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BOOK REVIEWS

INHERENTLY UNEQUAL JUSTICE: INTERRACIAL RAPE AND THE DEATH PENALTY

BARBARA HOLDEN-SMITH*


The execution of black men for allegedly raping white women is a defining characteristic of the history of race relations in the South. In the years between the Civil War and the early 1930s, these executions often took the form of extra-legal lynchings in which black men were burned, shot, or hung by mobs of whites. Lynching served primarily as a means to control black people in a white supremacist culture. However, Southern apologists for lynching argued that the mob acted in order to protect the virtue of white Southern womanhood from black men who were incapable of controlling their desire for white women. Thus, beyond functioning as a justification for lynching, the mythical black rapist also served to create an atmosphere of danger and menace in which the white Southern woman was kept in a role of vulnerability and weakness in the patriarchal South. Lynch- ing, though, began to die out as a primary means of social control around 1930.

* Associate Professor of Law, Cornell Law School.

1 According to one recent study of Southern lynching, more than 700 blacks accused of raping white women were lynched in the South between 1882 and 1930. STEWART E. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE, AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882-1930, at 91-92 (1995).

2 For a concise discussion of the Southern defense of lynching as a necessary measure to protect white women from rape by black men, see W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880-1930, at 58-68 (1993).

3 One of the most thorough examinations of lynching's function as a means to control white women is found in JACQUELYN DOWD HALL, REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING 129-58 (1993). For a similar analysis see Barbara Holden-Smith, Lynching, Federalism and the Intersection of Race and Gender in the Progressive Era, YALE J.L. & FEMINISM (forthcoming 1996).

4 Scholars offer various reasons for lynching's demise. See, e.g., GUNNAR MYRDAL, AN
But the demise of lynching did not end the Southern practice of executing blacks accused of raping white women. The electric chair and the gas chamber of the criminal justice system replaced the rope and faggot of the mob. Yet death at the hands of the state proved no more just than had death by the lynch mob. The trials of black men accused of raping white women were all too often mere "legal lynchings"—resulting sometimes from false charges and conducted in a manner that merely gave a passing nod to the procedural incidents of due process. And the number of legal executions rivaled the number of lynchings. Between 1930 and the early 1970s, the Southern states executed 405 black men convicted of rape. In the wake of the Supreme Court's 1972 decision in *Furman v. Georgia*, striking down all then-prevailing death penalty laws, most of the states that had previously punished rape as a capital offense declined to include rape among the offenses eligible for the death penalty under laws designed to meet *Furman*'s requirements. The last hold-out was Georgia, whose statute making rape a capital offense was struck down by the Supreme Court in 1977 in *Coker v. Georgia* as a violation of the Eight Amendment's ban on cruel and unusual punishments. Since then, no one has been sentenced to death for rape.

In *The Martinsville Seven*, Eric Rise, an Assistant Professor of Sociology and Criminal Justice at the University of Delaware, tells the story of the legal proceedings that culminated in the execution of a group of young black men accused of having raped a white woman in Mar-

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5 Probably the most infamous of these trials were those of the so-called "Scottsboro Boys," nine black teenagers who received death sentences for allegedly raping two white women in Scottsboro, Alabama in 1931. After extensive appeals, the sentences were all eventually overturned. For a comprehensive recent study of the Scottsboro affair, see JAMES GOODMAN, STORIES OF SCOTTSBORO (1994). For an excellent treatment of "legal lynchings," which often followed what were likely false charges of rape, see GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY, 1865-1940, at 255-57 (1990).

6 *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring). During the same time period, only 48 whites were executed for rape. *Id.*


All seven men died in Virginia's electric chair in the first week of February, 1951. The case of the Martinsville Seven is unique in the annals of the death penalty because the seven executions were the largest number ever for a single instance of rape. Indeed, no reported lynching incident involved a larger number of black men put to death for raping a white woman.\footnote{9}{Eric W. Rise, The Martinsville Seven: Race, Rape, and Capital Punishment (1995).}

The case is also a significant landmark in the history of the legal struggle to combat the racism that infects the American criminal justice system, for it was the first case in which lawyers used statistical evidence to attack the death penalty on equal protection grounds.\footnote{10}{Id. at 150.} That attack proved unsuccessful in the Martinsville case, as the Virginia Supreme Court of Appeals rejected it on review and the Governor of Virginia found it an insufficient reason to grant clemency.\footnote{11}{Id. at 3.} The United States Supreme Court likewise rejected the defendants' petitions for certiorari, which were also premised on statistical proof of racial disparity in capital sentencing for rape in Virginia.\footnote{12}{On the actions of the Virginia Supreme Court of Appeals, see id. at 124-25; on the Governor's rejection of the clemency petition see id. at 110-11.} In fact, the Supreme Court did not directly consider the question of the use of statistics to prove racial discrimination in capital sentencing until thirty-six years later in McCleskey v. Kemp.\footnote{13}{Id. at 128-30.} There the Court held that the individual defendant had to prove racial discrimination in his own case in order to make out an equal protection violation, even though the statistical evidence, the Court assumed, proved racial disparity in Georgia's decisions on whom to put to death.

Professor Rise's account of the Martinsville affair thoroughly describes the factual background of the case and the legal proceedings leading up to the convictions and executions. He also examines the place of this case in the history of Southern justice and race. In doing so, Professor Rise presents the interesting thesis that, because these trials conformed with the legal requirements for a fair trial, the convictions and sentencing of these seven men were atypical of the Southern justice that had usually been meted out to blacks accused of crimes against whites. Professor Rise's thesis is flawed, however, because he fails to recognize that a trial of seven black men accused of having gang raped a white woman could have but one outcome in the South of the 1940s, regardless of the procedures used or the guilt or innocence of the accused. Professor Rise downplays far too much the
racial subtext that underlies most Southern stories about the conviction of a black man accused of having raped a white woman. Thus, he fails to acknowledge that the Martinsville affair is part of a long history of unequal justice in cases of blacks accused of crimes against whites, especially where the crime is rape.

The other subtext that Professor Rise largely ignores is the story of the need to achieve justice for the alleged victim of the rape. I found myself torn between these two stories—that of justice for the victim and that of justice for the black men accused of having raped her. The conflict between justice for the alleged victim and justice for her accused attackers is an important underlying issue in the Martinsville story, but one that Professor Rise does not address. In Part I of this review, I will discuss and critique Professor Rise’s treatment of the Martinsville case. Then in Part II, I will briefly discuss my own views about the race and gender dimensions of cases like the Martinsville affair.

I. PROFESSOR RISE’S ACCOUNT

The thesis of Professor Rise’s study is that, contrary to the “stereotypical view of southern justice,” the death of the Martinsville defendants at the hands of the state cannot be explained by racism alone. According to Professor Rise, the seven defendants received procedurally fair trials, free of the lynch mob atmosphere and of hysterical prosecutorial appeals to the necessity of protecting the virtue of white women that characterized the typical Southern trial of a black man accused of raping a white woman. Moreover, he argues, the evidence at trial clearly proved that the victim had indeed been raped and that all seven defendants were present at the scene. Thus, this case was not a “legal lynching,” but rather a case in which the criminal justice system followed procedures comporting with due process. In Professor Rise’s view, other values beyond enforcing white supremacy account for the convictions and failed appeals in this case. Those values, he argues, are due process, crime control, community stability, judicial restraint, and domestic security. Using the transcripts, briefs and other legal documents filed in the Martinsville trials and appeals as his primary sources, Professor Rise extensively examines the legal proceedings in an attempt to show that each of these values contributed to the state’s decision to sentence the seven black men to death.

15 Rice, supra note 9, at 1.
16 Id. at 3.
17 Id.
and to carry out their executions.\textsuperscript{18}

The victim of the rape recounted in \textit{The Martinsville Seven} was Ruby Stroud Floyd, a thirty-two year old housewife who had moved to Martinsville with her husband, Glenn Floyd, a department store manager, only four years prior to the attack. The attack occurred in Cherrytown, the black section of Martinsville. Mrs. Floyd frequently visited the neighborhood to sell her homegrown vegetables and used clothing to the black residents, and to do missionary work for the Jehovah's Witnesses. Many in Cherrytown knew her as the "Watchtower Woman," presumably because of her work distributing copies of the religious group's magazines.

