invented in the nineteenth century and premised on the pursuit of that purpose (Rothman 1971; Allen 1981). So were individualized and indeterminate sentencing systems for dealing with adult offenders and the *parens patrie* rationale that underlies the juvenile court (Platt 1969; Rothman 1971; Mennel 1983).

Near the end of that 150-year period, the *Model Penal Code* (1962) laid out a blueprint for the mother of all consequentialist punishment systems. Offenses were defined broadly and were categorized only into misdemeanors and three levels of felonies. Precise delineation of the seriousness of crimes was considered unimportant and unnecessary. The only important question was whether the defendant was guilty. Once that was determined, the judge was given broad discretion to decide what sentence to impose. Probation was available for any offense, including murder. If the judge believed that the sentences authorized for a crime were too severe, he or she could sentence the offender as if he had been convicted of something less serious. If a prison sentence was ordered, the parole board decided when the prisoner was released. The prison authorities could award and withdraw time off for good behavior. Consistent with the utilitarian principle of parsimony, presumptions were created to ensure that offenders were not punished more severely than was necessary: judges were directed not to send people to prison, and parole boards were directed to release inmates when first they became eligible, unless specified conditions existed to justify some other decision. Allusions to retributive ideas appear only three times, and faintly. Nonincarcerative penalties should not be imposed or inmates released on parole if doing so would "unduly depreciate the seriousness of the offense." One of the overall purposes of the code was to ensure that disproportionately severe punishments were not imposed (Tonry 2004, chap. 7).

In our time, in contrast, retributive ideas about crime and punishment seem an inherent part of thinking by most philosophers and other theorists, even if those ideas have had little recent influence on policy except in the loose, vindictive sense that policy makers have generally preferred harsher punishments to milder ones. Social and experimental psychologists instruct that human beings are hardwired to react punitively to crime (Darley 2010). Evolutionary psychologists explain that natural selection has favored human beings with that hard wiring. Individuals with clear senses of right and wrong and a willingness to act

on them, it is said, are better community members, fostering cohesion, increasing the odds of community survival, and perpetuating the gene pool that predisposed people to be retributive (Robinson, Kurzban, and Jones 2007). Some influential philosophers of criminal law argue that those punitive intuitions justify retributive punishment theories (e.g., Moore 1993).

If retributive ideas and instincts are so common, how can it be that they had so little influence before the 1970s? The answer is that most practitioners and academics in the 1950s and 1960s believed that retributivism was atavistic. Conventional wisdom and intuition can be morally, ethically, and empirically wrong, as widely held beliefs about racial inferiority, homosexuality, and gender roles in earlier times demonstrate. That is what our midcentury predecessors believed about retributive instincts. The instinctual response should be resisted (Michael and Adler 1933, pp. 341, 344; Michael and Wechsler 1940, pp. 7, 11).

Sensibilities, however, were changing during the period when the *Model Penal Code* was being developed. Harbingers of discontent with penal consequentialism had already begun to appear (e.g., Lewis [1949] 2011; Allen 1959) and recurred with increasing frequency (e.g., Burgess 1962; Allen 1964; Davis 1969). By the mid-1970s, dissatisfaction was widespread. Policy makers rejected many features of indeterminate sentencing and favored new approaches based on retributive ideas.

Consequentialism lost ground and influence. Retributivism came into vogue. In the 1950s, Norval Morris (1953), John Rawls (1955), and H. L. A. Hart (1959) attempted to reconcile general utilitarian rationales for punishment as an institution with resort to retributive considerations in individual cases. Numerous philosophers offered diverse retributive punishment theories (Morris 1966, 1981; Feinberg 1970; Kleinig 1973; Murphy 1973; Hampton 1984; Duff 1986). Among the lawyers, Norval Morris (1974) elaborated his theory of limiting retributivism, Alan Dershowitz (1976) his of "fair and certain punishment," and Andrew von Hirsch (1976) his of "just deserts." By the early 1980s, it was not unreasonable to believe that a corner had been turned and that policy makers, practitioners, and theorists would long march to the beat of distant retributive drums.

That did not happen, except for a few years. During the sentencing reform period, some legislatures enacted determinate sentencing laws and abolished parole release in order to ensure that offenders served the proportionate sentences they received. Sentencing commissions

adopted presumptive sentencing guidelines based on retributive premises.

