Comments on Preliminary Draft #6

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This commentary is an update of *Commentary on Preliminary Draft #5* (August 27, 2007), because most of the observations concerning Preliminary Draft #5 remain pertinent to Preliminary Draft #6. I will address the arguments in favor of abolishing parole release discretion, the use of risk assessment, and some minor suggestions on several specific provisions, including provisions or variants new to Preliminary Draft #6. I will also correct for the record – again – 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 - which remains the bulk of sentencing as contemplated by the revision..

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.

I would challenge, however, the implication that parole boards' "relatively poor history" is in marked contrast with the history of judicial sentencing outcomes – when the test is what matters to the public: our effectiveness in reducing recidivism and in promoting public values. When recidivism rates are measured with transparency (*i.e.,* when we do not erect a facade by

ignoring serious misdemeanors to declare success – as is the case with several of the figures cited by the Reporter), the sentencing behavior which the Reporter would normalize with guidelines has been profoundly dysfunctional. And if the test is the impact of sentencing on public values – the social functions of just deserts, proportionality, punishment in the punitive sense – there *is* no measure. The Reporter is content to perpetuate the unaccountable role of just deserts in a sentencing culture which may purport to quantify aggravation and mitigation, but presumes rather than validates any impact whatever on such obvious purposes of punishment as enhancing public confidence, endorsing and maintaining public moral standards of behavior (*e.g.,* thou shall not steal), preventing vigilantism and private retribution, and encouraging respect for the rights, property, and persons of others.

The revision's *allowance* for the role of risk and needs assessments in sentencing is a potential escape valve for the continued dysfunction of sentencing otherwise perpetuated by the revision. I certainly applaud the assignment of a role to sentencing commissions to explore and validate risk and needs assessments. But permitting improvement is not encouraging it, and perpetuating the destructive notion that proportionality is a *sufficient* justification for all sentencing *and the dominant foreseeable means by which to assign prison beds and terms* is directly subversive of that very improvement.

From the point of view of restraining mass incarceration (returning here to the parole release authority abolition argument), a sentencing guideline/commission structure with no parole release authority is a more efficient structure through 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 [that what is imposed will actually be served] 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 performance only on each track in isolation – 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 validated 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 well have relied entirely on just deserts with no meaningful analysis of risk or public safety. 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 if the sentencing judge ignored them. Conversely, if the sentencing judge choose to consider only proportionality, the parole board is far more likely to reach the right result based on public safety if that is its focus. 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" [Fifth Draft at 12], were and are generally a disaster: they often *increase* recidivism.

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 relatively reliable method by which to identify those who most safely can be released.

My pitch is that these programs must 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.

Note that this proposal is not accomplished sufficiently by the new (to Draft #6) provision for "back to court" review of the longest sentences. First, workable "alternative incarceration" programs are likely to reduce the harm threatened by a far wider swath of offenders than those serving the relatively long sentences contemplated by new 6.10A. Second, while the Reporter is arguing (correctly) that the combination of abolition of parole release and the creation of guidelines are likely to slow prison *growth* rates, at least until someone implements a solution to end the *growth* of imprisonment as a proportion of population (the Reporter's argument does not contend that his solution ends the persistent increase in imprisonment as a percentage of

population, just that it mitigates it), such programs are a critical component of any strategy for controlling prison growth which claims consistency with public safety.

After all, the realities of the limits of capacity to effectuate the sentence we impose was around when we pretended to send almost all offenders to the gallows, but somehow sent them to Australia instead. It continued in every era in one form or another. Lawyers and judges have found ways to evade most legislation – most systemically now by plea bargains that achieve a result not contemplated by the legislation by artificially compromising the crime charged and, thereby, the sentencing law that applies. A recent manifestation: it has become fashionable in my jurisdiction to accomplish this distortion: to win probation at the front end, the defense trades a downward departure from an artificially *higher* gridblock – and the state's benefit of the bargain is the availability of substantially more prison upon probation than was "presumptive" under the actually applicable gridblock.

The point here is that participants will find their ways to release the pressure on prisons that we continue to stuff with too many prisoners. Preserving the safety valve of "alternative incarceration" programs that actually work is one way to relieve prison overcrowding (which is itself a major cause of prison growth – the worse the conditions, the higher the recidivism for most cohorts in the prison population) without undermining public safety. We shouldn't blunder into forcing the players to resort to less healthful responses – such as triple bunking, shortchanging programs and reintegration efforts, and the like.

