Criminal Law Scholarship: Three Illusions

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The paper criticizes criminal law scholarship for helping to construct and failing to expose analytic structures that falsely claim a higher level of rationality and coherence than current criminal law theory deserves. It offers illustrations of three such illusions of rationality. First, it is common in criminal law discourse for scholars and judges to cite any of the standard litany of "the purposes of punishment" — just deserts, deterrence, incapacitation of the dangerous, rehabilitation, and sometimes other purposes — as a justification for one or another liability rule or sentencing practice. The cited "purpose" gives the rules an aura of rationality, but one that is, in large part, illusory. Without a principle defining the interrelation of the "purposes," nearly any rule can be justified by some "purpose of punishment." Thus, a decision maker can switch among distributive principles as needed to provide an apparent rationale for whichever rule the person prefers, even if that preference is not based on rational criteria. A second example is found in a central mechanism for determining an offender's blameworthiness: the use of an individualized objective standard. The widely used mechanism avoids the problems acknowledged to attend a strictly objective standard. A person's situation and capacities are central to an assessment of whether a person can be fairly blamed for a violation, and the individualized objective standard allows the decision maker to take these into account. At the same time, the mechanism avoids reversion to a completely subjective standard, which might exempt many blameworthy cases from liability. In reality, however, the mechanism only shifts the form of the problem. Codes that use the individualized objective standard fail to provide a principle by which one can determine those characteristics of an offender with which the objective standard ought to be individualized and those with which

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it ought not. Without a governing principle, the issue again is left to the discretion of decision makers, with no guidance as to how that discretion is to be exercised. A final illusion obscures whether the criminal justice system is, in fact, in the business of "doing justice." The "criminal justice" system imposes "punishment" and encourages moral condemnation of those found "guilty" of "crimes." But while the system cultivates its doing-justice image, it increasingly shifts to a system of essentially preventive detention, where a violator's sanction is derived more from what is needed to incapacitate him from committing future offenses than to punish him for a past offense. There are great advantages to the deception, but also serious costs and inefficiencies. The paper discusses why some illusions are more objectionable than others and what the existence of such illusions says about modern criminal law scholarship.

INTRODUCTION

We criminal law theorists like to think that we are moving existing criminal law theory to a higher plateau of rationality, as furthering current understanding beyond that which was given to us by our criminal law theory predecessors. But the truth is that our advances in rationality often are less than they appear; they are sometimes advances only in their appearance of rationality. This article gives illustrations of three such illusions. As will become apparent, these illustrations are of different sorts: one demonstrates the inevitable limitation of any theoretical advance; one is an example of an inevitable limitation that has been unnecessarily retained over time; and one is a case of possibly cynical deception.

The focus here is upon American criminal law and its development, but there is nothing special about American criminal law or theory on this point.[1] These illusions are likely to have some form of counterpart in the criminal law theory of most legal systems.

1 To illustrate this point, the footnotes contain some references to English criminal law and to the Draft Criminal Code for England and Wales.

I. ARTICULATING THE PURPOSES OF LIABILITY AND PUNISHMENT

A. The Problem: Policy Mush

Before the wave of American recodifications in the 1960s and 1970s, there was a growing awareness that criminal lawmaking operated in a policy mush. There was no articulated statement of what the criminal law was intended to accomplish or how it was to do so. Without open agreement on even the most fundamental questions, rational debate was difficult, for every person might reason from a different set of premises. Or worse, lawmakers could create criminal law without reference to any set of goals.

This lack of a statement of purposes was seen, well before the recodifications, as a primary hurdle to rational criminal lawmaking. In 1931, the Joint Committee on the Improvement of Criminal Justice, in its brief *The Need for Clarification and Modernization of the Substantive Criminal Law,* put near the top of its list of reasons for such clarification and modernization "Uncertainty in the Purposes Which the Criminal Law is Designed to Serve":

> [T]here is ... uncertainty as to the purposes which the criminal law and its various component parts are designed to serve. An example of this is to be found in the situation which has grown up in connection with the group of statutory offenses — embezzlement, writing fictitious checks, obtaining money or goods under false pretenses. Contrary to the generally recognized principle of criminal law which condemns the compromising of cases, a widespread practice has grown up of permitting the adjustment of such cases upon settlement of the money differences between offenders and complainants. This practice is freely and openly participated in by police, prosecutors and sometimes by judges upon the theory that it is proper to use the criminal law as a means of coercing a defendant into a private settlement.
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> Another example is to be found in the partial abandonment of the rule of the common law which provided that condonation by an injured person would not excuse the defendant. Recent statutes have declared that no prosecution for adultery shall be commenced except upon the complaint of the aggrieved spouse, and that a subsequent marriage between the defendant and the injured person shall prevent a prosecution for seduction. The point is further illustrated by the extension of certain common law crimes to cover new situations and to accomplish new purposes. So the common law crime of arson has been made to include burning a house by the owner thereof with intent

> to defraud an insurance company, thus accomplishing a purpose quite different from that which was envisaged by the common law definition of arson, namely the protection of the dwelling house. Again it had long been thought that the criminal law existed for the sole purpose of punishing crimes and that prevention, except through punishment, was no concern of the law, but recently a wider concept of prevention has been imported into the criminal law by provision for padlocking places wherein a certain class of crimes have been committed and are likely to be continued. The establishment of juvenile courts is another illustration of changed ideas as to the purpose the criminal law is designed to serve. The increasing individualization of the disposition or treatment of the offender, based not so much upon variations in the nature of the offense as upon the variations in the nature of the offenders, will necessitate some very radical reconstruction of our substantive criminal law.
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> While the present uncertainty exists as to the meaning of terms, the concepts which they represent and the purposes which the criminal law is designed to serve under present-day social, industrial and political conditions, it seems unwise to undertake the preparation of a crime definition act except in connection with a study of the whole criminal law.
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> The difficulty of drafting an adequate crimes definition act is but an illustration of the fact that no part of the main body of our criminal law can be effectively improved apart from a study of the problem as a whole. The existing confusion of ideas is too great.[2]

No doubt the inconsistency of the criminal law extended far beyond the kinds of specific problems that the 1931 brief cites, but it is significant that the need for a statement of purposes was recognized even when the working standards of rationality and consistency were so low.

B. The Solution: Articulated Purposes

The Model Penal Code sought to address the problem by providing section 1.02, Purposes, Principles of Construction. The provision includes, in one form or another, all of the purposes that we now think of as part of the traditional litany: deterrence, incapacitation, rehabilitation, and desert:

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2 *Report of the Joint Committee on the Improvement of Criminal Justice*, 56 A.B.A. Rep. 513 (1931) (adopted and distributed July 13, 1931) (Appendix A. The Need for Clarification and Modernization of the Substantive Criminal Law).

> (1) The general purposes of the provisions governing the definition of offenses are:
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> (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
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> (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
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> (c) to safeguard conduct that is without fault from condemnation as criminal;
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> (d) to give fair warning of the nature of the conduct declared to constitute an offense;
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> (e) to differentiate on reasonable grounds between serious and minor offenses.[3]

The Code's official commentary explains:

> Section 1.02 undertakes to state the most pervasive general objectives of the Code. The statement is included for its own sake, as an explanation of the underlying legislative premises of the enactment. It is also envisaged, as Subsection (3) explicitly declares, as an aid in the interpretation of particular provisions and in the exercise of the discretionary powers vested in the courts and in the organs of the correctional administration.[4]

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3 Model Penal Code § 1.02(1) (Official Draft and Revised Comments 1985). Subsection (2) provides a similar statement of purposes for sentencing and treatment:

> (2) The general purposes of the provisions governing the sentencing and treatment of offenders are:
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> (a) to prevent the commission of offenses;
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> (b) to promote the correction and rehabilitation of offenders;
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> (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
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> (d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;
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> (e) to differentiate among offenders with a view to a just individualization in their treatment;
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> (f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;
>
> (g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;
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> (h) to integrate responsibility for the administration of the correctional system in a State Department of Correction [or other single department or agency].

4 § 1.02 cmt. 15.

Subsection (3) of the Code directs that the statement of purposes is to guide the interpretation of the Code's provisions.[5] More than half the American state codes now contain a statement of purposes based on this subsection.[6]

C. The Illusion: Undefined Interrelation

The Model Penal Code statement of purposes includes many different purposes and does not define an interrelation among those listed. The drafters explained:

> The section [1.02] ... does not undertake ... 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.[7]

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5 Model Penal Code section 1.02(3) provides:

> (3) The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved. The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code and, insofar as such criteria are not decisive, to further the general purposes stated in this Section.

6 § 1.02 cmt. 15 n.2.

7 Model Penal Code § 1.02 cmt. 2 (Tent. Draft No. 2, 1954). The passage continues:

> 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 [sic] a social value in itself [sic], 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.

