RICHARD S. FRASE

JUST SENTENCING

Principles and Procedures for a Workable System

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Printed in the United States of America
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To my parents, teachers, mentors, colleagues, and students
(some of them have starred in more than one role)

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PREFACE

In this book I describe and defend a hybrid sentencing model that integrates theory and practice. The model's goals and values represent a blend of retributive and nonretributive principles, giving substantial weight to all traditional sentencing purposes while also incorporating several important new principles. The model's principles are implemented with procedures inspired by the best American state sentencing guidelines systems.

A hybrid approach to sentencing theory is needed for both normative and practical reasons. No sentencing model can completely satisfy everyone, so we must try to construct a principled and coherent model that incorporates the most important principles from competing theories. Strong believers in retributive sentencing values will still object if such values are not fully recognized, while those who believe strongly in using sentencing to achieve effective and efficient crime control, or other nonretributive values, will object when limits are placed on the pursuit of such values. Each of these competing normative visions is based on deeply held intuitions about justice and public policy, and all of these intuitions must be reflected in any workable sentencing model. As a normative matter, it is unreasonable to propose a sentencing model that simply defines away or ignores one set of intuitions or the other. And any sentencing model that did that would not succeed in practice—indeed, it would probably never even be adopted in the first place—because the competing retributive and nonretributive intuitions are widely shared by the public, politicians, judges, attorneys, and correctional officials. The practical need for a hybrid approach is reflected in the fact that, to my knowledge, all modern sentencing systems are hybrids of one kind or another; no system anywhere in the developed world is purely retributive or purely nonretributive. The question is not whether to take a hybrid approach. The question is only: what kind of hybrid?

Any set of sentencing principles—hybrid or not—is of little value unless those principles are accompanied by and tied directly to a set of workable procedures to implement the chosen principles. And just as sentencing theory must

strike a reasonable balance between competing principles, sentencing structures must achieve an acceptable balance between two strongly competing procedural ideals—rule versus discretion. Each ideal has important advantages: rules promote consistency and predictability; discretion promotes flexibility and efficiency. Sentencing procedures must also strike a workable balance in the use of various sentencing options (incarceration, supervision, monetary sanctions, restorative measures), and in the contributions of systemic and case-level decision makers (the legislature, sentencing commission, judges, attorneys, and correctional officials) to the formulation and application of sentencing policy.

Sentencing guidelines are usually seen as reflecting strong preferences for rules over discretion, and for system-wide over case-level policymaking, but that is not how the best state guidelines systems actually work. As will be shown in this book, these systems structure and confine case-level sentencing discretion, yet they also leave judges and other officials with a substantial degree of discretion to tailor the form and severity of sanctions to the facts of particular cases so as to achieve justice, effective crime control, and efficiency. No sentencing system can simultaneously maximize both rule and discretion. For a variety of principled and practical reasons, most modern systems—including most guidelines systems—tend to prefer flexibility and efficiency, and that seems unlikely to change. So the task of a model builder is to find the best way to rationalize and structure these preferences. This book argues that the best American state guidelines systems have found a workable and principled way to do this, and that these systems represent the best choice for achieving a well-balanced sentencing structure.

Prior to guidelines, all American states used an "indeterminate" sentencing system that gave strong priority to discretion in the belief that judges and parole boards would use such discretion to rehabilitate offenders, while protecting the public from offenders who were not yet rehabilitated. That model fell out of favor in the 1970s, in the face of accumulating evidence that rehabilitation was difficult to achieve or even measure, and that broad judicial and parole discretion guaranteed grossly unequal treatment of offenders convicted of the same crime. Many states adopted or experimented with judicial or parole guidelines or abolition of parole-release discretion, and almost all states now have at least some mandatory-minimum or other "determinate" sentencing laws. But no new sentencing model has emerged to replace the formerly monolithic dominance of indeterminate sentencing, with its close integration of sentencing theory (rehabilitation) with sentencing procedures (broad discretion).

Thus, there is a compelling need for a new sentencing model. Like the old indeterminate model, the new model needs to have a coherent set of principles, and a set of procedures that is not only consistent with those principles but also workable in practice. Of necessity, the new model will be more complex than the

old one. For the reasons stated above, the new model must incorporate and harmonize multiple, potentially conflicting principles; the old model only had to harmonize rehabilitation and public protection. The new model's procedures will also be more complex, in order to strike a better balance between rule and discretion; the old model's procedures were the essence of simplicity, but they were totally lacking in balance—all discretion, no rules.

