Model Penal Code Sentencing Revisions: ALI Faces Critical Issues

Michael Marcus - April 22, 2006

The Reporter has done a masterful job of evolving a comprehensive revision to the sentencing provisions of the Model Penal Code. I applaud the revision's commitment to deontological limits ("limiting retributivism"), trial court sentencing discretion, and meaningful roles for appellate review and sentencing commissions. I agree enthusiastically with the subtext that reform must include a strategy for reducing mass incarceration and punitivism. I write, however, to identify issues of profound importance to the future of criminal justice and to ALI's role in that future.

The 2006 Discussion Draft, like all of its prior versions, critically builds upon the premise that sentencing should always be about meting out punishment that is neither too lenient nor too severe, while utilitarian purposes of offender rehabilitation, general deterrence, incapacitation, and restoration of crime victims and communities should only be pursued in "appropriate cases"[1] and when there is a "realistic prospect of success."[2] The notion is that our empirical support for utilitarian objectives is limited, but that appropriate punishment is both demanded of us and an adequate talisman for all sentencing. The subtext is that popular punitivism can best be kept in check by sentencing commissions that primarily establish presumptive ranges of punishment for all crimes (subject to departure for reasons of "aggravation" and "mitigation") and monitor compliance with sentencing guidelines, but that may also monitor empirical support for utilitarian objectives.

The competing contention,[3] which I endorse, is that all sentencing should be first and foremost about harm reduction: all sentencing, within limits of law, proportionality, and resource, should focus primarily upon reduction of criminal behavior, through evidence-based allocation of dispositions along the entire range of available sentencing options, according to each offender's risk of causing harm and likely susceptibility to reduction in criminality, and subject to corresponding prioritization of correctional resources. Only when other sentencing objectives cannot otherwise be served should the best sentence for harm reduction purposes be altered or compromised for such other purposes – a relatively rare set of sentencing occasions.[4]

A worthy revision would define the roles of sentencing commissions and appellate review in light of the harm-reduction focus of sentencing objectives.

This piece will simply outline the arguments in favor of the harm-reduction model, and will conclude with suggestions for further reading.

The choice that ALI will face is whether to cling to a socially irresponsible and archaic model of sentencing that enables public misconceptions about crime and punishment, or to provide leadership to law and society toward humane, evidence-based and effective harm reduction.

1. Pervasive focus on punishment is archaic, out of touch with modern criminology and corrections, and unnecessary for public support

The notion that robed figures should first and foremost dispense punishment in all cases of misconduct by way of social denunciation is a throwback to public thrashings, morality plays, and completely out of touch with the most common criminal cases – which involve addiction, the products of family dysfunction, and social maladjustment. What the public wants of these cases is reduction of recidivism and crime, not, as politicians wrongly assume, punishment *per se* . Our criminal justice partners – correction and probation – steeped in risk and needs assessment, stage of change analysis, and pursuit of "what works," have to step into the past to communicate in our courtrooms, and will likely continue to do so wherever the *Draft*'s proposal is endorsed.

2. Though the Draft seeks to mitigate punitivism, the harm reduction model is far more likely to further that objective

It is at least ironic to pursue punishment without empirical support, while demanding that support before pursuing utilitarian objectives, *when the purpose is to reduce unnecessary punishment*. Guideline systems have proven inadequate to stem mandatory minimum and other popularly adopted sentence enhancement schemes, in large part because by avoiding accountability for the failure of utilitarian results we *continue to encourage the fallacy that punishment* ***is*** *crime reduction*. It is largely our failure to focus sentencing on what works that allows the public to be mobilized to increase punishments and decrease judicial discretion. Focusing on what works would be far more likely to encourage public support for alternatives and programs – provided that we accept accountability for best efforts and rigorously pursue evidence-based practices, and also provided that we accept that incarceration is appropriate for those whose risk cannot otherwise be managed with appropriate safety.

3. Eschewing empiricism for punishment is the worst strategy for addressing the undersupply of useful data

The *Draft*'s prerequisite of empirical support for pursuit

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[1] §1.02(2)(a)

[2] §1.02(2), *comment 3* (p. 24); §7B.03(3)

[3] *See, e.g.,* Kristin L. Caballero, *Blended Sentencing: a Good Idea for Juvenile Sex Offenders?* 19 St John's . Legal Comment 379 (2005); Steven L. Chanenson, *Sentencing and Data: the Not-so-odd Couple*, 16 Fed Sent Rptr 1 (2003); Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 Me L Rev 569 (2005); Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 Fed Sent Rptr 76 (2003); Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the next Generation of Reform*, 105 Colum L Rev 1351 (2005);Christopher Slobogin, *The Civilization of the Criminal Law*, 58 Vand L Rev 121 (2005);Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 Nw U L Rev 1 (2003); David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal*, 17 St Thomas L Rev 743 (2005).

