A Procedural Plea for Leniency

The racial disparities that plague the American criminal justice system seem to call for the suspension of criminal penalties, at least for black offenders. But refusing to punish violent offenses leaves unprotected those most vulnerable to crime, and outright abolition thus appears to undermine the rights and liberties of black Americans. I call this the **decarceration dilemma**. After analyzing and evaluating Christopher Lewis’s admirable attempt to resolve the dilemma, I offer my own, which employs a procedural rather than a substantive solution. I lean on the principle of expanded asymmetry (EA), which holds that it is better to underpunish than overpunish. After defending the principle, I note that EA obtains only under conditions of uncertainty. I then show that because virtually all trials of black offenders meet the uncertainty condition, sentencing authorities are obliged to treat black offenders leniently. I conclude by noting the advantages of my proceduralist approach.

1. **The decarceration dilemma**

The project of decarceration aims to reduce the intensity and scope of policing and imprisonment, advocating policy changes that include drug decriminalization, removing police from schools, banning solitary confinement, and eliminating cash bail. Decarceration is especially urgent in light of the racial inequalities blighting the criminal justice system: blacks are more likely than whites to be denied bail, blacks are punished more frequently and more harshly for the same offences as whites, and black neighborhoods are subject to heightened police surveillance. These disparities reinforce the injustices already suffered by black communities, inflicting additional wrongs on top of preexisting structural deprivations and exacerbating the factors that contribute to differential punishment.¹

A successful solution to these inequalities is undoubtedly far off. In the meantime, those who condemn disproportionate enforcement of the criminal law face a philosophical and practical dilemma. Because American penal practices are deeply objectionable, respect for the rights and liberties of black communities seems to require the suspension of criminal penalties. However, refusing to punish violent offenses in particular would leave unprotected those individuals and communities most vulnerable to crime. So outright abolition also appears to undermine the rights and liberties of black Americans. I’ll call this the **decarceration dilemma**, which ensnares at least two leading philosophers of punishment, R.A. Duff and Victor Tadros.²

The most successful attempts to resolve the decarceration dilemma can be found in the work of Tommie Shelby and Christopher Lewis, though for brevity’s sake I will focus on Lewis. Lewis argues that disadvantaged offenders’ blameworthiness is reduced by their disadvantaged position, not evacuated altogether. He keeps the wholesale abolition of punishment off the table, while urging that the disadvantaged be sentenced more leniently on account of their social status.

After briefly analyzing Lewis’s proposal, I turn to my own, which offers a **procedural** rather than a substantive way around the dilemma. Rather than concerning myself with how the law should respond to reduced moral blameworthiness in the context of acute social deprivation, I construct a plea for leniency based on procedural considerations. I lean heavily on what I call the principle of expanded asymmetry (EA), which holds that, all things being equal, it is better to...
underpunish than overpunish. After defending the principle, I note that EA obtains only under conditions of uncertainty. I then show that because virtually all trials of black offenders meet the uncertainty condition, sentencing authorities are obliged to treat black offenders leniently. I conclude by noting the advantages of my proceduralist approach.

2. Lewis’s limitations on blameworthiness

Lewis joins Tadros and Duff in hitching the legitimacy of punishment to blameworthiness. All three posit that blame is justified only to the extent that sentencing authorities possess the appropriate moral standing. Lewis adds a second condition: sentencers must have good evidence of blameworthy attitudes on the part of the accused. In the case of disadvantaged offenders, this condition is less likely to be met, and so less blame attaches to disadvantaged lawbreakers than advantaged ones. He concludes that the former must be punished more leniently than the latter.

It is harder for sentencers to justifiably blame disadvantaged lawbreakers than advantaged ones on account of significant differences in their incentives for lawbreaking: owing to their deprivation, disadvantaged offenders have relatively weighty reasons to commit crimes to acquire basic social goods or to augment their ability to live a life they have reason to value. Because the advantaged already have ample access to basic social goods and the ability to live a valuable life, advantaged malefactors have less reason to prioritize their interests over others’ (Lewis 2016: 165). (It is worth noting that Lewis views most crimes as having an economic payoff.) Even though legal institutions have no direct mechanism for discerning the strength and content of particular offenders’ motives, there is thus a strong likelihood that members of the class of disadvantaged lawbreakers act on less selfish motives than the class of advantaged offenders. For Lewis, these considerations support the general presumption that disadvantaged offenders are relatively less blameworthy (2016: 167 ff.). The practical consequences of this presumption are far-reaching, though Lewis declines to get into specifics (2016: 179). Thanks to the tight connection between punishment and blame, courts are unjustified in sanctioning disadvantaged offenders as seriously as they otherwise could. This policy of penal leniency is, however, compatible with the coercive enforcement of rights violations.

