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Hybrid Principles for the Distribution of Criminal Sanctions

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HYBRID PRINCIPLES FOR THE DISTRIBUTION OF CRIMINAL SANCTIONS

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Most criminal codes, and most criminal law courses, begin with the "familiar litany" of the purposes of criminal law sanctions—just punishment, deterrence, incapacitation of the dangerous, and rehabilitation.[1] We train and direct our lawyers, judges, and legislators to use these purposes as guiding principles for the distribution of criminal sanctions. The purposes are thus to guide both the drafting and interpretation of criminal statutes and the imposition of criminal sentences in individual cases.

The purposes frequently conflict, however, as part I will demonstrate. Conflicts arise because each purpose requires consideration of dif-

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[1] The Model Penal Code, for example, describes "[t]he general purposes of the provisions governing the definition of offenses" as including desert, control of the dangerous, and deterrence. MODEL PENAL CODE § 1.02(1) (1985). Specifically, the Code is designed "to safeguard conduct that is without fault from condemnation as criminal," and "to subject to public control persons whose conduct indicates that they are disposed to commit crimes." *Id.* § 1.02(1)(b)-(c). Deterrence is implicit in the statute but explicit in the commentary, which makes clear that this is what is intended by the reference to the purpose to "prevent" crime. *See infra* note 9 (quoting the comment to § 1.02(2)). "Rehabilitation" is missing from the list of "provisions governing the definition of offenses," but is frequently cited by the Code's commentary in evaluating the propriety of a criminal law rule or doctrine. *See, e.g.*, MODEL PENAL CODE § 1.07 commentary at 16 (Tent. Draft No. 5, 1956); *id.* § 5.05(1) commentary at 178-79 (Tent. Draft No. 10, 1960). Finally, rehabilitation is included with the other three purposes as one of the general purposes of "the provisions governing the sentencing and treatment of offenders." *Id.* § 1.02(2) (1985).

Throughout this Essay, the phrase "just punishment" or "desert" refers to the punishment of an offender in relation to the degree of his moral blameworthiness for the conduct or omission constituting the offense. The concept includes but is not limited to an assessment of the extent of the harm or evil that he caused and the extent of his responsibility for that harm or evil. "Deterrence," unless otherwise noted, means general deterrence, that is, "the inhibiting effect of sanctions on the criminal activity of people other than the sanctioned offender." Panel on Research on Deterrent and Incapacitative Effects, National Academy of Sciences, *Report*, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 3 (A. Blumstein, J. Cohen & D. Nagin eds. 1978) [hereinafter *Report*]. "Incapacitation" means "isolating an identified offender from the larger society, thereby preventing him or her from committing crimes in that society." *Id.* "Rehabilitation" means the reform or correction of the offender through treatment, education, training, or any other mechanism which changes that part of the actor or his character that contributed to his criminal conduct.

ferent criteria; in some cases, a particular fact suggests different sentences or statutory formulations under different purposes. Ultimately a choice must be made to follow one purpose at the expense of another. Yet when faced with conflicting purposes, judges, legislators, and sentencing-guideline drafters have no principle to guide that decision.

In the absence of a guiding principle, the choices made are, at best, inconsistent. For example, most state criminal codes maintain an insanity defense[2] because it exculpates the blameless (and thus furthers just punishment), even though abolishing the defense might more effectively incapacitate the dangerous. Yet the same codes sacrifice just punishment, in favor of increasing deterrence, by recognizing strict liability.[3] At the same time, rather than increasing the threatened sanction when the temptation or inclination is greater, as a deterrence principle suggests, these codes frequently decrease the deterrent threat—as, for example, in cases of provocation[4]—because of the offender's reduced blameworthiness. Code drafters are choosing to further different purposes in different contexts.[5]

At worst, the absence of a guiding principle fosters arbitrariness or prejudice. This happens when the inconsistent approach of the code drafters is followed on the level of individual sentencing decisions. For instance, while rehabilitation might be the best means of avoiding future crime by a young addict who is caught selling drugs to support his habit, a judge rationally might decide to impose a long prison term in order to further general deterrence interests. When faced with a young bank teller who embezzled money from her cash drawer, the same judge might decide to sacrifice the general deterrent value of a long prison term and put the offender on probation, under an incapacitative theory—she is no longer dangerous because she will never again be placed in a position of trust.[6] Both of these sentences are justified by one of the purposes of

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[2] *See* 2 P. ROBINSON, CRIMINAL LAW DEFENSES § 173 n.1 (1984) (insanity).

[3] *See, e.g.*, MODEL PENAL CODE § 213.6(1) (1985) (strict liability as to age in some sex offenses).

[4] *See* 1 P. ROBINSON, *supra* note 2, § 102 nn.2 & 9 (provocation, extreme emotional disturbance).

[5] The theoretically sophisticated Model Penal Code is no different. It reflects the same ambivalence about the insanity defense and strict liability—if ambivalence is what it is—and like every other code, provides additional examples. It keeps an insanity defense, to further desert principles at the expenses of incapacitation, *see* MODEL PENAL CODE § 4.01 (1985), but then it rejects desert in favor of incapacitation when it provides a defense to unsuccessful attempters who are not dangerous, *see id.* § 5.05(2), and when it sets the penalty for an attempt at the same level as that for the completed offense, *see id.* § 5.05(1). While it rejects the significance of resulting harm in attempts—because resulting harm does not manifest an offender's dangerousness—it stresses the importance of resulting harm by insisting on a strong causal connection between the offender's conduct and the criminal results required by an offense definition, *see id.* § 2.03, presumably because blameworthiness requires such a causal connection. For a more detailed discussion of these conflicts, see *infra* part I B.

[6] For a more detailed discussion of these and other conflict points, see *infra* part I B.

sentencing, but they nonetheless may be the product of arbitrary or biased decision making. Without a principle governing when one sentencing purpose is to be followed at the expense of another, judges and guideline drafters are free to choose whatever purpose justifies the desired sentence.

Why do we not insist that code and sentencing-guideline drafters adopt, and that judges follow, a statement of the interrelation among purposes that will direct the choice among conflicting purposes? A cynic may conclude that the use of "the purposes" to justify a particular code formulation or sentence is a convenient means of rationalizing results for which the decision maker has another, undisclosed reason.[7] This suspicion—that "the purposes" are popular as a method of justification precisely *because* they offer hidden flexibility—is fueled by the almost universal failure to articulate a guiding principle. The Model Penal Code, for example, lists the traditional purposes and directs judges to use them in interpreting the provisions of the Code and in fashioning sentences under the Code;[8] but the Code provides no more guidance in cases of conflict than to urge, in commentary, that the purposes be "just[ly] harmoniz[ed]."[9] Others suggest that the competing interests are to be "balance[d],"[10] "blend[ed],"[11] "accommodate[d],"[12] "taken account of,"[13] or "deal[t] with [such that] the public interest will be served."[14]

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[7] While Professor Kelman does not address the issue of distributive principles, he makes an analogous claim with regard to the formulation of criminal law doctrines. *See* Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

[8] *See supra* note 1.

[9] The section is drafted in the view that sentencing and treatment policy should serve the end of crime prevention. It does not undertake, however, to state a fixed priority among the means to such prevention, i.e., the deterrence of potential criminals and the incapacitation and correction of the individual offender. These are all proper goals to be pursued in social action with respect to the offender, one or another of which may call for the larger emphasis in a particular context or situation. What the Code seeks is the just harmonizing of these subordinate objectives, rather than the concentration on some single target of this kind. It is also recognized that not even crime prevention can be said to be the only end involved. The correction and rehabilitation of offenders is a social value in itself, as well as a preventive instrument. Basic considerations of justice demand, moreover, that penal law safeguard offenders against excessive, disproportionate or arbitrary punishment, that it afford fair warning of the nature of the sentences that may be imposed upon conviction and that differences among offenders be reflected in the just individualization of their treatment.