The retributive moment quickly passed. By the mid-1980s the tough on crime period was under way. Except in lip service, proportionality largely disappeared as a policy goal. Many of the sentencing laws enacted in the United States in the 1980s and 1990s, including mandatory minimum, three-strikes, truth-in-sentencing, and LWOP laws, paid no heed to the idea that punishments should be proportionate to some plausible assessment of the offender's blameworthiness or the gravity of the offense. If principled rationales were implied by developments such as these, the principles were consequentialist: deterrence by means of threats of harsh punishment, incapacitation by means of lengthy sentences, and moral education by means of the messages severe punishments ostensibly convey about right and wrong. There was, however, as I show in Section III, no credible evidence on the basis of which to believe that those policies would be more effective crime preventatives than the less severe policies they supplanted.

New, less overtly punitive initiatives also paid little heed to proportionality or parsimony. Drug courts and other problem-solving courts targeting mentally ill offenders, domestic violence, and gun crimes began in the early 1990s. By 2010 they numbered in the thousands (Mitchell 2011). Drug courts are predicated on the beliefs that drug treatment can work, that drug dependence is causally related to offending, and that coerced treatment backed up by firm judicial monitoring can break drug dependence and thereby reduce offending. Other problem-solving courts are based on parallel logic. The logic calls not for proportionate punishments but for participation in treatment and behavioral controls as long as needed to maximize their effectiveness.

Other proportionality-defying approaches proliferated, including prison reentry programs predicated on risk prediction and rehabilitative programming. Throughout corrections systems, increased investments were made in cognitive skills, drug abuse, sexual offending, and other treatment programs. Throughout the world, including in the United States, thousands of new restorative justice programs were established. All of these initiatives shared the characteristics that their primary aims were forward-looking—reduce reoffending or drug use; solve problems; restore relations among offenders, victims, and communities—and not much concerned to apportion punishment to offense gravity or blameworthiness (Tonry 2011*a*).

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The rationales of drug courts, correctional treatment programs, and restorative justice are not the same, and they are not the same as the rationales for mandatory minimum sentences, three-strikes laws, and LWOPs. What all these programs and policies share, however, is that they do not give much weight to ideas about proportionality and parsimony in deciding what should be done in individual cases. Committing an offense, particularly a serious violent or sexual offense, in effect makes offenders into outlaws whose interests do not matter.

The ideas encompassed in retributivism and consequentialism are ultimately concerned to explain and justify what happens to convicted offenders in terms that relate to them as individual human beings and that acknowledge their interests and moral autonomy. In many countries at diverse times, however, punishment policies have taken little account of offenders' interests. Prominent contemporary examples include the United States during the tough on crime period, England and Wales since the early 1990s, South Africa, the former socialist states of Eastern and Central Europe, and Russia.

What all those countries share is histories characterized by political cultures in which the interests of some people do or did not count. All of these social categories of people are the targets of laws, policies, and patterns of punishment that suggest that they are seen primarily as social threats and not as people whose interests deserve the concern and respect that traditional retributive and consequentialist theories of punishment would give them.

If such views were given a name, they might be called anormative theories. They are influential in many countries in our time, particularly in the United States and parts of Eastern Europe. They were prevalent in South Africa during apartheid and in the Soviet Union and continue to cast long shadows. Whether offenders were considered "Kaffirs," "class enemies," "social parasites," or something similarly opprobrious, their interests need not be considered. Anormative theories were predominant in Western countries before the nineteenth century as is demonstrated by Foucault's (1977) accounts of punishment under the *ancien regime* and historians' accounts of the use of capital punishment in England (e.g., Hay et al. 1975) and imprisonment throughout Europe and Britain in the sixteenth through eighteenth centuries (Whitman 2003).

The two traditional ways of thinking about punishment focus fully or partly on offenders. Retributive theories link notions of blamewor-

thiness, culpability, or wrongfulness to what happens to them. Consequentialist theories, although by definition concerned with effects, impose limits on what may justly be done to offenders: for example, that the harm done to offenders not exceed the harm thereby averted for others (Frase 2009). Anormative ways of thinking about punishment take no or reduced account of considerations relating to just treatment of offenders. That is the only way that extraordinarily disproportionate punishments—life without possibility of parole for 13-year-old robbers or three-strikes sentences of 25 years to life for adult shoplifters, or in England and Wales indeterminate, potentially lifetime imprisonment of "dangerous" offenders—can be understood. Those policies and practices have little or nothing to do with justice toward offenders. They center instead on denunciation of wrongdoing, reassurance of citizens, acknowledgment of popular outrage and insecurity, and demonstration of government resolve. All of these goals, or functions, involve communication about norms related to wrongdoing, but none is principally concerned with offenders and their circumstances or interests.

