Review Essay

Sentencing (and) the Underclass

Candace McCoy

Thomas G. Blomberg & Stanley Cohen, eds. *Punishment and Social Control: Essays in Honor of Sheldon L. Messinger.* Foreword by Philip Selznick. Hawthorne, NY: Aldine de Gruyter, 1995. x + 318 pp. $46.95.

Chris Clarkson & Rod Morgan, eds. *The Politics of Sentencing Reform.* New York: Oxford University Press, Clarendon Press, 1995. vi + 287 pp. $59.00.

Todd R. Clear. *Harm in American Penology: Offenders, Victims, and Their Communities.* Albany: State University of New York Press, 1994. xvi + 242 pp. $74.50 cloth; $24.95 paper.

Michael Tonry. *Malign Neglect: Race, Crime and Punishment in America.* New York: Oxford University Press, 1995. Pp. xii+233. $25.00 cloth; $11.95 paper.

Michael Tonry. *Sentencing Matters.* New York: Oxford University Press, 1996. Pp. vii + 222. $29.95 cloth.

The primary principle underlying the physician's oath is nonmaleficence: "first, do no harm." These five books present the best contemporary thinking about trends in criminal sentencing and philosophies of punishment; taken together, they offer the physicians' wise counsel to modern politicians, judges, and citizens across the globe.

Gratitude goes to my colleagues: to Marvin Zalman for commenting on an early draft of this essay and especially to George Thomas for prompting me to write it. Address correspondence to Candace McCoy, School of Criminal Justice, S. I. Newhouse Center for Law and Justice, Rutgers University, 15 Washington St., Newark, NJ 07102 (e-mail: cmccoy@andromeda.rutgers.edu).

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The caution is especially germane because debates about sentencing reform—indeed, debates about crime and justice generally—occur in the wider context of postindustrial social change. To comprehend both the manifest and the latent functions of punishment and how the courts can or cannot impose just sanctions on people convicted of crime, we must take account of the world from which the offenders and the courts themselves come. These five books all provide rich consideration of issues related to inequality and the political choices we make about punishment. All five volumes present thoughtful overviews of how penal philosophies have changed over the past 25 years, offered either as theoretical reflections or as legislative histories and impact evaluations. All five present sober analysis of sentencing reforms that have not only failed to reduce disparities among various racial and economic classes but also have exacerbated the tension between equal treatment in the courts and the drive to process tremendous numbers of offenders from the urban underclass.

The link between inequality and current sentencing policies is a primary subject in Clear's *Harm in American Penology* and Tonry's *Malign Neglect.* Clear chronicles the tremendous boom in size and power of "the penal harm machine" over the past two decades, and he asks and answers the question: Why did this happen? By contrast, Tonry's starting point is the jurisprudence of sentencing, not corrections, although he arrives at the same question and answer that Clear does. Both implicate crime-control ideologues in inflaming the extraordinary punitiveness of the American public, and doing so while including an unspoken but very real degree of racism in their ideology. While Clear and Tonry believe that these arguments and agendas have produced a contemporary obsession with harsh punishment, other scholars whose work is reviewed here contend that "popular punitiveness"[1] is a preexisting cultural characteristic springing from a variety of sources.

Social inequality is not the explicit focus of the other works reviewed here, all of which seek to explain sentencing and how it has changed, although race and inequality are constant subterranean themes. Tonry's *Sentencing Matters,* for instance, is an encyclopedic compendium of sentencing theory and reform in the United States, beautifully written and organized around a set of eight prescriptions for change that Tonry says are the logical outcomes of studying the reforms. In *Sentencing Matters,* Tonry's scholarly "good cop" book, and *Malign Neglect,* his angry "bad cop" political book, the aim is to get American politicians to confess to malpractice in setting up the sentencing reforms of the

[1] The phrase is from Anthony Bottoms's chapter, "The Philosophy and Politics of Punishment and Sentencing," in the Clarkson/Morgan volume. Clear agrees that punitiveness ultimately springs from deep cultural roots that sprouted long before law-and-order ideologues set out to achieve a punish-and-control agenda.

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past two decades and to do penance by repealing the worst of these laws. Tonry advocates establishing a more rational system roughly designed on the principles of limited retributivism: "within the range of sanctions set out in applicable guidelines, judges should impose the least punitive and intrusive appropriate sentence" (Tonry, *Sentencing Matters*, p. 5).

This policy prescription, which nicely fits the principle of nonmaleficience, emerges also from essays in the edited volumes. The Clarkson/Morgan book is a collection of empirical evaluations of new sentencing laws in various developed nations,[2] and the chapters in part II of the Blomberg/Cohen book address the impact of various sentencing reforms on court and prison operations in the United States.[3] The former work illustrates the point that severe penality is not inevitable in postindustrial societies, and the latter describes the evolution of the American "prison industrial complex" while exploring the criminological and sociological theories that could explain it. Under all these learned discussions continually lurks the often unspoken but well-understood reality that we are speaking about the state's response to a criminal phenomenon disproportionately evident among the ranks of the poor.

Of course, there is little to nothing the criminal justice system can do to alleviate poverty or the conditions that breed it. The mission of the police is to prevent crime and address it once it has occurred, and the mission of the courts and prisons is to provide due process and just punishment. Conventional wisdom holds that the system is working as well as can be humanly expected if it pursues these goals impartially, and that is all that can realistically be expected of it. The result? Given great inequality between classes and races, the criminal justice system's fair and even application of neutral substantive law will inevitably produce punishments that are themselves unequal, because they simply mirror the inequalities evident among criminal arrestees at the outset. Thus, to the mainstream justice professional, the frustrated comment from African American observers that "the justice system must be racist, since the prisons are filled mostly with people of color" misses the mark. Inequality and racism *are* pernicious features of the contemporary scene, the reasoning goes, but the police or courts do not necessarily act on them.

[2] Six chapters evaluate specific sentencing reforms in far-flung jurisdictions: Victoria, Australia; Sweden; England and Wales; the U.S. federal system, and particular U.S. states such as Oregon and Minnesota.

[3] Subjects in this volume range widely, from problem-oriented policing to an epilogue about how the School of Criminology at Berkeley met its demise at the hands of opponents of its left-inspired research and pedagogy. However, the majority of the chapters concern the theory of social control and the reality of punishment through imprisonment. This is surely attributable to the fact that the volume is a *festschrift* for Sheldon L. Messinger.

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Economic structure and social attitudes cause inequality, and the justice system simply reacts to what is already there.