MODEL PENAL CODE § 1.02 commentary at 4 (Tent. Draft No. 2, 1954). This same lack of rigor is apparent when the drafters of § 7.01 (Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation) explain that "the reasons for imprisonment are usually obvious." *Id.* § 7.01 commentary at 34.

[10] Cohen, *An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment*, 27 MCGILL L.J. 73, 81 (1981).

[11] SOLICITOR GENERAL, REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS—TOWARD UNITY: CRIMINAL JUSTICE AND CORRECTIONS 188 (1969) (known as the Ouimet Report).

[12] Cohen, *supra* note 10, at 73.

[13] Wechsler, *Sentencing, Corrections, and the Model Penal Code*, 109 U. PA. L. REV. 465, 468 (1961).

[14] State v. Ivan, 33 N.J. 197, 201, 162 A.2d 851, 853 (1960) (Weintraub, C.J.). Chief Justice

Is it, as some suggest, simply a failure of the theorists? That is, "We would love to articulate a governing principle, but we cannot figure out how one feasibly can be fashioned." If so, then all will be greatly heartened by part II of this Essay, which demonstrates several mechanisms for constructing a workable distributive principle embodying multiple purposes (a "hybrid distributive principle"), and by part III, which illustrates how several of these mechanisms can be combined, creating hundreds of possible hybrid distributive principles, one of which is likely to be suitable to every decision maker. On the other hand, parts II and III may be bad news to some. Identification of a principled basis for fashioning sentences and statutes will underscore the arbitrariness and personal bias of those who continue to adhere to ad hoc decision making.

Whether the flexibility of rationalization offered by "the purposes" has been used for conscious manipulation or is the result of inadvertent vagueness, a rational and principled system for the distribution of criminal sanctions is needed. Such a system must define the interrelation of the multiple purposes it seeks to further; that is, it must fully articulate a hybrid distributive principle.

I. Alternative Purposes and Conflict Points

Before discussing alternative approaches to constructing a hybrid distributive principle, two preliminary, related questions must be briefly addressed. First, why do we need a hybrid distributive principle? Why not simply adopt one of the four traditional purposes as the sole distributive principle? Second, do the traditional purposes really conflict in application? If so, where and why?

A. Single-Purpose Distributive Principles

One could avoid the inconsistency and abuse of the traditional approach to criminal sanctions by adopting a distributive principle based upon a single purpose. But such a single-purpose distributive principle would produce sentences that are generally seen as unacceptable. Consider, for example, the adoption of a utilitarian purpose, either deterrence, incapacitation of the dangerous, or rehabilitation, as the sole purpose. Each scenario would justify consideration of factors that, in the Anglo-American criminal law tradition, are considered illegitimate bases for distributing criminal liability and punishment.[15]

Weintraub concluded that one should arrive at a "composite judgment, a total evaluation of all the facets, giving to each [purpose] the weight, if any, it merits in the context." *Id.*

[15] Other writers might seem to disagree with this conclusion. They suggest that much of existing criminal law doctrine is not inconsistent with utilitarian principles of general deterrence seeking efficient crime prevention. *See* Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1247-59 (1985). Other writers make a related claim with regard to incapacitation. *See* M. MOORE, S. ESTRICH, D. MCGILLIS & W. SPELMAN, DANGEROUS

To the extent that incapacitation determines the distribution of criminal sanctions, statistical data on the probabilities of recidivism is useful. Under a principle designed solely to incapacitate the dangerous, offenders would be sentenced on the basis of backgrounds and characteristics having little or no necessary connection to their crimes. Past employment history, for example, is highly relevant in predicting recidivism.[16] Thus, under such a single-purpose principle, unemployment for the preceding two years should aggravate the grade of an offense or increase the sentence imposed. Age and family situation are also useful predictors of future criminality,[17] and thus also would bear on liability. Indeed, if incapacitation of the dangerous is the only distributive principle, there would be little justification for waiting until an offense is committed; it would be more efficient to screen the general population for dangerous persons and "convict" them of being dangerous and in need of incapacitation.[18]

If pure deterrence were the distributive principle, a potential offender's perception of the probability of apprehension would be highly relevant.[19] To enhance deterrence, offenses with a perceived low

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OFFENDERS: THE ELUSIVE TARGET OF JUSTICE 65-66 (1984) [hereinafter M. MOORE, DANGEROUS OFFENDERS]. *But see* A. VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 77-91, 128-38 (1985).

There is a significant difference, however, between claiming that deterrence and incapacitation are not inconsistent with current law and claiming that one of these purposes might be appropriate as the sole distributive principle for criminal liability. The true test is not whether one can construct some economic explanation that, under some economic principles, is not inconsistent with current law. The true test would be to select beforehand a fixed set of utilitarian principles and assumptions, and to generate from them a system of rules of liability and sentencing. Unless desert is adopted as a utilitarian principle, *see* Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315 (1984), I believe the resulting system would be judged unacceptable for the reasons noted in the text.

[16] *See, e.g.*, D. GOTTFREDSON, L. WILKINS & P. HOFFMAN, GUIDELINES FOR PAROLE AND SENTENCING 41-67 (1978); P. GREENWOOD, SELECTIVE INCAPACITATION 11-26 (1982).

[17] Age has been found to be an effective predictor of future violence. *See, e.g.*, Cocozza & Steadman, *Some Refinements in the Prediction of Dangerous Behavior*, 131 AM. J. PSYCHIATRY 1012 (1974), *cited in* State v. Davis, 96 N.J. 611, 618-19, 477 A.2d 308, 311-12 (1984). The predictive value of various aspects of an offender's family situation is discussed in A. BLUMSTEIN, D. FARRINGTON & S. MOITRA, DELINQUENCY CAREERS: INNOCENTS, DESISTERS, AND PERSISTERS 198 (1985).

Greenwood identifies several other factors of predictive value: prior convictions of the instant offense type; incarceration for more than half of the preceding two years; conviction before age 16; time served in a state juvenile facility; drug use during the preceding two years; and employment for less than half of the preceding two years. P. GREENWOOD, *supra* note 16, at 50.

[18] One study suggests that rapists may be distinguished from nonrapists based upon their penile erection response to certain stimuli. Abel, Barlow, Blanchard & Guild, *The Components of Rapist Sexual Arousal*, 34 ARCHIVES GEN. PSYCHIATRY 895 (1977). If this predictive technique were sufficiently refined, a pure incapacitation distributive principle might find it appropriate as a basis for distributing criminal liability. *See generally* Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968).

[19] *See, e.g.*, Shavell, *supra* note 15, at 1235-36.

probability of apprehension should be graded highly and punished severely. Deterrence theory also suggests that would-be criminals will be powerfully influenced by the perceived likelihood of conviction; therefore punishment should be administered frequently, as well as severely. To that end, it would be appropriate to increase the likelihood of conviction by dispensing with traditional desert-based liability requirements, such as culpability, causation, or complicity requirements, which significantly impede convictions. A pure deterrence principle also logically would base liability upon the extent of the publicity that a sanction receives in a particular case. Just as an advertising executive pays more to place an ad that reaches more people, society may efficiently spend more (that is, impose a greater penalty at a greater cost) if imposition of a sanction will be widely communicated. Thus, news coverage should aggravate the grade of or sentence for an offense. In its most extreme extension, the pure deterrence principle would justify punishment of the innocent; as long as the public perceived the "offender" to be guilty, the deterrence purpose would be served.

