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The A.L.I.'s Proposed Distributive Principle of "Limiting Retributivism": Does It Mean in Practice Anything Other than Pure Desert?

Paul H. Robinson[†]

Let me first note how pleased I am that the A.L.I. has undertaken the new Sentencing Project Report. Sentencing has been a central focus of national debate for several decades. It is just the kind of difficult and contentious issue on which the A.L.I., with its expertise and credibility, can make a unique and important contribution.

The new sentencing project raises a host of wonderful issues on which I could say something. I have written a good deal about structuring sentencing decision making,¹ for example. But because there are no specific proposals on these matters I thought I would use this space to comment on that aspect of project that has resulted in at least a sample proposed black letter text: the official statement of the "purposes" that are to guide decision makers in sentencing.

The proposed principle for distributing criminal sanctions is an important step forward from the existing Model Penal Code section 1.02, which offers only a facade of guidance. By listing a host of purposes without defining their interrelation, the current provision offers no real guidance; different purposes will suggest different sentences and the provision gives no guidance in selecting among the possibilities. Worse, it is subject to conscious or subconscious abuse. It lets a judge first settle on a result,

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1. See, e.g., Paul H. Robinson, A Sentencing System for the 21st Century?, 66 Tex. L. Rev. 1 (1987); Paul H. Robinson, Legality and Discretion in the Distribution of Criminal Sanctions, 25 Harv. J. on Legis. 393 (1988); Paul H. Robinson, One Perspective on Sentencing Reform, 8 Crim. L.F. 1 (1997); Paul H. Robinson, The Federal Sentencing Guidelines Ten Years Later: An Introduction and Comments, 91 Nw. U. L. Rev. 1231 (1997).

then work backwards to offer as its justification whichever of the listed purposes supports that result. This is not principled decision making.² The Report's proposed provision offers a true distributive principle that tells decision makers with greater clarity what criteria should guide their judgments.³

The Report adopts as its principle what it describes as "limiting retributivism," an approach it attributes to Norval Morris. I have some reservations about "limiting retributivism" as Morris and others have advanced it, but I do not have reservations about the Report's proposed principle, for reasons I will explain.

On the contrary, I very much support it. But I do so because I believe that in practice the Report's proposal will produce a very different distributive principle than the advocates of "limiting retributivism" would want.

This leaves me with a dilemma. To explain what I think is so attractive about the Report's proposal, I must explain what I think the true effect of the proposal will be, and that explanation may serve only to undermine its support among the "limiting retributivism" advocates. I have decided to proceed despite the risk, however, comforted in the fact that people are commonly unpersuaded by what I say.

With regard to determining punishment, the proposed distributive principle might be outlined in this way:

- (i) In determining punishment, look to the extent of the offender's blameworthiness (including the seriousness of the offense),
- (ii) but reliance upon the traditional utilitarian purposes of rehabilitation, general deterrence, and incapacitation of the dangerous, as well as "restoration of crime victims and communities," is permitted where the purpose can effectively be achieved,

2. See Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 Nw U. L. Rev. 19 (1987) [hereinafter *Hybrid*].

3. For a remaining caveat on its success in this regard, see *infra* text accompanying note 13.

(iii) but such reliance may not produce punishment in conflict with the offender's degree of blameworthiness.⁴

What will be the instances under this proposal in which the distribution of punishment will be guided by a principle other than desert? The answer, I suggest, is: not many. (By "punishment according to desert" I mean punishment according to the offender's personal blameworthiness for the past offense, which takes account not only of the seriousness of the offense but also the full range of culpability, capacity, and situational factors that we understand to affect an offender's blameworthiness.⁵)

I. THE LIMITATIONS ON PERMITTED DEVIATION FROM DESERT DUE TO THE PROPOSAL'S EFFECTIVENESS REQUIREMENT

Reliance upon non-desert purposes will be seriously limited, first, by the fact that those purposes commonly cannot effectively be achieved, and thus are excluded from use by paragraph (ii) of the proposed distributive principle. Consider each of the traditional utilitarian purposes in turn. As the Report concedes, there are limits to the effectiveness one can expect from rehabilitation programs.⁶

As is becoming apparent from social science research, our realistic expectations for the effectiveness of deterrence also are fading, as John Darley and I have detailed elsewhere.⁷ Potential offenders commonly do not know the

4. See American Law Institute, Model Penal Code: Sentencing, Report 129, § 1.02(2)(a)(i)-(ii) (April 11, 2003) [hereinafter Report]. The provision also requires that a sentence be no more severe than is necessary to achieve the applicable purpose, but I take this to be inherent in the requirement of fixing punishment according to an offender's blameworthiness (and inherent in the efficient achievement of the utilitarian purposes).