But the task of designing a new model with the features described above is not actually that difficult—the model already exists, and has been working well for decades in several states. These states have adopted legally binding (not purely advisory) sentencing guidelines that embody a hybrid blend of retributive and nonretributive principles. This promising model was first implemented in Minnesota in 1980. By 1994 similar guidelines reforms had been adopted in Washington, Oregon, Kansas, and North Carolina, and less-developed versions were enacted in several other states; the model implemented in the five states listed above was also endorsed by the American Bar Association (1994). Despite widespread dissatisfaction with the federal guidelines adopted in 1987, by the mid-1990s it seemed likely that the guidelines approach would continue to spread to other states.

But then sentencing reform lost momentum and direction. At the national level and in many states, political leaders of both major parties were endorsing a highly punitive, prison-based approach to sentencing—an expensive policy choice that was facilitated by the economic boom of the middle and late 1990s. Under those political and fiscal conditions there seemed to be little interest in or need for the balanced, principled, and more budget-conscious state-guidelines model.

By the early 2000s interest in the state-guidelines model began to revive as the economy slowed down and budgets got tighter. Legally binding guidelines gained further support from the American Law Institute (2003), which chose this procedural structure—and many of the principles endorsed in this book—as the basis for the revised sentencing and corrections provisions of the Model Penal Code. But then another roadblock to sentencing reform arose, or at least so it seemed. In *Blakely v. Washington* (2004) the Supreme Court held that, under legally binding guidelines such as those implemented in federal courts and the five states listed above, contested sentence-enhancing facts must be submitted to the jury and found beyond a reasonable doubt. But these new standards do not apply to enhancements in an indeterminate sentencing system, or under nonbinding (voluntary or advisory) guidelines (*Booker v. U.S.* 2005). In the years since *Blakely* was decided, no state has adopted legally binding guidelines, and several states that had such guidelines have chosen to make them voluntary to avoid any need to meet the new constitutional requirements. Yet prior to *Blakely*, legally binding guidelines had been working well in Minnesota and other states, and such guidelines provide a better

balance between rule and discretion than voluntary guidelines, the pre-*Booker* federal guidelines, or indeterminate sentencing regimes. Moreover—and contrary to the worst fears of sentencing reformers—the five states listed above have adjusted well to *Blakely's* requirements. It is now clear that those requirements pose no real barrier to adoption of legally binding guidelines in state systems. (Whether such guidelines can and should be reestablished in the federal system is an entirely different question to which I will return later; it may be that the post-*Booker* federal guidelines are "as good as it gets" in that system.)

A new sentencing model is also needed in light of the massive growth in U.S. prison populations during recent decades, and the fact that these populations are disproportionately nonwhite. Rapidly rising imprisonment rates reflected policy choices to punish more harshly, not rising crime rates, and the growth has been much higher in jurisdictions that have not adopted Minnesota-style guidelines. Such guidelines, and the version of that model advocated in this book, include a number of features that act to restrain excessive and racially disparate use of prison sentencing. Perhaps, if they are lucky, Americans will never again see the huge increases in sentence severity that have occurred since the 1970s; perhaps racial disparities will subside. But given the highly politicized nature of criminal justice in the United States, and the stubborn persistence of racial disparities, the safer course is to assume that punitive shifts and racial disparities will be recurring problems that a sentencing system must anticipate by incorporating multiple limiting principles and procedures. Some of these limits may also be needed in systems outside the United States, particularly those in which punitive trends and major racial or ethnic disparities are already evident.

The concerns just expressed might seem unduly critical of elected officials and voters, but that is not the intent. Indeed, a necessary assumption of this book is that officials and voters want to do better than they sometimes have done, and that, despite the attractiveness of "get-tough" appeals, Americans want sentencing to be more principled, structured, and cost-effective. The most successful sentencing guidelines systems were created and supported by legislators who recognized the value of an independent, specialized agency that can take a comprehensive, evidence-based, long-term perspective on sentencing policy while remaining subject to legislative oversight. The sentencing model proposed in this book, like the state guidelines systems that inspired it, is designed to help elected officials implement sentencing policies that make wise use of public resources and best serve the public interest.

