

Sentencing Guidelines, Disadvantaged Offenders, and Racial Disparities

At every stage of the criminal justice system in the United States, from arrest through incarceration, blacks are present in numbers greatly out of proportion to their presence in the general population. On any given day, a black American is nearly seven times likelier than a white American to be in jail or prison.

Many people interpret these disparities as proof of racial bias and enmity on the part of criminal justice officials. This response is understandable; virtually no one argues that bias is absent from the system, that no police, prosecutors, or judges are bigots, or that no local courts and bureaucracies are discriminatory. Yet the overwhelming weight of the evidence suggests that long-term racial disproportions result largely from racial differences in patterns of offending and that bias is a relatively small, though immensely important, part of the problem. This evidence comes from studies of racial discrimination by police in making arrests, empirical analysis of sentencing practices, and data concerning crime victims' identifications of the race of their assailants.

Yet the crime control policies of the recent past, and not racial differences in rates of criminality, are the principal reason why racial disparities in the criminal justice system have steadily *worsened* since 1980. American politicians have adopted policies that have had disparate impact on blacks and whites, to blacks' collective disadvantage. The most serious example is the War on Drugs, which spurred the arrest, prosecution, conviction, and imprisonment of blacks at rates grossly out of proportion to their numbers in the general population or among drug traffickers and users. Officials in the Reagan and Bush administrations pressed vigorously for the implementation of such policies, even though it was foreseeable that they would exacerbate long-standing racial imbalances.

Other recent initiatives were largely intended to reduce racial disparities. Of these, the most important were changes in sentencing policies and laws, both at the state and federal levels. However, these initiatives have had perverse and unanticipated effects. Minimum and mandatory penalties instituted over the

past twenty years often conflict with our intuitions concerning just punishment. They have not reduced rates of serious crime. And whatever the intentions of their proponents, they too have contributed to the worsening of racial disproportions in American jails and prisons. My purpose here is to consider how these effects came about, and to explore the principles at stake in the struggle over sentencing reform.

Demands for Change

During the 1970s, both liberal and conservative critics demanded a radical overhaul of American sentencing policies. Their common target was the prevailing system of indeterminate sentencing. Under this system, judges and parole authorities were given broad discretionary powers to tailor penalties to individual offenders' rehabilitative needs and the requirements of public safety. Liberal reformers, believing that racial discrimination was endemic to every criminal justice stage from arrest to parole release, argued that only strict controls on the discretion of officials would reduce disparities in the treatment of white and black offenders. Conservative reformers, complaining that indeterminate sentencing allowed judges and parole boards to coddle criminals, supported laws that would make punishment more harsh and certain. By this means, they hoped to increase the deterrent and incapacitative effects of criminal sanctions.

Thus, with odd-couple supporters from both sides of the political spectrum, many states reformed their sentencing policies. Parole release was abolished in some jurisdictions, thereby eliminating entirely the risk of discrimination in those decisions. Some, and eventually all, states adopted mandatory sentencing laws that required judges to impose prison sentences of determinate lengths for certain offenses. A few, and eventually many, states established presumptive standards to guide judges' sentencing decisions. The federal government did it all, abolishing parole release, enacting many mandatory penalties, and creating a system of sentencing guidelines.

It is now clear, however, that the new sentencing policies have not achieved the goals of either group of reformers. Liberals, who underestimated the susceptibility of sentencing commissions to "law and order" appeals, have been dismayed to see penalties become substantially harsher, and racial disparities substantially worsen, over the past two decades. And conservatives, who predicted that longer sentences would make society safer, have overseen a tripling of the prison and jail population in the United States — from 500,000 in 1980 to 1.4 million in 1993 — without the decline in rates of serious crime that was supposed to follow. "What effect has increasing the prison population had on levels of violent crime?" asked a 1993 National Academy of Sciences report commissioned and paid for by the Reagan and Bush administrations. The answer: "Apparently, very little."