5. Some writers, typically opponents of a desert distribution, offer a much more limited notion of desert, but all thoughtful desert advocates that I know essentially support the description I have offered here. More on this issue at *infra* text accompanying notes 21-22.

6. American Law Institute, Report, *supra* note 4, at 28-31.

7. See Paul H. Robinson & John M. Darley, Does Criminal Law Deter? A Social Science Investigation, 24 Oxford J. Legal Stud. (forthcoming 2004); Paul H.

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legal rules, either directly or indirectly, even those rules that have been explicitly formulated to produce a deterrent effect. Even if they know the rules, the cost-benefit analysis potential offenders perceive—which is the only cost-benefit analysis that matters in deterrence—commonly leads to a conclusion suggesting violation rather than compliance, either because the perceived likelihood of punishment is so small, or because it is so distant as to be highly discounted, or for a variety of other reasons. And, even if they know the legal rules and perceive a cost-benefit analysis that urges compliance, potential offenders commonly cannot or will not bring such knowledge to bear to guide their conduct in their own best interests, due to a variety of social, situational, or chemical influences. Even if no one of these three hurdles is fatal to law's deterrent influence, their cumulative effect typically is fatal.⁸

Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 *Geo. L.J.* 949 (2003).

8. Even if the prerequisites to deterrence did exist, using deterrence as a distributive principle faces other serious challenges. First, such use requires information that is not available, and not likely to be available any time in the foreseeable future, and requires a complexity of analysis that is beyond our current or foreseeable capacity. Second, *any* distributive principle for criminal liability and punishment will produce some deterrent effect (if any is to be had). A deterrence-based distribution makes sense only if it can provide meaningfully greater deterrent effect than that already inherent in competing distributions that advance other valuable goals, such as doing justice. Finally, even if one assumes for the sake of argument that a deterrence-based distribution could produce a greater deterrent effect than a justice-based distribution, there is reason to be concerned that the deterrence-based distribution also produces more crime because its conflicts with the community's shared intuitions of justice and thereby undercuts the criminal law's moral credibility, lessening its crime-control power as a moral authority, a dynamic that can have significant criminogenic effect.

There are possibilities for reform, but also serious limitations, due in large part to the sacrifices such reforms would demand: in greater financial cost, in infringing interests of privacy and freedom from governmental intrusion, in compromising basic notions of procedural fairness, and in doing injustice and failing to do justice. A realistic view of deterrence, even after plausible reforms are made, would have little increase in the deterrent effect of doctrinal manipulation, and not enough to justify its continued use as the standard mechanism of criminal-law making analysis. See Robinson & Darley, *Does Criminal Law Deter? A Social Science Investigation*, *supra* note 7; Robinson & Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, *supra* note 7.

There seems little doubt that having a criminal justice system that punishes violators, as every organized society has, does have a deterrent effect; having a punishment system does deter. But accumulating evidence increasingly suggests that there is little added deterrent effect that can be derived from the manipulation of criminal law rules for the distribution of criminal liability and punishment within that system.

It is true that incapacitation undoubtedly works to prevent future crime. Prison terms, for example, do prevent offenders from reoffending, at least against the unimprisoned population. But as I have argued elsewhere,⁹ while incapacitation works, it also incurs serious costs, including costs in effective crime prevention. Using the criminal justice system for such preventive detention, rather than providing such detention in a more open and explicit fashion, both produces unnecessarily ineffective prevention and subverts justice. Both society and potential detainees would be better off if such preventive detention purposes were not cloaked as criminal *justice* but advanced openly and honestly in an explicit system of preventive detention.