There is a lurking problem with new section 6.10. 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 largely 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 content with trial judges making no such effort whatever, surely post-prison supervision officers are more likely than judges to be equipped to do the job (certainly this is so as long as judges are permitted to perform solely based on just deserts within whatever matrix the law provides). Post-prison supervision officers 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]. They unlike trial judges (as present as under the regime promoted by the Reporter) - are trained in risk and needs assessment, stage of change analysis, available programs, and lessons learned. The Reporter suggests that we might not "believe" that they were better at "forecasting future behavior" than judges – but again, they surely are better when they are trained and try while the judge has relied upon just deserts alone. At the very least, post-prison supervision officers are likely to be in a better position years after a sentence is imposed to determine what is appropriate in dealing with released offenders *based on public safety*. 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 – as recognized by the Reporter.

Critically, new Section 6.10(2) permits judges to impose an independent term of post release supervision *without any attempt whatever to guide that discretion – even by the seriously flawed sentencing purposes provision which otherwise so pervasively directs sentencing functions under the draft*. It may make sense for the guidelines to provide guidance to judges on post-prison supervision terms just as they do the primary sentence itself. But describing that guidance in the revision is a good place to understand how importantly the sentencing purposes provision determines the worth of this revision.

The Reporter has considered how variations in role, perspective and time affect the propriety of the locus of sentence length with judges or parole boards. The Reporter has also explained (correctly, generally) why there should be no mandatory supervision for *all* who leave prison, but no case in which the worst of offenders leave prison with no remaining supervision. These explanations reveal that the purposes of post-prison supervision are obviously utilitarian. Surely the "just deserts" component has largely fallen away. Any notion that public attention to the actual term (and, critically, level) of supervision after custody will serve or undermine whatever purposes "proportionality" is supposed to serve is theoretical in the extreme. What is left is public safety – whether accomplished by the rehabilitation/reintegration of the offender or by monitoring, controlling, and even re-incarcerating the offender – or by all of the above. The draft should say so, and the draft should vastly improve what it says about the purposes of sentencing in the first place – for the reasons I've stated so many times before.

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. It may merely be a matter of a provision that the maximum post prison supervision term may be prescribed within the provisions that prescribe maximum incarceration terms for the various levels of felonies. Alternatively, a generic provision might be made for a maximum based on a percentage of the incarceration term and/or by category of crime. 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 post-release 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.

Surely the Draft must come to some conclusions about limits on the extent of post-prison

supervision – unless, of course, the Reporter has concluded that a lifetime of the many restrictions post-prison supervision imposes has no bearing on the cherished "proportionality" to which the Reporter remains content to sacrifice all utilitarian objectives – at least until they prove their worth (even though proportionality *per se* has not been asked to pass any such test and may very well fail in its present iteration). 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 – optionally – to increase incapacitation of violent offenders "who present an unusually high risk to public safety through future violent criminal conduct." [*Note, by the way, the Reporter's comfort with "public safety" notwithstanding his argument for the 2006 motions that we should not use such a term because it might go out of fashion*]

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 the impact on public safety of sending the vast majority of prisoners to 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 inquiry.

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." [Fifth Draft] 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 "terrible and, in statistical terms, ineluctable." [Sixth Draft].

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 – *or on innocent victims or unnecessarily incarcerated offenders*. 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. Certainly, if we were doling out sentences based on membership in a protected class, 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 enlist, 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 arguably be unethical].

In a very real sense, even allowing the skeptics to cast the issue in terms of "predicting future criminality" and "false positives" is a misleading and distorting perception. The Reporter poses the quandry in these terms:

> [if we have enough false positives] tho-thirds of those who appear to

> present a high risk of future violence will in fact refrain from violent behavior. The unavoidable mis-sorting of "false positives" – those predicted to be dangerous who are in fact harmless – presents compound ehtical problems. It is difficult for some to countenance the extended incarceration of any human being in anticipation of crimes they have not yet committed, even "true positives" who would in fact commit the predicted cimrinal acts if released. With false positives, the case is harder still: extended incarceration is imposed for crimes they will *never* commit.

I concede we need to be careful to be fair to potential victims and offenders, but that need is addressed by careful risk assessment, not aggravated by it. There is no false positive in *risk* prediction just because a high risk offender does not in fact reoffend. That reoffense may be prevented by greater scrutiny afforded because of the high risk designation, or it may be entirely by the accidental variation in opportunities or temptations for inflicting harm. That does not make the assessment of high *risk* "false," as long as the risk were actually high. That a high risk offender does not commit the act does not mean he was "harmless" in any meaningful sense. Yes, we must be as careful as we can be, but no, we are not punishing for future crime, and we're not imprecise when we accurately identify those at high risk of reoffending just because many do not ultimately reoffend. As long as the resulting disposition is not disproportional, there is no unfairness in allocating correctional restraints (custody or intensive supervision) to those at highest risk of reoffending. After all, it's a lot more rational, fair, and transparent than allocating custody based on a wholly untested facade of just deserts – and far, far less brutal in its consequences to victims and to offenders. We must not lose sight of the fact that such ordered just deserts is precisely the alternative the skeptics of risk assessment ultimately defend.

