An Examination of a Desert-Based Presumptive Sentence Schedule

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AN EXAMINATION OF A DESERT-BASED
PRESUMPTIVE SENTENCE SCHEDULE

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ABSTRACT

To reduce the problem of sentencing disparity (unlike sentences for
the offenses), the Committee for the Study of Incarceration pro-
posed a determinate sentence scheme based on a desert theory of
punishment. While the proposal at first glance may appear to solve
many sentencing problems, this paper attempts to show its defects and
some of the problems involved in (1) determinate sentence schedules
generally, (2) desert as a principle of punishment, and (3) basing a
determinate sentence schedule on a desert theory.

INTRODUCTION

There is a current discomfort with a fundamentally important feature of the criminal justice
system: sentencing. It has come to the attention of the public generally that the present system of
sentencing convicted persons in the United States lacks an underlying rational, cohesive ground.
Sentences, that is, are disparate. Individuals convicted of similar crimes are given dissimilar
sentences. To the degree that such deviations are manifestly unfair, our sense of justice is shocked.
And so there have been cries for an end to such sentencing disparity, and there has been an
accompanying call to abandon the orientation toward rehabilitation, which is thought to characterize
our criminal justice system, in favor of some "realistic" policy such as retribution.

While many proposals have been made to solve the problem of disparate sentences (such as
sentence review councils, requirements for written reasons supporting particular sentences, and clear
sentencing guidelines), only one is dealt with here — a proposal to take sentencing discretion away
from the judge and impose a legislatively mandated schedule of sentences. The schedule criticized is
one based on a desert theory of punishment. While other theories may be used to ground such a
schedule, some of the criticisms that follow apply to determinate sentence schemes generally,

35
regardless of the theories that seek to justify them. Other criticisms apply only to a desert-based schedule, and still others only to desert theory itself.

Events such as the uprising at New York State's Correctional Facility at Attica in the fall of 1971 helped to foster the subsequent perception of a moral vacuum in our decisions about punishment. A rethinking of the premises for prisons resulted, and the Committee for the Study of Incarceration was established to examine whether incarceration could be justified at all. The work of the committee is reported by one of its members, Andrew von Hirsch, in Doing Justice: The Choice of Punishments. (The page numbers cited here refer to this 1976 publication and von Hirsch is generally referred to rather than the committee.)

In Doing Justice, a punishment model is proposed that is designed to reduce sentencing disparity by taking discretion away from the judge and imposing a legislatively mandated sentencing schedule. The punishment model stems from a desert theory of punishment. I argue here against the use of such a theory tied to such a structure (a presumptive sentence schedule). Simply put, the principle of commensurate deserts maintains that one should get what one deserves; blame (and so punishment), like praise (and so reward), must be earned (p. 49). Punishment should not look ahead to what offenses a person might commit or to what rehabilitative level might be reached. Rather, punishment should look back to the offense itself and be invoked solely on the grounds of what that behavior warrants (p. 46). Punishment, then, should reorient rather than predict; it should not speculate. One argument developed here centers on the notion that the structure put forth in Doing Justice may well be more speculative than first appears.

There are valuable lessons to be learned from focusing on desert in considering why, who, and how much we should punish. Most obviously, such a focus may cause us to become consciously concerned with fairness of treatment for convicted offenders. Whatever complexities a concept such as fairness may entail, a focus on desert may make us more critical in our statements about punishing, both generally and in specific cases. Further, a concentration on desert may provide us with the skepticism necessary to an accurate perception of our present rehabilitative capabilities, and insofar prevent us from uncritically believing that those locked behind prison bars are receiving "treatment." In short, concern with desert may constitute an instructive attitude.

At the same time, dangers lurk in the relation of desert and punishment. First, there are conceptual difficulties with the notion of desert as used by von Hirsch; second, there may be real-world systemic consequences that flow from the establishment of a desert-based presumptive sentence structure that are diametrically opposed to those intended by the desert theorists and that are undesirable on other grounds. This essay investigates some difficulties of both types that the structure involves.

THE INTERPLAY OF PRINCIPLES: DESERT AND DETERRENCE

It is necessary to understand the role of desert in the structure put forward by von Hirsch. Is desert the only principle looked to? Do other punishment theories play a role? If so, what is the relationship of principles, the scale of priority? We must keep in mind that the theory behind the structure of Doing Justice has two levels: one justificational, the other allocative. We must examine how the principles we operate on each of these levels. (There is a third level involved — the practical allocative level, the consequences on the criminal justice system.)