To the extent that rehabilitation governs distribution, the actor's amenability to reform or treatment is central. It was in furtherance of the rehabilitative purpose that fully indeterminate sentences were imposed in the recent past.[20] The length of the sentence was to be determined by the length of time necessary for the offender's rehabilitation, which could not be determined at the time of conviction. The offender remained in prison until he or she was rehabilitated. With a pure rehabilitation principle, as with each pure utilitarian principle, there would be little reason to wait for an offense to occur. Incarceration would be justified if the "offender" were shown to have a treatable abnormality.[21]

The utilitarian purposes, if used without desert considerations, not only would permit or compel distribution according to factors that are likely to be judged unacceptable, but also would preclude the consideration of factors that are generally held to be key to the distribution of sanctions under current law. Even the nature of the crime committed may be of little relevance under some utilitarian purposes. As the Model Sentencing Act proudly points out:

> The [Act] diminishes the major source of [sentencing] disparity—sentencing according to the particular offense. Under [the Act] the dangerous offender may be committed to a lengthy term; the non-dangerous offender

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[20] *See, e.g.*, NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE, DECLARATION OF PRINCIPLES, TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE 541-47 (1871); *see also* MODEL SENTENCING ACT § 1 (National Council on Crime and Delinquency rev. ed. 1972) ("[D]angerous offenders shall be identified, segregated, and correctively treated in custody for long terms as needed . . . . Persons convicted of crime shall be dealt with in accordance with their potential for rehabilitation . . . .").

[21] If a dangerous offender could not be successfully treated, application of a pure rehabilitation distributive principle would not authorize incarceration. Thus such a pure principle would poorly serve even the goal of crime control.

may not. It makes available, for the first time, a plan that allows the sentence to be determined by the defendant's make-up, his potential threat in the future, and other similar factors, with a minimum of variation according to the offense.[22]

In contrast to utilitarian single-purpose distributive principles, one might create a generally acceptable system based solely on desert; several writers have proposed just this.[23] But many people will resist such a pure desert system because it may cause unnecessary inefficiency in the use of criminal sanctions to prevent crime.[24] A pure desert principle might impose sanctions that cost more than the crime they prevent and might fail to impose sanctions where the opportunities for efficient crime prevention were great.

B. Conflict Points Among Alternative Purposes.

With such differences in criteria, it is no surprise that the purposes frequently conflict in application. If rehabilitation is temporarily excluded from the analysis,[25] because of doubt as to its feasibility and moral objections to its use as a distributive principle,[26] a conflict is likely

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22 MODEL SENTENCING ACT art. 1, § 1 comment (National Council on Crime and Delinquency 1st ed. 1962), *reprinted in* 9 CRIME & DELINQ. 337, 346 (1963). There is disagreement as to whether a deterrence principle would generate liability proportionate to the seriousness of the offense. *Compare, e.g.*, van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 RUTGERS L. REV. 706 (1981) (suggesting that deterrence calls for proportionality) *with* Goldman, *Beyond the Deterrence Theory: Comments on van den Haag's "Punishment as a Device for Controlling the Crime Rate,"* 33 RUTGERS L. REV. 721 (1981).

23 *See, e.g.*, R. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 11-34 (1979); A. VON HIRSCH, *supra* note 15, chs. 3, 4; Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968).

24 I say "may" because Professor Seidman argues that, given society's apparent commitment to just punishment, utilitarian principles may require adoption of a desert-based distributive principle. Seidman, *supra* note 15.

25 I suggest an appropriate role for rehabilitation as part of a distributive principle in note 47 *infra*.

26 Rehabilitation may have significance in justifying a criminal justice system, and one may wish to rehabilitate the offender whenever possible after liability has been imposed. However, there is likely to be general agreement that a rehabilative purpose cannot and should not control how sanctions are *distributed*.

That there is little support for the use of rehabilitation as a distributive principle is reflected in the fact that few existing American codes give significant deference to this purpose. Indeed, some explicitly reject it as a distributive principle for some purposes. *See, e.g.*, 28 U.S.C. § 994(k) (Supp. III 1985) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant . . . ."). Others do so implicitly. *See, e.g.*, MODEL PENAL CODE § 1.02(1) (1985) (omits rehabilitation from "general purposes of the provisions governing the definition of offenses"); California Uniform Sentencing Act, CAL. PENAL CODE § 1170(a)(1) (West 1985 & Supp. 1987) ("The legislature finds and declares that the purpose of imprisonment for crime is punishment.").

Commentators also have suggested that rehabilitation should not be considered in distributing sanctions because of its immorality and its tendency to invite abusive punishment in the guise of therapy. *See, e.g.*, F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 25-41 (1964); Morris,

to reflect one of these three alignments:[27]

(1) desert vs. deterrence and incapacitation;
(2) deterrence vs. desert and incapacitation;
(3) incapacitation vs. desert and deterrence.

1. *Desert vs.*—Desert can conflict with deterrence and incapacitation in two sorts of cases. First, the desert principle gives rise to doctrines like the insanity defense and the voluntary act requirement, which acquit blameless offenders even though they may be dangerous and even though their punishment might serve a general deterrent function. Con-

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supra note 23, at 475-501. Even if it were appropriate, it has been argued, rehabilitation could not be employed because social scientists do not yet know how to rehabilitate offenders. *See, e.g.*, Robinson & Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQ. 67 (1971). The authors conclude, "If the choice is, in fact, merely between greater and lesser punishments, then the rational justification for choosing the greater must, for now, be sought in concepts other than rehabilitation and be tested against criteria other than recidivism." *Id.* at 80; *see also* A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 11-18 (1976) (discussing failure of rehabilitation programs to establish successful treatment results). For an example of the most optimistic conclusion that a modern researcher can draw on the ability of a penal system to rehabilitate offenders, see Palmer, *Treatment and the Role of Classification*, 30 CRIME & DELINQ. 245 (1984).

In any case, rehabilitation can be set aside in constructing a hybrid distributive principle in order to simplify the process of analysis, without deciding to permanently exclude rehabilitation as a viable purpose. The simplified analysis may more easily permit the discovery of dominant patterns in conflict decisions; once spotted, these patterns can be helpful even if rehabilitation is ultimately included in the hybrid.

[27] In choosing between any two doctrinal or sentencing alternatives, there are sixteen theoretically possible alignments of the four purposes. (The number of alignments equals 2^X, where X is the number of different purposes.) In one of these, all purposes will agree in suggesting alternative *A* over *B*; in another, all will agree in supporting *B* over *A*. These two alignments, in which there is no conflict of purposes, are not uncommon; many offenders are dangerous, blameworthy, and useful subjects of general deterrence. For discussions of the overlap among these purposes, see the writers cited in note 15 *supra*. It is not clear, however, that a majority of offenders are treatable. *See supra* note 26.

The remaining fourteen theoretically possible alignments, in which at least one purpose is in conflict with another, represent seven pairs of analogous alignments suggesting opposite conclusions. For example, one of the remaining fourteen is desert and deterrence suggesting alternative *A* over *B* and incapacitation and rehabilitation supporting *B* over *A*, while another is desert and deterrence suggesting *B* over *A* and incapacitation and rehabilitation suggesting the opposite. The number of unique conflict alignments equals $2^{X-1}-1$, where X equals the number of purposes. Thus, four purposes generate seven conflict alignments (three purposes would generate three conflict alignments; two purposes would generate one conflict alignment). In other words, the fourteen possible alignments of purposes in conflict derive from only the following seven distinct alignments:

(1) deterrence vs. all others;
(2) desert vs. all others;
(3) incapacitation vs. all others;
(4) rehabilitation vs. all others;
(5) deterrence and desert vs. incapacitation and rehabilitation;
(6) deterrence and incapacitation vs. desert and rehabilitation;
(7) deterrence and rehabilitation vs. desert and incapacitation.

