Comments on Preliminary Draft #5
August 27, 2007
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This commentary will address the arguments in favor of abolishing parole release discretion, the use of risk assessment, and some minor suggestions on several specific provisions. I will also correct for the record some erroneous implications aimed at our sentencing support tools. Overall, I agree that parole release discretion is not inherently superior to the revision's preferred front-loaded sentencing approach, but caution that we should not threaten effective evidence-based "alternative incarceration programs" however designated. I applaud the acceptance of rigorous risk and needs assessment, suggest an extension to evidence-based prison term analysis, and argue that the best arguments for both also establish the social dysfunction of sentencing that has only proportionality as its purpose.

Parole Release Authority: I agree that at least as parole boards have functioned to date, they hold no advantage over a guidelines system roughly like that envisioned by the revision and existing in states such as Oregon. The Reporter's critique of the work of Ireland and Prause is completely persuasive. Since neither the guidelines nor parole boards have rationally prioritized objectives governed by empiricism, let alone evidence-based harm reduction within the limits of proportionality, neither does a particularly good job of accomplishing any social goal [other than full employment for law enforcement, criminal justice and corrections workers, and related "treatment" industries]. Both result in the administration of punishments that are overwhelmingly detached from anything approximating responsible pursuit of public safety or any other demonstrable social interest.

The result is that crime is largely regulated by other factors than corrections, the few enclaves in criminal justice actually accepting the challenge of accomplishing something positive [the "helping courts" are the most common example], and the wholly accidental application of incapacitation in many cases in which it does not result in a countervailing post-prison recidivism increase.

The result is also that prison growth is limited not by wisdom, moral restraint, or empirical methodology linking incarceration to social need, but by budget restraints known to the states but apparently not to the federal government. Guidelines and parole boards are both easily overwhelmed by fanned punitivism – Zimring's eraser surely has its counterpart in the world of indeterminate sentences. If, as the Reporter persuasively argues, parole release abolition states have lower prison *growth* rates than states retaining parole release, it is most likely because states that have sensed budget restraints have turned to guidelines, "truth in sentencing," and other controls precisely to restrain prison growth.

From the point of view of restraining mass incarceration, a sentencing guideline/commission structure with no parole release authority is a more efficient structure in which to accomplish the economies of prison-bed load adjustment in response to occasional legislative recognition that there's something wrong when we spend more on prisons than, say, on education or health care.

So I do not contest the Reporter's conclusion that parole release may be abolished without loss. But the argument for abolition did indeed take "a serious wrong turn." [Fifth Draft at 12]. With wrinkles, the argument goes like this: If [as is overwhelmingly the case] the original

sentence was based on a judicial wisdom as to proportionality [just deserts], parole boards have neither expertise nor the appropriate role of second-guessing the wise judge. If the purpose were general deterrence, a subsequent parole release can only undermine whatever deterrence might be expected to result from the original sentence – and in any case, the falsehood in sentencing is unacceptable. If the purpose is [public safety by] incapacitation [and the "flip side" of gaging the success of rehabilitation], most useful factors are static and therefore exist at the time of sentencing, and assessing an offender's suitability for lawful life in the community while he is in prison is like "teaching aviation in a submarine."

Putting aside some substantial included issues, here is the wrong turn: It makes no sense to divide sentencing purposes into separate tracks and compare front end and back end opportunities on the same track – at least where, as is pervasively the case, the criminal justice system suffers enormously from a lack of priorities among the "shopping list" of purposes correctly criticized in earlier drafts [but not in later drafts, which offer no priority other than proportional severity]. Since we're focusing here on prison, and since prison is overwhelmingly based on just deserts rather than anything else [the draft continues to shun public safety through incapacitation except for violent offenders when there is a valid risk assessment instrument], it is completely fallacious to argue that we can't expect the parole board to do a better job of predicting risk than the sentencing judge when the sentencing judge may just have heard of the concept of risk assessment but relied entirely on just deserts. Logically, if the sentencing judge imposed a severe sentence considering only public safety, the parole board may be in a better position to impose the limits of proportionality when the sentencing judge set them aside. And so on.