The model described in this book is a "package" in the sense that its principles and procedures are designed to complement and support each other. But the book is also addressed to scholars, policymakers, and reformers who cannot or do not wish to endorse the entire package. The model's principles, and many of its

procedures, have application to, and can improve the quality of, justice in all contemporary sentencing systems.

The main goal of this book is to describe and defend the principles and procedures of an approach to sentencing that might be accurately (but awkwardly) entitled the expanded limiting-retributive, state-guidelines model—or, more simply and in the remainder of this book: "the expanded model." More specifically: the model proposed in this book builds on and considerably expands the hybrid theory of limiting retributivism developed in the writings of Norval Morris and implicit in several state guidelines reforms. The model also incorporates sentencing principles endorsed by other writers, and suggests modest improvements in the principles and procedures found in the best guidelines systems and in the revised Model Penal Code. This book also seeks to distinguish the expanded model from hybrid approaches proposed by other writers, and to demonstrate the practical feasibility of and broad support for the expanded model by showing that it has been successfully implemented in several guidelines states and that elements of the model can be found in most other contemporary sentencing systems.

The remainder of this book is organized as follows. The introduction serves as an overall summary of the book, describing the origins, need for, and contents of the expanded model. Chapter 1 presents a fuller statement and defense of the model's key elements. Chapters 2 through 5 provide further support for the model by examining hybrid theories proposed by other writers, elements of the model that have been implemented in contemporary sentencing systems, and two particularly difficult and complex issues: sentence enhancements for repeat offenders, and the disparate racial and ethnic impact of criminal penalties. Of course, no single book can fully address all existing or potential sentencing principles, procedures, and problems; the choice and treatment of topics in this book is thus, necessarily, selective.

Many colleagues have helped me to refine my thinking and make this a better book, although they shouldn't be blamed for the defects that remain. I would particularly like to thank Antony Duff, Kevin Reitz, and Michael Tonry for their support, encouragement, and comments. I am also very grateful for helpful comments received from David Boerner, Jae Lee, Allan Manson, Sandra Marshall, Marc Mauer, Marc Miller, Perry Moriearty, Michael O'Hear, Josh Page, Julian Roberts, Rossella Salmini, Sonja Snacken, Dirk Van Zyl Smit, Andrew von Hirsch, Ron Wright, and Frank Zimring. Finally, I would like to gratefully acknowledge the important contributions to this project of my research assistants Rachel Anderson, Jessica Ems, John Lassetter, Aaron Marcus, Kathleen Starr, Jason Steck, and Eric Steinhoff.

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INTRODUCTION

What are the most important purposes and limitations of punishment, in general and in particular cases? These important normative and public policy questions are very difficult to answer because traditional as well as emerging sentencing principles often conflict. How can these conflicts be resolved? And what sentencing procedures—advisory or presumptive guidelines, other mandatory or determinate sentencing rules, traditional discretionary sentencing, parole-release discretion or its abolition—are best suited to implement the chosen sentencing principles and priorities?

In recent decades there have been many important changes in sentencing laws, procedures, and practices, with more changes likely in the years ahead. As a result of increased legislative activity, dramatic growth in prison populations, and the U.S. Supreme Court's greater willingness to address constitutional issues in this area, questions of sentencing law and policy have commanded much wider attention from legislators, courts, and scholars. But there is no well-elaborated theory to evaluate sentencing practices and the diverse sentencing procedures and structures found in American jurisdictions, and no coherent model to guide reform efforts.

The solution to these vitally important theoretical and practical challenges can be found in the sentencing model summarized below and more fully developed in the following chapters. The model's sentencing principles reflect an expanded version of the theory of limiting retributivism. But sentencing principles have little utility, or even clear meaning, without concrete implementing structures; the model's limiting-retributive and other principles are given form and effect by means of procedures found in the best American state guidelines systems.

The basic principles of limiting retributivism have been endorsed by numerous writers, and are most fully articulated in the writings of Norval Morris. A similar theory, known as "modified just deserts," was explicitly adopted as the basis for Minnesota's pioneering sentencing guidelines reform, in effect since 1980; several other states have implemented guidelines systems modeled on (and in some respects more fully developed than) the Minnesota approach. Looser versions of limiting retributivism

are implicit in the remaining American guidelines systems and in most other modern sentencing systems in the United States and in other Western countries. Limiting retributivism is thus already the de facto consensus theoretical model of criminal punishment, but practitioners and policymakers remain largely unaware that a coherent and widely accepted set of principles underlies much of what they do.