Every instance in which purposes conflict will match one of these seven alignments.

The problem can be simplified further if one is willing to assume that rehabilitation is not legitimately part of a distributive principle. *See supra* note 26.

versely, in another set of cases, desert is sacrificed to deterrence and incapacitation. For example, the defense for inherently unlikely attempts[28] acquits blameworthy offenders because the inherent harmlessness of the conduct suggests that both incapacitation and deterrence are unnecessary. In both sets of cases, a conflict arises: desert leads to one result while deterrence and incapacitation lead to another.

2. *Deterrence vs.*—Deterrence frequently conflicts with desert and incapacitation where some abnormal condition external to the actor, such as duress, coercion, or nonjustified necessity, contributes to the actor's criminal conduct. Because the conditions rather than the actor are judged responsible for the conduct, the actor is held blameless and nondangerous and thus is acquitted or receives a reduced sentence. On the other hand, the same coercive conditions can create the need for a greater rather than lesser deterrent threat. Greater sanctions would provide a needed additional deterrent in the face of unusual pressure to commit the offense.

If the pressure to commit the offense is so great as to be essentially irresistible, the "special deterrence" rationale (that is, punishment of the offender at hand so that he or she will not commit the same offense in a similar situation in the future) may disappear. In such a situation, any sanction would be futile and thus an inefficient expenditure. There may remain, however, a "general deterrent" purpose in imposing a significant sanction. In *Regina v. Dudley & Stephens*,[29] for example, the sailors who killed the sick cabin boy to stay alive until they could be rescued were hardly shown to be dangerous people (as long as they stayed off boats that would be adrift for weeks) and their blameworthiness was significantly reduced because of the life-threatening conditions. Furthermore, people in their situation, or they again in the same situation, cannot be effectively deterred, because, as is assumed, the pressure they encountered was irresistible. However, there may remain nonetheless some general deterrent value in imposing a significant sanction to reaffirm the strong prohibition against the killing of innocent non-aggressors.[30]

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[28] An example of an inherently unlikely attempt occurs when an actor sticks pins in a voodoo doll representing the victim, honestly believing that this will cause the victim's death or injury. The Model Penal Code provides:

> If the particular conduct charged to constitute a criminal attempt, solicitation or conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section, the Court shall . . . enter judgment and impose sentence for a crime of lower grade or degree or, in extreme cases, may dismiss the prosecution.

MODEL PENAL CODE § 5.05(2) (1985).

[29] 14 Q.B.D. 273 (1884).

[30] This analysis reflects a simple deterrence goal, that is, the goal of deterring as much crime as possible. A goal of cost-efficient deterrence would justify greater sanctions in response to greater pressures to commit the offense, only to the extent that the cost of the sanctions are less than the cost of suffering the offense. Under this efficient deterrence theory, some crime ought not be deterred—

The same conflict arises in applying mitigating principles, like heat of passion, provocation, and mistake as to self-defense by battered wives and abused children.[31] In these cases, an otherwise normal actor reacts less than admirably when confronted with a difficult situation. Such an actor is not as dangerous or blameworthy as an actor who kills absent the mitigating conditions, but, as with instances of duress, coercion, and nonjustified necessity, the need for a deterrent sanction to oppose the tendency and temptation is as great, if not greater.

A similar conflict between purposes arises under many strict liability doctrines when an offender, who is neither blameworthy nor dangerous, is sanctioned as a means of deterring similar violations by other potential offenders. Whenever these sorts of cases arise, a conflict arises in which principles of desert and incapacitation would support a reduction of the degree or scope of liability while deterrence principles would oppose reduction.

3. *Incapacitation vs.*—Incapacitation conflicts with deterrence and desert in setting the grade and sentences for attempted, as compared to completed, offenses, and in the related issue of defining the required causal relationship between an offender's conduct and a prohibited result. Reducing liability for unsuccessful attempts and requiring a strong causal connection between acts and results reflect two judgments: that an offender is less blameworthy when he or she creates no harm, and that efficient deterrence can justify greater sanctions where the offense has occurred than where it has not. The absence of a completed offense does not, however, alter the offender's dangerousness. Thus, whenever cases arise under doctrines giving significance to resulting harm, a conflict arises in which desert and deterrence will take account of resulting harm while incapacitation will not.

II. Some Alternative Approaches to Constructing a Hybrid Distributive Principle

When alternative purposes conflict, a principled hybrid system must define which of the competing purposes is to be followed. One can identify several rational approaches to establishing such conflict rules.[32]

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crime that costs more to deter than it costs to suffer. *See, e.g.*, Shavell, *supra* note 15, at 1244-45. Where it is not obvious from the context, I shall attempt to identify the particular theory of deterrence to which I refer.

[31] *See* State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984) (mitigation for mistake as to justification arising from battered woman's syndrome); State v. Ott, 297 Or. 375, 686 P.2d 1001 (1984) (extreme emotional disturbance, the broader modern version of heat of passion and provocation); State v. Gounagias, 88 Wash. 304, 153 P. 9 (1915) (provocation).

[32] Some theories in the literature have attributes of more than one purpose—some even mix desert and utilitarian purposes—and therefore may seem to be hybrid principles. Some have argued, for example, that some desert criteria can have good predictive value. *See* M. Moore, Dangerous Offenders, *supra* note 15, at 66. Another argues that the community's commitment to desert,

A. Establishing Priorities

Under what might be called a "simple priority" approach, whenever Purpose *A* (the purpose of highest priority) supports a doctrine or sentence different from that supported by another purpose, Purpose *A* shall govern. To the extent that Purpose *A* is indifferent as to which of two doctrines or sentences is adopted, but Purpose *B* supports one and Purpose *C* the other, then Purpose *B* (the second highest priority purpose) shall be followed, and so on. Under such an approach, the purpose selected as primary is given greater weight than in any other approach described below. The primary purpose controls whenever it makes a difference.

Somewhat more sophisticated is a "contingent priority" approach. It sets priorities, as in a simple priority approach, but it also sets conditions assuring that a purpose is given priority only in those cases where a defined level of reliability or effectiveness is present. Thus, for example, incapacitation might be given first priority, but that priority can be exercised only if, for example, the empirical data for the given situation shows that the reliability of the prediction of dangerousness exceeds a minimum level.[33] Or, general deterrence might be given first priority, contingent upon, for example, empirical data projecting a deterrence effectiveness of a minimum rate. Under this approach, the decision maker would follow the purpose with the highest priority that satisfies its contingent criteria. The virtue of such an approach is that it permits a purpose to control only to the extent that the assumptions underlying the effectiveness or accuracy of the purpose are true.

B. Distinguishing Determining Principles from Limiting Principles

The priority approaches generally assume that a particular purpose will call for a particular doctrinal formulation or a particular sentence. Some purposes, however, might be used to limit, rather than determine the distribution of sanctions. That is, their effect may be to exclude a formulation or sentence rather than to recommend one. Where this is true, a purpose may be given first priority, but, if it is treated as a limiting purpose, it is not considered in the initial formulation of the distribution of sanctions; it is consulted only afterwards, to determine whether the

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whether irrational or not, means that the deviation from desert would cause a disutility greater than the increased deterrence that one might otherwise derive by following a deterrence principle that conflicted with desert. *See* Seidman, *supra* note 15. Still others argue that many desert criteria maximize efficient deterrent effects. *See* Posner, *supra* note 15, at 1217-30; Shavell, *supra* note 15, at 1247-59. But none of these theories embody hybrid distributive principles. They are, rather, utilitarian theories that find some utilitarian value in desert criteria. In other words, they do not attempt to resolve the conflict problem but rather urge that it does not exist.

