Comments on Preliminary Draft #7
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These comments bring forward my *Comments on Discussion Draft No. 2*[1] in light of the project's evolution from that draft to this one. I will address only those issues as to which I believe I have something substantial to offer. I will also correct for the record – *for the fifth time* – misconceptions concerning our sentencing support tools.

I will illustrate again[2] the tragedy that the Reporter's fine scholarship, well-crafted improvements in sentencing mechanics, laudable distaste for imprisonment and disparate treatment, and expanding embrace for risk and needs assessment are all subverted by his ultimate submission to the notion that mainstream sentencing and its allocation of prison beds can be adequately driven by notions of proportional severity alone. Enshrining the notion that proportional severity is a sufficient accomplishment of sentencing ensures that mainstream sentencing will be productive of *no* social purpose. If ALI persists on this path, it will serve a status quo that spawns excessive incarceration, avoidable victimizations, and draconian responses from an understandably frustrated public. That public has been duped by obsession with blameworthiness – an obsession the Reporter shares – into equating severity with efficacy and excusing judges and prosecutors from any meaningful accountability for any public purpose.

Section 6B.09 and Risk and Need Assessment – Again, I applaud the Reporter's increasing movement toward the acceptance of risk and needs assessment. I agree that we must be vigilant in pursuing validation of both on a continuous basis, as both are continuing to improve and neither is likely to reach perfection. I also agree that research and funding ought to be encouraged, and that assessment must not trump proportionality.

Only because it is dangerously imprecise is it necessary to address the Reporter's notion that "[needs and risk assessments are distinct tasks . . . . Risk assessments estimate the probability that an individual will engage in violent or other criminal conduct in the future." (*Preliminary Draft No. 7* at 70). First, perhaps because of his incentive to argue that risk assessment is based on static factors that won't change,[3] the Reporter overlooks common knowledge that responsible risk assessment employs *both* static (*e.g.*, accumulated criminal record) *and* dynamic (*e.g.*, substance abuse, inappropriate associates) factors to pursue accuracy. Second, it is critical for many purposes related to sentencing (and thus to public safety) to recognize and distinguish among varies types of risk: risk of failing in treatment or abstinence; risk of nonviolent recidivism; risk of violence; and risk of a specific misconduct (such as harming a known potential victim in a domestic violence context – "lethality assessment" – or

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[1] Those *Comments* are available at http://www.ali.org/doc/Comment-Marcus.pdf.

[2] *See MPC-The Root of the Problem: Just Deserts and Risk Assessment*, 61 Fla. L. Rev. 751 (2009), and authorities cited p. 752 n.1 [available at http://www.smartsentencing.info/Marcus_FLRev9-09.pdf]; *Conversations on Evidence-Based Sentencing*, 1 Chapman J. of Criminal Justice 61 (2009), and sources cited p. 61 n.2 [available at http://www.chapman.edu/images/userImages/dfinley/Page_12412/CCJ_Spring_2009_a.pdf]

[3] *Discussion Draft No. 2* at 9 – as part of the argument that "back-end release authority" is inappropriate because risk doesn't change.

engaging in a continued pattern of sex offense). A recent tool of the Oregon Criminal Justice Commission derives assessments of four distinct types of risk from the offender's identification and the crime for which s/he is being sentenced.[4]

Here is an example of how these various types of risks – typically assessed with distinct instruments – affect a rational sentencing decision (within bounds of proportionality, law, and resource): Risk of violence, violent harm, or specific misconduct may be high enough to preclude non-custodial attempts at behavior modification simply because the risk is too high that failure will occur and result in unacceptable public safety consequences. Risk of failure in treatment or of committing new nonviolent crime can be critical in assigning an offender to a modality of response. Indeed, the most significant assessment we need to make about an offender properly managed in the community (with or without incarceration) is this type of "risk" coupled with a needs assessment.[5]

My overwhelming concern, however, remains the thinking errors that persist in the Reporter's resistance to risk assessment and his resulting likely allocation of risk and needs assessment to the fringes of prison – low risk offenders to be diverted from prison, rare high risk to be extended in prison – while inferentially leaving the bulk of prison to be allocated through some means *wholly divorced from risk and need.*

My differences with the Reporter's approach have always focused on what it is that we are doing with the bulk of sentencing resources, and to what end. I have insisted that allowing undifferentiated "just deserts" *per se* to justify a sentence – whether clothed in the label "limited retributivism" or otherwise – cloaks enormous irresponsibility, brutality, and social harm by excusing all involved in sentencing (and policy makers) from accountability for achieving *any* social purpose. Without some accountability to either utilitarian purposes or to the legitimate social functions lurking unmeasured within "just deserts," sentencing continues to inflict brutality upon victims of crimes accountable sentencing would have prevented, and upon offenders punished with no benefit to anyone.[6] This is all related to the Reporter's successful

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[4] This tool is derived from Oregon's actual experience with a large cohort of offenders released from prison. In its present form, its operable calculations are mostly hidden. The Commission, working the Oregon Department of Corrections (whose researchers, principally Paul Bellaty, produced the underlying analyses), is in the process of enhancing both the tool and its web presentation. It can be accessed at http://198.107.6.133:8080/. For an example, enter an SID number of 14189966 and a statute 164.055 [ORS 164.055 is theft in the First Degree] (you must select a user type, but it does not affect the calculation).

[5] These are all by Douglas B. Marlowe: *Evidence-based sentencing for drug offenders: An analysis of prognostic risks and criminogenic needs*, 1 Chapman Journal of Criminal Justice 167 (2009)[available at http://www.chapman.edu/images/userImages/dfinley/Page_12412/CCJ_Spring_2009_a.pdf], with Festinger, D. S., Arabia, P. L., Dugosh, K. L., Benasutti, K. M., Croft, J. R., & McKay, J. R, *Adaptive interventions in drug court: A pilot experiment* 33, Criminal Justice Review 343(2008); with Festinger, D. S., Dugosh, K. L., Lee, P. A., & Benasutti, K. M. *Adapting judicial supervision to the risk level of drug offenders: Discharge and six-month outcomes from a prospective matching study*, 88 Drug & Alcohol Dependence 4 (2007); with Festinger, D. S., Lee, P. A., Dugosh, K. L., & Benasutti, K. M., *Matching judicial supervision to clients' risk status in drug court*, 52 Crime & Delinquency 52 (2006) ; with DeMatteo, D. S., & Festinger, D. S., *Secondary prevention services for clients who are low risk in drug court: A conceptual model* 52 Crime & Delinquency 114 (2006); *Judicial supervision of drug-abusing offenders*, 3Journal of Psychoactive Drugs, SARC Suppl. 323 (2006); with Taxman, F. S. (eds), *Risk, needs, responsivity: In action or inaction?* 52(1) Crime & Delinquency (2006).