This same approach is taken with regard to section 7.01 (Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation). The drafters explained that "the reasons for imprisonment are usually obvious ... ." § 7.01 cmt. 34.

Others suggest that the competing interests are to be "balanced,"[8] "blended,"[9] "accommodated,"[10] "taken account of,"[11] or "deal[t] with [such that] the public interest will be served."[12]

One may speculate that the drafters took this view in part because there was no agreement among them as to which purposes should dominate and in part because they saw little difficulty in leaving the interrelation undefined. Judges and administrators could "harmonize" the purposes as needed. Professor Wechsler, during the A.L.I. Floor Debate relating to section 1.02, explained:

> I may say that [section 1.02] represents a lot of work, because it really is a matter of substantive importance, what the purposes that you think to be pursued in penal law are. We ... are an eclectic group. We are suspicious of anybody who attempts to vindicate the thesis that penal law has some single, sole, exclusive objective in the world, such as the reformation of offenders, or the deterrence of offenders, or any other single articulation.
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> We do think that its dominant and prime justification is the prevention of crime, and in that respect I do not think that we face room for large disagreement. But within that framework, there are many other values that a society must serve and that arise acutely in the context of penal law where so much is at stake for both the public and the individual.
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> Hence, starting with this eclectic view, we have attempted to state the major objectives that we think it right this field of law should undertake to pursue. We recognize that here as elsewhere the task of administration is largely to harmonize a group of public purposes rather than to run rough-shod in pursuit of some single one.[13]

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8 Stanley A. Cohen, *An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment*, 27 McGill L.J. 73, 81 (1981).

9 Solicitor General, Report of the Canadian Committee on Corrections — Toward Unity: Criminal Justice and Corrections 188 (1969) (known as the "Ouimet Report").

10 Cohen, *supra* note 8, at 73.

11 Herbert Wechsler, *Sentencing, Corrections, and the Model Penal Code*, 109 U. Pa. L. Rev. 465, 468 (1961).

12 Chief Justice Weintraub in *State v. Ivan*, 33 N.J. 197, 201 (1960). He concludes 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.*

13 Herbert Wechsler, *A.L.I. Floor Debate Relating to Section 1.02*, 31 A.L.I. Proc. 47-48 (1954). The passage continues:

> We recognize that interpretation. This is the essential process for which we look to the courts and to judicial action. Therefore I think the measure of 1.02 is

It is argued here, however, that the failure to define the interrelation among purposes — leaving it to individual officials in the criminal justice system to "harmonize" the purposes — undercuts much of the advance promised by the Model Penal Code's statement of purposes. Further, section 1.02 may make matters worse by creating the illusion that the system is principled, thus helping to shield decisions from criticism. The fact is, the various purposes listed frequently conflict with one another. When they do, the decisionmaker is free to select that purpose that justifies the result he or she prefers for whatever reason, even an inappropriate one. The result is a system that has the appearance of being based upon principle, a system in which decisionmakers can give sound reasons for their decisions, but that allows them uncontrolled and undisclosed discretion.

1. The Conflict among Alternative Purposes

As noted, the purposes enumerated in the Model Penal Code's list frequently conflict. Different purposes necessarily rely on different criteria and, thus, frequently suggest different sentences or statutory interpretations or formulations.

Deterrence frequently conflicts with desert and incapacitation where some abnormal condition external to the actor, such as duress, coercion, or non-justified 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 non-dangerous. 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 the added pressure to commit the offense.

If the pressure to commit the offense is so great as to be essentially irresistible, the "special deterrence" rationale may disappear (deterrence of the offender at hand in a similar situation in the future). 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 *Dudley & Stephens*,[14] for example, the sailors who killed the sick cabin boy in order to keep themselves alive until they could be rescued were hardly shown to be dangerous people (as long as they avoided boats adrift for weeks), and their blameworthiness was significantly reduced because of

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whether we have omitted anything here that a civilized system of penal law would regard as a dominant purpose, or secondly, whether we have stated purposes that we ought not to be seeking to fulfill.

14 The Queen v. Dudley, 14 Q.B. 273 (1884).

the life-threatening conditions. Further, people in their situation cannot be effectively deterred. Nonetheless, there remains some general deterrent value in imposing a significant sanction to reaffirm to others the strong prohibition against killing innocent non-aggressors.[15]

The same conflict arises over mitigations like heat of passion, provocation, and mistake as to self-defense, due to conditions such as those suffered by battered wives or abused children. In such 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 non-justified necessity, the need for a deterrent sanction to counter the tendency and temptation is as great if not greater. A similar conflict arises under many strict liability offenses and doctrines in which a defendant 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 — an exculpating or mitigating external force or condition or offenses or doctrines of strict liability — a corresponding conflict emerges in which principles of desert and incapacitation would support a reduction in the degree of liability, while deterrence principles would oppose reduction.

Conflict also arises between incapacitation, on the one hand, and deterrence and desert, on the other. Consider, for example, the rationale for setting the grade and sentences for an attempt, as compared to a completed offense, and for defining the required causal relationship between an offender's conduct and a prohibited result. Reduced liability for an unsuccessful attempt and a strong causal requirement reflect a conclusion of less blameworthiness and less deterrent efficiency for imposing a sanction where there is no resulting harm attributable to the offender. The absence of attributable harm does not, however, alter the offender's dangerousness. Thus, whenever cases arise under doctrines giving significance to resulting

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15 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 would be less than the cost of suffering the offense. Under this efficient deterrence theory, some crime ought not be deterred — crime that costs more to deter than it costs to suffer. *See, e.g.*, Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 Colum. L. Rev. 1232, 1244-45 (1985). Where it is not obvious from the context, I shall generally attempt to identify in this essay the particular theory of deterrence to which I refer.

harm, a conflict arises in which desert and deterrence will take account of resulting harm, while incapacitation will not.

Finally, note the conflict between desert, on the one hand, and deterrence and incapacitation, on the other. Doctrines like the insanity defense and the voluntary act requirement acquit blameless offenders even though they may be dangerous and even though their punishment might serve a general deterrent function. In a second, reverse set of cases, doctrines like the defense for inherently unlikely attempts[16] acquit blameworthy offenders because the inherent harmlessness of the conduct suggests that both incapacitation and deterrence are unnecessary. In both sorts of cases, a conflict arises: desert leads to one result, while deterrence and incapacitation lead to another.

The conflict between desert and the utilitarian crime control purposes of deterrence, incapacitation of the dangerous, and rehabilitation is predictable in that the factors upon which these utilitarian principles rely often are inconsistent with desert.

If incapacitation were to determine the distribution of criminal sanctions, past employment history would be highly relevant.[17] Thus, unemployment for the preceding two years might aggravate the grade of an offense or increase the sentence imposed. Age and family situation are also useful predictors of future criminality[18] and, thus, will also determine liability. Indeed, if incapacitation of the dangerous were the only distributive principle, there would be little

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16 An example of an inherently unlikely attempt occurs when an actor sticks pins into 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).

17 *See, e.g.*, Don M. Gottfredson et al., Guidelines for Parole and Sentencing 41-67 (1978) (Chapter 3); Peter W. Greenwood, Selective Incapacitation 11-26 (1982) (known as "the Rand study").

18 Age has been found to be an effective predictor of future violence. *See, e.g.*, Joseph Cocozza & Henry J. 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 are discussed in Alfred Blumstein et al., 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 preceding two years;

justification for waiting until an offense is committed; it would be more efficient to screen the general population for dangerous persons and "convict" those in need of incapacitation.[19]

If deterrence were the distributive principle, a potential offender's perception of the probability of apprehension would be highly relevant.[20] Thus, offenses with a perceived low probability of apprehension should be graded higher and punished more severely. Similarly, the perceived likelihood of conviction can be an important factor. It may be useful for deterrence 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 bases 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 (i.e., impose a greater penalty at a greater cost) if imposition of the sanction will be widely communicated. Thus, news coverage should aggravate the grade of or sentence for an offense.

If rehabilitation were to govern distribution, the actor's amenability to reform or treatment would be central. It was in furtherance of the rehabilitative purpose that fully indeterminate sentences were imposed in the recent past.[21] The length of the sentence was to be determined by the length of time necessary for rehabilitation of the offender, which could not be determined in advance. The offender's term continued indefinitely until the offender was rehabilitated. With a pure rehabilitation principle, as with a pure incapacitation principle, there would be little reason to wait for an offense to occur. Liability would be justified if the "offender" were shown to have an abnormality that is treatable.[22]

The utilitarian purposes not only permit or compel distribution according to factors that are likely to be judged unacceptable for desert, but they also

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and employment for less than 50% of the preceding two years. Greenwood, *supra* note 17, at 50.

