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PRINCIPLES OF CRIMINAL SENTENCING,
PLAIN AND FANCY

Franklin E. Zimring*

One can read Professor Robinson's essay either as an attempt to
construct a new formal apparatus in the jurisprudence of criminal sen-
tencing, or as an informal plea that considerations of just desert should
be preferred over those of efficient crime control in almost all cases where
they point toward different sentencing choices. For reasons developed
below, I prefer to view Professor Robinson's argument as the informal
plea, rather than the elaborate jurisprudential apparatus.

I.

The dressed-up version of the Robinson argument appears to as-
sume four propositions which are problematic as well as unnecessary to a
balancing of punishment goals. In the world according to Robinson:
(1) there are four (and only four) purposes of punishment;
(2) these four purposes can be adequately defined and precisely
measured;
(3) these principles conflict in sentencing decisions; and
(4) conflicts can be resolved by using a hybrid principle that com-
bines three utilitarian goals on one side of the equation and one non-
utilitarian goal on the other.¹

Let me sketch out why I find these assumptions problematic. First,
are there four and only four purposes of punishment? The first sentence
in Robinson's analysis assumes so, and names them "just punishment,"
"deterrence," "incapacitation," and "rehabilitation."² Putting aside
questions about whether rehabilitation is or should be properly regarded
as a purpose of punishment, there are at least two other purposes in the
allocation of punishment that deserve serious consideration: propor-
tional equality, "the somewhat hazy requirement that like cases be
treated alike,"³ and parsimony, the utilitarian and morally informed goal
of restricting those punishments inflicted to the absolute minimum that is

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¹ See Robinson, Hybrid Principles for the Distribution of Criminal Sanctions, 82 Nw. U.L. Rev.
² Id. at 19.
necessary. Perhaps Robinson may mean to subsume the requirement that like cases be treated alike in his general concept of "just punishment," but he does not say so. Moreover, to make the desert category into a conglomeration of a number of different aspects of justice would generate a conflict between its constituent parts, one which would look very much like the conflict between goals of punishment that Robinson is discussing.

With respect to parsimony, Robinson does not mention it as an independently important limiting principle of punishment. Perhaps, by "principles of punishment," he means only those reasons why we might impose punishment rather than those reasons why we might limit it. But this is surely too restrictive if the search for hybrid principles is an attempt to accommodate all the important vectors that determine just punishment in the individual case.

Robinson's four allowable principles of punishment and their exclusive sovereignty over the punishment decision are both taken as givens in his article. An extensive recent literature to the contrary, most notably the work of Norval Morris, merits no mention in this section of Robinson's analysis. So much for issue number one.

Issue number two is this: The calculus of hybrid principles depends on a capacity to define and measure purposes. Can we do either? On the question of definition, Robinson is both forthright and elliptic. This is his definition of desert:

> 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.

While this phrase is evocative, it is far from specific. Yet this is as close to an operational definition as the article gets. This deficiency is compounded because "just desert" is the central term in the Robinson analysis. We must take it as an article of faith that this concept of desert not only can be defined but also measured.

Do the same factors that influence public perception of desert also influence feelings about dangerousness and deterrence? Often, we think a crime requires more punishment because the people who commit the crime are dangerous. And, both our view of the need for deterrence and our feelings about the degree of moral blameworthiness of the individual who commits an offense will be magnified if the particular crime is seen as a major social problem. This shift toward increasing perception of

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5 Robinson, supra note 1, at 19 n.1.

both deterrent need and desert marks the recent history of drunk driving law in the United States. We do not know whether these sorts of joint effects would be acknowledged or even allowed in Robinson’s concept of desert.

There are other problems of definition. The article seems to assume that rehabilitation is a crime control consideration that stands or falls, on equal footing with deterrence, on a cost-benefit analysis, rather than a goal of choice because of the obligations the state owes to the dignity and future life chances of the offender. In juvenile justice, rehabilitation has a preferred position that is not strictly related to crime control. Robinson seems to assume the contrary for the entire criminal justice system.

On the crucial question of the ability to measure the different effects of alternative punishments, the article resorts to government by assumption. Professor Robinson is, of course, in good company when he tries to assume away issues of specification and measurement in order to decide sentencing priorities as a matter of principle in a near-perfect world. But if measurement imprecisions are inherent, an informal rather than a formal calculus for determining sentences is appropriate. I shall return to this point in section II when considering the concrete guidance offered by Robinson’s hybrid principle.

We come now to issue number three: When do Robinson’s four principles of punishment conflict? One’s conclusion here turns on the definition of conflict. On the one hand, Robinson may mean that purposes of punishment are in conflict when the punishment required for one purpose (for example, deterrence) is substantially greater or substantially less than the amount of punishment required for another purpose (for example, incapacitation or rehabilitation).

But does this difference necessarily signal conflict? Or can these crime control goals be harmonized in a noncompetitive way? If five years is fine for incapacitation but seven seems required by deterrence, imprison for seven. This discomforts Robinson, who suggests that the longer sentence for deterrence in some way “violates a principle of efficient incapacitation.” Yet, absent some notion of cost or use of parsimony as a limiting principle, the addition of two years beyond what incapacitation alone would require does not in any coherent fashion conflict with incapacitation as a purpose of punishment.