[33] An incapacitation-desert hybrid of this sort has been proposed by John Monahan. Monahan, *The Case for Prediction in the Modified Desert Model of Criminal Sentencing*, 5 INT'L J.L. & PSYCHIATRY 103 (1982).

contemplated formulation violates the limitations of that higher priority purpose.

To categorize a purpose as a limiting purpose, however, one must conceive of it as simply excluding, rather than requiring, certain formulations or sentences. Some commentators suggest that just deserts is properly treated as such a limiting purpose.[34] Under this model, desert makes relatively imprecise demands—it conceives of just punishment as simply prohibiting certain "unjust" formulations or sentences—and does not require specific results. Other writers disagree with this conclusion, arguing that desert has, for example, specific ordinal and cardinal ranking requirements.[35]

Even if it is true that desert is not properly characterized as a limiting purpose, however, the determining-limiting distinction might nonetheless be useful in constructing a hybrid distributive principle. One might, for example, treat one of the utilitarian purposes, such as deterrence, as a limiting purpose and thus use it not to formulate doctrines of distribution but to exclude certain formulations generated by a desert principle—such as those that exceed a given net social cost.[36] In other words, deterrence could be employed to set an upper limit on the disutility that society is willing to suffer for the sake of doing justice to individual defendants. Use of deterrence as a limiting purpose might result in a formulation that was less just but significantly more efficient than a pure desert formulation.

The operation of a determining-limiting approach is in many respects similar to a contingent priority approach. The difference is partly formalistic and partly real. Under a contingent priority approach, the first priority purpose is presumed to control as long as the contingencies concerning its effect and reliability are met. Under a determining-limiting approach, the limiting purpose has first priority but is presumed *not* to control *unless* the limitation criteria of the purpose are violated. The difference, then, is partly one of expectations. Assume, for example, that deterrence is the first priority (limiting) purpose and desert the second priority (determining) purpose. Under a contingent priority system, one might describe deterrence as the governing distributive principle except where it is too weak or unproven to be relied upon. Under a determining-limiting system, the same priority puts desert as the dominant principle, except when it undercuts the deterrent effect of the punishment beyond a tolerance level previously set.

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[34] N. MORRIS, THE FUTURE OF IMPRISONMENT 73-76 (1974); N. MORRIS, MADNESS AND THE CRIMINAL LAW 179-209 (1982); Morris & Miller, *Predictions of Dangerousness*, 6 CRIME & JUST. 1 (1985).

[35] *See, e.g.*, A. VON HIRSCH, *supra* note 15, 38-46; von Hirsch, Book Review, 82 MICH. L. REV. 1093 (1984).

[36] This may be appropriate given how little we know about and how little we can measure deterrent effects. *See, e.g., Report, supra* note 1, at 58.

The more significant difference between the two approaches is that under a contingent priority approach, a purpose falls from priority only because of its own shortcomings—failing to meet the criteria that assure that it will do what it claims it will do. Under a determining-limiting approach, a determining purpose may be operating as promised, but the punishment or scheme it dictates nonetheless will be rejected if it violates the limiting criteria of another purpose. Thus, a contingent priority approach maximizes reliance upon a single primary purpose so long as the purpose works effectively. Where it is not possible to achieve the goal of the primary purpose—be it deterrence, control of the dangerous, or imposition of just deserts—it is hardly a sacrifice of that purpose to turn to another purpose. Under a determining-limiting approach, by contrast, a determining purpose is indeed sacrificed where it sufficiently conflicts with a limiting purpose.[37]

If a purpose can effectively do what it promises across the full range of cases, as some may think is true in the case of desert, the purpose will have greater effect as the primary purpose under a contingent priority approach than under a determining-limiting approach. If a purpose has proven effectiveness in a more limited range of situations, as is frequently the case with deterrence and incapacitation, the purpose is more likely to influence the formulation of distribution rules as the primary purpose under a determining-limiting approach.

C. Combining Purposes

Both of the approaches described above are priority systems of a sort, in which one purpose is furthered at the expense of another. One could formulate, however, an approach by which purposes are combined to give a result influenced in part by all purposes, rather than choosing among purposes. Such an approach seems ideal; it seems to further all and sacrifice none.

Unfortunately, while the concept seems perfect, the extent of its realization is limited. The combination of purposes is feasible only if the purposes to be combined share two characteristics. First, all purposes considered must share the same ultimate goal, for example, efficient crime prevention. Second, they must be measurable in a common currency, for example, the "costs" in monetary terms of avoiding or not avoiding certain crimes.

Consider, for example, the combination of deterrence and incapacitation. Assume that from a general deterrence perspective, doctrinal formulation or sentence A costs 10 units to gain a benefit of 15 units for a

[37] In that sense, the determining-limiting mechanism suggests a stronger commitment to a mixed-purpose approach. On the other hand, such an approach will follow a determining purpose no matter how ineffective or unreliable it is, as long as it does not conflict with another purpose. In that sense, the determining-limiting mechanism shows a perhaps undeserved commitment to a single purpose (the determining one).

net societal benefit of 5, while formulation *B* costs 15 to save 15 for a net benefit of 0. In this situation, general deterrence as a distributive principle would prefer formulation *A*. Assume that incapacitation finds that formulation *A* costs 20 in order to avoid a harm of 15, for a net loss of 5, while formulation *B* costs 10 to avoid an injury of 15, for a net gain of 5. Thus, incapacitation as the distributive principle prefers formulation *B*. This would be an instance where the two purposes conflict and where any of the previously described priority approaches might be used to decide which of the two conflicting purposes to follow (and thus which of the two formulations to adopt).

But the dilemma can be resolved without giving absolute or conditional priority to one purpose. Because the two purposes have the same goal (efficient crime prevention) and a single currency, the costs and benefits of each formulation for both purposes may be determined and these totals for each formulation may be compared to select the best formulation. Thus, if the incapacitation purpose is significantly increased by a formulation that only minimally hurts the general deterrence purpose in comparison to an alternative formulation, that difference in magnitude of effect might be enough to justify following the incapacitation formulation. The example above generates the following combined analysis:

	Formulation *A*	Formulation *B*	
Deterrence	−10	−15	
	+15	+15	
	+5	0	Deterrence prefers Formulation *A*
Incapacitation	−20	−10	
	+15	+15	
	−5	+5	Incapacitation prefers Formulation *B*
Combined Assessment	0	+5	Combined purposes prefer Formulation *B*

Thus, by combining the costs and benefits of both purposes one can determine that formulation *B* will best further the common goal of efficient crime prevention.

The difficulty, of course, is that not all purposes of sentencing share a common goal of crime prevention or a common currency of monetary cost and benefit. As the Model Penal Code commentary suggests:

> It is also recognized that not even crime prevention can be said to be the only end involved. The correction and rehabilitation of offenders is a social value in itself, as well as a preventive instrument. Basic considerations of justice demand, moreover, that penal law safeguard offenders against exces-

sive, disproportionate or arbitrary punishment . . . .[38]

Others may disagree. Some suggest that the ultimate purpose of rehabilitation is the same as that of deterrence and incapacitation of the dangerous—that is, crime prevention.[39] On the other hand, some state the difference between the utilitarian goals and desert in even stronger terms than the Model Penal Code commentary does: justice not only bars "excessive, disproportionate or arbitrary punishment," but also requires specific formulations for rules, doctrines, offenses, and sentences.[40] Whatever view one takes, the important point is that the combined approach cannot be used to amalgamize purposes that do not share a common currency and goal.