On the afternoon of January 8, 1949, Mrs. Floyd went to Cherrytown to collect money from Ruth Pettie, who owed her for some secondhand clothes. Because Mrs. Floyd had never been to Ruth Pettie's house before, she asked people on the street for directions. One man she asked warned her that it was a Saturday night and, with darkness coming soon, she should leave and return in the day. She declined to follow the advice and so eleven year old Charlie Martin offered to show her the way to the Pettie house.\textsuperscript{19}

Sometime around six o'clock, Mrs. Floyd and Charlie stopped to ask directions from a group of four men—Joe Henry Hampton, Frank Hairston, Booker T. Millner, and Howard Hairston—who were standing near the railroad tracks. The four men had spent nearly the entire day drinking brandy and wine. They gave Mrs. Floyd directions, but, for reasons that Professor Rise does not explain, ten minutes later she and Charlie passed by again. This time one of the men, Joe Henry Hampton, grabbed Mrs. Floyd around the waist. She pulled away and began running, but Hampton ran after her. The other men followed. Sometime thereafter, they were joined by three other men: Francis DeSales Grayson, John Clabon Taylor, and James Luther Hairston. Grayson had seen the other four on the railroad tracks with Mrs. Floyd and had run to get Taylor and Hairston, telling them that "some boys got a lady up on the track" and asking them to go with him to find out who she was.\textsuperscript{20} It was this group of seven men who were accused of raping Mrs. Floyd.

The eldest of the men was Francis DeSales Grayson, who was thirty-seven years old, married, and the father of five children. He was an army veteran, had served in World War II, and had lived in Maryland, North Carolina, and New Jersey before settling in Martinsville,
where he worked in the local furniture factory. He, like most of the other defendants, had never been convicted of any crime. Unlike Grayson, however, all of the other defendants were young, with the oldest being twenty-one and the youngest, eighteen. All of the six were born and raised in Martinsville, none had completed high school, and one, John Clabon Taylor, had not gone beyond the fourth grade. Most had been employed as furniture and tobacco workers at various times since leaving school.  

Professor Rise argues that the Martinsville affair did not fit the stereotype of the innocent black man wrongly convicted of rape. Whether all seven of the men actually raped Mrs. Floyd is not clear. However, the evidence at trial supports Professor Rise's view that all of the defendants were present at the scene and that all of them were probably at least guilty of having aided and abetted the rape of Mrs. Floyd. All of the defendants made incriminating statements to the police, and the prosecution entered into evidence at each man's trial his confession that he was present at the scene of the attack. Some of the confessions contradicted the other confessions in various details. Each of the confessions, however, placed the other defendants at the scene, and all of the confessions contained either direct admissions of the defendant's own guilt or accusations that the other defendants had raped Mrs. Floyd.  

In addition to the confessions, the prosecution called witnesses who placed Mrs. Floyd and some of the defendants at the crime scene. For example, young Charlie Martin identified the first four men as being present at the scene. He testified that after Hampton had grabbed Mrs. Floyd and pulled her down an embankment near the tracks, Millner gave him a knife and told him "if anybody come down, to cut them." When Charlie refused the knife, Millner gave him a quarter in exchange for a promise not to tell anyone what he had seen. Josephine Grayson, Francis DeSales Grayson's wife, and Leola Millner, Booker Millner's fourteen year old sister, both testified that, as they were walking along the tracks on the evening of the attack, Mrs. Floyd had jumped out of the darkness, wrapped her arms around Mrs. Grayson and sobbed, "Help me, make these boys let me alone." Mrs. Grayson said that she was frightened by Mrs. Floyd's sudden ap-

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21 Id. at 17-18.
22 Under Virginia's law, attempted rape, as well as aiding and abetting a rape, were also punishable by death. Id. at 47.
23 In their confessions, Howard Lee Hairston, Francis DeSales Grayson, John Taylor, and Joe Henry Hampton all confessed to having raped Mrs. Floyd, though Hairston and Grayson said that they were unsuccessful in penetrating her, apparently not realizing that impotence is not a defense to rape. Id. at 15-16, 18.
24 Id. at 39.
pearance out of the darkness and so jerked away from the woman saying, “Don’t tear my clothes off me.” Mrs. Floyd also testified, identifying some of the defendants as her assailants. In addition to these accounts, four of the defendants testified on their own behalf and admitted either penetrating Mrs. Floyd or attempting to do so, though they attributed their behavior to their intoxication or contended that Mrs. Floyd had consented.

In attempting to show that the Martinsville case was not the stereotypical Southern criminal case, Professor Rise further argues that each man received appointed counsel before arraignment, some of whom were experienced and respected members of the local bar. Moreover, most of these lawyers put up a defense more spirited than the typical white Southern lawyer would give to a black accused of a crime against a white. The Martinsville lawyers moved to change the venue of the trial, attacked the medical evidence, and tried to undermine the credibility of the victim. In addition, the defense lawyers successfully moved to have each defendant tried separately, so that the juries would hear only the evidence against the particular defendant on trial and not evidence about the activities of the defendants as a group. Moreover, the judge who tried the case warned the lawyers that the trial was to be conducted fairly, “as though both parties were members of the same race.” Most importantly, Professor Rise argues, “the local authorities did not act as extensions of the mob. Instead they displayed a professionalism which was increasingly characteristic of police departments after World War II.”

Although Professor Rise’s characterization of the pre-trial and trial procedures may be accurate, the Martinsville trial was not as free of the evils of the stereotypical Southern trial of black defendants as Professor Rise contends. While Professor Rise presents a convincing case that the Martinsville defendants received a greater measure of procedural safeguards than a typical black defendant usually received

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25 Id. at 9, 41.
26 At their trials, Mrs. Floyd identified Joe Henry Hampton, Francis DeSales Grayson and Frank Hairston as her attackers. Id. at 37-38.
27 The four who testified in their own behalf were Booker T. Millner, Joe Henry Hampton, Frank Hairston, and Howard Hairston. Id. at 41-44.
28 Professor Rise admits, however, that the performances of the lawyers were uneven, and that their defense strategy consisted primarily of emphasizing the youth and intoxication of the defendants rather than challenging the prosecution’s evidence as to their client’s guilt. Id. at 40-41. One could also question the judgment of the lawyers who allowed their clients to testify before all-white juries.
29 Because the last two defendants subsequently agreed to be tried together, there were six trials, not seven.
30 Rice, supra note 9, at 30.
31 Id. at 23.
in the South, he either downplays or ignores the elements of those procedures that in fact were typical of the criminal justice system that blacks encountered. First, all seven of the defendants were tried before all white juries, a fact that Professor Rise states but fails to discuss in his analysis of why, in his view, these trials were procedurally fair. The jury pool for some of the trials contained several blacks. However, some of these prospective jurors were dismissed from the panel because they did not believe in the death penalty, and the remaining blacks were struck from the panel by the prosecution. Second, the confessions were obtained without the defendants having the benefit of counsel or even being informed of their right to counsel; none of the defendants had the advice of counsel before or during police interrogations. Third, it is questionable whether the confessions were indeed voluntary. Not only were the defendants alone during questioning, unassisted by either counsel or family members, but some of them may still have been intoxicated at the time of questioning, having been arrested within hours of the incident. Fourth, each of the six juries took less than two hours to convict and sentence to death, with the first jury needing only half an hour to send the defendant to the electric chair. Such summary deliberations were typical of all-white Southern juries trying blacks accused of crimes against whites. Finally, although the trials may have been conducted free of mob violence and threats, as Professor Rise argues, it is hard to believe that the jurors did not feel the pressure of the prevailing community sentiments favoring convictions and sentences of death.

True, the U.S. Supreme Court did not begin to recognize some of these procedural infirmities as violations of due process and equal protection under the Fourteenth Amendment until years after the Martinsville affair. However, the Court did so, finally, because the

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32 See id. at 36-7 for Professor Rise's discussion of the composition of the jury.
33 Id.
34 On the police interrogations leading to the confessions, see id. at 11-18.
35 Id. at 33.
36 As noted earlier, the last two defendants agreed to be tried together and so there were only six juries, not seven.
37 Rise, supra note 9, at 47.
38 For example, most of the juries that convicted and sentenced the Scottsboro defendants to death took less than two hours to reach their decisions. Loren Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro 267 (1966).
39 Indeed, as Professor Rise notes, the prosecution decided to try Joe Henry Hampton first because, as the State's case against him was the strongest of the seven, the jury would be most likely to convict him and sentence him to death, a outcome that would put pressure on the subsequent juries to reach the same conclusions in the trials of the other defendants. Rise, supra note 9, at 36.
40 See, e.g., Batson v. Kentucky, 476 U.S. 79 (1986) (holding use of race-based peremp-
states refused to voluntarily adopt procedures that protected a defendant's right to a fair trial. The fact that the states did so only after being forced to by the Supreme Court hardly excuses them from engaging in unfair practices.