Limiting retributivism is popular with practitioners, and makes good sense as a matter of policy, because it strikes an appropriate balance between the conflicting punishment goals and values that are recognized in almost all Western countries. The theory accommodates retributive values (especially the important, human-rights-based need to avoid excessively severe penalties) along with crime-control goals such as deterrence, incapacitation, rehabilitation, and moral education. The theory also promotes efficiency and provides sufficient flexibility to incorporate restorative justice programs, other forms of victim and community participation, and local values and resource limitations.

Sentencing guidelines like those implemented in Minnesota, Washington, Oregon, Kansas, and North Carolina are widely respected, although they cannot yet be described as a consensus procedural model. Such guidelines provide the best vehicle for implementing limiting-retributive and other important principles; they also have many practical advantages and have proven workable in practice over periods of several decades. The guidelines in these five states are legally binding but do not unduly restrict sentencing decisions. Recommended sentences under the guidelines assume a "typical" case; when unusual facts are present the judge may depart from the recommendation, stating reasons, and usually subject to appellate review. The guidelines thus serve to structure but do not eliminate judicial sentencing discretion, providing a suitable balance between the values of uniformity and flexibility.

In each of these five systems, parole-release discretion was replaced by limited good-conduct credits, thus further promoting sentencing uniformity while increasing judicial sentencing authority and transparency in decisions about the duration of prison sentences. The greater uniformity of sentences imposed and carried out has also permitted these states to predict the inmate-population and other resource impacts of particular sentencing policies, which in turn has allowed these states to avoid prison overcrowding and set priorities in the use of limited and expensive correctional resources. And although the legislature retains ultimate authority to modify or overrule specific guidelines provisions, these states have found it useful to have recommended sentences developed, monitored, and updated by an independent sentencing commission. Like other administrative agencies, such commissions develop and apply expertise, collect and analyze relevant data, and take a comprehensive, long-term approach to sentencing policy issues and resource limitations.

A. Sentencing at the Crossroads: Recent Major Changes in Goals, Procedures, Law, and Practice

The need to reformulate sentencing principles and procedures is particularly great at this time because of four major sentencing developments in recent decades: (1) changes in the relative priority of sentencing purposes; (2) corresponding changes in sentencing procedures; (3) massive increases in prison and jail inmate populations, which are disproportionately nonwhite; and (4) U.S. Supreme Court decisions placing minimal federal constitutional limits on severe prison sentences and racial disparities, but imposing procedural requirements that apply to some sentencing structures (including Minnesota-style guidelines) but not others. This is a period of sentencing and correctional "fragmentation" (Tonry 1999); we need a new vision, and a new way forward.

For much of the twentieth century, sentencing purposes and procedures were virtually the same in all American jurisdictions (Reitz 2001). The primary sentencing goal was rehabilitation of offenders, and prisons were seen as an appropriate setting for pursuit of that goal. But in the 1970s many scholars, judges, and legislators lost faith in the prison-based treatment model, and in the largely unfettered judicial and parole-release discretion that had been viewed as necessary to implement that model. These critics argued in favor of reduced discretion, and greater emphasis on other sentencing goals such as retribution, deterrence, and incapacitation of high-risk offenders (Allen 1981; Blumstein et al. 1983). But rehabilitation was never entirely discarded as a sentencing goal, and with no clear priority on any single goal, sentencing systems became incoherent.

The loss of faith in rehabilitation and discretion led many American jurisdictions to replace their prior "indeterminate" sentencing regimes with new, more "determinate" sentencing structures (Tonry 1996; Reitz 2001). Some jurisdictions adopted Minnesota-style guidelines; others adopted guidelines that were purely advisory (not legally binding) or were only for judicial decisions, retaining parole-release discretion (Frase 2005d). A few jurisdictions adopted legislatively drafted statutory guidelines, without the aid of a sentencing commission. All jurisdictions adopted at least some mandatory or mandatory-minimum penalties. As with sentencing purposes, no single structural model has prevailed, to replace the once-monolithic endorsement of indeterminate sentencing.

