Blakely, *Booker*, and the Future of Sentencing

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The Supreme Court's decisions in *Blakely v. Washington*[1] and *United States v. Booker*[2] have spawned renewed debate about sentencing. Although there are several obvious and relatively easy fixes to the disruption occasioned by these decisions,[3] various camps have sensed some threat to their objectives and have mobilized to advance their favored outcomes. Painting with a broad brush, and with due regard to the actual diversity of views on all such subjects, the basic players are these: organized crime victims, prosecutors, judges, defense attorneys, academia,[4] and the guidelines movement.[5] For analytical purposes, it makes sense to group them by their distinct objectives: advocates for increased severity, advocates for restored discretion, and advocates for sentencing guidelines.

Though diverse in their goals and perceptions, the major players share this flaw: They all refuse to embrace "public safety" (or "crime control") goals as a primary and coherent purpose of sentencing. In so doing, they ultimately defeat their own legitimate purposes.

This defect is perhaps most obvious in the ongoing efforts of guidelines advocates to enact sentencing rules to normalize punishment decisions. Guidelines as they now exist make no meaningful effort at crime reduction. They are organized around blameworthiness, criminal history, and prison resources.[6] To be sure, by the accident that worse crimes and worse records crudely predict greater risk for those sentenced to longer terms, guidelines very roughly amount to risk assessment and to this extent serve public safety.[7] Because they do so by accident and with tremendous imprecision, guidelines do a far worse job of allocating correctional resources than would best efforts at crime reduction. In common with the sentencing culture that they codify, guidelines continue to produce abysmal recidivism.[8] Promoting such guidelines will only cultivate the tragic cycle of misdirected sentencing decisions and avoidable victimizations. Without responsible attention to crime reduction, guidelines will inevitably perpetuate legislative efforts to adopt further restrictions on sentencing discretion and persistent demands for draconian sentencing.

I will explore the counterproductive efforts of each of the major players struggling to influence sentencing. I will focus on the guidelines movement, which has influenced many state systems and fuels the current ALI project to revise the Model Penal Code sentencing provisions around guidelines.[9] I do so for two reasons: First, the leader of the ALI effort, Prof. Kevin Reitz, conveniently collects the arguments for structuring guidelines around just deserts to the exclusion of crime reduction. Second, the tragedy of the project's present misdirection is multiplied by its diversion of voices that should be leading criminal justice toward a far higher goal than merely ordered just deserts.

I. The Major Players and Their Positions

The following sections briefly describe the goals and shortcomings of each of the three major players: advocates for increased severity, advocates for restored discretion, and advocates for sentencing guidelines.

A. Advocates for Increased Severity

The fear of most vocal crime victims and prosecutors is that *Blakely* and *Booker* will somehow restore sentencing discretion. They believe that judicial discretion generally results in lenient sentences, that offenders deserve severity, and that severity best serves public safety. They agree with the proponents of guidelines that we should not attempt to rely on programs or treatment to reduce crime because they are skeptical of research and academia. They disagree with most guidelines proponents because they believe that incapacitation is an effective means by which to prevent criminal behavior by those we incarcerate and is justified for reasons in addition to punishment.

These advocates for severity originally opposed sentencing guidelines as codifying leniency but repeatedly succeeded in creating an overlay of substantially enhanced mandatory and presumptive minimum sentences[10]—an overlay that is in no way threatened by *Blakely* and *Booker*. Although they would generally prefer that responses to *Blakely* and *Booker* raise the ceilings and perhaps the floors on the available sentences for any given conviction of interest, when faced with the political realities of budget restraints, they will probably be satisfied with a response that continues guidelines and other restraints on judicial discretion.

The advocates for increased severity most urgently and legitimately seek to reduce victimization. Adamantly convinced that nothing short of death or incarceration reduces

Federal Sentencing Reporter, Vol. 17, No. 4, pp. 243–248, ISSN 1053-9867 electronic ISSN 1533-9867

criminal behavior, they will pursue any response to *Blakely* that facilitates enhanced prison terms and reduces judicial discretion to shorten or avoid prison. The tragedy is that by their strategy, they contribute to our continued inability to make criminal justice responsibly pursue crime reduction, while discrediting in the eyes of other players the public safety value of incarceration by equating it with punitiveness and retribution. By pursuing increased severity as a matter of faith, they will perpetuate guidelines that accomplish crime reduction largely by accident and that yield at least some victimizations that smarter sentencing would prevent.