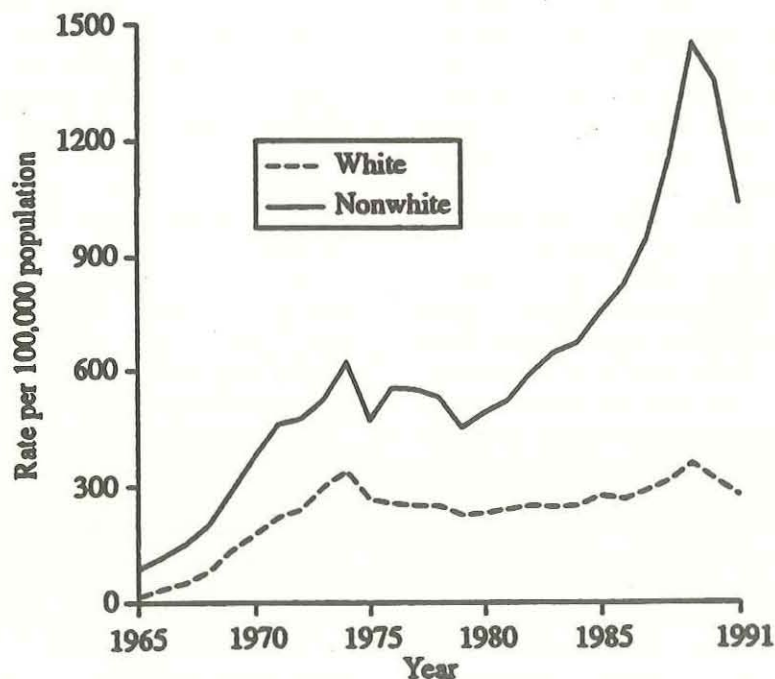
Two Contending Principles

Part of the inspiration for sentencing reform came from contemporary writers on philosophies of punishment, many of whom belong to the modern tradition of retributivist thought. The hallmarks of a just pun-

ishment system, these writers have argued, are equality and proportionality: equality in the sense that like cases are treated alike, and proportionality in the sense that culpable wrongdoers are punished in strict proportion to the seriousness of their crimes. Some sentencing reformers, relying on a somewhat narrow version of retributivist theory, believe that in a system of punishments that is truly proportionate, all offenders with criminal history X who commit offense Y should receive the same sentence; and that is the end of the matter.

The polar view, indebted to the utilitarian tradition, holds that the considerations relevant to punishment have mainly to do not with the offender's moral culpability, but rather with the consequences of alternative decisions. The responsibility of the state is to find the most efficient and economical way of minimizing whatever threat to public safety the offender poses. Some utilitarians might impose severe punishment if this could be shown to conduce to a larger good. But insofar as punishment involves the infliction of suffering, utilitarianism favors a principle of parsimony: a requirement to do the least harm in every instance,

Arrest Rates for Drug Offenses,
by Race, 1965-91



Source: Alfred Blumstein, "Making Rationality Relevant: American Society of Criminology 1992 Presidential Address." *Criminology*, vol. 31, no. 1, 1993. Reprinted with permission of the author.

and therefore to impose the least severe punishment that meets other social purposes.

Twenty or fifty years ago, when most writing on criminal justice was utilitarian (or, as we would now say, consequentialist), most people believed that rehabilitation was a primary objective of punishment, and they accepted the principle of parsimony in sentencing. Thus, the American Law Institute's *Model Penal Code* (1962) favored use of the least restrictive alternative among sentencing choices, while creating presumptions in favor of probation over imprisonment and in favor of releasing prisoners on parole when they first became eligible.