The community would be better off because an openly preventive system offers both more justice and increased protection from dangerous offenders. Giving the criminal justice system a better chance of doing justice is valuable for its own sake. It also creates greater moral credibility for the system, and thus greater long-term crime-control power.¹⁰ An explicit preventive detention system also offers better protection, because it can directly consider a person's present dangerousness and more accurately predict who is dangerous. Such a system also enhances accuracy by allowing for periodic re-evaluations, in comparison with the present system's need to make a single prediction of

9. See Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 Harv. L. Rev. 1429 (2001) [hereinafter *Dangerousness*].

10. See Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U. L. Rev. 453 (1997).

dangerousness years in advance. Greater accuracy leads to more detention of the dangerous, better protection, and less detention of the nondangerous, thus saving resources.

Segregating preventive detention from criminal justice also benefits the potential detainees for many of the same reasons. Better accuracy in prediction means less detention of nondangerous offenders. Periodic re-evaluation leads to detention limited to periods of actual dangerousness. Acknowledging the preventive nature of the detention also logically suggests a right to treatment, a right to nonpunitive conditions, and the application of the principle of minimum restraint, meaning greater freedom among those who are detained.¹¹

The purpose of “restoration of crime victims and communities” presents a situation similar in some respects to incapacitation. There is evidence that “restorative” processes, such as sentencing circles, victim-offender mediation, and family group conferences, do work, in the

11. See Robinson, *Dangerousness*, *supra* note 9:

Beyond the new limitations imposed on it, an open system of preventive detention ought to be preferred precisely because it is open rather than cloaked. No one can guarantee that a legislature or court will not attempt to abuse its power. But an open system makes it harder to abuse the system. The openly preventive nature of the system makes it susceptible to closer scrutiny, which the present cloaked system escapes. Instead of the current debates—which typically reduce to disagreements about, for example, whether “three strikes” sentences are “too long”—the debate would shift to the many aspects of preventive detention that cry out for debate: What is the reliability of the predictions of dangerousness? Is the threatened danger sufficient to justify the extent of intrusion on personal liberty? Are there less expensive or less intrusive measures that would as effectively protect the community? Under the current cloaked system, these issues escape examination and debate.

Imagine a legislature considering an explicit preventive detention statute that would provide life preventive detention on a third conviction for a minor fraud offense Such legislation would be difficult to defend and would be unlikely to find support in any political quarter. Indeed, imagine the Supreme Court’s review of *Rummel* if Rummel were being preventively detained. Life terms without the possibility of parole may be common and acceptable in a criminal justice system, in which horrible crimes deserve severe punishment. But life commitment with no further dangerousness review for a property offense would be preposterous on its face in a civil preventive detention system.

Id. at 1455.

sense that they can help “restore” victims and communities and can have a modest effect in reducing crime by the same offenders in the future. But depending on how they are used, restorative processes also can produce more future crime. For example, they may produce results that seriously deviate from shared community intuitions of justice and, thus, can undercut the criminal law’s moral credibility and thereby its power to gain compliance as a moral authority that can harness social norms.¹²

The incapacitation and “restoration” purposes reveal a weakness in the Report’s proposed distributive principle: it does not seem to allow one to take into account the *costs* of advancing a purpose—for example, its crime-producing effects—that may outweigh its benefits—such as its crime-prevention effects. The proposed text authorizes reliance upon one of the enumerated goals when it is possible “to serve [the] goals.” Thus, as long as the goal is being satisfied—rehabilitation, general deterrence, incapacitation, or “restoration of crime victims and communities”—the Report’s test would authorize reliance upon it *even if such would seriously increase future crime!* While the enumerated purposes have traditionally and primarily been justified as crime reduction mechanisms, the proposed text language does not actually require such.

A second flaw in the proposed distributive principle is its failure to give guidance in selecting among the enumerated purposes when more than one of those purposes meets the “realistic prospect of success” test and the alternative purposes suggest different distributions. If both incapacitation and “restoration,” for example, have a “realistic prospect of success” but suggest different sentences, as they commonly would, which purpose should be advanced? The provision fails to tell us, thus essentially leaving it to the unbridled discretion of the sentencing judge, with all of the potential for abuse and disparity in treatment of similar cases that such discretion brings.

12. See Paul H. Robinson, The Virtues of Restorative Processes, the Vices of Restorative Justice, in Symposium on Restorative Justice, 2003 Utah L. Rev. 375; Robinson & Darley, The Utility of Desert, *supra* note 10.

Recall that a similar (albeit more disabling) failure of this sort has been part of the criticism of current Model Penal Code section 1.02(2).¹³ For reasons I explain immediately below, the practical effect of these flaws in the proposed distributive principle may be limited.