B. Advocates for Increased Discretion

Most judges believe that sentencing discretion is inherent in the judicial function and initially opposed guidelines as diminishing our role. Some of us, however, welcomed relief from the formidable challenge of vast discretion in the face of essentially useless statutory "shopping lists" of unprioritized sentencing objectives[11] and a complete lack of useful information or advocacy about how best to accomplish *any* of those objectives. I sense that many state judges have become comfortable with the ordered flexibility of presumptive guidelines adopted by a number of states. Nonetheless, most judges would welcome the return of increased discretion exemplified by *Booker*, particularly if it rolled back such assaults on discretion as mandatory minimum and three-strikes provisions—and the increasingly restrictive federal guidelines. Most would also applaud a return to the nearly unfettered discretion of the pre-guidelines era. Most defense attorneys and their allies would prefer a return to wider discretion as well. If they remember the disparity of sentences that predated guidelines, they probably agree with their institutional opponents—vocal victims and prosecutors—that the strikingly severe sentences of unbridled sentencing discretion were unusual and that increased discretion ultimately favors leniency. In any event, many advocates for restored discretion fear that the legislative response to *Blakely* and *Booker* will be increased floors and ceilings, further reduced discretion, and, perhaps, more mandatory minimum sentences.

The advocates for discretion are least likely to prevail in shaping a response to *Blakely* and *Booker*. Because the proponents of rehabilitation were largely ostracized from the debate in the last quarter century, advocates for discretion as a right of judicial office or on behalf of criminal defendants lack the clout to shape policy. Their only ally is fiscal restraint (a much stronger ally in most states than in Congress).

The irony of their position is that a return to discretion without directing and informing that discretion toward crime reduction would surely produce examples of leniency that would be portrayed in the media as outrageous and would continue the abysmal public safety results of the same mainstream sentencing that guidelines seek to encourage. Either way, since the combined efforts of all voices have repeatedly enabled the public misconception that severity and safety are synonymous, the result would be precisely what these advocates least favor: increased demand for draconian sentencing provisions and further limitations on judicial discretion.

C. Advocates for Sentencing Guidelines

Blakely and *Booker* caused shock waves among those academics and practitioners arrayed around Professor Kevin Reitz's ongoing efforts to transform the Model Penal Code into a vehicle for spreading sentencing guidelines among the states. Although *Booker* left federal guidelines in place as "advisory," many members of this community perceive that result as fraught with danger. They fear that *Booker* will encourage non-guideline states to forgo guidelines, and guideline states to retreat from "mandatory" guidelines. They see merely advisory guidelines as inadequate to combat either sentencing disparity or populist demands for severity. And they correctly understand that *Blakely* and *Booker* leave their movement at a crossroads, with vocal advocates for enactment of mandatory sentences on the one hand and those seeking elimination or emasculation of guidelines on the other.

In a nutshell, most guidelines proponents abhor what they see as the rise of punitivism and mass incarceration.[12] They tend to favor judicial discretion but pragmatically concede that a return to the broad discretion of indeterminate sentencing is unlikely. They endorse guidelines as a way both to attack sentencing disparity and to moderate the trend toward punitivism and mass incarceration. In their eyes, the guidelines provide a buffer against the enactment of additional mandatory sentences. Their hope is that sentencing commissions and expanded appellate review of judicial departures would accomplish both goals—reduced disparity and, indirectly, moderated punitivism. Even when they fail to moderate punitivism, they insist that guidelines achieve consistency worthy of their vigorous defense.

Professor Reitz and many other guidelines advocates endorse a penological theory—"limiting retributivism"—as a central feature of his revision to the Model Penal Code.[13] Professor Reitz invokes the leading advocate of limiting retributivism, Norval Morris, to insist that proportional just deserts be the dominant purpose of punishment.[14] These advocates reject crime reduction as a significant rationale for sentencing[15] (except, perhaps, in some exceptional "layers" of crime[16]), because they fear that a public safety focus would further encourage incarceration. Some believe that just deserts is the only appropriate goal of punishment, but most endorse an exclusive role for ordered just deserts because they believe it a more fair and ultimately more lenient metric for assessing punishment than crime reduction.