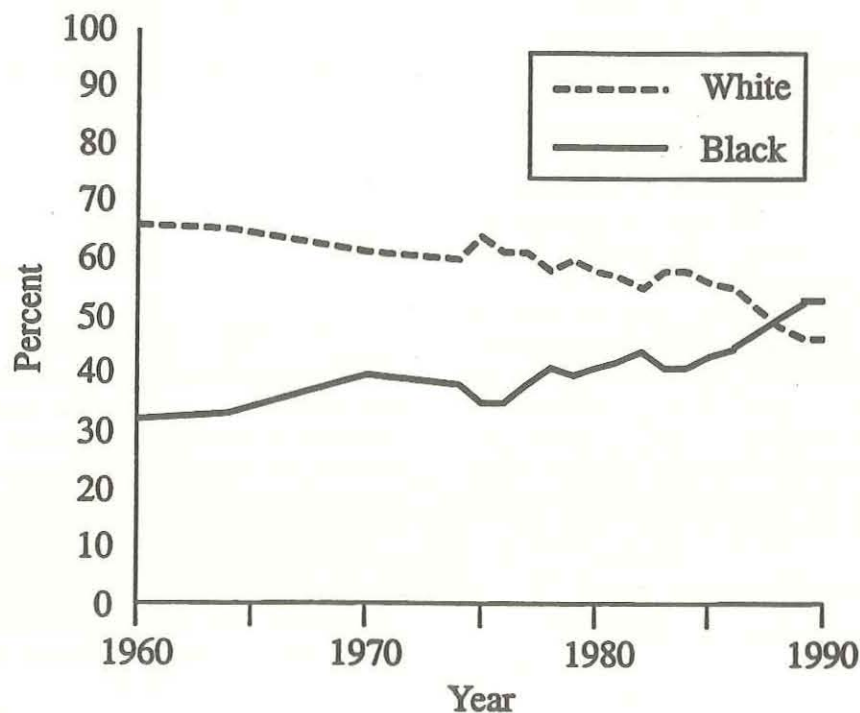
When American jurisdictions began to develop sentencing guidelines, proportionality largely won out over parsimony. Guidelines derive in part from a concern to alleviate sentencing disparities; once sentences are scaled for severity, some proportionality among offenses inexorably follows. If some sentences prescribed under the guidelines are harsher than judges believe appropriate, the harshness is said to be justifiable because the punishment is no more or less severe than that suffered by other, like-situated offenders.

The Illusion of "Like-Situated Offenders"

There are, however, a number of problems with this justification. First of all, it assumes that offenders can conveniently and justly be placed into a manageable number of categories and that standard punishments can be prescribed for each category. In fact, neither offenders nor punishments come in standard forms, and the practice of dividing them into generic categories produces much unnecessary suffering and provides only the illusion of proportionality. A look at Minnesota, the first jurisdiction to formulate sentencing guidelines, shows why.

Minnesota's original guidelines were expressly premised on the view that crimes, not criminals, should be punished and that basing punishments only on crimes and criminal histories would ensure equality in sentencing. (The most influential modern statement of this "just deserts" theory appeared in Andrew von Hirsch's 1976 book *Doing Justice*.) The Minnesota Sentencing Guidelines Commission constructed a grid in which offenses were divided into ten categories on the vertical axis, and criminal history into seven categories on the horizontal axis. An offender's presump-

Admissions to Federal and State Prisons,
by Race, 1960-90



Note: Hispanics are included in black and white populations.
Source: Bureau of Justice Statistics data reported by Darrell K. Gilliard, Patrick A. Langan, and Craig Perkins. Reprinted from *Malign Neglect*, by permission of Oxford University Press, 1995.

tive sentence was determined by consulting the block at which the row containing the conviction offense met the column containing criminal history.