Whether this mainstream response is true or not, and taking into account that every objective observer of modern punishment systems would willingly concede that there are many individual examples of harsh sentences not explained by the facts of the crimes charged, the shared assumption is that the criminal justice system is doing as well as can be expected by simply applying the laws fairly in most cases. This leaves larger questions of social justice to the more powerful economic and political systems that should be addressing them. But such orthodoxy has the relieving effect of providing an ethic of nonresponsibility to the police, prosecutors, judges, and correctional managers who punish offenders, and to citizens who can then dismiss them as "the other." "We realize that poor people have a significantly higher involvement in crime," they might say, "but it's not our job to do anything about that; our job is only to impose the rule of law carefully. We go home at night with clear consciences. We can do little more, because we can't change the world."

These same professionals, however, would surely agree that their equal application of the law to an unequal situation would be unjust if it went further—that is, if the law itself were not fair or if the application of it created its own injustices. Thus, we return to the injunction "first, do no harm." Passively enduring a bad situation is one thing; actively creating more badness is another.

A Just Measure of Pain?

These five books are unanimous in their stance that modern American sentencing and penal systems do, in fact, cause more harm to offenders and their communities than the offenses committed warrant. In this, they are squarely at odds with popular opinion and other books recently published by American crime policy analysts which contend that lengthy incarceration is the only rational response to "superpredator" criminals (Bennett, DiIulio, & Walters 1996; compare Zimring & Hawkins 1995 for opposing argument). The notion that we are under siege by a crowd of amoral, remorseless victimizers highlights the divide in thought at the heart of this debate: Are we dealing with animals, or are we dealing with fellow citizens? If we are to "do no harm," presumably punishment would not be inappropriate if it were directed against criminal brutes who have scarcely any sensibilities that could be harmed to begin with. But if criminals are people who are moral beings and wayward members of the body politic, any harm directed against them will be designed to achieve utilitarian prevention and/or retributive payback—and then it will stop.

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Equating sentencing with pain is certainly an implicit assumption in all these works, though Clear makes it explicit. He says that we must recognize "the essential nature of punishment—it is organized, intentional harm against a fellow citizen" (p. 5). None of these writers would aver that punishment is necessarily an inappropriate response to crime, though in individual cases it might be. They are instead concerned to understand how *much* pain the state can justifiably inflict on its deviant citizens, and they take as a given that the criminal is a member of society and not an outsider.

Traditionally, the question "How much to punish?" follows the question "Why punish at all?" The answers are usually formulated from the perspective of utilitarian or deontological theory. The utilitarian, Benthamite goal of "the greatest good for the greatest number" calls for prevention of future crime as the purpose of punishment, while the deontological, Kantian principle holds that criminals must be punished because they have violated the moral order and thus are blameworthy. Resulting notions of how *much* to punish are "as much as it takes to reduce crime" versus "as much as the offender deserves." Scholars have worked mightily to point out the tensions and contradictions between the two philosophical schools and to highlight the alleged injustices inherent in each model—primarily, that utilitarians will sacrifice the individual person's autonomy by punishing in the interests of achieving the greater good, versus the charge that Kantians are compelled to punish even if no practical good will come of it or despite relevant factors from the individual's life that invite mercy. However compelling the jurisprudential objections to each model may be, the common theme in both of these overarching criticisms is that the opposing model is too punitive.

Thus, it perhaps comes as no surprise that scholars of sentencing would point fingers at each other, chiding those of a different jurisprudential stripe and accusing them of providing the intellectual groundwork for citizens' and politicians' popular punitiveness. Since utilitarians (at least, utilitarians concerned primarily with deterrence) and "just desert" theorists alike believe that the others are too punitive, it also comes as no surprise that they all agree that current punishment practices must be reined in. They simply arrive at that conclusion through different principled routes.

But there is one group of participants in the current debate who do *not* agree that current policies are too harsh, and that is the group who operate primarily from the utilitarian notion of incapacitation. Theoretically, even incapacitation would be limited under the utilitarian rationale when it no longer achieves any good and begins to cause harm, either to the person being punished or to the society as a whole. But if you believe that criminals are incorrigible and unfeeling predators, that time will

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never come. Thus, beliefs about the nature of criminality and personhood in the United States at the turn of the millennium lie at the heart of our prescriptions about punishment, and they are tied to beliefs about moral citizenship and inclusion versus ostracism from the moral community.

Each of the writers of these books knows where he or she stands in the utilitarian versus "just deserts" debate. But when these debaters blame each other for creating policies that cause harm, they are misdirected. Causing too much harm is possible by too zealously advancing either a utilitarian *or* a desert agenda. The pain should stop, under either rubric, when it does "more harm" than the principles require. The difficult yet essential decision in evaluating U.S. sentencing policies is to differentiate between policymakers who sincerely base their prescriptions on moral foundations of any stripe—and who are willing to modify those prescriptions when their effects go beyond the original moral justifications—and those who advocate severe sentencing as a moral imperative with no possibility of mercy or recognition of excess. Gratuitous punishment can have no place in principled sentencing policy, but the challenge is to recognize and oppose it whenever it appears.

Indicting the Harmers

Michael Tonry's *Malign Neglect* indicts and opposes the architects of Ronald Reagan's crime-control legislation.[4] The first half of the book is an indignant, occasionally angry analysis of how the sponsors of the punishment policies of the Reagan and Bush years knew or should have known that these policies would be ineffective in reducing crime. Nevertheless, Tonry believes, the activist crime controllers plunged ahead in an exercise of brute repression. They could easily have predicted that their harsh penal projects, ranging from mandatory sentences to the entire War on Drugs, would fall with disparate force on minorities—thus further ravaging the community lives and economic bases of people whose living conditions were already marginal. Like the

[4] To put these policies in the context of the jurisprudential debate, those architects were not primarily retributionists. Despite Tonry's disdain in *Sentencing Matters* for the policy results of "just deserts" theories, it is misguided to blame desert theory for the federal sentencing guidelines. The U.S. Sentencing Commission specifically declined to embrace any sentencing theory, though any reading of the federal guidelines demonstrates that they were devotees of incapacitation and general deterrence. Incapacitation arguably serves utility when directed against serious violent criminals who will probably recidivate, but both incapacitative and deterrent ideologies are strained when applied against criminals of lower dangerousness, especially those who—like drug dealers—are engaged in the criminal behavior as part of a street lifestyle. Whatever the murky reasoning of those who conceived and prosecuted the War on Drugs, in *Malign Neglect* Tonry convincingly demonstrates that current federal punishment policies regarding drugs create more harm than good.

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criminal law that crime controllers enforce, Tonry asks: Was their *mens rea* intentional or negligent?