In the tough on crime period, in contrast to the two preceding periods, it is impossible to link the main components of sentencing policies and practices to normative ideas about just treatment of convicted offenders. Some contemporary laws, such as presumptive guidelines systems, are broadly consistent with retributive ideas. Others, including drug courts, many treatment programs, and restorative justice, are broadly consistent with different kinds of consequentialist ideas. Still others, such as three-strikes laws, many minimum sentence laws, and LWOPs, are inconsistent with any discernible set of ideas about justice. Anormative thinking may accurately describe the thinking underlying many contemporary sentencing laws, but it can hardly be described as a theory of justice.

III. Does Research Matter?

In recent decades social science evidence was conspicuously absent from legislative policy making processes concerning sentencing and punishment. The consequences have contributed substantially to contemporary patterns of imprisonment.

For much of the century before 1975, faith in good will and good effects, not research findings, underlay indeterminate sentencing. If

major developments since 1975 had been predicated on widely accepted research findings, things would have evolved very differently or, as has been true of most other developed countries, not have changed much at all. Most laws were enacted not on the basis of research findings, cost-benefit studies, impact projections, or meta-analyses, however, but because policy makers believed them to be intuitively plausible, morally appropriate, or politically expedient.

Research has interacted with policy in several ways. The developments during the sentencing reform period for a time provided a classic example of evidence-based policy making. Pilot studies suggested that federal parole guidelines might work. Federal parole guidelines were developed, implemented, and evaluated. They were successful at reducing disparities and increasing consistency. On the basis of that experience, voluntary sentencing guidelines were developed (Gottfredson, Wilkins, and Hoffman 1978). They proved unsuccessful but were succeeded by presumptive sentencing guidelines, which were a success.

That instance of admirably evidence-based policy making proved short-lived. By the mid-1980s, credible evaluations showed that *voluntary* sentencing guidelines had little effect on sentencing patterns and did not reduce disparities. By contrast, *presumptive* sentencing guidelines developed by a sentencing commission were shown to reduce racial and other unwarranted sentencing disparities, bringing greater consistency to plea bargaining, and enabling states to improve resource planning (e.g., Knapp 1984; Tonry 1996, chap. 2). From an evidence-based policy perspective, the implications were straightforward: parole and presumptive sentencing guidelines work, voluntary guidelines do not. Nonetheless, parole guidelines, despite their successes, withered away, and voluntary sentencing guidelines became the industry standard.

Mandatory minimum sentence and three-strikes laws offer a diametrically opposed example of the limited influence of research findings. Little solid research evidence was ever available to justify their enactment or their survival.

A. Deterrence

Some of the laws enacted during the tough on crime period were ostensibly premised on beliefs or assumptions about the deterrent effects of mandatory and severe punishments. From a crime control perspective, such beliefs and assumptions were largely misguided. There

are three main sources of evidence: government reviews for policy making, scholarly surveys, and evaluations of mandatory minimum and three-strikes laws. All point in the same direction.

1. *Government Reviews.* Governments in many countries have asked advisory committees or national commissions to survey knowledge of the deterrent effects of criminal penalties generally. After the most exhaustive examination of the question ever undertaken, the National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects concluded, "In summary . . . we cannot assert that the evidence warrants an affirmative conclusion regarding deterrence" (Blumstein, Cohen, and Nagin 1978, p. 7). The 2012 National Academy of Sciences Panel on Deterrence and the Death Penalty concluded that there is no credible evidence that the death penalty is a deterrent to homicide (Nagin and Pepper 2012).

Similar bodies in other Western countries have reached similar conclusions. An English Home Office advisory committee on criminal penalties, explaining the rationale for the Criminal Justice Act 1991, expressed deep skepticism: "Deterrence is a principle with much immediate appeal. . . . But much crime is committed on impulse, given the opportunity presented by an open window or unlocked door, and it is committed by offenders who live from moment to moment; their crimes are as impulsive as the rest of their feckless, sad, or pathetic lives. It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation" (Home Office 1990, p. 6). The Home Office commissioned a follow-up survey of the literature a decade later. It concluded that "there is as yet no firm evidence regarding the extent to which raising the severity of punishment would enhance deterrence of crime" (von Hirsch et al. 1999, p. 52).