2.1. A brief assessment

While Lewis is right that disadvantaged offenders’ incentives are particularly vulnerable to sentencers’ misapprehension, black offenders face many hurdles that white offenders do not. The ways in which blacks are unfairly treated—even unfairly treated with respect to assessments of their desert—are numerous and varied; some are canvassed below. Lewis’s call for leniency does not do justice to these specific legal-institutional disadvantages.

Lewis’s view suffers from a second shortcoming, one which afflicts other arguments based on the notions of blame and desert. Given the tight connection between blameworthiness and moral responsibility, assertions of the diminished blameworthiness of black offenders risk

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3 To be sure, Lewis is not interested in offering such an account, and it would be uncharitable to take him to task for failing to do so.
portraying them as less than fully responsible for their misdeeds. And this can suggest that black offenders possess less moral agency than whites, a morally disrespectful consequence that constitutes a partial denial of black agency and personhood. It might even be said that the implication of diminished responsibility generates a second dilemma for those sensitive to racial inequalities in punishment: either black offenders are punished excessively severely, or they are afforded leniency purchased at the price of disrespect.

3. A procedural alternative

Fortunately, there is a way around these difficulties. Claims about moral standing or blameworthiness are not the only grounds for affording leniency to black offenders. Another reason can be identified by examining the procedural values of the legal systems of (purportedly) liberal societies. My resulting procedural account develops an ameliorative view of punishment though an analysis of norms governing the calibration of sentencing under conditions of uncertainty, conditions which obtain in virtue of larger racial inequalities. This approach addresses procedural injustice while dodging the decarceration dilemma and its progeny. I call the principle central to my proposal the principle of expanded asymmetry.

**Expanded asymmetry (EA):** It is better to underpunish P by $n$ units for crime $c$ than to overpunish P by $n$ units.

Expanded asymmetry is a modified version of the asymmetry principle. In its canonical form, the asymmetry principle holds that it is worse to punish an innocent person for $c$ than it is to let someone guilty of $c$-ing go free. The principle finds its most famous expression in William Blackstone’s pronouncement that “the law holds it better that ten guilty persons escape, than that one innocent party suffer.” For many scholars, asymmetry underlies the “beyond a reasonable doubt” standard of criminal conviction pervasive in Anglophone legal systems, as well as the legal presumption of innocence. The prosecutorial burdens imposed by these norms reflect the view that legal procedures should favor lowering the risk of punishing the innocent even at the cost of increasing the risk of the guilty going free. Canonical asymmetry thus seems to express the normative judgment that it is worse to overpunish an offender than it is to underpunish her, which just is expanded asymmetry.

At the same time, the significance of EA to my argument means that a more robust vindication is needed. My defense is anchored by an uncontroversial premise.

**Minimal invasion principle (MIP):** When faced with alternative means of achieving a (legitimate) political or legal aim, and when one alternative is clearly less invasive than the other, authorities must choose the less invasive means.

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4 Lewis responds to this concern by prying apart blame and wrongdoing (2016: 178–9). For Tadros’s response, see 2009: 393.


6 If, for example, courts employed the less stringent “preponderance of the evidence” standard—“more probable than not,” or .51 on the certainty scale—for establishing elements of the offense, convictions would be secured more easily, capturing more of the guilty, but at the cost of raking in more of the innocent.

7 I borrow this moniker from Hugo Adam Bedau, although my principle differs slightly from his (2002).
MIP is a bedrock liberal principle. Let’s call liberal states those in which officials must justify their interference in, or domination over, citizens’ lives. Liberals of all stripes—libertarian, neo-republican, or egalitarian—will consider the associated demands to be quite stringent. When fundamental rights are at stake, the burden of justification will be close to insurmountable. Liberal political morality thus harbors a second-order principle mandating minimal invasion of citizens’ liberties. Owing to liberty’s overriding importance, a state cannot justify infringing on citizens’ freedom any more than is needed. When abrogations of freedom are necessary due to a compelling and legitimate state interest, authorities must choose the least invasive means of infringing thereupon; if two methods suffice to achieve the state’s purpose, only the least invasive is permissibly pursued.8

It is MIP that generates EA’s uncertainty condition. If an offender’s guilt is undeniable, and if sentencers are confident that the selected sanction is appropriate to her desert bases, there are no alternatives for MIP to regulate. Only when the choice between softer and harsher sanctions is marked by uncertainty can we posit equally legitimate alternative sanctions.