II. THE LIMITATIONS ON PERMITTED DEVIATION FROM DESERT DUE TO DESERT'S ORDINAL RANKING DEMANDS

Compared to this first limitation on non-desert distributive principles—the difficulty in showing that such purposes can be achieved or achieved without causing more crime than they avoid—the second constraint on the influence of the enumerated non-desert purposes is more important and dramatic in its effect: the “limiting retributivism” distributive principle will in practice be primarily a desert distributive principle because of the proposed text’s demand that no distribution of punishment may conflict with the demands of desert.

Contrary to the assumption of the original advocates of “limiting retributivism”—that desert provides only vague outer limits on punishment—desert has quite specific demands, driven in large part by the demand of ordinal ranking. Desert demands that a case of greater blameworthiness receive greater punishment than a case of comparatively less blameworthiness.¹⁴ Given the limited range of punishments a liberal democracy ought to be willing to inflict, distinguishing cases of distinguishable blameworthiness means that the deserved punishment in any given case will fall within a narrow range on the punishment continuum.

This deontological conclusion (that desert requires a rather specific amount of punishment in order to properly rank it against other cases) turns out to be entirely consistent with recent social science research that reveals fairly sophisticated intuitions of justice shared by lay

13. See text accompanying *supra* note 3.

14. See Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* ch. 4 (1985).

persons.¹⁵ Small changes in facts can alter the consensus view of the comparative blameworthiness of an offender and, thus, the relative punishment that lay persons see the offender as deserving.

This characteristic of desert—its demand that distinguishable degrees of blameworthiness result in distinguishable amounts of punishment—means that desert demands specific amounts of punishment, not vague limitations on it, and this, in turn, has important implications: even where the enumerated non-desert purposes pass the Report proposal's effectiveness test, the purposes will rarely be used because such use would commonly conflict with desert.¹⁶ And where they do not conflict—where they give the same result as a desert distribution—they are irrelevant. That is, non-desert purposes are relevant only to the extent that they suggest a distribution of punishment different from desert, yet such deviation is expressly forbidden by the Report's proposal!

I don't want to overstate the case. There will be instances where a non-desert distribution will not conflict with desert. For example, desert generally cares about punishment amount, not punishment method.¹⁷ Thus, once the punishment amount is determined, one could look to any number of non-desert purposes to determine how that fixed amount of punishment is to be imposed.¹⁸ One might

15. See Paul H. Robinson & John Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* (1995) [hereinafter *Justice, Liability, and Blame*]; Paul H. Robinson & John M. Darley, *Objectivist vs. Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory*, 18 *Oxford J. Legal Stud.* 409 (1998); Paul H. Robinson & John Darley, *Testing Competing Theories of Justification*, 76 *N.C. L. Rev.* 1095 (1998).

16. See, e.g., Robinson, *Hybrid*, *supra* note 2, at 22-28; *Dangerousness*, *supra* note 9, at 1439-1443.

17. Not everyone would agree with this conclusion. Dan Kahan, for example, would argue that there sometimes is no substitute for a sentence of imprisonment as a means of signaling the seriousness of the offense. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. Chi. L. Rev.* 591 (1996).

18. See Paul H. Robinson, *Desert, Crime Control, Disparity, and Units of Punishment*, in *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* 93 (Antony Duff et al. eds., 1994); Robert E. Harlow, John M. Darley & Paul H. Robinson, *The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions*, 11 *J.*

look to the special circumstances of each case to determine whether the punishment method should maximize incapacitation or restoration, or even rehabilitation or general deterrence if the special circumstances exist that make achievement of such purposes possible.¹⁹

Ultimately, I predict that the Report's proposed distributive principle, with its prohibition of any distribution that conflicts with desert, will look almost exclusively to the desert principle in determining the amount of punishment to be imposed, both because many of the non-desert purposes cannot effectively be achieved and because those that can be achieved can do so only by deviating from desert.

As I noted at the start, there is the danger that my remarks here will undercut support for the Report among traditional "limiting retributivism" advocates, who often disapprove of a pure desert distribution. It seems likely, however, that they will simply ignore these remarks, comfortable in their conception of desert as having limited practical effect—as simply barring grossly disproportionate punishment. Perhaps they will be prompted to make clear in a carefully prepared legislative history for the proposed text the notion of desert upon which their drafting relies. I hope that move makes them feel better.