19 One study suggests that rapists may be distinguished from non-rapists based upon their penal erection response to certain stimuli. Gene Abel et al., *The Components of Rapist Sexual Arousal*, 34 Arch. Gen. Psychiatry 895 (1977).

20 *See, e.g.*, Shavell, *supra* note 15, at 1235-36.

21 *See, e.g., National Congress on Penitentiary and Reformatory Discipline, "Statement of Principles," in* Transactions of the National Congress on Penitentiary and Reformatory Discipline 541 (1872).

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

preclude the consideration of factors that are generally held to be key to desert. 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 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.[23]

On the other hand, a system based upon desert might result in unnecessary inefficiency in the use of criminal sanctions to prevent crime.[24] A desert distributive principle may impose sanctions that cost more than the crime they prevent and may fail to impose sanctions where the opportunities for efficient crime prevention are great.

2. The Exercise of Undisclosed Discretion

When faced with conflicting purposes, judges, officials, and legislators must make a decision nonetheless. The judge or criminal justice administrator posed with alternative interpretations of an ambiguous code provision, with some interpretations supported by one purpose and others supported by another purpose, must choose an interpretation. In doing so, he or she also chooses to advance one purpose at the expense of another. The same conflict in purposes is faced by the legislator considering an addition or change in the criminal code, by the drafter of a sentencing guideline, and by the sentencing judge deciding on a sentence.

What will influence that choice? It would be surprising if the

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23 National Council on Crime and Delinquency, Model Sentencing Act, *reprinted in* 9 Crime & Delinquency 337 (1963). There is disagreement as to whether a deterrence principle would generate liability proportionate to the seriousness of the offense. *Compare, e.g.*, Ernest 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* Alan H. Goldman, *Beyond Deterrence Theory: Comments on van den Haag's "Punishment as a Device for Controlling the Crime Rate,"* 33 Rutgers L. Rev. 721 (1981).

24 I say "might" because as I have argued elsewhere, there may be great crime control power in a desert distribution. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453 (1997).

decisionmaker, even one acting in good faith, did not look to his or her own values and beliefs, including his or her views of what the proper purpose of criminal law should be. But this undercuts much of the value of having articulated purposes. Often, any of the existing choices can be justified under one or another of the purposes. The result is that decisionmakers are left to decide without guidance. This discretion creates unpredictability and can create inconsistency, as the decisionmaker might choose to favor one purpose in one situation and another purpose in another, as does commonly occur.[25] It may be that the decisionmaker in fact has a private principle for how to decide among conflicting purposes — an unarticulated principle of interrelation. No matter whether such a principle is conscious or unconscious, because it is not public, it will not save the system from the appearance of irrationality and is not open to the testing of criticism.

Indeed, undisclosed discretion may be used in a more troubling way. The

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25 It is common for people to choose different purposes in different situations. For example, most state criminal codes maintain an insanity defense 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 when they recognize strict liability. At the same time, rather than increasing the threatened sanction when the temptation or inclination is greater, as a deterrence principle suggests, the same codes frequently decrease the deterrent threat, in cases of provocation, for example, because of the offender's reduced blameworthiness. Code drafters are choosing to further different purposes in different contexts. Clearly, in their own minds, they have some kind of principle that tells them when to advance one purpose at the expense of another. But without an articulation of that principle, the law seems unprincipled and unpredictable.

Similarly varying choices among conflicting purposes occur in sentencing. Rehabilitation might be the best means of avoiding future crime by a young addict who is caught selling drugs to support his habit. But a judge might rationally decide to impose a long prison term in order to further general deterrent interests. Yet, when faced with a young bank teller who embezzled money from her cash drawer, the same judge might decide to forego 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. Each of these sentences may be justified by one of the purposes of sentencing, but they may, nonetheless, 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 the purpose to fit the sentence. Again, sentencing judges probably have in their own minds some kind of principle that tells them when to advance one purpose at the expense of another. But without an articulation of that principle, the sentences seem unprincipled and unpredictable.

decisionmaker resolving conflicts among purposes may look not to his or her own view of the proper purpose of punishment, but to his or her view of how the specific case at hand ought to come out, a personal assessment that may be a function of entirely inappropriate influences, even if not consciously so. The social science research suggests that people naturally tend to identify with others similar to themselves: the greater the similarity, the greater the identification. In a system of uncontrolled discretion, then, especially one in which the discretion is not evident, even to the decisionmaker, one can expect decisions to be based on personal characteristics, such as race, gender, religion, and ethnicity.[26]

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 use of the purposes list to justify a particular code formulation or sentence is a convenient means of rationalizing results for which the decisionmaker has another, undisclosed reason.[27] And this suspicion — that the purposes list is popular as a method of justification precisely *because* it offers hidden flexibility — is fueled by the almost universal failure to articulate a guiding principle of interrelation among alternative purposes.[28]

II. Judging Culpability: The Individualized Objective Standard

A. The Problem: The Unfairness of the Common Law's Objective Standard

The problems inherent in the common law's use of an objective standard are well known and much discussed. For example, murder is to be reduced to manslaughter if among other things, a reasonable person would have been similarly provoked.

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26 Valerie P. Hans & Neil Vidmar, Judging the Jury 140-41 (1986).

27 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* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 Stan. L. Rev. 591 (1981).

28 For a discussion of how such a principle might be constructed, see Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 Nw. U. L. Rev. 19 (1987).

> The doctrine of mitigation is briefly this: That if the act of killing, though intentional, be committed under the influence of sudden, intense anger, or heat of blood, obscuring the reason, produced by an adequate or reasonable provocation, and before sufficient time has elapsed for the blood to cool and reason to reassert itself, so that the killing is the result of temporary excitement rather than of wickedness of heart or innate recklessness of disposition, then the law, recognizing the standard of human conduct as that of the ordinary or average man, regards the offense so committed as of less heinous character than premeditated or deliberate murder. Measured as it must be by the conduct of the average man, what constitutes adequate cause is incapable of exact definition.[29]

There was much criticism of this reliance upon a purely objective standard. In the famous 1954 case of *Director of Public Prosecutions v. Bedder*,[30] seventeen year old Bedder, aware of his impotence, hired a prostitute in the hope of being able to have intercourse. When the prostitute ridiculed him for his inability to perform, he flew into a complete rage and killed her. The court refused to allow the jury to take Bedder's impotency into account in judging whether he might have a provocation mitigation to manslaughter. He was to be judged by the standard of the reasonable man, who is not impotent. The decision was attacked by scholars and ultimately led to remedying legislation.[31]

In a well-known American case, *State v. Gounagias*,[32] from where the above quote is taken, the defendant, Gounagias, was sodomized by the victim while unconscious. The sodomizer then spread the news of his accomplishment. Those who learned of it taunted and ridiculed Gounagias until he finally shot and killed his assailant two weeks after the sodomy. The court applied the common law rules to deny the mitigation, because the killing was not an immediate response to sodomizing and the reasonable man would have cooled off by the time of the killing. Yet, there seems to be consensus that Gounagias is easily distinguishable in blameworthiness from the unprovoked murderer and that the common law rules are too rigid in not allowing consideration of the wide variety of situations that might provoke a killing in a way that deserves mitigation from murder.[33] The Model Penal

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29 State v. Gounagias, 88 Wash. 304, 311-12, 53 P. 9, 11-12 (1915).

30 1 W.L.R. 119; *see also* Holmes v. Dir. of Pub. Prosecutions, 1946 A.C. 588, 598.

31 *See infra* text accompanying note 42.

32 88 Wash. at 311-12.

33 For an example of criticism of the period of the objective test of provocation, see Edwards, *Provocation and the Reasonable Man — Another View*, 1954 Crim. L. Rev.

Code commentary describes the *Gounagias* case and its outcome as part of the Code's explanation for why it adopts a broader rule.[34]

The problem of a purely objective standard also is seen in the context of recklessness and negligence. For example, whether an offender was liable for reckless murder (manslaughter) traditionally depended on whether the reasonable person would have disregarded the risk of death as the defendant did.[35] Similarly, liability for negligent homicide, where it was permitted, depended upon whether the reasonable person would have been aware of the risk.[36] (As is well known, English law does not adopt awareness of risk as the key to the recklessness-negligence distinction; some forms of English recklessness include what Americans would call negligence.[37])

The difficulties surrounding a purely objective standard in these definitions parallel those in provocation. In *State v. Williams*,[38] two loving parents failed to get medical aid for their child, believing he had only a toothache. The reasonable person would have known from the rank smell of gangrene and the baby's inability to keep food down that the situation was life-threatening. Should the lack of education and the low intelligence of the parents be taken into account in judging whether their unawareness of the risk of death was unreasonable? A purely objective standard of reasonableness disallows such considerations and would hold the parents liable for negligent homicide, as were the parents in *Williams*.[39]

B. The Solution: The Individualized Objective Standard

The Model Penal Code drafters were sympathetic to the unfairness of the purely objective standard. Citing the *Gounagias* case, they substituted a mitigation of "extreme emotional disturbance" that individualized the objective standard:

> [A] homicide which would otherwise be murder is committed under

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898; Note, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. Pa. L. Rev. 1021 (1958).