II. RACE, RAPE AND GENDER

Despite the obstacles to a fair trial mentioned above, the most egregious aspect of the case is not the convictions themselves. Rather, it is the fact that, given the racial disparity in the imposition of the death penalty for rape, the defendants probably would not have received the death penalty save for the fact that they were black and their victim was white. Professor Rise, of course, does not completely deny this fact. However, he does argue that it was of diminished importance in the Martinsville affair as compared with the stereotypical trial of an innocent black man accused of having raped a white woman.\textsuperscript{41} Professor Rise's lack of emphasis on the racial aspect of the case is consistent with his view that the convictions and the failed appeals resulted from the fact that "the prevailing attitude at all levels of the state and federal judiciary at mid-century emphasized the preservation of social order over the values of due process."\textsuperscript{42} But this explanation fails to account for the glaring historical racial disparity in the imposition of the death penalty for rape. As the statistics gathered by the lawyers who represented the Martinsville defendants in their appeals shows, between 1908 and 1950 the State of Virginia executed forty-five black men for rape, yet not one white man suffered the same penalty for that crime.\textsuperscript{43} The use of death as a punishment for black men accused of raping white women, whether the men were guilty or not, as a means of social control,\textsuperscript{44} is, in my view, a subtext of the Martinsville affair—as it is to any story about interracial rape and the Southern criminal justice system. It is a part of the story that Professor

\textsuperscript{41} Rise, \textit{supra} note 9, at 3.
\textsuperscript{42} Rise, \textit{supra} note 9, at 94.
\textsuperscript{43} \textit{Id.} at 120.
\textsuperscript{44} On the connection between rape law, social control, and its relation to the lynching of black men, see Jacquelyn Dowd Hall, \textit{The Mind that Burns in Each Body: Women, Rape, and Racial Violence}, in \textit{POWERS OF DESIRE: THE POLITICS OF SEXUALITY} 328 (A. Snitow et al. eds. 1983); on rape laws as a means to control black men, see \textit{ANGELA Y. DAVIS, WOMEN, RACE AND CLASS} 172 (1983).
Rise acknowledges, but relegates to a minor plot line.

The other subtext of the Martinsville affair is the story of the victim, Ruby Floyd, and how the rape affected her. In addition to testifying at the preliminary hearing, at which one of the seven defense lawyers questioned her at length in an attempt to discredit her, she had to testify at each of the six separate trials. Although her testimony had minor inconsistencies as compared with earlier statements, and although she could not identify all seven of the men who had attacked her, her testimony left me, even on a cold written record, angry that this had happened to her. These two subtexts—the defendant’s right to treatment free of racial animus and the victim’s right to justice—came most clearly in conflict for me in reading the account of what happened to Mrs. Floyd—both the rape itself and her ordeal of testifying numerous times about the rape.

At each of her trial appearances, Professor Rise tells us, Mrs. Floyd was highly emotional, sobbing so violently that her questioning had to be interrupted. In fact, the court had to postpone the second trial for a day because Mrs. Floyd’s doctor told the judge in chambers that her physical and mental condition made it “inadvisable” for her to testify that day. Consequently, most of the defense lawyers either cross-examined her gently or declined to do so at all. One of them, however, kept her on the witness stand for more than forty minutes in an attempt to discredit her identification of his client.

As Professor Rise recounts this testimony, when Mrs. Floyd passed the four black men the second time, one of them grabbed her after yelling “Hey Honey.” She ran, but was caught. Professor Rise further recounts what Mrs. Floyd testified happened next:

[Hampton] threw her down next to the track, lay on top of her, and threatened to kill her if she screamed. By then the other men had begun to hold her down and pull off her skirt and underpants. Mrs. Floyd struggled, protesting that she was a Christian woman. Hampton raped her first, penetrating her “more than once,” then he assisted the others as they assaulted her. Hampton/raped her first, penetrating her “more than once,” then he assisted the others as they assaulted her. [As she testified], “They were holding my legs, prizing [sic] my legs open. Every time I pulled my legs together they said ‘Hold them legs up woman.’ Every time I tried to move or holler or say anything they’d slap me in the mouth and as each one got me he put his tongue in my mouth. They kept my mouth covered all the time with their hands and tongues, sucking my tongue and slobbering all over me.

45 Rise, supra note 9, at 21-23.
46 Id. at 37-37, 45, 49-60.
47 Id. at 38.
48 Id.
49 Id.
50 Id. at 37-8.
Mrs. Floyd testified that as the attack continued, the men argued among themselves as to whose turn was next. They were then joined by several other men and the men all assaulted her again and again, "every bit of twelve or fourteen times," she said. She also testified that she had felt something penetrate her rectum. After the attack, she said she felt "paralyzed from the hips down," but managed to get to Mary Wade's house for help.\footnote{Id. at 38.}

Mary Wade testified that Mrs. Floyd had scratches and bruises on her face, arms and legs, had sticks and twigs in her hair, mud on her shoes and clothes, that her clothes were damp, and she smelled of urine. Later Mrs. Wade learned from Joe Hampton, who had come to Mrs. Wade's house the morning after the attack, that the men had urinated on Mrs. Floyd.\footnote{Id. at 20.}

The physician who examined Mrs. Floyd shortly after the attack testified that she had abrasions on several parts of her body and that active sperm were present in her body.\footnote{Id. at 19-20.} Despite the doctor's advice, she insisted on going home that evening, but returned to the hospital the next day complaining of muscular aches.\footnote{Id. 11, 17.} Afterwards, she was in and out of hospitals with complaints of high fever and abdominal pain. Another doctor testified that Mrs. Floyd was presently under his care for a hematoma on the left side of her pelvis, caused by penetration of either her vagina or rectum.\footnote{Id. at 40.} Mrs. Floyd's doctor thought it would take six to nine months for her to heal.\footnote{Id.}

Thus there are two compelling stories here. On the one hand resides the horror of the South's history of putting black men to death—first by mostly extra-legal lynching and later by state-sanctioned executions. On the other hand sits the horror of rape itself and all it symbolizes about the unjust treatment of women in our society.

In thinking about this conflict between the need for justice for the white woman victim and justice for the black men accused of raping her, I was reminded of a short story written some years ago by Alice Walker. In the story, Walker describes the reaction of a black woman upon being told by her white friend that the friend had been raped by a black male acquaintance of theirs years before, when all three were civil rights workers in the South.\footnote{Alice Walker, Advancing Luna and Ida B. Wells, in BLACK-EYED SUSANS; MIDNIGHT
the story is embarrassed and angry that her friend has told her about the rape. "How dare she tell me this!" the woman thinks to herself. In rather unusual author's notes accompanying the story, Alice Walker tries to discuss her own feelings about black men, white women, and rape. Walker writes:

Who knows what the black woman thinks of rape? Who cares? . . . . Whenever interracial rape is mentioned, a black woman's first thought is to protect the lives of her brothers, her father, her sons, her lovers. A history of lynching has bred this reflex in her. I feel it as strongly as anyone.58

Walker goes on to say that she prays to Ida B. Wells—one of the primary leaders of the anti-lynching movement that began during the turn of the century—for guidance and forgiveness in talking about interracial rape and for breaking the silence and admitting that in fact black men have raped and do rape white women.59 Walker ultimately does break the silence and publish her story, even over the imagined advice of Wells who tells her:

Write nothing. Nothing at all. It will be used against black men and therefore against all of us . . . . You are dealing with people who brought their children to witness the murder of black human beings, falsely accused of rape. People who handed out, as trophies, black fingers and toes. Deny! Deny! Deny!60

I, like Walker, find it difficult to know how to reconcile the history of false cries of rape and the lynching of black men with the present fact that black men do rape both white and black women. Indeed, black women are far more likely to be the victims of rape by black men than are white women.61 And so it is vital that black women speak out against rape—even interracial rape.62 Black female scholars have begun to do so by pointing out that neither the legal system nor white feminist scholars have adequately confronted the interconnectedness of rape and racism.63

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58 Id. at 320.
59 Id. at 320-21.
60 Id. at 321.
61 Irene Sege, Race, Violence Make Complex Picture, BOSTON GLOBE, Jan. 31, 1990, at 1 (noting that "seventy percent of black rape victims were raped by blacks, and seventy-eight percent of white rape victims were raped by whites").
62 Interestingly, three black women, Mary Wade, Josephine Grayson, and Leola Miller testified at the Martinsville defendants' trials. See Rise, supra note 9, at 40-41. While all three of the women's testimony was damaging to the defendants, only Mrs. Wade testified in behalf of the prosecution. Professor Rise does not indicate whether any of these women testified willingly.
III. Conclusion

Although I wish that Professor Rise’s study of the Martinsville incident had given more attention to these subtexts, the book nevertheless is important. It comes at a time when the number of executions is increasing and threatens to skyrocket, yet the states and the federal government seem bent on decreasing the procedural safeguards against the arbitrariness of the death penalty in order to speed up the death machinery even more. At the same time, there is a faint glimmer of hope that the country may soon engage in a new debate about the death penalty. There is a new and popular film that, while almost presenting in an even-handed way both sides of the death penalty debate, comes across with a strong anti-death penalty message. And one can only hope that Justice Blackmun, who, especially in his early days on the Court, often voted against the interests of death penalty opponents, may have given new life to the debate, having proclaimed in one of his last opinions before retiring from the Bench that:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness. . . . I [now] feel morally and intellectually obligated to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherently unconstitutional deficiencies.