More importantly, while casting about for what to retain of back-end adjustments, it is critical to recognize the growth of "alternative incarceration programs" that permit prisoners to earn considerably more sentence reduction than the small percentages available through "good time" or "earned time." The earliest of these devices [spawned, no doubt, by punitivists' eyes being bigger than corrections' stomachs, so that prisons had to come up with ways to keep the mandatory minimums without triple bunking prisoners] were soon found to be counterproductive – boot camps usually increased recidivism as compared with prison. [Prison, by the way, generally increases recidivism for low and medium risk offenders, but has no such impact on high risk offenders – with variations among cohorts such as sex offenders]. It is no surprise that "programs" designed on the level of sophistication that responds to the complexities of human development, criminology, and psychology with the pathetically clueless notion that "all they need is discipline" or "spare the rod, spoil the child" did not work. They, like the typical sentence "to give an offender time to think about making better choices" or "to send a message," suffered the usual fate of magical thinking – abject failure. Boot camps, designed with an "absence of knowledge" [Draft at 12], were and are generally a disaster.

But in spite of the celebration of proportionality as sufficient performance that infects the criminal justice system, some in corrections have continued to seek and exploit research and data. There are now many alternative incarceration programs that responsibly apply evidence based practices on susceptible cohorts, and graduate offenders who are substantially less likely to reoffend than those who fail the program or remain ineligible for it. Whether they amount to "creaming" mechanisms that allow the successful to self-select for early release or they actually reduce risk by successfully identifying and modifying criminogenic factors [or both], these programs are far superior to parole release authority for a variety of reasons. First, they have

statistics demonstrating success. Second, they are staffed by trained and supervised providers who apply literature-based modalities and measure success or failure by means that are far more competent than the nonsense that deceived and discredited parole boards at inmates' parole hearings. Third, only by completing the program does an inmate earn a sentence reduction, and if the program is evidence-based and supported by evidence of success [based on recidivism], completing the program is a reliable method by which to identify those who can be released.

My pitch is that these programs be given shelter in the rush to discard parole release. By all means, apply the same standards this draft would apply to risk assessment – but don't throw them out on the theory that they are somehow subversive of guidelines.

There is a lurking problem with new section 6.10. I suspect the intent is to limit the total of prison plus post prison supervision to the statutory maximum of a sentence, but section 6.10 is so busy facing the real problem that with a fixed term the worst prisoners are released with no supervision that it overlooks referencing any limitation on post prison supervision whatever. But think this through. On the one hand, "the revised code continues the recommendation of the original Code that the duration of post-release supervision terms should be determined by the needs of and risk posed by each offender, not by the happenstance of the balance of time remaining unserved of a prison term upon early release." On the other, the revision would have the trial judge determine the period of post prison supervision "at the time of sentencing." It is one thing to argue that the trial judge is in a better position to do risk and needs assessment when fixing a prison term at the time of sentencing than parole boards with the real power to determine the length of a prison term. That debate is about whether the sentence is real or facade. It is another thing altogether to suggest that the trial judge rather than post prison supervision officers should be the arbiter of risk and needs. Putting aside the reality that the revision is willing to accept trial judges making no such effort whatever, surely post prison supervision officers, who function much the same way as probation officers [in our jurisdiction, they are the same people – and they get revoked probationers back after prison during post-prison supervision] may indeed be better at assessing risk and needs. They - unlike trial judges - are trained in risk and needs assessment, stage of change analysis, available programs, and lessons learned. At the very least, they're in a much better position years after a sentence is imposed to determine what is appropriate in dealing with released offenders. The "knowledge" that the revision properly insists should determine the details of sentencing [except, of course, for the great bulk of prisoners who are neither diverted from prison as low risk nor held for longer terms because violent – the great mass of prisoners who are to be imprisoned under the revision not for public safety, but for just deserts regardless of any demonstrable social gain] surely may change over the years of imprisonment.

In any event, 1) a substantial role must be retained for the application of "wisdom" in the form of improving evidence-based practices by post prison supervision officers, and 2) the revision must pose some limit on the trial judge's ability to extend the period of post-prison supervision – even though a limit implies the contradiction that all but lifers may include those who are so unsuccessful that they exhaust their terms to be released without supervision. After all, a term of post prison supervision implies that violations of the term of supervision can result in re-imprisonment. That performance determines the actual duration of imprisonment is inherent in postrelease supervision; depending upon the term of post prison supervision, it may afford back-end correctional officials the same effective control of terms of imprisonment that exist through parole release in states that retain parole boards. Unless the trial judge imposed post

prison supervision for life [some states provide for this for murder and some sex crimes], in which case each such sentence is potentially a sentence of imprisonment for life, to avoid cases in which the worst offenders finally exit prison without supervision we would have to allow prison or post-prison supervisors to add terms of post prison supervision to the sentence (and post prison supervision) established by the trial judge. I expect the drafters must set some upper limit on the trial judge's discretion to impose post prison supervision, and the reality will remain that even though every sentence has a potential post-prison supervision period, there will be cases in which offenders violate the terms of supervision, spend their entire sentence in custody, and get released with no power whatever over them. In Oregon, as elsewhere, the term of post prison supervision is prescribed by the guidelines [and may be departed from as with any other presumptive sentence], and the total of prison and post prison supervision cannot exceed the statutory maximum for the crime absent dangerous offender sentencing. Some states have explored invoking some form of civil commitment to capture some of the worst example – provided they have the requisite mental health diagnoses.