What, then, is uncertainty? Let’s begin with certainty. One type of certainty is psychological or subjective. Subjective certainty belongs to a sentencer who is unswervingly convinced of her judgment; in epistemological terms, a sentencer is subjectively certain that P is guilty of c when she has a very high credence in P’s guilt. A second type is epistemic certainty, which obtains when there is strong evidence supporting a sentencer’s view of the accused. Uncertainty is weaker than certainty. A sentencer is beset by psychological uncertainty when she is not entirely confident that P is guilty of c, and her belief that P is guilty of c is epistemically uncertain when there are good reasons to doubt its truth. Now, the standard of certainty employed by a criminal justice system cannot be too stringent, otherwise no accused would ever be convicted. Absolute certainty is too high a bar: it is hard enough to be absolutely certain that one possesses hands, much less that a money launderer deserves n days of confinement. Although it is natural to ask where to locate the boundary between certainty and uncertainty, I don’t have a firm view, and nothing in what follows hangs in the balance. So I will simply stipulate that certainty is somewhere between .85 and 1 on a scale where 1 is absolutely certain.9

8 MIP need not be understood as mandating that states seek out the absolute least invasive means for achieving their ends, a construal that would likely place unworkable burdens on policy-making. MIP can be formulated more modestly, such that it forbids only those actions or policies which are known to be more invasive than the alternatives; this is just how I presented it above.
9 That is, the threshold between uncertainty and certainty is, in the psychological sense, a .85 level of confidence, and, in the epistemic sense, an 85 percent likelihood that the belief is true. Where the number falls within the range is going to depend partly on the legal context. When it comes to criminal conviction, the process of determining whether the accused is guilty as charged, the official line in the U.S. is that jurors must find proof beyond a reasonable doubt. This is meant to be a very high bar. In keeping with the putative stringency of the standard, scholars who venture to quantify it put it in the vicinity of .95. When it comes to the sentencing phase of a criminal trial, judges are typically granted discretion to choose from among the penalties contained within a statutorily prescribed range. At the same time, they cannot deviate from the range, even when they are convinced that the statutorily mandated sentence is unjust. In practice, then, sentencing is not subject to anything like the beyond a reasonable doubt standard. In principle, however, both consequentialist and retributivist theorists will insist on a relatively high level of psychological and epistemic certainty, as they are loath to under- or overpunish. Although I’m open to the claim that the threshold for sentencing should be lower than conviction, I will again stipulate that in the sentencing phase, the floor for certainty is a confidence level somewhere around .85 and, epistemically speaking, a likelihood that the punishment fits the crime around .85. Again, this should be understood as a rough estimate, and a revisable one.
Let’s now move to the argument for EA. I’ll start with the principle of symmetry, which is favored by opponents of asymmetry.\textsuperscript{10}

1. The wrong of overpunishing P by \( n \) units for \( c \) = the wrong of underpunishing P by \( n \) units for \( c \).  

Now for MIP.

2. When faced with alternative means of achieving a legitimate political or legal aim, and when one alternative is clearly less invasive than the other, authorities must choose the less invasive means.  
3. Underpunishing P by \( n \) units is less invasive than overpunishing P by \( n \) units.  
4. Overpunishing P by \( n \) units violates MIP.

From (1) and (4) an intermediate conclusion can be drawn:

5. Overpunishing P by \( n \) units is wrong and also a violation of MIP.

The fifth premise is a key step in the argument. The basic idea is that overpunishment encompasses two wrongs, the violation of MIP and the wrong of disproportionate punishment. The latter wrong, which can be found in the first premise, is the wrong of punishing an offender more harshly than is warranted by her offence. The fifth premise leads to EA.

