Dear Prof. Reitz: Saturday, October 4, 2003

I found our telephone meeting quite valuable, and hoped you would be willing to engage in some further discourse. As you mentioned, this is frustrating because we agree on so much – but also, at least from my perspective, because I have great trouble understanding the reasons for our disagreement. I hope at least to clarify where we agree and where we do not. I also hope to have a better understanding of *why* we disagree where we do. I'll have some specific questions where I have speculated on your reasoning for what I take to be your positions.

If "argue with a buzz saw" comes to mind about here, I apologize for my persistence, understand that you may not wish to continue this dialog, but repeat my request that I be provided with a copy of your next draft as soon as it is available so that I might have a fair opportunity to comment.

Where I think we agree:

Limiting retributivism, subconstitutional limits on severity, and disparity: I think we agree [as stated in each sentence] that:

1. Deontological considerations should limit severity even when utilitarian (or merely retributive) considerations would call for a harsher sentence;
2. There are some occasions on which just deserts may properly call for a punishment that is unnecessary for any utilitarian purpose (excluding whatever utility may lurk in retributivism) – but that these occasions are relatively rare: *e.g.*, the social drinker with no priors who kills by accident while impaired; intrafamilial, opportunistic sex offenders where recidivism is easily avoided and punishment would serve no therapeutic purpose for the victim. In the vast majority of cases, deontological considerations do not militate in favor of a harsher sentence than one that would at least attempt to serve utilitarian purposes. On the other hand, deontological considerations are more commonly significant in limiting what utilitarian objectives might suggest [*e.g.,* locking up repeat car thieves for life].
3. Sentencing commissions and appellate processes could serve to suggest appropriate limits to the excessiveness of common forces propelling mass incarceration;
4. The structure you would erect to protect against excessive punishment or incarceration is no match in and of itself for the political forces that have driven mandatory minimum or three-strikes sentencing, and have, for example, repeatedly over-ridden sentencing guidelines where inconsistent with the incarcerationist, angry victim's, or political panderer's view of "appropriate" sentencing;
5. Even at its best, sentencing based on the "gravity of offenses and the blameworthiness of offenders" has no claim to precision and therefore cannot compete with utilitarian objectives on the basis of measurable efficacy. In other words, whatever the weakness of statistical and research support for rehabilitation, incapacitation, and even deterrence, just desert sentencing cannot claim superior validation in statistics or research. Again, if we were to apply the stringent data-based assessment your unnamed colleague at the University of Colorado demands of treatment programs to just deserts, just deserts would have to find its justification elsewhere.
6. Sentencing based on just deserts predominates present criminal justice practices apart from juvenile and "therapeutic" courts;

A) It only rarely strays beyond the limits that limiting retributivism would impose, except where sentences are compelled by such mechanisms as the holy drug war, punitive sentencing guidelines, and mandatory minium sentencing provisions;
B) It typically coexists with abysmal recidivism rates.

Rehabilitation: I think we agree that:

1. The criminal justice field is heavily populated with programs which have never been required to demonstrate, and have never been validly assessed to confirm, any significant benefit in terms of crime reduction;
2. Careful research has demonstrated that some substantial slice of the offender community can benefit from (*i.e.*, display reduced recidivism after) programs that have these sorts of characteristics: they are focused on multiple criminogenic factors; they rely on modalities supported by research; they are responsibly delivered via supervised and competent staff adhering to written and updated protocols.
3. None of the literature supporting or challenging the efficacy of rehabilitation has studied programs whose "clients" were selected based on the sort of data-driven assessment which our "smart sentencing" initiative has promoted: comparing outcomes in terms of crime reduction for similar offenders sentenced for similar crimes.
4. There is reasonable hope for substantial improvement in our crime reduction performance if we match programs and offenders with such assessments, and select programs for support or termination based on their performance with the offenders for whom they are most suited (*i.e.*, for whom crime reduction correlates best with exposure to the program).
5. Any substantial reduction in a typical offender's criminal conduct has a potential multiplier effect due to the prevalence of repeat offenders in the criminal justice population.
6. There is undoubtedly a substantial portion of the criminal justice population for which "programs" are unlikely to result in any improvement (measured by crime reduction) and may even have the opposite effect.
7. "Rehabilitation" and "incapacitation" do not capture the totality of sanctions in common use in criminal justice; the majority of dispositions, at least in state court, employ alternative sanctions and supervision modalities (*e.g.*, formal and bench probation, casebank and enhanced probation) that are neither incarceration nor "treatment."
    A) None of these are in fact assigned by virtue of any assessment of which is most likely to correlate with reduced criminal conduct for the offender in question;
    B) There is reasonable hope for substantial improvement in our crime reduction performance if we match these sanctions and offenders with such assessments, and select these sanctions based on their performance with the offenders for whom they are most suited (*i.e.*, for whom crime reduction correlates best with exposure to the sanction);
8 Therapeutic justice is a healthy movement with some probable beneficial impact on crime reduction, but would benefit from rigorous assessment and adjustment to ensure best practices and wisest use of the resources involved (*e.g.,* to ensure that offenders most likely to benefit are within those swept into instead of excluded from such courts, and that therapeutic principles do not simply justify widening the criminal justice net in appropriately).