The Canadian Sentencing Commission (1987) expressed a similar view: "Evidence does not support the notion that variations in sanctions (within a range that reasonably could be contemplated) affect the deterrent value of sentences. In other words, deterrence cannot be used with empirical justification, to guide the imposition of sentences" (p. xxvii). The Finnish National Research Institute of Legal Policy, explaining a national policy decision to reduce use of imprisonment substantially, observed, "Can our long prison sentences be defended on the basis of a cost/benefit assessment of their general preventative ef-

fect? The answer of the criminological expertise was no" (Törnudd 1993, p. 3).

2. *Scholarly Surveys.* A sizable number of comprehensive reviews of the deterrence literature have been published. The heavy majority reach similar conclusions. In a classic, much-cited survey, Cook (1980) concluded that existing studies showed that "there exist feasible actions on the part of the criminal justice system that may be effective in deterring [certain] crimes, . . . [but the studies] do *not* demonstrate that all types of crimes are potentially deterrable, and certainly they provide little help in predicting the effects of any specific governmental action" (p. 215; emphasis in original).

Updating the work of the 1978 National Academy of Sciences panel, Nagin (1998) observed that he "was convinced that a number of studies have credibly demonstrated marginal deterrent effects" but concluded that it was "difficult to generalize from the findings of a specific study because knowledge about the factors that affect the efficacy of policy is so limited" (p. 4).

Doob and Webster (2003) concluded, "There is no plausible body of evidence that supports policies based on this premise [that increased penalties reduce crime]. On the contrary, standard social scientific norms governing the acceptance of the null hypothesis justify the present (always rebuttable) conclusion that sentence severity does not affect levels of crime" (p. 146).

A meta-analysis by Pratt et al. (2006) produced a main finding on deterrence, one "noted by previous narrative reviews of the deterrence literature," that "the effects of severity estimates and deterrence/sanctions composites, even when statistically significant, are too weak to be of substantive significance (consistently below −.1)" (p. 379).

Nagin and Durlauf (2011) in an influential recent article examined evidence on the deterrent effects of sanctions and the effects on crime of imprisonment and policing. About deterrence, they concluded, "In summary, the literature on whether increases in prison sentence length serve as a deterrent is not large, but several persuasive studies do exist. These studies suggest that increases in the severity of punishment have at best only a modest deterrent effect" (p. 31). They also concluded that the effects of imprisonment on prisoners might on average be criminogenic rather than crime-preventative (e.g., Nagin, Cullen, and Jonson 2009) but that a sizable literature indicates that some police actions have preventive effects (e.g., Evans and Owens 2007). As a

result, they proposed that prison use be reduced and saved funds be transferred to more effective police crime-prevention efforts.

3. *Impact Evaluations.* Evaluations have been conducted of the deterrent effects of newly enacted mandatory penalty laws. The evaluators of the Rockefeller Drug Laws in New York, which required lengthy prison sentences for drug crimes, devoted most of their energies to trying to identify effects on drug use or drug-related crime. They found none (Joint Committee on New York Drug Law Evaluation 1978).

A number of studies were made of the crime-preventive effects of a Massachusetts law requiring a 1-year minimum sentence for people convicted of possession of an unregistered firearm. The studies concluded that it had either no deterrent effect on the use of firearms in violent crimes (Beha 1977; Rossman et al. 1979; Carlson 1982) or a small short-term effect that quickly disappeared (Pierce and Bowers 1981).