D. Relying upon the Purpose with the Greatest Sanction

Some writers have suggested, in the context of sentencing, that one should determine an appropriate sentence under each purpose and then impose the highest of those sentences, under the theory that the highest sentence will assure that all of the purposes are satisfied.[41] Thus, if desert requires seven years, deterrence five years, and incapacitation one year, this approach generates a sentence of seven years. If deterrence requires seven years, incapacitation five, and desert one, seven years is again appropriate. The same process can be used for the selection of criminal law rules and doctrines; after formulating a rule or doctrine using each of the purposes separately, one can simply adopt the formulation that gives the broadest liability to assure that all of the purposes will be satisfied. Rather than choosing among conflicting purposes according to their criteria, this approach selects among them by comparing their results.

But this approach assumes, incorrectly, that to give a sentence higher than a purpose calls for is nonetheless to satisfy that purpose. In the context of doctrinal rules, this approach assumes, equally incorrectly, that a formulation that imposes broader liability than a purpose requires nonetheless satisfies that purpose. "Satisfying" a purpose sometimes requires limiting the sanction or extent of liability. In the first hypothetical above, the seven years required by desert is an inefficient expenditure of sanctions when analyzed according to deterrence and incapacitation principles.[42] In the second hypothetical, the seven years required by de-

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[38] MODEL PENAL CODE § 1.02 commentary at 4 (Tent. Draft No. 2, 1954).

[39] *See, e.g.*, G. FLETCHER, RETHINKING CRIMINAL LAW 414-16 (1978).

[40] Professor von Hirsch makes it clear, for example, that desert requires a specific ranking of offenses by seriousness in assigning punishment. A. VON HIRSCH, *supra* note 15, at 40-43.

[41] P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM 109 (1977) ("The length of the sentence of imprisonment imposed on the defendant by the court shall be the longest of the four sentences derived in accordance with subsections (d)(1), (2), (3), (4) [which govern the determination of a sentence solely for the purpose of deterrence, incapacitation, rehabilitation, and denunciation, respectively].") (section 2302(d)(5) of their proposed statute). For an illustration of how the proposal would be applied, see *id.* at 52.

[42] A sentence higher than a utilitarian purpose calls for may be an inefficient sentence. To the

terrence not only violates a principle of efficient incapacitation, but also is grossly undeserved. Such a sentence does not satisfy desert; it violates it. In the context of liability doctrines, desert might support complicity liability of a host for the drunk driving of an intoxicated guest. However, it does not follow that if *more* than such liability is imposed (for example, complicity liability for deaths caused by the drunk driving guest), desert will be satisfied. Such extended liability may further a deterrent purpose yet may violate a just punishment principle.

In the end, then, a hybrid principle that follows the purpose with the highest sentence or broadest liability is not a principled hybrid at all, at least not in relation to the alternative purposes for distributing criminal sanctions. Under such an approach, the selection of the governing purpose among conflicting purposes is not the product of a defined relationship among the purposes that can be articulated beforehand. Instead, the governing purpose is determined ad hoc, depending on the relative results generated in each instance.

E. Distinguishing the Assignment and Amount of Sanction from the Method of Sanction

The traditional purposes are used to resolve a range of distinguishable issues in the distribution of sanctions: Who should be sanctioned? How much sanction should they receive? How should the sanction be imposed? The first issue is essentially one of liability assignment—who should be held criminally liable. The second issue—how much sanction—goes to both liability rules (that is, what grade or degree of offense is appropriate for certain conduct) and sentencing practice (for example, how long a sentence or how great a fine is appropriate in a particular case). Together, these two issues govern the quantitative distribution of sanction—who will receive how much. The third issue, concerning the method of sanction, is distinguishable from the distribution of amount. Two offenders may merit the same *amount* of sanction yet different *methods* of sanctioning may be suitable for imposing that amount. These two issues—how much for whom and what method—are not only functionally distinguishable but also may properly be subject to different distributive principles.

Each of the distributive purposes may treat the different issues differently. Effective crime control can be furthered through a variety of mechanisms—by setting the amount or the method of sanction, as well as by setting enforcement and prosecution patterns and expenditures. Satisfaction of desert concerns, by contrast, depends almost exclusively on the

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extent that liability is justified by a deterrence utilitarian calculus—a comparison of the social cost of imposing liability and the social benefit that is projected to flow from the future crimes deterred by imposing such liability—the imposition of liability in a given situation may create more social cost than benefit.

amount issue—who receives how much; the method issue (as well as the resource allocation issues) is generally not relevant.

The desert requirement of a proper ordinal ranking of offenders by overall blameworthiness,[43] for example, concerns the ranking of *amounts* of sanction. As long as the ordinal ranking is correct, the *method* by which each amount is imposed is not relevant to desert. If one month in the state prison is the punitive equivalent to five months of weekends in the local jail, then desert is satisfied even if the more blameworthy offender gets probation, with a condition of seven months of weekends in jail, while the less blameworthy offender goes to prison for one month.[44] It is critical, of course, that the sanction equivalencies be properly set. Some empirical research has been done on perceptions of relative seriousness of sanctions,[45] but the work is still in its infancy.

With an estimate of equivalencies, one can construct a sentencing system that allows independent determination of the amount and method issues. The principles governing the "amount" issue can generate total "sanction units" for each offender, which can then be allocated to a particular sanctioning method or combination of methods according to a different set of "method" principles.[46] As long as the issues can be effectively segregated in practice, one can develop a hybrid distributive principle for governing the amount of sanction that is different from the principle used to determine the method of sanction. One could, for example, emphasize desert in determining the amount of sanction, but ignore it in determining the method. The selection of method could be made to maximize pure utilitarian concerns[47] without infringing desert interests—a precious no-loss, all-win opportunity.

The separation of amount and method issues has other important collateral advantages. For example, unwarranted disparity in sentencing primarily concerns disparity in amount, rather than disparity in method. Thus, one might significantly reduce judicial sentencing discretion on the amount issue, in order to reduce disparity among judges, yet maintain broad judicial discretion on the method issue. As long as the total "sanc-

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[43] *See* A. VON HIRSCH, *supra* note 15, at 40-43.

[44] Or, if the punitive "bite" of a fine of 15% of a business offender's assets is equivalent to one week in jail, then desert is served if the more blameworthy offender is fined an amount equal to 25% of assets, while the less blameworthy is sentenced to jail for one week.

[45] Deborah Buchner's study, for example, makes comparisons between the severity of sentences according to the perceptions of judges (for example, 3-23 months in the county prison is approximately equal to 9 years probation). Buchner, *Scale of Sentence Severity*, 70 J. CRIM. L. & CRIMINOLOGY 182 (1979); *see also* Erickson & Gibbs, *On the Perceived Severity of Legal Penalties*, 70 J. CRIM. L. & CRIMINOLOGY 102 (1979) (field surveys in four Arizona cities on public perceptions of severity of various sanctions); Sebba, *Some Explorations in the Scaling of Penalties*, 15 J. RES. CRIME & DELINQ. 247 (1978) (tentative findings of exploratory study measuring the relative severity of various penalties).