While Professor Rise expresses no view on either the morality or the constitutionality of the death penalty, his study helps to put the issues in historical perspective.

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65 The film is DEAD MAN WALKING (Polygram Filmed Entertainment). The film is based on HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES (1993).

MICHAEL TONRY AND THE STRUCTURE OF SENTENCING LAWS

KEVIN R. REITZ*


I. INTRODUCTION

The laws and legal institutions that govern sentencing have been changing more rapidly over the past two decades than any other part of the legal landscape of American criminal justice. Prior eras have seen analogous, but distinct, areas of ferment. In the 1950s and ‘60s, one can point to upheavals of criminal code reform (driven by the Model Penal Code) and the constitutional regulation of law enforcement (imposed by the Warren Court). Largely speaking, however, these events have since slowed to a halt. Throughout the century, there have been other important criminal justice trends, including the professionalization of police forces and the expanding reach of the federal government into criminal law, but few would say these movements are still in acceleration. The current main event, in terms of focused concern and activity—on the part of the public, politicians, policymakers, and some academics—is the disposition of persons adjudged to be criminals.

Two continuing developments stand out: first, between 1972 and 1995 the population of U.S. prisons more than quintupled, reaching 1.1 million inmates in mid-1995. The rate of growth by current indi-

* Associate Professor, University of Colorado School of Law; Co-Reporter, ABA Standards for Criminal Justice, Sentencing (3d ed. 1994). I am grateful for comments on an earlier draft that I received from a number of thoughtful readers, including Marvin Frankel, Richard Leo, Robin Lubitz, Norval Morris, Robert Nagel, William Pizzi, and Franklin Zimring.

ces is proceeding apace. Whether one applauds or decries this investment in incarceration, its magnitude is breathtaking. There is no known historical precedent for it—in our culture or any other. Indeed, prior to America’s carceral expansion, one leading sociological belief was that societies maintained constant incarceration rates over long periods. In 1996, there remains substantial popular sentiment that we need to “get tougher” on criminals.

The second major development in the sentencing world is the great experimentation that has taken place across the country since the mid-1970s with new institutions and systems for the apportionment of sentences. As criminal punishment has become big business, governments have become interested in new managerial and research tools for controlling systemic throughputs and outputs. Many jurisdictions have created sentencing commissions; some have abolished parole boards; all have enacted mandatory penalty statutes for selected crimes; and a growing number have adopted sentencing guidelines. Such changes in “sentencing structure” are the chief concern of Michael Tonry’s new book, Sentencing Matters. The basic questions he treats are: How have the new sentencing structures been built? How well or poorly have they worked? Given what we have learned about them, how should they be fashioned?

II. A Brief Description of the Book

Sentencing Matters is written in eight chapters. The first and last sweep most broadly, and both highlight Tonry’s suggested eight-part program for the design and operation of a “just sentencing system.” (More on the eight points later.) In between, Chapters 2 through 7 respectively contain a survey of American sentencing reform jurisdictions, a critique of the federal sentencing guidelines, a current assessment of the intermediate sanctions movement, a focused attack on legislatively mandated penalties, a discussion of the judicial role in the formulation of sentencing policy, and an effort to shed international

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2 The most recent imprisonment data we have, from the first six months of 1995, show a record-breaking increase in the nation’s prison populations. U.S. Dept. of Justice, supra note 1, at 1.
4 The United States Sentencing Commission and its federal sentencing guidelines are the best known and least applauded artifacts of sentencing reform on the present scene. See infra notes 21-22 and accompanying text. Less well known are the state sentencing commission systems, which have won considerably greater acceptance than their federal counterpart. At present there are about twenty U.S. jurisdictions with working sentencing commissions. See Richard S. Frase, State Sentencing Guidelines: Still Going Strong, 78 JUDICATURE 173, 173-74 (1995).
5 MICHAEL TONRY, SENTENCING MATTERS (1996).
perspective on our evolving sentencing systems.

All told, Tonry has written the most inclusive and up-to-date study of American sentencing practices now available. To my knowledge, no other work approaches Sentencing Matters' field of vision, particularly in its sustained attention to developments in the states. No other scholar has taken on the painstaking and unglamorous work of learning what so many jurisdictions are doing—and then keeping up with their progress over time. The tedious nature of this effort should not be undersold; the serious student of state sentencing systems has almost no secondary literature to consult and must rely on a smattering of official reports (generally less fulsome than one would like and not in the library), contacts with persons in the field (in multiple jurisdictions), and whatever hands-on experience one can get. Since the late 1970s, Tonry has been the principal architect of this field of study, and its main contributor. Indeed, when there is an aspect of state sentencing that Tonry has not written about, the rest of us tend not to know much about it.

This is not to say, however, that Sentencing Matters serves as a comprehensive treatise. There are large subjects that do not receive Tonry's sustained attention. He is, by inclination, a student of sentencing "reform," for instance, and does not devote much ink to the current doings of those states (close to half) that are decidedly unreformed in their sentencing practices. Also, Tonry's strong suit is the realm of structure and process (e.g., the advantages and disadvantages of sentencing guidelines). He is less sure-footed when discussing sub-

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6 As a result, much of the material in Sentencing Matters is unfootnoteable because it is based on personal knowledge. See, e.g., Sentencing Matters at 86 (Tonry's account of the early U.S. Sentencing Commission draws on his close contacts with the commission and staff and his own brief work there); id. at 166-67 (there is no literature on the subject of judicial participation in sentencing reform; Tonry recounts lessons derived from numerous interviews with professionals in state and federal guidelines systems).

7 For example, Tonry does not take much interest in the widely differing appellate cultures across guidelines jurisdictions and does not compile comparative information on rates of appeals, rates of reversals, reasons for reversals, the nature of judge-made law supplemental to guidelines, etc. As a result (and because no one else has done this work, either!), a lacuna in Tonry's field of view likewise exists in the general knowledge base.

8 One of the most wrenching issues in American punishment policy is the subject of another of the author's books, Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America (1995). As if to avoid repetition, the data, arguments, and conclusions of Malign Neglect are not reiterated in Sentencing Matters.

9 The prevailing system in places like New York, Indiana, Georgia, Colorado, and Texas is still the traditional approach of "indeterminate" sentencing that existed nationwide from the late nineteenth century until the 1970s and 1980s. In such venues it remains a matter of controversy—if the issue is alive at all—whether the old fashioned vehicles of judicial and parole-board discretion should be tampered with. See, e.g., Pamela L. Grixet, Determinate Sentencing: The Promise and the Reality of Retributive Justice (1992) (reflecting a New Yorker's parochial view that "determinacy is dead").
stantive punishment policy (e.g., the extent to which just deserts theory should undergird a sentencing system). These relative strengths and weaknesses will play a part in the discussion below. For now, however, it is unfair to tarry on subjects that Sentencing Matters does not address or addresses more sparingly than the book reviewer would like. Without Michael Tonry, virtually no literature of state sentencing systems would exist at all. Those of us who are newer to the field work on foundations supplied by Tonry nearly alone.

III. An Assessment of the Book's Contributions

It is difficult to discuss Sentencing Matters without reference to a much earlier book, Marvin Frankel's Criminal Sentences: Law Without Order, published in 1973. Frankel's short classic first ventured the idea of a sentencing commission, after a withering attack on the then-universal practices of indeterminate sentencing. Frankel sketched the basic mechanics of a commission's operation, but left numerous details to be filled in later. The main subject of Sentencing Matters is the progress that has been made since the 1970s to breathe life into the sentencing commission as imagined by Frankel. Over that time, Tonry has been Frankel's most effectual foot soldier; in 1996 he stands as Frankel's most important successor in mapping the future shape of American sentencing structures.