Nigel Walker (1966), discussing retributive schemes in general, argues that "the retributionist must be prepared to argue that the penal system should force atonement even if by doing so it increases the frequency of the offense in question . . . ." A similar argument may be made for von Hirsch's brand of desert theory specifically, and so it would seem that some sort of tempering principle may be necessary to ensure that the doctrine of commensurate deserts does not issue into absurd or otherwise undesirable results (results, that is, that would be undesirable even to one making von Hirsch's argument). Just such a tempering does occur in the scheme of Doing Justice, and it is to this additional feature that we must now turn our attention.
sanction policies, failure to test policies while continuing to penalize offenders in the name of deterrent beliefs becomes morally obnoxious” (1973:43). Our ignorance about punishment, conclude the authors, establishes the moral necessity of research into the effect of different punishment policies. First, it should be noted that this argument may be directed against von Hirsch’s reliance on deterrence. But the argument is applicable as well to a reliance on desert theory for it is difficult to see how the required research might be carried out in relation to desert theories, unless one equates desert with the community sense of retribution. Desert theory, that is, allows for no modification along an experiential continuum; one simply cannot find facts in the world that when pointed to, verify or diversify desert hypotheses. This is not to say that a concern with desert is somehow futile, but is rather to point up a limitation on the use of desert as a punishment principle, as a means of allocating penalties generally. (Nor is it this to say that we should somehow not impose penalties that are deserved, but instead shows something of what the term “deserves” means and does not mean in propositions regarding punishment.)

The argument for desert seems irrational without some tempering principle. If deterrence (or some other rational limiting principle) is necessary to a punishment structure, what is left of the role of desert in a scheme that purports to place it (desert) in a paramount position? The issue is not without importance. We have seen that desert needs some tempering principle — that it cannot stand alone as a punishment principle. Perhaps it is desert itself that should temper, that should serve as a limit to other principles.

Desert should play an important role in almost any rational theory of punishment. To get a degree as possible we want to insure that the person who receives punishment deserves it, and deserves that particular punishment. But is it necessary, or desirable, to place a principle such as commensurate deserts at the base of a sentencing structure, so that it grounds the theory behind the structure and plays the major role in the allocative scheme of the structure itself? As will be seen, this is precisely the role of desert in Doing Justice.

The principle of commensurate deserts becomes preeminent in the allocative scheme. In the allocation of penalties, desert becomes preeminent. We will argue that the distribution of penalties among convicted offenders should be decided chiefly by reference to the seriousness of the offense of which the offender has been convicted and the number and seriousness of his prior convictions. (PP. 59-60)

Deterrence plays a minor role in the allocative scheme, compared to its role in justifying the criminal sanction. In decisions on how much to punish, the desert principle plays the major role, since it is a “requirement of justice,” while deterrence, incapacitation, and rehabilitation are merely “strategies for controlling crime” (p. 75). Von Hirsch claims that the practical benefit of the preeminence of commensurate deserts is that it offers a principled way to avoid a mere balancing of the different aims of punishment (p. 75). It is not clear that deterrence, rehabilitation, and incapacitation are not requirements of justice, that they have less to do with justice than does desert, or that the claimed practical advantage does accrue. But for the moment it is clear that desert comes to play the paramount role in the allocative scheme of Doing Justice. While deterrence plays a fundamental role in the justifying portion of the theory (along with desert), and comes, along with other principles, to be considered at various points in sentencing decisions (pp. 93, 94), desert alone forms the basis of the allocative theory. It is this emphasis on desert that constitutes both the value of, and some of the difficulties with, the proposed sentencing structure.

H.L.A. Hart suggests that even a thoroughly utilitarian view of punishment be tempered by some fairness principle, to insure a proper proportion between the seriousness of the offense and the severity of the punishment (von Hirsch, 1976:70). Such a principle could be some sort of fairness, desert, or humanitarian principle. On such a view, utilitarian considerations (such as deterrence) could play the major role in the allocative scheme, and perhaps too in the justifying scheme, while desert could be used as a limiting principle. Nigel Walker (1966) describes a similar scheme as “limiting retributivism,” where “what is done to offenders can be planned with a view to reducing the frequency of repetitions of their offenses so long as the principle is observed that . . . the unreasonableness of a punishment measure must not exceed the limit that is appropriate to the culpability of the offence” (p. 18). Like Hatt’s suggestions, Walker’s points out a possible difficulty with von Hirsch’s priority of principles. On Walker’s view, a principle such as rehabilitation or deterrence (or some combination of principles) may serve as the essential feature of a punishment scheme, while a desert principle serves as a limit. But am I merely playing with words? Is this talk of “essential” and “limiting” roles just that, and nothing more?

