

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1988

Model Penal Code Conference Transcript: Discussion Five

Albert Alschuler

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Albert Alschuler, "Model Penal Code Conference Transcript: Discussion Five," 19 Rutgers Law Journal 849 (1988).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

MODEL PENAL CODE CONFERENCE TRANSCRIPT—DISCUSSION FIVE

November 6, 1987

Editor's Note: After the presentations by Professor Norval Morris and Mr. Michael Tonry, the following discussion ensued:

PROFESSOR SCHWARTZ: I absolutely agree with Michael Tonry that the sentencing guidelines system renders at least Part II of the Code largely obsolete. I think our whole scheme there of dividing offenses into degrees, and our grading of theft, for example, was really a sentence guideline system.

I do disagree, Mike, about the Code not imposing any restraint. These are things I've been talking about, that were themselves outer boundaries for discretion of judge and jury. But the wave of reform rolls on. We are now in an era where much more precise constraints will be introduced.

So, there is a lot of constraint in the Model Penal Code on sentencing, but a lot more is coming and is coming in the form of guidelines, and that Model Penal Code II has to take account of this new development.

The other thing I want to say is that the main sanction for many crimes, of violence at least, ought to be disciplined work, not disciplined idleness, which is the characteristic of the prison system. We ought to have, in effect, penal factories and farms. I know we sort of draw back from that because the phrase "labor camps" comes into focus. But I wonder if either or both of you have views on the general principle that disciplined work is the best organizing principle for detention.

PROFESSOR MORRIS: I would say, it seems to be one important organizing principle. That was what I had in mind when I asked, "What is a prison?" And it seems to me that we have more hope of developing a greater diversity of institutional control mechanisms in which we may be able to obtain both minimal-maximal work and social contribution. As you know, one of the few things that prison administrators and prisoners agree on is that they would like more work.

PROFESSOR von HIRSCH: Just to follow up on what Michael Tonry was saying, it seems to me that there are two areas in which the debate has gone beyond the Model Penal Code. The initial question is whether there is to be some form of specific sentencing guidance. If there is,

the issue becomes the precise form of that guidance. Here, there are a number of different stopping places ranging from the most detailed kind of guidance which would be something like the Minnesota guidelines to something that gives more discretion to the appellate courts, such as the Canadian proposals. There's going to be a lot of continued debate, which there wasn't at the time of the Model Penal Code as to which of these formats is most useful.

The Model Penal Code was truly a multipurpose scheme. Almost everyone now writing, including Norval Morris and myself, also believes, in one or another fashion, in a multipurpose approach. But, because of the enormous discretion that the Code had, its drafters could be agnostic about the relative weight to be given to the various purposes. For example, the Code had a principle of desert in its clause about "not depreciating" the seriousness of the crime, and a principle of incapacitation in its clause about the defendant's likelihood of committing another crime. But it was totally unclear where the boundaries between these diverse principles lay. One of the things you've seen in the new guidelines is the attempt to develop principles of which purpose should be given the dominating role or what order you proceed in when you go from one to the other. For example, the Canadian proposal makes proportionality the dominant theme.

The one thing we can no longer afford to do is to say, well, there should be a mixture, but we won't decide what the proportions of that mixture are. That leads to bad cooking and bad law.

PROFESSOR MORRIS: At least in relation to the distinction of terms on prediction, the Model Penal Code clearly made prediction subservient to desert.

MR. DEL BUONO *to Professor Tonry*: You voiced concerns over the lack of specificity or more specificity in substantive definitions, and I think you also manifested some concern about how we might avoid rights to, say, jury trial or proof beyond a reasonable doubt where we move elements into the sentencing stage. Would you go so far as to recommend that we put everything relating to the antisocial nature of the current transaction in the definition of the crime as opposed to background elements?

PROFESSOR TONRY: No, no, but it's a question of a continuum, I suppose. We now have very, very broad generic definitions that carry with them relatively long sentence maximums, with no greater guidance than that.

What I would want to see is much greater specificity of sub-

categorizing — for example, eight category robbery, or five or six or seven, each of which bears with it real constraints on substantive liability of punishment.

I want to make the conviction matter in some substantive way. If there were seven grades of robbery, sentence maximums were one, two, three, four, five, six, and seven years for seven grades, and a sentencing guidelines commission developed guidelines within those constraints, then the decision by a judge or jury to convict of grade two, or a guilty plea to grade two, would constrain the limit. Within those statutory limits, judges can then make appropriate decisions, including ignoring the guidelines proper.

PROFESSOR DASH: Doesn't that position ignore the existence of a prosecutor? You assume that everything automatically goes through, according to your classifications of robbery. The prosecutor makes decisions. He can play all kinds of games with that.

PROFESSOR TONRY: Although it may seem naive, I don't think it's inevitable that prosecutors will forever and always cynically manipulate decision standards to achieve outcomes that are inconsistent with the broad content of those standards.