The following subsections will touch on several of the book's size-

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10 Tonry blames an ascension of just deserts theory in part for the sustained prison growth of recent years, see Tonry, supra note 5, at 13, and argues that, especially in conjunction with sentencing guidelines, the theory "conduces to needlessly harsh sentences." Id. at 15. There may be some truth to these suppositions, but research has shown that a number of the desert-based guidelines states have had slower than average prison expansion. See Thomas Marvell, Sentencing Guidelines and Prison Population Growth, 85 J. Crim. L. & Criminology 696 (1995). Furthermore, many states that have been leading the pack in incarceration rates lack sentencing guidelines, a coherent sentencing policy of any kind, or both. See U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 1994 3 tbl. 3 (1995) (highest imprisonment jurisdictions include Texas, Oklahoma, and District of Columbia); Franklin Zimring & Gordon Hawkins, The Scale of Imprisonment 156-75 (1991) (incarceration levels show no correlation with punishment policy or sentencing structure).

On the theoretical level, Tonry rejects retributive reasoning on a number of grounds (society lacks the moral standing to judge its least fortunate members; the sentencing process is too crude to render accurate moral judgments; the pain inflicted by punishments is experienced idiosyncratically and is therefore unjust in application), but presents no powerful vision in the alternative. At times Tonry appears to subscribe to the approach of "limiting retributivism" propounded by Norval Morris, see Tonry, supra note 5, at 18; Norval Morris and Michael Tonry, Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System, 87-88 (1990), but the objections against a moral basis for punishment arrayed in Sentencing Matters make a mish mash of Morrisonian doctrine.

able offerings, leaving much out. My goal is to give the reader a sense of the texture and merits of Tonry's contributions, and to make a few suggestions along the way.

A. TONRY’S EIGHT-POINT PROGRAM FOR A “JUST SENTENCING SYSTEM”

The centerpiece of Tonry's presentation is his eight-element skeleton for a modern sentencing system, outlined at the beginning and end of the book. To facilitate discussion, here is a précis of the eight points: (1) legislatures should repeal all mandatory minimum penalty statutes; (2) legislatures should create and fund “credible, well-managed noncustodial penalties”; (3) every jurisdiction should charter a permanent sentencing agency, usually called a “sentencing commission”; (4) the commission should draft sentencing rules, usually called “sentencing guidelines,” and monitor their application; (5) the sentencing commission should ensure that aggregate sentences imposed can be accommodated by existing or funded correctional resources; (6) the sentencing guidelines for custodial penalties should set maximum presumptive terms of confinement for all cases and minimum terms for the most serious crimes; (7) the sentencing guidelines should apply to prison and nonprison sanctions; (8) legislatures and commissions should instruct judges to impose the “least punitive and intrusive appropriate sentence” in each case. Taking all eight points together, this is an ambitious agenda that would call for appreciable reform in every jurisdiction, even those already far down the road of systemic innovation.

Tonry's points, probably by design, are more structural than substantive. That is, they have to do with the roles different actors in the sentencing system should play and how discretion over punishment decisions should be apportioned. Within the confines of his eight recommendations, Tonry does not make explicit claims of substantive preference, e.g., that our use of imprisonment should expand or contract, or that particular purposes of sentencing (rehabilitation, inca-

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12 See Tonry, supra note 5, at 5 (eight proposals offered to show what a “just sentencing system . . . would look like”); id. at 191 (“A sentencing system that incorporated the following eight elements . . . would be far better than any now in operation.”).

13 Id. at 5.

14 See id. at 193. This is a nearly verbatim quotation of Tonry's text. I do not understand point (6) well enough to attempt a paraphrase. It may signal Tonry's latest thinking that parole release, in some shape or form, should be retained in determinate sentencing structures. See id. at 163; Panel Discussion, State and Federal Sentencing Guidelines: What's Working? What Isn't, 78 JUDICATURE 207, 210-11 (1995) (edited transcript of Professor Tonry's remarks). In contrast with the other seven points of SENTENCING MATTERS' outline, point (6) is little elucidated. See Tonry, supra note 5, at 5, 193-94 (point (6) receives only two paragraphs in entire book).

15 Tonry, supra note 5, at 5.
pacitation) should or should not be pursued. In its procedural orientation, Tonry's machinery could conceivably win the approval of "get tough" types as well as so-called "coddlers" of criminals. Indeed, one of Tonry's historical observations, elsewhere in the book, is that the newer sentencing structures have proven adept at effectuating whatever policies are fed into them.

The eight points are not all readily adoptable, however; there is in fact an "easier-said-than-done" quality to some of them. Recommendations (1), (2), (7), and (8) face severe political or implementation difficulties. There is probably no jurisdiction in the country that exemplifies Tonry's views about mandatory penalties, intermediate sentences, or parsimony in the use of punishment. Items (3), (4), and (5), which outline the sentencing commission's mission, are on firmer ground because there are up-and-running systems that prove the workability of each point. Even so, much room remains for debate about the exact manner in which future commissions should discharge their duties. As a whole, Sentencing Matters' scheme is best understood as a catalogue of core structural concerns for anyone trying to build or run a sentencing system. It is a superstructure rather than a turn-key plan.

Had I been Tonry's editor I might have encouraged him to add a ninth point to his catalogue, growing out of the important new material presented in Chapter 6 ("Judges and Sentencing Policy"). There, Tonry offers a number of canny observations about judicial tendencies toward attachment to their sentencing discretion, abstention from the reform process, and ambivalence or hostility toward the end product. These insights boil down to a crucial message for systems-

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16 Point (1) is discussed more fully *infra* part II.D; points (2) and (7) are the meat of part II.C.

17 For instance, it is not wholly clear that Tonry approves of the two-axis grid now in use, in one form or another, in every U.S. jurisdiction that has created sentencing guidelines. Tonry runs hot and cold on the subject. See, e.g., *Tonry*, *supra* note 5, at 20 ("Use of two-dimensional grids to express sentencing standards has impoverished sentencing . . . "). *But see id.* ("This does not mean that grids should be abandoned . . . "). *See also id.* at 22 ("a grid axis cannot handle factors that are not linear, and many ethically relevant considerations in sentencing cannot be expressed in a linear way"). Tonry would probably say that he is agnostic about grids, as opposed to verbally-expressed guidelines but, where grids are used, they must be complemented by provisions that allow for additional individualization of sentences. For my own thoughts on a promising "three-dimensional" grid approach, see notes 42-44 and accompanying text.

18 See *Tonry*, *supra* note 5, at 165-73. Later on, Tonry gives amusing evidence that judges in other countries are little different than their American counterparts in prizing their sentencing authority. See *id.* at 178 (Australian judges believe sentencing should be a "subjective" process leading to an "intuitive synthesis"); id. at 179 (Austrian judges reportedly view sentencing decisionmaking as an "existential conversation" despite observers' criticisms of sentencing disparity).
THE STRUCTURE OF SENTENCING LAWS

builders: judges’ participation and investment in the design of new sentencing structures should be sought to a greater degree than heretofore attempted; judges, for their part, should make themselves available to the task. Otherwise, as the federal guidelines illustrate, the system may limp forward in the face of mutiny among its principal—and powerful—administrators. Tonry’s instincts on this point are well informed by his close familiarity with the human dynamics of sentencing systems in operation. As he has done in the past, Tonry has put his finger on an important but underdeveloped topic of concern.19

If Tonry’s master program were solely a statement of his personal views, it would be worthy of note. It should be added, however, that seven of Tonry’s eight points were recently given strong support in a new edition of the ABA’s Criminal Justice Standards for Sentencing, following five years of study.20 This is hardly a coincidence; the ABA was well aware of Tonry’s work, and that of Marvin Frankel. In a sense, the Sentencing Standards project was a referendum—and a positive one—on the Frankel-Tonry vision of sentencing systems as it has grown up in the last two decades. The ABA’s endorsement adds organizational clout to the major conclusions of Sentencing Matters. Tonry’s proposals are not merely the views of one law professor, however accomplished; they have also registered in the knowledgeable legal community at large.

B. TONRY’S PLAN TO “SALVAGE” THE FEDERAL GUIDELINES

Michael Tonry is not the harshest critic around of the federal sentencing guidelines (most of these are federal district court judges), but he is solidly in the negative camp. He begins a chapter on the federal system by saying that, “[t]he guidelines developed by the U.S.