By “essential” or “fundamental” role, I mean that role that purports to have the most weight in a punishment scheme, considering both the justifying and allocative aspects. On allocative grounds, we may want to know what extent desert (or any other principle) may be used to establish presumptive sentences. It is this use of desert that is extensive in Doing Justice, and gives the proposal its distinctive tone. Certainly, we do not want to impose undeserved sentences. But herein lies a seductive use of “desert,” and an indication that other goals or punishment theories may better serve us in establishing sentences, or may lead us to not establish a presumptive sentence system at all. The significance of the differences between the views expressed here will emerge as we discuss measurement difficulties of various punishment theories. We are not concerned with desert theory in abstractio, but rather as it is used in Doing Justice — i.e., closely tied to the presumptive sentence schedule. If Doing Justice stands for nothing beyond the proposition that “we should attempt to achieve fair sentencing decisions,” I find nothing problematic in its use of desert. But I take it that, in terms of specificity, if nothing else, von Hirsch seeks to go beyond this proposition.

**THE "OFFENSE" AND THE OFFENDER'S PAST**

In the sentencing structure proposed by von Hirsch, the severity of punishment is determined by the seriousness of the crime. Seriousness has two components: harm and culpability. Harm is measured by the harm characterizedly "done or risked" (p. 80) by an offense of the kind being considered, and culpability is measured by the degree to which the offender may be held to Shame for the consequences of the act. Culpability is largely determined by the offender’s criminal record or lack thereof (pp. 84-88). Presumptive sentences based on seriousness are established in an attempt to reduce judicial discretion and sentencing disparity. Mitigating and aggravating factors may justify deviations from presumptive sentences.

As a preliminary point, perhaps indicative of the kinds of difficulties the structure entails, one wonders how to measure harm characteristically risked. This cannot be measured on the basis of harm characterizedly done, for the latter represents a distinct measure of harm. We are to consider harm ordinarily done and harm ordinarily risked. How do we establish the latter? Do we make guesses of harm likely to flow from an act? What does "characteristically" mean? Does a ten percent chance of a certain harm occurring qualify? A sixty percent chance? Characteristic risk, apparently, must be measured by harm uncharacteristically done, if it is to constitute a category other than harm characterizedly done, and if it is to be capable of even vague measurement (determination). Are we to add an increment of punishment for harm that did not occur in this offense, does not ordinarily occur in offenses of this type, but that might have occurred (was somehow risked), because it has occurred with other offenders, albeit uncharacteristically? And if "harm characterizedly risked" means something else, what does it mean, and how is it to be determined?
A fairness problem resides in the use of the term "harshly characterized done." How fair is it to consider "characteristic" harm, when we are dealing with this offender and this act? How fair is it to include such consideration in the determination of presumptive sentences (even admitting the role of mitigating and aggravating factors in permitting some deviation)? While deterrence and rehabilitation may be forward-looking, away from the offense, the use of desert here may be sideways-looking, away from the offense and toward other offenders and acts (offenses of the same species). Again, what does "characteristically" mean? Is a harm that is done in fifty percent of the incidents of a particular offense characteristically done? What is the threshold? Does it depend on the gravity of the harm? Is a lesser chance of death to be counted as more characteristic than a greater chance of bodily harm? What is the role of aggravating and mitigating factors here? What sense does it make to speak of separate offenses as the "same"? The factors in any criminal offense are numerous, complex, and capable of infinite variation. Is our taxonomy of offenses sophisticated enough to warrant presumptive sentences (thereby reducing judicial discretion) based on harm typically done and risked for offenses of such-and-such a type?

A difficulty remains focusing on this offender, but it is a focus on previous offenses, that is, the effect of criminal record on seriousness (via culpability). If seriousness of offense embraces the offender's criminal record, what of his or her noncriminal record? Should we consider educational level, employment history, and family background in determining culpability (and thereby seriousness)? Von Hirsch says no. While commensurate deserts looks only to crime (past and present), theories such as predictive restraint look to "anything else that bears on [the] likelihood of offending again" (p. 87). The argument, made in relation to the example of parole release decisions, seems to boil down to this. Factors such as social status are out of an offender's control. Criminal behavior is within the offender's control. In making just judgments about punishments, then, we should consider criminal, but not noncriminal, biography.