[6] *See, e.g.*, Michael Marcus, *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users*, 17 So Cal Interdisciplinary Law Journal 67 (2007); *Limiting Retributivism: Revisions To Model Penal Code Sentencing Provisions*, 29 Whittier L. Rev. 295 (2007)*; Commentary on Preliminary Draft #6* (April 19, 2008);

insistence that crime reduction and public safety be removed from the Code's list of the purposes of sentencing.[7]

> ***Thinking Error #1:*** ***When assessing the accuracy of risk assessment, crimes an offender does not commit in the future are not "false positives"; a sentence informed by risk assessment is not "punishment for future crime."***

Although the Reporter correctly recites that most[8] risk assessment "estimates the *probability* that an individual will engage" in crime in the future,[9] he continues to accept the subterfuge that because 2/3 of those assessed at high risk for violence do not in fact commit a new crime of violence, the assessment is *wrong* two times out of three. That two out of three high risk offenders may not actually commit a new violent crime hardly proves that they are "harmless." Violent crime is fortunately relatively rare; many seriously violent criminals commit violent crimes relatively infrequently, but that is no reason to ignore their relatively extraordinary tendency to commit violent crimes when compared with lower risk offenders. The notion that a "false positive" arises when an offender assessed at "high risk" does not commit a future crime is woefully off target. It probably emanates in part from understandable and laudable bias against incarceration as a deprivation of liberty – the same source that labels using prison for public safety as "preventive detention." But the Reporter's continued endorsement of this error is alarming. Consider this example:

Assume we have identical serious assaults by offenders whose criminal histories also appear to be identical. Assume further that a validated risk assessment instrument identifies one of the offenders at 1% risk of violent recidivism, and the other at 30% risk of violent recidivism. That of ten of such identical higher risk offenders only three will in fact commit a new violent crime within the contemplated period *does not yield seven "false positives."* The assessment of risk is by definition (in this hypothetical) precisely accurate. Of course this disparity of risk ought to inform the choice whether to use scarce custody resources on the higher risk offender, while using community based supervision and appropriately vetted programs on the lower risk offender. This much should be obvious to any rational person. Considering real disparity in risk does not mean that we are punishing offenders for "future crimes," because we are *managing the risk they represent* with the tools and occasion provided by their present conviction for a past crime.

Justitia's Bandage: Blind Sentencing, 1 Int'l J. Punishment & Sent'g 1 (2005); *Comments on the Model Penal Code: Sentencing, Preliminary Draft No. 1*, 30 American Journal of Criminal Law 135 (2003).

[7] The Reporter's success in banishing public safety from the purposes of sentencing in the revised Code is recounted in part in *Responding to the Model Penal Code Sentencing Revisions, supra* note 6. See also *ALI Model Penal Code Issues Page*. My expectation is that this decision will earn for ALI the sort of justified embarrassment that *Plessy v. Ferguson* earned for the United States Supreme Court – I just hope it doesn't take as long for this error to be corrected.

[8] Importantly, some instruments assess the risk that an offender will not respond to correctional intervention *rather than* the offender's propensity to commit new crimes. Because of the variety of risk assessment instruments and the consequences of their confusion, it is critical that all who rely on them fully understand such distinctions.

[9] *Preliminary Draft No. 7* at 70. Correctly understood, a false positive is generated when an assessment labels an offender at an incorrect level of *risk*. A true false positive is implied by an offender's mere avoidance of a new crime only if the assessment were that he would *certainly commit* a new crime.

As long as the underlying conviction is just and the resulting disposition lawful and 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, undifferentiated façade 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.

> ***The argument against risk assessment is not that we do a better job of protecting potential victims and avoiding unnecessary imprisonment without risk assessment than with it. The argument is instead that we should not use prisons for public safety – regardless of the harm <u>that choice</u> inflicts on victims and offenders. If we actually buy that argument, we should at least allow offenders the option of caning in lieu of incarceration.***

"False positives," like "preventive detention" and "punishment for a future crime," are essentially propaganda – slogans seeking to disparage the use of prison for the one thing it is best at – protecting people on the outside from people on the inside, while they are inside. Risk and needs assessment should be as accurate as we can make them, but the office of risk assessment is to assess *risk*, and the office of rational sentencing is to *manage* that risk.

Perhaps that is why 89.3% of judges responding to a recent poll commissioned by the Oregon Criminal Justice Commission agreed that risk assessment would be useful in sentencing *all* crimes. Needs and risk assessment should be considered throughout the realm of sentencing, including for purposes of determining presumptive and individual sentences. I hope that Oregon will continue[10] its exploration of incorporating risk assessment in its guidelines, and will learn from Missouri, Virginia, Wisconsin, and other states exploring the issue.

As noted by the Reporter,[11] the use of risk assessment in sentencing would be the one occasion on which counsel for the offender and the state could advocate and perform a quality assurance role, as compared with the rapidly expanding (and appropriate) use of risk assessment pretrial, on probation, in prison, and post-prison. That the courtroom provides the best crucible for challenging accuracy, protocol, and fairness makes the Reporter's continued comfort with the default role of unquantified, opaque,[12] and arbitrary just deserts particularly ironic: he welcomes just deserts with no qualification other than guidelines, while requiring that risk and needs

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[10] 2005 Or. Laws Ch. 474 (SB 919) directed the Oregon Criminal Justice Commission to study "whether it is possible to incorporate consideration of reducing criminal conduct" into Oregon's sentencing guidelines. The Commission offered a bill in 2007 that would have begun to incorporate risk assessment, but the bill did not survive the legislative process. The Commission is continuing the exploration; the poll cited in the text, *supra*, is one manifestation, and the web-based risk assessment tool described in note 4, s*upra*, is another.

[11] *Preliminary Draft No. 7* at 70 refers to the "procedural safeguards in the trial and appellate courts."

[12] *See, e.g.*, Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. Crim. L. Criminology 1293 (2006)

assessment be validated before it is allowed to participate. A rational system requires some level of validation for all bases upon which we allocate correctional resources.[13]

As to sentencing "enhancement" based on risk assessment, although prediction of US Supreme Court decisions carries some risk of false positives, the *Blakely - Apprendi* line surely means that when a finding of risk is necessary to increase the sentence above that otherwise available (as with some dangerous offender schemes), a jury trial right attaches, but that when risk assessment merely informs but does not control discretion within a range available as a result of a conviction (by plea, or trial subject to a jury trial right), there is no additional jury trial right.[14] This recognition of a right to a jury should be applauded, not assailed; it surely imposes no risk of unfairness or of error that does not exist without that jury trial right.