19 The only point of emphasis I would add to Chapter 6 is that there is a particular need to bring appellate judges into the reform process, and to carve out a visualized role for the appellate courts before new sentencing provisions go into effect. To my knowledge, no jurisdiction has engaged in such advance planning.

20 Only number (6) of Tonry’s recommendations is without analogue in the Standards. See supra note 14. In support of the remainder of Tonry’s program, see ABA SENTENCING STANDARDS, supra note 1, Standard 18-3.21(b) (“A legislature should not prescribe a minimum term of total confinement for any offense”); Standards 18-2.2 and 18-3.11 through 3.22 (legislature should create and fund wide array of sanctions); Standard 18-1.3 (a) & (b) (legislature should create sentencing agency; most effective agency is a “sentencing commission”); Standards 18-1.3(a) and 18-4.1(a) (sentencing agency should create provisions that guide courts toward presumptive sentences); Standards 18-2.5(e) and 18-4.4(c)(i) (legislature should instruct sentencing agency to draft sentencing provisions that will match imposed sentences with available or funded correctional resources); Standards 18-3.12(a) and 4.4(b) (sentencing agency should create presumptive sentencing provisions for all sanctions, including nonprison sanctions); Standard 18-2.4 (“Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized.”).
Sentencing Commission . . . are the most controversial and disliked sentencing reform initiative in U.S. history.” Later, he summarizes that:

The core objections are that the [federal] guidelines are too rigid and too harsh, and too often force judges and lawyers to choose between imposing sentences that are widely perceived as unjust or trying to achieve just results by means of hypocritical circumventions. Judges are forced by the guidelines to choose between their obligations to do justice and their obligations to enforce the law.

These are stern judgments indeed and, as becomes evident in the full text of Sentencing Matters, Tonry is not merely reporting them; he agrees with them.

Because Tonry has placed himself on the attack, his evaluations of the federal system are occasionally clouded. For example, he discounts the U.S. Commission’s claims that disparities have been reduced under the federal guidelines and offers his own view that disparities have actually increased. Admittedly this is a difficult subject and, depending on how one defines “disparity,” Tonry may well be right. But Tonry is not consistent in his criticisms of federal and state guidelines structures. He castigates the federal commission for using a “self-serving definition” that equates low disparity with compliance with guidelines factors. Such a formula, Tonry argues, “inevitably underestimates the degree of variation in sentences.” This may be so, but all disparity measurements must be made with reference to some kind of selected, external criteria. It is at least defensible for the federal commission to use the standards from its own guidelines. More to the point, however, Tonry is willing to accept similar measurements from state commissions. Particularly in the area of racial disparities, the state guideline systems tend to report that race-neutral sentencing has occurred when blacks and whites alike appear to be receiving punishment in line with formal guidelines factors. Again, this is a defensible claim and, now that state data is in issue, Tonry finds it so. Generally speaking, Tonry is willing to give state commissions the benefit of the doubt when they claim to have achieved a modicum of uniformity in sentencing.

21 Tonry, supra note 5, at 72.
22 Id. at 99.
23 Id. at 48-49.
24 Id. at 48.
25 Indeed, I would argue that “uniformity,” as an abstract process goal, is relatively easy to achieve. A crucial substantive question always remains, however, of whether such uniformity is in service of satisfactory or unsatisfactory criteria.
26 See Tonry, supra note 5, at 54-58.
27 Compare id. at 42 (states get benefit of conclusions stated in terms of “Most likely,” “presumably,” “it would be astonishing if they had no effect”) with id. at 48-49 (federal data
Having said this, however, it is important to stress that Tonry is different from many critics of the federal guidelines in that the thrust of his arguments is intended to be constructive. As opposed to many, Tonry does not conclude that the federal guidelines should be repealed or neutered of binding force. Instead, he offers seven distinct, reasonably solid, and occasionally technical amendments to improve the system. Two overarching messages are embedded in his presentation. First, Tonry evidently believes it would be undesirable to return to the indeterminate sentencing system that existed in the federal courts prior to the guidelines. He would not agree that the “cure” has proven worse than the “disease.” This is an important judgment and, in my view, a correct one. At any rate, it is too soon to say that the federal experiment is a failure for all time. Second, the manageable scope of Tonry’s seven-point proposal implies that the project of reforming the federal guidelines need not entail “going back to the drawing board.” Learning from the experience of other jurisdictions, the major defects in the federal structure can be made to appear both discrete and reparable.

Tonry’s seven recommendations are a good starting point for “salvaging” the federal guidelines, as he puts it, but I would add two more that do not appear on his agenda. First, federal judges should be given more latitude to depart from the guidelines sentence in individual cases, and the U.S. Commission should reverse its practice of evaluated with suspicion). Tonry’s dual standard appears again in his charge that the U.S. Commission has not done enough to incorporate nonprison sanctions into its guidelines. He writes that, “[h]ad it the will,” the federal commission “could easily incorporate fines and intermediate sanctions into the federal guidelines.” Id. at 95. This is a fair criticism (except for the “easily” part) but, when it comes time to level a similar indictment against state commissions, Tonry alters his tone to one of understanding that the task facing the states was “very difficult, if not impossible.” Id. at 132. He writes that, “It is easy to criticize the Oregon commission for not carrying its innovation further and the Washington commission for lack of imagination, but that would be unfair.” Id. at 131.

28 See id. at 88-89.

29 These are: (1) Prosecutors should not have exclusive power to determine whether offenders will be eligible for sentence reductions for “substantial assistance” to government investigations; (2) the guidelines should reinstate the statutory presumption of nonprison sanctions for first offenders by defining fewer offenses as “serious” and therefore requiring incarceration upon a first conviction; (3) the guidelines should be rewritten so that probation and other nonprison sanctions are stand-alone punishments under the guidelines, instead of defined as “zero months of imprisonment”; (4) the “relevant conduct” guideline should be stricken, so that punishment under the guidelines is based only on offenses for which convictions have been obtained; (5) the guidelines should be rewritten to incorporate nonprison sanctions; (6) The commission should reverse its past practice of drafting guidelines that treat statutory mandatory penalties as benchmarks; (7) the commission should simplify the 43-level guidelines grid. See id. at 89-99.

placing tight restrictions on eligible departure factors. Much could be
done along these lines without amendment to the enabling legisla-
tion. It is surprising that this does not appear among Tonry’s recom-
mendations; he identifies the problem of undue rigidity with clarity at
the beginning of Chapter 3.31

Second, the U.S. Commission should take the elementary step,
heavily suggested if not mandated by Congress, of writing guidelines
that match sentencing outcomes with funded correctional resources.
State guidelines commissions have proven that such elementary fiscal
planning is possible; the Federal Commission has chosen deliberately,
so far, not to do so. Once again, Tonry’s omission of this point has
the feel of mere oversight. Sentencing Matters assembles the relevant
evidence of both the state successes and the federal failure in this
area.32 From there, it would have been a very short leap for Tonry to
ask the U.S. Commission to change its ways.

One perplexity behind all of this discussion, however, should be
mentioned: there is a conspicuous absence of widespread political
pressure to reformulate the federal guidelines. As unpopular as they
are with district court judges (and rumor has it this resentment is soft-
ening), the guidelines—or anything having to do with the U.S. Sen-
tencing Commission—rarely invoke the public’s ire. The Commission
was so low on President Clinton’s agenda that four vacancies (out of
seven spots) went unfilled for nearly two years following his election.
Once nominations were finally sent to the Senate, there was so little
public interest that all four were confirmed without hearings and with-
out complaint. These are but indications of a public mood un-
troubled by the current federal guidelines. It is a fair guess that the
present system meets with overall approval because of the (accurate)
perception that it dishes out harsher penalties than the former system.
Indeed, the U.S. Commission tends to get flack and media attention
only when it has proposed to cut back on sentencing severity.33

These grains of salt subtract something from the packaging of
Tonry’s chapter on the federal system. It is not exactly true that the

31 See Tonry, supra note 5, at 76-77. The recent U.S. Supreme Court decision in Koon
v. United States, 116 S. Ct. 2034 (1996), aims to address the rigidity problem through a
loosening of the standard of appellate review of district court sentences that deviate from
the guidelines.
32 See id. at 58-59, 67.
33 In the past five years the commission has recommended Congressional repeal of
mandatory sentencing laws and the revision of the guidelines for crack cocaine offenders.
Both changes would have resulted in fewer and lighter federal prison sentences; both were
consistent with Michael Tonry’s views; both battles were lost by the Commission. In the
case of the proposed crack guidelines amendment, overwhelming political opposition wel-
led up against the Commission’s proposal.
world, aside from employees of the U.S. Commission, is aligned in favor of an overhaul. On the contrary, the best-case scenario for a reform agenda like Tonry's is that it may be allowed to proceed against a backdrop of public indifference.