One of the most dramatic and troubling developments in recent decades has been the more than sevenfold increase in American prison populations since 1970, and the almost fivefold increase in local jail populations (BJS 1972, 2011a; LEAA 1971). The staggering cost of these historically unprecedented increases should, by itself, lead to serious examination of the sentencing principles and procedures that drove or at least allowed such increases. The disparate racial

composition of inmate populations provides another compelling reason to reexamine our principles and procedures (Tonry 2011). Mass incarceration worsens the socioeconomic plight of already-disadvantaged minority offenders, their families, and their communities, contributing to a revolving door of crime, punishment, incarceration, and release to greater disadvantage and increased risk of recidivism and further incarceration. Sentencing policies cannot, of course, solve deeply rooted racial inequalities and relative disadvantage. But any model sentencing system must at least strive to not make those inequalities and disadvantages worse—not only because they are unfair, but because they cause more crime.

Unfortunately, any state that seeks to more clearly define its core principles and procedures, and to control excessive and racially disparate use of incarceration, will receive little help from constitutional principles as interpreted by the Supreme Court; indeed, the Court's recent decisions have seemed to make it more difficult for states to adopt the most promising reform model. The Court has held that the Eighth Amendment Cruel and Unusual Punishments Clause will almost never invalidate three-strikes, mandatory-minimum, or other severe prison terms (Frase 2005a, 2010a). And even when criminal penalties have starkly racially disparate impacts, they will almost never be held a violation of Equal Protection (see, e.g., *McCleskey v. Kemp* 1987; *U.S. v. Moore* 1995).

The Supreme Court has, however, increased the procedural requirements for sentence enhancements under Minnesota-style guidelines. In *Blakely v. Washington* (2004) the Court held that jury trial rights and the requirement of proof beyond reasonable doubt apply to fact-finding that permits an upward departure from the recommended (typical case) sentence under legally binding guidelines (even if the enhanced penalty remains well within a statutory maximum penalty that existed prior to and was unchanged by the guidelines). But no such trial-like procedural requirements apply when the same facts are found and used for sentence enhancement in a traditional indeterminate sentencing system, or under advisory (not legally binding) guidelines (*U.S. v. Booker* 2005). The perceived problems of compliance with these new rules have led some states to switch from legally binding to advisory guidelines (Frase 2007), and since *Blakely* no state has adopted legally binding guidelines.

But in fact, Minnesota and most other states with similar guidelines have not had difficulty adapting their guidelines to comply with *Blakely*, so that case can no longer be seen as a reason not to adopt legally binding guidelines. Moreover, guidelines like those in Minnesota, Washington, Oregon, Kansas, and North Carolina remain a widely respected model, and one that has been strongly endorsed by the American Bar Association (1979b, 1994, 2004b) and the American Law Institute's project to revise the sentencing and corrections provisions of

the Model Penal Code (2003, 2007, 2011). The revised Code adopts a structure modeled on state guidelines such as those implemented by the five states listed above, and a theoretical framework based on limiting retributivism.

In most respects, the revised Model Penal Code approach is similar to the expanded model proposed in this book, but the expanded model incorporates additional sentencing principles and procedures based on existing practices and theoretical literature (for example: the expanded model expressly endorses expressive sentencing goals and utilitarian ["ends-benefits"] proportionality, and it recommends frequent use of suspended sentences and greater limitations on sentence enhancements for prior convictions). Both practice and scholarly writings also provide the basis for the expanded model's definite-asymmetric conception of limiting retributivism (section E, below); in this respect the American Law Institute's theoretical model is closer to Norval Morris's conception of desert limits as inherently imprecise. Despite these differences, I strongly endorse the revised Code provisions. States should adopt the Code's approach, the expanded model, or a blend of these two models, and the states that have already done so should retain and support their systems.

B. The Need for a Model That Accommodates All Major Sentencing Purposes and Limitations

To appreciate the virtues of limiting retributivism as the theoretical foundation of the model proposed in this book, one must start with a brief review of traditional and emerging punishment principles, and the ways in which they often conflict with each other (see generally: Frase 2005b, 2011b, 2012; Bedau and Kelly 2010; Duff 2010). Such conflicts pose serious practical problems for sentencing decision makers, and they also risk undermining the moral authority of their decisions.

1. Overview of Sentencing Principles

Punishment justifications and goals can be either positive or negative criteria—they can provide moral and practical arguments in favor of the punishment, or they can set limits on the type or degree of punishment that it is permissible to impose under one or more of the positive rationales. Whether positive or negative, punishment justifications and goals fall into two major categories. Under utilitarian (or consequentialist) theories, punishment is justified and limited according to whether it produces good or bad effects, in particular, whether it tends to decrease future criminal acts by the offender or other would-be offenders.