> ***Thinking Error #2: Sentencing informed by risk and need assessment is not competing with sentencing that is accurate, free of false positives, fair, responsibly in pursuit of public purposes, or rational.***

The Reporter continues to stress that assessment must be used with great caution, although he is increasingly cognizant of the growing conclusion that it is far more reliable than "clinical judgments." [*Preliminary Draft No. 7* at 70-71] I agree – with both propositions – but wonder why we need no such caution with the mainstream of sentencing he is willing to trust to that clinical judgment – albeit bounded by guidelines – until and unless his vision of risk assessment to divert from prison at the lower end and to extend imprisonment at the upper end converge upon and displace the intervening middle. That middle is where we send most offenders to prison, spend most of our money for corrections, compete with such social purposes as higher education,[15] and do terrible harm. As the reporter seems to acknowledge, mainstream sentencing is "notoriously imperfect."[16] "[W]hole categories of inmates are confined without adequate policy justification."[17]

To whatever extent some may consider typical guidelines to function as risk assessment, our exploration of the issue yielded research to the effect that, for the population most at issue [those eventually released from prison], Oregon's guidelines over-incarcerate about one-third of our population, under-incarcerate one-third, and get it about right roughly one time out of three.[18] Apart from the oppression inflicted on offenders imprisoned without social benefit, using prison

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[13] See *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users*, *supra* note 6.

[14] The Supreme Court has recently declined to adhere to this rationale in the context of consecutive sentences, even when a statute expressly requires a finding of specified facts as prerequisite to consecutive sentences. *Oregon v. Ice*, 555 US ___, 129 S Ct 711 (2009), available at http://www.supremecourtus.gov/opinions/08pdf/07-901.pdf.

[15] See Jenifer Warren, *et. al*, ONE IN 100: BEHIND BARS IN AMERICA 2008 at 4, 14-15, 31-32 (Pew Charitable Trust 2008), available at http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf

[16] *Preliminary Draft No. 7* at 69.

[17] *Discussion Draft No. 2* at 14 n.39.

[18] These were the findings of a Department of Corrections researcher working with the SB 919 work group studying whether guidelines might be adjusted to serve public safety. See note 10, *supra*.

imprecisely on low and medium risk offenders is demonstrably likely to *increase* the recidivism of some,[19] leading to victimizations that a more precise allocation of prison would have avoided.

The Reporter's *de facto* refuge, whose supposed relative precision is held up against the risk of error in risk assessment, is ordered just deserts [i.e., guidelines-limited retributivism]. Since this is wholly unreliable as measured against public safety, the Reporter rests upon "punishment" – (limiting) retributivism – as its own purpose of sentencing – "severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of the offender."[20]

The logic is this: since punishment is a purpose, it is entirely appropriate to distribute prison beds to those not properly diverted by risk assessment (and high risk offenders subject to extended incarceration to serve public safety) "adequately to punish" offenders so as to meet the expectations of the public. Public expectations have legitimate roles in sentencing, but what is the justification for eschewing any attempt to identify those legitimate roles and to hold sentencing accountable for serving them? And how can we honor public expectations while rejecting public safety as the primary purpose of prison?

If any given range of punishment within guidelines is *per se* "accurate" measured by just deserts, why the caution about informing the concurrent discretion (*within* that range) with less than perfect assessment instruments?[21] "There are compelling reasons for an attitude of caution"[22] for *all* use of prison, not just that in pursuit of public safety – yet the only caution the Reporter offers outside utilitarian objectives is the unpacked and unguided ordering of just deserts subject to appellate review for aggravation and mitigation.

There are finite purposes to be served by punishment. On the utilitarian side are specific[23] and general deterrence. The remaining purposes are these, and as far as I can tell, only these: serving the legitimate needs of crime victims, preventing vigilantism or private retribution, promoting respect for legitimate authority, and enhancing respect for the persons, property, and rights of others.[24] That we serve any of these purposes – or that any justifies a departure from

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[19] *See* Kovandzic et al., *When Prisoners Get Out: The Impact of Prison Releases on Homicide Rates*, 1975-1999, 15 CRIM. JUST. POL'Y REV. 212, 213-14 (2004); Todd R. Clear, *Backfire: When Incarceration Increases Crime*, 1996 J OKLA. CRIM. JUST. RES. CONSORTIUM 2 (1996); Lin Song and Roxanne Lieb, RECIDIVISM: THE EFFECT OF INCARCERATION AND LENGTH OF TIME SERVED (WA State Inst for Pub Pol'y 1993), *available at* http://www.wsipp.wa.gov/rptfiles/IncarcRecid.pdf; Paula Smith et al., THE EFFECTS OF PRISON SENTENCES AND INTERMEDIATE SANCTIONS ON RECIDIVISM: GENERAL EFFECTS AND INDIVIDUAL DIFFERENCES (Centre for Crim Just Studies, U New Brunswick 2002) 4-5, *available at* http://www.sgc.gc.ca/publications/corrections/200201_Gendreau_e.pdf; *The Effects of Punishment on Recidivism*, 7 Research Summary No. 3 (Solicitor Gen. of Canada, May 2002)(reporting meta analysis of 111 studies), *available at* http://www.sgc.gc.ca/publications/corrections/pdf/200205_e.pdf; *The Effectiveness of Community-Based Sanctions in Reducing Recidivism* 2, 18, 25, Table 3 (Or Dept of Corrections 2002) (reporting results of Oregon study and review of national literature), available at http://egov.oregon.gov/DOC/TRANS/CC/docs/pdf/effectiveness_of_sanctions_version2.pdf.

[20] *Council Draft No. 1* §1.02(2)((a)(1). (Sept 27, 2006).

[21] Class and minority disparity are good reasons to avoid unbounded discretion, but it cannot be logically argued that a given range of discretion is made more susceptible to improper disparity by including consideration of imperfect assessment tools – assuming the tools themselves do not exacerbate discrimination. Perfection can be the enemy of good.

[22] *Preliminary Draft No. 7* at 72

[23] The Reporter continues his silence as to the role of specific deterrence.

[24] See generally, *Responding to the Model Penal Code Sentencing Revisions*, *supra* note 6. Proportionality restraints are derivative of these purposes. *Id.*

the lawful and proportional sentence *most attuned to risk and need* – cannot responsibly be merely assumed and exempted from the construct that requires validation for risk and need assessment. Particularly is this so when public trust and confidence is so dependent upon our pursuit of public safety.[25]

Guidelines *per se* arguably serve interests in reducing disparity and regulating prison resources. They do so with great imprecision and unreliability, and largely by ignoring very real differences among offenders – such as their diverse risks, needs, and responsivity, which so powerfully affect what is most likely to work (or not) on which of them. Guidelines treat the psychopath and the drunk as identical in a grid block, and guidelines are frequently overcome by draconian ballot measures and legislation that decrease judicial discretion by imposing mandatory minimums, increasing presumptive sentences, or otherwise raising the severity of sentences. Even as to their functions - regulating disparity and prison resources - guidelines *per se* impose *constraints*, but they pursue no affirmative social purpose. Until and unless guidelines are *responsibly* aimed at public safety (via risk and needs assessment, for example) or at the other social purposes properly included in "just deserts," they surely raise no bar against which to measure the validity of risk and needs assessment.