C. TONRY ON INTERMEDIATE SANCTIONS

Six years ago Michael Tonry and co-author Norval Morris wrote a book called *Between Prison and Probation: Intermediate Punishments in a Rational Punishment System*. In it, they argued for the expanded use of "intermediate" sanctions (those in between the harshness of incarceration and the laxity of standard probation). At least for a time, *Between Prison and Probation* was the flagship academic work for advocates of decarceration through the development of non-prison punishments such as day fines, community service orders, and intensive supervision probation. It remains the most positive account available of a sentencing system built upon a wide continuum of sanctions, graded in severity.

What is fascinating in 1996 is the change in attitude between Tonry's new and earlier books. Chapter 4 of *Sentencing Matters* takes a world-weary tone in recognition that intermediate punishments have not been taking the country by storm.34 Indeed, although the subject is hardly dead, no U.S. jurisdiction has succeeded in materially altering its sentencing patterns through the use of alternative punishments. To be sure, there have been highly-touted programs here and there, but these add up to drops in the bucket rather than sea changes. The most visible proof of the failure of the intermediate sanctions movement to date is the unabated velocity of the growth of American prisons.35

Just as it would be too soon to lay the federal guidelines to rest after several years of operation, it would be premature to declare that ambitious experiments in nonprison sanctions cannot succeed. What is needed, and what Tonry has been coming to, is a chastened view of the enormous difficulty of the project. Tonry now believes that proponents of intermediate punishments oversold the benefits of such programs (including their swiftness of attainment) and underestimated great implementation and funding impediments. Moreover, he fairly recounts the disappointing evaluation data for program after program, showing that rehabilitation is seldom detected and prison

34 See, e.g., TONRY, supra note 5, at 133 ("Most intermediate sanctions have failed to achieve promised reductions in recidivism, cost, and prison use, but those promises were never realistic, even though they were, for the most part, offered in good faith.").
35 See supra notes 1-2 and accompanying text.
populations do not shrink.

On the subject of writing guidelines for nonprison sanctions, Tonry concedes that little progress has been made and that "[a]dvise from academics . . . has not proven enormously helpful." Tonry's prescriptions about intermediate sanctions are the least specific of any offered in *Sentencing Matters.* In my view he is still in the process of rethinking the forceful posture of *Between Prison and Probation,* and no full vision of lowered expectations has yet coalesced in his mind. When push comes to shove, therefore, Tonry's proposals are broad and vague. His eight-point plan for an up-to-date sentencing system, discussed earlier, calls for the establishment of "credible, well-managed noncustodial penalties that can serve as sanctions intermediate between prison and probation." Many people would agree, but dozens of baby steps are needed in getting from here to there. His plan also calls for "guidelines for noncustodial penalties," which have yet to be invented in satisfactory form.

Still, the problems Tonry fails to solve have not been solved by anyone else. He is probably right to push forward in the hope and confidence that better learning lies ahead. (The alternative concession, that confinement is the only serious punishment available to us, is both inhumane and intellectually improbable.) On this score, I will mention one development that I consider particularly promising, but that Tonry does not trumpet as a potential breakthrough. Pennsylvania has recently adopted new guidelines that do more to incorporate intermediate sanctions than earlier guideline formats. The sentencing grid is stratified into four zones, each of which captures crimes and prior records of declining gravity and recommends sentencing options of declining intrusiveness. Moreover, each of the four zones is subject to a separate subsection of narrative text that is made part of the guidelines, so that the rules of decision for each quadrant vary from the other three. In the present edition of the Pennsylvania

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36 Tonry, supra note 5, at 67.
37 See id. at 132-33.
38 At times he slips back into the guise of promoter, producing such statements as: "new widely approved intermediate sanctions have been introduced in many states." Id. at 175.
39 Id. at 192 (emphasis omitted).
40 Id. at 194 (emphasis omitted).
41 Like *Sentencing Matters,* the ABA *Sentencing Standards* endorsed the furtherance of intermediate sanctions and the development of guidelines to give structure to their imposition. See supra note 20. Also like *Sentencing Matters,* the Standards acknowledged that proven programs to give life to such ambitions lie in the future. See ABA *Sentencing Standards,* supra note 1, Standard 18-8.12 and Commentary at 88 ("The Standards Committee concluded that it would be premature to endorse any one of the new schemes [for the structuring of the full array of criminal sanctions."])
guidelines, for example, judges are directed to consider a different hierarchy of sentencing purposes at each level. Retribution and incapacitation dominate for the most serious cases, but judges are steered toward rehabilitation and victim restitution when lower on the grid.\textsuperscript{42}

The Pennsylvania system is not a fully realized approach to non-prison sanctions, but its combination of a guidelines matrix plus narrative guidance ("three-dimensional guidelines," I would call them) holds intriguing potential. Earlier attempts to integrate intermediate punishments into guidelines have foundered on trying to produce a numerical formula for the selection of one penalty, or combination of penalties, over another.\textsuperscript{43} The Pennsylvania system uses the two-dimensional grid as an entry point to a further decisional process that can be as sophisticated as language and imagination allow. Its alternative formulations of apposite sentencing goals at different levels already executes a subtle cluster of policy choices with simplicity and elegance. If sentencing judges could be made to articulate their decisions in terms of these structured goals, and if appellate courts would exercise a more-than-perfunctory power of review, the rationalization of sanctioning choices could receive a needed shot in the arm.

As Tonry points out, the new Pennsylvania guidelines are not sufficiently specific in creating a decisional tree that channels particular offenders to appropriate programs.\textsuperscript{44} More work needs to be done in this area. In addition, clever new guideline technologies cannot produce funded community corrections programs that otherwise would not exist; nor can they solve the nasty intergovernmental tangles of state-imposed sentences and county-run sanctions; nor can they create public acceptance for nonprison sanctions that fail to deliver the wanted punitive punch or incapacitative effect. In short, we are still a long way from a markedly improved system of intermediate punishments. Tonry's mixed attitude of discouragement and perseverance gets things about right.

D. TONRY ON MANDATORY PENALTIES

If Tonry's prescriptions for the advancement of intermediate sanctions are the least solid in \textit{Sentencing Matters}, his suggestions about legislatively mandated sentences are the most straightforward: they


\textsuperscript{43} Tonry views such efforts as a dead letter—and has never been warm to unit-of-exchange proposals. \textit{Tonry}, supra note 5, at 130-31; \textit{Between Prison and Probation}, \textit{supra} note 10, at 31.

\textsuperscript{44} \textit{Tonry}, supra note 5, at 67.
should be abolished or, short of that, cut back and compromised as much as possible. In its thesis, argumentation, and forceful conclusions, Chapter 5 on "Mandatory Penalties" is one of the most satisfying of the book. Tonry sets out to show that current practices such as lengthy required drug sentences and "three-strikes" laws are not supportable on any utilitarian premise. Further, he attacks those who favor such laws as acting out of either ignorance or political cynicism. These are categorical claims of the strongest kind, and one can admire Tonry's argument even while observing that he has proved only 95% of his case.

The force of Chapter 5 owes much to its intelligent historical survey, from which Tonry draws consistent lessons of failure from mandatory punishment regimes dating back to England's Black Act in the eighteenth century, and forward to the recent excoriation of mandatory laws by the Bush-era U.S. Sentencing Commission. Time and again, Tonry documents the tendencies of mandated penalties to exacerbate rather than eliminate sentencing disparities, to create unintended bulges of discretion in law enforcement officials, to prompt nullification and avoidance strategies in courts and juries, to produce administrative bottlenecks (such as occur when large numbers of defendants refuse to plead guilty), and to fail in their stated goal of increasing the average severity of sentences. As usual, Tonry's analytic grip is firm when speaking of such process dynamics.