[46] *See* Robinson, *A Sentencing System for the 2lst Century?*, 66 TEX. L. REV. 1 (1987).

[47] One could include rehabilitation in the utilitarian determination of the method of sanction to be used.

tion units" for an offender are satisfied and the sanction equivalencies are properly set, it does not matter what method or methods an individual judge selects; the punitive "bite" will be the same.

The ability to defer to judicial discretion without creating undesirable disparity is particularly useful where method is concerned, because at present the principles for the selection of methods are much less obvious than the principles for the determination of amount. One can do rough ordinal rankings of offense seriousness,[48] for example, but it is more difficult to articulate principles to govern issues such as which conditions of probation are appropriate in what situations.

III. Combined Approaches: Conflict Decisions Under One Hybrid System

One can construct a hybrid distributive principle that rationally and consistently will resolve the conflict points described in part I by using a combination of the approaches set out in part II.

Generally, the search for a hybrid distributive principle is a search for a means by which all of the purposes can be fully satisfied. That goal cannot be attained, of course, because the purposes frequently conflict—one purpose can be furthered only at the expense of another. However, part II reveals at least two instances in which compromise is not necessary. First, the utilitarian purposes can be effectively *combined* to give a result shaped by all and to maximize the efficient crime control goal common to all.[49] Second, the *method* of sanctioning can be governed solely by the combined utilitarian purposes, without compromising desert concerns.

The problem, then, can be reduced to defining a hybrid for desert and combined-utilitarian purposes to govern the amount issues—who should be sanctioned how much. One wants both justice and less crime, of course, but it may be difficult to choose which of these benefits is more important to us. It may be useful to address the problem from a cost rather than a benefit perspective—what would it *cost* to follow desert at the expense of the utilitarian purposes, or vice versa?

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[48] *See* A. von Hirsch, *supra* note 15, 63-76.

[49] This is possible as long as one has no special preference for deterrence over incapacitation, and as long as both are viewed as equally suitable crime prevention devices. One must also accept that rehabilitation is useful solely for its crime prevention effect. (One might conclude, for example, that making people better people or at least making people feel like better people is an important goal, but is not an appropriate goal of the criminal justice system.) *See supra* note 26.

The criticisms and costs of each side in the conflict between desert and utilitarian purposes might be summarized as follows:

	Desert	Utilitarian Purposes
Case #1	Desert suggests greater/broader liability	Utilitarian purposes suggest lower/narrower liability
	(a) If desert purpose is followed:	(b) If utilitarian purpose is followed:
	"Punishment here is wasting resources. It will not reduce crime enough to justify the cost of punishment."	"The offender is getting off too easily—justice isn't being done."
Case #2	Desert suggests lower/narrow liability	Utilitarian purposes suggest greater/broader liability
	(x) If desert purpose is followed:	(y) If utilitarian purpose is followed:
	"We are missing an opportunity to reduce crime. Indeed, this rule may even increase crime."	"The offender is being punished unfairly; he is being used by society as a means to an end. An injustice is being done to the defendant."

In Case #1, the objection to the desert rule is monetary—"wasting resources." But given the public outrage that ensues when an offender gets off under the utilitarian rule, society might well be willing to pay more to have justice done.

Case #2 is more difficult. If one is offended by the unfairness and injustice of imposing more or broader liability than deserved, then there is a great incentive to adopt the desert rule to avoid this. But the cost of doing so is not just money, as in Case #1; the cost is a missed opportunity to reduce crime, which may or may not be tolerable. Should we punish offenders more than they deserve if the alternative is more crime? To me, admittedly without any reasoned or compelling logical support, the answer is: It depends—how much more than they deserve? and how much more crime?

Minor injustices—for example, giving a parking ticket to someone who does not deserve it—might be tolerable, but not too much more would be. Minor increases in crime—for example, more illegal parking—might be tolerable, but not too much more. On balance, I would probably tolerate more crime than I would more injustice—at least to a point.[50]

This view does not necessarily condemn us to suffer more crime. There are mechanisms other than the manipulation of the rules for distributing sanctions that may alter the crime rate. We can protect ourselves from identifiable dangerous persons who are blameless by incapacitating them through expanded use of civil commitment proce-

[50] I do not suggest that others share these values; therefore, I do not suggest that others should necessarily adopt the hybrid system discussed here.

dures.[51] We can increase the general deterrent effect for a particular kind of crime or offender (beyond the deterrent effect inherent in the desert distribution of sanctions) by adjusting our allocation of investigatory, enforcement, or prosecution resources. We do not know whether these alternative mechanisms are more or less cost-effective than manipulating the distribution of sanctions, but, if they require an additional cost, money may be well spent if it avoids the perversion of a deserved distribution of sanctions and preserves the effectiveness of the condemnatory voice that accompanies a true desert distribution.

With this obviously generalized view of the proper relationship between desert and the utilitarian purposes, I might construct a hybrid distributive principle for deciding who should get how much sanction as follows: Desert is to be given priority over the combined utilitarian formulation, except where it causes an intolerable level of crime that the utilitarian formulation could avoid. At this point utilitarian adjustments can be made, but no utilitarian adjustment can be made if it generates a formulation that imposes an intolerably unjust punishment.

In terms of the approaches described in part II, this is a mixed system. It uses desert as a determining principle and combined utilitarian purposes as a limiting principle. The limiting criteria is an "intolerable crime rate" standard. The utilitarian purposes are also subject to contingent limitations based upon the reliability of any predictions of crime rates. Desert then serves as a second limiting principle, one that limits the application of the first limiting principle if the combined utilitarian purposes generate an "intolerable injustice."

Such a system requires defining both a point of intolerable crime and, if the occasion arises, a point of intolerable injustice. Recognizing the magnitude of this project, I leave it to others or to a future article. It is possible that some standards may be borrowed from current law. For example, an extreme example of intolerable injustice may already be embodied in the cruel and unusual punishment case law, which requires a certain proportionality between the criminal conduct and the penalty imposed.[52] The issue of intolerable injustice is never reached, however, unless it is first shown that the desert principle must be abandoned in some respect because it causes an intolerable crime rate.

This hybrid distributive principle is still somewhat general and abstract, but it does suggest a process of analysis. First, generate a desert formulation (or range of acceptable formulations) for the issue at hand. Second, generate a combined utilitarian formulation for the issue. Third, compare the two. If the utilitarian formulation is the same as the desert formulation or any of the acceptable desert formulations, then use that formulation. If there is no overlap but rather a conflict between desert

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[51] *See, e.g.*, Schoeman, *On Incapacitating the Dangerous*, 16 AM. PHIL. Q. 27, 27-35 (1979).

[52] *See, e.g.*, Solem v. Helm, 463 U.S. 277 (1983).

and utility, determine the cost of the desert formulation in terms of increased crime. Fourth, establish what constitutes an intolerable level of crime and determine whether the desert formulation would cause this level to be reached or exceeded. If a *prediction* of crime rate is used, establish as well an acceptable standard for reliability and compare to this standard the level of reliability of the prediction. Fifth, if the predicted rate is intolerable, and if the prediction is sufficiently reliable, establish a standard of intolerable injustice and assess the results of the utilitarian formulation by this standard. If the utilitarian formulation exceeds the intolerable injustice standard, use the desert formulation; if it does not, use the utilitarian formulation. In the last analysis, then, the utilitarian formulation would be followed only where it is consistent with desert or where it is shown (with an acceptable level of certainty) that the desert formulation would cause an intolerable crime level and that the utilitarian formulation would not cause intolerable injustice.