Risk Assessment: Again, I applaud the decision to accept risk assessment, and I agree that instruments and their application must be vigorously vetted to ensure best practices and to avoid sloppy science and the harm to victims and offenders that it can accomplish.

But I have two criticisms – both of which have ultimately to do with the Reporter's persisting resistance to the notion that prison should be used for public safety. For nonviolent offenders, §6B.09 would allow the use of sufficiently validated instruments to divert some offenders from prison to community-based programs (or to shorten their terms), and to increase incapacitation of violent offenders "who present an unusually high risk to public safety through future violent criminal conduct." [I note that the Reporter is comfortable with the term "public safety" notwithstanding his suggestion that the term might go out of fashion in resisting listing public safety as a purpose of sentencing].

The first criticism is this: The same science, subject to the same threshold of validation, should be aimed at determining optimum prison term lengths based on offender and offense characteristics and post-prison recidivism data. We know that for some cohorts, recidivism goes up after imprisonment (most low and medium risk offenders), and for some it seems to stay the same (most high risk offenders). Were we to study which lengths of prison "work" best by producing the best return measured by recidivism reduction, we might go a long way toward ensuring that we use prison for the right cohorts for the right periods of time. It makes no sense to realize that we might be better off diverting some offender from prison or shortening their terms, while lengthening the terms of the worst violent offenders, on public safety grounds, while *ignoring public safety for the vast majority of prisoners in prison.* I urge that 6B.09 be supplemented with provision for optimum prison term research. Oregon's sentencing commission has expressed substantial interest in the field, and Washington has scratched the surface of this important, untapped research.

The second criticism is that the logic of the Reporter's analysis is twisted by his refusal to acknowledge that we should be using prison first and foremost for public safety within limits of proportionality. Quite correctly, the Reporter argues that a validated risk assessment instrument might identify offenders whose risk is best addressed with community based sentences, as diverting such offenders "conserves scarce prison resources for the most dangerous offenders, reduces the overall costs of the corrections system, avoids the human costs of unneeded

incarceration to offenders, offenders' families, and communities, and incurs a lower risk of future victimizations in society." Also correctly, the Reporter argues that we must tolerate the imprecision of risk assessment to lengthen incapacitation for the highest risk violent offenders because the alternative is "accepting the cost of serious victimizations of innocent parties" - an anticipated human suffering" that is "horrible and, in statistical terms, ineluctable."

Here's what's twisted: the revision is content with using the bulk of prison beds [and all of them until and unless risk assessment achieves some measure of validation] based on proportional severity alone, with no requirement that the default sentence pass any muster whatsoever on account of evidence for risk, harm, susceptibility to treatment, or the actual impact of prison on any social purpose. In other words, between the cohorts deemed appropriate for risk assessment to divert from prison and to extend terms for the most dangerous – and for all cohorts until and unless risk assessment achieves validation – the revision is content that we incarcerate with no effort whatever to determine whether the incarceration is unneeded [thereby meeting Norval Morris's "definition of cruelty], and with no requirement that anyone make any effort to determine which disposition – program, supervision, incapacitation or whatever else is available within limits of proportionality and resource – is most likely to prevent future victimizations at the hands of the offender – thereby "accepting the cost of serious victimizations of innocent parties" - an "anticipated human suffering" that is "horrible and, in statistical terms, ineluctable."

The victimizations that ineluctably result from eschewing public safety as a sentencing purpose for most sentences are just as unacceptable as those the Reporter would have us attempt to avoid for the most violent offenders and the least. Likewise the cruelty occasioned by sentences that have no demonstrable social utility but merely mete out proportional severity.