34 Model Penal Code § 210.3 cmts. 59-60 (1980).

35 Wayne R. LaFave, Criminal Law 722 n.13 (3d ed. 2000).

36 Model Penal Code § 210.4 cmt. 81 (1980).

37 *See, e.g.*, Commissioner v. Caldwell, 1982 A.C. 341 (H.L.).

38 4 Wash. App. 908, 484 P.2d 1167 (1971).

39 For an influential discussion of the unfair consequences of the unindividualized objective standard in negligence, see H.L.A. Hart, Punishment and Responsibility 152-57 (1967), *reprinted from* Oxford Essays in Jurisprudence (A.G. Guest ed., 1961).

> the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person *in the actor's situation under the circumstances as he believes them to be.*[40]

The Model Penal Code mitigation uses an objective standard, as the common law doctrine does, but this standard is partially individualized through the requirement that the reasonableness of the explanation or excuse is to be determined "under the circumstances as he [the actor] believes them to be" and "from the viewpoint of a person in the actor's situation." These two phrases provide significant opportunities for a court to endow the reasonable person with the characteristics of the defendant and to place the reasonable person in the conditions under which the defendant acted. The second phrase in particular — "in the actor's *situation*" — was intended by the drafters to permit a trial judge great leeway in individualizing the reasonable person standard.[41]

Under this approach, defendants like Gounagias would be distinguished from the unprovoked murderer.[42] His earlier sodomizing by the deceased and his public taunting would be taken into account in judging whether his liability

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40 Mode Penal Code § 210.3(1)(b) (emphasis added).

41 Model Penal Code § 2.02 cmt. 4, at 242 (1985), *cited in infra* text accompanying note 52. *See also id.* n.27 (noting that a similar problem exists with recklessness and that discriminations similar to those required by the negligence standard must be made).

42 The English rule, at work in *Bedder*, was broadened in a somewhat different way, by the Homicide Act of 1957:

> Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

Homicide Act, 1957, 6 Eliz. 2, c. 11, § 3 (Eng.). While the Act keeps the reasonable person standard, the practical effect of transferring the decision to the jury is to allow the jurors to take individual characteristics into account that they otherwise would not be able to, as is borne out by subsequent cases. *See, e.g.*, The Queen v. Simpson, 1958 L.R. 815 (Crim. 1956); D.P.P. v. Camplin, [1978] 2 W.L.R. 679, 682 (H.L. 1978). The Draft Criminal Code for England and Wales appears to more explicitly allow such individualization:

> (a) [the defendant] acts when provoked (whether by things done or by things said or by both and whether by the deceased person or by another) to lose his self-control; and

should be mitigated to manslaughter. As Professor Wechsler explained during the A.L.I. floor debate on the provision,

> The standard for judging the adequacy of [Common Law] provocation is the standard of the ordinary reasonable man. You don't take into account the peculiarities of the actor, whatever they may be.
>
> We tried to broaden this ... to achieve a greater reduction, and we put it this way, that homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. ...
>
> Then we add, "The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."
>
> This is an effort ... to make the standards somewhat more subjective than the Common Law standard of sufficiency of provocation, but on the other hand, we only say that it shall be determined from that viewpoint, not that the defendant's viewpoint governs. We ask that the men who try the man — and this usually means the jury, of course — perform the act of empathy, perhaps I should say, of trying to put themselves in the defendant's position.[43]

The Model Penal Code drafters used the same individualization of the

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(b) the provocation is, in all the circumstances (including any of his personal characteristics that affect its gravity), sufficient ground for the loss of self-control.

Draft Criminal Code for England and Wales cl. 58; cl. 55 (authorizing the mitigation to manslaughter); *see also* 2 *id.* at 251, cl. 58 (Commentary).

It should be noted that in a recent decision, the House of Lords decided to apply such an individualized-subjective test, R. v. Smith, [2000] 3 W.L.R. 654.

43 Herbert Wechsler, *A.L.I. Floor Debate Relating to Section 210.3*, 36 A.L.I. Proc. 125-26 (1959). The passage continues:

> I cannot say that I can precisely tell you how this reformulation would apply to every concrete case that you can put to me, any more than you can do that with any other generalizations. But I can say that I think this is framed so as to meet what one might almost say was the traditional critique of the rigorous, inherited law of homicide and by overcoming at each point the obstacles to a decently sympathetic judgment that have appeared in the course of time.

objective standard in their definitions of recklessness and negligence.[44] The Code defines "recklessly" as follows:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.[45]

It then goes on to provide a somewhat individualized objective standard against which the person's disregard of the risk is to judged:

> The risk must be of such a nature and degree that, *considering the nature and purpose of the actor's conduct and the circumstances known to him*, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe *in the actor's situation*.[46]

Analogous individualizing language is included in the definition of negligence.[47]

C. The Illusion: Individualize with Which Factors?

One aspect of the Model Penal Code's individualization approach is

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44 The Draft Criminal Code for England and Wales does not appear to provide individualization of the objective standard in its definition of "recklessly." The Draft Code's definition is similar in its focus on awareness of risk: "[A] person acts ...'recklessly' with respect to (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur." Draft Criminal Code for England and Wales, cl. 18(c). But the Draft Code does not provide the detailed decision process of the Model Penal Code for judging the culpability of the defendant's disregard of the risk. The Draft Code provides simply that taking a risk constitutes recklessness if "it is, in the circumstances known to him, unreasonable to take the risk." *Id.* The reason for the absence of an explicit decision process is unclear given its use in provocation. Perhaps the controversy surrounding the *Caldwell* decision deflected attention from the issue.

45 Model Penal Code § 2.02(2)(c).

46 *Id.*

47 Section 2.02(2)(d), *id.*, provides:

> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

problematic: Which characteristics of a defendant should be attributed to the reasonable person in judging the reasonableness of the defendant's conduct and which characteristics should not?

Clearly such factors as an actor's age are relevant in assessing the reasonableness of his or her disturbance.[48] But, presumably, a defendant's certifiably bad temper ought not be taken into account to lower our expectations of his or her resisting the provocation. That is, he or she ought not to be judged against the standard of the reasonable person with a similar bad temper. To individualize the objective standard fully would turn it into a purely subjective standard, which would fail to make the blameworthiness judgment the law seeks.

Yet, it is not obvious which factors should be taken into account and which should not. For example, should the law take account of a genetic predisposition toward violent reaction when provoked? If so, should it be used to alter the standard by which such an offender is judged? We are inclined to believe that people can control their tempers if they choose to, but the claim of genetic predisposition clouds the issue by making it seem beyond the actor's control.[49] How, then, is a judge to determine which characteristics are to be taken into account and which are not?

The Model Penal Code's answer to this question is not to answer: it leaves the issue to the *ad hoc* determination of the trial judge and jury:

> The critical element in the Model Code formulation is the clause requiring that reasonableness be assessed "from the viewpoint of a person in the actor's situation." The word "situation" is designedly ambiguous. On the one hand, it is clear that personal handicaps and some external circumstances must be taken into account. Thus, blindness, shock from traumatic injury, and extreme grief are all easily read into the term "situation." This result is sound, for it would be morally obtuse to appraise a crime for mitigation of punishment without reference to these factors. On the other hand, it is equally plain

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48 This is commonly the rule in non-Model Penal Code jurisdictions as well and has come to be the rule in England. See the House of Lords decision in *D.P.P. v. Camplin*, [1978] 2 W.L.R. 682 (H.L. 1978) (suggesting the standard to be a reasonable person endowed with the characteristics of the defendant but retaining power of self-control of a reasonable person of the same sex and age). *But see* R. v. Smith, [2000] 3 W.L.R. 654.

49 If the genetics only create a predisposition toward violence, it would seem that the actor retains the ability to control his conduct. If the genetics are to be relevant, the actor must show that their influence on his conduct is sufficiently strong that we should see him as less blameworthy.