Studies in other states reached similar results. An evaluation of a mandatory sentencing law for firearms offenses in Detroit concluded, "the mandatory sentencing law did not have a preventive effect on crime" (Loftin, Heumann, and McDowall 1983, pp. 304–5). Assessments of the deterrent effects of mandatory penalty laws in Tampa, Jacksonville, and Miami "concluded that the results did not support a preventive effect model" (Loftin and McDowall 1984, p. 259). The results of evaluations of the effects of mandatory penalty laws in Pittsburgh and Philadelphia "do not strongly challenge the conclusion that the statutes have no preventive effect" (McDowall, Loftin, and Wiersema 1992, p. 352).[13]

Most credible empirical assessments of California's three-strikes law's effects on crime rates and patterns have concluded that none can be shown. In 2005, the Legislative Analyst's Office, after analyzing

[13] McDowall, Loftin, and Wiersema (1992), the team of researchers who conducted the Michigan, Florida, and Pennsylvania deterrence analyses mentioned in the text, combined the data from all three states and concluded that mandatory penalties for gun crimes reduced gun homicides but not assaults or robberies involving guns. This is counterintuitive. Homicides by definition are lethal assaults, and the ratios of assaults and robberies that involve guns and result in deaths should be relatively stable, assuming that there have been no substantial changes in the availability or lethality of weapons. If the proportions of assaults and robberies involving guns decline, gun homicides should decline commensurately, and vice versa. If a deterrent effect can be shown for relatively small numbers of homicides, it should be much easier to demonstrate for vastly larger numbers of assaults and robberies. Nagin and Durlauf (2011, p. 28) provide other reasons to be skeptical.

declines in overall and violent crime rates, concluded, "For now, it remains an open question as to how much safer California's citizens are as a result of Three Strikes" (Analyst's Office 2005, p. 33).

There have been more than 20 published assessments of the crime-preventive effects of three-strikes laws, most focusing on California's experience.[14] Only four conclude that three-strikes laws have crime reduction effects (Chen 2000, 2008; Zimring, Hawkins, and Kamin 2001; Shepherd 2002; Helland and Tabarrok 2007). Of these, Zimring, Hawkins, and Kamin found a small effect and only for second-strike offenders; Helland and Tabarrok also found only a small effect and concluded that it fell far short of what would be required to justify the law's effects on prison budgets in cost-benefit terms; Chen's findings were weak and her conclusions were hedged;[15] and Shepherd's findings are not credible.[16] Three studies concluded that enactment of three-strikes laws produced increases in homicide rates (Marvell and Moody 2001; Kovandzic, Sloan, and Vieraitis 2002; Moody, Marvell, and Kaminski 2002). One concluded that they result in increases in killings of police (Moody, Marvell, and Kaminski 2002).

No matter which body of evidence is consulted—the general literature on the deterrent effects of criminal sanctions, research on marginal deterrence effects, or the evaluation literature on mandatory penalties—the conclusion is the same. There is little basis for believing that mandatory penalties or severe penalties have significant marginal deterrent effects.

[14] Most are shown in Tonry (2011*b*, table 6.3).

[15] "The approach taken in California has not been dramatically more effective at controlling crime than other states' efforts. . . . [California's law] is not considerably more effective at crime reduction than alternative methods that are narrower in scope" (Chen 2008, pp. 362, 365). Doob and Webster (2003) have demonstrated fundamental problems with her analysis.

[16] Shepherd (2002) concluded, "During the first 2 years after the legislation's enactment, approximately eight murders, 3,952 aggravated assaults, 10,672 robberies, and 384,488 burglaries were deterred in California by the two- and three-strikes legislation" (p. 174). The fundamental problem, however, is that Shepherd, like most economists, assumed what other social scientists investigate: that increased penalties reduce crime rates. Shepherd's findings correspond to her findings on the deterrent effects of capital punishment (e.g., Dezhbakhsh, Rubin, and Shepherd 2003). Other economists have demonstrated why those findings are not credible (e.g., Donohue and Wolfers 2005; Donohue 2006). Problems recurringly identified are reliance solely on official data analyzed at county or state levels, lack of awareness of case processing differences at local levels, and poorly specified models. On California's three-strikes law, however, Shepherd is an outlier; most other economists' analyses concur with the no deterrent effect conclusions of noneconomists (Marvell and Moody 2001; Kovandzic, Sloan, and Vieraitis 2002; Moody, Marvell, and Kaminski 2002).

B. Incapacitation

Research on incapacitative effects provides no firmer underpinnings to the proliferation of laws mandating lengthy prison sentences during the tough on crime period. Some of them were ostensibly premised on beliefs or assumptions about incapacitation. From a crime control perspective, however, such beliefs and assumptions were largely misguided. Three major bodies of evidence are particularly relevant: research on replacement effects, criminal careers, and the overbreadth of "selective incapacitation."