Guidelines advocates are likely to succeed in preserving mandatory state guidelines at least in the short term, as they have as de facto allies those who are most concerned with budgets and who favor guidelines on the

managerial basis that they make prison population predictions more reliable. But their strategy will fail either to reduce disparity or to moderate punitiveness.

Understanding why that is so is critically important, and it is the subject of the following sections.

II. Guidelines, Punitiveness, and Disparity

The decision by leading guidelines advocates to embrace limited just deserts to the exclusion of meaningful pursuit of crime reduction has led to unexpected and still unappreciated problems. It has failed to achieve satisfactory reductions in disparity or to moderate punitiveness. To achieve either goal, guidelines advocates will need to accept that meaningful pursuit of crime reduction must be the central function of sentencing, and limited just deserts should merely provide outer limitations on sanctions based on accepted notions of proportionality.

A. Guidelines and Punitiveness

The contradiction inherent in resisting sentencing punitiveness with a just-deserts ideology is patent. Because guidelines proponents seek refuge from mass incarceration in ordered just deserts, they necessarily endorse the notion that retribution should be the main concern in sentencing. Because they disparage public safety as a guiding principle in sentencing, they have no standing to object that the public responds to real or perceived failures of sentencing to achieve crime reduction by seeking to increase the severity of sentences. Because just deserts is a profoundly democratic notion, deliberative sentencing commissions are no match for a public we teach to equate safety with severity—with the result that guidelines are easily and dramatically overrun with ballot measures and legislation raising guideline floors and ceilings and imposing mandatory minimum sentences. As a result, if guidelines advocates save guidelines without aiming them more responsibly at crime reduction, the resulting continuing recidivism will ensure continued pressure to increase sentences and reduce judicial discretion.

None of this is necessary. The public is generally far more concerned with crime reduction and rehabilitation than with punishment for its own sake.[17] It is far more feasible to seek resonance with the "thoughts and impulses" of "responsible officials"[18] by making best efforts at crime reduction than by attempting to regulate just deserts. Moreover, 75 to 80 percent of sentencing occurs in a context totally below the public radar and in which the prospect of lengthy incapacitation is simply nonexistent as a matter of resources. This is precisely the context in which incapacitation is least likely to equate with public safety and rigorous attention to impacting the offender's likely future behavior is most critical.

B. Disparity and Illusion

Guidelines advocates also undermine their ability to reduce disparity by embracing a retributive rationale of punishment. This conclusion may appear to fly in the face of the common view that the guidelines movement has greatly reduced sentencing disparity. Guidelines have some worthy regularizing influence, but they pursue consistency largely as charade.[19] They largely pretend to treat like alike, and just deserts is hardly a sufficiently precise metric upon which to posit consistency.

Guidelines construct categories with gross divisions and pretend to prescribe equal sentences for similarly situated offenders largely by ignoring differences among crimes and offenders. For example, Oregon's guidelines ignore an offender's degree of involvement in a crime and do not ask whether a crime is the product of psychopathy. Thus the "presumptive" sentence ranges necessarily prescribe similar sentences in spite of real differences among offenders and offenses. To accommodate such differences, courts must employ notions of "aggravation" or "mitigation" and consider a departure—which inherently relaxes any normalizing influence of guidelines. Moreover, because the decisions are based on just deserts,[20] they necessarily invoke a metric that is at best wildly imprecise.[21] It should come as no surprise, therefore, that even with prescribed presumptive and limited departure sentences, guidelines have proven woefully inadequate to eliminate unjust disparity in sentencing. They have proven particularly inadequate as a means to eradicate racial disparity.[22]

Infusing guidelines with a crime reduction rationale would provide a vastly improved metric for avoiding disparity within the wide deontological limits that guidelines rightly pursue. By responsible assessment of those aspects of criminal acts, careers, and offenders that help us rationally select the disposition most likely to serve public safety, we should certainly improve our ability to treat like alike. Instead of pretending that blameworthiness meaningfully distinguishes among offenders within the limits of proportionality, we should strive to identify variations among them that help us choose dispositions with the greatest likelihood of success.

There is nothing inconsistent or unfair about recognizing that offenders for whom public safety is best achieved by disparate dispositions are to this important extent not "alike" and should be treated differently. That an identical crime can be committed by a psychopath or by an addict susceptible to recovery (with equal criminal histories) does not compel identical dispositions as a matter of fairness. Thus the existing Model Penal Code contemplates awareness of "individualization" in treatment.[23] Varying dispositions—within an acceptable range of severity in light of traditional notions of proportionality—can indeed treat like alike without compromising public safety.