The argument assumes that criminal behavior is somehow more within an offender's control than noncriminal behavior, and that greater punishment is deserved on each repetition of an offense. Why is every criminal record looked to at all? To provide an index to seriousness. This reflects an evaluation that an offender is more culpable, and so each offense more serious, with each repetition (pp. 85-86). But is it not possible that on desert grounds a disadvantaged offender, having reduced opportunities and choices, is less culpable for criminal behavior than a more advantaged offender, and that the additional stigma of a criminal record unfairly reduces already minimal options? It may be precisely the accidents of social status (over which an offender has little or no control) that generate criminal behavior (about which an offender may have little choice, or over which that person may have little control).

If we wish not to discriminate against the disadvantaged, what of our suggested treatment of prior criminal record? One of our purposes in committing a crime, does not the stigma of a prior criminal record compound the burdens of poverty? And, if so, is not punishing him more severely if he commits another crime failing him unfairly for disabilities which society has helped impose? It is unquestionably true that the stigma of a criminal record narrows the person's opportunities. But such disabilities are the consequences of the person's own actions in violating the law. (P. 148)

Quite so. But the question is not one of linking actions to actors. The question is precisely to what extent are certain actors responsible for their actions. A sentence scheme properly based on desert must do a better job than is done here in defending its use of increased penalties for repetitions of criminal behavior on grounds of desert. Why do disadvantaged actors deserve more punishment for offense repetitions, when offending constitutes one of their limited options? It does not suffice to say that "the offenses are theirs." Further, there is a sense in which not even this is clear. What is the theory of moral accountability that is entailed in the use of "desert" here? It appears that not enough attention is given to the nature of a word that denotes nothing if not an ethical position, or at least serves as a sort of moral signpost. But von Hirsch does make a further argument:

From the point of view of the impoverished, moreover, our suggested treatment of prior record has an important advantage. By scaling down the penalties for first offenses, we make it easier for him to avoid severe punishment—he will not suffer the full signs of the law unless he stays several times. Were our suggested treatment of prior record rejected and each successive infraction punished equally, he would be visited by the full penalty when he made his first mistake. For an indigent person whose restricted opportunities create greater temptations to break the law, one mistake is all too easy to make. (P. 148-149)

This argument seems to admit that a criminal record reduces choices, and that such reduction is morally and legally relevant, but only to a point. Then, somehow, the offender does deserve the "full righers" of the law. I am uncertain as to how this threshold is established, and how it relates to desert. Perhaps the point is a simple one, that after one or two offenses the offender should have learned a lesson. From then on, each offender is fully responsible for his or her criminal behavior. This view may be salutary on utilitarian grounds; I am uncertain how it is supported by desert theory. Moreover, it is at least possible that the initial light treatment prescribed by von Hirsch may invite criminal behavior, and may lure offenders into committing further crime (based on initial treatment) and incurring escalated penalties. I am not here arguing that initial penalties must be increased for some deterrent effect. Nor am I arguing that repetitions of offenses do not generally warrant escalating penalties. I am instead pointing out that if any theory of punishment should attempt to deal satisfactorily with the problem of the disadvantaged offender, it is a desert theory.

A more specific difficulty involved in treatment of criminal record stems from the fact that some offenders will not have criminal records (will have escaped detection). An unfair disadvantage is thus placed on those whose criminal behavior is not sophisticated enough to escape detection. Criminal record, to this extent, does not show culpability. Disparities in plea bargains enter here also, where two offenders may have radically different criminal records for the same behavior, and so have disparate sentences visited on them for similar (new) behavior.

Von Hirsch does testify to some considerable frustration over the problem of criminal record generally.

But it should be only small comfort that our theory of punishment deals somewhat less unfairly with deprived persons than traditional utilitarian theories do. As long as a substantial segment of the population is denied adequate opportunities for a livelihood, any scheme for punishing must be morally flawed. (P. 149)

While this last proposition may be true, it is not, as I have tried to show, entirely clear that the sentence structure proposed here does deal less unfairly with deprived persons than do traditional utilitarian theories.