6. The cumulative wrongness of overpunishing P by \( n \) units for \( c > \) the cumulative wrongness of underpunishing P by \( n \) units for \( c \).  
7. It is better to underpunish P by \( n \) units than to overpunish by \( n \) units. (EA)

4. Uncertainty

The present argument for leniency in the sentencing of black offenders will need to establish that EA applies to most, if not all, instances of said punishment. And to make that connection I need to show that the punishment of black offenders is shot through with uncertainty. To prosecute this task, I must distinguish first-order uncertainty from what I call higher-order uncertainty. First-order uncertainty is uncertainty about the adequacy of the reasons underlying the conviction or sentencing of a particular defendant, where that uncertainty is based on evidence pertaining to his crime or criminal proceeding. If you question whether an accused murderer should be convicted on the basis of eye-witness testimony alone, in the absence of corroborating evidence or plausible motive, it is likely because you think his case is marred by first-order uncertainty. (There are also moral species of first-order uncertainty.) Though many criminal trials feature first-order uncertainty, regardless of the race of the accused, I’ll set this issue aside.

Higher-order uncertainty is constituted by our inability to distinguish between cases in which first-order uncertainty is present, and those in which it is not. Criminal trials feature such uncertainty when there is no secure way to draw the line—at the time of sentencing—between instances in which judges and juries’ findings track the truth and instances in which, given the

\textsuperscript{10} I do not know of any philosopher who believes that underpunishment is worse than overpunishment.
factual and normative information available to them and their own sound reasoning, their beliefs regarding an offender’s desert are rationally justified but false all the same. Higher-order uncertainty is the product of what epistemologists call uneliminated error possibilities. Uneliminated error possibilities are just what they sound like, namely, potential grounds for error that have not been satisfactorily ruled out. Not just any uneliminated error possibility will generate higher-order uncertainty, because some lack legal salience. A juror need not worry that an evil genius is manipulating her mental states so that she is (wrongly) convinced of the accused’s guilt, because this uneliminated, and ineliminable, error possibility is irrelevant within the pragmatic context of the criminal justice system. We need not hammer out a precise standard to see that some possibilities of error are relevant. For us the most important is that of racism or racial bias. We know that this possibility is relevant because it is a proper object of the court’s deliberation, and, when its existence is established, constitutes grounds for legal relief under the 6th or 14th Amendments. So let us examine what reasons we have for thinking that racism generates higher-order uncertainty.

4.1. Establishing higher-order uncertainty

One reason to designate racism as a source of higher-order uncertainty is that black offenders are more severely punished for their crimes than white offenders. The best explanation for this disproportion is illicit implicit or explicit racial bias. So in any case involving a black defendant, there is a good possibility that her sentencing was in error, even though it will be difficult to establish whether, in her case, racial considerations improperly affected her proceeding.

A recent report by the United States Sentencing Commission that controls for age, education, and most importantly, criminal history, establishes that in federal courts, black men are sentenced to terms 19 percent longer than white men who commit the same crime (Commission 2016). The main cause of these discrepancies is judges’ willingness to go easy on white men. White male offenders are 21 percent more likely to receive downward variances from federal sentencing ranges than black male offenders. And when black male offenders are granted leniency, their sentences are still 17 percent longer than whites’. When we confine ourselves to sanctions falling within the specified range, black male offenders are sentenced to terms of imprisonment 8 percent longer than white offenders. An independent multiagency study that followed offenders through the federal court system from arrest to sentencing and controlled for similar variables found that black men received sentences 13 percent longer than white men (Rehavi and Starr 2014: 1323). (Again, these discrepancies exist all else being equal.)

Prosecutorial charging decisions explain up to half of this disparity. Prosecutors charge blacks with crimes carrying mandatory minimum sentences far more frequently than whites; blacks face a 65 percent higher likelihood of being slapped with mandatory minimums (Rehavi and Starr 2014: 1323). Charging decisions have outsized impact in plea bargaining, which is used to

11 A recent study analyzed the correlation between punitive attitudes toward sentencing (which were measured by strong support for capital punishment, three-strikes laws, and punishing juveniles as adults) and standard racial attitude indicators, including anti-black stereotypes, negative intergroup affect toward blacks, and racial resentment of blacks. It found that the presence of anti-black attitudes was correlated with a punitive disposition toward penal policy in both blacks and whites, thought the correlation was much stronger in whites (Bobo and Thompson 2010: 339). More specifically, it found that racial resentment predicts punitive attitudes, regardless of age or education level. It also ruled out alternative explanations based on conservative social values, individualistic worldviews, fear of crime, and victimization levels.
dispose of ninety-seven percent of federal criminal cases (and close to that rate in state jurisdictions). Not surprisingly, blacks are also more likely than whites to receive custodial plea deals, even when controlling for criminal record and crime severity.