*By establishing new sentencing systems,
the Minnesota commission hoped to
ensure that all comparable offenders received
the same punishment.*

Yet most people's intuitions about just punishment would lead them to consider more distinctions among offenders than can be found by consulting the two axes on the sentencing grid. Imagine an offender charged with theft who grew up in a single-parent, welfare-supported household, who has several siblings in prison, and who was formerly drug dependent, but who has been living in a common-law marriage for five years, has two children whom he supports, and has worked steadily for three years at a service station — first as an attendant, then as assistant mechanic, and now as a mechanic. According to the Minnesota commission's policies, none of these personal characteristics was supposed to influence the sentencing decision, and certainly not to justify imposing a noncustodial sentence on a presumed prison-bound offender. Under a system of indeterminate sentencing, by contrast, a judge could have taken such characteristics into account in pronouncing sentence.

Nor did Minnesota attach any significance to the collateral effects of a penalty on the offender or on the offender's family or children, even though such effects vary widely among "like-situated offenders." Incarceration for a drug crime for a woman raising children by herself may result in the breakup of her family and the placement of her children in foster homes or with relatives who will not be responsible care providers. Incarceration of an employed father and husband may mean loss of the family's home and car, perhaps the collapse of the marriage, perhaps the creation of welfare dependency on the part of the wife and children. Here again, the decision to ignore such factors runs counter to most people's intuitive sense of what just punishment demands.

Race and Class Disparities

When the Minnesota commission decided that considerations such as "employment, education, living arrangements, and marital status" should not be used as reasons for departing from its presumptive guidelines, one of its goals was to reduce racial and class disparities in sentencing. By establishing new sentencing systems based only on the offender's current and past criminality, the commission hoped to keep judges

from imposing less severe sentences on white, middle-class offenders and to ensure that all comparable offenders received the same punishment.

At a time when indeterminate sentencing systems accorded immense and unreviewable discretion to judges and parole boards, when many of the great legal victories of the civil rights movement were less than a decade old, and when overt racial hostility was widespread, concern about bias and the wish to narrow its ambit were understandable. Under indeterminate sentencing, judges often had the discretion to impose any sentence ranging from probation to a ten- or twenty-year prison term; if the normal sentence for a particular offense was two to four years, a "worthy" defendant might receive a sentence of probation, and an "unworthy" one might receive ten years. Moreover, no American jurisdiction then had a meaningful system of appellate sentence review (few do now); thus, if a racially biased judge sentenced members of minority groups to harsher terms, a defendant who received an aggravated sentence had no recourse.

One clear success of sentencing guidelines has been a lower incidence of aberrantly harsh sentences: "upward departures" from the guidelines are low in every jurisdiction for which data have been published. For a variety of reasons, including the legal presumption in favor of guidelines sentences, the one-way pressure of plea bargaining towards sentence reductions, and the availability of sentence appeals for departures, judges rarely impose sentences harsher than the applicable guidelines direct.

*One clear success of sentencing guidelines
has been a lower incidence of
aberrantly harsh sentences.*