1. *Replacement Effects.* For some categories of offenders, an incapacitation strategy necessarily failed because most or all of the individuals sent to prison were rapidly replaced in the criminal networks of which they were a part. Confining those individuals did not diminish future offending. Drug trafficking is the paradigm case. Drug dealing is part of a large complex illegal market with low barriers to entry. The net earnings of street-level dealers are low and the probabilities of eventual arrest and imprisonment are high (Levitt and Venkatesh 2000; Cook et al. 2007). Even so, arrested dealers are quickly replaced by new recruits (Dills, Miron, and Summers 2008; MacCoun and Martin 2009). At the corner of Ninth and Concordia in Milwaukee in the mid-1990s, for example, 94 drug arrests were made within a 3-month period. "These arrests, [the police officer] pointed out, were easy to prosecute and to convict. But . . . the drug market continued to thrive at the intersection" (Smith and Dickey 1999, p. 8).

Disadvantaged young people tend to overestimate the benefits of drug dealing and to underestimate the risks (Reuter, MacCoun, and Murphy 1990; Kleiman 1997). This is compounded by peer influences, social pressures, and deviant role models provided by successful dealers who live conspicuously affluent lives and manage to avoid arrest. This impression can be strong because the likelihood of arrest for any individual sale of crack, cocaine, heroin, or methamphetamine is low even though the likelihood of eventual arrest and imprisonment is very high (Caulkins and MacCoun 2003; Reuter, in this volume). Similar analyses apply to many members of deviant youth groups and gangs: as members and even leaders are arrested and removed from circulation, others step into the newly opened positions. The arrests and imprisonments of street-level dealers and, often, of gang members create illicit "opportunities" for others.

2. *Criminal Careers Research.* Research on "criminal careers" pro-

vides other reasons to be skeptical of using long sentences to incapacitate offenders. Many of those confined would have ceased offending long before their prison terms expire. Criminal careers were a major focus of federally funded crime research in the 1980s and the subject of a National Research Council panel report (Blumstein et al. 1986). Researchers investigated patterns of onset, continuation, desistance, specialization, acceleration, and deceleration in criminal careers. One strand of that literature documented "age-crime curves" (Farrington 1986). Another strand investigated and documented the phenomenon of "residual career length," the period during which an active offender will continue to commit offenses (Blumstein, Cohen, and Hsieh 1982). A third examined the effects of incapacitation strategies (Cohen 1983), including strategies of "selective incapacitation," which target especially serious offenders (Greenwood and Abrahamse 1982). The findings of none of those literatures justify reliance on incapacitation as a crime control strategy.

a. Age-Crime Curves. The work on age-crime curves shows that very large percentages of young people commit offenses; rates peak in the midteenage years for property offenses and the late teenage years for violent offenses followed by rapid declines (e.g., Farrington 1986; Sweeten, Piquero, and Steinberg 2013). For most offenders, a process of natural desistance results in cessation of criminal activities in the late teens and early 20s. Confining people after they would have desisted from crime is in any case inefficient; it also may be criminogenic and operate to extend criminal careers of people who would otherwise have desisted (Nagin, Cullen, and Jonson 2009).

b. Residual Criminal Career Lengths. Most active career offenders desist from crime at relatively early ages—typically in their 30s (Farrington 2003). This means that most—even active—criminal careers are short. In the federal system and most states, first offenders are punished less severely—usually much less severely—than repeat offenders. Under three-strikes laws, dangerous offender statutes, and all sentencing guidelines, criminal history considerations substantially increase sentence lengths, often doubling or tripling sentence lengths for first offenders (e.g., Reitz 2010; Frase 2013). Under three-strikes and "career criminal" or "dangerous offender" laws, the multiplier is often vastly greater. The short "residual career lengths" of most offenders mean that there is little incapacitative gain to be realized from holding repeat offenders for increasingly long terms.

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c. Selective Incapacitation. Longitudinal research on offending has long shown that relatively few offenders commit a large percentage of offenses (e.g., Wolfgang, Figlio, and Sellin 1972; Farrington 1979). Research in the 1980s based on interviews with prison inmates seemed to show that identifying and confining high-rate offenders would be a viable crime-prevention strategy (Chaiken and Chaiken 1982; Greenwood and Abrahamse 1982). The results, however, did not withstand scrutiny. The early research was retrospective; offenders were asked to detail their past behavior. The overriding difficulty was that it is easy to identify high-rate serious offenders retrospectively but exceedingly difficult to identify them prospectively. When researchers tested prospective application of selective incapacitation by developing instruments for use in predicting high-rate offenders, they discovered that they were unable to identify high-rate offenders with sufficient accuracy for the strategy to be viable (Blumstein et al. 1986). Too many of the people confined on the basis that they were predicted to be active offenders in the future proved to be "false positives," people who would not have committed new serious offenses. The age-crime curve and short residual lengths of criminal careers are principal reasons for the inadequate prediction capacity.