THE OFFENDER'S FUTURE (REHABILITATION)

Having examined the difficulties of the past of the offender, criminal record, it is now appropriate to inquire into the relationship of the scheme of Doing Justice and the future of the offender, rehabilitation. Clearly, von Hirsch reacts against the current trend of rehabilitative thought. He suggests punishment on the basis of the offense, rather than the offender. There may be good reasons to abandon the rehabilitative model in favor of some other. Von Hirsch makes a valuable
point when he claims that "it cannot be rational or fair to sentence for treatment, without a reasonable expectation that the treatment works" (p. 18). In the guise of rehabilitation, offenders may undergo more severe punishment than if a straightforward retributive model were applied. If rehabilitation exists as a goal, and not as a result, of the present system, we should sentence on other grounds. But what of the value of rehabilitation as a goal? What if rehabilitation worked?

Von Hirsch argues that rehabilitation (1) does not work, and (2) would be unjust in most cases, even if it did work (pp. 14-18). It is true that we may abuse the punishment function by assuming that those punished are being treated. "Once criminal sanctions are given a semblance of beneficence, they have a tendency to escalate: if, in punishing, one is (supposedly) doing good, why not do more?" (p. 121). But is there not a similar problem with desert? Aren't we tempting, on a presumptive sentence desert scheme, to feel too secure about punishment decisions, since the offense is purportedly "deserve what they get"? Is not the use of desert so seductive here as to encourage imprisonment on a potentially unjust notion of desert?

Von Hirsch questions the justice of dissimilar sentences for similar crimes under the rehabilitative disposition. But one is led to wonder what is unjust about such dissimilarity, given an effective rehabilitative system, where both offender and society benefit. If a rehabilitative program succeeds in reforming an offender and protecting society, what is unjust about dissimilar sentences under such a program?

There are clear dangers in the concept and practice of coerced rehabilitation. Surely, there are gross abuses that could occur under an effective rehabilitative system (abuses such as surgical, biochemical, and behavior modifications, selection procedures, etc.). Assuming for the moment that we can and will prevent such abuses (and there is little very evidence to support that assumption), is it then that we can see that rehabilitation has taken place or (2) release an offender later than otherwise, on the basis that rehabilitation has yet to occur?

To be worthwhile at all, the present discussion must, in one sense, be placed in the context of present realities. The kinds of rehabilitative achievements being discussed here bear little resemblance to present capabilities. However, as a logical point, it is important to examine the relationship of such ideal rehabilitative schemes to Von Hirsch's proposal in order to see just how different the desert model of Doing Justice is from rehabilitative models. (Further, it may be the case that as time passes, we will more closely approach the rehabilitative ideal. If this is the case, we should be prepared to evaluate that system from various perspectives, and desert constitutes one such perspective.)

It seems to be Von Hirsch's view that the rehabilitative disposition, insofar as it results in dissimilar punishments for similar offenses, results in injustice. When an offender deserves only X months of confinement, holding him past X + N months—even if the treatment calls for the extra time—is disproportionately severe in relation to the seriousness of the crime. The fact that the treatment is effective does not eliminate that objection. . . . (P. 128)

The opposite case, where an offender is released earlier than otherwise, is rejected on grounds of disproportionate leniency (p. 128). One difficulty with the above argument is this: If treatment results in the offender's not committing future crimes, and so avoiding future punishment, as long as X + N is less than X + M (where M is future punishment for future crime), isn't it more just to impose the X + N period? Isn't there more just than allowing future imprisonment of greater length? Doesn't the offender, one might ask, deserve the best we can give? Doesn't society?

As already stated, the argument in favor of the X + N period simply points out a possible formal difficulty with Von Hirsch's proposal. In relation to the criminal justice system as it now stands, and as it is likely to stand in the foreseeable future, Von Hirsch takes a cautious and wise position on rehabilitation, especially on increasing prison terms for rehabilitative purposes. The case against disproportionate leniency may be harder to make, since here there is no fairness problem to the offender, but rather a more general fairness problem to other offenders and society as a whole. It should also be pointed out that Von Hirsch does not maintain that rehabilitation is somehow without value. Instead, he comments voluntary participation in rehabilitative programs, perhaps reflecting a judgment that compulsory programs are likely to be ineffective or dangerous (or perhaps both). In any case, some further argument is necessary to undercut rehabilitation as a goal (and perhaps a measure) of punishment. As Rick Carlson points out: "The retribution model is appealing in its simplicity. But it requires a rationale that transcends its character as a reaction to the rehabilitation model's failure. The Committee for the Study of Incarceration... struggled with this problem and finally settled on a sort of 'natural justice' rationale..." (1976:111). It is the natural justice rationale that does valuable service in (1) raising doubts about our present rehabilitative capabilities and (2) warning us to avoid possible future abuses of gains in rehabilitative technology. But it is also the natural justice rationale that leaves open the question of just why, if rehabilitation worked, a consequent disparity of sentences would be less just than a desert-based presumptive sentence system. (Don't the requirements of justice, one might argue, demand that we transcend the merely punitive aims of punishment?)