> In the criminal law, purpose and knowledge are equally culpable states of mind. An action taken with a purpose to kill is no more culpable than an action taken with some other purpose in mind but with knowledge that a death will probably result .... [B]y analogy with the criminal law, the responsibility of the architects of contemporary crime-control policies is the same as if their primary goal had been to lock up disproportionate numbers of young blacks. (Tonry, *Malign Neglect,* p. 32)

Ever the lawyer, Tonry even considers the policies from an *actus reus* angle:

> Although the common law imposed no criminal responsibility for harms caused by omissions... this is almost universally seen as a retrograde doctrine .... If the crime control architects could have adopted polices that would not have damaged the lives of so many young black Americans, as of course they could have done, why should they not have done so? Are they not morally responsible for having omitted to do so? (Tonry, *Malign Neglect,* p. 33)

Naturally, these are incendiary statements—although Tonry didn't go so far as to name his book *Malign Intent.* Most conservative crime-control ideologues firmly believe that harsh punishment applied to *any* criminal will incapacitate dangerous predators and deter future ones. The fact that young blacks are incapacitated in numbers grossly disproportionate to their numbers in the population, they argue, simply reflects the objective fact that they commit a disproportionate number of serious crimes. Tonry does not disagree with the latter point. After a fine overview of the literature on this issue, he concludes:

> [T]he answer to the question, "Is racial bias in the criminal justice system the principal reason that proportionately so many more blacks than whites are in prison?" is no, with one important caveat . . . drugs. From every available data source, discounted to take account of their measurement and methodological limits, the evidence seems clear that the main reason that black incarceration rates are substantially higher than those for whites is that black crime rates for imprisonable crimes are substantially higher than those for whites. This conclusion is the beginning, not the end, of the policy problems. (Tonry, *Malign Neglect,* p. 79)

Enter the polemicist. After a *tour de farce* of the War on Drugs, which Tonry claims is the one example of crime-control policies whose "supply side" enforcement was intentionally aimed at the suppression of minority communities, Tonry brings the debate right back to the locus of concern in all of these recent works: sentencing. Given that young black males are convicted of crimes against persons, property, and "society" (in the case of drug-related crimes) in numbers greatly disproportionate to their num-

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bers in the population as a whole, decisionmakers still must grapple with such questions as: (1) how severe should the punishments be, (2) whether the drug epidemic will be alleviated by incarcerating these young men and, most important, (3) whether the punishments, of whatever severity, "create more disadvantaged neighborhoods and make the existing ones worse,"[5] thus actually becoming criminogenic in themselves (Tonry, *Malign Neglect,* p. 41).

We know how conservative thinkers such as James Q. Wilson and his disciple, John DiIulio (who Tonry says "ought to know better,"), would answer these questions. Wilson in particular has always demonstrated a remarkable capacity to synthesize available criminological and justice system literature and state that it proves the wisdom of incapacitative ideology (Wilson 1975, 1983).[6] Using a method identical to Wilson's—reviewing and critiquing the major bodies of crime research, carefully picking apart and decimating what he deems to be blatant misstatements from politically motivated officials, and approving those from scholars whose work is more ideologically consistent with his own—Tonry marshals his evidence and marches toward politically charged conclusions. He has emerged as the James Q. Wilson of the left.

Tonry demands that crime policies be analyzed primarily from the viewpoint of their demonstrated crime reduction impacts *in conjunction with* their impact on communities. Todd Clear in *Harm in American Penology* agrees. On the crime reduction issue, they both argue that the marginal deterrence bought so dearly in terms of prison costs[7] is simply not worth the attendant costs in social rupture. Todd Clear adds the criminologist's point that since so many offenders are imprisoned at the time of their lives when their criminal careers would naturally be waning, very little in crime prevention is achieved by imprisonment, and, even worse, the offenders then learn in prison to self-identify only as criminals rather than as the breadwinners they might have been had they not been incarcerated. A negative impact on families and communities inevitably follows.

In his book, Clear considers the issue of harm from a criminological rather than legal viewpoint, but his conclusions agree with Tonry's in indicting crime-control ideologues. He also goes deeper, seeing the policies as manifestations of the broader

[5] Note the utilitarian calculus here. If the Drug War hurts the economic bases of entire neighborhoods, thus creating more poverty and attendant social pathologies, harsh sentencing could not be justified as having gained "the greatest good for the greatest number."

[6] See especially chap. 8 on sentencing.

[7] That is, the difference in the amount of crime that would be committed if nondangerous offenders serve a few years in prison or even under nonincarcerative control, compared with the crime rate if the same offenders serve mandatory sentences that imprison virtually for life.

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American tendency toward punitiveness. Clear is an empirical researcher, and he uses available data on crime, the justice system, and social indicators to test what he sees as the two models that might explain the phenomenon of punitive sentencing and teeming prisons: (1) the crime rate itself was higher and thus created more prison "demand," or (2) policies enhancing the penal law, increasing law enforcement, and spending more money on prisons became common. Acknowledging that the models are not mutually exclusive, he nevertheless finds that "neither of these two simple models is fully satisfactory as an explanation . . . and neither stands alone as a description of the basis for the punishment experiment of the 1970s and 1980s" (p. 64). He says, "The failure of the traditional models to fit the data adequately suggests the need to integrate [them]," and he launches into an elaborate and creative attempt to explain the amount of punishment in terms of crime volume, justice response, and the lagged impact of each on sentencing.[8] But he finds:

> It is true to say that the amount of punishment comes from the number of criminals; it is correct to say that punishing them will have something to do with the amount of crime. What is incorrect is to presume that this is the entire story. The level of penal harms has a different set of determinants that have little to do with these forces, though they are not antagonistic to them.
>
> A variation in this model—a higher version of it—posits that both crime and penal harm are products of social forces. (Clear, p. 71)

In other words, the demonstrated relationship between crime rates and punishment volume may be spurious; they both may be primarily linked to a third factor that is driving the whole mess. Relying on Garland,[9] Clear states that in "U.S. culture, the growth in penal harms has remained steady even as crime rises and falls. Punishment is far from a natural consequence of crime. It is a deeply ingrained aspect of our culture . . . . [P]unishment has been a social barometer of public disquiet about social change, but it has also been a manifestation of our most firmly entrenched beliefs about 'the order of things'" (pp. 73-74).

While Clear is willing to regard the crime-control ideologues of the 1970s and 1980s as sad symptoms of a deeper cultural disease, Tonry—as noted above—does not let them off so easily, as-

[8] Compare the intellectual history of this period, written by the leading empirical criminologist (Blumstein) who first approached the subject from a selective incapacitation viewpoint but later pulled back in the face of his own rigorous statistics. In his chapter in Blomberg/Cohen, Alfred Blumstein assails "the naive reaction . . . that more punishment will lead to less crime" (in "Stability of Punishment: What Happened and What Next?" pp. 259-76).