Evidence has not made much difference in recent decades in relation to sentencing laws and policies. Initiatives that largely achieved their goals—notably parole and presumptive sentencing guidelines—have not notably influenced policy making outside the pioneering jurisdictions and within them have suffered abandonment and retrenchment. Sentencing laws and policies putatively aimed at deterrence and incapacitation could not have been justified when they were adopted on the basis of then-available research findings, and their retention cannot be justified now. Whatever it is that has been driving sentencing policy in the United States has been something other than evidence.

IV. What's It All About?

Evidence and mainstream normative ideas about just punishments have been conspicuously absent from policy making about sentencing since the mid-1980s. Something else has been driving policy.

A number of master narratives are available to explain what that might be. One focuses on rises in crime rates, most importantly for homicide, which began in the 1960s and began to fall, after some in-

termediate fluctuations, only in 1991. Americans became angry and fearful. Policy makers and practitioners responded. The rest, the narratives proponents argue, is obvious. The public was angry and frightened and policy makers responded (Zimring and Hawkins 1999; Ruth and Reitz 2003).

A second master narrative is that it's partly about crime but it's also about the existential agonies of contemporary society. The final third of the twentieth century was a period of instability and rapid social and economic change. Politicians responded opportunistically. On one influential account, crime and criminals were convenient symbols of the forces of instability. American (and English) politicians promoted punitive, expressive legislation in order to acknowledge public anxieties, protect the legitimacy of the state, and promote political self-interest (Garland 2001). In another, politicians manipulated public anxieties in order to gain or preserve power that could be used to pursue other ends (Simon 2007). In yet another, increases in crime and insecurity created an atmosphere of "populist punitivism" (Bottoms 1995) or "penal populism" (Pratt 2007) to which politicians responded. In still another account, public anxieties, exacerbated by global mass media, fostered a climate of risk aversion to which politicians responded, harsh anticrime policies being but one of many responses to heightened perceptions of risk (Douglas 1992).

A third master narrative is that the tough on crime period in the United States and similar developments since the early 1990s in England and Wales and New Zealand are consequences of the growing global influence of neoliberalism and globalization and their political emanations. Declining social welfare expenditure has reduced governmental capacity to shelter citizens from adversity. Increasing emphasis on personal responsibility for economic and social disadvantage, what former British Prime Minister Tony Blair called "responsibilization," has exposed individuals to more extreme disadvantage and heightened willingness to react harshly to criminal and other nonconforming behavior (Cavadino and Dignan 2005; Lacey 2008).

None of the master narratives suffices to explain American developments. All wealthy developed countries except Japan experienced steep rises in crime rates, including homicide rates, from the 1960s to the 1990s, but only a handful adopted harshly punitive criminal justice policies: the United States during the tough on crime period, England and Wales after 1993 (Morgan 2006; Downes and Morgan 2012), and

New Zealand since the late 1990s (Pratt and Clark 2005). Most others, including Germany, Australia, Belgium, Canada, Switzerland, and the Scandinavian countries except Finland, had stable or only slightly rising imprisonment rates during the period of sharply rising crime rates (Lappi-Seppälä 2008).

Countries have different criminal justice policies and practices for reasons of political culture and history, not because of crime levels, crime trends, or larger social and economic forces. Anglo-Saxon countries have higher imprisonment rates than Scandinavian ones. French and Italian governments regularly reduce their prison populations by use of large-scale collective pardons and amnesties (Lévy 2007). The United States responded to the rising crime rates from the 1960s to the 1990s with harsher laws and larger prisons. Most European countries responded to similar crime rises with diversion programs and alternatives to imprisonment (Tonry 2007).