When it comes to the substantive policy bases for mandatory penalties—or, as Tonry portrays it, the lack thereof—he overplays his hand. In conjunction with an overview of the empirical research of incapacitation and deterrence policy, Tonry argues that such hoped-for consequential benefits, when pursued through mandatory sentencing schemes, are effectively zero. Of incapacitative initiatives, for example, he writes that such programs have been "demonstrated" to be "ineffective," that they "could not be justified in cost-benefit terms," and that they lack "ethically defensible and economically af-

45 Repeal is the first item of the book's eight-point program. See id. at 5, 191-92. Chapter 5 makes four second-best recommendations on the assumption that outright abolition will probably be impossible politically in the foreseeable future: (1) Mandatory sentencing laws should be made presumptive rather than mandatory. (This amounts to repeal since "presumptive" penalties, by definition, are not mandatory.) (2) Mandatory sentencing statutes should be enacted with "sunset" clauses, so they disappear from the books after a period of time. (This amounts to delayed repeal.) (3) Mandatory penalties should be restricted to "patently serious crimes like homicide and aggravated rape." (This would dictate repeal of most existing mandatory laws.) (4) Correctional or parole officials should be allowed to release persons sentenced under mandatory penalties after five or ten years. (This would be a significant amendment to many present mandatory statutes, which specify that their prison terms must be served without possibility of parole.) Id. at 161-63.

46 See id. at 147-48.
What Tonry might have said is that confinement-intensive laws such as mandatory sentencing statutes carry undenied consequential benefits, but most people find them surprisingly small once they are quantified. It is important to put the argument this way because few people will accept the proposition that no crime is prevented when large numbers of convicted offenders are locked away for elongated terms (particularly when the prisoners are proven recidivists such as those subject to three-strikes laws). The amount of prevention, insofar as we can judge it, needs to be part of the argument. Disappointment on this score can persuade some fair-minded conservatives, such as James Q. Wilson, that “[v]ery large increases in the prison population can produce only modest reductions in crime rates.” On the other hand, there are people who place very high value on even tiny percentage points of crime avoidance. For example, one method used in a recent study of California’s prison growth through the 1980s estimated that for every 1,000 new incarcerees held for one year, seven homicides were averted, as were fifty-five rapes, 125 robberies, 1,110 larcenies, and 2,180 burglaries. Such benefits must be acknowledged just as they must be assessed in light of their costs.

Nothing Tonry has written will deflect the opinions of those who believe that harsh mandatory punishments are justified on moral retributive grounds regardless of their consequential impact. Throughout Sentencing Matters, Tonry establishes his utilitarian leanings and campaigns against the just deserts movement as a “wrong turn” in American penal policy. Concededly, many of us would agree with Tonry’s ethical sense that most current mandated penalties are excessive, and that moral claims without consequential punch are an arrogant basis for the infliction of lengthy confinement—but not everyone

47 See id. at 138-39; see also id. at 161 (“If the findings of empirical evaluations of mandatory sentencing laws were heeded, there would be no mandatory penalties.”). For reasons given above, although I hope Tonry is right, I am not sure of it. Tonry has made similar claims elsewhere. See MALIGN NEGLECT, supra note 8, at 190 (“The only possible legitimate argument for [the “penalty-enhancing” laws enacted during the 1980s] is that tougher or surer penalties will lower crime rates. ... [T]here is no credible evidence on which such an argument could be based . . . .

48 For some of the recent numbers, see FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME (1995).

49 Indeed, Tonry’s failure to make any utilitarian concession opens the door to the charge that he is a typical academic who ignores plain facts. See John J. Dilulio, Jr., SUFFICIENT UNTIL THE DAY IS THE EVIL THEREOF, WALL ST. J., Dec. 15, 1995, at A12 (intemperate review of SENTENCING MATTERS and MALIGN NEGLECT).

50 James Q. Wilson, PRISONS IN A FREE SOCIETY, 117 PUB. INTEREST 37, 38 (1994).

51 ZIMRING & HAWKINS, supra note 48, at 118 tbl. 6.6.

52 See supra note 10.
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thinks this way. In relegating his opposition to the status of demagogues, and in dismissing rather than picking away at their claims, Tonry weakens his otherwise powerful presentation.

IV. SENTENCING MATTERS AS AN ACT OF LEGAL SCHOLARSHIP

In treating specific points of Sentencing Matters, and in raising the inevitable book reviewer's quibbles, it is easy to underrepresent the book's value to the policy community. Because Sentencing Matters is noteworthy as an example of real-world-oriented legal scholarship, this section offers some reflections on the book's intended readership and impact.

Tonry's main audience is made up of policymakers in the criminal justice field: legislators and their staff, executive branch criminal justice divisions and research arms, members and staff of sentencing commissions, and interested judges or judicial conferences. Only secondarily, Sentencing Matters is aimed at academic consumption. In each chapter, Tonry writes toward a workable list of bullet-point recommendations; some are even accompanied by suggested redrafts of applicable provisions. Tonry is invariably concerned with political obstacles and implementation glitches. He is engaged, in short, in trying to get the tire to meet the road.

Just as importantly, the content of Sentencing Matters derives heavily from Tonry's experience in the world of criminal justice administration, and from the close contacts he maintains with professionals who oversee sentencing systems across the country. Tonry appears to believe that, if one can choose between learning one's subject from other academics or from persons in the field, one should choose the latter. Again, this intellectual center of gravity is different than the image sometimes offered of legal scholars, that they speak only to each other and are disdainful of practitioners. In this and in other ways Tonry runs contrary to stereotype: the influence of his work over the years has not been due to the intricacy of his theories or the fluency of his writing style. Instead, his achievements have come from knowing what he is talking about.

Occasionally (although this happens infrequently in Sentencing Matters), Tonry sacrifices some of his well-earned credibility when he

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53 Even so, it will prove a valuable teaching tool for criminal justice courses with a systemic-reform perspective.
54 See Tonry, supra note 5, at 91-92 (proposing new language for federal sentencing guidelines).
portrays gnarled disputations of policy as collapsible questions of right and wrong. His chapter on mandatory penalties, discussed above, falls into this trap in places. Sporadically, throughout the book, Tonry refers to “partisan,” “ideological,” or “cynical” conservative crime control policies and draws a contrast between those and the “nonpartisan,” “rationalistic,” and “good-government” instincts of those nearer to Tonry’s heart. If one is in the liberal camp, such pronouncements can be bracing; there is no doubt a time and a place for them. My own view of the academic voice, however, would call for greater political detachment than these passages display. Scholarship stands its best chance to inform and influence people when it does not insult them. I fear that Tonry alienates a portion of his potential audience, and fails to put his own reasoning to a full test when he brushes aside the conservative viewpoint.

Perhaps in recognition of this, the mainstays of Sentencing Matters are procedural arguments rather than substantive ones. Tonry’s command of the operational features of different sentencing structures yields reliable information regardless of the reader’s political persuasions. A well-built sentencing system, as Tonry himself emphasizes, can be an effective instrument of crackdown policies just as it can be used to restrain the growth of the criminal justice enterprise. In fact, a coordinated sentencing structure is a precursor to meaningful debate about what the underlying policy should be. Without systemic management, the goals of punishment are determined one judge at a time, or one parole board at a time. It is small wonder that aggregate punishments show no rhyme or reason under such an approach. The hope for greater sense and deliberation, I suspect, explains Tonry’s continued interest in his subject over the years.

V. Conclusion

Sentencing Matters is a compendium of the best work of the leading scholar of American sentencing innovations. It does not say every-

56 See Tonry, supra note 5, at 4-5 (Tonry compares “partisan political calls for ever-increasing severity” with “nonpartisan calls for more just, efficient, and effective systems”); id. at 12-13 (early sentencing reform proposals of mid-1970s characterized favorably as “bipartisan, good-government, rationalistic”; in contrast, Reagan-era crime control policies “were oriented more toward toughness than toward fairness”); id. at 129 (“the modern emphasis on absolute severity of punishment is the product of partisan and ideological politics”); id. at 160 (“the public officials who enact mandatory sentencing laws support them for symbolic and political reasons while the public officials who administer mandatory sentencing laws oppose them for instrumental and normative reasons”); id. at 194 (“Many of the more cynical recent proponents of harsh crime-control policies have apparently decided that elections cannot be won without breaking people”).

57 This problem is pronounced in Tonry’s important but strident MALIGN NEGLECT, supra note 8.
thing that could or should be said on the subject, but no one in the field can afford to overlook the impressive groundwork Michael Tonry has laid. Indeed, in its scope and solid foundations, Sentencing Matters is either the first or second book that public officials should read in seeking a grasp on the changing landscape of American sentencing structures. (The other contender for first place is still Frankel’s Criminal Sentences.) Marvin Frankel had the Big Idea of the sentencing commission, which has now spread across nearly half the country. Tonry, for his part, has devoted himself to making the idea work. It is hard to say which is the more exalted occupation.