Can such a hybrid distributive principle be used to decide the conflicts described in part I? Part I noted which of the formulations or sentences are supported by a desert principle.[53] The next question is: Will any of these desert formulations generate an intolerable level of crime? This possibility can be excluded in all cases where desert would deny a mitigation or defense, as, for example, for inherently unlikely attempts. The defense for inherently unlikely attempts is designed only to avoid "wasting resources," not to reduce crime.

Is it likely that recognizing any of the mitigations or defenses proposed by desert will create an intolerable level of crime? Here two variables become relevant. The more infrequent the conditions of defense or mitigation and the less serious the offense, the less likely that the "intolerable" level will be reached. Thus, for example, the infrequency of the conditions constituting duress or nonjustified necessity (as in *Dudley & Stephens*[54]) suggests that the defenses or mitigations should not be limited by the combined utilitarian concerns. The same may be true of the insanity defense, especially where it is formulated in a narrow fashion to require significant abnormality.

Less clear are mitigations for killing under heat of passion, in response to provocation, or after ongoing abuse by a spouse or parent; the situations giving rise to these doctrines are unfortunately not uncommon occurrences in our society. On the other hand, most of these mitigations are already recognized, and, while many people would view the current homicide rate as too high, it is not clear that most would consider it intolerable. Even if it were intolerable, these desert-based mitigations in punishment may be abandoned under the hybrid principle only if it is shown with sufficient reliability that adopting the utilitarian position (of

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[53] *See supra* note 28 and accompanying text.

[54] *See supra* note 29 and accompanying text.

rejecting the mitigations) would reduce the homicide rate in such cases to below the intolerable level. I am not at present aware of any empirical research concerning such projections.

Further, before the mitigation doctrines could be rejected, we would have to determine that an intolerable injustice would not result. Many of these mitigations have an unbroken common law history of over three centuries.[55] Many have been expanded in modern developments rather than contracted.[56] It is not clear that their rejection would be accepted as tolerable.[57]

The use of strict liability offenses and doctrines is justified differently under the hybrid distributive principle. These are cases in which following the desert principle likely would result in an intolerable crime level. First, the instances that they concern—for example, the manufacture and handling of food, drugs, toxic substances, firearms, and explosives—are very common.[58] Second, the potential harm from a single offense can be great, if not staggering, in its scope and degree. Unlike a single killing upon provocation, the violation of food and drug regulations, for example, can endanger hundreds or thousands of persons who have no part in the food or drug enterprise and who are helpless to guard against the harm. A mere threat to or lack of public confidence in the integrity of the food and drug distribution system can, because of the vulnerability of the public, seriously disrupt the operation of the system.[59] Further, some evidence suggests that designation of an act as a strict liability offense is likely to deter potential offenders.[60]

Assuming that the failure to consider utilitarian purposes would produce an intolerable level of crime, the question then becomes: Is the use of strict liability offenses an intolerable injustice? This question is not

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55 *See, e.g.*, 1 M. HALE, HISTORIA PLACITORUM CORONAE 455-70 (1736 & photo. reprint 1971) (describing mitigations of heat of passion and provocation in homicide cases). While Hale's work was not published until 1736, its existence was well known in 1678; Hale died in 1676 before completing his work. *See* Glazebrook, *Introduction*, in 1 M. HALE, *supra*.

56 *See, e.g.*, 1 P. ROBINSON, *supra* note 2, § 102(a)(2) (describing ways in which Model Penal Code "extreme emotional disturbance" mitigation broadened common law "provocation" mitigation).

57 Indeed, some writers have suggested that nearly any distribution of sanctions based upon a prediction of future criminality will be judged intolerable because of the inherent "false positive" problems. That is, even if predictive methods were highly successful in identifying future offenders, the infrequency of the events predicted—a future offense—makes the number of false positives (instances where the test *incorrectly* predicts that a person *will* commit an offense) intolerably high. *See* von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717, 730-39 (1972); *see also* A. VON HIRSCH, *supra* note 15, app. at 1.

58 *See, e.g.*, MODEL PENAL CODE § 2.05 commentary at 141-45 (Tent. Draft No. 4, 1955); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 84-88 (1933); 115 A.L.R. 1230 (1938); 28 A.L.R. 1385 (1924).

59 The recent "Tylenol poisonings" and their effect on the manufacture, sale, and use of related medicines are a prime example.

60 *See, e.g.*, Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 736 (1960).

trivial; desert seems to require a culpable state of mind or, at least, objectively wrongful risk-taking. Strict liability requires neither. However, history suggests that strict liability is not considered intolerably unjust; it has always existed at common law.[61] Further, many codes and some case law significantly limit the kinds of penalties that may be imposed for strict liability offenses, thus minimizing the injustice through sentencing rather than formal rules of liability.[62] It is significant that the continuing disputes over strict liability concern its use with nonregulatory offenses such as statutory rape and felony murder, where the potential for far reaching societal harm from a single violation is less than in the regulatory setting, yet where the penalties imposed are greater.[63] Strict liability thus may be a conflict point at which the hybrid principle would permit deviation from the result dictated by desert. Other appropriate deviations from desert might be found.[64] Part of the value of such an articulated hybrid distributive principle is that it can guide decisions on new conflict points as they appear.

IV. Summary and Conclusion

The traditional purposes of criminal sanctions—just punishment, deterrence, incapacitation of the dangerous, and rehabilitation—are relied upon by legislators, sentencing-guideline drafters, and judges in the formulation, interpretation, and application of the rules and doctrines of criminal law and the determination of sentencing guidelines and individual sentences. When different purposes suggest different formulations or sentences, as part I demonstrated that they frequently do, the decision maker must, and does, choose among the conflicting purposes. Yet, there is no articulated principle governing such conflict decisions. This leaves the codes, guidelines, and sentences vulnerable to the criticism that "the purposes" are used only to provide the appearance of reason and principle to a result that, in reality, is the product of some unarticulated value judgment by the decision maker.

While some argue that an interrelation among the purposes cannot be defined—that, as a practical matter, the choice among conflicting pur-

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61 *See* Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 Hastings L.J. 815, 823-25 (1980).

62 *See, e.g.*, Morissette v. United States, 342 U.S. 246, 250-60 (1952); Ark. Stat. Ann. §§ 41-202(2), 41-204(2) (1977); Ky. Rev. Stat. Ann. §§ 501.010(1), 501.030(2), 501.050 (Michie/Bobbs-Merrill 1985); Or. Rev. Stat. §§ 161.105(1), 161.115(2) (1985); 18 Pa. Cons. Stat. Ann. §§ 302(a), (c), 305(a) (Purdon 1983).

63 *See, e.g.*, Model Penal Code § 210.2 commentary at 29-43 (1985) (felony murder); *id.* § 213.6 commentary at 412-17 (statutory rape).

64 The fact that this hybrid distributive principle generates a result similar to the law now existing in most states suggests only that it *may* be the unarticulated system at work in those states. Other systems may generate the same results on these conflict points. If this is so, none can be judged the controlling system unless other conflict points, upon which the systems disagree, can be found and analyzed.

poses must be ad hoc—part II demonstrated that a hybrid distributive principle can be constructed by any of several mechanisms. Indeed, a large number of different hybrid principles are possible by combining two or more of the mechanisms. Part III illustrated how such a combined-mechanism hybrid might be constructed and used to resolve a full range of conflicts.

Because such principled mechanisms are available, one need not and should not simply direct, as the Model Penal Code commentary does, that conflicting purposes be "just[ly] harmoniz[ed]." If, when purposes conflict, the choice of formulations or sentences is to be rational, principled, and explainable, the rules governing choices must be fully articulated.