Countries and, within the United States, states have the policies and prison populations they choose to have. Politicians in Finland decided to reduce the Finnish imprisonment rate by two-thirds between 1965 and 1990, a period when overall and violent crime rates tripled. In the face of similar rising crime rates, German politicians chose to hold the imprisonment rate flat, and American politicians allowed American rates to quintuple (Tonry 2001). All American states experienced large crime rate increases in the 1970s and 1980s, but their responses were substantially different. Not surprisingly, politicians in states such as Maine, Vermont, and Minnesota resisted calls for enactment of the harshest laws and politicians in states such as California, Oklahoma, Florida, and Georgia responded with enthusiasm.

The words "politicians chose . . ." are at the beginning, not the end, of the story. The next question is why politicians in one country or state chose one thing and those in another country or state chose another. I have my own explanation for what happened in the United States. It includes the history of American race relations, the continuing influence of Protestant fundamentalism, constitutional arrangements that give short-term emotions and politics greater influence on policy than elsewhere, and what historian Richard Hofstadter (1965) called the "paranoid style" in American politics (Tonry 2009*a*).

The basic story is simple. Republican presidential candidate Barry Goldwater in 1964, a time when crime rates had been rising for several years, made "crime in the streets" into a partisan political issue. The

victories of the civil rights movement increased opportunities for black people but also offered conservative Republicans an opportunity to appeal to white voters in the formerly solidly Democratic South. In *The Emerging Republican Majority* (1969), Goldwater staffer Kevin Phillips proposed that Republicans take advantage of the opportunity. Throughout the United States, they did, using crime, welfare fraud, and affirmative action as facially neutral but racially tinged "wedge issues" to undermine traditional working class and southern white support for Democrats (Edsall and Edsall 1991). All three issues proved potent, but especially crime. Simplistic sound bite proposals, campaign advertisements with images of jailhouse doors slamming shut, and accusations that opponents were "soft on crime" proved potent. Democrats eventually learned that they could seldom win head-to-head electoral contests in which Republicans made crime a major issue, unless they too became "tough on crime." They did, most famously when soon-to-become president Bill Clinton and his Democratic Leadership Council decided never to let the Republicans get to the right of Democrats on crime issues (Windlesham 1998; Gest 2001).

Until the politics of law and order settled into a stalemate, American criminal justice policy making from the mid-1980s through the mid-1990s was a one-way ratchet. Sentencing laws only became harsher and prison populations larger. Once the stalemate was in place, relatively few major new punitive laws were enacted. However, at least when these words were written, the laws enacted during the tough on crime period largely remain in place.

The seemingly odd sentencing policy developments of the 1980s and 1990s in retrospect are intelligible, even if regrettable. The successful policy initiatives of the 1970s and early 1980s—parole and presumptive sentencing guidelines—fell from favor because their accomplishments ceased being strategically important to politicians. Reducing racial and other unwarranted disparities and enhancing consistency and predictability were not major aims of the tough on crime period.

By contrast, however, once crime became a galvanizing issue in partisan politics, it is not surprising that evidence ceased to matter. The main findings of the research on mandatory minimum sentences, deterrence, and incapacitation were known in the mid-1980s before lengthy minimum sentence, three-strikes, LWOP, and truth-in-sentencing laws proliferated. The proponents of those laws aimed to

win elections and gain political power; they did not let evidence, or its absence, get in the way.

Making predictions about the future is a highly uncertain business, possibly more so in relation to sentencing policy than to other criminal justice subjects such as policing or juvenile justice. Conceivably, the recent flattening out of the American prison population, many nibbles at the edges of harsh laws, and the emergence of programs aiming at rehabilitation of offenders signal a major change of direction. Or maybe the Great Recession of recent years has created pressures for modest reforms meant to save money that will abate when the good times again roll, and the march toward continued or greater toughness will resume. Or maybe a major shift in sensibilities is under way and American penal attitudes will shift back toward the greater degrees of moderation and optimism that predated the last 30 years' developments.

If a sea change is coming, the steps necessary to move American sentencing policies and patterns back into the mainstream with those of other Western countries are straightforward: repeal all mandatory minimum, three-strikes, and LWOP laws so that judges can decide case by case what justice requires; establish presumptive sentencing guidelines systems to provide standards to guide those decisions, subject to appellate court review; and either reestablish parole release systems for use across the board or establish administrative systems of regular review of the need for continued detention of any prisoner serving a sentence longer than some designated period such as 5 or 7 years. If those things happen, American sentencing policy may in time become both evidence-based and compatible with mainstream notions of justice.

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