To aim guidelines at the social purposes properly included within "just deserts," those purposes must be identified, and the causal links between sentence and purpose must be held at least to the "realistic prospect of success" test to which the Reporter would hold "utilitarian or restorative" purposes of sentencing.[26]

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[25] *See generally* U.S. Department of Justice, National Institute of Corrections, "*Promoting Public Safety Using Effective Interventions*," Section 1 (Feb. 2001), *available at* http://nicic.org/Library/Default.aspx?Library=016296 (citing B.K. Applegate, F.T. Cullen & B.S. Fisher, *Public Support for Correctional Treatment: The Continuing Appeal of the Rehabilitative Ideal*, 77 PRISON J. 237–58 (1997)); Fairbank, Maslin, Maulin & Associates, RESOURCES FOR YOUTH CALIFORNIA SURVEY (1998); Peter D. Hart Research Associates, Inc., *Changing Public Attitudes toward the Criminal Justice System* (Feb. 2002) (for The Open Society Institute), *available at* Http://Www.Soros.Org/Initiatives/Usprograms/Focus/Justice/Articles_Publications/Publications/Hartpoll_20020201; Beldon, Russonello & Stewart, OPTIMISM, PESSIMISM, AND JAILHOUSE REDEMPTION: AMERICAN ATTITUDES ON CRIME, PUNISHMENT, AND OVER-INCARCERATION (2001); Judith Green & Vincent Schiraldi, *Cutting Correctly: New Prison Policies for Times of Fiscal Crisis* 4–8 (Ctr. on Juvenile and Criminal Justice 2002), *available at* http://www.cjcj.org/pdf/cut_cor.pdf.

When it examined the issue of public opinion through empirical means in the United Kingdom, the HALLIDAY REPORT found:

> When asked unprompted what the purpose of sentencing should be, the most common response is that it should aim to stop re-offending, reduce crime or create a safer community. Next most frequently mentioned are deterrence and rehabilitation. Very few spontaneously refer to punishment or incapacitation.

John Halliday, Cecilia French & Christina Goodwin, *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, at 8, *(*Home Office, July 2001) available at http://www.homeoffice.gov.uk/documents/312280/. For an analysis of the HALLIDAY REPORT, *see* Marcus, *Thoughts on Strathclyde, Processing the Second Sentencing and Society Conference*, 31–38, nn.101–131, and accompanying text, August 20, 2002,

See also Princeton Survey Research Assoc. Int'l, *The NCSC Sentencing Attitudes Survey: A Report on the Findings* (2006), http://www.ncsconline.org/D_Research/Documents/NCSC_SentencingSurvey_Report_Final060720.pdf.

[26] *Council Draft No. 1* §6B.03(3) (Sept 27, 2006). *See generally, Responding to the Model Penal Code Sentencing Revisions, supra* note 6.

Abolition of Parole Release Authority – In general, I have no substantial disagreement with the Reporter's approach of "abolishing" parole release authority, particularly when some of the functions are replaced by the proposed sections affording judicial authority to modify sentences at the back end.[27] 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. 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 Reporter cites "more than a century of demonstrated failure" to condemn parole boards. But the focus on blameworthiness that so cripples the value of his work has demonstrated its failure for far longer than that. The more ancient the abuse, the more sacred.[28] Until the role of proportional severity is reduced to its legitimate function of "*limiting* retributivism" and denied its status as *itself a sufficient accomplishment of sentencing*, guidelines will continue on their own lengthening path of demonstrated failure. Without the sort of modifications I've suggested,[29] following the Reporter's approach will simply add to the accumulating decades in which guidelines have failed to constrain the growth of draconian sentencing laws, grossly misdirected allocation of prison beds, world-leading over-incarceration, and the avoidable victimizations that drive them all.

Three issues warrant mentioning:

First, the Reporter repeatedly alludes to the "disappointing" performance of parole boards.[30] Measured by the same metric, *the results of judicial sentencing decisions – with or without guidelines – fully merit the same scores.* That is to say, if we measure performance by the subsequent criminal behavior of those we have sentenced, judges are in no position to contend that they compare favorably with the performance of parole boards.[31] There are only two ways we escape scrutiny for these outcomes: we can blame recidivism on the supervision or

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[27] Federal District Judge Ann Aiken is largely responsible for the emergence of "Reentry Courts" for managing appropriate offenders as they are released from prison much as treatment courts address the needs of some offenders at the front end. See Daniel Close, Melissa Aubin, and Kevin Alltucker, *The District of Oregon Reentry Court: Evaluation, Policy Recommendations, and Replication Strategies*, available at http://www.ord.uscourts.gov/ReentryCourtDoc.pdf. Both versions represent an enlightened and evidence-based alternative to sentencing obsessed with proportional severity alone. The Reporter seems to approve of such approaches at the fringes of the criminal justice population, but continues strenuously to resist evidence-based allocation of prison beds in mainstream sentencing.

[28] Attributed to Voltaire. Also apropos is Voltaire's "Those who can make you believe absurdities can make you commit atrocities."

[29] *Responding to the Model Penal Code Sentencing Revisions: Tips for Early Adopters and Power Users*, *supra* note 6.

[30] *E.g., Discussion Draft No. 2* at 2 [citing Kenneth Culp Davis], 52 [claiming "more than a century of demonstrated failure"], 60 ["a resounding failure"].

[31] *See, e.g., Justitia's Bandage: Blind Sentencing,* 1 Int'l J. Punishment & Sent'g 1, 2–4 (2005), citing several sources, including US Bureau of Justice Statistics. Although many departments of corrections include only felony convictions in recidivism measures, when misdemeanors – which constitute upwards of 75% of crimes – are included, the recidivism rate of those we sentence is in the neighborhood of 62-75% for most crimes. *Id.*

correctional authorities down the line from our choices, or we can invoke "appropriate severity" as adequate sentencing performance *instead of* the accomplishment of any social goals. But if we truly measure our performance by the same standard as those who assail the performance of parole authorities, we are not demonstrably superior just because we are better placed to conceal our responsibilities for public safety.

In order for front-end sentencing to compete persuasively with parole release, it is essential that we hold it accountable for accomplishing utilitarian and other purposes of sentencing. Otherwise we accomplish improvement only by redefining success. Improvement requires identifying the public safety and other purposes of sentencing with some specificity, and holding us accountable for demonstrably serving those purposes.