III. The Future of the Guidelines Movement

Because their purpose is to resist excessive incarceration, guidelines advocates reject the notion that incapacitation should be used to prevent crime, but they join the voices of advocates for severity in disparaging as well all forms of treatment and alternative sanctions in order to seek

refuge in just deserts. They resist constructing guidelines based on best efforts to reduce criminal behavior, and they reject risk assessment as imprecise and unfair.[24] But the flaws in risk assessment are "trivial compared to the calibration chores that afflict a retributivist regime."[25] Critically, guidelines advocates do not pursue improvement in the precision with which we pursue rehabilitation, do not propose that we do a better job of reducing offenders' subsequent criminal behavior, and do not support allocating prison or jail beds in pursuit of public safety.

Guidelines advocates fail to appreciate that every sentencing disposition has an impact on public safety. Every decision to use jail, prison, probation, alternative sanctions, treatment, or even fines either does or does not prevent the offender's next crime. Incarceration unavoidably reduces an offender's risk to the public while the offender is in custody, yet most proponents of guidelines resist the notion that it is appropriate to use incapacitation as a public safety tool.[26] Guidelines advocates damage their credibility with practitioners, policy makers, and those who favor severity by ignoring the obvious, and thus they needlessly enhance the "nothing works" mantra of the advocates for severity, who really mean "nothing works but prison."

Sentencing by just deserts alone is surely no kinder to offenders (or their potential victims) than sentencing guided at least in part by risk assessment and other responsible attempts at evidence-driven dispositions. The crucial question is whether rigorous attempts at best practices including risk assessment, with attendant protections for fairness and accuracy, would do a better job of allocating incapacitation and other dispositions where they are most needed than sentences imposed with no such rigorous attempt.[27] Avoiding risk assessment for fear of "false positives" does not reduce false positives; it renames and compounds them.

This analysis in a National Institute of Justice study articulates the obvious:

> The judges' diverse selection purposes for sentencing individuals support the need for greater clarity and consistency in sentencing aims. The conflict between utilitarian and retributive perspectives was apparent in this study, despite a general preference on the part of judges for utilitarian crime control. Clarity could be increased if there were an internally consistent sentencing theory and if it were consistently applied. Despite their modest validity, the judges' subjective risk judgments substantially influenced their sentencing choices. The use of more formal, empirically derived methods would enhance sentencing rationality when sentencing theory incorporates risk as a relevant and justifiable consideration.[28]

Virginia's lonely attempt to pursue crime reduction by incorporating risk assessment within guidelines[29] is an impressive step in the right direction. Risk assessment is widely and successfully used in probation and postprison supervision and pretrial release decisions. It is surely imperfect, but modern risk assessment dwarfs the rationality of sentencing unaided by risk assessment. As long as the resulting sentence is within legal limits and not disproportionate in its severity, the employment of risk assessment is just as long as it correctly identifies offenders at higher or lower *risk* of reoffending; certainty is not a perquisite for any sentence. Risk management is surely among our highest callings.

IV. Conclusion

In the end, guidelines advocates began with hopes of moderating punitivism but settle for the illusion of consistency. Insistent that they have achieved meaningful reform, they defend their edifice against the beneficial infusion of rationality much as Colonel Nicholson defended his bridge on the River Kwai[30]: enamored by the structure, blind to its function, and disloyal to their own objectives.

The prospects for the guidelines movement need not be so bleak. If the American Law Institute uses the opportunity afforded by *Blakely* and *Booker* to redirect the MPC revision efforts toward crime reduction, ALI might still champion profound improvement in criminal law. A change in the MPC's orientation requires no abandonment of the general notion of guidelines, but it does require rigorous incorporation of best efforts at crime reduction within the limits of proportionality and resources. ALI could transform criminal justice into a responsible and effective institution of public safety. That result would serve the legitimate interests of all whose voices are now heard in the aftermath of *Booker* and *Blakely* and all who would seek to reduce cruelty, victimization, disparity, and waste.

Notes

1 124 S. Ct. 2531 (2004).

2 125 S. Ct. 738 (2005).