Nor must we lose sight of this reality: the argument against risk assessment is not that we do a better job of protecting potential victims and avoiding unnecessary imprison without risk assessment than with it. The argument is instead that we should not use prisons for public safety – regardless of the harm that choice inflicts on victims and offenders unnecessarily imprisoned. Again, if we actually buy that argument, we should at least allow offenders the option of caning in lieu of incarceration.

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 than 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 [but myhope is dimming: the Reporter wholly ignored this explanation given in response to his Draft No. 5]:

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 more effectively target criminogenic circumstances 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.

Comments unique to the 6th Draft:

Vesting: New section 305.1(6) vests earned credits. The Reporter recites that this "materially increases an inmate's incentives" to seek those credits. Maybe so, but I strongly suspect that this is as much *a priori* reasoning as that which supports the rejected paradigm that treatment or deterrence works just because we assume, presume, or hope that it does. Where is the evidence to support this notion? It may be correct, it may not. Maybe we ought to ask sentencing commissions to research the issue and authorize them to recommend or prescribe vesting provisions.

Consider, for example, the offender who accumulates earned time credits for getting a GED, attending some addiction classes, some cognitive restructuring programs, and many hours of work in custody. Yet towards the end of a lengthy sentence, this offender begins making it clear in prison that none of this has been retained – he shows relapse, criminal thinking, and assaultive behavior. Worse, seeing his release date approach, he doesn't mind not earning a few new credits, so refuses programing aimed at reversing his regressions, and even opts for some vacation from prison work assignment and efforts at reintegration..

The Reporter argues that if we're in real trouble, he'll commit a new crime in prison so we can keep him longer for that offense. But short of new criminal behavior, public safety may surely militate in favor of employing the loss of earned credits to motivate his return to programming or to extend his custody. The only question is whether *that* incentive is more effective or not compared to whatever incentive *vesting* adds to prospective credits. I am not certain, but I suspect the Reporter is making a guess – just as he would have sentencing judges do when assessing "proportionality" in its most ephemeral but common forms. Perhaps we should see what happened in the jurisdictions that repealed their vesting provisions.

Research Agency: Washington and Oregon have such agencies, in common with other jurisdictions, and our local county "Department of Community Corrections" has an excellent research team. There are branches of public and private entities that have been doing this sort of research for many, many years – the National Institute of Corrections, the Vera Institute, and the Pew Charitable Trust are but a few of them. Yes, every state must at least have a fixed responsibility for at least gathering what others are learning if not contributing to that learning. Preferably, every jurisdiction should do both.

But here's the rub: We must address the bulk of sentencing – not just its peripheries, not just "layers" of offenders deemed potentially susceptible to rehabilitation, and not even just those most violent offenders potentially subject to increased incarceration based on dangerous offender adjudication or validated risk assessment. We've had yards and now terabytes of good (and not so good) research within our reach for some decades. Yet our sentencing behaviors are typically unaffected by and ignore that wisdom. What passes for "judicial wisdom" in the form of individualized just deserts notions, and collective policy-making about ordered just deserts *effectively displaces any meaningful use of research to improve sentencing.*

To improve things beyond merely *reducing* the *rate* of prison growth, we need to do three things: **first**, we must understand that all legitimate purposes of sentencing, both those typically

deemed "utilitarian" and those bundled within "proportionality" [or "just deserts"] are to some meaningful extent both measurable and susceptible to far more effective pursuit through evidence-based practices than the mere proclamations we now rely on that those purposes are what our sentencing behaviors serve. We are making things up that are overwhelmingly not so; we should apply all we can learn to improve our pursuit of those objectives.

Second, we must structure our sentencing practices and institutions around the proposition that sentencing serves those very purposes and must responsibly seek success.

Third, we must prioritize those institutions' attention and efforts toward that success. If, for example, we make the reasonable choice to construct guidelines and create and task a sentencing commission for sentencing purposes, we must strategically enlist research and data to direct and to improve sentencing. Thus, for example, instead of tasking sentencing commissions primarily with monitoring the effect of sentencing on systems, or the extent to which sentencing practice adheres to guidelines, commissions should be tasked primarily with ensuring that sentencing actually achieves its social purposes. Collecting, deploying, and exploiting data and research to that end is a corollary of that task.

Thus it matters little whether the collection, production, and dissemination of useful research and data is a function sited within sentencing commissions or external research agencies – as long as the knowledge is properly shared and exploited.

The important thing is that sentencing is structured and conducted as if research and data mattered. Presently, and – for the bulk of sentencing contemplated by the revision – sentencing is structured and conducted as if research and data are irrelevant. That must stop, but it won't until we reject the notion that proportionality is itself a sufficient result for the bulk of sentencing, and for determining the bulk of prison populations.

[*See, generally,* *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users*, 17 S Cal Interdiscipl L J 68 (2007), and http://www.smartsentencing.com]