General deterrence: I think we agree that:

1) A great deal of the literature proves nothing, but proposes and debates models that are built on *suppositions* of a deterrent effect and speculations about how factors such as severity, celerity, and certainty might interact;

2) The most common crimes of public concern outside the realm of corporate scandal and hazardous waste dumping are probably not susceptible to meaningful control by a deterrence strategy;

3) Whatever the role of deterrence in crime reduction, it is quite likely certainty and swiftness of punishment rather than its severity that affect its influence;

4) For the great bulk of sentencing decisions, both in individual sentencing and in adjusting presumed sentences in the context of sentencing commissions, guidelines, and legislation, factors wholly apart from general deterrence should determine the result.

Incapacitation: I think we agree that:

1) As to *some* categories of offense and offender, the mass incarceration movement has led to enormous cruelty, expense, and collateral harm with no benefit to public safety or any other legitimate public goal (with the possible exception of the economics of the prison-industrial complex); this is particularly so with respect to some applications of federal sentencing guidelines, Attorney General Ashcroft's recent plea policy, mandatory minimum and three strikes laws;

2) (On the other hand,) Incapacitation indeed prevents crime on the outside while the offender is on the inside, a dependable result studiously ignored by most or all anti-incarcerationists who otherwise correctly criticize elevated recidivism rates for some offenders *after* lengthy incarceration;

3) In spite of overbreath of application and their other social costs, three strikes and mandatory minimum sentencing provisions have quite probably contributed to crime rate reductions (although other factors are certainly also at work);

4) There are offenders whose total criminal output is reduced by lengthy incarceration and whose recidivism does not rise after incarceration;

5) There are offenders whose crime reduction during incarceration is offset and even exceeded by the criminogenic influence of incarceration, reflected in increased recidivism after release;

6) There are offenders whose total criminal output is reduced by lengthy incarceration even though their recidivism is increased after release – *i.e.*, the increase in recidivism after release does not offset the reduction in crime accomplished by incapacitation;

7) At least for some and probably for many offenders, the extent and quality of programs in prison and during transition out of prison may have a substantial effect on their subsequent criminality;

8) The length of incarceration is essentially *never* determined, either on an individual basis or at the level of legislation or crime commission decisions, by consideration of data or even decent speculation as to the variations mentioned in Nos. 4-7;

9) Public safety may well be improved by rigorous attempts more wisely to aim periods and conditions of incarceration at those offenders whose criminality is most likely to be

reduced by what they get. [*I acknowledge your concern for "false positives" of assessment instruments, but do not understand you to disagree that we can nonetheless be smarter about the use of prison for incapacitation than we now are, with crime reduction as the reward*].

Restorative Justice: We did not discuss this much, but I suspect we agree that:

1) Restorative Justice innovations in criminal justice are healthy and generally ought to be encouraged;
2) Properly allocated, restorative justice innovations have demonstrated benefits in the areas of victim satisfaction and anger reduction;
3) Though evidence for recidivism reduction is scant, the proposition that restorative justice reduces criminality among at least some offenders is plausible and worthy of further pursuit and assessment.

Where I think we have fundamental disagreement:

The organizing principle of revision: You apparently believe that the guiding principle around which all else must be constructed is "punishment . . . sufficient but not excessive to reflect the gravity of offenses and the blameworthiness of offenders."

I contend that so organizing the revision is to perpetuate the myth that punishment is the same thing as crime reduction, to obscure and evade responsibility for best efforts to achieve crime reduction, to tolerate avoidable victimizations, to multiply the costs of crime, and to encourage the pressures for the very increased incapacitation I understand you to deplore.

The consistency of the proposed revision with public safety: I contend that by elevating limiting recidivism to the flagship of your revision while relegating utilitarian goals including crime reduction to that limited "layer" for which it may be realistic to seek to serve those goals, you abandon public safety for all other "layers" and cast official doubt over public safety efficacy even within the chosen "layer." I understand you to contend that your approach does not abandon public safety at all.

The need to promote pursuit of crime reduction to a prominent place in the purposes of sentencing and the role of crime commissions: I contend that meaningful progress can only be accomplished by affording crime reduction a prominent place in the purposes of sentencing and the functions of crime commissions, and that the answer to the lack of validation for crime reduction impact of "rehabilitation" in the past is not to abandon the goal but to improve its pursuit – through rigorous pursuit of data and best practices with *all* levels of criminal dispositions [not just "programs," and not what "works best" but "what works best on which offenders" with due regard to the various flavors of reduced recidivism, and to social priorities – *e.g.*, better a car thief than a rapist.] I understand you to take one of two positions on this – and I'm not at all sure which: 1) except for a narrow range of offenders, it is "unrealistic" to seek crime reduction and we should aim elsewhere; or 2) the structure you propose is entirely consistent with crime reduction goals and no useful purpose would be served (or some negative consequence occasioned) by giving greater prominence to crime reduction as a goal of sentencing or a function of crime commissions.