3 From the outset of the *Blakely* turmoil, there were obvious responses: leave criminal law in its pre-guidelines condition (many states have not yet adopted guidelines); render guidelines advisory (as in *Booker*); alter discretionary ranges within guidelines to increase the range of discretion; tweak specific statutes to require or permit more severe sentences for some crimes without new facts; or (as in Kansas) simply accommodate the jury trial right these cases vindicate. To be sure, there are details to be addressed, but these details are no different from the usual grist of the criminal law working groups that are ubiquitous in jurisdictions with a healthy legislative process.

4 There is a sector of academia that I do not include: the research and criminology sector. This sector makes no effort to impact, and is generally ignored by, sentencing practitioners. Michael Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link*, 1 OHIO STATE JOURNAL OF CRIMINAL LAW 671, 675–676 (2004). This separation can be overcome. *See* Michael Marcus, *Sentencing Support Tools and Probation in Multnomah County*, Executive Review (Spring 2004), available under "Articles on Smart Sentencing" at http://www.smartsentencing.com (site maintained by the author).

[5] Another set of players at the state and local level—legislators and administrators concerned with resource limitations—is largely focused on social and spending priorities and is not very worked up about *Blakely*. From their point of view, the trains will continue to run—wherever they're headed.

[6] In Oregon, for example, the presumptive sentence is determined by the "crime seriousness" associated with the offense and related circumstances, and the "criminal history" of the offender. See OAR 213-004-0001 and http://www.ocjc.state.or.us/SGGrid.htm (last accessed January 22, 2005). The Oregon Public Safety Review Steering Committee (appointed by Oregon's governor) on October 8, 2004, included this proposal in its recommendations:

> The Oregon Criminal Justice Commission shall examine the feasibility and means of incorporating consideration of reducing criminal conduct and the crime rate into Oregon's felony sentencing guidelines.

The recommendations are available at http://www.ocjc.state.or.us/PSReview/viewtfrec.php?tf=AS (last accessed January 22, 2005).

[7] A laudable first step and notable exception to the blindness of guidelines to crime reduction is Virginia's recent incorporation of offender risk assessment into its sentencing guidelines. Risk assessment instruments generally begin with past behavior—often as documented by conviction history—and then progress through a much longer list of variables upon which to construct an assessment of the risk of future criminal behavior. *See* BRIAN J. STROM, MATTHEW KLEIMAN, FRED CHEESMAN, II, RANDALL M. HANSEN, NEAL B. KAUDER, OFFENDER RISK ASSESSMENT IN VIRGINIA—A THREE-STAGE EVALUATION: PROCESS OF SENTENCING REFORM, EMPIRICAL STUDY OF DIVERSION AND RECIDIVISM, BENEFIT-COST ANALYSIS (The National Center for State Courts and the Virginia Criminal Sentencing Commission 2002), available at http://www.vcsc.state.va.us/risk_off_rpt.pdf (last accessed January 22, 2005); VA. CODE ANN. § 17.1-803(5), (6).

[8] Although some publish lower rates by ignoring all but new felony convictions, actual recidivism rates usually run at 65 to 75 percent or higher. Michael Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 AM. J. CRIM. LAW 135, 138–139 (2003) (hereinafter *Comments*); Michael Marcus, *Sentencing in the Temple of Denunciation*, *supra* note 4, at 672–73.

[9] Kevin R. Reitz, Reporter, *Model Penal Code: Sentencing—Preliminary Draft No. 3* (May 28, 2004) (hereinafter *Third Draft*). I have been a persistent critic. *Comments*, *supra* note 8.

[10] Oregon's adopted sentencing guidelines initially by 1989 Or. Laws ch. 790, § 87. From the same legislative session, 1989 Or. Laws ch. 1, §§ 2 & 3, and ch 790, § 82, required previous mandatory "gun" minimum sentences to trump guideline sentences and required "determinate" sentences without reduction, leave, or parole for certain felonies if committed by offenders with similar prior convictions ("Denny Smith" sentences). In 1995, Oregon voters adopted mandatory minimum sentences for a similar range of serious felonies ("Ballot Measure 11," 1995 Or. Laws ch. 2), codified at ORS 317.700, *et seq*). In 1996 (effective July 1997), Oregon legislated 13- and 19-month presumptive sentences (to override lower presumptive sentences in the guidelines) for certain "repeat property offenders." ORS 137.717, 1996 Or Laws ch 3, § 1. Oregon is hardly alone in this experience. Compare, for example, J. Clark, J. Austin, & D. Henry, *"Three Strikes and You're Out": A Review of State Legislation* 1 (U.S. Dept. of Justice, National Institute of Justice, Sept. 1997), http://www.ncjrs.org/pdffiles/165369.pdf (last accessed January 24, 2005) *with* ARK. CODE ANN. § 16-90-804 (Supp 2003); KAN. STAT. ANN. § 21-4701, et seq (2003); FLA. STAT. § 9210016 (2003); NC GEN. STAT. § 15A-134016 (Lexis 2003); 204 PA. CODE § 303, *et seq* (2004), reproduced following 42 PA. CONS. STAT. ANN. § 9721 (Purden Supp. 2004).