> that idiosyncratic moral values are not part of the actor's situation. An assassin who kills a political leader because he believes it is right to do so cannot ask that he be judged by the standard of a reasonable extremist. Any other result would undermine the normative message of the criminal law. In between these two extremes, however, there are matters neither as clearly distinct from individual blameworthiness as blindness or handicap nor as integral a part of the moral depravity as a belief in the rightness of killing. Perhaps the classic illustration is the unusual sensitivity to the epithet "bastard" of a person born illegitimate. An exceptionally punctilious sense of personal honor or an abnormally fearful temperament may also serve to differentiate an individual actor from the hypothetical reasonable man, yet none of these factors is wholly irrelevant to the ultimate issue of culpability. The proper role of such factors cannot be resolved satisfactorily by abstract definition of what may constitute adequate provocation. The Model Code endorses a formulation that affords sufficient flexibility to differentiate in particular cases between those special aspects of the actor's situation that should be deemed material for the purpose of grading and those that should be ignored. There thus will be room for interpretation of the word "situation," and that is precisely the flexibility desired. There will be opportunity for argument about the reasonableness of explanation or excuse, and that too is a ground on which argument is required. In the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy to the ordinary citizen. Section 210.3 faces this issue squarely and leaves the ultimate judgment to the ordinary citizen in the function of a juror assigned to resolve the specific case.[50]

An analogous problem — of selecting the factors with which to individualize an objective standard — arises in the definition of negligence,[51] and the Code deals with it in a similar fashion.

> A further point in the Code's concept of negligence merits attention. The standard for ultimate judgment invites consideration of the "care that a reasonable person would observe in the actor's situation." There is an inevitable ambiguity in "situation." If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal

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50 Model Penal Code § 210.3 cmt. 63 (1980).

51 For a discussion, see Paul H. Robinson, Criminal Law § 4.3 (1997).

> liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.[52]

The commentary makes clear that the same analysis applies to the definition of "recklessness" and that the same interpretation is to be given to the phrase "in the actor's situation" in that context.[53]

This seems an inadequate resolution of the problem. Ad hoc determination means that similar cases are likely to be treated differently, that the law will be unpredictable, and that there is created the possibility of abuse of discretion by decisionmakers, judge or juror. As with the "list of purposes" innovation discussed in Part I of this article, the individualization objective person decisions may seem principled but, in fact, are the product of unguided and undisclosed discretion. The results may depend more on whom the defendant gets as a trial judge or jury than on whether he or she deserves an EED mitigation or whether he or she was reckless or negligent.

Unfortunately, criminal law theory has yet to develop a principle that will distinguish the characteristics that ought to be included from those that ought to be excluded when individualizing the reasonable person standard. In the absence of a theory, let alone a workable provision implementing a theory, it is hard to imagine any approach other than the uncontrolled *ad hoc* discretion model the Model Penal Code drafters adopted.

III. ENHANCING CRIMINAL LAW'S CRIME CONTROL EFFECTIVENESS

A. The Problem: Dangerous Persons

Americans are sometimes criticized for being preoccupied with crime, but even after the recent reductions, we still have the highest per capita rate of serious crime in the industrialized world. Our 10 homicides per 100,000 population is eight times the rate in Germany and Switzerland, for example, and twenty times the rate in England and Wales.[54]

Even with the recent dramatic declines, the overall crime rate remains

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52 Model Penal Code § 2.02 cmt. 4, at 242 (1985).

53 *Id.* n.27.

54 Franklin E. Zimring & Gordon Hawkins, Crime is Not the Problem: Lethal Violence in America 53-55 (1997); Swiss Review of World Affairs (Nov. 3, 1997).

nearly three times higher than it was during the decade and a half after World War II, when many current legislators were growing up.[55] The violent crime rate is now more than four times what it was during that period.[56] Homicide rates are 50% higher today. Rape, robbery, and aggravated assault rates are almost quadruple.[57]

Even if crime rates dropped back to earlier levels, people still would have reason to be concerned. One reason crime rates are not higher than they are is because we have seriously altered our lifestyles to protect ourselves. Many people no longer let their children walk home from school or go out to play in the neighborhood. Many have dead bolts on their doors, "The Club" on their cars, and live in security-staffed apartments and "gated" communities. Thus, we have both dramatically higher crime than forty years ago and dramatically less freedom of action.

Given the situation, it should come as no surprise that politicians have, for several decades, searched for ways in which criminal law can be modified to more effectively prevent crime. One obvious route to crime reduction came along with the realization that a small number of repeat offenders were accounting for a disproportionate share of the offenses.[58] Decisionmakers reasoned that while incapacitation normally is an expensive strategy, it would be feasible if it were to focus on the dangerous offenders, the high-rate recidivists. Following this reasoning, the last several decades have seen many reforms aimed at incapacitating the dangerous offender.

B. The Solution: Focusing on Dangerousness

The criminal law reforms aimed at incapacitating dangerous offenders have taken several forms: altering criminal liability rules to draw more of those who are dangerous into the criminal justice system; changing the grade of some offenses to increase the term an offender can be incapacitated; and revising sentencing rules to provide longer terms for dangerous offenders.

As to the first sort of "dangerousness" reform, consider the extension

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55 Sourcebook of Criminal Justice Statistics — 1996, tbl. 3.106 (1997) [hereinafter Sourcebook] (5078.9 per 100,000 in 1996 versus 1887.2 in 1960). Crime rates were relatively constant from the end of World War II until 1960. See Violent Crime Rates in the F.B.I. Uniform Crime Reports, 1946-1960; *see also* Gary LaFree, *Social Institutions and the Crime "Bust" of the 1990's*, 88 J. Crim. L. & Criminology 1325 fig. 3 (1998).

56 Sourcebook, *supra* note 55 (634.1 per 100,000 in 1996 versus 160.9 in 1960).

57 *Id.*

58 *See, e.g.*, Peter W. Greenwood, Selective Incapacitation 9 (1982).

of inchoate liability common among modern American criminal codes, following the lead of the Model Penal Code.[59] The Code discards the common law requirement that a person come within some proximity of completing an offense, the so-called "proximity" test, of which the common law had several variations. It substitutes only the requirement that a person have taken a "substantial step" toward the offense (section 5.01(1)(c)). Under the substantial-step test, it no longer matters whether the actor gets anywhere near committing a specific offense. All that matters is that the actor externalize his intention to commit an offense, thereby revealing his dangerousness. The common law proximity tests are discarded because they focus on the nature of the actor's conduct rather than, as the Model Penal Code drafters explained it, "the proper focus of attention [–] the actor's disposition" to commit a crime.[60]

The Code similarly discards the common law definition of conspiracy. It no longer requires that the actor in fact agreed with another that one of them would commit an offense, instead requiring only that the actor *thought* he had agreed with another.[61] This change logically follows from the drafters' view that conspiracy's purpose is to serve "as a basis ... for corrective treatment of persons who reveal that they are disposed to criminality."[62] There may be no real danger of that offense being committed when an actor only mistakenly believes he has conspired with another (an undercover officer, for example), but the actor's agreement shows that he is the kind of person who is willing to enter into such a criminal agreement.

In each of these instances of extension of criminal liability to conduct not previously defined as criminal, the liability imposed for the newly criminalized inchoate conduct is equal to the liability for the full offense. As discussed below, the Code's general rule is that an inchoate offense is graded the same as the completed offense.

The Code similarly expands the reach of complicity liability. It drops the common law's unconvictable perpetrator defense to complicity. Thus, it no longer matters that the perpetrator had no intention of committing the crime. The drafters reasoned that the accomplice is equally dangerous

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59 Recall that one of the Model Penal Code's stated purposes is "to subject to public control persons whose conduct indicates that they are disposed to commit crimes." Model Penal Code § 1.02(1)(b).

60 Model Penal Code § 1.02 cmt. 298 (1985).

61 *Compare, e.g.*, Archibold v. State, 397 N.E.2d 1071, 1073 (Ind. Ct. App. 1979), *with* People v. Schwimmer, 66 A.D.2d 91, 411 N.Y.S.2d 922 (1978); *see generally* Robinson, *supra* note 51, at 648.

62 Model Penal Code § 5.03 cmt. 97 (Tent. Draft No. 10 1960).

and, therefore, ought to be equally criminally liable, whether the perpetrator actually intended to commit the crime or not.[63]

With similar reasoning, the Code reduces the objective requirements of complicity to allow liability for the full substantive offense upon proof that a person tried but failed to assist or encourage.[64] This reform is consistent, of course, with the Code's grading of attempts the same as the completed offense, reflecting the drafters' general view that resulting harm ought not be relevant to criminal liability. That the failed assister contributed nothing to the offense does not take away from the person's dangerousness revealed in trying to assist.[65]

As to the second kind of reform, relating to grading, the Model Penal Code's inchoate grading rule has been noted. Section 5.05(1), Grading of Criminal Attempt, provides:

> Except as otherwise provided in this Section, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or solicited or is an object of the conspiracy.[66]

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63 Under the unilateral approach of the Code, the culpable party's guilt would not be affected by the fact that the other party's agreement was feigned. He has conspired within the meaning of the definition, in the belief that the other party was with him ... his culpability is not decreased by the other's secret intention. Model Penal Code § 5.03 2(b) cmt. 400 (1980).

64 Model Penal Code § 2.06(3)(a)(ii) ("aids or agrees or attempts to aid").

65 "It is sufficient if he solicits another to commit an offense. It is likewise sufficient if he aids the other in planning or committing the offense, or if he agrees or attempts to aid the other in such planning or commission." Model Penal Code § 2.06 explanatory note at 297 (1980).