The proper scope of the qualification that objectives should be sought "when possible with realistic prospect of success": You seem to contend that this qualification has equal utility when applied to the potential of rehabilitation efforts, general deterrence, incapacitation, and restorative justice. I submit that each of these objectives has unique limitations which can only usefully be addressed by distinct analysis of those limitations. Rehabilitation (in the sense in which I understand you to address it: treatment and counseling programs) works or not depending on the validity of the modality, the rigor and intelligence with which it is delivered, the accuracy of selecting "clients" based on their susceptibility for improvement through that modality, and the lack (at least at present) of modalities that are effective for substantial portions of the offender population. General deterrence is subject to quite different limitations, having largely to do with the impulsivity of most crime, the perceived mediacy of most threat, and the mythology of most literature – as discussed briefly above. As to incapacitation, I understand you to have far more confidence in its efficacy than you acknowledge in your *Report* of April 11, 2003 [the day on which I turned 60, by the way]. But as we both know, its limitations for crime reduction have to do with its cost, its collateral consequences, its wild popularity for crimes well beyond its appropriate application, and the absence of any rational approach to deploy it based on its criminogenic costs weighed against its incapacitative benefits – also as discussed above.

How the revision ought to be articulated: I contend – and I understand you to disagree – that the revision should be presented with a strong emphasis on crime reduction within the deontological limits you articulate, and an equally strong demand that crime reduction be rigorously assessed and analyzed – rather than presumed more than accomplished as in the past. I would certainly retain the subconstitutional severity-limiting and proportionality-seeking role of judicial discretion within limits established with input from crime commissions, but I would recognize that within those limits our highest priority is crime reduction, that we serve or not that objective by every sentence we impose, and that our obligation is to employ our best efforts to determine and apply all sentencing tools – across the entire range of available sanctions, certainly including programs on the one hand and incapacitation on the other, but also all alternatives including forms of supervision – based on how well they accomplish crime reduction on offenders like the one subject to the sentence. I would have crime commissions predominantly charged with learning which practices are best for which offenders, and which methods work best to achieve best practices by sentencing judges.

I understand you to disagree, and instead to want crime commissions to worry primarily about which sentences for which crimes accomplish "punishment . . . sufficient but not excessive to reflect the gravity of offenses and the blameworthiness of offenders," and about how sentencing laws and behaviors affect demands on prison resources. I, of course, submit that this is but to enshrine what demonstrably does not work in the cloak of monkish ritual, that we ought instead to focus on which sentences *reduce crime* and how, accordingly, we ought to prioritize resources.

Questions: If you're with me so far, by any corrections to my list of agreements you have of course identified disagreements. But are there any other points of significance on which you think we disagree?

As I have tried to articulate above, I understand us to disagree about the relative proper

prominence of the objectives of crime reduction and "punishment . . . sufficient . . . to reflect the gravity of offenses and the blameworthiness of offenders." My greatest frustration is that I do not know *why* we disagree. I don't understand why you reject giving crime reduction the prominence I suggest. These speculations have occurred to me:

Is your position based on a philosophical position that sentencing *ought* to be first and foremost *about* punishment regardless of its utilitarian impact if any? This could certainly explain our disagreement, though I'd be curious as to the further question: is this in turn based on a utilitarian notion such as that punishment serves a social function in and of its own right wholly apart from crime reduction or even deterrence [such as the prevention of vigilantism, the reinforcement of social values, the reinforcement of the role of the state, etc], or is this simply a moral position that criminals ought to be punished [be visited with "consequences," "held accountable," forced to take "responsibility" for their crimes] and that the state is the appropriate means by which to impose punishment? In any event, this would explain why you reject the notion of giving substantial prominence to the crime-reduction content I propose: it would simply compete with the prominence of punishment for its own sake, limited by deontological concerns.

Or is your position based on a tactical assessment that to encourage rational pursuit of crime reduction would be to increase (inappropriately) the severity of sentences in general and the use of incapacitation in particular? This is certainly plausible to me. I've encountered one or two of my colleagues whose fear seems to be that the net result of a focus on crime-reduction would be pressure to increase incapacitation. And the treatment and corrections communities have some interest in avoiding *measurement* of crime-reduction impact – though they've actually been far more receptive than I understand you to be to elevating the prominence of crime reduction as an objective of sentencing.

Or do you agree in principle with me but reject crime reduction as a prominent objective for fear that the ALI would not adopt a revision that gave crime reduction equal billing with punishment?

Or is the prominence of limited punishment in your proposal simply a product of the perspective that your task is to choose the most persuasive of the theoretical strains now existent in academia and to build the revision around the winner? I can see how you could classify my contentions as representing the utilitarian strain, and relegate them to a losing camp because the utilitarians can claim only scarce statistical validation. [*And I appreciate that you understand my position that punishment measured by "gravity" and "blameworthiness" does not compete for statistical validation but avoids it*].

Conclusion

We also agree that your pursuit is of tremendous importance. I welcome any response you care to offer.

Sincerely,

Michael Marcus