[11] Kevin R. Reitz, Reporter, *Model Penal Code: Sentencing—Preliminary Draft No. 1* at 10 (American Law Institute, August 26, 2002) (hereinafter *First Draft*). Professor Reitz correctly criticizes sentencing purpose statutes modeled after the existing Model Penal Code provision as "decoration" because they amount to mere proclamations of the many desirable effects of sentencing with no guidance whatever as to how to craft a sentence likely to achieve any of them.

[12] The rise of mass incarceration followed the apparent growth of crime and the proliferation of academic skepticism about the efficacy of a medical model of corrections. For example, Richard S. Frase, *Sentencing Guidelines in Minnesota: 1978-2003*, *in* MICHAEL TONRY, ED., CRIME AND JUSTICE: A REVIEW OF RESEARCH, vol. 32 (2004); Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT. REP. 69 (1999); KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

[13] *Third Draft*, *supra* note 9.

[14] This is arguably a distortion of Morris's views. Morris himself was concerned with assigning a role to just deserts rather than displacing other sentencing purposes. As Morris writes, "The concept of 'just desert' sets the maximum and minimum of the sentence that may be imposed for any offense and helps to define the punishment relationships between offenses; it does not give any more fine-tuning to the appropriate sentence than that. The fine-tuning is to be done on utilitarian principles." NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 199 (U. Chicago Press, 1982). *See also* NORVAL MORRIS & GORDON HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 245 (1970) ("If the evolution of criminal sanctions is to be adapted to the needs of community protection, it is essential that we evaluate different correctional methods in their application to different categories of offenders. . . . We must know which of our available methods works best with a range of classifications of type of criminal.").

[15] Prof. Reitz's approach is this: reject as objectives deterrence, incapacitation, and rehabilitation unless there is a "realistic prospect of success," but pursue limited retribution in all cases with no such qualification. Proposed § 1.02(2), *Third Draft*, *supra* note 9, at 4–17; *Comments*, *supra* note 8, at 140–49.

[16] *First Draft*, *supra* note 11, at 30.

[17] *Comments*, *supra* note 8, at 145–46. The arguments in favor of Oregon's "Ballot Measure 11" mandatory minimum sentences stressed that increased incapacitation prevents crimes while offenders are inside, contributes to public safety through enhanced general deterrence, and makes "Oregon a safer place to live." Proponents cited a RAND Corporation study estimating that incapacitating persistent offenders saves far more than it costs—probably a reference to Peter W. Greenwood et al., THREE STRIKES AND YOU'RE OUT: ESTIMATING BENEFITS AND COSTS OF CALIFORNIA'S NEW MANDATORY-SENTENCING LAW (Santa Monica: RAND Corporation, 1994). *Oregon 1994 General Election Voters' Pamphlet* at 54–55 (Oregon Secretary of State, 1994).

[18] *Third Draft*, *supra* note 9, at 9.

[19] *Comments*, *supra* note 8, at 155, n. 66. And, as the author of "Limiting Retributivism" argued: "Treating like cases alike is by no means a categorical imperative of justice; it is merely one of several interacting, guiding principles of justice to be accorded respect up to the point that it decreases community protection or increases individual suffering without sufficiently compensating social advantage." NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 209 (1982).

[20] *Aggravation* and *mitigation* are, of course, terms of desert, not public safety and not science. Science would speak of such concepts as criminogenic factors, risk assessment, state of denial, psychological evaluation, and so forth.