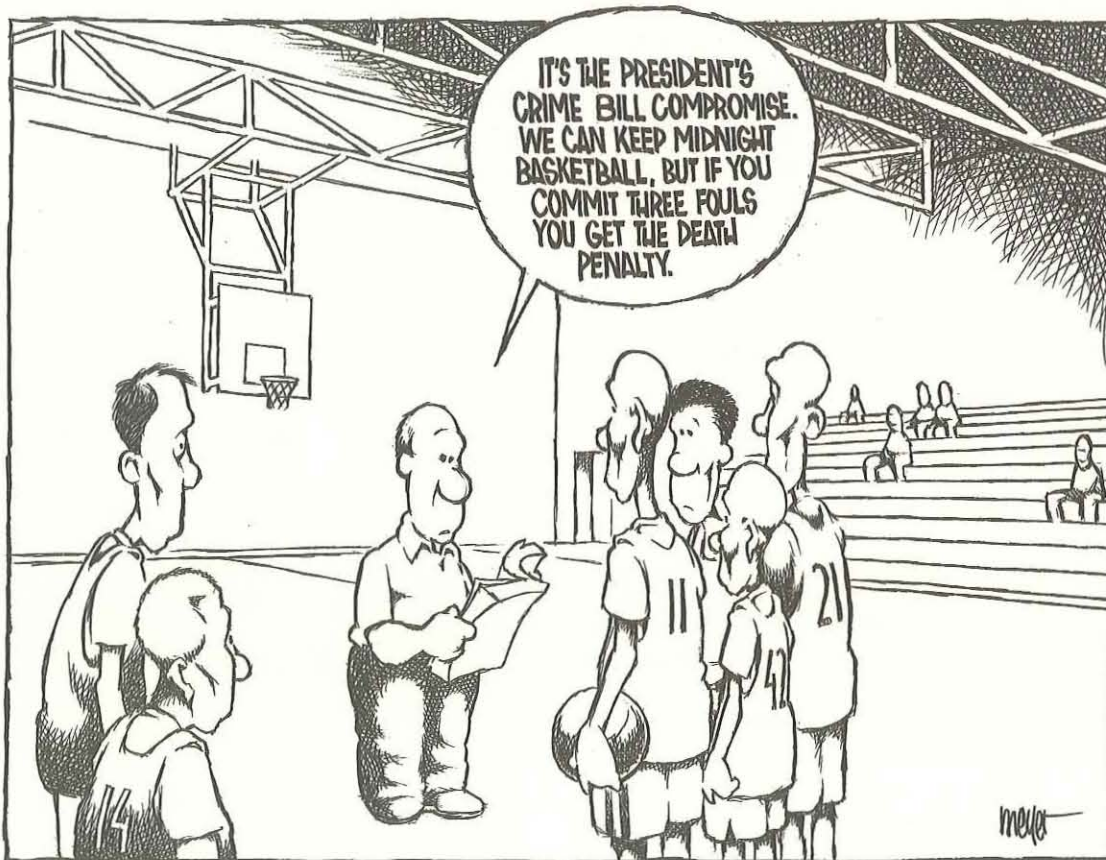
However, even as presumptive maximum standards provided a way to prevent invidious aggravation of penalties, presumptive minimum standards typically forbade the mitigation of penalties, with effects that many reformers did not intend. The goal may have been to ensure that middle-class defendants did not receive more favorable treatment than poor defendants. But in fact, there are very few middle-class defendants in most felony courts; the offenders who might benefit from mitigating consideration of personal circumstances are mostly disadvantaged people who to some degree have overcome the odds against their achieving a stable, law-abiding life. Unfortunately, it is these offenders, not the chimerical middle-class defendants, who are now denied the possibility of a mitigated sentence.

When Congress approved the Sentencing Reform Act of 1984, principles intended to promote "class neutrality" were enshrined in federal law. The Act noted "the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." Since then, the U.S. Sentencing Commission has gone to extreme lengths to ensure the application of policies that make an offender's personal circumstances irrelevant to sentencing. Whenever courts have attempted on humanitarian grounds to take into account individual defendants' special circumstances and appellate courts have upheld the trial courts' decisions, the Commission has revised its rules to eliminate the use of that rationale for future departures from the guidelines. Such actions on the part of an administrative agency are unusual; ordinarily, agencies do not have the authority to overrule judicial interpretations of their enabling legislation or of the rules they have issued. In *Braxton v. U.S.* (1991), however, the Supreme Court gave the Sentencing Commission this authority.

Thus, after the Eighth Circuit Court of Appeals in *U.S. v. Big Crow* (1990) approved a sentence reduction for a Native American who had overcome severe childhood adversities and had an exemplary work record, the Commission amended its policy statements to forbid reductions for "employment-related contributions and similar prior good works." When the Ninth Circuit in *U.S. v. Lopez* (1991) approved a reduction on the grounds of a defendant's lack of guidance as a youth, the Commission amended its policy statements to forbid reductions "for lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing." Such cases confirm that the burden of the Commission's efforts to root out consideration of offenders' personal circumstances has been borne not by middle-class offenders, but by disadvantaged ones.