Criminal penalties have the potential to achieve these crime-control effects through several mechanisms: *rehabilitation* of offenders, to address the causes of their offending; *incapacitation* of higher-risk offenders, usually by means of secure custody; specific and general *deterrence* of this and other would-be offenders, by instilling fear of punishment; and *moral education*, defining and reinforcing societal norms that guide and restrain behavior even when (as is often true) the chances of detection and punishment are slight—the sentence sends a message to the offender and the public that the punished behavior was wrong, and the severity of the sentence shows *how* wrong it was. The latter purpose of punishment is sometimes referred to as denunciation or positive general prevention; moral education can also be viewed as a utilitarian version of the expressive and communicative theories of punishment, noted below.

Under the second category of rationales and limits, comprised of so-called deontological theories, a punishment is justified according to its inherent value—whether it is a good or a bad thing in itself, regardless of whether the punishment yields good or bad consequences. Deontological principles are based on values of justice and fairness that are viewed as ends in themselves. The best-known deontological punishment theory is retribution, also often referred to as the theory of just deserts: offenders should be punished because they deserve it, and the severity of their punishment should be proportional to their degree of blameworthiness. The two elements most often cited as determining an offender's degree of blameworthiness are the nature and seriousness of the harm caused or threatened by the crime, and the offender's culpability in committing it. Culpability depends on factors such as the offender's intent (deliberate wrongdoing is more culpable than negligence); his or her capacity to obey the law (diminished, for example by mental illness, threats, or other situational pressures); the offender's motives for committing the crime (which may mitigate or aggravate culpability); and, in multidefendant crimes, the defendant's role in the offense as instigator, primary actor, or minor player.

Some desert-based theories (e.g., Duff 2001) justify punishment in terms of its expressive or communicative value—conveying deserved censure to offenders, and inviting an appropriate response from them, are viewed as good things for society to do whether or not any such response is obtained.

Another deontological punishment principle is uniformity (or equality)—similarly situated offenders should receive similar penalties. Two offenders may be deemed "similar" by reference to retributive criteria (they are equally blameworthy), or simply because they were convicted of the same crime, and have similar prior conviction records.

Like all punishment goals, retribution and uniformity can each serve as either a positive or negative criterion. The positive versions typically view retribution as the primary or even exclusive goal of punishment—offenders are punished simply

because they are blameworthy and deserve to be punished; the severity of their punishment should be no more and no less than they deserve (retributive proportionality); and equally blameworthy offenders should receive equally severe punishment (retributive uniformity or "parity"). The negative version of these deontological theories—"limiting" retributivism—merely sets outer limits on punishment imposed to achieve other (positive) goals (especially: crime control), thus producing a range of permissible severity for any given case. Sentences must not be excessively severe or excessively lenient from a desert perspective, and equally blameworthy offenders must not receive grossly unequal penalties.

Other deontological normative principles, which typically only serve as limitations on punishment imposed to achieve other purposes, include the avoidance of disparities based on race or other clearly illegitimate criteria; the requirement that punishment respect norms of humane treatment and human dignity, as embodied in constitutional and human rights provisions; and procedural fairness.

Although sentencing proportionality and uniformity are usually linked to theories of retribution or just deserts, they also have important utilitarian value. Sentencing in proportion to crime seriousness deters offenders from committing a more serious crime, and helps to match punishment costs with crime-control benefits. Greater uniformity in sentencing permits more accurate forecasts of future prison populations and other correctional resource needs. And to the extent that the public subscribes to these values, making sentences more uniform and proportional improves the moral-education effects of penalties and maintains critically needed public respect and support for the criminal law and law enforcement (Ewing 1929; H. L. A. Hart 1968; Robinson 2008).

In addition to crime control, sentences may achieve several other important practical purposes: promoting satisfaction, closure, and compensation for crime victims and victimized communities; reassuring the public that something is being done about crime; and facilitating the offender's successful reintegration into society following his release from incarceration. Each of these effects is desirable for its own sake but may also help to prevent future crimes by the defendant or other would-be offenders. Finally, various administrative purposes and limitations must be taken into account in any theory of punishment, in particular: the need to encourage guilty pleas and other forms of offender cooperation; and the necessity to avoid prison and jail overcrowding and prioritize the use of these and other correctional resources.