Second, in proposing reasonable approaches to back-end adjustments in sentencing after abolishing "parole release authority,"[32] the Reporter thus far[33] ignores an issue I've raised in prior commentary: "alternative incarceration" programs identify prisoners for whom some intense form of custodial treatment coupled with transition and reintegration is encouraged with the prospect of earning release even *before* good time and other credits would render the offender eligible for release. This approach to swelling prison populations, if properly administered with appropriate needs and risk assessment and evidence-based programs, and meaningfully measured for success, can further refine the use of prisons for public safety and reduce overall criminal behavior by those sentenced to and released from prison.

The Reporter now generally allows for various forms of back-end alteration to the duration of imprisonment, but cautions against any generosity that smacks of reintroducing an indeterminate sentencing system.[34] Such innovations should not be foreclosed in the process of abolishing parole release authority – especially on the basis that the benefits of judicial wisdom in sentencing might be compromised. Indeed, at this point the Reporter's refusal to structure sentencing in a manner that responsibly serves public purposes means that anything approaching demonstrable success at risk reduction at the "back-end" could easily tip the scales decidedly in favor of restoring vigorous use of back end sentence adjustment.

For example, were validated and properly focused risk assessment the basis of post-prison release, and the bulk of mainstream sentences still based essentially on blameworthiness, the argument for restoring back-end release so directed would easily overwhelm the Reporter's ruminations about the shortcomings of parole release.[35] Surely the Reporter's preference for its abolition has no significant weight if competing with effective reduction of the harms of avoidable victimizations and useless incarcerations.

Similarly, although it is probably correct that static factors – which by definition do not change during imprisonment – are a heavy component of risk assessment, we should not foreclose the reasonable possibility that evidence-based approaches to addressing dynamic

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[32] §§305.1, .6, .7.

[33] I am unable to find reference to "alternative incarceration" or the equivalent; if I've overlooked something, I stand corrected. I appreciate that to some extent, this issue is appropriately housed in any forthcoming revision of Part III of the 1962 Code.

[34] *Preliminary Draft No. 7* at 99.

[35] An analog: for many years, the combination of risk assessment, jail overcrowding, and federal jail population caps has yielded the most pro-social routine behavior in the criminal justice system: selection of inmates to be released to honor the cap based on validated risk assessment instruments. Would mainstream sentencing approach this level of pro-social behavior!

factors through programs, and our concomitant ability accurately to assess the resulting *reduced* risk, will together justify earlier safe release of some cohorts of offenders. The Reporter's resistance to "natural-life" sentences acknowledges this possibility,[36] but there is no reason to reject this logic with other sentences or insist upon limiting the magnitude of sentence reductions through such means without assessing the possibility that *all* purposes of sentencing become consistent with release for a particular inmate even after a small proportion of a sentence is served.

Third, the Reporter's endorsement of the existing Penal Code's recommendation that "the duration of post-release supervision terms should be calibrated to the needs of and risks posed by each offender"[37] implores the question why, exactly, should the duration of the initial prison term not also be so calibrated?[38] This endorsement also has obvious tension with the straw-man arguments the Reporter offers for abolition of post-prison release authority.[39]

As to all provisions for back-end adjustments, it is appropriate that the Code refer back to the purposes of sentencing in §1.02(2), as do §§ 305.6(5) and 305.7(5). As I've long argued,[40] the purposes of sentencing section profoundly subverts any claim to "proportionality and rationality"[41] until and unless "proportional severity" – the "just deserts" or retributive set of sentencing purposes – is vetted and held to some requirement of demonstrative "realistic prospect of success." Until then, the mainstream sentencing product tolerated by the purposes provision is insulated from any accountability for accomplishing any social purpose, and therefore has no convincing claim to rationality. And, since proportionality in the sense of guidelines is both opaque[42] and maintained primarily by ignoring differences among offenders and offenses that matter,[43] the Reporter pursues even meaningful proportionality with appalling imprecision.

Grading Crimes vs. Guidelines as rearranging deck chairs on the *Titanic* – Several aspects of the Reporter's provisions for the role of legislators are significant. As he comments, the consequences of the legislative role of grading crimes are limited, as they merely establish maximum sentences within which sentencing commissions are to craft guidelines to provide "the most important source of prescriptions" for sentences for "the mine run of cases."[44] The overwhelming strategy of the Reporter's revision as a whole is to displace the role of legislation and unlimited prosecutorial and judicial discretion with a commission-driven set of guidelines

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[36] *Preliminary Draft No.7* at 25

[37] *Preliminary Draft No.7* at 42.

[38] I appreciate retribution fills this gap in the Reporter's construct, but I contend that once public safety is afforded any role in initial sentencing, risk and needs assessment have as much legitimacy with respect to that role in initial sentencing as at the "back-end" to which the Reporter directs his endorsement. Of course, I continue to insist that without identifying and assessing the reasonable expectations for the legitimate components of "desert," we simply give all players a free pass at accomplishing anything of value, particularly crime reduction. *See Responding to the Model Penal Code Sentencing Revisions*, *supra* note 6.

[39] *Discussion Draft No. 2* at 4-31.

[40] See, *e.g.*, authorities cited notes 2 and 6, *supra*.

[41] *Discussion Draft No. 2* at 118.

[42] *See* Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 Journal of Criminal Law & Criminology 1293 (2006).

[43] *Responding to the Model Penal Code Sentencing Revisions*, *supra* note 6, at 77 & n.31.

[44] *Preliminary Draft No. 7* at 10.

for two purposes: reducing incarceration rates and severity, and reducing embarrassing and unjust disparities. But the tactic of encouraging legislators to distract themselves from what actually governs most sentencing by debating and adjusting the rarely relevant maximum sentence is demonstrably ineffective as long as the commissions tasked by the Reporter address precisely the same questions of proportionality with no apparent advantage. Yes, the commissions properly have other tasks involving research and promulgations around risk and need assessment, alternative forms of sentences, and other innovations that have come to the Reporter's attention. But as long as the Reporter continues to relegate such matters to the lower ranges short of or instead of imprisonment (and, reluctantly, to very rare occasions on which a sentence might be lengthened by consideration of high risk) – that is, as long as the Reporter relegates guidelines and commissions to prescribing the "mine run" of prison sentences entirely on the basis of proportional severity in light of "blameworthiness" – why is there any basis to expect legislative (or popular) deference to a sentencing commission? In this respect, the Reporter would relegate commissioners to the role of cloistered pontificators of morality, but without the clout or cultural legitimacy of such analogous institutions as the National Islamic Front's Guardians of Morality and Advocates of the Good.

Yes, the legislature and the commission might agree on methods for easing prison sentences in times of economic crisis, such as increasing the extent of available of good time.[45] But blameworthiness is extraordinarily flexible and democratic.