[21] As Prof. Reitz himself notes, "It is difficult to overstate this problem. People can disagree wildly about the appropriate punishment value that ought to attach morally to a given set of facts—and they can also disagree about the set of facts that ought to be consulted before assessing a moral judgment. . . . As Norval Morris has noted (allowing for poetic license and religious differences), this full extension of retributive analysis places the sentencing court in much the same position as Saint Peter at Heaven's Gate." *First Draft, supra* note 11, at 18, n. 25.

[22] U.S. Census figures show African-Americans at 1.6 percent of Oregon's population. United States Census Bureau, *Oregon Quick Facts*, http://quickfacts.census.gov/qfd/states/41000.html (last accessed February 1, 2005). After some 15 years of guidelines, Oregon Department of Corrections figures show African-Americans at 9.6 percent of the prison population. See Oregon Department of Corrections, *Inmate Population Profile for 01/01/2005*, http://egov.oregon.gov/DOC/RESRCH/docs/inmate_profile.pdf (last accessed February 1, 2005).

[23] Model Penal Code § 1.02(2)(e) recognizes that the purposes of sentencing provisions include allowing us "to differentiate among offenders with a view to a just individualization in their treatment." Oregon's version, based on the existing code, declares that sentencing should be "proportionate to the seriousness of offenses and . . . permit recognition of differences in rehabilitation possibilities among individual offenders." ORS 161.025(1)(f).

[24] Prof. Reitz and others cite authors who argue, in essence, that predicting future dangerousness is so imprecise that fairness should preclude the use of incapacitation to protect the public from offenders. *See, e.g.*, Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001); Allan Manson, SENTENCING AND PENAL POLICY IN CANADA (Toronto: Emond Montgomery, 2000); Norval Morris and Marc Miller, *Predictions of Dangerousness*, in MICHAEL TONRY & NORVAL MORRIS EDS., CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH, 1–50 (1985); Norval Morris, *On "Dangerousness" in the Judicial Process*, 39 RECORD OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK 102 (1982).

[25] Christopher Slobogin, *The Civilization of the Criminal Law*, VANDERBILT LAW REVIEW (forthcoming Spring 2005).

[26] Here the proponents of guidelines generally ally with those researchers and criminologists who look everywhere *except* at crime reduction *during* incapacitation to find evidence that incarceration increases crime. Sane sentencing and corrections require rigorous analysis—not mutual denial—to guide our choices between custodial and noncustodial sentences and among lengths of custody and supervision.

[27] Quite by accident, guidelines actually amount to a crude and imprecise risk assessment tool by escalating presumptive prison sentences with crime seriousness and criminal history. It is the common sense of this accident and managerial concern with resource management, rather than guidelines advocates' tortured justification for ignoring public safety, that explains the successes of the guidelines movement. Retribution, of course, has utilitarian functions: reinforcing social values, obviating vigilantism, and fostering confidence in and respect for institutions of lawful authority—the government, law enforcement, criminal justice, and the judiciary. The guidelines movement makes no attempt to demonstrate that sentences aimed at public safety would be less effective than those aimed solely at punishment in reinforcing social values or obviating vigilantism. Given the public's preference for crime reduction (note 17, *supra*), avoiding public safety undermines the goal of public confidence and respect for criminal law. And pretending that there is some issue about the success of incapacitation, at least in the short run, is to forfeit credibility in the discussion.

[28] Don M. Gottfredson, *Effects of Judges' Sentencing Decisions on Criminal Careers*, RESEARCH IN BRIEF, (National Institute of Justice, November 1999), http://www.ncjrs.org/pdffiles1/nij/178889.pdf (last accessed on January 23, 2005).

[29] Note 7, *supra*. Critics may argue that risk assessment would only increase prison terms. Virginia has already managed to reduce some terms for lower-risk offenders, and critics would be wise to understand that it takes some time to change a culture of just deserts. Virginia Criminal Sentencing Commission, 2004 ANNUAL REPORT, 58 available at http://www.vcsc.state.va.us/2004FULLAnnualReport.pdf (last accessed January 23, 2005).

[30] Pierre Boulle, LE PONT DE LA RIVIÈRE KWAI, popularized by the 1957 film *Bridge on the River Kwai*, in which Alec Guinness portrays a British officer forced as a Japanese World War II prisoner of war to build a bridge in aid of the Japanese war effort. Eventually enamored of his rationale (demonstrate British brilliance) and his product, he dies defending the bridge against an Allied attack. See http://www.imdb.com/title/tt0050212/ (last accessed January 22, 2005).