The Case against More Incarceration

For conservatives who favored harsher and more certain penalties, the denial of mitigated sentences to disadvantaged offenders, many of whom are black,



Tom Meyer/Reprinted with permission of
The San Francisco Chronicle

may seem entirely defensible. William Barr, attorney general in the latter part of the Bush administration, suggested as much in a 1992 policy tract entitled "The Case for More Incarceration," where he remarked (in no doubt ill-chosen words), "The benefits of increased incarceration would be enjoyed disproportionately by black Americans." Fleshed out, his argument was that since blacks are disproportionately represented among crime victims, they would benefit overall if the criminal justice system imposed longer sentences on offenders and increased the prison population. If this argument is right, then policies restoring the mitigating power of judges would put law-abiding members of the black community at risk.

There is, however, no credible basis for believing that allowing judges to mitigate sentences would have any discernible impact on rates of serious crime. In studies of the deterrent effects of new mandatory penalty laws in Massachusetts, Michigan, Florida, New York, and Pennsylvania, researchers have generally found either that no crime-preventive effect could be demonstrated or that there was a short-term effect that quickly disappeared. These results are in keeping with the most authoritative findings from research in this country and elsewhere on the deterrent and incapacitative effects of criminal penalties. No one doubts that society is safer having some penalties for crime rather than none at all; it is a commonsense insight that state-administered sanctions have some deterrent effects. But on the real-world question of whether increases in penalties reduce the incidence of serious crimes to which they attach, the evidence tells us: maybe a little, at best, but usually not.

Most studies of new mandatory penalty laws have found either that no crime-preventive effect could be demonstrated or that there was a short-term effect that quickly disappeared.

An advocate of vigorously enforced guidelines and minimum penalties might argue that they seem to have failed only because they have not been fully implemented. The nature and authority of sentencing guidelines vary widely in different jurisdictions. For example, in the federal system, the standards are highly specific, and the legal presumption against departures is great. In Minnesota and Washington, while the standards are specific, the presumptions against departures are less strong. In Pennsylvania, the standards are broad, and there is little pressure against departures.

But there are other reasons for the partial implementation of guidelines and of laws calling for mandatory

penalties, and none of them bolsters the supporters' cause. First, applicable standards often dictate the imposition of penalties that the judge and everyone else consider unjustly severe. Torn between their oaths to enforce the law, and therefore to impose the harsh penalty, and their oaths to do justice, and therefore to avoid the harsh penalty, judges and juries often do the latter.

As for prosecutors, studies suggest that they routinely agree to indict offenders on a lesser charge — one that does not involve a mandatory penalty — in exchange for a guilty plea. Sometimes they do this because they, too, believe that the mandatory penalty is unjustly severe. In other cases, the mandatory sen-

Malign Neglect: Race, Crime, and Punishment in America

Michael Tonry

Drawing on the latest statistical, legal, and social science research, Michael Tonry presents evidence that current crime control policies are devastating black communities and impeding the movement of disadvantaged black Americans into the social and economic mainstream of American life.

"A knowledgeable, wide-ranging, hard-hitting examination of American criminal justice, *Malign Neglect* makes plain the causes of today's burgeoning incarceration of African-American men. It documents the cynicism, hypocrisy, and racism of the war on drugs, demonstrates the inhumanity of current state and federal sentencing guidelines, and considers with sense and sensitivity the relevance of social disadvantage in resolving criminal justice issues. The book offers sound prescriptions for fixing some of the things that are wrong — dreadfully wrong — with American criminal justice."