[9] Clear draws on David Garland's excellent *Punishment in Modern Society* (1990). Garland also contributed a chapter to the Blomberg/Cohen volume, which is discussed below.

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serting that they intentionally caused harm. Tonry offers no new or testable data. But before dismissing this assertion as ungrounded, readers should examine chapter 3 of *Malign Neglect,* "Race and the War on Drugs," and ask whether the masterful overview of data concerning drug use among different races coupled with description of the enforcement policies *and when they were put into effect* constitute, at least, the best empirical evidence of policymakers' harmful intent that we are likely to find in an inexact world.

Anthony Doob concurs in the indictment. In the Clarkson/Morgan edited work, *The Politics of Sentencing Reform,* he contributes a biting and amusing critique of the legislative and intellectual origins of the federal sentencing guidelines. The chapter is called "The United States Sentencing Commission Guidelines: If You Don't Know Where You Are Going, You Might Not Get There." Doob proves the opposite; despite significant disarray in leadership, impact evaluation, and guidelines amendment, the Commission knew exactly where it was going and got there. Where it was going was straight toward the goals of stark incapacitation and general deterrence through wholesale incarceration—all along using the principled rhetoric of "just deserts" to mask what it was really doing. This could have been predicted—and was—from a reform such as this, jointly sponsored by Senators Strom Thurmond and Ted Kennedy. In that unholy matrimony, Thurmond and his "let 'em rot"[10] supporters bamboozled the well-meaning liberals who had supported guidelines as a way to eliminate racial, ethnic, and gender disparities. That they did. Now *everybody* is in prison, regardless of race, color, or national origin, at least in the federal system.

If pressed, Doob himself would probably apologize to Yogi Berra (who contributed the slogan) and rename his article, "if you know where you are going, you'll get there despite resistance from people who don't agree you should be going there." "The issue is not whether the Sentencing Commission succeeded," Doob writes. "The issue is whether one agrees with what they were trying to do" (Clarkson/Morgan, p. 201). What they were trying to do, they said, was to create honesty, uniformity, and proportionality in sentencing. By "honesty," the Commission meant "abolish parole." By "uniformity," the Commission meant elimination of disparities among "different federal courts" but not necessarily among ethnically diverse defendants convicted of the same crime but receiving different sentences. By "proportionality," Doob says, the Commission "appears to have a meaning above and beyond the use that von Hirsch and others have given

[10] The phrase is from a 1994 editorial by John DiIulio in the *Wall Street Journal,* but the sentiment as a popular statement of incapacitative ideology has been ascendent for over a decade.

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it. In particular, it seems to be a rather indirect way of saying that offenders are not being punished enough" (p. 204).

The latter, of course, is a perversion of the "just deserts" proportionality formula. Retributive theory had been revived in the 1960s with Andrew von Hirsch's and David Fogel's reconstruction of Kant's notions into a fully elaborated sentencing structure: "just deserts." Beginning with the fundamental principle—derived from the Categorical Imperative—that we punish people only if they are blameworthy, a corresponding postulate would be that punishment will be calibrated by degrees of blameworthiness. Thus, because minor crimes deserve only minor punishments, desert *limits* the severity of punishment. But by appropriating terms that in previous political discourse had been associated with retributivism, the Commission made its stark utilitarian goals politically palatable—without actually embracing "just deserts." Doob presents a quick overview of the original battle among the commissioners over whether to base the guidelines on utilitarian or on desert principles. "If one were to focus seriously on the utilitarian goals of sentencing (deterrence, incapacitation, rehabilitation) one would have to determine how best to achieve them. Presumably also one would have to consider the various costs of achieving them" (p. 213). The Commission did not want to talk about how much incapacitative incarceration would cost, either in terms of prison cells or indirect effects on families and neighborhoods. But it could not honestly turn to "just deserts," because the principle of proportionality inherent in "commensurate desert" would strictly limit the severity of the sentencing scale. "An eye for an eye" restated is "an eye for an eye and no more. You can keep the rest of your body." Retributive punishment cannot exceed the severity of the crime.

Faced with this uncomfortable limitation, the Commission declined to base its sentencing law on any philosophy at all, deciding to use the average sentences as they stood at the time that the new law passed as the pragmatic norm that would set punishments under the new system. Based on its exhaustive study of sentences passed nationwide prior to 1986, the Commission ascertained the "going rates" and adjusted them for each crime as the commissioners together later would decide. Doob comments:

> In the end . . . the Commission probably was right: if what it really wanted to do is to put more people in prison for longer periods of time, and if departures from the Guidelines are to be discouraged at almost any cost, then principles and purposes are not worth worrying about. (P. 214)

Doob continues in a deft example of the results of this (non)thinking, lambasting the "relevant conduct" provision of the Guidelines:

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> It is important to realize that a person can plead guilty to one charge and find, lo and behold, that he is being sentenced for other things. Given that the test of the inclusion of all of these other things is the preponderance of evidence, it can easily be seen that obtaining convictions on all related counts becomes rather unimportant. Being sentenced for behaviour that was not part of the convicted offense may seem strange to those who have not fully resigned themselves to the new world of Federal sentencing. It is, however, true. (P. 217)

In *Sentencing Matters,* Tonry confirms the sentiment:

> [M]ore than once when describing the relevant conduct system to government officials and judges outside the United States, I have been accused of misreporting or exaggerating. People unfamiliar with the federal guidelines have difficulty accepting that any western legal system would require judges to take conduct into account at sentencing that was the subject of charges of which a defendant was acquitted. (Tonry, *Sentencing Matters,* pp. 93-94)

Federal courts here in the United States, however, have no such difficulty—the law requires it.[11]

Doob's chapter continues with many examples of dissembling on the part of the U.S. Sentencing Commission, including a mordant description of his own dealings with Commissioner Ilene Nagel over the question of whether the public actually is as punitive as the Commission said it was (p. 210). (This question was important at the time because the Commission had taken considerable heat for the severity of the guidelines. Intuitively grasping that this could not be justified under any philosophical rationale, some commissioners set out to justify it as politically responsive to a bloodthirsty public—who, Doob says, inconveniently were not all that bloodthirsty.) The main point of the chapter, however, is that the federal sentencing guidelines are justly excoriated because they are simply too harsh, and that is so because their purpose is really incapacitative and heavily deterrent. Thus, according to Doob's analysis, Tonry's criticism of sentencing for drug offenses is poorly aimed: Blame the "let 'em rot" crowd, not the desert bunch.