There are many common serious crimes for with the range of "proportional" punishment is decades wide. In any modern jurisdiction, the "appropriate" punishment for three aggravated drug sales, or three stranger-to-stranger violent rapes involving adult victims, could claim proportionate severity anywhere within the range of 10 to 50 years (except by reference to common practice or other sentences in that jurisdiction). There is no reason why a commission tasked with prescribing proportionate severity should command any deference from the legislature or the people who bring and support ballot measures. And commission choices on such matters have been commonly and easily swept aside by legislation and ballot measures.[46]

> ***Unless and until the Reporter's revision assigns to commissions and guidelines the task of allocating the "mine run" of prison sentences on some basis in addition to and more worthy of expertise and deference than blameworthiness, there is no persuasive case for legislative or popular deference, and no reasonable expectation of success. On this score, guidelines have by now already accumulated "decades of failure."***

[45] A recent example is Oregon's 2009 HB 3508, which increases available "good time" to 30% and, postpones much of a recent severity-boosting sentencing ballot measure, to reduce prison costs.

[46] *See, e.g., MPC-The Root of the Problem: Just Deserts and Risk Assessment, supra* note 2, 61 Fla. L. Rev. at 762-63 n. 38. Oregon's experience that guidelines are no match for "popular punitivism" is hardly unique. *Compare, e.g.*, 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), available at http://www.ncjrs.org/pdffiles/165369.pdf, with Ark. Code Ann. § 16-90-804 (Supp. 2003), Kan. Stat. Ann. § 21-4701, et seq (2003), Fla. Stat. § 9210016 (2003), N.C. Gen. Stat. § 15A-134016 (Lexis 2003), and 204 Pa. Code § 303, et seq (2004), reproduced following 42 Pa. Cons. Stat. Ann. § 9721 (Purden Supp. 2004).

I certainly agree that there is value in establishing some consensus about the outer limits of proportionality and enforcing the resulting maximum limits on sentences. But it is rightly hopeless to invoke blue ribbon status, academic or professional standing, or other prerequisites of membership in sentencing commissions as a basis for special wisdom or insight in proportionality. As the Reporter long ago conceded, the premise of proportionality lies in its resonance with "thoughts and impulses . . . commonly felt by responsible officials."[47] Those "thoughts and impulses" are not the unique property of commission members, but are in essence the social conventions which the Reporter hopes to appease.

The missing bases for deference and expertise is precisely that which the Reporter relegates to the lesser crimes while denying it to mainstream sentencing: risk and need (and responsivity) assessment, and evidence-based sentencing – which pursues public safety and deviates from that pursuit to serve "non utilitarian" purposes only when and to the extent such purposes demonstrably require such a deviation.

The public is remarkably supportive of crime reduction as a sentencing purpose, of "rehabilitation," and of meaningful performance measurement of public functions.[48] Tasking the commissions and guidelines would quite probably earn deference by the public and the legislative branch – or at the very least justly argue for such deference.

True Life vs. Death, Younger Offenders, release of old and mentally ill inmates – as examples of the distorting obsession with blameworthiness: The Reporter's wholesale investment in blameworthiness and rejection of public safety as the primary function of prisons distorts many of his new proposals and rationales.

The Reporter's laudable anguish over using life without parole ["true life," "whole life," or "natural life"][49] invokes a possible reduction in *blameworthiness* to explain his distaste for true life, as well as the possibility of rehabilitation. Putting aside the niceties of blameworthiness – niceties that strain against the Reporter's arguments against back-end release authority[50] – the Reporter struggles particularly to identify a host of reasons why it could make sense that a prisoner should be released before dying in prison. The distortions are these: the arguments all make sense, but it makes no sense not to apply them as well to the sentences that may be decades long simply because deemed "presumptive" under his preferred guidelines. It is illogical and brutal to ignore the cruelty of sentences that serve no purpose during, say, the last 20 years of a long prison sentence unless it began as a life sentence without possibility of parole. The day to day impact of a possibility of release before declining into death without the support of prison medical benefits[51] is of no more weight than the certainty of mortality that we all live with.

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[47] *Preliminary Draft No. 3* at 9 (2004).

[48] *MPC-The Root of the Problem: Just Deserts and Risk Assessment, supra* note 2, 61 Fla. L. Rev. at 758 & n.21.

[49] *Preliminary Draft No. 7* at 23-27.

[50] *Council Draft No. 2* at 6-7. The Reporter does not entirely dismiss the notion that an offender can earn down his blameworthiness by good works in prison, but relegates any recognition of that possibility to limited earned "good time."

[51] I applaud the Reporter's encouragement for post-prison support for released offenders, but if he really expects that states are going to bear the economic burden of geriatric patients once they are released from prison, that implies his optimism for the Obama health reform – which is also to be applauded. The increasing expense of geriatric care is in fact a primary motivator for releasing older prisoners.

With respect to the timing of assessing "blameworthiness" at the front or back end of sentencing, the analysis would be enormously enhanced were the Reporter to identify exactly what social purposes are properly served within the "proportional severity" he would establish as the lodestar of all sentencing. Were those social purposes articulated to include such objectives as serving the needs of victims, enhancing public respect and confidence in the rule of law, avoiding vigilantism and private retribution, and promoting respect for the persons, property, and rights of others,[52] this calculus would make far more sense. Few sentences would require incapacitation for life for such reasons. In most cases by far, any legitimate purposes of sentencing would be accomplished by a far shorter sentence if coupled with credibility that the sentence served would at least resemble the sentence announced.

Far more important is that all of these discussions reveal the Reporter's destructive state of denial of the major legitimate role of prison: incapacitation. There are some offenders whose capacity for committing great harm is clearly insufficiently restrained short of physical incapacitation. To deny this reality is to forfeit credibility with anyone familiar with a full criminal docket, not to mention the public and "responsible officials." Assuming that notions of proportionality do not preclude decades of imprisonment, the over-riding analysis ought to be whether and how the risk an offender presents has been reduced by such factors as age or medical-related disability. Absent a dependable reason for sufficiently reducing such an offender's likelihood for inflicting harm if released, he should not be released before serving the full term of imprisonment – *regardless* of the relationship between that term and his life expectancy. Conversely, if no social purpose justifies his continued incarceration, continuing that incarceration because of the accidental placement of his sentence at some arbitrary point within a decades-wide swath of "proportionality" for a serious crime is every bit as unsupportable as a true life sentence.