66 Model Penal Code § 5.05(1) (1985). The subsection permits one exception: "An attempt, solicitation or conspiracy to commit a [capital crime or a] felony of the first degree is a felony of the second degree." The only first degree felonies in the Code are murder and aggravated kidnapping. The drafters explained the exception this way:

> It is doubtful ... that the threat of punishment for the inchoate crime can add significantly to the net deterrent efficacy of the sanction threatened for the substantive offense that is the actor's object, which he, by hypothesis, ignores. Hence, there is a basis for economizing in use of the heaviest and most afflictive sanctions by removing them from the inchoate crimes. The sentencing provisions for second degree felonies, including the provision for extended terms, should certainly suffice to meet whatever danger is presented by the actor.

§ 5.05(2) cmt. 490.

As discussed briefly in Part I of this article,[67] a provision of this sort advances the preventive detention goal, albeit at the expense of what most people would consider doing justice. The Model Penal Code drafters gave the following explanation for their inchoate grading rule:

> The theory of this grading system may be stated simply. To the extent that sentencing depends upon the antisocial disposition of the actor and the demonstrated need for a corrective sanction, there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan.[68]

That is, successful and failed attempts generally indicate the same danger of a future offense, thus calling for the same grade of liability.[69] In the view of the drafters, the absence of resulting harm is irrelevant to liability: "The primary purpose of punishing attempts is to neutralize dangerous individuals."[70]

"Three strikes" laws, which mandate life imprisonment for three-time offenders, illustrate the third sort of reform.[71] The rationale for and effect of these laws are well-documented: the incapacitation of dangerous offenders. Less obviously based on a preventive detention rationale is another

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67 *See supra* text accompanying notes 15-16.

68 Model Penal Code § 5.05(2) cmt. 490 (1985).

69 The Draft Criminal Code for England and Wales takes a similar approach, setting the punishment for an attempt at the same maximum as that for the substantive offense. Draft Criminal Code for England and Wales, sched. 1, cl. 49, col. (4). The schedule sets the maximum term for offenses. *Id.* cl. 7(3)(a)(i). The motivation may be simply to maximize sentencing discretion rather than a rejection of the significance of resulting harm.

70 Model Penal Code § 5.01 cmt. 5(b) at 323 (1985). *See also id.* at 298, 299, 331.

71 *See, e.g.*, 18 U.S.C. § 3559 (requiring life imprisonment upon a third serious violent felony conviction). Similarly, new sentencing guidelines give great weight to an offender's prior criminal history. U.S. Sentencing Guidelines Manual ch. 4, ch. 5 pt. A (1998-1999) (Sentencing Table) (setting guideline sentence as a function of Offense Level and Criminal History Category). Jurisdictional reforms lower the age at which juveniles may be tried as adults. *See generally* U.S. Dep't Justice-OJJDP, Juvenile Offenders and Victims: A National Report (Aug. 1995). "Megan's Law" statutes require community notification of a convicted sex offender. 42 U.S.C. § 14071(d) (Wetterling Crimes Against Children and Sexually Violent Offender Registration Act). "Sexual predator" statutes provide civil detention of sexual offenders who remain dangerous at the conclusion of their criminal commitment. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2085-86 (1997) (at the time the Kansas statute was challenged, in December 1996, six states had such statutes — Arizona, California, Minnesota, Washington, and Wisconsin — and thirty-eight states, including New Jersey and New York, filed amicus briefs urging the justices to uphold the law, which they did).

common reform: using prior criminal record to dramatically increase the offender's term of imprisonment. Sentencing guidelines and "three-strikes" and related habitual-offender statutes commonly double, triple, or quadruple the punishment imposed upon a repeat offender.[72] An initial portion of an imprisonment sentence may well be deserved, but is followed by a purely preventive detention portion that cannot be justified as deserved punishment.

One can construct a theory that makes prior criminal record at least relevant to deserved punishment.[73] By committing another offense after having been previously convicted, an offender might be seen as "thumbing his nose" at the system, and such nose-thumbing may justify some incremental punishment over what a first offense would deserve.

But a nose-thumbing increase can hardly justify the doubling, tripling, or quadrupling of the punishments provided by habitual-offender statutes and sentencing guidelines.[74] The nose-thumbing characteristic of the second

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72 Under "three-strikes" statutes, the criminal history often quadruples or more the sentence that would be imposed for the identical offense by the identical offender with no criminal history. A twenty-five year-old offender committing a felony that normally carries a ten-year sentence, for which less time than that normally would be served, can get mandatory life imprisonment without the possibility of parole, which may mean a sentence of forty-five years or more. *See* Nat'l Inst. of Justice, "Three Strikes and You're Out": A Review of State Legislation, Exhibit 9 (Sept. 1997) [hereinafter N.I.J.].

Even the less dramatic "habitual offender" statutes, which have been in use for some time, can have a substantial effect. For example, the Model Penal Code provision, which is the structural model for such statutes, allows an "extended term of imprisonment" for a repeat offender, which essentially doubles the maximum authorized sentence: the maximum sentence for a third-degree felony is increased from five years to ten; for a second-degree felony, it is increased from ten years to twenty; for a first-degree felony, it is increased from a maximum of twenty years to a requirement of life imprisonment. Model Penal Code § 7.03(3)&(4). Model Penal Code sentences require the judge to give both a minimum and a maximum sentence; these sentences reflect the maximum.

Even in the absence of either "three-strikes" or habitual offender statutes, a similar increase in punishment for dangerousness is provided by sentencing guidelines that tie the sentence in large part to the offender's criminal history. Under the United States Sentencing Commission Guidelines, for example, a level 10 offense gets 1-12 months in the absence of a criminal record, but 24-30 months for significant record; a level 19 offense gets 30-37 months, but, with a record, gets 63-78; a level 37 offense normally gets 18-22 years, but, with a record, between 30 years and life imprisonment. See U.S. Sentencing Guidelines Manual 304 (1997).

73 Andrew von Hirsch et al., Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals 132-38 (1985).

74 *Id.*

robbery may make it more aggravated than the first, but the nose-thumbing is only one of many characteristics of the second robbery that influences its blameworthiness. It hardly can justify as much punishment as the robbery itself and certainly not more. The victim, for example, is offended by the robbery itself, not by the fact that it was a second-timer who performed it.

Further, if the underlying theory of these statutes were really increased desert due to the disrespect for law inherent in repeating the offense, then logically the same theory would apply to all offenses. Yet, the three-strikes and other habitual offender provisions typically apply only to a limited class of offenses — commonly violent offenses[75] — and typically take account of a criminal history of only a certain kind — again, commonly a history of violent offenses.[76] It seems difficult to construct a desert theory of nose-thumbing disrespect that limits the punishment add-on in this way. In contrast, the limitation of the schemes to violent offenses makes good sense under a prevention rationale, for these are the offenses in greatest need of prevention.

To summarize, the current criminal justice system commonly serves a preventive detention function more than a deserved punishment function. It brings into the system persons whose conduct would not previously have been thought to be criminal, as in the extension of inchoate and complicity liability. While empirical studies suggest that people of today would not think such newly criminalized conduct warrants criminal liability and punishment,[77] such actors are detained because they are thought to be dangerous. Similarly, the current criminal justice system grades offenses, especially inchoate offenses and complicity, to allow offenders to be kept in prison after the term of imprisonment justified as deserved punishment. Finally, the current criminal justice system sets sentencing rules that similarly extend terms of imprisonment past that deserved, as with "three strikes" statutes and sentencing guidelines using prior criminal record to dramatically increase the term of imprisonment to be imposed.

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75 *See* N.I.J., *supra* note 72, col. 2.

76 *See, e.g.*, Rev. Wash. Code §§ 9.94A.120(4), 9.94A.030(23)&(27).

77 *See, e.g.*, Paul H. Robinson & John M. Darley, Justice, Liability and Blame: Community Views and the Criminal Law, Study 1 & Study 3 (1995) (finding that laypersons see the Model Penal Code's substantial-step test for attempt and its lack of an assistance requirement for complicity liability as inconsistent with their intuitive notions of what is an adequate basis for deserving punishment).

C. The Illusion: Cloaking Preventive Detention as Criminal Justice

The criminal justice system has traditionally advertised itself as "doing justice," imposing punishment on those who deserve it in the amount they deserve. Our language reflects this view. In the criminal context, we speak of a "crime" rather than a "violation" or "breach" and of "punishment" rather than "remedy" or "damages" or "sanction." The terms "crime" and "punishment" carry the implication of moral condemnation that the civil terms do not. As Webster's puts it, something "criminal" is something "disgraceful."[78] "Punishment" suggests "retributive suffering, pain, or loss."[79] Breaking a contract or failing to adequately fence a swimming pool may be conduct that we seek to discourage and may be a sufficient violation of rules or expectations to justify compensation of a party injured by the breach, but such conduct or omission typically lacks the moral blameworthiness, the "disgracefulness," sufficient to merit the condemnation implicit in criminal conviction. The terminology of moral condemnation helps cultivate the moral stigmatization that sets criminal apart from civil liability or "civil commitment."