Scaling Sentencing Severity Down

The traditional answer to questions of sentencing disparity based on race, gender, or class was to control it by means of guidelines. But even if they did work to eliminate racial and class

[11] A recent case is *United States v. Behr,* 97 F. 3d 764 (1997), in which the 11th Circuit held that a defendant's uncharged criminal conduct could be considered as relevant and thus lengthen his guidelines sentence, even when the statute of limitations would have prevented the prosecutor from bringing charges for that conduct if it were to be proven in court. No argument about preventing violence is possible as a justification for this holding; the offender was a white-collar criminal convicted of fraud.

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disparity in sentences imposed in particular cases, this would not alleviate the kind of inequality that Tonry identifies in *Malign Neglect*,—inappropriately harsh sentences that apply equally to every convicted defendant when a disproportionately high number of defendants are from the underclass.

The question of disparity that sparked the 1970s sentencing reforms is much deeper than "sentencing like cases alike." It is the question of how it can be ethical to punish people for committing crimes that are acts that a much greater proportion of middle-class people would commit if they were in the social and economic circumstances that members of the underclass are. The high-minded yet impractical answer is to first achieve full social equality and then assess "just deserts in a just world." The political answer has been to ignore the disparity issue entirely—and even further to embrace approaches that might have a repressive impact—and the federal sentencing guidelines are only one example.

The books reviewed here remind us that it is time to bring the disparity question back to center stage in sentencing policy—or to acknowledge openly that it has always been there while the dance of sentencing policy has gone on as if it were nonexistent. But the conventional wisdom, tired as it is, still holds persuasive force: We know that inequality and racism exist, but until the Messiah comes and wipes them away, all we can do is deal with the case of each individual person under the rule of law. However, the conventional wisdom does not preclude changing the law so as to reduce significantly, across the board, the gratuitous harm that the current level of punishment exacts.[12] It does not preclude changing what judges are supposed to do in regard to the personal circumstances of individual offenders. These changes could be made as easily (or not so easily!) as the sentencing law reforms of the 1970s and 1980s were, but first there must be the political and cultural will to do so.

If culture and social forces are the bedrock determinants of punitiveness, then the volume and degree of punishment would be expected to vary among different cultures and nations. This is exactly what the various arguments and studies in these five books demonstrate. Given similar postindustrial conditions and similar teeming underclasses, developed nations would all be expected to have embarked on an American-style penal binge in the past two decades. Yet, as descriptions of Australian and Swedish sentencing reforms in the Clarkson/Morgan volume indicate, sometimes those nations even went in the opposite direction. Culture is at work here, where "culture" includes the fundamen-

[12] Or, if not across the board, punishment levels could be reduced for entire categories of crimes, such as drug-related crimes or all juvenile offenses or all nonviolent street crimes. At the very least, penalty reduction would include repeal of "three strikes" laws, as Tonry advocates in *Sentencing Matters*.

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tal question of how people regard each other as citizens of a shared nation or, at least, of a local community.

For instance, guidelines sentencing doesn't *have* to look like that of the United States's federal system. Many states' and nations' sentencing guidelines are models of rational reform, some based on desert principles and others based on a hybrid of desert and deterrence. Arie Frieburg, for instance, offers a chapter on sentencing reform in Australia's state of Victoria in the Clarkson/Morgan volume. In Victoria, the sentencing committee that wrote the law explicitly stated that it would be based on retributivism, with utilitarian concerns adjusting the punishments for individual cases:

> [J]ust deserts principles ought to set the maximum sentence . . . . however, [they] should be modified by giving the appropriate weight to the principles of parsimony, relevant aggravating and mitigating factors and the other aims of sentencing—rehabilitation, deterrence and denunciation. In no circumstances should a sentence be increased beyond that which is justified on just deserts principles in order that one or more of the secondary aims are met. (Clarkson/Morgan, p. 122)

Victoria's law set out a straightforward "sentencing hierarchy" of a 14-level scale of punishments and then matched to these punishments all crimes ranked from least to most serious. This may seem backwards. Isn't the punishment supposed to fit the crime, rather than the other way around? Not really, if one is considering the entire quantum of punishment that would be acceptable overall, and then parceling out pieces of it in each sentencing decision so that the total will add up to that acceptable level. Determining what is "acceptable" overall may be based on any consideration one thinks important—available prison beds, for example (as with Minnesota's sentencing guidelines in which top punishments are keyed to prison availability), or such nonempirical considerations as how much, as a moral matter, we should be willing to hurt others, even though they are guilty of having committed a crime and presumably deserve some degree of punishment. The Victoria reform seems to have been implicitly based on both considerations, concentrating on shortening prison terms for all but the most "serious sexual offenders" and "serious violent offenders" (a subsequent amendment to the original act) and using more "intensive corrections orders" which allow short sentences of imprisonment to be served nonincarceratively through community service and participation in treatment programs. At each particular level of punishment severity, the act provides that a court cannot impose a sentence "more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed" (Frieberg in Clarkson/Morgan, p. 69, quoting sec. 7(3) of Sentencing Act 1991 [Victoria]). An adjustment downward would be mandatory if the reason for

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the sentence exceeds what a desert-based punishment system requires.

The impact of this law demonstrates that sentencing based on retributivism does not inevitably produce the kind of harshness that Tonry in *Sentencing Matters* claims it does (pp. 13–24). Frieberg reports that in Australia, after the act took effect in the state of Victoria, "the average aggregate prison term for all prison receptions dropped from 14.7 months . . . to 10.8 months." Furthermore, "real diversion occurred, with the non-custodial options displacing the custodial option for a range of offenders." Yet "the average estimated time in custody for all offences remained about the same." This apparently anomalous result is explained by studying which punishment ranges increased or decreased in volume of prisoners. "[S]entences of between 5 to 10 years have decreased from 11.7 to 6.8 percent of all sentences, [while] small increases can be noted for the 2-3 year category and the 1-2 year category" (Frieberg in Clarkson/Morgan, pp. 86, 90, 91). In other words, fewer people went to prison, but of those who did, punishment severity for the less serious felonies increased while that for serious felonies (with the exception of the very most serious) decreased. The net result was a wash in terms of imprisonment space but a significant improvement in terms of proportionality.