[4] For example, addressing the need for tangible justice or therapeutic resolution may call for a sentence not crafted solely for crime reduction in some cases of non-predatory child sex abuse, and vehicular homicide caused by a non-recidivist social drinker. In the overwhelming majority of cases, a sentence crafted solely to reduce future criminal behavior will also serve all other legitimate purposes of sentencing – including consonance with public values.

of any utilitarian objective expressly applies to rehabilitation, general deterrence, incapacitation, and restorative justice. It does *not* apply to pursuit of "severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders."[5]

There is no good or sufficient reason to require less empirical support for punishment *per se* than for any of the listed utilitarian objectives. While the prospects of empirical support for each varies, there is no greater prospect of evidence to support punishment than, say, general deterrence. Indeed, the *Draft*'s rationale for its pervasive pursuit of punishment is the need to resonate with social values.[6] But the functions of punishment are themselves ultimately utilitarian – preventing vigilantism and private retribution, while encouraging public values, including respect for the institutions of justice and for the rights, property, and dignity of others. There is no logical or functional justification for allocating sentencing resources (anywhere along the spectrum of crime and sentence) to "punish" without empirical support than to deter, rehabilitate, incarcerate, reform, or restore.

Second, the result of the pursuit of punishment *a priori* is to punish many whose punishment does not advance any social purpose, is not required to satisfy the public or any "responsible official," and is self-defeating as to the objective of crime reduction.

Third, allowing the culture of criminal justice to evade responsibility for empirical support as to punishment endorses its persistent failure to pursue empirical answers to all issues of sentencing, and its failure to integrate effectiveness data into the protocols and rituals of sentencing.

A harm-reduction strategy would require the pursuit of best practices for all sentencing objectives, and motivate commissions, judges, and practitioners to invite and encourage a major role for data in sentencing – not data about how sentencing affects prison population levels, but about how sentencing affects safety, public values, and criminal behavior.

4. Meaningful reform requires rational assessment of all levels of sentencing

The *Draft* continues the fallacy that empirical purposes make more sense in some types of crimes than others, and that more serious crimes call for punishment for its own sake rather than any consideration of public safety – tacitly resisting the allocation of incarceration for the utilitarian purpose of incapacitation. While realistic utilitarian responses surely vary with the level of risk and criminogenic factors represented by an offender, all sentences are properly guided by a harm-reduction analysis. If we are not using prisons for public safety, it would make more sense at least to offer offenders caning as an alternative. If we are using prisons for public safety, public responsibility dictates that we allocate that resource – within limits imposed by law and proportionality – according to risk and the best evidence we can assemble as to what lengths and conditions of incarceration, transition, and release represent the highest likelihood of long-term crime reduction – moderated, in the few cases in which it is demonstrably required that we do so, by pursuit of other legitimate sentencing purposes.

5. Avoiding disparity does not require abandoning empiricism

The primary accomplishment of guidelines is a partial reduction of disparity in sentencing. Consistency is appropriately pursued, and is at least as attainable, through guidelines that recognize the variations in offenders that correspond with the efficacy of varying dispositions, and in the availability of such dispositions. Disparity is not as well reduced by guidelines that ignore variations to claim that we are treating like alike. Moreover, the higher form of disparity reduction is that which addresses the disparities in efficacious crime reduction resources.

Conclusion

The stakes in the choice of organizing purposes for sentencing reform are tremendous. Permitting "appropriate severity" to be a sufficient measure of our performance perpetuates an archaic practice that is cruel to offenders whose sentences serve no actual function or forgo alternative dispositions that would improve their behavior; it is cruel as well to victims whose victimizations would be avoided by smarter sentencing. It reduces the practical incentive to improve our knowledge of what works and its implementation in the halls of criminal justice, and forfeits the best hope of legitimacy in the eyes of the public.

The choice will ultimately determine whether ALI provides leadership toward a modern sentencing culture or endorses that which is archaic, dysfunctional and punitive in its past.

For further reading, *see* the authorities cited note 3, *supra*, and, by this author:

Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link, 1 Ohio St J of Crim Law 671 (2004);

Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1, 30 Am J Crim Law 135 (2003);

Blakely, Booker, and the Future of Sentencing, 17 Fed Sent Rptr, 243 (2005);

Justitia's Bandage: Blind Sentencing, 1 Int'l J of Punishment and Sentencing 1 (2005);

LR - Limiting Retributivism or Lamentable Retreat? - The Third Draft of Revisions to the Model Penal Code, available at http://www.smartsentencing.com

A Harm Reduction Sentencing Code, available at http://www.smartsentencing.com

Note: I am happy to provide copies of any of these materials upon request. Michael.H.Marcus@OJD.State.OR.US

[5] §1.02(2)(a)(i) [all such citations are to the 2006 Draft]

[6] *See, e.g.,* Kevin R. Reitz, Reporter, *Model Penal Code: Sentencing - Preliminary Draft No. 3*, at 3 (ALI 2004)