The criminal justice system's shift of recent decades from doing justice to providing protection from dangerous persons has produced some terminological awkwardness. It is impossible, of course, to *punish dangerousness*, within the meaning of those terms. To "punish" is "to cause (a person) to undergo pain, loss, or suffering *for a crime or wrongdoing*."[80] Punishment can only exist in relation to a past wrong. "Dangerous" means "likely to cause injury, pain, etc.,"[81] that is, a threat of future harm. One can "restrain" or "detain" or "incapacitate" a dangerous person, but one cannot logically "punish" dangerousness.

Imprisonment as deserved punishment has always provided the useful side effect of giving temporary protection from the dangerous offender. What has changed in the past decades is a shift in the criteria for assigning liability and punishment from desert to dangerousness, such that incapacitation of the dangerous is not simply a useful byproduct but a primary purpose. The rules for assessing liability and punishment are increasingly set to maximize protection, even if they conflict with desert. Yet the reformers have been

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78 Webster's New Collegiate Dictionary 197 (7th ed. 1965).

79 *Id.* at 693.

80 Webster's New World College Dictionary 1180 (2d ed. 1959) (emphasis added).

81 *Id.* at 372.

careful to not advertise the shift and re-characterize the system as one of preventive detention. Instead, they have sought to maintain the increasingly false criminal *justice* image.

One might charitably conclude that the retention of the appearance of moral desert in a system that practices preventive detention is simply inertia. There was neither the opportunity nor the real need to change the long-standing characterization. But a closer look at the reforms of the last decades reveals a more calculated effort to exploit the traditional image for its usefulness.

For example, recall the Model Penal Code's grading of inchoate conduct as equal to that of the substantive offense.[82] The policy logically follows from the drafters' view that the actual occurrence of resulting harm does not alter the dangerousness of the offender. Whether the harm or evil of the offense actually occurs is irrelevant; it is the person's propensity for a future offense that ought to be the system's focus.

But if the drafters believed that resulting harm should be irrelevant to grading, why did they not just drop all result elements from the Code's offense definitions and define all offenses in terms of conduct and accompanying mental state? "Engaging in conduct by which one intends to" burn a building, falsify an official document, or injure another. Why keep the result elements of offense definitions, making the Code look, at a glance, as if it takes account of resulting harm?[83]

Reformers could have chosen a course, in terminology and in substance, that more openly revealed the system's growing preventive detention character. Why didn't they? Most jurisdictions allow civil commitment in order to detain dangerous persons who have mental illness, drug dependency, or a contagious disease.[84] Why the shyness here to openly announce the

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82 *See supra* text accompanying note 59. Satisfying all elements other than the prohibited result — that is, conduct and intention toward the offense — typically results in attempt liability. (This is true of offenses that require intention.) Every instance in which all elements of the offense are proven except the result element constitutes an attempt. *See, e.g.*, Model Penal Code § 5.01(b). In the few instances in which the Code punishes recklessly causing a result, reckless is not enough in many jurisdictions to support attempt liability. *See, e.g., id.; but see* Robinson, *supra* note 51, at 28.

83 These issues are explored more fully in Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 5 J. Contemp. Legal Issues 299 (1994).

84 For statutes authorizing detention of dangerously mentally-ill persons, see, e.g., Conn. Gen. Stat. Ann. § 17a-498 (West 1992); Idaho Code § 66-329 (1989); La. Rev. Stat. Ann. § 28:55 (West 1989); Mass. Ann. Laws ch. 123, § 12 (Law. Co-op. 1992); Minn. Stat. § 253B.02, subd. 13, 17 (1990); Mo. Rev. Stat. § 552.040 (1991);

preventive detention of dangerous persons? One might speculate that the drafters saw value in maintaining the appearance of a criminal justice system, if not its spirit. The fact is, several practical advantages exist for reformers in cloaking preventive detention as criminal justice.

First, such cloaking avoids the stigma that many people associate with the preventive detention legislation.[85] Such programs were decried as "Clockwork Orange"[86] and "'Alice in Wonderland' justice" in which

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N.H. Rev. Stat. Ann. § 135-C:34 (1991); N.J. Stat. Ann. § 30:4-27.1 (West 1992); N.Y. Mental Hyg. Law § 9.37 (Consol. 1993); Utah Code Ann. § 62A-5-312 (1992); Wash. Rev. Code § 71.05.280 (1991); Wis. Stat. § 51.20 (1989-1990); Wyo. Stat. Ann. § 25-10-101 (Michie 1992).

For statutes authorizing detention of persons with a communicable disease, see, e.g., Ala. Code § 22-11A-10 (tuberculosis), -14 & -18 (sexually transmitted diseases), -24 (notifiable diseases) (1992); Colo. Rev. Stat. § 25-1-650 (1992) (communicable diseases); Del. Code Ann. tit. 16, § 505 (1983) (communicable diseases); Fla. Stat. ch. 384.28 (1991) (sexually transmitted diseases); Haw. Rev. Stat. § 325-8 (1985) (infectious, communicable, or other disease dangerous to public health); Iowa Code Ann. § 139.3 (West 1989) (communicable diseases); Kan. Stat. Ann. § 65-128 (1991) (infectious or communicable diseases); Minn. Stat. § 144.4180 (1992) (communicable diseases); N.H. Rev. Stat. Ann. § 141-C:11 (1990) (communicable diseases); N.C. Gen. Stat. § 130A-145 (1992) (communicable diseases); Ohio Rev. Code Ann. § 3707.08 (Baldwin 1989) (communicable diseases); R.I. Gen. Laws § 23-8-4 (1989) (communicable diseases); Tenn. Code Ann. § 68-5-104 (1992) (communicable or contagious diseases); Wis. Stat. Ann. § 143.05 (West 1989) (communicable diseases). For statutes authorizing detention of persons with a chemical dependency, see, e.g., Cal. Welf. & Inst. Code §§ 3000-3111 (Deering 1993); D.C. Code Ann. §§ 24-601-24-611 (1992); Minn. Stat. § 253B.02, subd. 14 (1990); S.C. Code Ann. §§ 44-52-50-44-52-210 (Law. Co-op. 1991).

For statutes authorizing detention of persons with a drug dependency disease, see authorities cited at Paul H. Robinson, *The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. Crim. L. & Criminology 693, 712 n.59 (1993).

85 For a chronological list of preventive detention enactments, see Toborg Assoc., Inc., Public Danger as a Factor in Pretrial Release, *reprinted in* Committee on the Judiciary's Report on Bail Reform Act of 1984, H.R. Rep. No. 98-1121, app. A, at 90 [hereinafter Report on Bail Reform Act]. The first statutes appeared in Alaska and Delaware, in 1967; Maryland, South Carolina, and Vermont, in 1969; and the District of Columbia, in 1970. Despite the constitutional approval of pretrial preventive detention, see United States v. Edwards, 430 A.2d 1321 (D.C. C. App. 1981), *cert. denied*, 455 U.S. 1022 (1982), many jurisdictions still have refused to enact such a system. The twenty-four states authorizing pretrial detention are listed in Report on Bail Reform Act, *supra*, app. A, tbl. 2, at 76.

86 Glen Elsasser, *U.S. Defends Pretrial Jailings of Suspects Seen as Dangerous*, Chi. Trib., Jan. 22, 1987, § 1, at 16 (quoting critics).

the punishment precedes the offense,[87] introducing a "police state,"[88] and "fostering tyranny."[89] It was said to be "intellectually dishonest,"[90] "one of the most tragic mistakes we as a society could make,"[91] and "would change the complexion of American Justice."[92] It was "simply not the American way."[93]

But the preventive detention legislation that prompted this outrage was controversial in large part because it provided *pretrial* preventive detention. In contrast, most of current reforms provide preventive detention only after trial and conviction, an important difference. On the other hand, part of preventive detention's bad reputation stems from an objection to its "Alice in Wonderland" quality of having the punishment precede the offense.[94] That same objection can be made of the present post-conviction system of preventive detention, where an offender is detained past the deserved term of imprisonment in order to prevent a future offense. By obscuring the preventive character of such extended detention by imposing it under the *criminal justice* system, the potential for controversy is reduced, even if the sentence has been imposed for a criminal offense defined as conduct that was previously not criminal but made so for the purpose of gaining authority over dangerous persons, such as with the extension of inchoate liability. The entire term of detention is based upon a preventive rather than a desert rationale.