It will not make me feel worse. For the truth is that desert is not a notion that is a creature of academics or one that can be controlled by a prepared legislative history. When the text says that the distribution of punishment must reflect "the blameworthiness of the offender," those words refer to a concept, blameworthiness, that has a strong and clear intuitive meaning, one shared among most lay persons and many criminal justice professionals, and it is that view of desert that will in the longer term have its say.

Quantitative Criminology 71 (1995).

19. Of course, there remains the troublesome failure of the proposed principle to articulate which among the enumerated non-desert purposes is to be served when more than one of those purposes could be achieved but where the different purposes suggest different methods of punishment. See text accompanying *supra* note 13.

III. TWO KINDS OF OPPOSITION TO DESERT

In closing, let me address the more basic issue that drives the debate: whether people should be concerned about a distributive principle that looks purely to desert in determining amount of punishment. It seems unlikely that anything I can say here could change minds on such a fundamental issue, but one never knows.

My experience suggests that there are two kinds of people who oppose a desert distributive principle: those who misunderstand it, and those who think justice less important than crime reduction. A brief comment to each group:

To the first group, who think desert is harsh and insensitive—often in the form of an eye-for-an-eye view of desert, in which anger and humiliation play a role²⁰—I say that they *should* energetically oppose desert, if it really meant what they think it means. But, as I have already suggested in my definition of “desert” at the start of these remarks,²¹ their view of desert is in error and has been in error for many decades. As far as I know, every thoughtful modern proponent of desert envisions a system that takes account of every aspect of an offense and an offender that alters our assessment of an offender’s blameworthiness.

Yes, it is true, people disagree about what affects blameworthiness. The most dramatic example I can think of is that some people think that resulting harm ought to increase punishment while others think it ought not and that the focus should be only on things like one’s conduct, culpability, and capacities. But that kind of disagreement is found in every distributive principle. People will disagree about what factors ought to be taken into account in a system built on general deterrence or incapacitation. Indeed, in some respects, desert is more subject to definitive determination than any other distributive principle because one can with some precision determine at

20. See, for example, the papers for this symposium by Ed Rubin and James Whitman.

21. See *supra* note 5.

least what the members of the community governed by a criminal justice system think are the relevant factors,²² while it is very difficult to get reliable data on the most basic factors for non-desert purposes. (More on this in a moment.) If the fear is that lack of complete agreement as to what constitutes desert may produce unduly harsh punishments, one need only look at the variety of current objectionable sentencing practices—such as “three strikes”—to see that the far more prominent producers of harsh punishment are the non-desert distributive principles, such as general deterrence and incapacitation. Indeed, the harshness of the current system may be attributed in largest part to the move to rehabilitation, incapacitation, and deterrence, which *disconnected criminal punishment from the constraint of just desert*.

A word to the second group, those who object to a desert distribution because it condemns us to needlessly suffer avoidable crimes. Their objection is not based upon an error, as is the case with the first group, but upon an entirely legitimate view that doing justice may be nice but avoiding crime is more important. To this group I would argue that they may overestimate the crime reduction potential of non-desert purposes, and underestimate the crime reduction effect naturally inherent in a desert distribution. As I noted above, rehabilitation and general deterrence have limited crime prevention effectiveness, and incapacitation and “restoration” may work but may have serious crimogenic costs. It is too early for us to know how the numbers will crunch, but I would suggest to this second group that they ought to at least be open to a conclusion that, when the numbers are crunched, a desert distribution will be seen as reducing crime more effectively than distributions that conflict with desert, and which thereby undercut the criminal law’s moral authority with the community.²³

The larger point here is that this is an empirical issue. No one can make crime reduction arguments with complete

22. On the issue of the significance of resulting harm, for example, see Robinson, Justice, Liability, and Blame, *supra* note 15, at Studies 1 & 17.

23. See Robinson, Utility of Desert, *supra* note 10.

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authority because we simply don't have—and are not likely in the near future to have—sufficient information to give a reliable answer as to what distribution produces the least crime. My point is that, in the absence of the information necessary to know what kind of distribution will work best, doesn't it make sense in the interim at least to do what we know we can do: do justice?