True, if we assume a limited amount of prison space that could be distributed to optimize either incapacitation or deterrence, a conflict could result. But such notions of scarcity are absent from the Robinson analysis.

The second sense in which Robinson may mean to speak of the goals

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8 Robinson, supra note 1, at 34.
of punishment as conflicting is to say that they point toward alternative levels of punishment which are not only different but antithetical to one another. Thus, conflict has a different meaning when we say that a punishment required for adequate deterrence, for example, is much greater than that which seems justly deserved by the individual offender—that a punishment serving deterrence will disserve desert. If it is this more direct conflict that Robinson seeks to resolve, how does his hybrid principle achieve the resolution?

Robinson restates the conflict as that between desert and the other three crime control or "utilitarian" purposes lumped together, and advances the following as his "hybrid distributive principle":

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.9

Three things can be said about this hybrid distributive principle. First, the dynamic of the principle can be simply stated. Second, the conflict between just desert considerations and utilitarian considerations is resolved by a preference that is in no sense derived from the rest of Robinson's apparatus, and thus does not depend on it. Third, the calculus called for by the author depends on so many imponderable issues of specification and measurement that outcomes in his scheme will nearly always be determined by presumptions. Since the direction of the presumption is only a matter of value preference, a consensus in sentencing choices will depend upon finding deciders with their hearts in the same place rather than in adopting a new calculus of hybrid principles.

Here is a simple statement of Robinson's hybrid principle: When conflict occurs, the just desert punishment controls over punishments that might enhance deterrence, incapacitation, or rehabilitation unless the proponent of the crime control purpose can show (1) that imposing the just penalty will lead to an intolerable level of crime; and (2) that adjusting the punishment would avoid the crime wave.10 With that burden of proof, I will put my money on the dominance of just desert every time.

But why does Robinson's hybrid principle prefer just desert considerations to those of crime control? The answer is, only because he values just desert considerations more than crime control considerations in anything but profound emergencies. There is no sense in which this preference is derived from any of the prior analyses in his essay.

Could one have a hybrid principle stating that whenever there is a conflict between a sentence required for effective crime control and that

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9 Id. at 38.
10 Id. at 38-39.
required for just desert, the crime control function should govern unless to do so would produce an intolerable level of deviation from the community sense of desert? This principle would be equally hybrid, just as coherent, and carry an equal degree of predictability of outcome. The only basis for preferring Robinson's formulation to this counter-hybrid is a preference for placing just desert first.

II.

Here is Professor Robinson's recipe for using his hybrid principle to distribute criminal sanctions:

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 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.¹¹

Can any of this be done under present or imaginable conditions of social science understanding? Robinson does not consider the question.

Yet questions of specification and measurement are of central relevance to the choice of jurisprudence in sentencing. When Norval Morris argues that the best we can obtain is a range of desert values, a ceiling and floor, he is making a statement about the inherent mushiness of the concept of desert, and about the way in which desert is determined in individual psychology and group processes.¹² Most self-styled desert theorists, however, do not participate in the debate about the function of desert in real-world settings. Rather, they assume we can read precision into levels of deserved punishment. Thus, these theorists do not face a key issue about the nature of desert.

It is not just desert that cannot precisely be specified. Professor Morris, while unwilling to speak of deserved punishments in anything other than range terms, does seem ready to believe that with better empirical data, punishments could precisely be set to conform to goals like deterrence.¹³ His optimism about defining principles seems misplaced. He assumes too much about the capacity of social science to measure.

¹¹ Id. (emphasis in original)
¹² See, e.g., N. Morris, Madness and the Criminal Law, supra note 4, at 179-92.
¹³ See id. at 182-83.
To speak of an optimum punishment for deterrence also ignores the fact that many different mixes of enforcement strategy, publicity, and sanction level could produce the same amount of deterrence. Thus, there is no way in which knowledge of general deterrent processes can translate into a single optimum punishment in an individual case even if measurements were perfect.

What if the search for defining principles is itself misguided? What if all the crime control considerations, like those of desert, guide us toward sentences in rough concordance with community desert values as well as in rough concordance with the crime control goals the society views as relevant to punishment setting? Is there anything wrong with conceptualizing sentencing as a series of approximations? Isn’t that the real world of criminal sentencing?

The illusory search for precision in criminal punishment has many origins. Formal models and economic theory have high status these days in the legal academy. The use of quantitative measurements to derive averages in the criminological study of sentencing leads some observers, incorrectly, to give normative weight to a statistical average. More important in fueling current scholarly searches for the optimum is the urge to construct guidelines that do more than average out those deviations in punishment that were the product of decentralized sentencing discretion in prior regimes.

Indeed, the apparatus of sentencing guidelines, with the multiple grids and quantitative cut points of modern social science, seems to assume a capacity to fine tune the function of the new criminal sentences as well as their form. Yet the road toward such exactitude is not merely long and difficult. It is the wrong path.