— Albert W. Alschuler,
University of Chicago Law School

272 pages, \$25.00

Oxford University Press
Order Department
2001 Evans Road
Cary, NC 27513
Tel: 800-451-7556
FAX: 919-677-1303
Credit cards accepted

tence is a bargaining chit: the defendant who resists a plea bargain agreement knows that he may be subject to a penalty substantially harsher than the one he will receive by pleading guilty to the lesser offense. One might claim that mandatory penalties serve a useful purpose by granting prosecutors this kind of leverage. But the typical argument in favor of mandatories is that they will make sentencing more certain, not that they will encourage plea bargains in which key sentencing decisions are driven underground.

In one further respect, prosecutorial discretion in systems with mandatory penalties confounds the hopes of those who favored sentencing reform. White offenders, the U.S. Sentencing Commission reports, are more likely than blacks to be offered the opportunity to plead guilty to charges that reduce vulnerability to mandatory sentences. The result is a perpetuation of the kinds of racial disparities that were supposed to be removed by the establishment of mandatory minimum sentences.

*Bias by individual judges or officials
contributes less to racial disparities than do
ostensibly neutral policies enacted by
legislatures and sentencing commissions.*

Changing Direction

As a result of the American experiment in criminal justice reform over the past twenty years, we now know that bias by individual judges or officials contributes less to racial disparities than do ostensibly neutral policies enacted by legislatures and sentencing commissions. Consider, for instance, the different treatments accorded to persons convicted of drug crimes involving crack cocaine and powder cocaine. Crack cocaine offenses are generally subject to much harsher penalties than those involving powder cocaine, even though (as a number of courts, including the Minnesota Supreme Court, have held) the two are pharmacologically indistinguishable. The extreme difference in treatment is mandated by federal laws enacted in 1986 and in Section 2D1.1 of the federal sentencing guidelines, under which one gram of crack is treated as equivalent to one hundred grams of powder. In a Minnesota law that was typical of laws in many states, the possession of three grams of crack exposed a defendant to a maximum twenty-year prison sentence and, under sentencing guidelines, a presumptive sentence of forty-eight months. The same amount of powder cocaine exposed a defendant to a five-year maximum sentence and a presumptive sentence of probation, with a stayed twelve-month

prison sentence to be served if probation were later revoked.

The problem with distinguishing between crack and powder cocaine in this way is that crack tends to be used and sold by blacks, and powder by whites, which means that the harshest penalties are mostly experienced by blacks. Statistics cited by a federal appeals court in 1993 showed that 95 percent of federal crack prosecutions were brought against blacks and 40 percent of powder cocaine prosecutions were brought against whites. According to a Bureau of Justice Statistics report from 1993, the different penalties for crack and powder cocaine were the major reason why, on average, federal prison sentences for blacks were 41 percent longer than those for whites.

Doing Less Harm

Basic changes in the social and economic conditions that shape the lives of disadvantaged black Americans are beyond the power of the criminal justice system. However, although we do not know much about using the criminal justice system to do good, we do know how to change its policies so that they do less harm. With regard to sentencing, we should recognize the prudence and compassion of our predecessors and reestablish presumptions that the least punitive and least restrictive appropriate punishment should be imposed in every case. Having discovered the injustices that result when sentencing shifts its focus from the offender to the offense, we should eliminate mandatory minimum penalties and authorize judges to lower sentences in particular cases to take account of the offender's circumstances.

This modest proposal may be less modest than it appears, however, because it involves fundamental changes in direction in American policies towards punishment and sentencing. It requires, in the first place, rejection of ever-escalating calls for harshness, including the kinds of political appeals that were so prominent in this summer's debate over federal anti-crime legislation. And it requires rejection of "just deserts" as an overriding rationale for sentencing and of the systems of rigid sentencing guidelines based on it.

— Michael Tonry

Michael Tonry is Sonosky Professor of Law and Public Policy at the University of Minnesota and, during 1994-95, visiting fellow at All Souls College, Oxford. Excerpted from the book *Malign Neglect: Race, Crime, and Punishment in America*, by Michael Tonry, to be published January 1995. Copyright 1995, Oxford University Press. Published by arrangement with Oxford University Press, New York.