A second, more concrete advantage to cloaking preventive detention as criminal justice is found in the logical limitations on preventive detention that such cloaking avoids. If the justification for the detention is dangerousness, then logically the government ought to be required to periodically demonstrate the detainee's continuing dangerousness. If the

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87 Elder Witt, *Preventive Detention Statute Is Upheld as Constitutional*, Cong. Q. Wkly. Rep., May 30, 1987, at 1141 (quoting Professor Alan Dershowitz).

88 *E.g.*, Ethan Bronner, *Court Upholds Pretrial Jailing*, Boston Globe, May 27, 1987, at 1; *Gotti Being Held Under Tough Bail Reform Act*, Las Vegas Rev. J., Dec. 17, 1990, at 7A; Herb Robinson, *Judge's Dilemma Delicate Balance in Bail Rulings*, Seattle Times, May 21, 1986, at A14; Carlyle Murphy, *Law Allowing Denial of Bail Provokes Debate on Rights*, Wash. Post, Aug. 1, 1986, at A1 (quoting Judge Jon Newman).

89 James J. Kilpatrick, *A Cautious "Yes" on Preventive Detention*, Seattle Times, June 3, 1987, at A12 (citing Justice Marshall).

90 Edwin M. Yoder Jr., *A Gross Judicial Assault on Personal Liberties*, Hous. Chron., May 31, 1987, at 2.

91 Opinion, *Say No to No Bail*, The Record — Northern N.J., Nov. 19, 1986, at A22 (quoting New Jersey Senate President John Russo, a former prosecutor).

92 Richard Lacayo, *First the Sentence, Then the Trial*, Time, June 8, 1987, at 69.

93 Alan Dershowitz, *Wonderland Court Trashes our Safeguards*, Chi. Sun-Times, June 7, 1987, at 11.

94 *Supra* note 87.

dangerousness disappears, so does the justification for detention. But if the detention is characterized as deserved punishment for a past offense, there is little reason to revisit the justification for the detention. All the factors relevant to determining deserved punishment are available at the time of sentencing: the offender's conduct and state of mind at the time of the offense and the resulting harm or evil. It is for this reason that "determinate" and "real time" sentencing are popular in the United States. An offender's term is set beforehand and is not subject to later modification, as parole authorities used to do.[95] Characterizing preventive detention as deserved punishment allows it to avoid periodic review by hiding behind the veil of deserved punishment for which fixed terms are appropriate.

A third advantage of cloaking relates to conditions of confinement. When a person is detained for society's benefit rather than because of deserved punishment, logically the conditions of detention ought to be non-punitive. The civilly-detained preventive detainee is not being punished, but, rather, suffering an intrusion on liberty for society's benefit. While financial constraints do not always make it so, the mentally-ill or contagious disease detainee logically ought to and often does enjoy noticeably better conditions than the offender being punished. Where confinement is deserved punishment, the offender has little justification to complain about punitive conditions. The point of the imprisonment is to bring about suffering, within the bounds of human dignity. By cloaking preventive detention as punishment, then, the system need not justify its failure to provide non-punitive conditions of detention.

A fourth and related advantage concerns the extent of intrusion on liberty. Restraint justified by prevention logically should be limited to the minimum required for the community's safety. If house arrest, an ankle bracelet, drug therapy, or other non-incarcerative conditions provide adequate protection, then greater restraint cannot be justified.[96] No such minimum-restraint principle applies in the application of deserved punishment. Indeed, Dan Kahan and others have argued that imprisonment might be preferred for punishment purposes because of its expressive power of condemnation.[97]

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95 Under the federal Sentencing Reform Act of 1984, for example, an offender must serve at least 85% of the term imposed by the sentencing judge. 18 U.S.C. § 3624(b).

96 *See, e.g.*, Norval Morris & Michael Tonry, Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System 3, 176-220 (1990).

97 *See, e.g.*, Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591 (1996) (discussing the "expressive dimension" of punishment and the significance of imprisonment for moral condemnation); Dan Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349, 362-63, 382 (1997) (suggesting that the form of punishment conveys a social meaning that, in turn, determines the

Cloaking preventive detention as criminal justice, then, saves authorities from having to show that the detention is the least restrictive means that is adequate for protection.

Finally, consistent with the preventive detention principle of minimum restraint, a detainee logically ought to have an absolute right to treatment if such can reduce the length or intrusiveness of the restraint. No similar claim to treatment is available if the justification for incarceration is punishment for a past wrong. The person incarcerated as punishment has no greater claim to government-provided treatment than any other citizen.

These, then, are some of the practical advantages to cloaking preventive detention as criminal justice. By continuing to advertise the system as "doing justice" and shrouding the preventive mechanisms in ambiguity as to their purpose and rationale, the system can provide preventive detention without the constraints that logically would attend an explicit preventive detention system.

But, as is obvious, these practical advantages also signal unfairnesses to the persons preventively detained under the cloak of criminal justice. The logical constraints on preventive detention should not be avoided. (There is also evidence that the current cloaking not only provides unfair detention, but also often causes ineffective preventive detention[98] and, at the same time, undermines the criminal justice system's crime control effectiveness.[99])

IV. CONCLUSION: ILLUSIONS AND CRIMINAL LAW SCHOLARSHIP

Here, then, are three illusions, each of a different sort. The introduction of individualization into the objective reasonable person standard was clearly an advance. It responded to a serious criticism of the previous theoretical scheme and made a useful correction. It is true that the new approach has its own theoretical weakness: we cannot provide a principled theory by which to distinguish those characteristics with which the law should individualize from those with which it should not. But our failure to move forward is

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direction of social influence) ("Imprisonment is an extraordinarily potent gesture of moral disapproval; because of the symbolic importance of individual liberty in American culture, there is never a doubt that society means to condemn someone when it takes that person's freedom away.").

98 *See* Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 Harv. L. Rev. (forthcoming March 2001).

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

more a matter of our own intellectual limitations than anything else. One might wish that more scholarly energy were being devoted to the problem, but there is little reason to think that people would not welcome a solution if it were to present in itself. Here the illusion is a scholarly challenge.

The addition of an articulation of purposes for criminal liability and punishment also was an advance in its time. We are better off having the reform than not. We see now that it too rests upon an illusion, however: the failure to define the interrelation among the purposes allows a decisionmaker to switch among purposes as needed, to give an appearance of rationality to any result he or she may wish, even if it is preferred for unprincipled reasons.

When the illusion of rationality became apparent, it presented the same scholarly challenge that the individualization issue now presents. But with the passage of time since the illusion was exposed and, especially, with the passage of time since its remedy became apparent — the articulation of a hybrid distributive principle — it is difficult to see the problem any longer as one of scholarly challenge, but, rather, as one of scholarly weakness. We show an unflattering level of comfort with the illusion.

The third illustration also tells the story of a response to a legitimate problem: the need to reduce seriously high crime levels. But the solution offered — the use of a criminal justice system that maintains its moral desert trappings yet increasingly engages in preventive detention — is harder than the previous illusion to justify as a principled response even from the start. It seems more a calculated than an inadvertent deception. It is conceivable that the first steps toward a preventive rationale were minor and incidental, perhaps the result of confusion in thinking more than anything else. But the history suggests that at least with the advent of the Model Penal Code, the confusion turned into strategy. The points of potential confusion between desert and prevention were exploited for maximum effect, as in turning the ambiguity of prior convictions to blameworthiness into "three strikes"[100] and in making results insignificant to liability wherever in might not be noticed, as in grading attempts, yet retaining the appearance of a system giving significance to resulting harm by keeping offenses with result elements. The cloaking of preventive detention as criminal justice is not weakness, but fraud. If it is a preventive detention system we are to have, then it ought to

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100 The existence of any desert justification for increasing a sentence for repeat offenders, such as the nose-thumbing theory (*see supra* text accompanying notes 75-76), creates ambiguity as to whether an increase for prior record, even if it is a 300% increase, is based on desert or dangerousness. And that ambiguity helps the preventive detention portion of the term blend in with the deserved portion.

openly proclaim itself as one and be judged accordingly, subject to all the limitations that logically follow from its nature.

Illusions are not always a sign of weakness or deception. They often are an inevitable part of theoretical advance. Theorists and reformers cannot always see the full implications of new theories or reforms. Often it is only when a subsequent generation stands on their shoulders with an improved view that an illusion and its detrimental effect can be seen. Critics ought to judge less the creators of the illusion and more the theoreticians and decisionmakers who discover it. Do they lack enthusiasm in their efforts to break the illusion because it serves a useful purpose? Or worse yet, do they take the opportunity to expand and exploit the illusion?

Scholars ought not be deterred from revolutionary proposals because they cannot be sure the proposal does not hide a new illusion. Every advance has its limitations. Scholars' only obligation with regard to illusions is to search for them and to break them when discovered.