THE IMPLICATIONS OF PRESENT PRACTICE
THE NEED FOR PROBATION

When the principle of desert is conjoined with a presumptive sentence schedule, special problems result. Any sentence schedule encounters obstacles. Let us take as an example the schedule proposed by the Twentieth Century Fund's Task Force on Criminal Sentencing (1976:19-29, 37-61). While that structure is not based on desert theory, it may serve to show how a fleshed-out schedule would work and may show difficulties with presumptive sentence schemes generally, whether or not they are based on desert theory. First, there are specific difficulties with the structure itself (such as the fact that subtle distinctions in the fact situations defining most of the major crime grades create great differences in punishment). Second, there are difficulties with presumptive sentence schedules generally, wherein an increase in prosecutorial discretion, sentence severity, and sentence disparity are the price one might pay for removing discretion from the judge. The schedule proposed by the Twentieth Century Fund contains eight offenses with a total of thirty-one levels or grades, with probation prescribed for six offense grades (and no imprisonment including probation for seven). There is not much room for probation on this schedule. Only two grades of larceny prescribe probation, and one level each of bribery, burglary, and homicide provide for probation. The Uniform Crime Reports for 1975 (1976) indicate that the most frequent crimes are property crimes (by a 10 to 1 ratio over violent crimes). Crimes of murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assault total 1,026,280, while crimes of burglary, larceny, theft, and motor vehicle theft total 10,230,300. Statistics from California state courts show that the greatest number of offenders granted probation in that system are those who commit crimes such as burglary, theft, and auto theft. In California's superior courts, the offenses for which probation was most often granted (from a total of 35,766) are as follows: drugs, 14,771; burglary, 4,588; theft, 3,834; forgery and checks, 2,815; auto theft, 1,696 (California, 1971:18). It would appear, then, that the presumptive sentence schedule proposed by the Twentieth Century Fund would issue into a tension between a high level of imprisonments and the need (and present practice) for high levels of probation. It is likely that a desert-based schedule would have similar results.
especially since it is difficult to conceive of nonimprisonment measures (such as probation) as capable of measurement on a scale of deserts (that is, there may be psychological difficulties in conceiving probation as deserved).

FINAL CONSIDERATIONS

The danger inherent in the scheme of Doing Justice in the potential misuse of desert to make presumptive sentences appear just, appropriate, and precise. What may be an otherwise ambiguous scheme can be given the semblance of clarity and precision through the appeal to, and invocation of, desert. While we should be concerned with desert at all stages of the criminal justice process, we must not be misled into believing that we have discovered an accurate sentencing principle. And an overly casual use of the term "deserves" is conclusory in such a manner as to block inquiry precisely at the point at which it should begin. While desert may serve as a valuable limiting principle, keeping us aware of fairness questions, it is much less instructive as a fixer of presumptive sentences.

This discussion points us to a fundamental limitation of desert as a punishment principle. Sentences appropriate to both rehabilitative and deterrent purposes are capable (in theory) of being precise and accurately established (although this is not to deny the present speculative status of both of these punishment theories). Theoretically, we could determine through empirical study the length of time needed to rehabilitate certain offenders and the length of imprisonment necessary to deter effectively. But desert allows no such measure. As Nigel Walker argues, "the difficulties of assessing reductive [deterrent] efficacy are practical rather than theoretical, and are therefore not impossible to overcome... whereas the difficulties of assessing retributive accuracy are theoretical, fundamental, and inescapable" (1966:15).

This is not to say that we should therefore measure sentences according to rehabilitative or deterrent necessities. The point is simply to show a difficulty with desert as a determinant. The moral necessity of research raises a serious obstacle to desert-based presumptive sentence structures; such research may tell us much about deterrence and rehabilitation, but it will tell us little about desert, unless we mean to do nothing more than conduct an opinion poll.