The Reporter's discussion of young offenders is similarly distorted by his emphasis on blameworthiness and rejection of the use of incapacitation for public safety. True, notions of childhood development can affect susceptibility to behavior modification, some senses of moral culpability, and an offender's capacity to comprehend the consequences of a criminal act. But the Reporter largely displaces the public safety consequences with concepts of ritualistic assessments of blame as if they had some claim to precision when they have no such claim. Thus the "basic framework" of his provision is that "offenders should be presumed less culpable for their criminal conduct than older offenders."[53] Only when a young offender "presents a high risk of serious violent offending in the future" does public safety get consideration, and then we are to weigh the offender's blameworthiness against "the *moral* claims of potential victims."[54] And judges functioning under the Reporter's paradigm are to calculate the resulting sentence based on the "judge's ability to find . . . an unusually high degree of personal *blameworthiness*."[55]

Judges are not oracles infused with some special access to sacred scales of culpability. Invited to perform such a function, they will do what they have always done – presume to mix

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[52] These constitute the "public values" set of sentencing purposes, as distinguished from the "public safety" purposes. *Responding to the Model Penal Code Sentencing Revisions, supra* note 6.

[53] *Preliminary Draft No. 7* at 46.

[54] *Id.*

[55] *Preliminary Draft No. 7* at 50.

their own personal reactions to the crime with some level of reaction to (or rejection of) their perceptions of peer and popular attitudes, or at least the attitudes of those who might be paying attention. Against this, public safety is dependent upon the fate of a similarly ephemeral weighing of the *moral* claims of potential victims. This is as powerful a window into the flaws of the revision as any. Compare what should be going on within the same limits imposed by law and resource:

> A judge shall construct a sentence with legally and practically available components, within any limits required to maintain proportionality, and with appropriate consideration of risk and safety. A judge shall first determine what sentence is most likely to reduce the offender's subsequent criminal behavior, and shall then determine whether that sentence must be modified otherwise to pursue public safety or to promote public values. In all such respects, the judge shall employ the best available evidence.[56]

Given that "public values" include the interests of victims, public trust and confidence in the justice system, and respect for the persons, property and rights of others,[57] it should be obvious both that this approach is superior to the ritualistic moralizing the Reporter endorses, and that it adequately allows a role for consideration of a young offender's reduced appreciation of consequences or reduced judgment, as well as for a young offender's susceptibility (responsiveness) to available interventions. It also allows for due consideration for the risk of future harm at the hands of a young offender who may already be demonstrably and dangerously psychopathic. After all, the Reporter's aversion to using incapacitation for public safety is probably the reason that he omits reference to the well established conclusion that early age of onset of violent criminal behavior is a strong predictor of risk.[58]

If it be argued that this sounds like a protocol for adult as well as juvenile offenders, that is precisely the point. Although the competing proposal quoted above allows for acknowledging differences that matter with younger offenders, it is entirely appropriate – and far superior to the Reporter's sentencing paradigm – for dealing with all offenders. Whether or not they are "moral claims,"[59] the interests in avoiding future victimization surely finds adequate justification as pursuit of public safety. "Balancing" them against an offender's blameworthiness makes as much sense as managing offenders by oija board. Within limits of law, proportionality, resource, and priority, sentencing should seek to reduce future criminal behavior because that is the dominant social purpose of sentencing – not pursue the ephemeral result of some moral equation.

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[56] A HARM REDUCTION SENTENCING CODE §5.1, in *Responding to the Model Penal Code Sentencing Revisions, supra* note 6, 17 So Cal Interdisciplinary Law Journal at 114.

[57] *Id.*, §1.2, 17 So Cal Interdisciplinary Law Journal at 92-95.

[58] *E.g.*, Michael Hogan and Justin Campbell, *Contrasting Juvenile and Program-Level Impacts on Diversion Service Provision*, 3 Youth Violence and Juvenile Justice 41 (2005); J. David Hawkins, Todd I. Herrenkohl, David P. Farrington, Devon Brewer, Richard F. Catalano, Tracy W. Harachi, and Lynn Cothern, *Predictors of Youth Violence*, OJJDP Juvenile Justice Bulletin (April 2000), *and authorities cited*, available at http://www.ncjrs.gov/pdffiles1/ojjdp/179065.pdf.

[59] The Reporter concedes that the injuries to victims are "equally serious regardless of the age of the criminal." *Preliminary Draft No. 7* at 50-51.

Similarly, rehabilitation and reintegration of offenders should be the dominant purpose of all sentencing whenever that is consistent with risk, proportionality, resource and priority. That the Reporter reserves this notion for young offenders (§6.11A) again illustrates that he anoints proportional severity as a *competing* and dominant purpose of sentencing. As with young offenders, it surely serves us well to recognize that many older first offenders will "voluntarily desist from criminal activity" if we are wise enough not to subvert that progression with interventions that "disrupt[ ] the normal progression."[60] Indeed, an older offender's later entry into the criminal justice system suggests that he is *more* likely to desist without our help than an offender alike except for an entry at a younger age.[61] Because the Reporter defaults to proportional severity as an independently sufficient goal of sentencing that dilutes his concerns for young offenders and perverts a rational approach to older offenders, his paradigm is extremely likely to spawn such disruptions with offenders of all ages.

Finally, what is remarkable about the otherwise unremarkable approach the Reporter takes to section 305.7 [release of elderly, infirm, or mentally ill inmates] is that he both recognizes that many states require a finding that the inmate "not pose a threat to public safety before release from prison," *and* apparently confines that perquisite to the relatively small number of cases in which he contemplates that imprisonment will be based "on the judgment that the offender presented a danger to the community."[62] The section as drafted appears to deny release to elderly, infirm, or mentally ill inmates on grounds they no longer pose a threat to public safety if they were imprisoned with no analysis of public safety – as is the Reporter's obvious preference for mainstream sentencing. With equal irrationality, the language suggests that for such offenders who have any other claim for early release, their danger to the public *should not be considered at all*.

Multnomah County's sentencing support tools are neither racist nor "unconstitutional" – and the corresponding flaw in Section 7.06: Multnomah County's sentencing support tools 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 recidivism or measure its risk [the user manual cautions that results may well simply display correlation rather than causation]. We hope at some point to include risk assessment data in crafting cohorts – but we cannot now do so because risk scores are not routinely calculated and recorded, and because the data collected so far does not include all that we would need to automate the calculation of risk. Precisely, what sentencing support tools do – and all they

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[60] *Preliminary Draft No. 7* at 50.