2. *Conflicts within and across Punishment Principles*

The sentencing principles summarized above are all valid and widely recognized, but they often conflict with each other. Here are several examples:

1. If two equally blameworthy offenders commit the same crime but one poses a much higher risk of reoffending, putting the low-risk offender on probation and sending the high-risk offender to prison saves scarce correctional resources while effectively promoting public safety. But doing so produces disparate and arguably "unfair" sentences from the perspectives of retributive proportionality and uniformity, and undercuts the practical values served by those values.
2. An offender's mental illness or drug addiction may greatly limit his capacity to obey the law, thus making him more likely to reoffend and therefore more in need of incapacitation and rehabilitation in a secure facility; but such offenders are less blameworthy, and may be undeterable unless penalties are increased to a level that would exceed their deserts.
3. Increased rates of imprisonment may heighten general deterrent and moral education effects, but some of the additional offenders sent to prison will probably be made worse (i.e., more dangerous, less able to cope with freedom) than they were before entering prison.
4. Efforts to promote victim or community satisfaction and compensation may result in sanctions that, from retributive, crime-control, or efficiency standpoints, are either too severe (e.g., because of vengeful victim or community views) or not severe enough.

How can these various conflicts be resolved by busy courts? In theory, conflicts between different utilitarian crime-control purposes are easily reconciled; since these purposes all share the same goal, they can be applied so as to produce the maximum net crime-control benefits (Robinson 1987, 31–33). Thus, in the third example above, incarceration would be used only in cases and to the extent that the expected deterrent and moral education effects outweighed the additional crimes caused by making some offenders worse. But all of these benefits and trade-offs would have to be assessed in each case by sentencing courts, a task that judges and probation officials often lack the necessary data and time to perform.

Even more serious conflicts frequently arise between case-specific utilitarian purposes and deontological goals, especially retribution. According to the stronger (positive) version of retributive theory, all offenders should receive their particular deserts—no more and no less. But such a system would not allow courts to pursue utilitarian punishment purposes in an efficient and affordable manner, and to my knowledge, no jurisdiction in the United States or elsewhere takes such a one-dimensional approach. Nor has any modern system adopted a purely utilitarian theory. Instead, all modern legal systems appear to take a hybrid approach; several systems have expressly adopted limiting retributivism, and some version of that theory is implicit in many other systems.

C. The Current Limiting-Retributive Model

Numerous writers have advocated a hybrid approach in which retributive principles set upper and sometimes lower limits on punishment severity, thus providing a range of permissible penalties within which sentencing judges may apply other (nonretributive) principles. The most fully elaborated version of this approach is found in the writings of Norval Morris (1974, 1982; Morris and Tonry 1990).

The most important principles of Morris's theory are that sentences must not be undeserved, but that desert is imprecise—in any given case there may be widespread agreement that certain penalties are clearly undeserved (either excessively severe, or excessively lenient), but little consensus on the offender's precise desert, even relatively (compared to other offenders). Morris also recognized the goal of equality in sentencing. But as with desert, he saw this not as a precise imperative but only a general guiding principle—like cases should be treated alike unless there are substantial utilitarian reasons to the contrary. Morris's lower desert limits appeared to be flexible, and based in part on utilitarian, moral-education considerations, so as not to depreciate the seriousness of the crime. Within the range of deserved (or not *un*deserved) penalties, other traditional sentencing purposes may be considered, including general deterrence and, exceptionally, offender risk-assessment, but subject to an overall, limiting principle of humaneness and utilitarian economy that Morris called "parsimony"—the sentence imposed should be no more severe than necessary to achieve these other purposes.

Even within the desert range, Morris opposed basing sentencing severity on highly individualized evaluations of the offender's dangerousness, need for treatment, or progress toward rehabilitation; he viewed all such assessments as inherently unreliable and overinclusive. He maintained that prison treatment programs should be voluntary, and should have no effect on the length of imprisonment (but he did stipulate that credit for good conduct should be retained, and that inmates can be required to take part in prescribed treatment programming long enough to see if they might want to continue). He also argued that parole-release discretion should be abolished; if it were retained, he argued that the timing of release should be based on actuarial (group risk) rather than individualized assessments. In any case, a parole-like period of postprison, conditional release should be retained, even for offenders who receive no good-conduct credits and "max out" their prison terms.

Although Morris opposed individualized assessments of dangerousness and need for treatment, he would allow enhanced sentences based on the offender's prior conviction record. Morris viewed such enhancements as both deserved and an effective means of incapacitating higher-risk offenders.