Desert-based presumptive sentences are empirically nonverifiable hypotheses.

Other measurement difficulties arise in the notion of a desert schedule. How do we grade murder? What differentia do we post to establish species of the offense? Further, suppose an offender is to be punished on the desert schedule. He deserves two years' imprisonment, and is sent to a work-release program. Since this program is less severe than a typical prison term, does our offender deserve more than two years of imprisonment, or to make up the difference? Again, take the case of two prisons, one with conditions much harsher than the other. May an offender who deserves two years fairly be said to deserve the term, irrespective of which prison it must be served in? Must the difference be accounted for in sentencing? These and other difficulties arise in part from the fact that on the desert schedule it is, in a sense, the offense rather than the offender whose deserts are relevant.

A side effect of the establishment of a structure such as that proposed in Doing Justice may be that it excuses inquiry into the question of appropriate sentences generally, and may divert attention from research into humane yet effective rehabilitation programs and techniques. At all events, it may well be the case that desert, as used by von Hirsch, does not offer a principled alternative to the balancing of punishment aims (p. 75) in decisions about punishment.

Discussions of punishment are often circumscribed by a needlessly limited view of penal measures. There are alternatives to prison. With desert, perhaps more than other punishment theories, there is too often a tendency to assume that prison is the only punitive means (in the only desert). Consequently, we enlarge the class of those who are imprisonable. It is not difficult to grasp the dangers of such enlargement.

A real tension resides in the relation of desert and rehabilitation, wherein desert calls for fixed imprisonment, and rehabilitation allows for imprisonment reductions. The starting point of analysis for the committee consisted of the question whether incarceration could be defended at all. The resultant desert schedule would likely issue into high incarcerative levels. Further, the committee seems to reject incapacitation as a punishment theory, yet proposes a structure that encourages incapacitative measures generally.

There are great difficulties involved in discussions of punishment theories and structures. In the present case, no attempt has been made to deal directly and precisely with the concepts of desert and justice. It is perhaps a failure of Doing Justice that it invokes such concepts without coming to intellectual grips with them. (On the other hand, while one is tempted to ask how we might do justice unless we know what it is, it is at least possible that we may know it only through doing it.)

It is not my point to show the irrelevance of desert theory to punishment needs, or to show that the present system is not in need of broad and deep reappraisal and remaking. Nor is my point that desert or some other fairness principle is unnecessary in punishment decisions. It is rather that a principle such as desert may be abused, making presumptive sentences appear more just and appropriate than they are warranted.

I have attempted here to show the difficulties involved in a desert-based presumptive sentence schedule as well as some difficulties of desert theory generally (when used as a principle of punishment) and of presumptive sentence schedules generally. While the problem of sentence disparity is one of great human importance and morally compels a rapid and well-reasoned solution, it may be that appeals to our "sense of justice," without more, may issue into punishment systems at least as problem ridden as that which we now seek to reshape. It is clear that the idea of a desert-based determinate sentence scheme is one with fundamental theoretical problems (conceptual problems with desert theory and determine sentence structures) and practical problems (the impact on the criminal justice system, the playing out of the scheme in the real world of judges, prosecutors, prisons, and parole boards). A much more rigorously philosophical treatment of desert is necessary before it soundly may be used to ground a punishment schedule. It is just as clear that many of the difficulties pointed to (for example, those mentioned as general difficulties on page 40) arise on any determinate sentence schedule, and not merely on those that rely on desert theory. Whatever the resolution of the issues raised by this paper, it is not feasible to ask whether anyone deserves our present prisons.

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FOOTNOTES

1 F. Zimring shows that, while the aims and priorities behind a determinate sentence proposal may be worthwhile, the introduction of such a reform proposal into the legislative process may nevertheless do more harm than good (1976:12-13).

2 Cf. Zimring (1976) generally for a point more emphatic than this.

3 Compare this with Morris (1974:175), "The concept of desert is a necessary but not sufficient condition of the punishment of crime. Desert is, of course, not precisely quantifiable."
But if Kant's *Metaphysical Elements of Justice* (1965:101): "Only the Law of retribution can determinize exactly the kind and degree of punishment... All other standards fluctuate back and forth and, because extraneous considerations are mixed with them, they cannot be compatible with the principle of pure and strict legal justice."

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