And I don't believe it's impossible that prosecutorial discretion or decision making will itself be regulated. Mike Bradbury, the prosecutor in Ventura County, California, claims to have abolished plea bargains; he started in the late seventies and by golly it's in place, and defense lawyers don't ask for it anymore. And there are other jurisdictions, such as Seattle, that claim for ten years to have had a meaningful system of constraint, on prosecutorial decision making.

Unless you assume that prosecutors are raging bulls and will ignore the legislation underlying guidelines decisions and ignore the policy decisions embodied in the guidelines system, then we should be prepared to assume that prosecutors will get their own houses in order.

That's an entirely viable prospect.

PROFESSOR ALSCHULER: To create a more just sentencing system, we must develop more precise definitions of offenses and more refined categories of crime. But we must also discover more precise ways of talking about offenders. In defining crimes, we customarily look primarily to social harm or the risk of harm. We look only a little bit at the offender. We examine his or her conscious mental state, and that's about it. We consider offender characteristics, not when we define crime, but when we get to sentencing. And something has been happening that we haven't

considered enough as the sentencing reform movement has progressed. We have been moving towards a new penal philosophy in which what matters even at the sentencing stage is simply how much harm a person has produced.

In sentencing guidelines, we set a precise price for every harm. Yet there is nothing in the rhetoric of the sentencing reform movement that should have led to this shift of focus from the offender to the offense. We've talked about how we want to reduce discretion. Fine. Let's do that, but let's do it by taking into account more precisely those same characteristics that we have taken into account in the past. Why should offender-based characteristics drop out simply because we've decided that we like certainty in sentencing?

Some of us have also said that we want to move away from rehabilitation and toward just deserts. Again, the goal doesn't require abandoning our traditional focus on the offender. Culpability or desert doesn't depend primarily on the harm produced. People who produce identical harms differ greatly in culpability — in what they “justly deserve.”

I think that part of the emerging shift in penal philosophy results from the impoverishment of our language. We don't know how to talk about offender and situational characteristics very well. We can't describe precisely how we have taken offender characteristics and situational characteristics into account in the past.

Studies of sentencing suggest that there's a difference between stranger and nonstranger crime. When two people know each other and one gets angry, we treat this offender less severely than we would treat a person who committed the same crime against a stranger on a streetcorner.

We regard stranger and nonstranger crimes very differently. But if we said that in our guidelines — if we wrote explicitly that stranger crime shall automatically be punished more severely than nonstranger crime — we might recoil. We would suddenly realize the imprecision of the language that we regularly use.

Is the stranger/nonstranger distinction a surrogate for something else? Is the real distinction between instrumental and expressive crime or between profit-seeking and non-profit seeking crime? A little reflection suggests that those concepts don't work any better. And so we throw up our hands and stop talking about offender and situational characteristics. As we move towards certainty and just deserts, we move away from the offender — more than we planned to do and much more than we should.

With drug offenses, our guidelines speak about the quantity of drugs. With theft offenses, they speak about the value of the stolen property. We

get very, very refined about the harm. But we don't get very refined about the defendant's characteristics, perhaps because these characteristics are so difficult to describe. We need to develop for Model Penal Code II a new vocabulary, so that we can achieve the goals of certainty and just deserts without moving all the way to inhumane crime tariffs.

PROFESSOR TONRY: You stood up and knocked down a strawman and a tinman. The tinman is the Federal Sentencing Guidelines Commission. I don't think anybody in this room who has worked with the Federal Sentencing Guidelines Commission to any significant extent can disagree with what you just said. But because the Federal Sentencing Guidelines Commission developed this awkward lumbering harm-based scheme — it looked much more formidable than it is — doesn't mean that sentencing guidelines have to be that way.

The strawman is the rigid mechanistic harm-based notion that sentencing guidelines cannot incorporate all kinds of information about people and cannot take them into account. I could easily imagine there would be spirited debate on the question of whether there would be separate guidelines on standard mitigating or aggravating factors for stranger and nonstranger crimes, controlling for the nature of the harm and nature of mental state. You could do those kinds of things.

And certainly the better sentencing guidelines that are in existence now, at least as they are conceptualized, are ones in which discretion is constrained within bounds, relying on harms and actual offense behavior or various measures of criminal history. But the statutes often have Model Penal Code type lists of approved and disapproved bases for not following the presumption. They merely require, if you don't follow the presumption, you say why, and that you be accountable for those reasons to somebody else. That's the model. It doesn't seem to me it's a model that's as rigid or harm-centered as what you described.

Sentencing guidelines are neutral. The Pennsylvania Sentencing Commission used guidelines to increase sentencing severity. The Federal Sentencing Commission appears to increase sentencing severity; Minnesota and Washington appear to increase sentences for violent degrees but to decrease them for other crimes. The Sentencing Commission is a mechanism that by its logic forces attention to proportionality and equality concerns, even if you don't begin with the just deserts premise.

Editor's Note: At this point, the Conference adjourned for the evening.