Other important components of Morris's theory relate to sentencing procedures. He argued that all sentences should be subject to appellate review, in order

to improve sentencing consistency, ensure that desert and parsimony limits are respected, and develop sentencing theory and jurisprudence through a gradual, common-law process. He also maintained that sentences would be more consistent and principled, and appellate review would be greatly facilitated, if trial courts were required to state reasons for their sentences. Morris opposed all mandatory penalties and categoric exclusions from probation eligibility, whether by statute or strict, legally binding guidelines; despite his career-long concerns about sentencing disparity, he believed that judges must retain substantial discretion to consider case-specific facts and circumstances. As for specific sentencing alternatives, Morris urged courts to employ a wide range of intermediate sanctions less intrusive than full-time incarceration but more intrusive than traditional probation.

Morris supported sentencing guidelines reforms provided that they retain substantial judicial discretion, strongly promote the use of intermediate sanctions, include appellate review, and require trial courts to state reasons for their sentences.

D. Other Hybrid Punishment Theories

Limiting retributivism is not the only theory that seeks to harmonize and provide roles for all traditional punishment purposes; a number of other hybrid or "mixed" theories have been proposed. Although some of these hybrids are merely suggested in principle, with little or no detail on how the model would actually work, a few authors have provided a more developed hybrid theory. Among these are advocates of the positive retributive model who, while insisting that penalties must be closely tied to each offender's deserts, have sought to leave room for the case-level pursuit of crime control and other utilitarian goals. These authors argue that only the severity of punishment needs to be proportional to desert; the precise form of punishment can vary to meet case-specific needs, provided that the overall severity of the package of sanctions imposed is proportional to desert. For example, Robinson (2008) would achieve such proportionate punitive "bite" by establishing a schedule of sanction equivalencies (e.g.: one day of jail is deemed equivalent to one day of home detention, or one day-fine, or eight hours of community service). An alternative approach suggested by von Hirsch, Wasik, and Greene (1989) would allow limited substitutions of one sanction type for another, without requiring close equivalency in sanction severity.

The proposed equivalency scales and substitutions might seem well designed to reconcile the kinds of sentencing goal conflicts previously noted. For example, high-risk offenders could receive custodial penalties while lower-risk offenders

receive community-based penalties of at least approximate severity. But such a system, especially Robinson's stricter version, is unworkable, at least in American jurisdictions where common offenses typically receive custodial penalties measured in years. A court wishing to impose a sufficiently severely noncustodial penalty would often be required to impose additional intermediate sanctions that have no direct, tangible benefits (e.g., home detention), or are too severe to be effectively enforced (Morris and Tonry 1990); indeed, piling on additional intermediate sanctions virtually guarantees that many offenders will not comply with all of the conditions, thus requiring resort to backup sanctions. But such sanctions (e.g., more intensive supervision; additional home detention; jailing) are costly, and will often provide little or no tangible public benefit; they would be imposed simply for the sake of enforcing full retributive proportionality and uniformity. Many people will find such costs unacceptable because they expend scarce public resources for no direct practical gain. Finally, it is not clear how backup sanctions can be justified under a strong desert-based model; the initial package of sanctions called for in such a model exhausts the claims of desert for the sentenced crime, leaving little or no room for subsequent tightening of sanctions to respond to heightened offender risk or technical (noncriminal) violations of release conditions.

These and other serious problems with alternative hybrids (as well as nonhybrid theories) are further discussed in chapters 1 and 2, which conclude that, of all the hybrid and nonhybrid theories that have been proposed, limiting retributivism is the most workable and does the best job of recognizing and harmonizing retributive and nonretributive purposes and limitations on punishment. For example, a limiting-retributive model permits low-risk offenders to be given less than their full desert, in the form of modest, readily enforceable intermediate sanctions, with ample room for a full range of backup sanctions that do not exceed desert. Modern sentencing systems in the United States and abroad (chapter 3) likewise reject any strict matching of punishment severity to desert. Most of these systems have adopted some form of limiting retributivism; none of them have adopted either a purely retributive or a purely utilitarian model.

E. The Expanded Limiting-Retributive, State-Guidelines Model (the "Expanded Model")

Despite its many strengths and its substantial congruence with modern sentencing systems, limiting-retributive theory as it now stands needs some adjustments to make the theory more specific and more consistent with sentencing guidelines systems that most closely follow this model. The theory also needs to