Things are usually no better at the state level. For example, the Sarasota Herald-Tribune recently conducted a comprehensive analysis of sentencing by county. Florida uses a guided sentencing system, where offenders are given points based on the circumstances of the arrest, seriousness of the crime, and prior criminal history. In principle, offenders with the same points should receive the same sentences for the same crimes; the Florida legislature introduced this mechanism precisely in order to standardize counties’ divergent sentencing practices. But reality has little resemblance to the ideal. In 60 percent of all felony cases, blacks serve a longer sentence than whites for crimes with the same characteristics; 68 percent of blacks are treated more harshly for the most severe felonies (Salman, Coz et al. 2016).

These data demonstrate that black offenders as a class are disproportionately sanctioned for their crimes. Even if we grant that some black offenders are punished appropriately, there will still be no good way to distinguish those cases in which sentences track desert from those in which racial bias brings about excessively severe sanctions. The associated possibilities of error constitute higher-order uncertainty. Given EA, black offenders must be treated leniently.

5. Conclusion

My proceduralist argument for reductions in sentencing for black offenders rests on claims about how legal authorities in a liberal society ought to proceed under conditions of uncertainty, rather than claims about culpability or blameworthiness. It is important in its own right to articulate procedural reasons for leniency, but it is also worth noting the advantages of the attendant view. On the one hand, it avoids the derivative decarceration dilemma (see §2.1) that plagues expressivist analyses offered by Lewis (and Duff and Tadros). Moreover, the practical prescriptions that accompany my argument are both finer-grained and more

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14 More specifically, in Okaloosa County, judges sentence white offenders to nearly five months for battery and blacks to almost a year. In Flagler County, judges put blacks convicted of armed robbery behind bars for nearly three times as long as whites (Salman, Coz et al. 2016).
15 Racial bias is not the only engine of higher-order uncertainty. Laboratory misconduct is surprisingly common (see Hansen 2013; Hsu 2015). Even apparently ironclad evidence like confessions can be misleading, as false confessions, be they voluntary or coerced, are not uncommon; the Central Park Five are an infamous example of the latter. This fairly obvious qualification raises a question—must all sentences be mitigated under expanded asymmetry? If so, then it looks like all criminal defendants should enjoy the relief promised by EA. For those of an especially retributivist cast of mind, this line of inquiry can be turned into a reductio of my proposal. But I think the question can be answered in the negative, on the basis of two crucial differences between the higher-order uncertainty that flows from racial disparities and that which flows from sources like those just mentioned. Both differences suggest that the former type of higher-order uncertainty is much stronger, hence more worthy of remedial measures. First, both laboratory evidence and the consideration of confessions are part of mechanisms aimed at increasing our confidence in a verdict. And when employed as intended, laboratory reports and statements of confession increase the reliability of a verdict. Second, there are regular causal connections between race and differential punishment. That an accused is black often explains why she is sanctioned more severely than she deserves.
16 For example, leniency might be mandated only in regard to those crime-types for which there is some evidence of racial disparities in sentencing. Here we could employ one of two starting points, which differ in where they allocate
responsive to the racial realities of the American criminal justice system. Lewis’s blanket solution suggests that we ameliorate the sentences of all of the disadvantaged. I agree that we have class-wide evidence of the diminished blameworthiness of disadvantaged offenders, but disadvantaged black offenders are nevertheless more likely than disadvantaged white offenders to receive brutal plea deals, to be hit with mandatory minimums, and to suffer from upward sentencing departures. The attendant procedural injustices are important reasons to afford leniency, yet go unnoticed on a desert-based paradigm.

References


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the burden of proof. The first, which is friendlier to black offenders, would stipulate that, unless there is strong evidence to the contrary, when crime c is committed by blacks it is no more serious than when committed by whites. Accordingly, racial disparities in the punishment of c will be taken to establish higher-order uncertainty sufficient for leniency. Leniency will thus be in order for all black offenders who commit c. The more prosecution-friendly approach would assume that sentencing disparities track desert. Here we would assert higher-order uncertainty sufficient for leniency only in those cases where there is independent evidence that conviction and sentencing fall more heavily on blacks.