The Victoria example is offered here not as an illustration of how severe sentences should or should not be but simply as proof that the inevitable result of desert-based guidelines need not be harsh punishments. The issue of sentencing severity must be separated from the question of whether guidelines work. The real question is: Work for what? In American states such as Minnesota and Oregon, Andrew von Hirsch asserts in his chapter in Clarkson/Morgan, "a greater emphasis on desert helps *restrain* use of imprisonment" (p. 164; my emphasis). Important judgments about where to set the "in/out prison/no prison" line on guidelines grids (i.e., what is the least serious crime for which we will imprison?), how much emphasis to give to prior criminal record, and what circumstances will be recognized as mitigating or aggravating can all be made under a desert rubric, and none of them intrinsically demand severity. (Tonry disagrees vehemently, claiming that "the psychology of two-dimensional grids . . . reifies thinking about punishment into a calculus that takes account only of criminality" (Tonry, *Sentencing Matters,* p. 20). He later admits, though, that a grid that can be affected by "three-dimensional defendant" characteristics would satisfy his objections.) The problem, von Hirsch concludes, is that standing up and saying that the majority of offenders do not deserve incarceration requires "considerable political courage" (von Hirsch in Clark-

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son/Morgan, p. 167)[13]—particularly in the punishment-crazed United States.

So much for scaling back the level of punishment generally.[14] Another way to address the problem of punishing entire classes of offenders more severely than either utility or desert would require—thus causing "gratuitous harm," as Clear calls it (p. 14)—is to modify the items judges may consider in their individual sentencing decisions. In the second half of *Malign Neglect,* Tonry moves to the question of "how much punishment" is justified, taking into account the unequal social conditions and politically tendentious policies he has critiqued in the first half. Appropriately beginning his discussion of mitigation with the statement that the law cannot allow poverty as a defense or excuse for criminal behavior—"to deny that human beings are responsible for their voluntary acts is tantamount to denying they are human beings"—Tonry nevertheless says that the actual charge of conviction should be lower if the offender is poor. "Mitigations involve circumstances . . . in which the defendant's actions seem less culpable than do similar actions by others who are not so afflicted. . . . Mitigating defenses result in conviction of a lesser charge, often a form of manslaughter rather than murder" (p. 125).

Mitigating *defenses?* Suggesting that poverty is an affirmative defense to criminal charges, even if it would go only so far as to lower the severity level of the conviction, raises so many legal, practical, and philosophical objections that it would take the rest of this essay even to outline them. But Tonry immediately abandons that line of inquiry, suggesting on the next page that judges must introduce mitigation in the *sentencing* phase of criminal prosecution, not the guilt phase: "allow[ing] judges informally to mitigate the *punishments*" (my emphasis). This itself is controversial enough; Tonry says it would require us to repeal all mandatory and habitual offender laws such as "three strikes and you're out" legislation and would "permit judges to lower sentences in particular cases to take account of the offender's circumstances" (*Malign Neglect,* p. 126). He also says it "requires rejection of 'just deserts' as an overriding rationale for sentencing" (p. 127).

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[13] Also, in a chapter in Blomberg/Cohen, von Hirsch explores "The Future of the Proportionate Sentence" and says that "trying to blame such initiatives [as 'three strikes and you're out laws' or mandatory minima] on this or that penological theory makes little sense, as law-and-order rhetoricians need no penal theory in order to advocate harsher responses . . . [and] indeed impede efforts to scale penalties proportionately to the seriousness of crimes" (pp. 132–33).

[14] Von Hirsch calls this "cardinal proportionality." If the punishment must fit the crime, the lowest sentences attached to the least serious crimes must "anchor" an ordinal scale of punishment from least to most severe, so the lowest point on the scale must be very minimal if the entire scale is not to get blown out of proportion to the seriousness of the crimes (von Hirsch 1995).

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No doubt he is correct that mitigation of punishment because of social adversity would eliminate mandatory sentencing laws; poverty, after all, is a variable that actually predicts crime and thus could be an *aggravating* factor in a sentencing scheme based on incapacitation. But it is not at all clear that mitigation is impossible under the retributive rubric of "just deserts" philosophies. Tonry says that judges already strive to give reduced sentences "because of special circumstances in the actors' lives that make them seem less blameworthy than others" (p. 126). (This extends the old socialist adage "from him to whom more is given, more is expected," to read "from him to whom less is given, less is expected.") Yet blameworthiness is the pivotal point on which desert-based thinking turns, and no true desert theorist would say that sentences should be severe under conditions in which an offender's blameworthiness is low. Surely the idea of mitigating the most harsh punishments for criminals convicted of crimes of middle- and lower-level seriousness should be perfectly acceptable both to utilitarian and deontological policymakers.

One suspects that Tonry's debate is not with desert per se—the "three strikes" sentencing that he attacks so vigorously, after all, springs from an incapacitative rather than a desert rationale—but rather his dispute is with retributionists who have embraced the punitive aspects of desert theory without remembering its limiting principle of proportionality. Even more, Tonry's battle is with crime-control ideologues who slyly claim "just deserts" as their own, thus pleasing a punitive public, even though desert theory is logically incompatible with their real goals: utilitarian incapacitation and deterrence.

But Is Mitigation Possible?

This brings us back to questions about the ideology that reform supposedly serves. American readers will find a breath of fresh air in the Clarkson/Morgan book, because the rabid and irrational politics over crime control evident in the United States are not a background factor in most of the sentencing reforms discussed there. Nils Jareborg, in writing in that book about Sweden's innovations, blithely uses the term "repression" as contrasted with desert, in the term's precise meaning of "controlling" crime through general deterrence (Clarkson/Morgan, p. 122). This is not the meaning that springs to mind to the American reader, nor one that emerges from theorists who approach the issue from a social control perspective. These observers of a "new penology" argue that postindustrial societies are inevitably moving toward sentencing and punishment policies designed to control entire populations irrespective of considerations of justice. The aim is to manage prisoners efficiently, not to give them

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what they may or may not deserve either individually or as a group. This is not a new idea to American (Feeley & Simon 1992) or European (Foucault 1977:293-308) readers, but whether punishment is actually taking this turn is quite debatable as an empirical matter. The ideology and practice of any purported "new penology" are evident only in the messy real world, in which many competing concepts and programs move forward simultaneously and thus present a variety of possible directions that punishment policies could take.