In any event, the logic also has this flaw: if the "ethical" issues of imperfect science are only satisfied by the tremendous harm occasioned by high risk violent offenders who turn out to be "true positives," how is it that risk assessment can be used to determine which lower risk offender goes to prison and which does not? In my view, the answer is really simple: There are two ethical issues only – whether we treat offenders fairly and whether we are accountable for the harm occasioned and avoided by our sentencing choices [both in individual cases and in adopting policy such as the revision]. The argument that because we cannot be precise in predicting future behavior, it is unfair to do so when selecting a prison term length is pure sophistry in practice. Certainly, if we were doling out sentences based on membership in a protected class, of course that would be unfair and unethical. But the proposition is that we should be using rigorous best practices, including but not limited to risk assessment, needs assessment, stage of change analysis, and whatever evidence-based tools we can obtain, to select dispositions that are not merely proportionate, but also represent best practices at harm reduction. If we do so, and determine with the best tools available and within the limits of proportionality and resource what disposition best accomplishes harm reduction, we act ethically. We can sentence by *risk of harm* quite ethically if we do so within those limits and on those bases – there is simply no ethical issue occasioned by the notion that we're addressing risk rather than actual future behavior. [Otherwise, all parenting would be unethical].

The other ethical issue is whether we act unethically when we avoid accountability for harm reduction, choose not to insist upon rigorous best practices, including but not limited to risk assessment, needs assessment, stage of change analysis, and whatever evidence-based tools we can obtain, to select dispositions that are not merely proportionate, but represent best practices at harm reduction. We do act unethically, and to the extent that the revision defaults to what passes

for sentencing in most cases in today's courts, the revision proposes that we continue to act unethically. In practice and in fact, the revision attempts to put some outer limits on a preserved judicial discretion in which judges typically claim that sentencing is "intuitive," act on their own sense of what is just, their own personal philosophy, ideology, or folk wisdom, and mete out sentences that are about as in tune with science and reality as the boot camps constructed on notions of what someone "intuited" should work ["what these felons need is discipline"] – with no accountability whatever for empiricism, performance, or outcome. These are the sentences that are the alternative to risk assessment; they are constructed entirely "upon an absence of knowledge"; it is absurd to call risk assessment "unfair" in comparison. Tested by the same measure – false and true positives and negatives – the default sentencing culture is far worse than the best risk assessment now attainable.

Multnomah County's sentencing support tools are not "risk assessment" and they are not racist: They resemble a risk assessment tool because they gather and display data based on cohorts assembled based on variables of crime and offender. But they do not purport to predict risk [the user manual cautions that results may well simply describe outcomes rather than causation]. They are not intended to predict risk, although we hope at some point to include risk assessment data in crafting cohorts -- but we cannot now do so. The tools absolutely include needs assessment by the Reporter's definition, however. Precisely, what they do – and all they purport to do – is assemble outcomes by some flavor of recidivism in correlation with offender cohort [by criminal history and demographics] AND dispositions – including both treatment, alternative, incarcerative, and supervision elements – so that outcomes are displayed for similar offenders sentenced for similar crimes with respect to the various dispositions used on such offenders for such crimes.

The tools do not suggest a sentence, but allow participants to see how similar offenders fared after receiving any of the dispositions available for such offenders for such crimes. Judges and advocates are encouraged to consider whether the results are useful and/or predictive for the offender before the court, all to the end of focusing the discussion on outcomes and an intelligent, evidence-based search for what works.

The Reporter's suggestion that consideration of ethnicity is unconstitutional reminds me of his years-long persistence in the view that my concerns with public safety were intended to trump proportionality (constitutional or subconstitutional). I hope this one doesn't take as long to correct:

The reasons for allowing consideration of ethnicity are these: 1) to the extent that discrimination has exaggerated the criminal history of some cohorts, it is both fair and even arguably constitutionally required, and in any event responsible, to be able to separate the data from cohorts whose history was not so exaggerated; the result may well be that an offender seems appropriate for a less severe sentence when s/he is compared with others subject to similar improper exaggeration. In other words, failing to do so may compound and exacerbate the impact of past racist impact of criminal justice. 2) there are many programs, some in custody, that are designed to target certain minorities. Without separating the cohorts based on this kind of data, we may well lose opportunities for more effective and less punitive dispositions that are particularly useful because they effectively target criminogenic circumstances more likely to be bundled in the groups they target [at risk Hispanic gang youth, African American youth, gay teenagers, American Indians with alcoholism – even programs aimed at some sexual minorities

such as transexuals, though we don't yet have tools to capture this data.

Of course I do not advocate increasing the severity of a sentence based on ethnicity or other protected class membership. And the tools easily allow exclusion of ethnicity as a variable to ensure that "colorblind" results are available for comparison to avoid such a result.