[61] *E.g.*, Max B. Rothman, Pamela Entzel, Burton D. Dunlop, ELDERS,CRIME, AND THE CRIMINAL JUSTICE SYSTEM: MYTH, PERCEPTIONS AND REALITY IN THE 21ST CENTURY 233 (Springer Publishing New York 2000) *and authorities cited*. *See* RECIDIVISM AND THE "FIRST OFFENDER" (US Sentencing Commission 2004), available at http://www.ussc.gov/publicat/recidivism_firstoffender.pdf;

[62] *Preliminary Draft No. 7* at 125, comment *d*. The Reporter's steadfast refusal to identify public safety as a purpose and allow it to guide deployment of prison resources has been the subject of many of my earlier commentary and papers. *E.g.*, *Responding to the Model Penal Code Sentencing Revisions, supra* note 6, at 72-77. In this comment, he suggests that the risk that the offender presents to public safety should *only* be considered if public safety were the reason for imprisonment: "*if* the original prison sentence was based on the judgment that the offender presented a danger to the community . . . on incapacitation grounds . . . no modification of the sentence would be appropriate in the absence of a finding" that there is no longer such danger."

purport to do – is assemble outcomes by some flavor of recidivism in correlation with offender cohort [by criminal history and demographics] AND dispositions – including the full range of treatment, alternative, custodial, and supervisory dispositions – 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 have, and do not purport to have, access to enough variables by which accurately to assess risk of recidivism. In essence, they afford access to data that allows us to see correlations between responses and recidivism; they also allow us to see which sentences are imposed with what frequency based on offender characteristics. They may help detect racism in the sentencing history they reveal, but they are neither supportive of such disparity nor unconsititutional.

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 in 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 is most likely to work.

The Reporter's repeated suggestion that our tools' consideration of ethnicity is unconstitutional reminds me of his years-long persistence in the absolutely false view that my concerns with public safety were intended to trump proportionality (constitutional or subconstitutional), and his long persistence in calling the tools "risk assessment." He has finally dropped the latter mischaracterization. I hope the charge of unconstitutionality doesn't take as long to correct [but my hope is dimming: the Reporter wholly ignored the explanation given in response to his *Preliminary Draft No. 5*, to his *Preliminary Draft No. 6*, to his *Council Draft No. 2*, and to his *Discussion Draft No. 2*]:

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 and hardly racist, 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 so to separate the data may compound and exacerbate the impact of past racial bias in the administration 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 [domestic violence victims who are mothers of infants or young children; at risk Hispanic gang youth; African American youth; gay teenagers; American Indians with alcoholism; some sexual minorities such as transsexuals, though we don't yet have tools to capture all of this data]. We certainly know that some modalities of treatment work best if designed for such minorities. Medicine is full of examples of diagnostic protocols that reflect the varying prevalence of disease and disorder among patients by gender and ethnicity; effective public health measures often require adjustment of tactics to cope with minority cultures. Does the Reporter view these realities as unconstitutional if the provider is publicly funded?

The Reporter has apparently learned about "risk assessment," and then about "needs assessment." He either is unaware of or rejects the wisdom concerning "responsivity,"[63] which recognizes the importance of assessing offender's characteristics that determine what dispositions are most likely to work for that offender. It is ironic that the Reporter purports to support the exercise of judicial discretion but willing to subvert it with blindness to the function of responsivity understood by medicine and the wiser representatives of corrections. [64]

Let me give practical examples. If I have an offender who is at risk of involvement with an African American (or Hispanic, or Asian) gang, should I be able to take advantage of a provider whose specialty is responding to and reducing that risk for offenders whose ethnicity is obviously prerequisite to that risk? And should I not be able to compare outcomes of assignments of offenders to that provider with other dispositions of like offenders? May I not for constitutional reasons look at data that may or may not support the notion that a Native American alcoholic has a better chance avoiding recidivism if sent to the local Native American treatment provider – as compared with Native Americans sent to mainstream providers? Is it improper to consider an offender's sexual orientation when a relevant program focuses on that particular orientation in helping offenders extract themselves from street prostitution? Ethnicity, sexual orientation and other variables the Reporter's faulty constitutional disparagement would reject are obviously critical variables in such analyses. Responsible sentencing requires that we are able to assess such questions and exploit resources that will best serve the offender and public safety – often with the result of a *less* severe and *more* successful disposition.

3) In practice, many of the voices insisting that we be "color blind" in our data collection are motivated by a desire to make it impossible to document racial disparity in sentencing. One of the great benefits of including ethnicity as a variable in our sentencing support tools is that we can readily discern exactly what correlation exists between ethnicity and severity of sentence for virtually any cohort of offenders and crimes. Unfortunately, the comfort with "color blindness" for many is their fear of transparency which might imply *their* racism.

4) The tools are adept at displaying sentencing disparity in correlation with ethnicity – a functionality[65] that is identical to that which the Reporter assails as "unconstitutional." Should it be answered that revealing racism is different because it is remedial rather than invidious, it should be obvious that the ability to separate cohorts by ethnicity in our sentencing support tools is also remedial rather than invidious – and also essential to the remedial purpose of detecting disparity.

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[63] The critical role of responsivity is common knowledge to probation and corrections departments steeped in "evidence based practices," but relatively new to the culture of sentencing. A concise history and description of risk and need assessment, and the related "responsivity principle," is James Bonta & D.A. Andrews, *Risk-Need-Responsivity Model For Offender Assessment And Rehabilitation* (Canada 2007), available at http://www.publicsafety.gc.ca/res/cor/rep/risk_need_200706-eng.aspx.

[64] I develop this point further in *MPC-The Root of the Problem: Just Deserts and Risk Assessment, supra* note 2, 61 Fla. L. Rev. at 766-72.

[65] The tools display dispositions ranked in order of the frequency of their imposition for offenders who are like the one chosen for analysis being sentenced for a similar charge. By changing only the ethnicity setting and clicking "recalculate," a user can easily see, for example, that prison is used more commonly for some ethnicities than for others facing sentencing for the same crime with similar records and other variables.

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.

Perhaps it is the Reporter's underlying insistence that proportional severity is the foundation of all sentencing that compels him to see any distinction based upon gender or ethnicity as oppressive and unconstitutional. But when the distinction is instead in service of harm reduction concomitant with reduction or at least no increase in severity, as often in medicine and public health, forgoing the distinction is neither required nor defensible.

To insist that we forgo the beneficial potential of the facility to separate data as described is to insist, in many applications, that we *exacerbate* racism and unnecessarily forgo opportunities to avoid harm. It is hardly constitutionally compelled.

New section 7.01A properly prohibits determining *severity* based on race, ethnicity, gender, sexual orientation or identity, national origin religion or creed, and political affiliation or belief. It creates exceptions when such "personal characteristics" might be considered in mitigation "to reduce the severity of the sentence," and when *gender* is an operative variable in "assessment of the risks of future criminality or the treatment needs of the offender provided there is a reasonable basis in research or experience for doing so."[66]

Ethnicity, sexual identity, and other "personal" variables cannot be distinguished – constitutionally or otherwise - from gender in this respect when their role has to do with assessing responsivity as opposed to increasing severity. Section 7.01A(3)(b) should apply to all "personal characteristics of offenders," not just gender. Otherwise, this is yet another way in which the ALI in following the Report will subvert rather than further improvement of the law of sentencing.

[66] §7.01A(2), (3).