Anthony Bottoms offers a masterful overview of these trends in his Clarkson/Morgan chapter, "The Philosophy and Politics of Punishment and Sentencing." He begins by noting that the same dilemmas of punishment confront all nations but that the responses differ significantly "influenced by the particular cultural and political context of the nation." Observing these varied contexts, he distills the "main movements of thought that seemed to underpin much of modern sentencing change," of which he isolates four: (1) just deserts/human rights, (2) managerialism, (3) "the community," and (4) populist punitiveness. The first three have deep philosophical roots and are based on fundamentally contrasting views of personhood. Thus Bottoms links just deserts and its deontological view of the offender as a free moral agent deserving of fair treatment with a human rights perspective; he extends this historically in noting that the concepts flow from "the liberal individualism of the eighteenth-century Enlightenment." But, he says:

> The puzzling question is why this liberal individualism, which has after all been available as an intellectual resource for a long time, should have become substantially more prominent in the sentencing theory and practice, and the prison law, of the period from the mid-1960s onwards. (P. 23)

The answer, I think, is that it hasn't. Surely in the early 1970s the desert model was wholeheartedly embraced both for its Enlightenment appeal and for its promise to reduce the pathologies of indeterminate sentencing, but the "onwards" part of Bottoms's statement leads us straight to the second of his paradigms: managerialism. By the 1990s, many if not most sentencing reformers who had claimed to be desert advocates had either emerged in their true utilitarian colors or had metamorphosed into well-intended super-managers. However, Bottoms situates the development of managerialism—and, in fact, of all the trends he describes—in "the relative decline of class as a social differentiator; hence when, as early in this century, class position was of overwhelming importance in terms of social identity, the formal Enlightenment concept of rights was of substantially less significance in the penal context" (p. 46). In other words, when class provided your identity, you didn't have (or need?) rights—

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but when the significance of class declines, you must rely on individual rights to hold your own among your many peers.

This may be a solid statement of the impact of Enlightenment liberalism and how its concern with equal rights would translate into a desert rationale requiring equal punishments for identical crimes. But surely Bottoms is far off the mark in describing the current situation regarding the significance of class and how punishment policies track it. In the safe and sanitary world of the intelligentsia and the global information economy, it is easy to believe that social and economic class differences are shrinking. (Everybody uses the computer. This work is available and comprehensible to all. Even the low-level jobs that service these clean industries are safe and obtainable. Etc.) But the gritty reality of the American underclass and, one suspects, the dislocated or permanently unemployed groups of any of the developed nations, belie these pleasant impressions. The postindustrial world apparently has as permanent and disorderly an underclass as the old industrial capitalists' "surplus value" world did.

This is why penological policies are so important: They bring us face to face with the fact that the poor are always with us, a fact that Jesus pointed out over two millennia ago and a situation that apparently changes only in its intensity but not in its actuality. No observer needs to be reminded that the volume of crime and therefore the amount of punishment have, throughout history, been concentrated more heavily on the low end of the social scale. Bottoms is surely right in his insight that the waxing and waning of penological thought is linked to shifts in the depth of class divisions and changes in class configurations, but he is inaccurate in claiming that these differentiations are shrinking. Instead, they are asserting themselves in new technological and cultural forms. A majority of American workers are involved in service jobs with widely divergent pay scales, so that the wages of low-skilled workers have fallen sharply relative to those of the more skilled, and job security and benefits even for the moderately skilled are considerably less than they were only a decade ago.[15] In addition, immigrants and blacks make up a great percentage of the working poor and unemployed, a situation which shows no indication of changing soon. So the central issue for contemporary philosophies of punishment, it seems, must be: How do we regard the omnipresent underclass and what penology emerges from that regard?

Here we return to Bottoms's other three "movements of thought" in penology: managerialism, "the community," and popular punitiveness. Does a nation regard its poor as members of the body politic and citizens who share common cultural refer-

[15] For a succinct overview of the trends, see Cassidy 1995.

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ents, or are they "the other"? If they are members of the community, desert-based punishment will be aimed at causing offenders pain (which they deserve because they are citizens who made bad choices) and then accepting them back into the communal fold. Sentencing would thus involve no more pain than humanely acceptable to any member of the community, and it would emphasize options that reintegrate or never even remove the offender from the community at all. On the other hand, if the poor are regarded as "others," people (or subpeople) who are not and never will be part of the moral or political community, then there is nothing to do but simply control them. Ergo, penal managerialism.

The assertion that penal policy begins with people's conception of their moral community, from a consensus about who is a member of that community and who is not and from decisions about expelling those previously thought to be members, is an idea that has been in circulation for some time. However, in describing policy shifts one does not necessarily need to explore the sociological functions of this process.[16] The practical policy outcome of expelling from civic society greater and greater numbers of people labeled "criminal" is that the penal apparatus will have a bigger and bigger job to do. The logical response is to do it efficiently with as little attention to an offender's personal needs or characteristics as possible. Yet this depersonalization is a perfect symbol of the reason so many people would be sent to prison in the first instance: They are not "people"; they are criminals, and because so many of them come from the underclass, any member of the underclass is suspect. The willingness to see them as subhuman springs from a virulent strain of popular punitiveness, the roots of which may be found in popular culture and political opportunism. Ergo, penal managerialism.

Three of the chapters in these books address these issues, and Clear's work explores the real harm these penal policies can have on the communities from which the offenders come. All agree that managerialism is becoming the dominant mode of penal operations, but none go so far as to draw the causal connections between "community," "punitiveness," and "managerialism"

[16] Simply note that Durkheim's theory of mechanical solidarity held that the collective conscience was strengthened when the group defined some people as "the other," and thus outsiders. By defining and reviling the outsider, we reinforce the social solidarity of those deemed to be members of the moral community. It seems logical that the moral beliefs and communal bonds between members of the community would also become stronger. In the modern example of penal policies, half of this equation seems to hold. Criminals are reviled and rejected from the moral community. Perhaps this reinforces the values of "law-abiding folk." But contemporary societies in the developed world nevertheless seem fragmented and contentious, and thus the idea that the common bonds among citizens are strengthened when criminals are expelled and locked away appears tenuous.

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as in the previous paragraph.[17] But I think they should, and if pressed I think they would.

Bottoms and Simon and Feeley converge in observing these common themes as they consider how the public and justice professionals "frame" the crime issue and the meaning they draw from their "discourses." Simon and Feeley say:

> The discourses of modern punishment have varied widely over time, from the language of religion and economics to psychology and social work, and more recently sociology. Despite significant differences among them, each of these discourses portrays crime primarily as a relationship between individuals and their communities. In contrast . . . the language of the new penology is . . . systems analysis and operations research. It conceives of crime as a systemic phenomenon and crime policy as a problem of actuarial risk management. (Pp. 147-48)

Bottoms (in Clarkson/Morgan) also cites managerialism as a driving force in penal operations, but for him there are various stripes of it: systemic, consumerist, and actuarial. Systemic "good government" efficiency is the stripe easily identified in the correctional systems of any industrialized nation. Systemic managerialism emphasizes cooperation among the various criminal justice agencies, planning, "key performance indicators," and information monitoring and feedback. The result is that offenders are moved through the system of punishment much as goods move down an assembly line.[18] The motivating idea may be to operate the system fairly and efficiently, but, as noted in the introduction to this essay, this can promote an ethic of nonresponsibility for what is fundamentally, as Clear emphasizes, the intentional infliction of pain. Bottoms echoes others in describing this cultural shift and its effect. Citing his own experience as "a coopted member of a local Probation Committee," Bottoms recounts the moment when a social worker member asked "whether probation officers in this county still see clients?" He says:

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[17] Simon and Feeley's main point in their Blomberg/Cohen chapter is that "the New Penology" has not "resonated" in the public mind and thus is not part of the public discourse about crime and punishment (Jonathan Simon & Malcolm M. Feeley, "True Crime: The New Penology and Public Discourse on Crime," in Blomberg/Cohen). Perhaps actuarial management is not on every tongue, but sending criminals away to "rot" surely is. Simon and Feeley say that although the public has not embraced such New Penology concepts as predicting career criminals, managing the underclass, or controlling drug offenders, public discourse about crime has become "defensive and exclusive," with political appeals to emotionalism "centered on fear" (pp. 168–69). I contend that the popular fear and punitiveness has *produced* the New Penology, and thus the public has passively participated quite fully. Simon and Feeley cite Garland's work (1990) so as to refrain from making these links: "Garland points out that once we acknowledge that penalty is both a product of culture and a determinant of it we must abandon any mechanical accounts of causation" (citing Garland 1990:294).

[18] Or perhaps like garbage collected, processed, and dumped. Feeley and Simon (1992:470) say that their New Penology managerialism may be applied to an underclass "that cannot be disaggregated and transformed but only maintained—a kind of waste management function."

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> The aggregational features of systemic managerialism were incompatible with the very individualized, person-centered approach of her social work training, and indeed of the probation service in an earlier era. If was, in effect, a clash of philosophies and of ontologies. (P. 29)

Bottoms nicely dissects the various strains of managerialism that he has observed, but these may be distinctions without a difference, if actuarial management becomes dominant. Simon and Feeley's actuarialism encompasses all the various strands of thought that Bottoms has isolated and compels us to face their ramifications: better surveillance, more control, and perhaps, then, more or simply more *efficient* repression of the underclass.

"Community" is a term thrown about so much in American criminal justice[19] that it has become meaningless—or perhaps there are so many meanings of it that the hearer never knows which is proffered. But the least common denominator is that there exists a group of people with common beliefs and common goals, membership in which constitutes citizenship. Bottoms has cited "community" as one of the primary notions driving punishment policies, but the examples of "community" sentencing that he cites are primarily European. They have to do with keeping felons *out* of jail and in their jobs and families, a notion that Americans simply will not tolerate at present. (See also the David Matza and Patricia Morgan chapter in Cohen/Blomberg, interpreting the American history of prohibiting drug use.) The implication would be that Europeans regard their "criminal classes" as more integrated into the body politic than Americans do.

In his excellent chapter entitled "Penal Modernism and Postmodernism" in Blomberg/Cohen, David Garland makes the salient observation that such observed variation on punishment among the nations indicates that penal policies cannot be described as postmodern, when one of the primary indicators of postmodern structure is globalization. There is scant uniformity in punishment, even if there are common problems of crime, drug use, and unemployment. Even actuarial management, which seems to be a common thread because a majority of the nations use sentencing guidelines of some sort and efficient techniques in managing prison, parole, and probation populations, Garland regards as simply a neutral tool that can be applied to any goal of punishment demanded by cultural imperative. Thus, he says, "a new apparatus of investigation, assessment, recordkeeping, classification, and prediction . . . was initially justified in the name of rehabilitation and welfarism"—which is associated

[19] "Community policing," for instance, is the most deeply entrenched term. "Community" might mean a nostalgic evocation of neighborhood-based justice, or it might mean "addressing community fears of disorder" by "establishing managerial control over disorderly populations . . . [and] public acceptance of this form of controlling the underclass" (Simon & Feeley in Blomberg/Cohen, p. 166).

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with penal modernism, not postmodernism—but "is, and always has been, an apparatus capable of supporting [other] strategies" (p. 188). (This is much like my earlier point that critics of guidelines sentencing who claim that guidelines produce overly harsh sentences are basing their observations on the sad example of the U.S. federal system, not the way guidelines have been used in other jurisdictions.)

Garland convincingly argues that "the age of penal modernism is not yet over" and that "the leading alternative to penal modernism is actually an Enlightenment liberalism, which is also committed to making punishment useful, but is unwilling to abandon individual rights or the rule of law in pursuit of utilitarian goals" (pp. 202–3). If different nations still act out their culturally based precepts about who should be punished—and how much—in different ways, it may be because they regard criminals themselves differently. If the Enlightenment view of the individual as a rational being who is the carrier of human rights still is tenable, then punishment will be scientifically applied to an individual who commits a crime, but this will not entail a loss of personhood or citizenship. Similarly, the modernist assumption that institutions of social control such as the state and its laws "normalize" the public's conflicting visions of criminality and what to do about it (p. 202) leaves room for the possibility that the laws differ, as will the norms.

Conclusion

What does this all say for sentencing, which is the policy manifestation of cultural imperatives regarding citizenship and punishment? It says, first, that observers of the contemporary American scene can explore its extraordinary punitiveness in connection with a rejection of Enlightenment ideals about human rights. If people are willing to dismiss underclass citizens as criminals and thus not really part of the moral community, there would be few compunctions against locking as many of them away for as long as possible. The observation that they are sent away for committing crimes that other nations regard as fairly nonserious only demonstrates the American willingness to embrace incapacitation, not desert, as the true penal objective. (Incidentally, a major historic parallel is the use of penal colonies of Australia and certain areas in America as dumping grounds for Britain's property offenders in the 1700s.)

Changing this direction might seem impossible. But if, as seems likely for the foreseeable future, Jesus' observation that "the poor are always with us" is correct, we will have to make do by fashioning sentencing structures that simultaneously take account of social inequality, true psychological pathologies of some individuals, and culpability of members of a common moral com-

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munity. At the most, this would require us to admit that members of the underclass must be regarded as citizens worthy of staying in the common community. Sentencing would begin to concentrate on reintegrative strategies instead of exclusionary ones. Though there may be glimmers of this approach in the United States, at least for misdemeanants and juveniles delinquents, it runs smack into the prevailing punitive attitude that simply will not yet allow felons to stay in the community. Until that attitude changes, sentencing won't either.

What these five volumes can recommend at the very least is that lawmakers not require prison terms that produce nothing but an excess of pain to offenders. There comes a point at which imprisonment simply cannot be continued either from a desert or utility perspective. Following the physician's admonition to nonmaleficence, the common advice to sentencing decisionmakers is: The underclass—don't kick 'em while they're down.

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